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**AUSTRALIA – CERTAIN MEASURES CONCERNING TRADEMARKS,
GEOGRAPHICAL INDICATIONS AND OTHER PLAIN PACKAGING
REQUIREMENTS APPLICABLE TO TOBACCO PRODUCTS AND PACKAGING**

REPORTS OF THE PANELS

*SCI redacted, as indicated [[***]]*

Note:

These Panel Reports are in the form of a single document constituting four separate Panel Reports: WT/DS435/R, WT/DS441/R, WT/DS458/R, and WT/DS467/R. The cover page, preliminary pages, sections 1 through 7, appendices, and annexes are common to all four Panel Reports. The page header throughout the document bears the four document symbols WT/DS435/R, WT/DS441/R, WT/DS458/R, and WT/DS467/R, with the following exceptions: section 8 on page HND-872, which bears the document symbol for and contains the Panel's conclusions and recommendations in the Panel Report WT/DS435/R; section 8 on page DOM-872, which bears the document symbol for and contains the Panel's conclusions and recommendations in the Panel Report WT/DS441/R; section 8 on pages CUB-872 – CUB-873, which bears the document symbol for and contains the Panel's conclusions and recommendations in the Panel Report WT/DS458/R; and section 8 on page IDN-872, which bears the document symbol for and contains the Panel's conclusions and recommendations in the Panel Report WT/DS467/R. The appendices and the annexes, which are part of the Panel Reports, are circulated in separate documents: WT/DS435/R/Suppl.1, WT/DS441/R/Suppl.1, WT/DS458/R/Suppl.1, WT/DS467/R/Suppl.1 (appendices); and WT/DS435/R/Add.1, WT/DS441/R/Add.1, WT/DS458/R/Add.1, WT/DS467/R/Add.1 (annexes).

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MAIN ABBREVIATIONS USED IN THESE REPORTS

Abbreviation	Description
ABAC	Alcohol Beverages Advertising (and Packaging) Code
ABS	Australian Bureau of Statistics
ACBPS	Australian Customs and Border Protection Services
ACCC	Australian Competition and Consumer Commission
ACL	Australian Consumer Law (Competition and Consumer Act 2010 (Cth), Schedule 2
ACT	Australian Capital Territory
Amended GPA	Agreement on Government Procurement, as amended by the 2012 Protocol
Anti-Dumping Agreement	Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994
ANPHA	Australian National Preventive Health Agency
ARIMA	autoregressive integrated moving average
ARIMAX	autoregressive integrated moving average with explanatory variable
Article 11 FCTC Guidelines	FCTC Guidelines for Implementation of Article 11 of the FCTC
Article 13 FCTC Guidelines	FCTC Guidelines for Implementation of Article 13 of the FCTC
Article 11 and Article 13 FCTC Guidelines	FCTC Guidelines for Implementation of Article 11 of the FCTC and FCTC Guidelines for Implementation of Article 13 of the FCTC
ASEAN	Association of South-East Asian Nations
ASSAD	Australian Secondary Students Alcohol Smoking and Drug
ATMOSS	Australian Trade Marks Online Search System
AUD	Australian dollar
BATA	British American Tobacco Australia
BMJ	British Medical Journal
CCA	Competition and Consumer Act 2010 (Cth)
CCQ	Cancer Council Queensland
CCV	Cancer Council Victoria
CI Regulations	Commerce (Imports) Regulations 1940 (Cth)
CINSW	Cancer Institute New South Wales
CISNET	Cancer Intervention and Surveillance Modeling Network
CITTS	Cancer Institute New South Wales Tobacco Tracking Survey
Codex	Codex Alimentarius Commission
COP	Conference of the Parties
CSE	cigarette stick equivalents

Abbreviation	Description
Doha Declaration	Declaration on the TRIPS Agreement and Public Health, WT/MIN(01)/DEC/2 (14 November 2001)
DHA	Department of Health and Ageing
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
EOS	Exchange of Sales
EPS	empty pack survey
FAO	Food and Agriculture Organization of the United Nations
FCTC	WHO Framework Convention on Tobacco Control, done at Geneva, 21 May 2003, UN Treaty Series, Vol. 2302, p. 166
FCTC Guidelines	FCTC Guidelines for Implementation of the FCTC
FMC	factory-made cigarettes
GATS	General Agreement on Trade in Services
GATT 1947	General Agreement on Tariffs and Trade 1947
GATT 1994	General Agreement on Tariffs and Trade 1994
GEE	generalised estimating equation
GI(s)	geographical indication(s)
GHW(s)	graphic health warning(s)
GPA	Agreement on Government Procurement
GRP(s)	gross rating point(s)
Havana Charter	Havana Charter for an International Trade Organization
IARC	International Agency for Research on Cancer
ILO	International Labour Organization
IMS	In-Market-Sales
IMS/EOS	In-Market-Sales/Exchange of Sales
Information Standard	Competition and Consumer (Tobacco) Information Standard 2011 (Cth)
IP	intellectual property
IPE	Institute for Policy Evaluation
IPPC	International Plant Protection Convention
IPPCC	International Plant Protection Convention Commission
ISO	International Organization for Standardization
ISO/IEC Guide 2: 1991	International Organization for Standardization / International Electrotechnical Commission Guide 2, General Terms and Their Definitions Concerning Standardization and Related Activities, 6th edn (1991)
ITA	Imperial Tobacco Australia Limited

Abbreviation	Description
ITC	International Tobacco Control
ITC Project	International Tobacco Control Policy Evaluation Project
IV	instrument variable
LHM	large handmade
Lisbon Agreement	"Lisbon Agreement for the International Registration of Appellations of Origin"
MFN	most-favoured-nation
MLA	minimum age of legal access
MLPA	minimum legal purchasing age
Declaration on Dispute Settlement Pursuant to Article VI of the GATT 1994 or Part V of the SCM Agreement	Declaration on Dispute Settlement Pursuant to the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 or Part V of the Agreement on Subsidies and Countervailing Measures
NDSHS	National Drug Strategy Household Survey
NHS	National Health Survey
NPHT	National Preventative Health Taskforce
NTPPTS	National Tobacco Plain Packaging Tracking Survey
NSW	New South Wales
NSWPHS	New South Wales Population Health Survey
NTC	National Tobacco Campaign
OBPR	Office of Best Practice Regulation
OIE	World Organization for Animal Health
OECD	Organisation for Economic Co-operation and Development
OLS	ordinary least square
Paris Convention	Paris Convention for the Protection of Industrial Property
Paris Convention (1967)	Stockholm Act of the Paris Convention for the Protection of Industrial Property of 14 July 1967
PCC	Pacific Cigar Company
PIR	post-implementation review
PML	Philip Morris Limited
RIS	regulation impact statement
RMSS	Roy Morgan Single Source
RYO	roll-your-own
SAHOS	South Australian Health Omnibus Survey
SCI	strictly confidential information
SCM Agreement	Agreement on Subsidies and Countervailing Measures
SDR	socially desirable responding

Abbreviation	Description
SPS Agreement	Agreement on the Application of Sanitary and Phytosanitary Measures
SSHBS	New South Wales School Students Health Behaviours Survey
TBT Agreement	Agreement on Technical Barriers to Trade
TBT Committee Recommendation	Committee on Technical Barriers to Trade, Secretariat Note, "Decisions and Recommendations Adopted by the WTO Committee on Technical Barriers to Trade Since 1 January 1995", WTO Document G/TBT/1/Rev.12 (21 January 2015), Section 4.3.1.1, p. 20 (entitled "Significant effect on trade of other Members")
TCT	Tobacco Control Taskforce
TM Act	Trade Marks Act 1995 (Cth)
TMA Act	Trade Marks Amendment (Tobacco Plain Packaging) Act 2011 (Cth)
TMA Bill	Trade Marks Amendment (Tobacco Plain Packaging) Bill 2011 (Cth)
Tokyo Round Standards Code	1979 Tokyo Round Agreement on Technical Barriers to Trade
TPB	Theory of Planned Behaviour
TPP Act	Tobacco Plain Packaging Act 2011 (Cth)
TPP Bill	Tobacco Plain Packaging Bill 2011 (Cth)
TPP literature	tobacco plain packaging literature
TPP measures	Tobacco Plain Packaging Act 2011 (Cth); Tobacco Plain Packaging Regulations 2011 (Cth), as amended by the Tobacco Plain Packaging Amendment Regulation 2012 (No. 1) (Cth); Trade Marks Amendment (Tobacco Plain Packaging) Act 2011 (Cth)
TPP Regulations	Tobacco Plain Packaging Regulations 2011 (Cth), as amended by the Tobacco Plain Packaging Amendment Regulation 2012 (No. 1) (Cth)
TRA	Theory of Reasoned Action
TRIPS Agreement	Agreement on Trade-Related Aspects of Intellectual Property Rights
TWG	Tobacco Working Group
USCDC	United States Centers for Disease Control and Prevention
USFDA	United States Food and Drug Administration
USIOM	United States Institute of Medicine
Vienna Convention	Vienna Convention on the Law of Treaties, done at Vienna, 23 May 1969, UN Treaty Series, Vol. 1155, p. 331
VSHS	Victorian Smoking and Health Survey
WHA	World Health Assembly
WHO	World Health Organization
WIPO	World Intellectual Property Organization
WTO	World Trade Organization
WTO Agreement	Marrakesh Agreement Establishing the World Trade Organization

MAIN EXHIBITS CITED IN THESE REPORTS

Exhibit No(s).	Short title	Title
AUS-1, JE-1	TPP Act	<i>Tobacco Plain Packaging Act 2011 (Cth)</i>
AUS-2, JE-7	TPP Bill Explanatory Memorandum	Explanatory Memorandum, Tobacco Plain Packaging Bill 2011 (Cth)
AUS-3, JE-2	TPP Regulations	<i>Tobacco Plain Packaging Regulations 2011 (Cth), as amended by the Tobacco Plain Packaging Amendment Regulation 2012 (No. 1) (Cth)</i>
AUS-4, JE-3	TMA Act	<i>Trade Marks Amendment (Tobacco Plain Packaging) Act 2011 (Cth)</i>
AUS-5, JE-5	TMA Bill Explanatory Memorandum	Explanatory Memorandum, Trade Marks Amendment (Tobacco Plain Packaging) Bill 2011 (Cth)
AUS-6, JE-4	TMA Bill	Trade Marks Amendment (Tobacco Plain Packaging) Bill 2011 (Cth)
AUS-7	Samet Report	"Expert Report of J. Samet" (5 March 2015)
AUS-8	Chaloupka Illicit Market Report	F. Chaloupka, "Expert Report on Australia's Tobacco Plain Packaging Legislation" (6 March 2015)
AUS-9	Chaloupka Public Health Report	F. Chaloupka, "Expert Report on Australia's Plain Packaging Legislation" (7 March 2015)
AUS-10	Tavassoli Report	N. Tavassoli, "Report on the World Trade Organization Dispute Settlement Proceedings Concerning Australia's Tobacco Plain Packaging Legislation" (10 March 2015)
AUS-11	Dubé Report	"Expert Report of Dr. Jean-Pierre Dubé" (9 March 2015)
AUS-12	Slovic Report	"Expert Report of Dr. Paul Slovic" (4 March 2015)
AUS-13	Biglan Report	"Expert Report of A. Biglan" (6 March 2015)
AUS-14	Fong Report	"Expert Report of Dr. Geoffrey T. Fong" (4 March 2015)
AUS-15	Brandon Report	T. Brandon, "Expert Report" (9 March 2015)
AUS-16	Correa Report	C. Correa, "Compatibility of Australia's Tobacco Plain Packaging Legislation with the TRIPS Agreement – Analysis of the Expert Reports Submitted by Ukraine" (10 March 2015)
AUS-17	Chipty Report	"Report of Dr. Tasneem Chipty" (9 March 2015)
AUS-18	Katz Report	M. Katz, "An Economic Assessment of the Effects of Tobacco Plain Packaging" (9 March 2015)
AUS-19 (SCI)	HoustonKemp Report	HoustonKemp, "Competition and Trade for Tobacco Products in Australia" (9 March 2015) (SCI)
AUS-21	Finkelstein Report	"Report by Ray Finkelstein QC to the Dispute Settlement Panel Established by the World Trade Organization: The <i>Tobacco Plain Packaging Act 2011 (Cth)</i> and the <i>Australian Consumer Law</i> " (11 March 2015)
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AUS-23	British American Tobacco, Packaging Brief 2001	British American Tobacco, "Packaging Brief" (2 January 2001), Bates Nos. 325211963-325211964
AUS-24	WHO Second-Hand Smoke Policy Recommendations	World Health Organization, <i>Protection from Exposure to Second-Hand Tobacco Smoke: Policy Recommendations</i> (Geneva, 2007)
AUS-25	US Surgeon General's Report 2004	US Department of Health and Human Services, <i>The Health Consequences of Smoking: A Report of the Surgeon General</i> (Atlanta, 2004), Chap. 1
AUS-27	Banks et al. 2015	E. Banks, G. Joshy, M. Weber, B. Lui, R. Grenfell, S. Eggar, E. Paige, A. Lopez, F. Sitas and V. Beral, "Tobacco Smoking and All-Cause Mortality in a Large Australian Cohort Study: Findings from a Mature Epidemic with Current Low Smoking Prevalence", <i>BMC Medicine</i> (2015), Vol. 13, doi:10.1186/s12916-0150281
AUS-28	WHO Tobacco Fact Sheet	World Health Organization, Media Centre, "Tobacco", Fact Sheet No. 339 (May 2014), available at: < http://www.who.int/mediacentre/factsheets/fs339/en/ >, accessed 25 February 2015
AUS-29	US Surgeon General's Report 1988	US Department of Health and Human Services, <i>The Health Consequences of Smoking: Nicotine Addiction: A Report of the Surgeon General</i> (Rockville, 1988)
AUS-30	Nomenclature and Classification of Drug- and Alcohol-Related Problems: A WHO Memorandum	G. Edwards, A. Arif, and R. Hadgson, "Nomenclature and Classification of Drug- and Alcohol-Related Problems: A WHO Memorandum", <i>Bulletin of the World Health Organization</i> (1981), Vol. 59, No. 2, pp. 225-242
AUS-31	Royal College of Physicians Report 2000	Royal College of Physicians of London, <i>Nicotine Addiction in Britain: A Report of the Tobacco Advisory Group of the Royal College of Physicians</i> (Sudbury, 2000)
AUS-33, DOM-149	NCI Tobacco Control Monograph No. 9	D. Burns, K. Cummings, and D. Hoffmann (eds.), <i>Cigars: Health Effects and Trends</i> , Smoking and Tobacco Control Monograph No. 9, US Department of Health and Human Services, National Institutes of Health, National Cancer Institute (Bethesda, 1998)
AUS-34	Cigars: Facts and Figures	American Lung Association, "Cigars", available at: < http://www.lung.org/stop-smoking/about-smoking/facts-figures/cigars.html >, accessed 30 January 2015
AUS-37, DOM-104, CUB-35	US Surgeon General's Report 2014	US Department of Health and Human Services, <i>The Health Consequences of Smoking – 50 Years of Progress: A Report of the Surgeon General</i> (Atlanta, 2014)
AUS-38	UICC and CCA <i>amici curiae</i> brief	Union for International Cancer Control and Cancer Council Australia, Written Submission of Non-Party Amici Curiae (11 February 2015)
AUS-39	US Surgeon General's Report 2006	US Department of Health and Human Services, <i>The Health Consequences of Involuntary Exposure to Tobacco Smoke: A Report of the Surgeon General</i> (Atlanta, 2006)
AUS-40	NCI Cigar Fact Sheet	National Cancer Institute, "Cigar Smoking and Cancer" (27 October 2010), available at: < http://www.cancer.gov/cancertopics/factsheet/Tobacco/cigars/ >, accessed 25 February 2015.
AUS-41	-	Cancer Council of Victoria, Quit Victoria, Heart Foundation, and VicHealth, Submission on Tobacco Plain Packaging: Proposed Approach to Non-Cigarette Tobacco Products (28 October 2011)

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AUS-42 (revised)	WHO/FCTC Request for Permission to Submit Information	World Health Organization and the WHO Framework Convention on Tobacco Control Secretariat, Request for Permission to Submit Information to the Panel by a Non-Party (16 February 2015)
AUS-43, HND-142	WHO Report on the Global Tobacco Epidemic 2011	World Health Organization, <i>WHO Report on the Global Tobacco Epidemic, 2011: Warning about the Dangers of Tobacco</i> (Geneva, 2011)
AUS-44, JE-19	FCTC	World Health Organization, Framework Convention on Tobacco Control (2003)
AUS-45, DOM-280	2010 NDSHS Report	Australian Institute of Health and Welfare, <i>2010 National Drug Strategy Household Survey Report</i> , Drug Statistics Series No. 25 (Canberra, 2011)
AUS-46	Vos et al. 2007	T. Vos, B. Barker, L. Stanley, and A. Lopez, "The Burden of Disease and Injury in Aboriginal and Torres Strait Islander Peoples: Summary Report", School of Population Health, The University of Queensland (September 2007)
AUS-47	Collins and Lapsley 2008	D. Collins and H. Lapsley, <i>The Costs of Tobacco, Alcohol and Illicit Drug Abuse to Australian Society in 2004/05</i> , Commonwealth of Australia (Canberra, 2008)
AUS-48	2013 NDSHS Report	Australian Institute of Health and Welfare, <i>National Drug Strategy Household Survey Detailed Report 2013</i> , Drug Statistics Series No. 28 (Canberra, 2014)
AUS-49	-	Australian Bureau of Statistics, "Australian Aboriginal and Torres Strait Islander Health Survey: Updated Results, 2012-2013", Cat. No. 4727.0.55.006 (2014)
AUS-50	USCDC Best Practices for Comprehensive Tobacco Control Programs	Centers for Disease Control and Prevention, <i>Best Practices for Comprehensive Tobacco Control Programs – 2014</i> , US Department of Health and Human Services, available at: < http://www.cdc.gov/tobacco/stateandcommunity/best_practices/ >, accessed 2 March 2015
AUS-51	Jha and Chaloupka 1999	P. Jha and F.J. Chaloupka, <i>Curbing the Epidemic: Governments and the Economics of Tobacco Control</i> , World Bank, (Washington, D.C., 1999)
AUS-52, JE-12	NPHT Technical Report 2	Preventative Health Taskforce, <i>Australia: The Healthiest Country by 2020 – Technical Report No. 2 – Tobacco Control in Australia: Making Smoking History</i> , Australian Government (24 July 2009)
AUS-53	US Surgeon General's Report 2000	US Department of Health and Human Services, <i>Reducing Tobacco Use: A Report of the Surgeon General</i> (Atlanta, 2000), Chap. 1
AUS-64, IDN-14	-	<i>Tobacco Advertising Prohibition Act 1992</i> (Cth)
AUS-67, JE-14	NPHT, The Roadmap for Action	National Preventative Health Taskforce, <i>Australia: The Healthiest Country by 2020 – National Preventative Health Strategy – The Roadmap for Action</i> , Australian Government (30 June 2009)

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AUS-71	United States v. Philip Morris	US District Court, United States v. Philip Morris USA, Inc., 449 F. Supp. 2d 1 (D. D.C. 2006)
AUS-73	US Surgeon General's Report 1994, Executive Summary	US Department of Health and Human Services, <i>Preventing Tobacco Use Among Youth and Young Adults: A Report of the Surgeon General: Executive Summary</i> (Atlanta, 1994)
AUS-76	US Surgeon General's Report 2012	US Department of Health and Human Services, <i>Preventing Tobacco Use Among Youth and Young Adults: A Report of the Surgeon General</i> (Atlanta, 2012)
AUS-77	NCI Tobacco Control Monograph No. 19	R. Davis, E. Gilpin, B. Loken, K. Viswanath, and M. Wakefield (eds.), <i>The Role of the Media in Promoting and Reducing Tobacco Use</i> , Tobacco Control Monograph No. 19, US Department of Health and Human Services, National Institutes of Health, National Cancer Institute (Bethesda, 2008)
AUS-78	1994 USIOM Report, Chap. 4	B. Lynch and R. Bonnie (eds.), <i>Growing up Tobacco Free: Preventing Nicotine Addiction in Children and Youth</i> , US Institute of Medicine (National Academy Press, 1994), Preface and Chap. 4
AUS-81, CUB-61	Chantler Report	C. Chantler, "Standardised Packaging of Tobacco: Report of the Independent Review Undertaken by Sir Cyril Chantler" (April 2014)
AUS-82	Philip Morris, Marketing Issues Corporate Affairs Conference	Philip Morris, "Marketing Issues Corporate Affairs Conference" (27 May 1994), Bates Nos. 2504015017-2504015042
AUS-83	RJ Reynolds, Australia Trip: Topline Learning	RJ Reynolds, "Australia Trip: Topline Learning (Highly Restricted Market)" (12 February 1997), Bates Nos. 531455747-531455751
AUS-84	JTI v. Commonwealth, Transcript	High Court of Australia Transcripts, JT International SA v. Commonwealth of Australia; British American Tobacco Australasia Limited v. The Commonwealth (2012) HCA Trans 91 (17 April 2012)
AUS-86	CCV Review 2011	Cancer Council Victoria, "Plain Packaging of Tobacco Products: A Review of the Evidence" (May 2011)
AUS-90	Cancer Research UK	Centre for Tobacco Control Research, "The Packaging of Tobacco Products", Cancer Research UK (March 2012)
AUS-91, JE-24(28)	Hammond 2010	D. Hammond, "'Plain Packaging' Regulations for Tobacco Products: The Impact of Standardizing the Color and Design of Cigarette Packs", <i>Salud Pública de México</i> (2010), Vol. 52, No. 2, p. S226-S232
AUS-92	Difranza et al. 2003	J. Difranza, D. Clark, and R. Pollay, "Cigarette Package Design: Opportunities for Disease Prevention", <i>Tobacco Induced Diseases</i> (2003), Vol. 1, No. 2, pp. 97-109
AUS-93, CUB-28	Wakefield et al. 2002	M. Wakefield, C. Morley, J. Horan, and K. Cummings, "The Cigarette Pack as Image: New Evidence from Tobacco Industry Documents", <i>Tobacco Control</i> (2002), Vol. 11, No. 1, pp. i73-i80

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AUS-96	Philip Morris Marketing Meeting 1990	Philip Morris, "Marketing New Products in a Restrictive Environment", Marketing Meeting, Naples, Florida (June 1990), Bates Nos. 2044762173-2044762364
AUS-99	Swedish Match, New Launch on Game	K. Hammar, "New Launch on Game", <i>Swedish Match Inside</i> (2009), Vol. 5
AUS-100	Swedish Match, New Products	Swedish Match, "New Products", <i>Swedish Match Inside</i> (2008), Vol. 2
AUS-101	Swedish Match, Cigars for a Trend-Conscious Generation	B. Sjöberg, "Cigars for a Trend-Conscious Generation", <i>Swedish Match Inside</i> (2007), Vol. 1
AUS-102, DOM-315	Miller et al. 2015	C. Miller, K. Ettridge, and M. Wakefield, "'You're Made to Feel like a Dirty Filthy Smoker When You're Not, Cigar Smoking is Another Thing All Together.' Responses of Australian Cigar and Cigarillo Smokers to Plain Packaging", <i>Tobacco Control</i> (2015), Vol. 24, pp. ii58-ii65
AUS-103	Swedish Match, 2013 Annual Report	Swedish Match, "2013 Annual Report" (2013), p. 9
AUS-104	Shanahan's Law of Trade Marks	Mark Davison, Tracey Berger, and Annette Freeman, <i>Shanahans's Australian Law of Trade Marks and Passing Off</i> , 4th edn (Lawbook Co., 2008)
AUS-107	Philip Morris, Alpine Cigarettes	Philip Morris, "CPC Submission – Alpine Cigarettes (Australia)" (2000), Bates Nos. 2079065303-2079065319
AUS-108	Colmar Brunton, Alpine Creative Presentation	Colmar Brunton Research, "Qualitative Research – Alpine Creative Presentation", prepared for Philip Morris (March 1994), Bates Nos. 2504102678-2504102701
AUS-109, DOM-44	FCTC Guidelines for Implementation (2013 edition)	<i>WHO Framework Convention on Tobacco Control: Guidelines for Implementation: Article 5.3, Article 8, Articles 9 and 10, Article 11, Article 13, Article 14</i> (2013 edn)
AUS-111	Article 6 FCTC Guidelines	"Guidelines for Implementation of Article 6 of the WHO FCTC" (2014)
AUS-115, HND-4, DOM-52	PM Rudd, Anti-Smoking Action Media Release	Prime Minister Rudd and Health Minister Roxon, "Anti-Smoking Action", Media Release (29 April 2010)
AUS-116, JE-15	Response to NPHT, The Roadmap for Action	Australian Government, <i>Taking Preventative Action - A Response to Australia: The Healthiest Country by 2020 - The Report of the National Preventative Taskforce</i> (11 May 2010)
AUS-117, JE-24(49)	Parr et al. 2011a	V. Parr, B. Tan, P. Ell, and K. Miller, "Market Research to Determine Effective Plain Packaging of Tobacco Products", GfK bluemoon, prepared for Department of Health and Ageing, Australian Government (August 2011)
AUS-119, CUB-75	Parr et al. 2011c	V. Parr, P. Ell, and K. Gagg, "Market Testing of Potential Health Warnings and Information Messages for Tobacco Product Packaging: Phase 2 Front and Back of Pack Graphic Health Warnings", GfK bluemoon, Qualitative Formative Research Report, prepared for Department of Health and Ageing, Australian Government (March 2011)

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AUS-120, JE-10	Consultation Paper TPP Bill Exposure Draft	Department of Health and Ageing, "Consultation Paper: Tobacco Plain Packaging Bill 2011 Exposure Draft", Australian Government, (7 April 2011)
AUS-125	-	<i>Tobacco Plain Packaging Amendment Regulation 2012 (No. 1) (Cth)</i>
AUS-126	Best Practice Regulation Handbook	Australian Government, <i>Best Practice Regulation Handbook</i> (Canberra, 2007)
AUS-128, JE-8	Information Standard	<i>Competition and Consumer (Tobacco) Information Standard 2011 (Cth)</i>
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AUS-216, CUB-60	Stirling Review 2013 Update	C. Moodie, K. Angus, M. Stead, and L. Bauld, "Plain Tobacco Packaging Research: An Update", Centre for Tobacco Control Research, Institute for Social Marketing, University of Stirling (2013)
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AUS-235	Letter from L. Baeumer, WIPO	Letter dated 31 August 1994 from L. Baeumer, Director, Industrial Property Law Department, WIPO, to R. Oman of Mudge, Rose, Guthrie, Alexander and Ferdon, Bates Nos. 515446013-515446015
AUS-236	Carvalho 3rd edn, AUS excerpts	Nuno Pires de Carvalho, <i>The TRIPS Regime of Trademarks and Designs</i> , 3rd edn (Kluwer Law International, 2014), pp. 233, 249, 252, 318-319, 323-333, and 348
AUS-242	Correa's Commentary on the TRIPS Agreement	C. Correa, <i>Trade Related Aspects of Intellectual Property Rights: A Commentary on the TRIPS Agreement</i> (Oxford University Press, 2007), pp. 175-176, 182, 186, 223, and 388
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AUS-246	-	J. Malbon, C. Lawson, and M. Davison, <i>The WTO Agreement on Trade-Related Aspects of Intellectual Property Rights: A Commentary</i> (Edward Elgar, 2014), p. 294
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AUS-251, DOM-155, CUB-1	CI Regulations	<i>Commerce (Imports) Regulations 1940</i> (Cth)
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AUS-265	Statements of the Hon. Chris Bowen MP, Treasurer, and Senator the Hon. Penny Wong, Minister for Finance and Deregulation	Statements of the Hon. Chris Bowen MP, Treasurer, and Senator the Hon. Penny Wong, Minister for Finance and Deregulation, "Economic Statement", Commonwealth of Australia (August 2013)
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AUS-280	Evidence Brief: Tobacco Control and Mass Media Campaigns	Australian National Preventive Health Agency, "Evidence Brief: Tobacco Control and Mass Media Campaigns" (2013)
AUS-283	Cancer Institute NSW website	Cancer Institute New South Wales, "iCanQuit", available at: < http://www.icanquit.com.au/ >, accessed 4 March 2015
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AUS-297, DOM-43	-	<i>Trade Practices (Consumer Product Information Standards) (Tobacco) Regulations 2004</i> (Cth)
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AUS-343	Tobacco in Australia 2012, AUS excerpts	M. Scoll, "The Pricing and Taxation of Tobacco Products in Australia", in M. Scoll and M. Winstanley (eds.), <i>Tobacco in Australia: Facts and Issues</i> , 4th edn, Cancer Council Victoria (Melbourne, 2012), Chap. 13, pp. i-130
AUS-350	-	<i>Tobacco Products Control Act 2006</i> (WA)
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AUS-358	-	<i>Public Health Amendment (Juvenile Smoking) Act 2002</i> (NSW)
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AUS-374	-	<i>Tobacco Control Act 2002</i> (NT)
AUS-417	-	<i>Excise Tariff Amendment Act (No 1) 2000</i> (Cth)
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AUS-536, DOM-139	WIPO Protection Against Unfair Competition	International Bureau of WIPO, <i>Protection Against Unfair Competition: Analysis of the Present World Situation</i> , World Intellectual Property Organization (Geneva, 1994)
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AUS-549	Consultation Paper, New Zealand Ministry of Health	Ministry of Health, <i>Proposal to Introduce Plain Packaging of Tobacco Products in New Zealand</i> , Consultation Document, New Zealand Government (Wellington, 2012); and Ministry of Health, "Regulatory Impact Statement: Plain Packaging of Tobacco Products", New Zealand Government (28 March 2012)
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AUS-595, DOM-319	WHO Report on the Global Tobacco Epidemic 2015	World Health Organization, <i>WHO Report on the Global Tobacco Epidemic, 2015: Raising Taxes on Tobacco</i> (Geneva, 2015)
AUS-595.A	WHO Report on the Global Tobacco Epidemic 2015, Appendix IX	World Health Organization, <i>WHO Report on the Global Tobacco Epidemic, 2015: Raising Taxes on Tobacco</i> (Geneva, 2015), Appendix IX
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DOM/HND-15	Steinberg Second Rebuttal Report	L. Steinberg, "Adolescent Decision-Making and the Prevention of Underage Smoking: The Role of Plain Packaging: A Second Response to Expert Evidence Submitted on Behalf of Australia" (23 October 2015)
DOM/HND-17	Peer Review Project Second Rebuttal Report	J. Inman, "Plain Packaging Literature Peer Review Project: Second Rebuttal Report" (8 December 2015)
DOM/HND-18	Kleijnen Systematic Review Second Rebuttal Report	J. Kleijnen, A. Bryman, and M. Bosnjak, "Systematic Review Second Rebuttal Report" (7 December 2015)
DOM/HND-19	Steenkamp Second Rebuttal Report	J.-B. Steenkamp, "Rebuttal to October 2015 Supplementary Reports of Professors J.P. Dubé and N. Tavassoli" (9 December 2015)
DOM/HND-20	Steinberg Response to Panel Question No. 159	L. Steinberg, "Adolescent Decision-Making and the Prevention of Underage Smoking: The Role of Plain Packaging: A Response to the WTO Panel" (7 December 2015)
DOM/IDN-1	List Report	J. List, "A Consideration of the Empirical Evidence on the Effects of Australia's Tobacco Plain Packaging Legislation" (1 June 2015)

Exhibit No(s).	Short title	Title
DOM/IDN-2	Ajzen et al. Data Report	I. Ajzen, A. Hortaçsu, J. List, and A. 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)
DOM/IDN-3	List Rebuttal Report	J. List, "A Further Consideration of the Empirical Evidence on the Effects of Australia's Tobacco Plain Packaging Legislation" (16 September 2015)
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HND-13	Best Practice Regulation Preliminary Assessment	Department of Health and Ageing, "Best Practice Regulation Preliminary Assessment", Australian Government (7 April 2010)
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HND-24	-	República de Honduras, Ley Especial para el Control del Tabaco, Decreto 92-2010, Diario Oficial Num. 32, 296 (21 August 2010)
HND-26	Reporting Instrument of the WHO FCTC submitted by Australia	Department of Health and Ageing, "Reporting Instrument of the WHO Framework Convention on Tobacco Control", Australian Government, (30 April 2012), pp. 1-3, 27-30, 55-56, and Annex 1, pp. 1 and 12, available at: < http://www.who.int/fctc/reporting/party_reports/australia_2012_report_final.pdf?ua=1 > and < http://www.who.int/fctc/reporting/party_reports/australia_annex1_miscellaneous.pdf >, accessed 3 October 2014
HND-31	Oxford Dictionaries online, HND excerpts	Oxford Dictionaries online, British and World English, definitions of "acquire", "by", "confusion", "course", "develop", "encumber", "identical", "justifiable", "likelihood", "nature", "necessary", "obstacle", "reasonable", "requirement", "right", "similar", and "trade", available at: < www.oxforddictionaries.com >, accessed 29 September 2014 or 3 October 2014
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HND-40	WIPO IP Handbook, HND excerpts	World Intellectual Property Organization, <i>WIPO Intellectual Property Handbook</i> , 2nd edn (Geneva, 2004)
HND-47	S. Lester International Economic Law and Policy Blog	S. Lester, "Fun with Plain Packaging", International Economic Law and Policy Blog, available at: < http://worldtradelaw.typepad.com/ielpblog/2014/06/fun-with-plain-packaging.html >, accessed 2 October 2014
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HND-72	Rimpelä and Rainio 2004	A. Rimpelä and S. Rainio, "The Effectiveness of Tobacco Sales Ban to Minors: The Case of Finland", <i>Tobacco Control</i> (2004), Vol. 13, pp. 167-174
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HND-79	Tobacco in Australia 2012, HND excerpts	M. Scollo and M. Winstanley (eds.), <i>Tobacco in Australia: Facts and issues</i> , 4th edn, Cancer Council Victoria (Melbourne, 2012), Chap. 1, p. 7 and Chap. 13, p. 1, available at: < http://www.tobaccoinaustralia.org.au/downloads/chapters/Ch1_Prevalence.pdf > and < http://www.tobaccoinaustralia.org.au/downloads/chapters/Ch13_Taxation.pdf >, accessed 6 October 2014
HND-83	Dunlop et al. 2011	S. Dunlop, D. Perez, and T. Cotter, "Australian Smokers' and Recent Quitters' Responses to the Increasing Price of Cigarettes in the Context of a Tobacco Tax Increase", <i>Addiction</i> (2011), Vol. 106, pp. 1687-1695
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HND-89	New Shorter Oxford English Dictionary, HND excerpts	<i>The New Shorter Oxford English Dictionary on Historical Principles</i> , L. Brown (ed.) (Oxford University Press, 1993), Vol. I and Vol. II, pp. 54, 459, 674, 1255, 1348, 1791, 2387, and 3482
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HND-121	ISO 3394	International Organization for Standardization, <i>International Standard 3394: Packaging — Complete, Filled Transport Packages and Unit Loads — Dimensions of Rigid Rectangular Packages</i> , 3rd edn, ISO 3394:2012(E) (1 November 2012)
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DOM-49	-	Australian Parliament, Senate Community Affairs References Committee, <i>The Tobacco Industry and the Costs of Tobacco-Related Illness</i> , (15 December 1995)
DOM-56	WIPO Brands Report	World Intellectual Property Organization, <i>2013 World Intellectual Property Report: Brands – Reputation and Image in the Global Marketplace</i> , WIPO Economics and Statistics Series (2013)
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DOM-72, IDN-103	Crazy Ron v. Mobileworld	Federal Court of Australia, Crazy Ron's Communications Pty Limited v. Mobileworld Communications Pty Limited (2004) 209 ALR 1
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DOM-79	Bodenhausen, Full text	G.H.C. Bodenhausen, <i>Guide to the Application of the Paris Convention for the Protection of Industrial Property, as Revised at Stockholm in 1967</i> (WIPO, 1969)
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DOM-93	SA HOS data	South Australian Health and Medical Research Institute, "Key Smoking Statistics for SA – 2013", results from South Australian Health Omnibus Survey 2013, available at: < https://www.sahmri.com/user_assets/c23dc77e9e0f242ca59442c3bc21e1c56cbdbe5/key_smoking_statistics_for_sa_2013_-30_april_2014.pdf >, accessed 7 October 2014

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DOM-100	IPE Report	D. Afshartous, M. Hagedorn, A. Kaul, and M. Wolf, "Empirical Assessment of Australia's Plain Packaging Regime", Institute for Policy Evaluation (7 October 2014)
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DOM-110	ACL	<i>Competition and Consumer Act 2010</i> (Cth), Schedule 2 (Australian Consumer Law)
DOM-115	Chaloupka et al. 2012	F. Chaloupka, A. Yerekly and G. Fong, "Tobacco Taxes as a Tobacco Control Strategy", <i>Tobacco Control</i> (2012), Vol. 12, pp. 172-180
DOM-116	Chaloupka and Warner 1998	F. Chaloupka and K. Warner, "The Economics of Smoking" (12 January 1999), prepared for J. Newhouse and A. Culyer (eds.), <i>The Handbook of Health Economics</i>
DOM-117	2011 IARC Handbook	World Health Organization, International Agency for Research on Cancer, <i>Effectiveness of Tax and Price Policies for Tobacco Control</i> , Handbooks of Cancer Prevention, <i>Tobacco Control</i> , Vol. 14 (Lyon, 2011)
DOM-118	Ross and Chaloupka 2006	H. Ross and F. Chaloupka, "Economic Policies for Tobacco Control in Developing Countries", <i>Salud Publica Mexico</i> (2006), Vol. 48, pp. S113-S120
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DOM-130, HND-75	Ahmad 2005a	S. Ahmad, "Closing the Youth Access Gap: The Projected Health Benefits And Cost Savings of a National Policy to Raise the Legal Smoking Age to 21 in the United States", <i>Health Policy</i> (2005), Vol. 75, pp. 74-84
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DOM-164	Peer review of Lund and Scheffels 2013	J. Hoek, "Reviewer's Report" of "Perceptions of Typical Users of Plain vs. Branded Cigarette Packs Among Young Smokers and Non-Smokers. A Between-Subjects Experimental Survey" (10 August 2013)
DOM-165	Author's response to peer reviews of Pechey et al. 2013	"Author's Response to Reviews" of "Impact of Plain Packaging of Tobacco Products on Smoking in Adults and Children: An Elicitation of International Experts' Estimates" (10 October 2012), available at: < http://www.biomedcentral.com/1471-2458/13/18/prepub > accessed 7 October 2014

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DOM-308	-	Oxford English Dictionary online, definition of "capable", available at: < http://www.oed.com/view/Entry/27354?redirectedFrom=capable&print >, accessed 9 September 2015
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DOM-318, CUB-81	WHO Report on the Global Tobacco Epidemic 2013	World Health Organization , <i>WHO Report on the Global Tobacco Epidemic, 2013: Enforcing Bans on Tobacco Advertising, Promotion and Sponsorship</i> (Geneva, 2013)
DOM-331	-	Oxford English Dictionary online, definition of "respect", available at: < http://www.oed.com/view/Entry/163779?rskey=uWPnla&result=1&isAdvanced=false&print >, accessed 9 September 2015
DOM-339	OIE, How to Use the Terrestrial Code to Set Health Measures for Trade in Terrestrial Animals and Products	World Organization for Animal Health, "Facilitating Safe Trade: How to Use the Terrestrial Code to Set Health Measures for Trade in Terrestrial Animals and Products", available at: < http://www.oie.int/fileadmin/Home/eng/International_Standard_Setting/docs/pdf/A_IMPORT_HEALTH_MEASURES_1.pdf >, accessed 15 September 2015
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DOM-361	IPE Second Updated Report	D. Afshartous, M. Hagedorn, A. Kaul, and M. Wolf, "Updated Empirical Assessment of Australia's Plain Packaging Regime", Institute for Policy Evaluation (27 October 2015)
DOM-369	Borland and Cummings 2010	R. Borland and K. Cummings, "Advancing Tobacco Control by Effective Evaluation" in P. Boyle, N. Gray, J. Henningfield, J. Sfrrin, and W. Zatonski (eds.), <i>Tobacco: Science, Policy and Public Health</i> (Oxford Scholarship Online, 2010), pp. 629-641
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DOM-373 (SCI)	-	Data update and computer code and calculations supporting the IPE Updated Report (SCI)
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<i>Indonesia – Autos</i>	Panel Report, <i>Indonesia – Certain Measures Affecting the Automobile Industry</i> , WT/DS54/R , WT/DS55/R , WT/DS59/R , WT/DS64/R , Corr.1 and Corr.2, adopted 23 July 1998, and Corr.3 and Corr.4, DSR 1998:VI, p. 2201
<i>Japan – Agricultural Products II</i>	Appellate Body Report, <i>Japan – Measures Affecting Agricultural Products</i> , WT/DS76/AB/R , adopted 19 March 1999, DSR 1999:I, p. 277
<i>Japan – Alcoholic Beverages II</i>	Appellate Body Report, <i>Japan – Taxes on Alcoholic Beverages</i> , WT/DS8/AB/R , WT/DS10/AB/R , WT/DS11/AB/R , adopted 1 November 1996, DSR 1996:I, p. 97

Short title	Full case title and citation
<i>Japan – Apples</i>	Appellate Body Report, <i>Japan – Measures Affecting the Importation of Apples</i> , WT/DS245/AB/R , adopted 10 December 2003, DSR 2003:IX, p. 4391
<i>Japan – DRAMs (Korea)</i>	Appellate Body Report, <i>Japan – Countervailing Duties on Dynamic Random Access Memories from Korea</i> , WT/DS336/AB/R and Corr.1, adopted 17 December 2007, DSR 2007:VII, p. 2703
<i>Japan – DRAMs (Korea)</i>	Panel Report, <i>Japan – Countervailing Duties on Dynamic Random Access Memories from Korea</i> , WT/DS336/R , adopted 17 December 2007, as modified by Appellate Body Report WT/DS336/AB/R, DSR 2007:VII, p. 2805
<i>Japan – Leather (US II)</i>	GATT Panel Report, <i>Panel on Japanese Measures on Imports of Leather</i> , L/5623, adopted 15 May 1984, BISD 31S/94
<i>Korea – Alcoholic Beverages</i>	Appellate Body Report, <i>Korea – Taxes on Alcoholic Beverages</i> , WT/DS75/AB/R , WT/DS84/AB/R , adopted 17 February 1999, DSR 1999:I, p. 3
<i>Korea – Dairy</i>	Appellate Body Report, <i>Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products</i> , WT/DS98/AB/R , adopted 12 January 2000, DSR 2000:I, p. 3
<i>Korea – Various Measures on Beef</i>	Appellate Body Report, <i>Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef</i> , WT/DS161/AB/R , WT/DS169/AB/R , adopted 10 January 2001, DSR 2001:I, p. 5
<i>Mexico – Taxes on Soft Drinks</i>	Appellate Body Report, <i>Mexico – Tax Measures on Soft Drinks and Other Beverages</i> , WT/DS308/AB/R , adopted 24 March 2006, DSR 2006:I, p. 3
<i>Mexico – Telecoms</i>	Panel Report, <i>Mexico – Measures Affecting Telecommunications Services</i> , WT/DS204/R , adopted 1 June 2004, DSR 2004:IV, p. 1537
<i>Russia – Pigs (EU)</i>	Panel Report, <i>Russian Federation – Measures on the Importation of Live Pigs, Pork and Other Pig Products from the European Union</i> , WT/DS475/R and Add.1, adopted 21 March 2017, as modified by Appellate Body Report WT/DS475/AB/R
<i>Thailand – Cigarettes</i>	GATT Panel Report, <i>Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes</i> , DS10/R, adopted 7 November 1990, BISD 37S/200
<i>Thailand – Cigarettes (Philippines)</i>	Appellate Body Report, <i>Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines</i> , WT/DS371/AB/R , adopted 15 July 2011, DSR 2011:IV, p. 2203
<i>Thailand – Cigarettes (Philippines)</i>	Panel Report, <i>Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines</i> , WT/DS371/R , adopted 15 July 2011, as modified by Appellate Body Report WT/DS371/AB/R, DSR 2011:IV, p. 2299
<i>Thailand – H-Beams</i>	Appellate Body Report, <i>Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland</i> , WT/DS122/AB/R , adopted 5 April 2001, DSR 2001:VII, p. 2701
<i>US – 1916 Act (EC)</i>	Panel Report, <i>United States – Anti-Dumping Act of 1916, Complaint by the European Communities</i> , WT/DS136/R and Corr.1, adopted 26 September 2000, upheld by Appellate Body Report WT/DS136/AB/R, WT/DS162/AB/R, DSR 2000:X, p. 4593
<i>US – 1916 Act (Japan)</i>	Panel Report, <i>United States – Anti-Dumping Act of 1916, Complaint by Japan</i> , WT/DS162/R and Add.1, adopted 26 September 2000, upheld by Appellate Body Report WT/DS136/AB/R, WT/DS162/AB/R, DSR 2000:X, p. 4831
<i>US – Animals</i>	Panel Report, <i>United States – Measures Affecting the Importation of Animals, Meat and Other Animal Products from Argentina</i> , WT/DS447/R and Add.1, adopted 31 August 2015

Short title	Full case title and citation
<i>US – Anti-Dumping and Countervailing Duties (China)</i>	Appellate Body Report, <i>United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China</i> , WT/DS379/AB/R , adopted 25 March 2011, DSR 2011:V, p. 2869
<i>US – Carbon Steel</i>	Appellate Body Report, <i>United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany</i> , WT/DS213/AB/R and Corr.1, adopted 19 December 2002, DSR 2002:IX, p. 3779
<i>US – Carbon Steel (India)</i>	Appellate Body Report, <i>United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India</i> , WT/DS436/AB/R , adopted 19 December 2014, DSR 2014:V, p. 1727
<i>US – Clove Cigarettes</i>	Appellate Body Report, <i>United States – Measures Affecting the Production and Sale of Clove Cigarettes</i> , WT/DS406/AB/R , adopted 24 April 2012, DSR 2012: XI, p. 5751
<i>US – Clove Cigarettes</i>	Panel Report, <i>United States – Measures Affecting the Production and Sale of Clove Cigarettes</i> , WT/DS406/R , adopted 24 April 2012, as modified by Appellate Body Report WT/DS406/AB/R, DSR 2012: XI, p. 5865
<i>US – Continued Suspension</i>	Appellate Body Report, <i>United States – Continued Suspension of Obligations in the EC – Hormones Dispute</i> , WT/DS320/AB/R , adopted 14 November 2008, DSR 2008:X, p. 3507
<i>US – Continued Suspension</i>	Panel Report, <i>United States – Continued Suspension of Obligations in the EC – Hormones Dispute</i> , WT/DS320/R and Add.1 to Add.7, adopted 14 November 2008, as modified by Appellate Body Report WT/DS320/AB/R, DSR 2008:XI, p. 3891
<i>US – Continued Zeroing</i>	Appellate Body Report, <i>United States – Continued Existence and Application of Zeroing Methodology</i> , WT/DS350/AB/R , adopted 19 February 2009, DSR 2009:III, p. 1291
<i>US – COOL</i>	Appellate Body Reports, <i>United States – Certain Country of Origin Labelling (COOL) Requirements</i> , WT/DS384/AB/R / WT/DS386/AB/R , adopted 23 July 2012, DSR 2012:V, p. 2449
<i>US – COOL</i>	Panel Reports, <i>United States – Certain Country of Origin Labelling (COOL) Requirements</i> , WT/DS384/R / WT/DS386/R , adopted 23 July 2012, as modified by Appellate Body Reports WT/DS384/AB/R / WT/DS386/AB/R, DSR 2012:VI, p. 2745
<i>US – COOL (Article 21.5 – Canada and Mexico)</i>	Appellate Body Reports, <i>United States – Certain Country of Origin Labelling (COOL) Requirements – Recourse to Article 21.5 of the DSU by Canada and Mexico</i> , WT/DS384/AB/RW / WT/DS386/AB/RW , adopted 29 May 2015
<i>US – COOL (Article 21.5 – Canada and Mexico)</i>	Panel Reports, <i>United States – Certain Country of Origin Labelling (COOL) Requirements – Recourse to Article 21.5 of the DSU by Canada and Mexico</i> , WT/DS384/RW and Add.1 / WT/DS386/RW and Add.1, adopted 29 May 2015, as modified by Appellate Body Reports WT/DS384/AB/RW / WT/DS386/AB/RW
<i>US – Corrosion-Resistant Steel Sunset Review</i>	Panel Report, <i>United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan</i> , WT/DS244/R , adopted 9 January 2004, as modified by Appellate Body Report WT/DS244/AB/R, DSR 2004:I, p. 85
<i>US – Countervailing and Anti-Dumping Measures (China)</i>	Appellate Body Report, <i>United States – Countervailing and Anti-Dumping Measures on Certain Products from China</i> , WT/DS449/AB/R and Corr.1, adopted 22 July 2014, DSR 2014:VIII, p. 3027
<i>US – Countervailing Duty Investigation on DRAMS</i>	Panel Report, <i>United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea</i> , WT/DS296/R , adopted 20 July 2005, as modified by Appellate Body Report WT/DS296/AB/R, DSR 2005:XVII, p. 8243

Short title	Full case title and citation
<i>US – Countervailing Measures on Certain EC Products (Article 21.5 – EC)</i>	Panel Report, <i>United States – Countervailing Measures Concerning Certain Products from the European Communities – Recourse to Article 21.5 of the DSU by the European Communities</i> , WT/DS212/RW , adopted 27 September 2005, DSR 2005:XVIII, p. 8950
<i>US – Customs Bond Directive</i>	Panel Report, <i>United States – Customs Bond Directive for Merchandise Subject to Anti-Dumping/Countervailing Duties</i> , WT/DS345/R , adopted 1 August 2008, as modified by Appellate Body Report WT/DS343/AB/R / WT/DS345/AB/R, DSR 2008:VIII, p. 2925
<i>US – FSC</i>	Appellate Body Report, <i>United States – Tax Treatment for "Foreign Sales Corporations"</i> , WT/DS108/AB/R , adopted 20 March 2000, DSR 2000:III, p. 1619
<i>US – FSC</i>	Panel Report, <i>United States – Tax Treatment for "Foreign Sales Corporations"</i> , WT/DS108/R , adopted 20 March 2000, as modified by Appellate Body Report WT/DS108/AB/R, DSR 2000:IV, p. 1675
<i>US – Gambling</i>	Appellate Body Report, <i>United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services</i> , WT/DS285/AB/R , adopted 20 April 2005, DSR 2005:XII, p. 5663 (and Corr.1, DSR 2006:XII, p. 5475)
<i>US – Gambling</i>	Panel Report, <i>United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services</i> , WT/DS285/R , adopted 20 April 2005, as modified by Appellate Body Report WT/DS285/AB/R, DSR 2005:XII, p. 5797
<i>US – Gasoline</i>	Appellate Body Report, <i>United States – Standards for Reformulated and Conventional Gasoline</i> , WT/DS2/AB/R , adopted 20 May 1996, DSR 1996:I, p. 3
<i>US – Large Civil Aircraft (2nd complaint)</i>	Appellate Body Report, <i>United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)</i> , WT/DS353/AB/R , adopted 23 March 2012, DSR 2012:I, p. 7
<i>US – Offset Act (Byrd Amendment)</i>	Appellate Body Report, <i>United States – Continued Dumping and Subsidy Offset Act of 2000</i> , WT/DS217/AB/R , WT/DS234/AB/R , adopted 27 January 2003, DSR 2003:I, p. 375
<i>US – Oil Country Tubular Goods Sunset Reviews</i>	Appellate Body Report, <i>United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina</i> , WT/DS268/AB/R , adopted 17 December 2004, DSR 2004:VII, p. 3257
<i>US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)</i>	Panel Report, <i>United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina – Recourse to Article 21.5 of the DSU by Argentina</i> , WT/DS268/RW , adopted 11 May 2007, as modified by Appellate Body Report WT/DS268/AB/RW, DSR 2007:IX, p. 3609
<i>US – Section 110(5) Copyright Act</i>	Panel Report, <i>United States – Section 110(5) of the US Copyright Act</i> , WT/DS160/R , adopted 27 July 2000, DSR 2000:VIII, p. 3769
<i>US – Section 211 Appropriations Act</i>	Appellate Body Report, <i>United States – Section 211 Omnibus Appropriations Act of 1998</i> , WT/DS176/AB/R , adopted 1 February 2002, DSR 2002:II, p. 589
<i>US – Section 211 Appropriations Act</i>	Panel Report, <i>United States – Section 211 Omnibus Appropriations Act of 1998</i> , WT/DS176/R , adopted 1 February 2002, as modified by Appellate Body Report WT/DS176/AB/R, DSR 2002:II, p. 683
<i>US – Section 301 Trade Act</i>	Panel Report, <i>United States – Sections 301-310 of the Trade Act of 1974</i> , WT/DS152/R , adopted 27 January 2000, DSR 2000:II, p. 815
<i>US – Shrimp</i>	Appellate Body Report, <i>United States – Import Prohibition of Certain Shrimp and Shrimp Products</i> , WT/DS58/AB/R , adopted 6 November 1998, DSR 1998:VII, p. 2755

Short title	Full case title and citation
<i>US – Softwood Lumber IV</i>	Appellate Body Report, <i>United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada</i> , WT/DS257/AB/R , adopted 17 February 2004, DSR 2004:II, p. 571
<i>US – Softwood Lumber VI</i>	Panel Report, <i>United States – Investigation of the International Trade Commission in Softwood Lumber from Canada</i> , WT/DS277/R , adopted 26 April 2004, DSR 2004:VI, p. 2485
<i>US – Superfund</i>	GATT Panel Report, <i>United States – Taxes on Petroleum and Certain Imported Substances</i> , L/6175, adopted 17 June 1987, BISD 34S/136
<i>US – Tuna II (Mexico)</i>	Appellate Body Report, <i>United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products</i> , WT/DS381/AB/R , adopted 13 June 2012, DSR 2012:IV, p. 1837
<i>US – Tuna II (Mexico)</i>	Panel Report, <i>United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products</i> , WT/DS381/R , adopted 13 June 2012, as modified by Appellate Body Report WT/DS381/AB/R, DSR 2012:IV, p. 2013
<i>US – Tuna II (Mexico) (Article 21.5 – Mexico)</i>	Appellate Body Report, <i>United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products – Recourse to Article 21.5 of the DSU by Mexico</i> , WT/DS381/AB/RW and Add.1, adopted 3 December 2015
<i>US – Upland Cotton</i>	Appellate Body Report, <i>United States – Subsidies on Upland Cotton</i> , WT/DS267/AB/R , adopted 21 March 2005, DSR 2005:I, p. 3
<i>US – Upland Cotton</i>	Panel Report, <i>United States – Subsidies on Upland Cotton</i> , WT/DS267/R , Add.1 to Add.3 and Corr.1, adopted 21 March 2005, as modified by Appellate Body Report WT/DS267/AB/R, DSR 2005:II, p. 299
<i>US – Wool Shirts and Blouses</i>	Appellate Body Report, <i>United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India</i> , WT/DS33/AB/R , adopted 23 May 1997, and Corr.1, DSR 1997:I, p. 323
<i>US – Zeroing (EC)</i>	Panel Report, <i>United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")</i> , WT/DS294/R , adopted 9 May 2006, as modified by Appellate Body Report WT/DS294/AB/R, DSR 2006:II, p. 521

1 INTRODUCTION

1.1 Complaint by Honduras

1.1. On 4 April 2012, Honduras requested consultations with Australia with respect to the measures and claims set out below. This request was made pursuant to Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Article 64 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement), Article 14 of the Agreement on Technical Barriers to Trade (TBT Agreement) and Article XXII of the General Agreement on Tariffs and Trade 1994 (GATT 1994).¹

1.2. Consultations were held on 1 May 2012 between Honduras and Australia. These consultations failed to resolve the dispute.²

1.2 Complaint by the Dominican Republic

1.3. On 18 July 2012, the Dominican Republic requested consultations with Australia with respect to the measures and claims set out below. This request was made pursuant to Article 4 of the DSU, Article XXII of the GATT 1994, Article 64.1 of the TRIPS Agreement, and Article 14.1 of the TBT Agreement.³

1.4. Consultations were held on 27 September 2012 between the Dominican Republic and Australia. These consultations failed to resolve the dispute.⁴

1.3 Complaint by Cuba

1.5. On 3 May 2013, Cuba requested consultations with Australia. This request was made pursuant to Article 4 of the DSU, Article XXII of the GATT 1994, Article 64.1 of the TRIPS Agreement, and Article 14.1 of the TBT Agreement with respect to the measures and claims set out below.⁵

1.6. Consultations were held on 13 June 2013 between Cuba and Australia. These consultations failed to resolve the dispute.⁶

1.4 Complaint by Indonesia

1.7. On 20 September 2013, Indonesia requested consultations with Australia with respect to the measures and claims set out below. This request was made pursuant to Article 4 of the DSU, Article 14.1 of the TBT Agreement, Article 64.1 of the TRIPS Agreement and Article XXII of the GATT 1994.⁷

1.8. Consultations were held on 29 October 2013 between Indonesia and Australia. These consultations failed to resolve the dispute.⁸

1.5 Panel establishment and composition

1.5.1 Honduras

1.9. On 15 October 2012, Honduras requested the establishment of a panel pursuant to Article 4.7 and Article 6 of the DSU, Article XXIII:2 of the GATT 1994, Article 64 of the TRIPS Agreement and Article 14 of the TBT Agreement, with standard terms of reference.⁹ At its

¹ WT/DS435/1.

² WT/DS435/16.

³ WT/DS441/1.

⁴ WT/DS441/15.

⁵ WT/DS458/1.

⁶ WT/DS458/14.

⁷ WT/DS467/1.

⁸ WT/DS467/15.

⁹ WT/DS435/16.

meeting on 25 September 2013, the Dispute Settlement Body (DSB) established a panel pursuant to the request by Honduras, in accordance with Article 6 of the DSU.¹⁰

1.10. The Panel's terms of reference are the following:

To examine, in the light of the relevant provisions of the covered agreements cited by the parties to the dispute, the matter referred to the DSB by Honduras in document WT/DS435/16, and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.¹¹

1.11. Argentina, Brazil, Canada, Chile, China, Cuba, the Dominican Republic, Ecuador, the European Union, Guatemala, India, Indonesia, Japan, the Republic of Korea, Malawi, Malaysia, Mexico, New Zealand, Nicaragua, Nigeria, Norway, Oman, Panama, Peru, the Philippines, Singapore, South Africa, Chinese Taipei, Thailand, Turkey, Ukraine, the United States, Uruguay, Zambia, and Zimbabwe notified their interest in participating in the panel proceedings as third parties.

1.12. On 26 March 2014, Australia requested the Director-General to determine the composition of the panel, pursuant to Article 8.7 of the DSU.¹²

1.5.2 Dominican Republic

1.13. On 9 November 2012, the Dominican Republic requested the establishment of a panel pursuant to Article 4.7 and Article 6 of the DSU, Article XXIII of the GATT 1994, Article 64.1 of the TRIPS Agreement and Article 14.1 of the TBT Agreement, with standard terms of reference.¹³ At its meeting on 25 April 2014, the DSB established a panel pursuant to the request by the Dominican Republic, in accordance with Article 6 of the DSU.¹⁴

1.14. The Panel's terms of reference are the following:

To examine, in the light of the relevant provisions of the covered agreements cited by the parties to the dispute, the matter referred to the DSB by the Dominican Republic in document WT/DS441/15 and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.¹⁵

1.15. Argentina, Brazil, Canada, Chile, China, Cuba, Ecuador, the European Union, Guatemala, Honduras, India, Indonesia, Japan, the Republic of Korea, Malaysia, Mexico, New Zealand, Nicaragua, Nigeria, Norway, Peru, the Philippines, the Russian Federation, the Kingdom of Saudi Arabia, Singapore, South Africa, Chinese Taipei, Thailand, Trinidad and Tobago, Turkey, Ukraine, the United States, Uruguay, and Zimbabwe notified their interest in participating in the panel proceedings as third parties.

1.16. On 25 April 2014, Australia requested the Director-General to determine the composition of the panel, pursuant to Article 8.7 of the DSU.¹⁶

1.5.3 Cuba

1.17. On 4 April 2014, Cuba requested the establishment of a panel pursuant to Article 4.7 and Article 6 of the DSU, Article XXIII of the GATT 1994, Article 64.1 of the TRIPS Agreement and

¹⁰ See WT/DSB/M/337.

¹¹ WT/DS435/18/Rev.1.

¹² WT/DS435/18/Rev.1.

¹³ WT/DS441/15.

¹⁴ See WT/DSB/M/344.

¹⁵ WT/DS441/17/Rev.1.

¹⁶ WT/DS441/17/Rev.1.

Article 14.1 of the TBT Agreement.¹⁷ At its meeting on 25 April 2014, the DSB established a panel pursuant to the request by Cuba, in accordance with Article 6 of the DSU.¹⁸

1.18. The Panel's terms of reference are the following:

To examine, in the light of the relevant provisions of the covered agreements cited by the parties to the dispute, the matter referred to the DSB by Cuba in document WT/DS458/14 and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.¹⁹

1.19. Argentina, Brazil, Canada, Chile, China, the Dominican Republic, Ecuador, the European Union, Guatemala, Honduras, India, Indonesia, Japan, the Republic of Korea, Malaysia, Mexico, New Zealand, Nicaragua, Nigeria, Norway, Peru, the Philippines, the Russian Federation, the Kingdom of Saudi Arabia, Singapore, South Africa, Chinese Taipei, Thailand, Turkey, Ukraine, the United States, Uruguay, and Zimbabwe notified their interest in participating in the panel proceedings as third parties.

1.20. On 25 April 2014, Australia requested the Director-General to determine the composition of the panel, pursuant to Article 8.7 of the DSU.²⁰

1.5.4 Indonesia

1.21. On 3 March 2014, Indonesia requested the establishment of a panel pursuant to Articles 4.7 and 6 of the DSU, Article XXIII of the GATT 1994, Article 64.1 of the TRIPS Agreement and Article 14.1 of the TBT Agreement with standard terms of reference.²¹ At its meeting on 26 March 2014, the DSB established a panel pursuant to the request by Indonesia in document WT/DS467/15, in accordance with Article 6 of the DSU.²²

1.22. The Panel's terms of reference are the following:

To examine, in the light of the relevant provisions of the covered agreements cited by the parties to the dispute, the matter referred to the DSB by Indonesia in document WT/DS467/15 and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.²³

1.23. Argentina, Brazil, Canada, Chile, China, Cuba, the Dominican Republic, Ecuador, the European Union, Guatemala, Honduras, India, Japan, the Republic of Korea, Malawi, Malaysia, Mexico, New Zealand, Nicaragua, Nigeria, Norway, Oman, Peru, the Philippines, the Russian Federation, Singapore, Chinese Taipei, Thailand, Turkey, Ukraine, the United States, Uruguay, and Zimbabwe notified their interest in participating in the panel proceedings as third parties.

1.24. On 23 April 2014, Australia requested the Director-General to determine the composition of the panel, pursuant to Article 8.7 of the DSU.²⁴

1.5.5 Procedural agreement between Australia, Ukraine²⁵, Honduras, the Dominican Republic, Cuba, and Indonesia

1.25. On 24 April 2014, before the establishment of the panels in the disputes brought by the Dominican Republic and Cuba, Australia sent a communication to the Chairman of the DSB on behalf of all the parties to the disputes in DS435, DS441, DS458, and DS467, as well as in relation

¹⁷ WT/DS458/14.

¹⁸ See WT/DSB/M/344.

¹⁹ WT/DS458/16/Rev.1.

²⁰ WT/DS458/16/Rev.1.

²¹ WT/DS467/15.

²² See WT/DSB/M/343.

²³ WT/DS467/17/Rev.1.

²⁴ WT/DS467/17/Rev.1.

²⁵ See section 1.6.6 below.

to the proceedings in DS434.²⁶ This communication concerned certain arrangements for the composition of the panels and the panels' timetable in these disputes. The communication stated that the Dominican Republic and Cuba would proceed with their panel requests at the DSB meeting of 25 April 2014 and that Australia would agree to the establishment at that meeting.²⁷

1.26. Australia also informed that it would request the Director-General to compose the panels in DS441 and DS458. The communication also stated that the parties had agreed to the harmonization of the timetable for the panel proceedings in DS434, DS435, DS441, DS458, and DS467, pursuant to Article 9.3 of the DSU. Furthermore, the parties indicated they would "undertake best endeavours to agree on a timetable to propose to the Panels".²⁸

1.27. On 5 May 2014, the Director-General accordingly composed the panels as follows²⁹:

Chairperson: Mr Alexander Erwin

Members: Mr François Dessemontet
Ms Billie Miller

1.6 Panel proceedings

1.6.1 General

1.28. On 19 May 2014, in accordance with their procedural agreement of 24 April 2014³⁰, the parties submitted to the Panel³¹ a proposed timetable for its consideration.

1.29. On 26 May 2014, the Panel transmitted draft Working Procedures and a draft timetable to the parties. The Panel explained that its draft timetable took "due account of the timeframes envisaged by the parties for various stages of the proceedings".³² The Panel also noted its understanding that the timetable jointly proposed by the parties assumed that substantive meetings as well as third-party sessions would not be held separately for each dispute but would rather be held jointly for all disputes. Accordingly, and in the interest of facilitating the efficient management of the proceedings, the Panel's draft Working Procedures sought to integrate the conduct of the proceedings to the greatest extent possible, in accordance with Article 9.3 of the DSU.³³

1.30. The Panel adopted its Working Procedures³⁴ and timetable on 17 June 2014. These Working Procedures were amended on 1 October 2014, to reflect the Panel's decision concerning the adoption of SCI procedures³⁵, and 15 December 2014, to reflect the Panel's decision concerning enhanced third-party rights.³⁶

1.31. The Panel held a first substantive meeting with the parties on 1 and 3-5 June 2015. A session with the third parties took place on 3 June 2015. The Panel held a second substantive meeting with the parties on 28-30 October 2015.

²⁶ The panel proceedings in relation to DS434 (Ukraine) were subsequently suspended. See section 1.6.6 below.

²⁷ WT/DS435/17, WT/DS441/16, WT/DS458/15, and WT/DS467/16.

²⁸ WT/DS435/17, WT/DS441/16, WT/DS458/15, and WT/DS467/16.

²⁹ WT/DS434/13, WT/DS435/18/Rev.1, WT/DS458/16/Rev.1, and WT/DS467/17/Rev.1.

³⁰ See Section 1.5.5.

³¹ For the reader's convenience, the Panels in DS435, DS441, DS458 and DS467 are herein collectively referred to as the Panel.

³² Panel's communication to the parties of 26 May 2014.

³³ Panel's communication to the parties of 26 May 2014.

³⁴ See Panel's Working Procedures in Annex A-1. In these Reports, exhibits submitted by Honduras are referred to as HND-#, by the Dominican Republic as DOM-#, by Cuba as CUB-#, by Indonesia as IDN-#, and by Australia as AUS-#. Exhibits that have been submitted jointly by the Dominican Republic, Honduras, and Indonesia are referred to as DOM/HND/IDN-#, by the Dominican and Honduras as DOM/HND-#, by the Dominican Republic and Indonesia as DOM/IDN-#, and by all of the complainants jointly as JE-#.

³⁵ See section 1.6.3 below.

³⁶ See section 1.6.4 below.

1.32. On 8 April 2016, the Panel issued the draft descriptive part of its Reports to the parties. The Panel issued its Interim Reports to the parties on 2 May 2017. The Panel issued its Final Reports to the parties on 25 September 2017.

1.6.2 Preliminary rulings on the Panel's terms of reference

1.33. On 7 May 2014, Australia submitted to the Panel requests for preliminary rulings with respect to the consistency of the Dominican Republic's, Cuba's, and Indonesia's panel requests with Article 6.2 of the DSU.

1.34. Australia requested the Panel to make preliminary procedural rulings excluding from its terms of reference the "*non-exhaustive* list of related measures and measures that 'complement or add to' the measures explicitly identified" in Cuba's, the Dominican Republic's, and Indonesia's panel requests on the basis that the requests did not "identify the specific measures at issue".³⁷ In respect of Cuba's panel request, Australia also challenged the inclusion of claims made by Cuba pursuant to Article 6bis of the Paris Convention (read with Article 2.1 of the TRIPS Agreement); Article 16.3 of the TRIPS Agreement; Article 15.1 of the TRIPS Agreement; and Article 17 of the TRIPS Agreement.³⁸ Australia requested that the Panel issue preliminary rulings in respect of these issues before the filing of the first written submissions.

1.35. On 11 June 2014, the Dominican Republic, Cuba, and Indonesia each responded to Australia's request in relation to their respective proceedings. On the same date, the Panel provided the third parties with an opportunity to comment on Australia's requests. On 17 June 2014, the Panel received comments from the European Union and on 18 June 2014, from Argentina, Brazil, Canada, Guatemala, and Mexico. The Panel also received comments from the Dominican Republic, Honduras, and Indonesia in their capacity as third parties in each other's disputes.³⁹

1.36. On 1 July 2014, the Panel received comments from Australia on the Dominican Republic's, Cuba's, and Indonesia's responses to Australia's requests for preliminary rulings. On 8 July 2014, the Dominican Republic and Cuba provided comments on Australia's comments. Indonesia did not submit comments.

1.37. On 19 August 2014, the Panel issued its preliminary rulings to the parties and the third parties, with an indication that these would become an integral part of the Panel's report, subject to any modifications or elaboration of the reasoning, either in a subsequent ruling or in the Panel's report.

1.38. With regard to the Dominican Republic's, Cuba's, and Indonesia's panel requests, the Panel found that "the terms 'including', 'complement' and 'add to', as used in [these] panel request[s], are not, on their face, inconsistent with the requirement under Article 6.2 of the DSU to identify the specific measures at issue".⁴⁰

1.39. In respect of Cuba's panel request, the Panel also held that "the additional claims introduced by Cuba in its panel request are closely related to those that formed the legal basis of its request for consultations and can, in our view, reasonably be said to have evolved from the legal basis that formed the subject of consultations". The Panel therefore was "not persuaded that Cuba's claims under Article 16.3 of the TRIPS Agreement and Article 6bis of the Paris Convention (through Article 2.1 of the TRIPS Agreement) ha[d] the effect of ... 'changing the essence of the complaint'. We consider that their addition in Cuba's panel request remains within the bounds of the 'measure of flexibility' accorded to Members in formulating their complaints in their panel request."⁴¹

³⁷ Australia's request for a preliminary procedural ruling in relation to the Dominican Republic's panel request, para. 1; Australia's request for a preliminary procedural ruling in relation to Indonesia's panel request, para. 1; and Australia's request for a preliminary procedural ruling in relation to Cuba's panel request para. 1(iii). (emphasis original)

³⁸ Australia's request for a preliminary ruling in relation to Cuba's panel request, para. 1(i).

³⁹ See WT/DS441/19, WT/DS458/18, and WT/DS467/19.

⁴⁰ WT/DS441/19, para. 5.36; WT/DS458/18, para. 5.71; and WT/DS467/19, para. 5.35.

⁴¹ WT/DS458/18, para. 3.53.

1.40. These rulings were circulated to the DSB on 27 October 2014.⁴²

1.6.3 Working procedures on strictly confidential information (SCI)

1.41. On 15 September 2014, the parties jointly requested that the Panel adopt addenda to its Working Procedures and Additional Working Procedures Concerning Strictly Confidential Information pursuant to Article 12.1 of the DSU. The complainants explained that such procedures were necessary to enable them to provide to the Panel proprietary company and industry data provided to them on the basis of an assurance of confidentiality. In addition, Australia asserted that protection was necessary to provide assurances to different government agencies that provided certain information for use in these disputes. In light of the explanations offered by the parties, the Panel agreed to adopt additional procedures for the protection of SCI and to amend its Working Procedures accordingly.⁴³

1.6.4 Requests for enhanced third-party rights

1.42. In May and June 2014, the Panel received requests for enhanced third-party rights from Brazil, Canada, the European Union, Guatemala, Mexico, New Zealand, Nicaragua, Norway, and Uruguay.⁴⁴

1.43. On 15 December 2014, after consulting with the parties and third parties, the Panel decided to grant the third parties the following additional rights: (a) access to the parties' rebuttal submissions; and (b) access to the final written versions of the parties' opening and closing statements at the first and second substantive meetings. The Panel also noted that, under its Working Procedures, it has the discretion to pose questions to the third parties, orally or in writing, at any point during the proceedings. The Panel further noted that the third parties' access to these documents would be subject to the Additional Working Procedures Concerning Strictly Confidential Information adopted by the Panel.

1.44. The Panel informed the parties and third parties that in reaching its decision, it had taken particular account of the economic interest in the production of, and trade in, tobacco products identified by several of the third parties, and the potential trade policy impact of the disputes in light of several third parties' ongoing policy debate concerning possible tobacco control measures, including plain packaging requirements.

1.45. The Panel considered that the combination of these factors in the present disputes warranted the granting of certain additional rights in the form of access to the above-mentioned documents. As a matter of due process, and following the approach of panels in previous cases⁴⁵, the Panel also considered it appropriate to extend the same enhanced rights to all third parties. The additional rights granted would enable third parties to engage more meaningfully in the panel process and allow their interests to be fully taken into account, without placing an undue burden on the Panel, the parties, or the Secretariat, delaying the proceedings, or upsetting the balance between the respective interests of the parties and third parties to the disputes.

1.6.5 Amicus curiae submissions

1.46. In a communication dated 17 June 2014, the Panel informed the parties that it did not include in its timetable a deadline for the submission of *amicus curiae* briefs. However, the Panel added that it did not anticipate being in a position to consider *amicus curiae* submissions submitted to it after the end of March 2015, as accepting *amicus curiae* briefs after this date would risk causing unnecessary delays and disrupt the orderly conduct of the panel process. The Panel

⁴² WT/DS441/19, DS458/18, and WT/DS467/19.

⁴³ The Additional Procedures Concerning SCI were adopted on 1 October 2014 and are reproduced in Annex A-2.

⁴⁴ Brazil's communication of 12 May 2014; Canada's communication of 16 May 2014; the European Union's communication of 13 May 2014; Guatemala's communication of 6 May 2014; Mexico's communication of 16 May 2014; New Zealand's communication of 22 May 2014; Nicaragua's communication of 12 June 2014; Norway's communication of 27 May 2014; and Uruguay's communication of 11 June 2014.

⁴⁵ See Panel Reports, EC – Tariff Preferences, Annex A; and EC – Export Subsidies on Sugar, paras. 2.5-2.7.

indicated that this determination was without prejudice to the Panel's authority to rule on the admissibility and relevance of any unsolicited submission. The parties were invited to provide their views on the admissibility and relevance of any *amicus curiae* submission either as part of their first written submissions or at the first substantive meeting.

1.47. On 20 August 2014, the Panel received an unsolicited *amicus curiae* submission from a group of business organizations.⁴⁶ On 1 September 2014, the Panel forwarded this submission to the parties and third parties and at the same time informed the third parties of the approach it would take towards *amicus curiae* submissions received in the proceedings.

1.48. On 15 December 2014, following certain revisions to the timetable, the Panel informed the parties and third parties that it "would not be in a position to consider unsolicited information submitted to it after 27 April 2015".

1.49. The Panel received 35 additional unsolicited *amicus curiae* submissions on or before 27 April 2015 and five unsolicited *amicus curiae* submissions after this date.⁴⁷

1.50. Australia submitted as exhibits three *amicus curiae* submissions, provided by the World Health Organization (WHO) and the WHO Framework Convention on Tobacco Control (FCTC) Secretariat⁴⁸; the Healthy Caribbean Coalition; and the Union of International Cancer Control and Cancer Council Australia.⁴⁹ The Dominican Republic, Honduras, and Indonesia submitted as an exhibit 36 *amicus curiae* submissions.⁵⁰

⁴⁶ This submission was made jointly by the following organizations: Emergency Committee for American Trade; National Association of Manufacturers of the United States; National Foreign Trade Council; Paperboard Packaging Council; Printing Industries of America; Independent Packaging Association; United States Chamber of Commerce; and United States Council for International Business.

⁴⁷ The Panel received *amicus curiae* submissions dated on or before 27 April 2015 from: Emergency Committee for American Trade, National Association of Manufacturers of the United States, National Foreign Trade Council, Paperboard Packaging Council, Printing Industries of America, Independent Packaging Association, United States Chamber of Commerce, and United States Council for International Business; Associação Brasileira da Propriedade Intelectual; American Chamber of Commerce in the Netherlands; Federation of Philippine Industries; Confederação Nacional da Indústria (Brazil); Federation of Attica and Piraeus Industries; Câmara Nacional de Comercio y Servicios del Uruguay; Federação des Industrias do Estado da Bahia; Japan Business Federation; Association of South-East Asian Nations (ASEAN) Intellectual Property Association; Institute of Public Affairs; Câmara de Industria de Guatemala; Trade-related IPR Protection Association; Indonesian Chamber of Commerce and Industry; Montenegrin Employers Federation; Taxpayers Association of Europe; International Trademark Association; Australian Retailers Association; Japan Intellectual Property Association; Association of European Businesses in Russia, American Chamber of Commerce in Russia, and RusBrand; International Tobacco Growers' Association; Patent and Trademark Attorneys Association – Turkey; Aegean Exporters Association; European Association of Trade Mark Owners (MARQUES); United States Chamber of Commerce; EU-ASEAN Business Council, EU-Malaysia Chamber of Commerce and Industry, European Chamber of Commerce in Singapore, European Chamber of Commerce of the Philippines, European Chamber of Commerce and Industry in Lao PDR, and European Association of Business and Commerce in Thailand; American Chamber of Commerce in Thailand; Romanian Small and Medium Retailers Association; Association of Trademarks and Design Rights Practitioners; Canadian Manufacturers and Exporters; Federation of Korean Industries; Polish Chamber of Trade; Union des Fabricants; Healthy Caribbean Coalition; Union for International Cancer Control; Cancer Council Australia; and World Health Organization and WHO Framework Convention on Tobacco Control Secretariat. The Panel received *amicus curiae* submissions dated after 27 April 2015 from: Russian Union of Industrialists and Entrepreneurs; Graphic Association Denmark; American Chamber Mexico; Malaysian International Chamber of Commerce and Industry; and Confederation of Danish Industry.

⁴⁸ World Health Organization and the WHO Framework Convention on Tobacco Control Secretariat, "Information for Submission to the Panel by a Non-Party", 16 February 2015, (WHO/FCTC *amicus curiae* brief), (Exhibit AUS-42, revised).

⁴⁹ Healthy Caribbean Coalition communication to the Panel of 22 April 2015, (Exhibit AUS-515); and UICC and CCA *amicus curiae* brief, (Exhibit AUS-38).

⁵⁰ Briefs from the following *amicus curiae* were submitted as Exhibit DOM/HND/IDN-1: Emergency Committee for American Trade, National Association of Manufacturers of the United States, National Foreign Trade Council, Paperboard Packaging Council, Printing Industries of America, Independent Packaging Association, United States Chamber of Commerce, and United States Council for International Business; Associação Brasileira da Propriedade Intelectual; American Chamber of Commerce in the Netherlands; Federation of Philippine Industries; Confederação Nacional da Indústria (Brazil); Federation of Attica and Piraeus Industries; Câmara Nacional de Comercio y Servicios del Uruguay; Federação des Industrias do Estado

1.6.6 Suspension of the proceedings and lapse of authority in DS434

1.51. At the time of adoption of the Panel's Working Procedures and timetable, these panel proceedings also related to DS434, initiated by Ukraine. Ukraine participated in these proceedings as a party until 30 May 2015.⁵¹ On 28 May 2015, the Panel received a request from Ukraine to suspend the proceedings in DS434 pursuant to Article 12.12 of the DSU. In a letter dated 29 May 2015, Australia indicated that it "support[ed] the request by Ukraine to suspend proceedings, on the basis that ... the suspension will be 'with a view to finding a mutually agreed solution'".

1.52. Article 12.12 of the DSU provides that a panel may suspend its work at any time at the request of the complaining party for a period not exceeding 12 months. On 30 May 2015, after consulting also with the parties in DS435, DS441, DS458, and DS467, the Panel sent a communication to the parties informing them that it had acceded to Ukraine's request and suspended its work in DS434. In its communication, the Panel also noted that Ukraine remained entitled to participate in the Panel's proceedings as a third party in disputes DS435, DS441, DS458, and DS467. The Panel also noted that it was the shared understanding of Ukraine and the parties that Ukraine's first written submission in DS434 and related evidence would remain on the record as a validly filed third-party submission in DS435, DS441, DS458, and DS467.⁵² Pursuant to paragraph 9 of the Panel's Working Procedures⁵³, the Panel also invited the parties, to the extent they had not already done so, to provide clear indications as to which of the arguments and evidence presented by Ukraine they wished to endorse.⁵⁴

1.53. On 1 June 2015, following consultation with the parties, the Panel contacted Ecuador, Egypt, and Moldova, which were third parties in the dispute initiated by Ukraine but not in the disputes initiated by Honduras, the Dominican Republic, Cuba, or Indonesia. The Panel informed Ecuador, Egypt and Moldova that they would need to notify their interest to the DSB pursuant to Article 10.2 of the DSU in respect of DS435, DS441, DS458, and DS467 should they wish to participate in one or more of these proceedings, including the third-party session of the first substantive meeting. On 1 June 2015, Ecuador notified its third-party interest in respect of DS435, DS441, DS458, and DS467 to the Chairman of the DSB. On 2 June 2015, Moldova informed the Panel that it did not wish to participate in the other disputes as a third party.⁵⁵

da Bahia; Japan Business Federation; ASEAN Intellectual Property Association; Institute of Public Affairs; Cámara de Industria de Guatemala; Trade-related IPR Protection Association; Indonesian Chamber of Commerce and Industry; Montenegrin Employers Federation; Taxpayers Association of Europe; International Trademark Association; Australian Retailers Association; Japan Intellectual Property Association; Association of European Businesses in Russia, American Chamber of Commerce in Russia, and RusBrand; International Tobacco Growers' Association; Patent and Trademark Attorneys Association – Turkey; Aegean Exporters Association; European Association of Trade Mark Owners ("MARQUES"); United States Chamber of Commerce; EU-ASEAN Business Council, EU-Malaysia Chamber of Commerce and Industry, European Chamber of Commerce in Singapore, European Chamber of Commerce of the Philippines, European Chamber of Commerce and Industry in Lao PDR, and European Association of Business and Commerce in Thailand; American Chamber of Commerce in Thailand; Romanian Small and Medium Retailers Association; Association of Trademarks and Design Rights Practitioners; Canadian Manufacturers and Exporters; Federation of Korean Industries; Polish Chamber of Trade; Union des Fabricants; Russian Union of Industrialists and Entrepreneurs; American Chamber Mexico; and Malaysian International Chamber of Commerce and Industry.

⁵¹ On 19 August 2014, the Panel issued a preliminary ruling on its terms of reference in DS434, further to a request by Australia (See WT/DS434/15).

⁵² Paragraph 20 of the Panel's Working Procedures provides that "a complaining party's first written submission in one dispute shall be deemed to be an exercise of its third-party rights in the other four disputes. Arguments presented as a third party only shall be clearly identified as such." Ukraine's arguments as presented in its first written submission are cited in the Findings section of these Reports as "Ukraine's first written submission", as originally filed, but with the understanding that its status in these disputes is of a third-party submission.

⁵³ Paragraph 9 of the Panel's Working Procedures states that "[a] party wishing to incorporate by reference or rely upon arguments and/or evidence submitted by another party or third party may do so provided that it clearly identifies the specific arguments and/or evidence it refers to and their source."

⁵⁴ Honduras, the Dominican Republic, Cuba, and Indonesia communicated this information in separate correspondence dated 8 July 2015. Cuba sent an additional communication on this matter on 13 July 2015.

⁵⁵ The text of Moldova's third-party submission was also submitted by Honduras, the Dominican Republic, and Indonesia as an exhibit in these proceedings on 1 June 2015. See Exhibit DOM/HND/IDN-2.

1.54. On 2 June 2015, the Panel notified the Chairman of the DSB of its decision to grant Ukraine's request and suspend its work in DS434, and requested that its communication be circulated to Members. The Panel's decision was circulated to Members on 3 June 2015.⁵⁶ The Panel was not requested to resume its work in DS434 during the 12 months following suspension. Pursuant to Article 12.12 of the DSU, the authority for the establishment of the Panel in DS434 lapsed as of 30 May 2016. The Secretariat issued a note informing the Membership on 30 June 2016.⁵⁷

1.6.7 Requests for information under Article 13 of the DSU

1.55. Article 13 of the DSU states:

1. Each panel shall have the right to seek information and technical advice from any individual or body which it deems appropriate. However, before a panel seeks such information or advice from any individual or body within the jurisdiction of a Member it shall inform the authorities of that Member. A Member should respond promptly and fully to any request by a panel for such information as the panel considers necessary and appropriate. Confidential information which is provided shall not be revealed without formal authorization from the individual, body, or authorities of the Member providing the information.
2. Panels may seek information from any relevant source and may consult experts to obtain their opinion on certain aspects of the matter. With respect to a factual issue concerning a scientific or other technical matter raised by a party to a dispute, a panel may request an advisory report in writing from an expert review group. Rules for the establishment of such a group and its procedures are set forth in Appendix 4.

1.56. As detailed below, in the course of the proceedings, the parties requested the Panel to exercise its authority to seek information under Article 13 on various occasions, regarding information relating to evidence submitted by another party.

1.57. The Panel also exercised its authority to seek information from the WHO and the FCTC Secretariat, the International Bureau of the World Intellectual Property Organization (WIPO), Cancer Council Queensland (CCQ), and Cancer Council Victoria (CCV).

1.6.7.1 Request for information from the WHO and the FCTC Secretariat

1.58. During the proceedings, the parties made reference to the FCTC and to the FCTC Guidelines for Implementation of the FCTC (FCTC Guidelines), particularly with respect to Articles 11 and 13 of the Convention.⁵⁸

1.59. On 16 February 2015, the WHO and the FCTC Secretariat addressed a joint communication to the Panel, requesting permission to submit information to the Panel and providing certain

⁵⁶ WT/DS434/16.

⁵⁷ WT/DS434/17.

⁵⁸ See WHO Framework Convention on Tobacco Control: Guidelines for Implementation (2013 edition), (FCTC Guidelines for Implementation (2013 edition)), (Exhibits AUS-109, DOM-44), pp. 55-69 and 95-114; "Guidelines for implementation of Article 11 (Packaging and labelling of tobacco products)", document FCTC/COP3(10), excerpted from Conference of the Parties to the WHO Framework Convention on Tobacco Control, "Decisions", Third Session, Durban, South Africa (17-22 November 2008), document FCTC/COP3/DIV/3 of 16 February 2009, (Article 11 FCTC Guidelines, FCTC/COP3(10)), (Exhibit JE-20); and "Guidelines for implementation of Article 13 (Tobacco advertising, promotion and sponsorship)", document FCTC/COP3(12), excerpted from Conference of the Parties to the WHO Framework Convention on Tobacco Control, "Decisions", Third Session, Durban, South Africa (17-22 November 2008), document FCTC/COP3/DIV/3 of 16 February 2009, (Article 13 FCTC Guidelines, FCTC/COP3(12)), (Exhibit JE-21). See details of the FCTC and related instruments in section 2.4 below.

information concerning the FCTC.⁵⁹ This communication also indicated that the WHO and FCTC Secretariat were prepared to provide additional information at the request of the Panel.⁶⁰

1.60. Pursuant to Article 13 of the DSU, and after consulting with the parties, the Panel considered that, in light of the competencies of the WHO and the FCTC Secretariat with respect to the FCTC, it would benefit from further factual information from them concerning the FCTC and, in particular, the FCTC Guidelines for Implementation of Article 11 of the FCTC and the FCTC Guidelines for the Implementation of Article 13 of the FCTC (Article 11 and Article 13 FCTC Guidelines).⁶¹ The Panel also took into account a request by Indonesia for the Panel to seek certain additional information from the WHO and the FCTC Secretariat.⁶²

1.61. Thus, on 14 September 2015, the Panel invited the WHO and the FCTC Secretariat to provide factual information relating to (i) the process through which the Article 11 and Article 13 FCTC Guidelines were adopted; (ii) the nature and intended function of the Article 11 and Article 13 FCTC Guidelines with respect to plain packaging of tobacco products; (iii) the specific aspects of the text of the Article 11 and Article 13 FCTC Guidelines with respect to the implementation of plain packaging of tobacco products; and (iv) any available preparatory materials (including scientific or technical evidence) considered by the FCTC Conference of the Parties (COP) in its deliberations preceding the adoption of the Article 11 and Article 13 FCTC Guidelines.

1.62. On 5 October 2015, the WHO and the FCTC Secretariat provided additional information in response to the Panel's request, which they indicated should be read in the context of the information submitted on 16 February 2015. The WHO and the FCTC Secretariat explained that, because the working groups were closed to the public, "the Convention Secretariat does not have a standing mandate to disclose preparatory materials from the working groups" preceding the adoption of the Article 11 and Article 13 FCTC Guidelines.⁶³ The WHO and the FCTC Secretariat further explained that, with regard to the Article 11 FCTC Guidelines, the restriction to share information was partially lifted by FCTC COP Decision FCTC/COP3(10), and the Convention Secretariat subsequently made a list of resources publicly available.⁶⁴ The WHO and the FCTC Secretariat also explained that, with regard to the Article 13 FCTC Guidelines, "there has not been a COP decision mandating that the Convention Secretariat make preparatory materials public".⁶⁵

1.6.7.2 Request for information from the International Bureau of WIPO

1.63. During the proceedings, the complainants raised certain provisions of the Stockholm Act of the Paris Convention for the Protection of Industrial Property (Paris Convention (1967))⁶⁶ as relevant to the interpretation of Australia's obligations under the TRIPS Agreement.

1.64. On 14 September 2015, pursuant to Article 13 of the DSU, and after consulting with the parties, the Panel requested the assistance of the International Bureau of WIPO with regard to

⁵⁹ WHO/FCTC *amici curiae* brief, (Exhibit AUS-42, revised).

⁶⁰ World Health Organization and the WHO Framework Convention on Tobacco Control Secretariat, "Request for Permission to Submit Information to the Panel by a Non-Party", 16 February 2015, (WHO/FCTC Request for Permission to Submit Information), (Exhibit AUS-42, revised), para. 15.

⁶¹ For simplicity and convenience, when mentioned *individually*, we will refer to the FCTC Guidelines for Implementation of Article 11 of the FCTC and the FCTC Guidelines for Implementation of Article 13 of the FCTC, as, respectively, the Article 11 FCTC Guidelines and Article 13 FCTC Guidelines. See also paras. 2.107-2.109 below.

⁶² Indonesia's communication to the Panel of 22 April 2015. The Dominican Republic had previously requested information from the WHO FCTC Secretariat on the material relied on by the WHO FCTC Working Parties in adopting the two Guidelines. Dominican Republic's communication of 25 April 2014 to the Head of the WHO FCTC Secretariat, (Exhibit DOM-46). The WHO FCTC Secretariat declined to provide this information, citing the "consultative and intergovernmental nature of the process of developing guidelines". Head of the WHO FCTC Secretariat's communication of 26 May 2014 to the Dominican Republic, (Exhibit DOM-47).

⁶³ Additional Information for Submission to the Panel by a Non-Party on behalf of the World Health Organization and the WHO Framework Convention on Tobacco Control Secretariat, 5 October 2015, (WHO/FCTC Additional Information to Panel), para. 68.

⁶⁴ WHO/FCTC Additional Information to Panel, para. 69, at fn 63 above.

⁶⁵ WHO/FCTC Additional Information to Panel, para. 68, at fn 63 above.

⁶⁶ Paris Convention for the Protection of Industrial Property, done at Paris, 20 March 1883, revised at Stockholm, 14 July 1967, amended 28 September 1979, 828 UNTS 305.

factual information relevant to the interpretation of Article 6bis, Article 6quinquies (and in particular paragraph (A)(1) thereof), Article 7, and Article 10bis, in particular as reflected in the materials of diplomatic conferences and subsequent developments in the framework of the Paris Union.

1.65. On 8 October 2015, WIPO provided material related to these provisions in response to the Panel's request.

1.6.7.3 Data requests by the parties

1.66. In the course of the proceedings, the parties made a number of requests to each other to provide data relied upon in certain expert reports and other material submitted to the Panel. In addition, the parties requested the Panel to exercise its authority pursuant to Article 13 of the DSU to seek data underlying different exhibits submitted by other parties during the proceedings.

1.6.7.3.1 Requests by Australia in relation to evidence submitted by the Dominican Republic and Ukraine⁶⁷ in the context of their first written submissions

1.67. On 17 October 2014, Australia requested the Panel to exercise its authority pursuant to Article 13 of the DSU to seek information from the Dominican Republic and Ukraine with regard to datasets relied upon in certain expert reports submitted with their first written submissions. Specifically, Australia requested the datasets underlying an expert report submitted by the Dominican Republic⁶⁸ (IPE Report), and two expert reports submitted by Ukraine⁶⁹ (Neven Report and Klick Report).

1.68. On 24 October 2014, the Dominican Republic undertook to provide the data requested by Australia relating to the IPE Report. On 31 October 2014, it provided this information⁷⁰ and offered to provide certain other data and computer programming language relied upon in the IPE Report not requested by Australia, if so requested by the Panel. On 24 October 2014, Ukraine indicated that it was not in principle opposed to providing the requested datasets but stated that Article 13 of the DSU was intended to provide the Panel, not Australia, with the right to request the additional information and that the Panel should therefore be "led only by its own needs".

1.69. On 31 October 2014, the Panel took note of the fact that the Dominican Republic had undertaken to provide the requested datasets and that Ukraine was not opposed to providing the datasets requested by Australia. The Panel further noted that Article 13.1 of the DSU grants to panels "significant investigative authority"⁷¹ and that this authority is 'comprehensive' in nature.⁷² Moreover, the DSU "accords to a panel 'ample and extensive authority to undertake and to control the process by which it informs itself both of the relevant facts of the dispute and of the legal norms and principles applicable to such facts'".⁷³ The Panel also noted that in *US – Large Civil Aircraft (2nd Complaint)*, the Appellate Body had discussed the use of this authority for the purpose

⁶⁷ On Ukraine's participation in these proceedings, see section 1.6.6 above.

⁶⁸ This request concerned retail scanner data as relied upon in D. Afshartous, M. Hagedorn, A. Kaul, and M. Wolf, "Empirical Assessment of Australia's Plain Packaging Regime", Institute for Policy Evaluation, (7 October 2014), (IPE Report), (Exhibit DOM-100).

⁶⁹ This request concerned retail sales data for cigarette sales as well as retail revenue and volume data in Australia and New Zealand provided by Nielsen, as relied upon in D. Neven, "The Effects of Plain Packaging Regulation on Competition and Tobacco Consumption: An Economic Assessment" (2 October 2014), (Neven Report), (Exhibit UKR-3) (SCI) (relied upon by Indonesia: see Indonesia's communication to the Panel of 8 July 2015); and J. Klick, "The Effect of Australia's Plain Packaging Law on Smoking: Evidence from Survey and Market Data" (26 July 2014), (Klick Report), (Exhibit UKR-5) (relied upon by Honduras, the Dominican Republic, Cuba, and Indonesia: see Honduras's communication to the Panel of 8 July 2015; Dominican Republic's responses to Panel questions following the first substantive meeting, para. 1; Cuba's communication to the Panel of 8 July 2015; and Indonesia's communication to the Panel of 8 July 2015).

⁷⁰ See Exhibit DOM-100.A (SCI).

⁷¹ Panel's communication of 31 October 2014, para. 8 (quoting Appellate Body Reports, *US – Continued Suspension*, para. 439; *Canada – Continued Suspension*, para. 439; and *Japan – Agricultural Products II*, para. 129).

⁷² Panel's communication of 31 October 2014, para. 8 (quoting Appellate Body Report, *US – Shrimp*, para. 104).

⁷³ Panel's communication of 31 October 2014, para. 8 (quoting Appellate Body Report, *Canada – Aircraft*, para. 185).

of obtaining information requested by another party to a dispute. In this regard the Appellate Body had observed that one aspect of ensuring that proceedings are fairly conducted is that each party is entitled to know the case it has to make or answer and is given a reasonable opportunity to do so. Accordingly, it advised that panels take into account the following considerations:

[W]hat information is needed to complete the record, whose possession it lies within, what other reasonable means might be used to procure it, why it has not been produced, whether it is fair to request the party in possession of the information to submit it, and whether the information or evidence in question is likely to be necessary to ensure due process and a proper adjudication of the relevant claim(s).⁷⁴

1.70. The Panel noted that the datasets requested by Australia underlay reports that Ukraine had submitted and relied upon in the presentation of its case, and that this reliance formed the basis for Australia's argument that access to the data was necessary to allow it "to test the veracity of the assertions based on the data and consequently to ensure due process and a proper adjudication of [the] disputes."⁷⁵ The Panel also noted that Australia had attempted unsuccessfully to obtain the data in question from the private entities responsible for its collection. The Panel was mindful of the Appellate Body's observation that due process is connected, *inter alia*, to the right of parties to be afforded an adequate opportunity to pursue their claims, make out their defences and establish the facts, and that there may be circumstances in which a party cannot meet its burden by adducing all relevant evidence, most notably when the information is in the exclusive possession of an opposing party.⁷⁶

1.71. The Panel further noted that Ukraine had not suggested that it would be unable or unwilling to provide the requested information, if requested to do so, and that the Panel had adopted additional working procedures for the protection of SCI. The Panel concluded that the provision of the data was appropriate and requested Ukraine to provide the datasets at issue, without prejudice to any later finding by the Panel concerning their relevance to the Panel's assessment of the matter before it.⁷⁷ The datasets, along with select related computer codes, were provided to the Panel and the parties on 13 November 2014. Additional related computer codes were provided on 28 November 2014 and 5 December 2014.⁷⁸

1.72. On 10 November 2014, Australia requested the Panel to exercise its discretion under Article 13 of the DSU to request additional information relating to the IPE Report from the Dominican Republic. On 12 November 2014, the Dominican Republic communicated that it would provide certain information, which it subsequently submitted on 24 November 2014⁷⁹, but required a ruling from the Panel under Article 13.1 of the DSU to obtain the remainder of the requested information from private entities. On 20 November 2014, the Panel exercised its discretion under Article 13 of the DSU and requested that the outstanding data in question be provided to the Dominican Republic in order to facilitate its production by the Dominican Republic to the Panel and the other parties. The Dominican Republic provided this information on 12 December 2014.⁸⁰

1.6.7.3.2 Requests by Ukraine⁸¹ and the Dominican Republic in relation to evidence submitted by Australia in the context of its first written submission

1.73. On 24 October 2014, Ukraine requested that the Panel exercise its authority pursuant to Article 13 to request Australia to provide, no later than the time of Australia's filing of its first written submission, certain datasets that were not in the public domain and that "could be relevant" to the dispute. Specifically, Ukraine identified certain studies "on the alleged effectiveness of plain packaging to impact smoking behaviour of consumers in Australia" conducted

⁷⁴ Panel's communication of 31 October 2014, para. 9 (quoting Appellate Body Report, *US – Large Civil Aircraft (2nd Complaint)*, para. 1140).

⁷⁵ Panel's communication of 31 October 2014, para. 11.

⁷⁶ Panel's communication of 31 October 2014, para. 12 (referring to Appellate Body Reports, *Thailand – Cigarettes (Philippines)*, para. 147; and *US – Large Civil Aircraft (2nd Complaint)*, para. 1139).

⁷⁷ Panel's communication of 31 October 2014, paras. 13-14.

⁷⁸ See Exhibits UKR-199(1) to UKR-199(12), UKR-200(1) to UKR-200(10), and UKR-201(1) to UKR-201(2), respectively. Ukraine designated the entirety of each of these exhibits as SCI.

⁷⁹ See Exhibit DOM-100.B (SCI).

⁸⁰ See Exhibit DOM-100.C (SCI).

⁸¹ On Ukraine's participation in these proceedings, see section 1.6.6 above.

by Cancer Institute New South Wales (CINSW) and CCV. Ukraine requested the Panel to request the underlying data from these studies in order for the Panel to "elucidate its understanding of the facts and assist it in making an objective assessment of the facts ... whether or not Australia relies on these studies in its submission". Ukraine argued that these datasets were known to Australia via these two governmental agencies and were not in the public domain or otherwise available to the Panel or other parties in these disputes. Ukraine also requested that the Panel request Australia to provide any data underlying its own expert reports and other argumentation in its first written submission, at the time it would file such submission.⁸²

1.74. In response, referring to its own requests for datasets relating to arguments submitted with the Dominican Republic's and Ukraine's first written submissions⁸³, Australia noted that it was aware of the specific challenges in properly considering materials based on datasets, when the underlying datasets are not provided in a prompt and timely manner. To avoid this situation going forward, Australia was "willing to provide data sets upon which its expert reports are based" at the time of filing its first written submission⁸⁴. However, it considered that "any claim for data in advance of that date is purely speculative".⁸⁴

1.75. On 20 November 2014, the Panel declined the request, noting that Ukraine had stated that the data "could" be relevant to its dispute and that it should be available "whether or not Australia relies on these studies in its submission".⁸⁵ The Panel was not persuaded that the circumstances required it to request Australia to submit this information at this stage of the proceedings. The Panel considered that it would be better placed to assess the need to seek additional information from the parties, including, if relevant, the information identified by Ukraine, after Australia had presented its first written submission. The Panel therefore declined to request Australia to submit the requested information, without prejudice to any later decision concerning the relevance or otherwise of the datasets at issue.⁸⁶

1.76. On 30 March 2015, Ukraine requested the Panel to request, pursuant to Article 13 of the DSU, that Australia submit "certain tracking survey data and information".⁸⁷ According to Ukraine, "not all relevant data and information presented as evidence and relied upon by Australia have been provided", contrary to Australia's undertaking to provide the datasets upon which its expert reports are based at the time of filing its first written submission.⁸⁸ On 7 April 2015, Honduras, the Dominican Republic, and Indonesia expressed their support for Ukraine's request. On 10 April 2015, the Dominican Republic also requested the Panel to request Australia to submit, pursuant to Article 13 of the DSU, certain "information referenced and relied upon in its first written submission ... and in expert reports submitted as exhibits to that submission"⁸⁹, including data and computer codes "associated with a series of studies referenced and relied upon by Australia and its experts to assert the effectiveness of the challenged plain packaging measure".⁹⁰

⁸² Ukraine's communication to the Panel of 24 October 2014, section III.

⁸³ See section 1.6.7.3.1 above.

⁸⁴ Australia's communication to the Panel of 30 October 2014, p. 2.

⁸⁵ Panel's communication of 20 November 2014, paras. 4-5.

⁸⁶ Panel's communication of 20 November 2014, paras. 7 and 9.

⁸⁷ Ukraine's communication to the Panel of 27 March 2015, para. 1.

⁸⁸ Ukraine's communication to the Panel of 27 March 2015, paras. 10-11.

⁸⁹ Dominican Republic's communication to the Panel of 10 April 2015, para. 1.

⁹⁰ Dominican Republic's communication to the Panel of 10 April 2015, para. 6. The Dominican Republic's request pertained to the datasets underlying the following fourteen published studies: NTPPTS: M. Wakefield, K. Coomber, M. Zacher, S. Durkin, M. Brennan, and M. Scollo, "Australian Adult Smokers' Responses to Plain Packaging with Larger Graphic Health Warnings One Year After Implementation: Results from a National Cross-Sectional Tracking Survey", *Tobacco Control* (2015), Vol. 24, ([Wakefield et al. 2015](#)), (Exhibits AUS-206, DOM-306), pp. ii17-ii25; S. Durkin, E. Brennan, M. Coomber, M. Zacher, M. Wakefield, and M. Scollo, "Short-Term Changes in Quitting-Related Cognitions and Behaviours After the Implementation of Plain Packaging with Larger Health Warnings: Findings from a National Cohort Study with Australian Adult Smokers", *Tobacco Control* (2015), Vol. 24, ([Durkin et al. 2015](#)), (Exhibits AUS-215 (revised), DOM-305), pp. ii26-ii32; E. Brennan, S. Durkin, K. Coomber, M. Zacher, M. Scollo, and M. Wakefield, "Are Quitting-Related Cognitions and Behaviours Predicted by Proximal Responses to Plain Packaging with Larger Health Warnings? Findings from a National Cohort Study with Australian Adult Smokers", *Tobacco Control* (2015), Vol. 24, ([Brennan et al. 2015](#)), (Exhibits AUS-224, DOM-304), pp. ii33-ii41. School-based surveys: V. White, T. Williams, and M. Wakefield, "Has the Introduction of Plain Packaging with Larger Graphic Health Warnings Changed Adolescents' Perceptions of Cigarette Packs and Brands?" *Tobacco Control* (2015), Vol. 24, ([White et al. 2015a](#)) (Exhibits

1.77. Australia considered "misleading" Ukraine's claim that the requested data is of a category that Australia undertook to provide, and added that the data were not analysed by Australia's experts but instead were analysed in academic journals or independent papers, the conclusions of which were relied on by Australia and one its experts.⁹¹ Australia also argued, in its response to the Dominican Republic of 16 April 2015, that the datasets requested by the Dominican Republic were not relied upon by Australia or its experts, but rather were analysed in independent peer-reviewed journal articles, which were relied on by Australia and its experts.⁹² Such publications were not, in Australia's view, properly the object of requests under Article 13 of the DSU.

1.78. Notwithstanding this position, Australia provided certain data requested by Ukraine and the Dominican Republic in the context of further exchanges on this issue on 7, 16 and 24 April 2015, and 12 May 2015. On 22 April 2015, the Dominican Republic submitted additional comments to the Panel, including an identification of data that it considered had still not been supplied. On 24 April 2015, Australia submitted further additional comments.

1.79. On 13 May 2015, the Panel responded to Ukraine's and the Dominican Republic's requests, while taking note of the aspects of these requests that had already been addressed in the context of Australia's communications of 7, 16 and 24 April and 12 May 2015. The Panel first recalled that, as observed in its communication of 31 October 2014, it was:

[W]ithin the scope of its discretion under Article 13 of the DSU to seek information from a party pursuant to a request from another party and that, in determining whether to exercise such authority, it should have regard to considerations such as what information is needed to complete the record, whose possession it lies within, what other reasonable means might be used to procure it, why it has not been produced, whether it is fair to request the party in possession of the information to

AUS-186, DOM-235), pp. ii42-49; V. White, T. Williams, A. Faulkner, and M. Wakefield, "Do Larger Graphic Health Warnings on Standardised Cigarette Packs Increase Adolescents' Cognitive Processing of Consumer Health Information and Beliefs about Smoking Related Harms?", *Tobacco Control* (2015), Vol. 24, ([White et al. 2015b](#)), (Exhibits HND-135, DOM-236, DOM-288), pp. ii50-ii57. Data on cigar smoking: C. Miller, K. Ettridge, and M. Wakefield, "'You're Made to Feel like a Dirty Filthy Smoker When You're Not, Cigar Smoking is Another Thing All Together.' Responses of Australian Cigar and Cigarillo Smokers to Plain Packaging", *Tobacco Control* (2015), Vol. 24, ([Miller et al. 2015](#)), (Exhibits AUS-102, DOM-315), pp. ii58-ii65. Data on personal pack display: M. Zacher, M. Bayly, E. Brennan, J. Dono, C. Miller, S. Durkin, M. Scollo, and M. Wakefield, "Personal Tobacco Pack Display Before and After the Introduction of Plain Packaging with Larger Pictorial Health Warnings in Australia: An Observational Study of Outdoor Café Strips", *Addiction* (2014), Vol. 109, ([Zacher et al. 2014](#)), (Exhibits AUS-222 (revised), JE-24(68), DOM-286), pp. 653-662; M. Zacher, M. Bayly, E. Brennan, J. Dono, C. Miller, S. Durkin, M. Scollo, and M. Wakefield, "Personal Pack Display and Active Smoking at Outdoor Café Strips: Assessing the Impact of Plain Packaging 1 year Post Implementation", *Tobacco Control* (2015), Vol. 24, ([Zacher et al. 2015](#)) (Exhibits AUS-223 (revised), DOM-287), pp. ii94-ii97. The ITC Project Four Country Survey: H.H. Yong, R. Borland, D. Hammond, J. Thrasher, K. Cummings, and G. Fong, "Smokers' Reactions to the New Larger Health Warning Labels on Plain Cigarette Packs in Australia: Findings from the ITC Australia Project", *Tobacco Control* (2015), doi:10.1136/tobaccocontrol-2014-05197, ([Yong et al. 2015](#)), (Exhibit DOM-382); E. Swift, R. Borland, K. Cummings, G. Fong, A. McNeill, D. Hammond, J. Thrasher, T.R. Partos, and H.H. Yong, "Australian Smokers' Support for Plain or Standardised Packs Before and After Implementation: Findings from the ITC Four Country Survey", *Tobacco Control* (2014), doi:10.1136/tobaccocontrol-2014-051880. VSHS: M. Scollo, M. Zacher, S. Durkin, and M. Wakefield, "Early Evidence about the Predicted Unintended Consequences of Standardised Packaging of Tobacco Products in Australia: A Cross-Sectional Study of the Place of Purchase, Regular Brands and Use of Illicit Tobacco", *BMJ Open* (2014), Vol. 4, doi:10.1136/bmjopen-2014-005873, ([Scollo et al. 2014](#)), (Exhibits AUS-507, JE-24(57)); M. Wakefield, L. Hayes, S. Durkin, and R. Borland, "Introduction Effects of the Australian Plain Packaging Policy on Adult Smokers: A Cross-Sectional Study", *BMJ Open* (2013), Vol. 3, doi:10.1136/bmjopen-2013-003175, ([Wakefield et al. 2013](#)), (Exhibits AUS-184, JE-24(64)). Cancer Institute Tobacco Tracking Survey (CITTS): S. Dunlop, T. Dobbins, J. Young, D. Perez, and D. Currow, "Impact of Australia's Introduction of Tobacco Plain Packs on Adult Smokers' Pack-Related Perceptions and Responses: Results from a Continuous Tracking Survey", *BMJ Open* (2014), Vol. 4, doi:10.1136/bmjopen-2014-005836, ([Dunlop et al. 2014](#)), (Exhibits AUS-207, HND-132, DOM-199). Data regarding calls to the Quitline: J.M. Young, I. Stacey, T.A. Dobbins, S. Dunlop, A.L. Dessaix, and D.C. Currow, "Association Between Tobacco Plain Packaging and Quitline Calls: A Population-Based, Interrupted Time-Series Analysis", *Medical Journal of Australia* (2014), Vol. 200, ([Young et al. 2014](#)), (Exhibits AUS-214, JE-24(67), DOM-285), pp. 29-32.

⁹¹ Australia's communication to the Panel of 7 April 2015, p. 1.

⁹² Australia's communication to the Panel of 16 April 2015, p. 1.

submit it, and whether the information or evidence in question is likely to be necessary to ensure due process and a proper adjudication of the relevant claim(s).⁹³

1.80. The Panel observed that, as expressed in its earlier communication in respect of Australia's own request for data⁹⁴, it was mindful of the fact that due process is connected to, *inter alia*, the rights of parties to be afforded an adequate opportunity to pursue their claims, make out their defences, and establish the facts, and that there may be circumstances in which a party cannot meet its burden by adducing all relevant evidence, most notably when that information is in the exclusive possession of an opposing party.⁹⁵

1.81. The Panel also noted Australia's recognition, prior to the filing of its first written submission, of "the challenges in properly considering materials based on data sets, when the underlying data sets are not provided in a prompt and timely manner" and its commitment ... to provide datasets upon which its expert reports are based at the time of filing its first written submission".⁹⁶ The Panel further noted that the requests at issue were "based on Australia's reliance, in its first written submission, on certain published research results relating to the impact of the challenged measures, including in relation to smoking behaviours since the entry into force of the Plain Packaging measures", and that the complainants also sought access to additional related datasets not expressly relied upon in the cited publications.⁹⁷

1.82. An important consideration guiding the Panel, in deciding whether an exercise of its authority under Article 13 of the DSU was warranted, was a consideration of in whose possession the information is, whether the information was in the exclusive possession of the other party, whether other reasonable means could be used to procure it, and whether the requesting party had availed itself of or tried to avail itself of such means. The Panel noted that Ukraine and the Dominican Republic had provided no indication of having taken steps to obtain the requested information directly from the institutions they identified as the source of the data, or from the persons identified as contact points in each of the cited publications, following Australia's filing of its first written submission. Based on the information before it and without prejudice to the potential relevance of the requested information, the Panel was also not persuaded that this information could, as the complainants' arguments suggested, "be assumed to be in the sole possession of, or directly accessible to, the Government of Australia, solely on the basis that the underlying research was publicly funded or conducted in publicly-funded institutions".⁹⁸

1.83. Without prejudice to the potential relevance of such information, the Panel was therefore not persuaded that the circumstances at that point of the proceedings warranted an exercise of its authority under Article 13 of the DSU to request Australia to produce it, and invited Ukraine and the Dominican Republic to seek to obtain data directly from the relevant sources through appropriate channels.⁹⁹

1.84. On 16 June 2015, the Dominican Republic informed the Panel that, pursuant to the Panel's ruling, it had sent letters to the authors of the fourteen studies to which its request pertained, as well as to the institutions that it understood to be in possession of the data, and that its efforts had "met with very limited success".¹⁰⁰ It requested that the Panel seek, first, from Australia, any requested information that was in its possession and control, and second, concurrently exercise its authority under Article 13 of the DSU by seeking information from the individuals and institutions designated as contacts in the studies in question.

⁹³ Panel's communication of 13 May 2015, para. 6. See also Panel's communication of 31 October 2014, para. 9 (quoting Appellate Body Report, *US – Large Civil Aircraft (2nd Complaint)*, para. 1140).

⁹⁴ See Panel's communication of 31 October 2015, and section 1.6.7.3.1 above.

⁹⁵ Panel's communication of 13 May 2015, para. 8.

⁹⁶ Panel's communication of 13 May 2015, para. 9 (quoting Australia's communication to the Panel of 30 October 2014, p. 2).

⁹⁷ Panel's communication of 13 May 2015, para. 11.

⁹⁸ Panel's communication of 13 May 2015, para. 14.

⁹⁹ Panel's communication of 13 May 2015, para. 15. The Panel addressed in the same communication a similar request by Ukraine, dated 30 March 2015. Australia provided certain information in response to this communication. See Australia's communication to the Panel of 7 April 2015. This request became moot following the suspension of proceedings in DS434 on 30 May 2015. See section 1.6.6 above.

¹⁰⁰ Dominican Republic's communication to the Panel of 16 June 2015, p. 3.

1.85. Between 17 June 2015 and 10 August 2015, CINSW provided, through Australia, certain requested data concerning the Cancer Institute New South Wales Tobacco Tracking Survey (CITTS), and data regarding calls to Australia's national smoking cessation helpline, Quitline.¹⁰¹ During this period, CCV also provided certain information, directly to the Dominican Republic or through Australia, concerning the National Tobacco Plain Packaging Tracking Survey (NTPPTS), cross-sectional school-based surveys, and data from the Victorian Smoking and Health Survey (VSHS).¹⁰²

1.86. On 21 August 2015, the Dominican Republic provided a further clarification of the status of its request, in light of recent communications. On 26 August 2015, Australia addressed an additional communication to the Panel, observing that despite the "firm position" it maintains concerning the "inappropriateness of the Dominican Republic's Article 13 requests", it had nonetheless provided all of the requested information in its possession.¹⁰³ On 29 August 2015, the Dominican Republic addressed a further communication to CINSW concerning the data and information it had provided.

1.87. On 7 September 2015, the Panel communicated to the parties its understanding that, as a result of the parties' exchanges, certain information had been provided by CINSW and CCV, through Australia, to the Panel and the other parties and that, as a result, a number of aspects of the Dominican Republic's request were moot.¹⁰⁴

1.88. With respect to outstanding aspects of the request, the Panel first addressed Australia's argument that the Dominican Republic was not requesting information prepared specifically for use in these proceedings, but information underlying "certain peer-reviewed journal articles prepared by independent academics that Australia has referred to in its submissions" which, in Australia's view, "are not the proper subject of an Article 13 request".¹⁰⁵

1.89. The Panel first observed that the information requested was comparable in nature to that previously requested by Australia. It recalled that on 17 October and 10 November 2014, Australia had requested that the Panel exercise its discretion under Article 13 of the DSU to seek information from the Dominican Republic¹⁰⁶, with respect to various exhibits submitted by the complainants¹⁰⁷, including unprocessed source data and programming language/computer codes.¹⁰⁸ The Panel also noted Australia's recent requests for similar data in relation to the Dominican Republic's statement at the first substantive meeting and responses to questions.¹⁰⁹ Similarly, in its requests, the Dominican Republic sought access to "data and computer codes underlying the conclusions presented"¹¹⁰ in various studies relied upon by Australia to "test the veracity of the assertions made" by Australia¹¹¹ in reliance on these studies.¹¹²

¹⁰¹ Australia's communications to the Panel of 17 June 2015, 28 July 2015, and 10 August 2015. On 18 June 2015, the Dominican Republic informed the Panel that it had received this information and clarified a "clerical error" in its communication of 16 June 2015 and, in light of this correction, clarified the precise content of its request.

¹⁰² On 22 June 2015, the Dominican Republic indicated that it had received a communication from CCV "offering to provide certain information to the Panel but refusing to provide other information". On 28 July 2015 and 7 August 2015 Australia provided certain information on behalf of CCV.

¹⁰³ Australia's communication to the Panel of 26 August 2015, p. 2.

¹⁰⁴ Panel's communication of 7 September 2015, para. 2.11.

¹⁰⁵ Panel's communication of 7 September 2015, para. 2.20 (quoting Australia's communication to the Panel of 19 June 2015, p. 2).

¹⁰⁶ Australia also addressed this request in respect of Ukraine, see fn 99 above.

¹⁰⁷ Klick Report, (Exhibit UKR-5); Neven Report, (Exhibit UKR-3) (SCI); IPE Report, (Exhibit DOM-100); and Exhibit DOM-100.B (SCI). See section 1.6.7.3.1 above.

¹⁰⁸ Panel's communication of 7 September 2015, para. 2.21 (quoting Australia's communication to the Panel of 10 November 2014, p. 2).

¹⁰⁹ Panel's communication of 7 September 2015, para. 2.21 (referring to Australia's communication to the Panel of 2 June 2015, p. 1; and Australia's communication to the Panel of 20 July 2015, p. 2). See also section 1.6.7.3.3 below.

¹¹⁰ Dominican Republic's communication to the Panel of 16 June 2015, p.1.

¹¹¹ Dominican Republic's communication to the Panel of 26 June 2015, paras. 22, 27, 32, 39, and 42-43 (quoting Australia's communication to the Panel of 10 November 2014, p. 2).

¹¹² Panel's communication of 7 September 2015, para. 2.21.

1.90. The Panel noted that Australia's and the Dominican Republic's respective requests, as well as their first written submissions, indicated that, notwithstanding the fact that the information requested by Australia formed the basis of commissioned expert reports rather than of published studies, both parties consider that the scrutiny of information at this level of detail is necessary, in these proceedings, for them "to know the case that [they have] to make or to answer".¹¹³ In light of this, and without prejudice to the Panel's own assessment of the level of scrutiny that will be required for it to make an objective assessment of the matter before it, the Panel considers that its obligation to ensure the right of the parties to be afforded an adequate opportunity to "pursue their claims, make out their defences, and establish the facts in the context of proceedings conducted in a balanced ... manner", mandates that the Panel allow the parties the opportunity to engage in comparable levels of review of the information on the record.¹¹⁴

1.91. With respect to Australia's argument that data underlying independent, peer-reviewed journal articles (as opposed to data underlying commissioned expert reports) is not properly the subject of a request for information under Article 13 of the DSU, the Panel noted that Articles 13.1 and 13.2 of the DSU permit panels to request and obtain information from "any individual or body which it deems appropriate" and from "any relevant source" and the Panel did not see any *a priori* restriction on the individual to whom, or body to which, we might direct a request.¹¹⁵ The Panel therefore considered that the fact that the requested information underlay published articles did not, in itself, shield it from scrutiny under Article 13 of the DSU.¹¹⁶

1.92. The Panel further noted that in the particular circumstances of these proceedings, the studies at issue were relied on by Australia in direct support of its arguments that the challenged tobacco plain packaging measures are fulfilling their objective and specifically address, in various ways, the effects of the measures, which is a strongly disputed issue. The Panel observed that these publications were specifically intended to evaluate the effects of the challenged tobacco plain packaging measures, and were based on data collected in the context of surveys and research programmes dedicated to the study of tobacco control, including programmes receiving public funding.¹¹⁷

1.93. The Panel further noted that CCV, which responded to the Dominican Republic's request on behalf of the authors of most of the studies at issue, and which holds most of the requested information, was established by statute in the State of Victoria as a non-profit organization and reports to Parliament, though it is not classified as a public entity or part of the public service.¹¹⁸ The Panel explained that the Dominican Republic also observes, and Australia does not dispute, that many of the authors of the cited studies, including those affiliated with CCV, have been part of various bodies advising the Australian Government on tobacco control, including on plain packaging legislation.¹¹⁹ Finally, the Panel noted that Professor Fong, one of Australia's

¹¹³ Panel's communication of 7 September 2015, para. 2.22 (quoting Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 1140).

¹¹⁴ Panel's communication of 7 September 2015, para. 2.22 (quoting Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 147).

¹¹⁵ Panel's communication of 7 September 2015, para. 2.23 (referring to Appellate Body Reports, *Argentina – Textiles and Apparel*, para. 84; and *Canada – Aircraft*, para. 185).

¹¹⁶ Panel's communication of 7 September 2015, para. 2.23.

¹¹⁷ Panel's communication of 7 September 2015, paras. 2.24-2.25. See Department of Health's online evaluation of Plain Packaging, (Exhibit DOM-297), p. 1:

The 15 peer-reviewed articles in the British Medical Journal (BMJ) Tobacco Control special supplement outline the results of the first comprehensive evaluation of tobacco plain packaging legislation. The special supplement contains a number of studies undertaken by various authors, including articles relating to work commissioned by the Department: the National Monthly Tracking Survey, the adolescent plain packaging evaluation and cigar research.

See also Dominican Republic's communication to the Panel of 10 April 2015, paras. 11 and 14. For example, as explained in several of the studies, the NPPTS was funded under a contract with the Australian Department of Health and Ageing (DHA). See Brennan et al. 2015, (Exhibits AUS-224, DOM-304), p. ii41; Wakefield et al. 2015, (Exhibits AUS-206, DOM-306), p. ii24; and White et al. 2015a, (Exhibits AUS-186, DOM-235), p. ii48.

¹¹⁸ Panel's communication of 7 September 2015, para. 2.26 (referring to Cancer Council Victoria, "About us: Governance", available at: <<http://www.cancervic.org.au/about/governance>>, accessed 2 October 2014, (Exhibit HND-62)).

¹¹⁹ Panel's communication of 7 September 2015, para. 2.26 (referring to Dominican Republic's communication to the Panel of 10 April 2015, para. 14 fn 26).

commissioned experts in these proceedings, is the founder and principal chief investigator of the International Tobacco Control Policy Evaluation Project¹²⁰ (ITC Project) and a co-author of the two studies referred to in his expert report that draw on data from the ITC Project, which are the object of some of the Dominican Republic's requests.¹²¹ In light of the above, the Panel concluded that information underlying these studies was not *a priori* beyond the scope of what the Panel may request in these proceedings.¹²² Nevertheless, the Panel also noted that the fact that it considered that it *may* request the information at issue, did not necessarily mean it should do so. The Panel therefore considered further the details of the Dominican Republic's request in light of the other considerations that should inform its decision, including the relevance of the specific information at issue, due process, in whose possession the information lay, and the reasons for which it had not been provided. The Panel was also mindful, in this context, of the fact that an orderly conduct of the proceedings should also take due account of the need to ensure, in accordance with the objectives of the DSU, the prompt settlement of disputes.¹²³

1.94. The Panel concluded that the provision of some of the information sought by the Dominican Republic in respect of the studies that Australia relied on in its first written submission would be appropriate, with a view to affording the Dominican Republic and other complaining parties a meaningful opportunity to comment on the arguments and evidence adduced by Australia, thereby contributing to ensuring due process and the Panel's ability to make an objective assessment of the matter before it in accordance with Article 11 of the DSU.¹²⁴

1.95. The Panel also noted the Dominican Republic's efforts to obtain this information directly from the individuals and institutions holding it and the reasons for which CCV declined to provide it, including: (a) the undue burdens and complexities that CCV considered would arise for itself from the provision of detailed information on the NTPPTS and the VSHS; (b) the appropriateness of disclosing for the purposes of these proceedings any data with respect to cross-sectional school-based surveys, considering its legal, ethical and other obligations vis-à-vis its stakeholders; and (c) the future viability of school-based surveys.¹²⁵

1.96. The Panel did not question CCV's assessment as to the legal, practical or other constraints that it would face in providing some of the additional information at issue for the purposes of these proceedings. Nonetheless, with respect to some of the information at issue, the Panel considered it appropriate to seek to "confirm further the extent to which reasonable means would be available, through which additional information could be provided, in a form that could assist in the conduct of these proceedings without compromising the interests expressed by CCV (and potential similar interests of CCQ, as relevant)".¹²⁶

1.97. The Panel also understood that Australia did not have in its possession any of the data and information not already provided to the Dominican Republic and to the Panel and the other parties.¹²⁷ Against this context, the panel considered it appropriate to seek, pursuant to Article 13.1 of the DSU, the further collaboration of CCV and CCQ, as holders of the relevant information, to the extent practicable and to the extent compatible with their legal and other

¹²⁰ Panel's communication of 7 September 2015, para. 2.26 (referring to "Expert Report of G. Fong", 4 March 2014, (Fong Report), (Exhibit AUS-14), para. 3 and Appendix A).

¹²¹ Panel's communication of 7 September 2015, para. 2.26 (referring to Fong Report, (Exhibit AUS-14), Appendix D; E. Swift, R. Borland, K. Cummings, G. Fong, A. McNeill, D. Hammond, J. Thrasher, T.R. Partos, and H.H. Yong, "Australian Smokers' Support for Plain or Standardised Packs Before and After Implementation: Findings from the ITC Four Country Survey", *Tobacco Control* (10 November 2014), doi:10.1136/tobaccocontrol-2014-051880 (Swift et al.); and H.H. Yong, R. Borland, D. Hammond, J. Thrasher, K. Cummings, and G. Fong, "Smokers' Reactions to the New Larger Health Warning Labels on Plain Cigarette Packs in Australia: Findings from the ITC Australia Project", *Tobacco Control* (19 February 2015), doi:10.1136/tobaccocontrol-2014-05197, (Yong et al.)).

¹²² Panel's communication of 7 September 2015, para. 2.27.

¹²³ Panel's communication of 7 September 2015, para. 2.27 (referring to Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 1140).

¹²⁴ Panel's communication of 7 September 2015, para. 2.63.

¹²⁵ Panel's communication of 7 September 2015, para. 2.65.

¹²⁶ Panel's communication of 7 September 2015, para. 2.66.

¹²⁷ Panel's communication of 7 September 2015, para. 2.67 (referring to Australia's communication to the Panel of 16 June 2015).

obligations.¹²⁸ The Panel also expected that, as the party relying on the studies at issue, some of which were commissioned by its own Department of Health, Australia would actively collaborate with CCV and CCQ to facilitate the establishment of the relevant facts¹²⁹ and ensure that relevant information underlying its own arguments could be presented in these proceedings promptly and to the fullest extent practicable.¹³⁰

1.98. Finally, in light of the considerable amount of evidence already exchanged and bearing in mind the already unusually long timeframes in these panel proceedings, the Panel reminded all parties that, pursuant to Article 12.2 of the DSU, panel procedures "should provide sufficient flexibility so as to ensure high-quality panel reports, while not unduly delaying the panel process". The Panel considered it important that, at that stage of the proceedings, any further exchange of evidence take place as expeditiously as possible, in the interest of a prompt settlement of these disputes in accordance with Article 3.3 of the DSU.¹³¹

1.99. On 24 September 2015, CCQ informed the Panel that the requested data from the school-based surveys could not be presented in a de-identifiable form, and that it was therefore prevented by binding legal and ethical agreements from releasing it.

1.100. On 25 September 2015, CCV informed the Panel that it was able to provide certain requested information relating to the NPPTS but was unable to provide the requested information in respect of the VSHS due to funding constraints. CCV stated that it was also unable to provide the requested information in respect of school-based surveys, due to undertakings provided to the participating schools, students and parents, and concerns that providing the information would jeopardize CCV's ability to conduct future surveys.

1.6.7.3.3 Additional data requests

1.101. On 2 June 2015, Australia requested that the Panel exercise its authority under Article 13 of the DSU to request certain information relating to a report prepared by Professor List (List Report), submitted as an exhibit by the Dominican Republic and Indonesia at the first substantive meeting with the parties.¹³² On 5 June 2015, the Dominican Republic indicated that it would voluntarily provide data and codes underlying the report, including calculations Professor List generated in reliance upon the "Klick mimeo".¹³³ The Dominican Republic also stated that the data underlying the Klick mimeo were already in Australia's possession and that it was not in a position to share this document itself as it did not have a "direct relationship" with Professor Klick.¹³⁴ The Panel invited the parties to continue bilateral discussions on this matter and to revert to the Panel in the event that an agreement could not be reached.¹³⁵ The parties met on 8 June 2015.¹³⁶

¹²⁸ Panel's communication of 7 September 2015, para. 2.68. See also Panel's communications of 9 September 2015 to CCV and CCQ, respectively.

¹²⁹ Panel's communication of 7 September 2015, para. 2.69 (noting that the Australian Department of Health website indicates that requests for access to data collected in the NTPPTS may be directed to a Department of Health email address, tobacco.control@health.gov.au, and referring to Department of Health's online evaluation of Plain Packaging, (Exhibit DOM-297)).

¹³⁰ Panel's communication of 7 September 2015, para. 2.69 (quoting in a footnote the Appellate Body's statement at paragraph 197 in *Canada – Aircraft* that "a panel has broad legal authority to request information from a Member that is a party to a dispute, and ... a party so requested has a legal duty to provide such information").

¹³¹ Panel's communication of 7 September 2015, para. 2.70. The Panel also drew the attention of the parties to the fact that, as observed by the Appellate Body, a panel's efforts to protect due process need to factor in a number of considerations, which may include "the need for a panel, in pursuing prompt resolution of the dispute, to exercise control over the proceedings in order to bring an end to the back and forth exchange of competing evidence by the parties". Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 155.

¹³² J. List, "A Consideration of the Empirical Evidence on the Effects of Australia's Tobacco Plain Packaging Legislation", 1 June 2015, (List Report), (Exhibit DOM/IDN-1).

¹³³ The Klick mimeo is a draft response to a critique of Professor Klick's original report, which was submitted by Ukraine as Exhibit UKR-5. The Panel suspended proceedings in DS434 at Ukraine's request before Professor Klick completed his response, but after Professor Klick, in his capacity as Ukraine's expert, shared his draft with Professor List. See Honduras's communication to the Panel of 19 June 2015, p. 1; and Dominican Republic's communication to the Panel of 19 June 2015, p. 1.

¹³⁴ First substantive meeting, 5 June 2015.

¹³⁵ First substantive meeting, 5 June 2015.

1.102. On 19 June 2015, Australia noted that it was awaiting data and backup materials underlying the List Report and reiterated its request for the Klick memo in a letter to the Dominican Republic. On the same day, the Dominican Republic explained that Professor List did not have control of the Klick memo and that it would be inappropriate for him to assert control over it by sharing it with third parties. The Dominican Republic however provided certain other data requested by Australia from the List Report (including details of the calculations for which Professor List relied on the Klick memo).¹³⁷ Also on 19 June 2015, Honduras informed the Panel that the Klick memo, in draft form when provided to and relied upon by Professor List, was being finalized and would be submitted as Honduras's exhibit in its responses to questions on 8 July 2015.

1.103. Australia responded that it required the "*specific version of Professor Klick's memo that was relied upon and referred to by Professor List in his report*" and asked that the Panel exercise its authority under Article 13 of the DSU to request it from the Dominican Republic or in the alternative, Honduras.¹³⁸ On 8 July 2015, Honduras submitted a new report authored by Professor Klick, along with related data and codes used to prepare it.¹³⁹

1.104. On 7 September 2015,¹⁴⁰ the Panel noted that, as a result of the exchanges described above, it understood Australia's request in relation to data underlying the List Report to have been addressed.¹⁴¹ In relation to the Klick memo, the Panel's understanding was that the document submitted by Honduras on 8 July 2015 was intended to satisfy this request.¹⁴² On 14 September 2015, the Dominican Republic and Honduras confirmed that the entirety of the requested data and analysis relied upon in the List Report and presentation had been provided to Australia.

1.105. On 20 July 2015, Australia asked the Dominican Republic to provide the data, computer codes, and programming language underlying two figures contained in the Dominican Republic's response to Panel question No. 8.¹⁴³ The parties subsequently had several further exchanges in relation to this information.¹⁴⁴ On 4 September 2015, the Dominican Republic indicated that Australia had all of the data needed to test the conclusion drawn in the response to Panel question No. 8.

1.106. On 30 September 2015, Australia requested Honduras to provide the backup data and coding used by Professor Neven in the preparation of his rebuttal report, which had been submitted by Honduras as part of its second written submission.¹⁴⁵ On 1 October 2015, Honduras provided the requested material.¹⁴⁶

1.107. On 7 October 2015, Australia requested that Honduras provide the complete backup material that accompanied Professor Klick's Supplemental Rebuttal Report¹⁴⁷, submitted by Honduras together with its second written submission. According to Australia, the backup materials provided were incomplete and in particular did not contain the original unprocessed data,

¹³⁶ See Dominican Republic's communication to the Panel of 19 June 2015, p. 1; and Australia's communication to the Panel of 2 July 2015, p. 3.

¹³⁷ See Dominican Republic's communication to the Panel of 19 June 2015; and Exhibit DOM/IDN-1.A (SCI).

¹³⁸ Australia's communication to the Panel of 2 July 2015, p. 2. (emphasis original)

¹³⁹ Klick Rebuttal Report, (Exhibit HND-118).

¹⁴⁰ See paras. 1.87-1.98 above.

¹⁴¹ Panel's communication of 7 September 2015, para. 1.13.

¹⁴² Panel's communication of 7 September 2015, para. 1.13.

¹⁴³ Australia's communication to the Dominican Republic of 20 July 2015, p. 2.

¹⁴⁴ Australia's communication to the Dominican Republic of 20 July 2015, p. 2; Dominican Republic's communication to the Panel of 13 August 2015; Australia's communication to the Dominican Republic of 14 August 2015; Dominican Republic's communication to the Panel of 21 August 2015; Dominican Republic's communication to the Panel of 28 August 2015; Australia's communication to the Panel of 24 August 2015; Dominican Republic's communication to the Panel of 28 August 2015; Australia's communication to the Panel of 31 August 2015; and Dominican Republic's communication to the Panel of 4 September 2015.

¹⁴⁵ D. Neven, "The effect of plain packaging regulation on competition and tobacco consumption: a Response to Professor Katz's report", 16 September 2015, (Neven Rebuttal Report), (Exhibit HND-123).

¹⁴⁶ See Exhibits HND-123(1)-HND-123(2) (SCI).

¹⁴⁷ J. Klick, "Supplemental Rebuttal Report – A Review of New and Updated Australian Survey and Market Data", 16 September 2015, (Klick Supplemental Rebuttal Report), (Exhibit HND-122).

metadata, or program files upon which Professor Klick's analyses relied. On 9 October 2015, Honduras provided the requested materials.¹⁴⁸

1.108. On 13 November 2015, the Dominican Republic requested Australia to provide additional backup production materials in respect of a report authored by Professor Chaloupka and submitted by Australia at the second substantive meeting.¹⁴⁹ Australia provided this information on 18 November 2015.¹⁵⁰

1.109. On 14 January 2016, Australia requested that Honduras provide backup production underlying calculations contained in a report by Professor Klick submitted by Honduras with its responses to questions following the second substantive meeting.¹⁵¹ On 15 January 2016, Honduras provided the relevant backup production.¹⁵²

1.6.8 Evidence and arguments presented subsequent to the comments on responses to questions following the second substantive meeting

1.6.8.1 Additional comments relating Dr Chipy's Third Rebuttal Report

1.110. On 17 February 2016, the Dominican Republic addressed a communication to the Panel with respect to certain issues of due process that it claimed arose regarding new material submitted by Australia in the context of its comments on responses to questions following the second substantive meeting. The Dominican Republic considered that "there are many comments that could now be made in respect of Australia's new arguments and evidence". The Dominican Republic identified "as an example" a specific issue relating to an expert report by Dr Chipy¹⁵³ provided by Australia with its final comments on responses to the Panel's questions. The Dominican Republic invited the Panel to "take appropriate steps, at its discretion, to ensure that the parties' due process interests are respected".¹⁵⁴ Australia considered that it was "entirely inappropriate for the Dominican Republic to submit additional rebuttal arguments" after the conclusion of the final exchange of arguments and evidence and that it would be appropriate for the Panel to deem them inadmissible. If the Panel were to consider the Dominican Republic's additional comments to be admissible, Australia requested an opportunity to submit a response limited to the specific criticisms made of Dr Chipy's report, in recognition of Australia's due process interests.¹⁵⁵

1.111. On 2 March 2016, the Panel addressed a communication to the parties, in which it noted that submission of evidence at this stage of the proceedings fell outside of the scope of the first sentence of paragraph 8 of its Working Procedures, and that it may consider evidence filed by the parties outside of the context of the first sentence of paragraph 8 "upon a showing of good cause". The Panel further observed that both parties had referred to their due process interests in this matter and that the Panel would therefore consider the appropriate course of action in light of these due process concerns, as well as other relevant factors as pertinent.

1.112. The Panel noted that the Panel's timetable already extended far beyond that which is envisaged by the DSU and that, though this timetable was adopted taking into account the requests of all parties to these disputes, the requirement of securing a "prompt settlement" of these disputes that is not 'unduly delay[ed]' weighed in favour of bringing the exchange of argumentation and evidence to a close.¹⁵⁶ The Panel further noted that a considerable amount of argumentation and evidence had already been exchanged concerning the robustness of the various experts' reports, and that a panel, in pursuing prompt resolution of a dispute, needed to "exercise control over the proceedings in order to bring an end to the back and forth exchange of competing

¹⁴⁸ See Exhibits HND-122(i)-HND-122(ae) (SCI).

¹⁴⁹ Chaloupka Rebuttal Report, (Exhibit AUS-582).

¹⁵⁰ See Exhibit AUS-582.A.

¹⁵¹ Klick Third Supplemental Rebuttal Report, (Exhibit HND-166).

¹⁵² See Exhibit HND-166(n) (SCI).

¹⁵³ See T. Chipy, "Third Rebuttal Report of Dr. Tasneem Chipy", 1 February 2016, (Chipy Third Rebuttal Report), (Exhibit AUS-605).

¹⁵⁴ Dominican Republic's communication to the Panel of 17 February 2016, pp. 1-3.

¹⁵⁵ Australia's communication to the Panel of 19 February 2016.

¹⁵⁶ Panel's communication of 2 March 2016, p. 3 (quoting Articles 3.3 and 12.2 of the DSU, and Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 150).

evidence by the parties".¹⁵⁷ Finally, the Panel noted that the Dominican Republic had not requested the opportunity to comment on Dr Chipty's report, but had nonetheless identified certain criticisms of it.

1.113. The Panel decided to accept the Dominican Republic's comments with respect to the specific criticisms expressly identified in its communication of 17 February 2016, and requested the Dominican Republic to provide the results mentioned in this communication. Australia (and the other complainants, strictly if necessary), was offered an opportunity to comment, strictly limited to addressing the specific criticisms identified in the Dominican Republic's communication. The Panel stressed the very limited scope of these opportunities to provide further comments, noting that the volume of evidence already submitted by the parties, and the imperative of bringing these proceedings to a close, were such that it would consider further requests of this kind only in the most exceptional of circumstances.¹⁵⁸

1.114. On 4 March 2016, the Dominican Republic provided the requested information. On 16 March 2016, Australia provided comments.

1.6.8.2 Additional comments relating to Australia's Post-Implementation Review

1.115. On 26 February 2016, Australia submitted a document containing a post-implementation review (PIR) of its tobacco plain packaging measures, as anticipated in its response to the Panel's question No. 149.¹⁵⁹ In its comments on Australia's responses to questions, Honduras had asked for an opportunity to comment on this document "if and when it is provided to the Panel and the parties".¹⁶⁰ The Panel agreed that it was appropriate to provide Honduras and the other complainants with an opportunity to comment on this newly submitted document and invited the complainants to submit comments by 21 March 2016.¹⁶¹ The complainants submitted comments on 21 March 2016. On 22 March 2016, Australia indicated that it did not seek to prolong the written proceedings any further by requesting a right to reply to the complainants' comments, but that its silence on this matter should in no way be taken as acceptance by Australia of the complainants' arguments.

2 FACTUAL ASPECTS

2.1. In this section, the Panel will describe the measures at issue (section 2.1), as well as elements of the domestic and international regulatory background against which they were adopted and are maintained, including other tobacco control-related measures in Australia (section 2.2), the general framework for the protection of trademarks¹⁶² and geographical indications (GIs) in Australia (section 2.3), other measures (section 2.2.5), and the FCTC (section 2.4).¹⁶³

2.1 The measures at issue

2.2. The measures at issue in these proceedings are the following:

- a. the *Tobacco Plain Packaging Act 2011* (Cth)¹⁶⁴ (TPP Act);

¹⁵⁷ Panel's communication of 2 March 2016, p. 3 (quoting Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 155).

¹⁵⁸ Panel's communication of 2 March 2016, p. 3.

¹⁵⁹ See Tobacco Plain Packaging PIR, (Exhibit AUS-624).

¹⁶⁰ Honduras's comments on Australia's response to Panel question No. 149.

¹⁶¹ Panel's communication of 2 March 2016, p. 3.

¹⁶² In keeping with the language of the TRIPS Agreement, we refer to trademark(s) as a single term throughout these Reports, unless quoting from material which refers to "trade mark(s)".

¹⁶³ The parties disagree on a number of factual issues. To the extent it is necessary for the Panel to address those disputed factual issues, it will do so in its Findings.

¹⁶⁴ *Tobacco Plain Packaging Act 2011* (Cth) (TPP Act), (Exhibits AUS-1, JE-1). The reference to "(Cth)" denotes legislation that was enacted at the Commonwealth level. State or territory legislation contains a commensurate reference, depending on the state or territory in question, which will be identified as applicable. In these Reports, references to the Australian Government or Commonwealth Government are references to government at the federal level. References to legislation enacted at the state and territory level are specified, as applicable.

- b. the *Tobacco Plain Packaging Regulations 2011* (Cth), as amended by the *Tobacco Plain Packaging Amendment Regulation 2012 (No. 1)* (Cth)¹⁶⁵ (TPP Regulations); and
- c. the *Trade Marks Amendment (Tobacco Plain Packaging) Act 2011* (Cth)¹⁶⁶ (TMA Act).

2.3. In addition to the above measures, the complainants indicated in their panel requests that the measures at issue also included additional instruments described, respectively, as:

- a. "any amendments, extensions, related instruments or practices" (Honduras)¹⁶⁷; and
- b. "[a]ny related measures adopted by Australia, including measures that implement, complement or add to these laws and regulations, as well as any measures that amend or replace these laws and regulations" (Dominican Republic, Cuba, and Indonesia).¹⁶⁸

2.4. As explained in section 1.6.2 above, the Panel held in preliminary rulings that these references in the panel requests of the Dominican Republic, Cuba, and Indonesia were "not, on their face, inconsistent with the requirement under Article 6.2 of the DSU to identify the specific measures at issue". However, we reserved the right to assess whether any particular measure (in addition to those expressly listed above in paragraph 2.2) that may be invoked on the basis of this language in the course of the proceedings would or would not be covered by those references and, consequently, fall within our terms of reference.¹⁶⁹

2.5. In the course of the proceedings, none of the complainants sought rulings with respect to additional measures within the descriptions quoted above. We therefore consider that the measures at issue in these proceedings are those listed in paragraph 2.2. The Panel will hereafter use the term "TPP measures" to refer to these instruments taken together.¹⁷⁰

2.1.1 Preparation, adoption, and entry into force of the TPP measures

2.6. The legislative process that led to the adoption of the TPP measures started in 2008 with the establishment of the National Preventative Health Taskforce (NPHT).¹⁷¹ The NPHT was responsible for developing a "National Preventive Health Strategy", to "provide a blueprint for tackling the

¹⁶⁵ *Tobacco Plain Packaging Regulations 2011* (Cth), as amended by the *Tobacco Plain Packaging Amendment Regulation 2012 (No. 1)* (Cth), (TPP Regulations), (Exhibits AUS-3, JE-2).

¹⁶⁶ The *Trade Marks Amendment (Tobacco Plain Packaging) Act 2011* (Cth), (TMA Act), (Exhibits AUS-4, JE-3).

¹⁶⁷ WT/DS435/16, p. 2.

¹⁶⁸ Respectively, WT/DS441/15, p. 2; WT/DS458/14, p. 1; and WT/DS467/15, p. 1.

¹⁶⁹ We consider that the same observation applies to the reference to "any amendments, extensions, related instruments or practices" in the panel request of Honduras, which was not the object of a preliminary ruling request by Australia.

¹⁷⁰ We note that parties have used different terms when referring collectively to the measures at issue. See, e.g. Honduras's first written submission, paras. 81 and 847 (using the terms "plain packaging measures" and "PP measures", respectively); Dominican Republic's first written submission, para. 161 (identifying that the Dominican Republic refers to the measures "individually, and collectively, as the 'plain packaging' or 'PP' measures"); Cuba's first written submission, para. 40 (identifying that Cuba refers to the instruments collectively as the "PP measures"); Indonesia's first written submission, para. 23 (using the term "PP measures", but without identifying whether it refers to individual measures with this title); and Australia's first written submission, para. 3 (using the term "tobacco plain packaging measure").

The use of "the TPP measures", in the plural, is not intended to signal that the Panel considers these three legal instruments to constitute distinct measures that would need to be considered separately for the purposes of its analysis of the claims before it. As described in the Appellate Body's observations quoted at para. 7.180 below, whether distinct legal instruments should be treated as a "single measure" or as separate measures for the purposes of its analysis will depend on the claim at issue and the manner in which the Panel considers it most appropriate to address that claim.

¹⁷¹ Between 1994 and 1995 the Australian Senate's Community Affairs References Committee discussed, held hearings and reviewed submissions with respect to various tobacco-related matters, in particular the level of regulation of tobacco products at that time. Submissions were received concerning the possibility of introducing "neutral or generic packaging". In its final report, the Senate Committee recommended that "additional research be undertaken into the efficacy of generic packaging of tobacco products as a means of addressing the problems of juvenile smoking". Australian Parliament, Senate Community Affairs References Committee, *The Tobacco Industry and the Costs of Tobacco-Related Illness*, (15 December 1995), (Exhibit DOM-49), pp. 68-71.

burden of chronic disease currently caused by obesity, tobacco, and excessive consumption of alcohol".¹⁷² A Tobacco Working Group (TWG) was also created.¹⁷³ The NPHT published in 2009 a discussion paper, accompanied by a Technical Report by the TWG that recommended a range of measures.¹⁷⁴

2.7. In September 2009, the NPHT released its final report, entitled *Australia: The Healthiest Country by 2020 – National Preventative Health Strategy – The Roadmap for Action*.¹⁷⁵ With respect to tobacco control, this report identified 11 "key action areas": "Make tobacco products significantly more expensive"; "Increase the frequency, reach and intensity of social marketing campaigns"; "End all remaining forms of advertising and promotion of tobacco products" (which included a specific "action" to "Eliminate promotion of tobacco products through design of packaging");¹⁷⁶ "Eliminate exposure to second-hand smoke in public places"; "Regulate manufacturing and further regulate packaging and supply of tobacco products"; "Ensure all smokers in contact with health services are encouraged and supported to quit ..."; "boost efforts to reduce smoking and exposure to passive smoking among Indigenous Australians"; "Boost efforts to discourage smoking among people in other highly disadvantaged groups"; "Assist parents and educators to discourage tobacco use and protect young people from second-hand smoke"; "Ensure that the public, media, politicians and other opinion leaders remain aware of the need for sustained and vigorous action to discourage tobacco use"; and "Ensure Implementation and measure progress against and towards targets".¹⁷⁷

2.8. On 29 April 2010, the Australian Government announced four measures to "deliver on [the] recommendations of the [NPHT]"¹⁷⁸, which it identified as a tobacco excise increase of 25%¹⁷⁹; legislation requiring that "all cigarettes ... be sold in plain packaging by 1 July 2012"; restrictions on Australian internet advertising of tobacco products; and extra expenditure on anti-smoking campaigns.¹⁸⁰ In May 2010, the Australian Government released a response to the NPHT final report, in which it elaborated on these four measures.¹⁸¹

2.9. On 7 April 2011, the Australian Government released an Exposure Draft of the Tobacco Plain Packaging Bill 2011 (Cth) (TPP Bill) for public consultations, which lasted until 6 June 2011.¹⁸² The TPP Bill and Trade Marks Amendment (Tobacco Plain Packaging) Bill 2011 (Cth) (TMA Bill)¹⁸³ were passed by the Parliament in November 2011 and received Royal Assent on 1 December 2011, thus becoming, respectively, the TPP Act and the TMA Act.¹⁸⁴ The TPP Regulations were adopted on 7 December 2011 and amended on 8 March 2012.¹⁸⁵ As indicated above¹⁸⁶, taken together, the TPP Act, the TMA Act and the TPP Regulations form the TPP measures at issue in these disputes.

¹⁷² NPHT Terms of Reference, (Exhibits HND-2, DOM-50).

¹⁷³ Australia's first written submission, para. 115.

¹⁷⁴ NPHT Technical Report 2, (Exhibits AUS-52, JE-12), pp. vii-ix. Recommended measures were categorized as follows: "Revenue measures that would reduce the affordability of tobacco products"; "Legislative reforms to address current deficiencies in tobacco regulation" (which included "Mandate plain packaging of cigarettes" and an increase in the required size of graphic health warnings); "Expenditure measures"; "Indigenous tobacco control"; "Other initiatives to reduce social disparities in smoking"; "Health system interventions"; "Reinvigoration of the Australian National Tobacco Strategy"; and "Overseas development".

¹⁷⁵ NPHT, The Roadmap for Action, (Exhibits AUS-67, JE-14).

¹⁷⁶ NPHT, The Roadmap for Action, (Exhibits AUS-67, JE-14), p. 182.

¹⁷⁷ NPHT, The Roadmap for Action, (Exhibits AUS-67, JE-14), p. 174.

¹⁷⁸ PM Rudd, Anti-Smoking Action Media Release, (Exhibits AUS-115, HND-4, DOM-52).

¹⁷⁹ See section 2.2.3 below.

¹⁸⁰ PM Rudd, Anti-Smoking Action Media Release, (Exhibits AUS-115, HND-4, DOM-52).

¹⁸¹ Response to NPHT, The Roadmap for Action, (Exhibits AUS-116, JE-15), pp. 61-85.

¹⁸² Exposure Draft, *Tobacco Plain Packaging Bill 2011* (Cth) (7 April 2011), (Exhibit JE-9). This was released alongside a consultation paper. See Australian Department of Health and Ageing, "Consultation Paper: Tobacco Plain Packaging Bill 2011 Exposure Draft", 7 April 2011, (Exhibits AUS-120, JE-10).

¹⁸³ TMA Bill, (Exhibits AUS-6, JE-4).

¹⁸⁴ TPP Act, (Exhibits JE-1, AUS-1); TMA Act (Exhibits AUS-4, JE-3). The TPP Bills were also notified to TBT Committee. See World Trade Organization, Australia's Notification to the Committee on Technical Barriers to Trade, G/TBT/N/AUS/67 (8 April 2011), (Exhibit AUS-130).

¹⁸⁵ TPP Regulations, (Exhibits AUS-3, JE-2). The amendment to the TPP Regulations was adopted on 8 March 2012. See the *Tobacco Plain Packaging Amendment Regulations 2012 (No. 1)* (Cth) (Exhibit AUS-125). The "purpose of the regulation is to amend the Principal Regulations to expand their application to non-cigarette tobacco products and to prescribe specific requirements for the retail packaging and appearance

2.10. Tobacco products manufactured or packaged in Australia for domestic consumption were required to comply with the TPP measures from 1 October 2012. As of 1 December 2012, all tobacco products sold, offered for sale, or otherwise supplied in Australia were required to comply with the TPP measures.¹⁸⁷

2.1.2 The TPP measures

2.1.2.1 Introduction

2.11. The TPP Act is, by its own terms, "[a]n Act to discourage the use of tobacco products, and for related purposes". A simplified outline contained in the TPP Act itself describes it as follows:

- This Act regulates the retail packaging and appearance of tobacco products in order to:
 - (a) improve public health; and
 - (b) give effect to certain obligations in the Convention on Tobacco Control.
- Part 2 of Chapter 2 specifies requirements for the retail packaging and appearance of tobacco products. (If there is an acquisition of property otherwise than on just terms, regulations made under section 15 might also specify requirements.)
- The retail packaging and appearance of tobacco products must comply with the requirements of this Act.
- Offences and civil penalties apply if tobacco products are supplied, purchased or manufactured and either the retail packaging, or the products themselves, do not comply with the requirements.¹⁸⁸

2.12. The term "tobacco product" is defined in the TPP Act to mean "processed tobacco, or any product that contains tobacco" that is "manufactured to be used for smoking, sucking, chewing, or snuffing" and "not included in the Australian Register of Therapeutic Goods maintained under the *Therapeutic Goods Act 1989*".¹⁸⁹ This definition encompasses not only cigarettes, but also "non-cigarette" products, such as cigars, little cigars (also known as cigarillos) and bidis.¹⁹⁰ To the extent that some of the products covered by this definition may be prohibited in Australia, either by the Commonwealth or states and territories, the TPP Act does not affect their legality.¹⁹¹

of non-cigarette tobacco products". Explanatory Statement to the *Tobacco Plain Packaging Amendment Regulation 2012 (No. 1)* (Cth), (TPPA Regulation Explanatory Statement), (Exhibit JE-22).

¹⁸⁶ See section 2.1 above.

¹⁸⁷ Australia's first written submission, para. 123. Section 2 of the TPP Act specifies the date on which each provision would enter into force, beginning 1 December 2011, with the last provisions taking effect on 1 December 2012. The TPP Regulations took effect on 1 October 2012. See TPP Regulations, (Exhibit AUS-3, JE-2), Regulation 1.1.2; and TPP Act, (Exhibit AUS-1, JE-1), Section 9.

¹⁸⁸ TPP Act, (Exhibits AUS-1, JE-1), Section 12.

¹⁸⁹ TPP Act, (Exhibits AUS-1, JE-1), Section 4(1) (containing various definitions for the purpose of the Act). These definitions are also applicable to the TPP Regulations, in addition to its own list of definitions. TPP Regulations, (Exhibits AUS-3, JE-2), Note to Regulation 1.1.3. The definition of "tobacco products" is based on the definition for the term found in Article 1(f) of the FCTC. Explanatory Memorandum, Tobacco Plain Packaging Bill 2011 (Cth), (TPP Bill Explanatory Memorandum), (Exhibits AUS-2, JE-7), p. 9. See WHO Framework Convention on Tobacco Control, done at Geneva, 21 May 2003, UN Treaty Series, Vol. 2302, p. 166, (FCTC), (Exhibits AUS-44, JE-19), Article 1(f).

¹⁹⁰ TPP Bill Explanatory Memorandum, (Exhibits AUS-2, JE-7), p. 9. See also Australia's response to Panel question No. 13, para. 60. Other covered "non-cigarette" products also include roll-your-own (RYO) tobacco, kreteks, and dissolvable tobacco products, such as tablets containing tobacco for sucking. Ibid. Some of these types of tobacco products (such as cigarettes, cigars and bidis), and their specific packaging, are also defined in the TPP Act and TPP Regulations. See TPP Act, (Exhibits AUS-1, JE-1), Section 4(1); and TPP Regulations, (Exhibits AUS-3, JE-2), Regulation 1.1.3.

¹⁹¹ TPP Bill Explanatory Memorandum, (Exhibits AUS-2, JE-7), pp. 4 and 9. For instance, chewing tobacco and snuffs intended for oral use have been permanently banned in Australia since 1991. See para. 2.64 below.

2.13. The TPP Bill and TMA Bill were accompanied by Explanatory Memoranda.¹⁹² Such documents are "documents that assist members of Parliament, officials and the public to understand the objectives and detailed operation of the clauses of a Bill".¹⁹³ In Australia, an Explanatory Memorandum may also serve as "extrinsic material" that can be used as an aid to judicial interpretation of Acts.¹⁹⁴ The TPP Regulations were accompanied by a similar document, an Explanatory Statement, which may also serve as an extrinsic aid to judicial interpretation.¹⁹⁵

2.14. Section 109 of the TPP Act provides that "[t]he Governor-General may make regulations prescribing matters: (a) required or permitted by this Act to be prescribed; or (b) necessary or convenient to be prescribed for carrying out or giving effect to this Act".¹⁹⁶ The TPP Regulations were made pursuant to this provision.¹⁹⁷

2.1.2.2 "Objects" of the TPP Act

2.15. Section 3 of the TPP Act, entitled "Objects of this Act", provides:

- (1) The objects of this Act are:
 - (a) to improve public health by:
 - (i) discouraging people from taking up smoking, or using tobacco products; and
 - (ii) encouraging people to give up smoking, and to stop using tobacco products; and
 - (iii) discouraging people who have given up smoking, or who have stopped using tobacco products, from relapsing; and
 - (iv) reducing people's exposure to smoke from tobacco products; and
 - (b) to give effect to certain obligations that Australia has as a party to the Convention on Tobacco Control.
- (2) It is the intention of the Parliament to contribute to achieving the objects in subsection (1) by regulating the retail packaging and appearance of tobacco products in order to:
 - (a) reduce the appeal of tobacco products to consumers; and
 - (b) increase the effectiveness of health warnings on the retail packaging of tobacco products; and
 - (c) reduce the ability of the retail packaging of tobacco products to mislead consumers about the harmful effects of smoking or using tobacco products.¹⁹⁸

¹⁹² TPP Bill Explanatory Memorandum, (Exhibits AUS-2, JE-7); and Explanatory Memorandum, Trade Marks Amendment (Tobacco Plain Packaging) Act 2011 (Cth), (TMA Bill Explanatory Memorandum), (Exhibits AUS-5, JE-5).

¹⁹³ P. O'Neill, "Was There an EM?: Explanatory Memoranda and Explanatory Statements in the Commonwealth Parliament" (12 September 2006), (Exhibit AUS-260), Executive Summary (cited in Australia's first written submission, para. 601 fn 775).

¹⁹⁴ *Acts Interpretation Act 1901* (Cth), (Exhibit AUS-259), Section 15AB(2)(e). See also Australia's first written submission, para. 601 fn 775.

¹⁹⁵ TPPA Regulation Explanatory Statement, (Exhibit JE-22); and P. O'Neill, "Was There an EM?: Explanatory Memoranda and Explanatory Statements in the Commonwealth Parliament" (12 September 2006), (Exhibit AUS-260), Explanatory Statements to Commonwealth Regulations. See also fn 185 above.

¹⁹⁶ TPP Act, (Exhibits AUS-1, JE-1), Section 109(1).

¹⁹⁷ See TPPA Regulation Explanatory Statement, (Exhibit JE-22), p. 2.

¹⁹⁸ TPP Act, (Exhibits AUS-1, JE-1), Section 3. See also TPP Bill Explanatory Memorandum, (Exhibits AUS-2, JE-7), pp. 1-2 and 6-7; TPPA Regulation Explanatory Statement, (Exhibit JE-22), pp. 1 and 10.

2.16. The term "Convention on Tobacco Control" is defined as meaning the WHO Framework Convention on Tobacco Control (FCTC).¹⁹⁹ The TPP Bill Explanatory Memorandum states that the "introduction of plain packaging for tobacco products is one of the means by which the Australia Government will give effect to Australia's obligations under the [FCTC]" and, in this context, refers to Articles 5, 11 and 13 of the FCTC.²⁰⁰ The TPP Bill Explanatory Memorandum adds that Section 3(2) "is not intended to be an exhaustive list of ways in which ... Australia's obligations under the WHO FCTC may be met".²⁰¹

2.1.2.3 Requirements for retail packaging of tobacco products

2.17. The TPP Act specifies requirements for the retail packaging of tobacco products. The Act defines "retail packaging" as:

- (a) any container for retail sale in which the tobacco product is directly placed; or
- (b) any container for retail sale that contains a smaller container in which the tobacco product is directly placed; or
- (c) any plastic or other wrapper that covers any retail packaging of the tobacco product (within the meaning of paragraph (a) or (b) of this definition); or
- (d) any plastic or other wrapper that covers the tobacco product, being a tobacco product that is for retail sale; or
- (e) any insert that is placed inside the retail packaging of the tobacco product (within the meaning of any of paragraphs (a) to (d) of this definition); or
- (f) any onsert that is affixed or otherwise attached to the retail packaging of the tobacco product (within the meaning of any of paragraphs (a) to (d) of this definition).²⁰²

2.18. As elaborated in the TPP Bill Explanatory Memorandum, the TPP Act regulates "any container that a tobacco product is packed in for retail sale, including the package immediately around the tobacco product, any carton that contains one or more packages of tobacco products for retail sale, any wrapper that covers the packaging of a tobacco product or a tobacco product itself, and anything placed in the packaging apart from the tobacco product and anything attached to or forming part of the packaging".²⁰³

2.19. Sections 18 to 25 of the TPP Act set out requirements for retail packaging of tobacco products²⁰⁴ and Section 26 sets out the requirements for appearance of tobacco products.²⁰⁵ Section 27 of the TPP Act provides that regulations may prescribe additional requirements in

¹⁹⁹ TPP Act, (Exhibits AUS-1, JE-1), Section 4(1).

²⁰⁰ TPP Bill Explanatory Memorandum, (Exhibits AUS-2, JE-7), p. 2.

²⁰¹ TPP Bill Explanatory Memorandum, (Exhibits AUS-2, JE-7), p. 7.

²⁰² TPP Act, (Exhibits AUS-1, JE-1), Section 4(1). The TPP measures also contain specific definitions for certain types of tobacco packaging, such as "cigarette pack", "cigarette carton", "cigar tube", and "pouch". A cigarette pack is "any container for retail sale in which cigarettes are directly placed". Ibid. Additionally, a reference to an outer surface of a cigarette pack (such as its "front outer surface"), "is a reference to all of that outer surface, including the part of that outer surface that forms part of the flip-top lid". Ibid. Section 6(1). Further, the "inside lip" of a cigarette pack "means the part of the outer surfaces of the pack that is obscured when the flip-top lid is closed". Ibid. Section 4(1). A cigarette carton is "any container for retail sale that contains smaller containers in which cigarettes are directly placed". Ibid. Additionally, "[i]f a cigarette carton has one or more flaps with surfaces that become visible only when the carton is opened, those surfaces are taken to be inner surfaces of the carton". Ibid. Section 6(2). A cigar tube means "a tube for packaging one cigar". TPP Regulations, (Exhibits AUS-3, JE-2), Regulation 1.1.3. A pouch means "primary packaging" that "is made from flexible material" and "takes the form of a rectangular pocket with a flap that covers the opening". TPP Regulations, (Exhibits AUS-3, JE-2), Regulation 1.1.3.

²⁰³ TPP Bill Explanatory Memorandum, (Exhibits AUS-2, JE-7), p. 8.

²⁰⁴ TPP Act, (Exhibits AUS-1, JE-1), Sections 18-25.

²⁰⁵ TPP Act, (Exhibits AUS-1, JE-1), Section 26.

relation to the retail packaging of tobacco products, and the appearance of tobacco products.²⁰⁶ These requirements are in the TPP Regulations.²⁰⁷ The cumulative effect of the TPP Act and TPP Regulations as applied to the packaging of tobacco products are summarized below.²⁰⁸

2.1.2.3.1 Physical features of retail packaging

2.20. Section 18(1) of the TPP Act provides that the outer and inner surfaces of the retail packaging of all tobacco products must not have any "decorative ridges, embossing, bulges or other irregularities of shape or texture, or any other embellishments" (other than as permitted by the TPP Regulations).²⁰⁹ Additionally, "any glues or other adhesives used in manufacturing the packaging must be transparent and not coloured".²¹⁰ The TPP Regulations set out other specifications for the physical features of tobacco packaging for retail sale²¹¹, including requirements for cigarette packs²¹², cigarette cartons²¹³, cigar tubes²¹⁴, and any other type of packaging.²¹⁵

2.21. Cigarette packs and cigarette cartons must be rigid and made only of cardboard.²¹⁶ When closed, each outer surface of the pack or carton must be rectangular, and the surfaces of the pack or carton must meet at a 90-degree angle.²¹⁷ All edges of the pack or carton must be rigid, straight, and not rounded, bevelled, or otherwise shaped or embellished (unless permitted by the TPP Regulations).²¹⁸ The dimensions of cigarette packs are determined by the TPP Regulations.²¹⁹

2.22. The opening of a cigarette pack must be a flip-top lid.²²⁰ The inside lip of the cigarette pack must have straight edges, other than the corners which may be rounded, and neither the lip nor the edges of the lip may be rounded, bevelled or otherwise shaped or embellished.²²¹ Any lining in the pack must be made only of foil backed with paper (unless prescribed by the TPP Regulations).²²²

2.1.2.3.2 Colour and finish of retail packaging

2.23. Section 19 of the TPP Act sets out additional requirements for all outer and inner surfaces of certain retail packaging of tobacco products, including both sides of any lining of a cigarette

²⁰⁶ TPP Act, (Exhibits AUS-1, JE-1), Section 27.

²⁰⁷ TPP Regulations, (Exhibits AUS-3, JE-2).

²⁰⁸ See generally TPP Bill Explanatory Memorandum, (Exhibits AUS-2, JE-7).

²⁰⁹ TPP Act, (Exhibits AUS-1, JE-1), Section 18(1)(a).

²¹⁰ TPP Act, (Exhibits AUS-1, JE-1), Section 18(1)(b).

²¹¹ See TPP Regulations, (Exhibits AUS-3, JE-2), Division 2.1.

²¹² See TPP Regulations, (Exhibits AUS-3, JE-2), Regulation 2.1.1.

²¹³ See TPP Regulations, (Exhibits AUS-3, JE-2), Regulation 2.1.2.

²¹⁴ See TPP Regulations, (Exhibits AUS-3, JE-2), Regulation 2.1.4. Cigar tubes must be cylindrical and rigid, and may have one or both ends tapered or rounded. The opening to a cigar tube must be at least 15 millimetres in diameter.

²¹⁵ See TPP Regulations, (Exhibits AUS-3, JE-2), Regulation 2.1.5. With the exception of cigarette packs and cigar tubes, the largest dimension of a container for retail sale in which the tobacco product is directly placed must be at least 85 millimetres, and the second largest dimension at least 55 millimetres. Ibid. See also TPP Regulations, (Exhibits AUS-3, JE-2), Regulation 1.1.3 (defining "primary packaging"); and TPP Act, (Exhibits AUS-1, JE-1), Section 4(1)(a) (defining "retail packaging").

²¹⁶ TPP Act, (Exhibits AUS-1, JE-1), Section 18(2)(a).

²¹⁷ TPP Act, (Exhibits AUS-1, JE-1), Section 18(2)(b).

²¹⁸ TPP Act, (Exhibits AUS-1, JE-1), Section 18(2)(c).

²¹⁹ The dimensions of closed cigarette packs must be between 85-125 millimetres (height), 55-82 millimetres (width), and 20-42 millimetres (depth). TPP Regulations, (Exhibits AUS-3, JE-2), Regulation 2.1.1(1).

²²⁰ TPP Act, (Exhibits AUS-1, JE-1), Section 18(3)(b). The lid must be hinged only at the back of the pack; have straight edges; and neither the lid, nor the edges of the lid, may be rounded, bevelled or otherwise shaped or embellished in any way, other than corners which may be rounded. Regulations 2.1.1(2)-2.1.1(3) also set out requirements concerning the opening of the packet. TPP Regulations, (Exhibits AUS-3, JE-2).

²²¹ TPP Act, (Exhibits AUS-1, JE-1), Section 18(3)(c).

²²² TPP Act, (Exhibits AUS-1, JE-1), Section 18(3)(d). Regulation 2.1.3 sets out requirements concerning the lining of containers of tobacco products for retail sale. Such lining may be embossed with dots or squares, provided they meet certain conditions, including that they do not form an image or other symbol, or constitute tobacco advertising and promotion. TPP Regulations, (Exhibits AUS-3, JE-2).

pack.²²³ These surfaces must have a matt finish and must be drab dark brown²²⁴, though the colour requirement does not apply to health warnings, the text of the brand, business or company name, or variant name, or the text of relevant legislative requirements.²²⁵ The TPP Regulations further stipulate that the outer surfaces of these packages must be the colour Pantone 448C (drab dark brown), and that the inner surfaces of a cigarette pack or cigarette carton must be white. The inner surface of these packages (other than a cigarette pack or cigarette carton) must be either white or the colour of the packaging material in its natural state. The lining of a cigarette pack must be silver coloured foil with a white paper backing.²²⁶

2.1.2.3.3 Trademarks and other marks on retail packaging

2.24. Section 20 of the TPP Act prohibits the appearance of trademarks and marks anywhere on the retail packaging of tobacco products, with the exception of the brand name, business or company name, variant name, the relevant legislative requirements, and other trademarks and marks permitted by the TPP Regulations.²²⁷ The TPP Regulations make provision for the appearance of origin marks, calibration marks, a measurement mark and trade description, a barcode, a fire risk statement, a locally made product statement, the name and address of the person who packed the product or on whose behalf it was packed, and a consumer contact number.²²⁸ These markings must not obscure any relevant legislative requirement, or constitute or provide access to tobacco advertising and promotion.²²⁹

2.25. Section 21 of the TPP Act, operating together with the TPP Regulations, prescribes the requirements for the manner in which the brand, business, company or variant names for tobacco products may appear on the retail packaging of a tobacco product.²³⁰ With respect to cigarette packaging, any of these names must be printed in the Lucida Sans typeface in fonts no larger than 14-point size (for a brand, business or company name) or 10-point size (for a variant name). The font must be normal weighted and in the colour Pantone Cool Gray 2C.²³¹ With respect to retail packaging other than retail packaging of cigarettes, names must meet the same specifications, but can be printed on the packaging or on an adhesive label fixed to the packaging.²³² Such adhesive label must be in the colour Pantone 448C (drab dark brown), no larger than reasonably necessary to print the permitted names, be fastened firmly to the retail packaging so as not to be easily removable²³³, and must not obscure any relevant legislative requirement.²³⁴

2.26. Section 21(3) of the TPP Act specifies the location and orientation of these names with respect to cigarette packaging:

²²³ Section 19 applies only to the elements of the definition of "retail packaging" set out in subparagraphs (a) to (b) of the definition in para. 2.17 above. See TPP Act, (Exhibits AUS-1, JE-1), Sections 19(1)(a) and 4(1) (defining "retail packaging").

²²⁴ TPP Act, (Exhibits AUS-1, JE-1), Section 19(2).

²²⁵ TPP Act, (Exhibits AUS-1, JE-1), Section 19(3).

²²⁶ TPP Regulations, (Exhibits AUS-3, JE-2), Regulation 2.2.1.

²²⁷ TPP Act, (Exhibits AUS-1, JE-1), Sections 20(1)-20(3). Section 20(3) also permits the appearance of relevant legislative requirements. Section 20(4) stipulates that Section 20 does not apply to wrappers, which are regulated by Section 22.

²²⁸ TPP Regulations, (Exhibits AUS-3, JE-2), Regulations 2.3.1(1)-2.3.1(2) and 2.3.8(1). The specific conditions governing each of these marks are elaborated in Regulations 2.3.2 to 2.3.9.

²²⁹ TPP Regulations, (Exhibits AUS-3, JE-2), Regulation 2.3.1(5).

²³⁰ TPP Act, (Exhibits AUS-1, JE-1). Section 21(5) stipulates that Section 21 does not apply to wrappers, which are governed by Section 22.

²³¹ TPP Regulations, (Exhibits AUS-3, JE-2), Regulation 2.4.1. In addition, the first letter in each word must be capitalised. No other upper case letters may be used.

²³² TPP Regulations, (Exhibits AUS-3, JE-2), Regulation 2.4.2(2).

²³³ Regulation 2.4.2(4) explains that an adhesive label is easily removable if it is not likely to stay fastened during the expected life of the retail packaging, or if it can be removed without damaging the label or the retail packaging. TPP Regulations, (Exhibits AUS-3, JE-2).

²³⁴ TPP Regulations, (Exhibits AUS-3, JE-2), Regulation 2.4.2(3).

Table 1: Requirements for brand, business, company or variant names

Requirements for brand, business, company or variant names			
Item	If this name ...	appears on this surface ...	the name ...
1	a brand, business or company name	the front outer surface of a cigarette pack	must appear: (a) horizontally below, and in the same orientation as, the health warning; and (b) in the centre of the space remaining on the front outer surface beneath the health warning.
2	a brand, business or company name	the front outer surface of a cigarette carton	must appear: (a) in the same orientation as the health warning; and (b) in the centre of the space on the front outer surface that is not occupied by the health warning.
3	a brand, business or company name	any outer surface of a cigarette pack or cigarette carton (other than a front outer surface)	must appear: (a) horizontally; and (b) in the centre of the outer surface of the pack or carton.
4	variant name	any outer surface of a cigarette pack or cigarette carton	must appear: (a) horizontally and immediately below the brand, business or company name; and (b) in the same orientation as the brand, business or company name.

Source: TPP Act, (Exhibits AUS-1, JE-1), Section 21(3).

2.27. With respect to cigar tubes, a brand, business or company name, or variant name, may only appear once, across a single line only, and must not obscure any relevant legislative requirement.²³⁵ Where a cigar tube contains a brand, business or company name only, or a variant name only, the name must appear in the same orientation as, and immediately below, the health warnings. Where a cigar tube contains a brand, business or company name, together with a variant name, the brand, business or company name must appear in the same orientation as, and immediately below, the health warnings on the surface, and the variant name must appear parallel to, in the same orientation as, and immediately below the brand, business or company name.²³⁶

2.28. Brand, business or company names or variant names may appear on other retail packaging²³⁷ across one line only on each of the front and back outer surfaces (and no others), in the same orientation as, and not above, the health warnings on the surface, and must not obscure any relevant legislative requirement. Variant names on such packages must appear parallel to, in the same orientation as, and immediately below the brand, business or company name.²³⁸

2.1.2.3.4 Wrappers

2.29. Section 22 of the TPP Act concerns requirements for wrappers.²³⁹ Wrappers must be transparent and not coloured, marked, textured or embellished in any way, other than as permitted by the TPP Regulations. Neither trademarks nor marks may appear anywhere on the

²³⁵ TPP Regulations, (Exhibits AUS-3, JE-2), Regulation 2.4.3(1).

²³⁶ TPP Regulations, (Exhibits AUS-3, JE-2), Regulation 2.4.3(2).

²³⁷ That is, other than cigarette packs, cigarette cartons, and cigar tubes. See TPP Regulations, (Exhibits AUS-3, JE-2), Regulation 2.4.4(1).

²³⁸ TPP Regulations, (Exhibits AUS-3, JE-2), Regulation 2.4.4(2).

²³⁹ TPP Act, (Exhibits AUS-1, JE-1), Section 22. This Section applies only to plastic or other wrappers that cover the retail packaging of tobacco products that are within the scope of subparagraphs (a) and (b) of the definition of "retail packaging" presented in paragraph 2.17. See *ibid*. Sections 22(1) and 4(1) (defining "retail packaging").

wrapper, except as permitted by the TPP Regulations.²⁴⁰ These requirements are elaborated in the TPP Regulations.²⁴¹

2.1.2.3.5 Inserts and onserts

2.30. Section 23 of the TPP Act applies to certain types of retail packaging, and provides that these packages must not have any inserts or onserts, other than as permitted by the TPP Regulations.²⁴² The TPP Regulations provide that retail packaging of tobacco products may include an adhesive label bearing a health warning²⁴³, and, except with respect to cigarettes and cigarette cartons, may contain an insert if it is used to avoid damage to the tobacco product during transportation or storage, and is white or the colour of the packaging material in its natural state.²⁴⁴ Packages of tobacco products other than cigarettes may include a tab for resealing the package, provided that it is either black, transparent and not coloured, or the colour Pantone 448C (drab dark brown).²⁴⁵

2.1.2.3.6 Other requirements concerning retail packaging

2.31. The retail packaging of tobacco products must not make a noise, or contain or produce a scent, that could be taken to constitute tobacco advertising and promotion²⁴⁶, and must not include features designed to change the packaging after retail sale.²⁴⁷

2.1.2.3.7 Summary of requirements on retail packaging

2.32. As described below, the requirements set out in the TPP Act and the TPP Regulations operate in conjunction with other legislative requirements that are not challenged in these disputes, including graphic health warnings (GHWs). The cumulative effects of the requirements set out in the TPP Act and the TPP Regulations, and other legislative requirements with respect to the packaging of cigarettes and cigars, are shown below:

²⁴⁰ TPP Act, (Exhibits AUS-1, JE-1), Section 22(2).

²⁴¹ See TPP Regulations, (Exhibits AUS-3, JE-2), Regulations 2.5.1-2.5.2.

²⁴² TPP Act, (Exhibits AUS-1, JE-1), Section 23. This Section applies only to the retail packaging of tobacco products that are within the scope of any of the subparagraphs (a) through (d) of the definition of "retail packaging" produced in paragraph 2.17. See *ibid*. Sections 23 and 4(1) (defining "retail packaging").

²⁴³ TPP Regulations, (Exhibits AUS-3, JE-2), Regulation 2.6.1. These warnings must comply with *Trade Practices (Consumer Product Information Standards) (Tobacco) Regulations 2004* (Cth), (Exhibits AUS-297, DOM-43); and *Competition and Consumer (Tobacco) Information Standard 2011* (Cth), (Information Standard), (Exhibits AUS-128, JE-8).

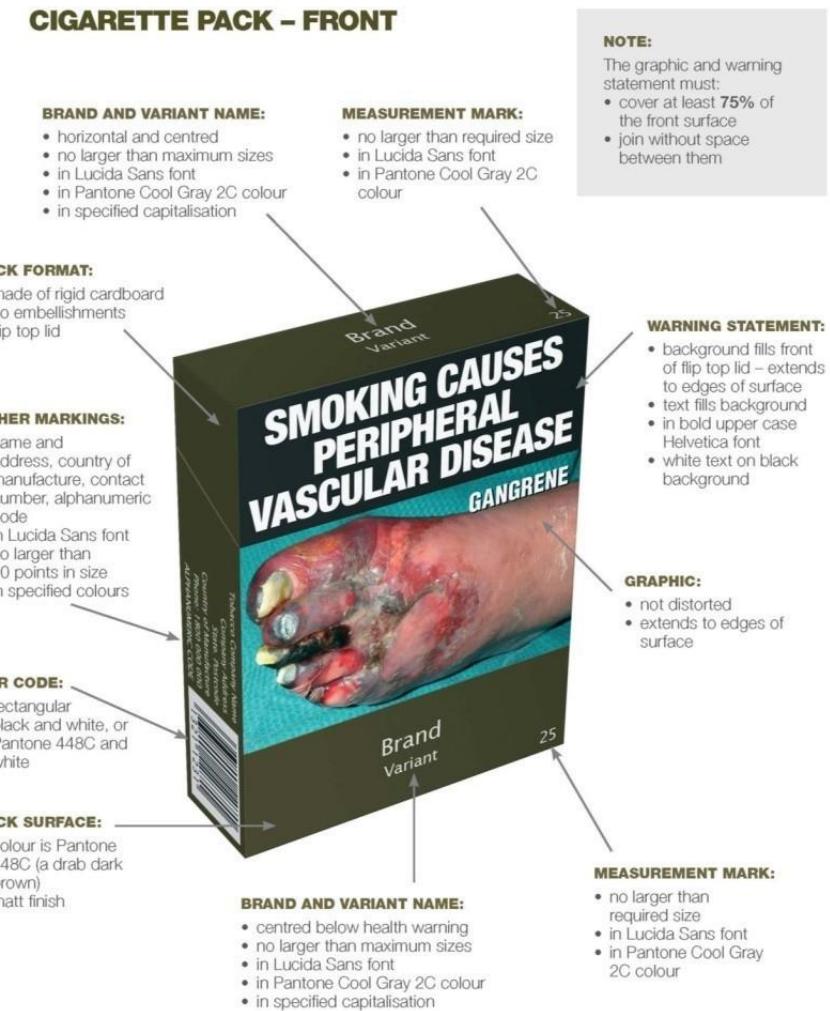
²⁴⁴ TPP Regulations, (Exhibits AUS-3, JE-2), Regulation 2.6.2.

²⁴⁵ TPP Regulations, (Exhibits AUS-3, JE-2), Regulation 2.6.3.

²⁴⁶ TPP Act, (Exhibits AUS-1, JE-1), Section 24.

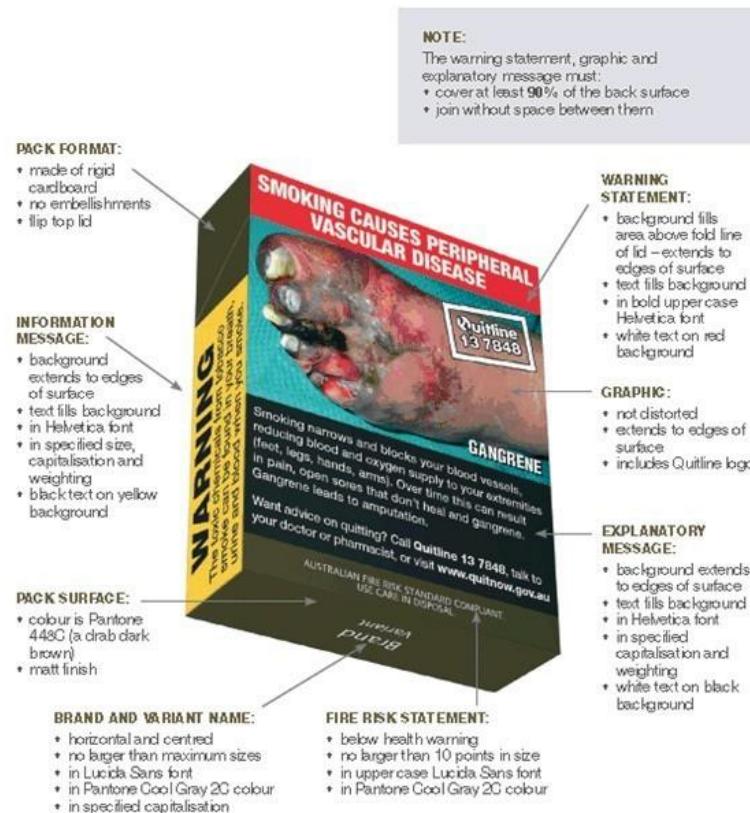
²⁴⁷ TPP Act, (Exhibits AUS-1, JE-1), Section 25. Section 25 provides the following examples of such features: (a) heat activated inks; (b) inks or embellishments designed to appear gradually over time; (c) inks that appear fluorescent in certain light; (d) panels designed to be scratched or rubbed to reveal an image or text; (e) removable tabs; and (f) fold-out panels.

Figure 1: TPP Act and TPP Regulations as applied to the front, top, and side of a cigarette pack



Source: Australia's first written submission, Annexure A, Figure 1; Dominican Republic's first written submission, Annex I, Figure 25; and DHA Guide to Tobacco Plain Packaging, (Exhibits HND-50, DOM-161).

Figure 2: TPP Act and the TPP Regulations as applied to the back, base and side of a cigarette pack



Source: Australia's first written submission, Annexure A, Figure 1; Dominican Republic's first written submission, Annex I, Figure 26; and DHA Guide to Tobacco Plain Packaging, (Exhibits HND-50, DOM-161).

Figure 3: TPP Act and TPP Regulations as applied to the front, top and side of a cigarette carton



Source: Dominican Republic's first written submission, Annex I, Figure 27; and DHA Guide to Tobacco Plain Packaging, (Exhibits HND-50, DOM-161).

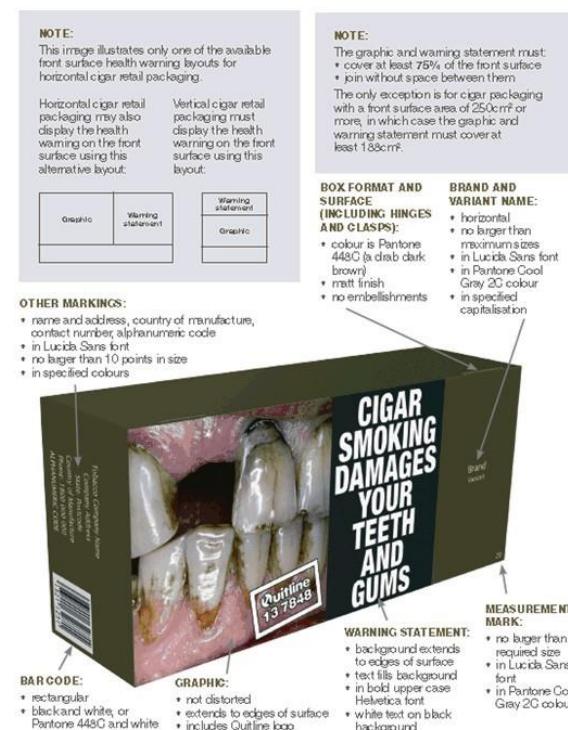
Figure 4: TPP Act and TPP Regulations as applied to the back, base and side of a cigarette carton



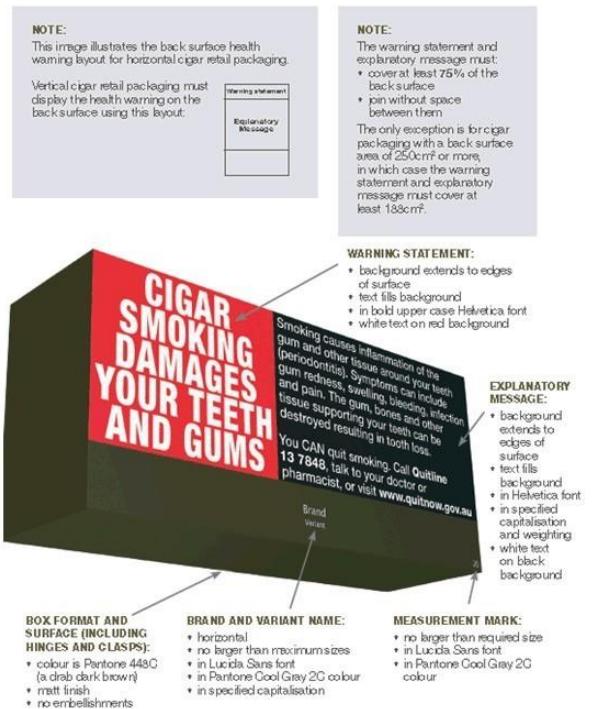
Source: Dominican Republic's first written submission, Annex I, Figure 28; and DHA Guide to Tobacco Plain Packaging, (Exhibits HND-50, DOM-161).

Figure 5: TPP Act and TPP Regulations as applied to cigar tubes

Source: Australia's first written submission, Annexure A, Figure 4. See also Dominican Republic's first written submission, Annex I, Figures 29 and 30; and DHA Guide to Tobacco Plain Packaging, (Exhibits HND-50, DOM-161).

Figure 6: TPP Act and TPP Regulations as applied to the front and side of a cigar box

Source: Dominican Republic's first written submission, Annex I, Figure 31; and DHA Guide to Tobacco Plain Packaging, (Exhibits, HND-50, DOM-161).

Figure 7: TPP Act and TPP Regulations as applied to the back of a cigar box

Source: Dominican Republic's first written submission, Annex I, Figure 32; and DHA Guide to Tobacco Plain Packaging, (Exhibits HND-50, DOM-161).

2.1.2.4 Requirements for the appearance of tobacco products

2.33. The TPP measures regulate various elements affecting the appearance of tobacco products themselves. Section 26 of the TPP Act provides that no trademark or mark may appear anywhere on a tobacco product, other than as permitted by the TPP Regulations.²⁴⁸ Section 27 of the TPP Act provides that the TPP Regulations may prescribe additional requirements in relation to the appearance of tobacco products to further the objects of the TPP Act.²⁴⁹

2.1.2.4.1 Requirements with respect to cigarettes

2.34. Division 3.1 of the TPP Regulations specifies requirements with respect to cigarettes. The paper casing and lowered permeability band (if any) must be white, or white with an imitation cork tip.²⁵⁰ A cigarette may be marked with an alphanumeric code, which may appear only once on the cigarette. The code must be printed parallel to, and not more than 38 millimetres from the end of the cigarette that is not designed to be lit in black, normal-weighted Lucida Sans typeface with a maximum 8-point font size.²⁵¹ The alphanumeric code must not constitute, or provide access to, tobacco advertising and promotion; be "false, misleading, deceptive or likely to create an erroneous impression about the cigarette's characteristics, health effects, hazards or emissions"; "directly or indirectly create a false impression that a particular tobacco product is less harmful than other tobacco products"; "represent, or be linked or related in any way to, the emission yields of the cigarette"; or "represent, or be related in any way to, the brand or variant name of the cigarette".²⁵² If a cigarette includes a filter tip, the filter tip must be white.²⁵³

²⁴⁸ TPP Act, (Exhibits AUS-1, JE-1), Section 26.

²⁴⁹ TPP Act, (Exhibits AUS-1, JE-1), Section 27(1)(b).

²⁵⁰ TPP Regulations, (Exhibits AUS-3, JE-2), Regulation 3.1.1.

²⁵¹ TPP Regulations, (Exhibits AUS-3, JE-2), Regulation 3.1.2(2).

²⁵² TPP Regulations, (Exhibits AUS-3, JE-2), Regulation 3.1.2(3).

²⁵³ TPP Regulations, (Exhibits AUS-3, JE-2), Regulation 3.1.3.

2.1.2.4.2 Requirements with respect to cigars

2.35. With respect to cigars, the TPP Regulations prescribe that a single band may appear around the circumference of a cigar in the colour Pantone 448C (drab dark brown). The band may be an adhesive band that completely covers another band or bands, provided it is fastened firmly to, and not easily removable from, that band.²⁵⁴

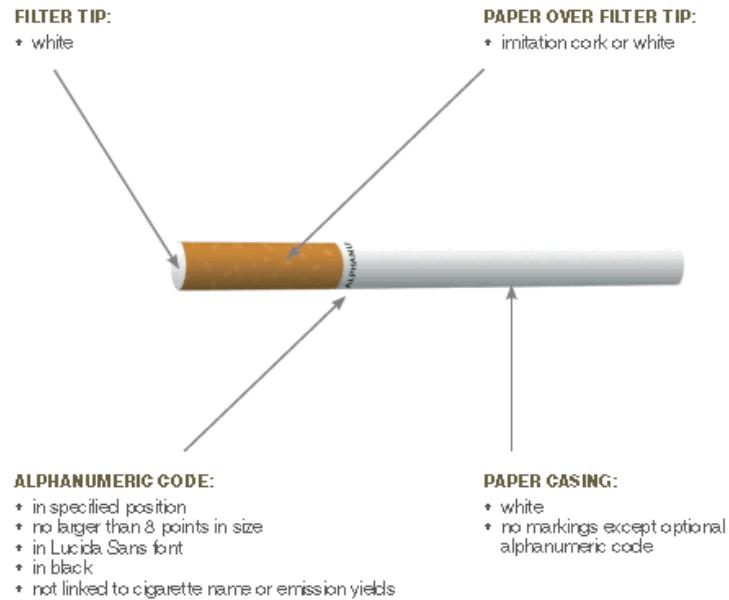
2.36. The band may feature the brand, company or business name, and variant name of the cigar, the name of the country in which the cigar was made or produced, and an alphanumeric code.²⁵⁵ These marks must appear only once on the band; and be printed in normal weighted Lucida Sans typeface, in maximum 10-point font size, in the colour Pantone Cool Gray 2C.²⁵⁶ The brand, business or company name and variant name must be placed horizontally along the length of the band so that they run around the circumference of the cigar.²⁵⁷ The alphanumeric code must not constitute, or provide access to, tobacco advertising and promotion; be "false, misleading, deceptive or likely to create an erroneous impression about the cigar's characteristics, health effects, hazards or emissions"; "directly or indirectly create a false impression that a particular tobacco product is less harmful than other tobacco products"; or "represent, or be linked or related in any way to, the emission yields of the cigar".²⁵⁸

2.37. The band may also contain a covert mark that is not visible to the naked eye and does not provide access to tobacco advertising and promotion.²⁵⁹

2.1.2.4.3 Summary of requirements on the appearance of tobacco products

2.38. The cumulative effects of the requirements set out in the TPP Act and the TPP Regulations, and the other legislative requirements set out in Sections 2.1.2.4.1 and 2.1.2.4.2 with respect to the appearance of cigarettes and cigars, are depicted as follows:

Figure 8: TPP Act and TPP Regulations as applied to the appearance of cigarettes



Source: Australia's first written submission, Annexure A, Figure 3; Dominican Republic's first written submission, Annex I, Figure 33; and DHA Guide to Tobacco Plain Packaging, (Exhibits HND-50, DOM-161).

²⁵⁴ TPP Regulations, (Exhibits AUS-3, JE-2), Regulations 3.2.1(1)-3.2.1(2).

²⁵⁵ TPP Regulations, (Exhibits AUS-3, JE-2), Regulation 3.2.1(3).

²⁵⁶ TPP Regulations, (Exhibits AUS-3, JE-2), Regulation 3.2.1(5).

²⁵⁷ TPP Regulations, (Exhibits AUS-3, JE-2), Regulation 3.2.1(6).

²⁵⁸ TPP Regulations, (Exhibits AUS-3, JE-2), Regulation 3.2.1(7).

²⁵⁹ TPP Regulations, (Exhibits AUS-3, JE-2), Regulation 3.2.1(4).

Figure 9: TPP Act and TPP Regulations as applied to the appearance of cigars

Source: Australia's first written submission, Annexure A, Figure 4; Dominican Republic's first written submission, Annex I, Figure 34; and DHA Guide to Tobacco Plain Packaging, (Exhibits HND-50, DOM-161).

2.1.2.5 Section 28 of the TPP Act

2.39. Section 28(1) of the TPP Act provides that, for the purposes of the *Trade Marks Act 1995* (Cth) (TM Act), and the regulations made under that Act, "an applicant for the registration of a trademark in respect of tobacco products is taken to intend to: (a) use the trademark in Australia in relation to those products; or (b) authorise another person to use the trade mark in Australia in relation to those products; or (c) assign the trade mark to a body corporate that is about to be constituted with a view to [it] using the trade mark in Australia in relation to those products".²⁶⁰

2.40. The TPP Bill Explanatory Memorandum states that Section 28 "preserves a trade mark owner's ability to protect a trade mark, and to register and maintain registration of a trade mark". It elaborates that, for example, "a tobacco manufacturer that applies for the registration of a trade mark in respect of tobacco products is taken to intend to use the trade mark in Australia, if it would use it on the products or retail packaging, but for the operation" of the TPP Act. It further states that, in the event of an application to remove a trademark from the register on the basis that it has not been used, the allegation of non-use "will be rebutted by evidence that the registered owner would have used the trade mark, but for the operation" of the TPP Act.²⁶¹ The complainants contest the effects of Section 28(1) of the TPP Act.

2.1.2.6 Offences and civil penalties

2.41. Chapter 3 of the TPP Act is entitled "Offences and civil penalty provisions". This Chapter identifies a variety of acts that attract either civil or criminal penalties. Section 30, which is contained in Part I of Chapter 3, provides a simplified outline of the provisions of the Chapter. It provides, *inter alia*, that:

- A person must not:
 - (a) supply or purchase tobacco products in retail packaging that does not comply with the requirements of this Act; nor
 - (b) be involved in the packaging of tobacco products for retail sale if the packaging does not comply with those requirements; nor

²⁶⁰ TPP Act, (Exhibits AUS-1, JE-1), Section 28(1).

²⁶¹ TPP Bill Explanatory Memorandum, (Exhibits AUS-2, JE-7), p. 15.

- (c) supply, purchase or manufacture tobacco products that do not comply with those requirements; nor
- (d) supply tobacco products that are not packaged for retail sale without certain contractual prohibitions.
- A person who does so:
 - (a) may commit a fault-based offence (that is, an offence where fault elements apply to the physical elements of the offence); and
 - (b) may also commit a strict liability offence (that is, an offence where no fault elements apply to the physical elements of the offence); and
 - (c) may also contravene a civil penalty provision.²⁶²

2.42. Each of the prohibitions identified in Chapter 3 stipulates the applicable criminal penalties (for fault-based and strict liability offences) and civil penalties.²⁶³ Part 4 of Chapter 3 creates an exception to certain offences and civil penalty provisions in that Chapter for non-compliant tobacco products that are for export.²⁶⁴

2.1.2.7 Relationship with other legislation

2.43. Section 10 of the TPP Act makes provision for inconsistencies between the Act and other Commonwealth legislation, and identifies certain safety or information standards which prevail to the extent of any inconsistency between them and the TPP Act.²⁶⁵ Section 11 of the TPP Act provides, *inter alia*, that the Act "does not exclude or limit the operation of a relevant tobacco law of a State or Territory that is capable of operating concurrently with this Act".²⁶⁶ The TPP Bill Explanatory Memorandum explains that the TPP Bill does not:

[L]imit the operation of State or Territory laws relating to packaging and appearance of tobacco products, where those laws are capable of operating concurrently with the provisions of the Bill. It is expected that Commonwealth and State and Territory tobacco control laws will continue to operate alongside each other. However, if there is any conflict between State and Territory laws and the plain packaging requirements, the Bill will prevail.²⁶⁷

2.44. Furthermore, the Explanatory Memorandum explains that:

It is intended that this Bill will operate alongside other regulatory mechanisms for tobacco products, and packaging generally. Although the Bill regulates information that may appear, and the ways in which certain required information may appear, [it] is not intended to interfere with other regulation of tobacco products, including any regulation creating a requirement for packaging generally that is applicable to retail packaging for tobacco products. [...] The Bill is not intended to detract from any form of regulation of advertising of tobacco products, but is intended to support existing advertising restrictions in so far as it creates requirements to restrict advertising on tobacco products themselves or on their packaging.²⁶⁸

²⁶² TPP Act, (Exhibits AUS-1, JE-1), Section 30. The details of these prohibitions are elaborated in Sections 31-50, which are contained in Parts 2-4 of Chapter 3.

²⁶³ TPP Act, (Exhibits AUS-1, JE-1), Sections 31-48.

²⁶⁴ TPP Act, (Exhibits AUS-1, JE-1), Chapter 3, Part 4.

²⁶⁵ TPP Act, (Exhibits AUS-1, JE-1), Section 10. See, e.g. *Trade Practices (Consumer Product Information Standards) (Tobacco) Regulations 2004* (Cth), (Exhibits AUS-297, DOM-43).

²⁶⁶ TPP Act, (Exhibits AUS-1, JE-1), Section 11(1).

²⁶⁷ TPP Bill Explanatory Memorandum, (Exhibits AUS-2, JE-7), p. 4. See also ibid. p. 10.

²⁶⁸ TPP Bill Explanatory Memorandum, (Exhibits AUS-2, JE-7), p. 4. See also ibid. p. 10.

2.1.2.8 The TMA Act

2.45. The TMA Act inserts into the TM Act a new provision, namely Section 231A. This provision provides as follows:

- (1) The regulations may make provision in relation to the effect of the operation of the *Tobacco Plain Packaging Act 2011*, and any regulations made under that Act, on:
 - (a) a provision of this Act; or
 - (b) a regulation made under this Act, including:
 - (i) a regulation that applies a provision of this Act; or
 - (ii) a regulation that applies a provision of this Act in modified form.
- (2) Without limiting subsection (1), regulations made for the purposes of that subsection may clarify or state the effect of the operation of the *Tobacco Plain Packaging Act 2011*, and any regulations made under that Act, on a provision of this Act or a regulation made under this Act, including by taking or deeming:
 - (a) something to have (or not to have) happened; or
 - (b) something to be (or not to be) the case; or
 - (c) something to have (or not to have) a particular effect.
- (3) Regulations made for the purposes of subsection (1):
 - (a) may be inconsistent with this Act; and
 - (b) prevail over this Act (including any other regulations or other instruments made under this Act), to the extent of any inconsistency.²⁶⁹

2.46. The TMA Bill Explanatory Memorandum explains that:

The [TMA Bill] is being introduced so, if necessary, the government can quickly remedy any unintended interaction between the [TPP Act] and the *Trade Marks Act 1995* The objective of any such exercise of power under the Bill will be to ensure that applicants for trade mark registration and registered owners of trade marks are not disadvantaged by the practical operation of the Plain Packaging Act.²⁷⁰

2.47. The Explanatory Memorandum continues that:

[T]he proposed Bill will insert a new section 231A to allow regulations to be made under the Trade Marks Act in relation to the effect of the operation of the [TPP Act] and regulations made under that Act on (a) a provision of the Trade Marks Act or (b) of a regulation made under that Act.

Regulations made under new section 231A are not intended to have any effect on the operation of the Trade Marks Act in relation to goods or services not governed by the Plain Packaging Act.²⁷¹

2.48. The TMA Act entered into force on 1 December 2011.²⁷²

²⁶⁹ TMA Act, (Exhibits AUS-4, JE-3), Schedule 1(2). (note omitted)

²⁷⁰ TMA Bill Explanatory Memorandum, (Exhibits AUS-5, JE-5), p. 1.

²⁷¹ TMA Bill Explanatory Memorandum, (Exhibits AUS-5, JE-5), p. 1.

²⁷² See TMA Act, (Exhibits AUS-4, JE-3), Section 2.

2.1.2.9 Regulatory impact analysis

2.49. The Australian regulatory impact analysis process involves a three-tier system for assessing regulations, including "in-depth analysis, documented in a Regulation Impact Statement (RIS), for all proposals that will have a significant impact on business and individuals or the economy".²⁷³ The process also allows for a PIR in circumstances where a RIS is not completed in relation to a regulatory proposal.

2.50. In April 2009, the Department of Health and Ageing (DHA) submitted to the Office of Best Practice Regulation (OBPR) a draft RIS for a Tobacco Control Act that would have contained, *inter alia*, provisions on plain packaging of tobacco products.²⁷⁴ The OBPR advised the DHA that the draft RIS required more work to satisfy the Australian Government's Best Practice Regulation requirements and offered comments to assist in finalizing it.²⁷⁵ In April 2010, the DHA transmitted to the OBPR a second draft RIS on plain packaging of tobacco products.²⁷⁶ In May 2010, after it was announced that the Government would adopt a comprehensive package of tobacco control measures targeting smoking, including plain packaging²⁷⁷, the OBPR informed the DHA that the second draft RIS did not satisfy the Best Practice Regulation requirements and that the DHA was required to commence a PIR within one to two years of implementation.²⁷⁸

2.51. According to the Best Practice Regulation Handbook, a PIR "should be similar in scale and scope to what would have been prepared for the decision-making stage" and "should focus on the way the policy was implemented, whether the implementation is proving effective in meeting the policy objectives, and whether implementation or ongoing delivery methods might be adjusted to manage the policy's ongoing delivery more efficiently and/or effectively".²⁷⁹ The DHA was granted an extension, from December 2014 to June 2015, to complete its PIR of the TPP measures.²⁸⁰ In November 2015, the "Department of Health received advice that it would be reported as 'non-compliant' on the Office of Best Practice Regulation's website in relation to the post-implementation review of the tobacco plain packaging measure".²⁸¹ The Department of Health

²⁷³ See Australian Government, "Best Practice Regulation Handbook", August 2007, (Best Practice Regulation Handbook), (Exhibit AUS-126), p. 16.

²⁷⁴ Email correspondence dated 7 April 2009 from D. Sloane, Assistant Director, Department of Health and Ageing, to R. Ristic, S. Rowley, and C. Toyne, Office of Best Practice Regulation, attaching Department of Health and Ageing, "DRAFT Regulation Impact Statement – Tobacco Control Act"(April 2009), (Exhibit UKR-51).

²⁷⁵ Letter of 23 April 2009 from OBPR to DHA, (Exhibits HND-12, IDN-6). The OBPR provided "general comments" on the definition of the problem, the structure of the RIS, the range of sources relied on, and the need to target the information to the measures proposed to be introduced, including an analysis of the degree to which the proposed measures will contribute to the health benefits of quitting smoking. *Ibid.* p. 2. With respect to plain packaging, it commented that "[t]he idea that cigarettes are held in the same social cues to style and display one's status like designer clothing seems overstated." *Ibid.* p. 6.

²⁷⁶ Letter of 4 May 2010 from OBPR to DHA, (Exhibit HND-16).

²⁷⁷ See PM Rudd, Anti-Smoking Action Media Release, (Exhibits AUS-115, HND-4, DOM-52).

²⁷⁸ Letter of 4 May 2010 from OBPR to DHA, (Exhibit HND-16). Under the Government's Best Practice Regulation Handbook:

Where the OBPR detects a regulation may have been introduced or amended without the appropriate level of analysis being undertaken, it will, in the first instance, contact the department or agency to obtain additional information. Following consultation with the department or agency, the OBPR will determine that:

- the best practice regulation requirements have been met and no further action is required; or
- the requirements to prepare a RIS or quantitative assessment of compliance costs have not been met and the department or agency must undertake a post-implementation review. In addition, the department or agency will be reported as non-compliant in the *Best Practice Regulation Report* for that year.

Australian Government, "Best Practice Regulation Handbook", August 2007, (Best Practice Regulation Handbook), (Exhibit AUS-126), p. 37. See also *ibid.* pp. 32 and 36-38. The tobacco plain packaging proposal was reported as non-compliant in 2012. Best Practice Regulation Report 2011-12, (Exhibits HND-18, CUB-9), p. 33.

²⁷⁹ Best Practice Regulation Handbook, (Exhibit AUS-126), p. 37.

²⁸⁰ Evidence to Senate Finance and Public Administration Legislation Committee, (Exhibit DOM-371).

²⁸¹ Australia's response to Panel question No. 149, para. 31.

completed the PIR for the TPP measures in February 2016.²⁸² This PIR seeks to assess "the effectiveness and efficiency of the tobacco plain packaging measure to meet its objective in order to determine if it is an appropriate regulatory intervention".²⁸³

2.2 Other tobacco control-related measures in Australia

2.52. Australia maintains a number of measures at the Commonwealth, state and territory levels regulating the use, sale, advertisement and promotion of tobacco products that are not challenged in these proceedings. A number of these measures have however been referred to and discussed by the parties. A general description of this regulatory context is therefore provided below.

2.2.1 Mandatory text and GHWs

2.53. Tobacco health warning requirements, enacted by all Australian states and territories in 1973, initially applied only to the retail packaging of cigarettes and involved textual health warnings.²⁸⁴ Subsequent measures at the federal level were enacted, expanding the scope of the warnings with respect to their form (i.e. to include textual and graphic/pictorial warnings), size (i.e. as a percentage of the surface of the pack), position (i.e. on the front and/or back of packs), modalities (i.e. the variation and rotation of text and images) and scope (i.e. application of the requirements to other categories of tobacco products).²⁸⁵ As of 1 March 2006, GHWs were required for almost all tobacco products.²⁸⁶

2.54. On 1 January 2012, the *Competition and Consumer (Tobacco) Information Standard 2011 (Cth)* (Information Standard) entered into force; it applied to all tobacco products as of 1 December 2012.²⁸⁷ This measure requires all tobacco products sold²⁸⁸, offered for sale or otherwise supplied in Australia to feature new and expanded health warnings, including warning statements and corresponding graphics, an explanatory message and information messages.²⁸⁹ Pursuant to the Information Standard, the package area covered by health warnings was expanded, such that textual and graphic warnings must cover 75% of the front surface and 90%

²⁸² See Australia's communication to the Panel of 26 February 2016 (referring to <http://ris.dpmc.gov.au/2016/02/26/tobacco-plain-packaging/>).

²⁸³ See Tobacco Plain Packaging PIR, (Exhibit AUS-624), p. 2.

²⁸⁴ Australia's first written submission, Annexure B, Section A(1); *Cigarette Containers (Labelling) Ordinance 1972 (Cth)* (as made), (Exhibit AUS-299), Section 5(1); *Cigarette Containers (Labelling) Ordinance 1972 (NT)*, (Exhibit AUS-300), Section 4; *Cigarette Package Labelling Regulations 1972 (Vic)*, (Exhibit AUS-301), Regulations 3-4 and 6; *Cigarettes (Labelling) Regulations 1972 (WA)*, (Exhibit AUS-302), Regulations 3-6; *Cigarettes (Labelling) Act 1972 (NSW)*, (Exhibit AUS-303), Section 4; *Cigarettes (Labelling) Regulations 1973 (NSW)*, (Exhibit AUS-304), Regulation 4; *Cigarettes (Labelling) Act 1972 (Tas)*, (Exhibit AUS-305), Sections 3-4; *Cigarettes (Labelling) Regulations 1973 (Tas)*, (Exhibit AUS-306), Regulation 3; *Cigarettes (Labelling) Regulations 1971-1972 (SA)*, (Exhibit AUS-307), Regulations 2 and 3; *Food and Drug Amendment Regulations 1973 (Qld)*, (Exhibit AUS-308).

²⁸⁵ Australia's first written submission, Annexure B, Section A(1). See, e.g. *Trade Practices (Consumer Product Information Standards) (Tobacco) Regulations 1994 (Cth)*, (Exhibit AUS-322), Regulations 7, 9, 10(1), 11(1)(b), 11(2)(b), and 15(1); *Trade Practices (Consumer Product Information Standards) (Tobacco) Regulations 2004 (Cth)*, (Exhibit AUS-323), Regulations 35, 42, 47, 51, and Schedule 2.

²⁸⁶ An exception was made for cigars sold singly and tobacco for export. *Trade Practices (Consumer Product Information Standards) (Tobacco) Regulations 1994 (Cth)*, (Exhibit AUS-322), Regulation 4(2)(b).

²⁸⁷ Information Standard, (Exhibits AUS-128, JE-8), Section 1.5.

²⁸⁸ Prior to the Information Standard, an exception to the warning requirements was made for cigars sold individually, as well as tobacco for export. See Australia's first written submission, para. 133 and Annexure B, Section A(1); Information Standard, (Exhibits AUS-128, JE-8), Section 9.16. It is noted that Information Standard requires warning statements, but not GHWs, for single cigar tubes, bidis and smokeless tobacco. See Information Standard, (Exhibits AUS-128, JE-8), Parts 6, 7 and 8.

²⁸⁹ For example, Section 3.2(4) offers the following "explanatory message":

Smoking during pregnancy reduces blood flow in the placenta and limits the oxygen and nutrients that reach the growing baby. Smoking increases the risk of miscarriage, stillbirth, premature birth, problems during the birth or the baby having a smaller brain and body.

You CAN quit smoking. Call **Quitline 13 7848**, talk to your doctor or pharmacist, or visit www.quitnow.gov.au

of the back surface of cigarette packs and cartons. Cigar tubes require only textual warnings; such statements must occupy 95% of the total length of the outer surface, and extend to at least 60% of the circumference of the outer surface.²⁹⁰ The warning on other tobacco products (except cigars tubes and bidis) was increased to 75% on the front and back of the package.²⁹¹ Warning statements on the front surface of a cigarette package must feature upper case, bold type, in the largest font size available to fit the set area, and must be set in white against black background. Furthermore, the side warning statements must have "WARNING" in uppercase and several lines of a specified message below in regular capitalization, in black lettering on a bright yellow background.²⁹²

2.55. In 2013, amendments were made to the Information Standard, with the effect that rotation of the health warnings on the retail packaging of tobacco products became the responsibility of manufacturers and importers of tobacco products rather than retailers.²⁹³

Figure 10: Current GHWs used on the front of cigarette packaging



Source: Australia's first written submission, para. 133.

2.2.2 Restrictions on advertisement and promotion of tobacco products

2.56. Since 1992, Australia has maintained restrictions and prohibitions concerning advertising and promotion of tobacco products across various media.²⁹⁴ It has also maintained prohibitions on tobacco advertising at the point of sale. As described in paragraph 2.7 above, the NPHT, in its final

²⁹⁰ Information Standard, (Exhibits AUS-128, JE-8), Part 6.

²⁹¹ Information Standard, (Exhibits AUS-128, JE-8), Sections 9.13, 9.14, and 9.24.

²⁹² Information Standard, (Exhibits AUS-128, JE-8), Sections 9.10-9.12.

²⁹³ Competition and Consumer (Tobacco) Amendment (Rotation of Health Warnings) Information Standard 2013 (Cth), (Exhibit AUS-325).

²⁹⁴ This includes restrictions on advertising in various print media; advertisements in film, videos, television or radio; advertising on tickets; the sale or supply or offer or hire of any item containing a tobacco advertisement to the public; displays that could be seen or heard from a public place, or from public transport or workplaces; and advertising of sponsorship. See *Tobacco Advertising Prohibition Act 1992* (Cth), (Exhibits AUS-64, IDN-14), Sections 9, 10(1), and 15; and *Smoking and Tobacco Products Advertisements (Prohibition) Act 1989* (Exhibit AUS-62).

report of June 2009²⁹⁵, identified "[e]nd(ing) all forms of advertising and promotion of tobacco products" as one of 11 "key action areas".²⁹⁶

2.57. In response to the NPHT's recommendations, the Prime Minister and the Minister for Health and Ageing announced reforms to further restrict tobacco advertising and promotion. The reforms announced included the introduction of legislation to restrict internet advertising of tobacco products; working with Australian states and territories to develop an action plan for ending other forms of tobacco promotion, and possible mandatory reporting of promotion expenditure, in the next iteration of the National Tobacco Strategy; and a proposal for legislation concerning the plain packaging of tobacco products.²⁹⁷

2.58. In addition, Australia indicated in these proceedings that legislation prohibiting tobacco advertising may include retailer advertising or over-the-counter word-of-mouth promotion and that some states and territories provide guidelines about what a retailer can say to a customer.²⁹⁸

2.59. In 2012, the *Tobacco Advertising Prohibition Act 1992* (Cth) was amended so as to extend existing tobacco advertisement restrictions to internet and other electronic media (e.g. mobile phones), with the exception of advertising on websites that sell tobacco products.²⁹⁹ Advertisements on these websites must comply with regulations accompanying these amendments in respect of their content, format, and location.³⁰⁰ These amendments took effect on 6 September 2012.³⁰¹

2.60. All Australian states and territories prohibit retailers from selling food, toys or other products designed to resemble tobacco products or that might encourage young people to smoke.³⁰²

2.2.3 Taxation measures

2.61. On 1 November 1999, Australia amended the *Excise Tariff Act 1921* (Cth) such that excise tax was applied to cigarettes, cigars and other tobacco products on a per stick basis (for products in stick form not exceeding 0.8 grams of tobacco per stick), or on a per kilogram basis (for products exceeding 0.8 grams per stick).³⁰³

2.62. In addition to indexation adjustments³⁰⁴, the excise rate has been increased on several occasions. On 29 April 2010, Australia announced an increase in the tobacco excise rate of 25% to

²⁹⁵ NPHT, The Roadmap for Action, (Exhibits AUS-67, JE-14).

²⁹⁶ Australia's first written submission, Annexure C, para. 15. See NPHT, The Roadmap for Action, (Exhibits AUS-67, JE-14), pp. 179-182. See para. 2.67 below.

²⁹⁷ Response to NPHT, The Roadmap for Action, (Exhibits AUS-116, JE-15), pp. 65-66.

²⁹⁸ Australia's first written submission, para. 56 and Annexure C, paras. 25-26. Australia cites the "Guide to the Sale of Tobacco Products in the ACT [Australian Capital Territory]" restricting the ability of retailers to say anything that would constitute the promotion of particular products or of smoking generally and the "Victorian Tobacco Retailer Guide", which provides that if a customer does not request a specific brand the retailer may ask general questions such as "What brand do you want?" or "What flavour are they?" but may not mention a specific brand themselves. See Australia's first written submission, Annexure C, para. 26.

²⁹⁹ *Tobacco Advertising Prohibition Amendment Act 2012* (Cth), (Exhibit AUS-473). See also footnote 311, below.

³⁰⁰ More specifically, online tobacco advertisement should be "presented in a plain, text-only format, without product images, and accompanied by health warnings and age warnings". Australia's first written submission, para. 56; *Tobacco Advertising Prohibition Amendment Regulation 2012* (Cth), (Exhibit AUS-68), Section 8A.

³⁰¹ *Tobacco Advertising Prohibition Amendment Act 2012* (Cth), (Exhibit AUS-473), Section 2.

³⁰² *Tobacco Products Control Act 2006* (WA), (Exhibit AUS-350), Section 106; *Tobacco Act 1927* (ACT), (Exhibit AUS-453), Section 18; *Tobacco Control Act 2002* (NT), (Exhibit AUS-374), Section 46; *Tobacco and Other Smoking Products Act 1998* (Qld), (Exhibit AUS-454), Section 26ZS; *Tobacco Act 1987* (Vic), (Exhibit AUS-455), Sections 15N, 15O(2)(a); *Public Health (Tobacco) Act 2008* (NSW), (Exhibit AUS-404), Section 21; *Public Health Act 1997* (Tas), (Exhibit AUS-456), Section 68A; *Tobacco Products Control Act 1986* (SA), (Exhibit AUS-366), Section 10; *Tobacco Products Regulation Act 1997* (SA), (Exhibit AUS-457), Section 34A(2)(b).

³⁰³ Australia's first written submission, Annexure B, Section D(1); *Excise Tariff Amendment Act (No 1) 2000* (Cth), Schedule 1 (Exhibit AUS-417).

³⁰⁴ *Excise Tariff Amendment (Tobacco) Act 2014* (Cth), (Exhibit HND-86), Section 6AA; *Excise Tariff Working Pages*, (Exhibit IDN-23), p. 4. From 1 March 2014, the indexation of tobacco excise changed from

be applied from 30 April 2010.³⁰⁵ On 1 August 2013, Australia announced four additional 12.5% increases in excise tax, effective on 1 December 2013, 1 September 2014, 1 September 2015, and 1 September 2016.³⁰⁶

2.2.4 Restrictions on the sale of tobacco products

2.63. Australia regulates, mostly through state and territory legislation, what kind of tobacco products may be sold, who can buy and sell and purchase tobacco products, and how they can be sold.³⁰⁷

2.64. The supply of chewing tobacco and snuff has been banned in Australia since 1991. A number of states and territories have also introduced prohibitions on the sale of flavoured cigarettes or fruit or confectionery-flavoured cigarettes, or enacted legislation allowing their prohibition.³⁰⁸

2.65. By 1998, all Australian States and Territories had increased the minimum age limit restricting the sale of cigarettes to persons under 18 years of age.³⁰⁹

2.66. All Australian states also regulate the modalities of sale through vending machines, online and other forms of "indirect sales", or via "mobile sales" in places such as nightclubs or dance events³¹⁰, though these restrictions are not applied uniformly across all states and territories.³¹¹ Some Australian states and territories require tobacco retailers and wholesalers to be licensed.³¹²

bi-annual indexation based on the Consumer Price Index to bi-annual indexation based on average weekly ordinary time earnings. Budget Paper No. 2 – 2013-2014, (Exhibit AUS-266).

³⁰⁵ PM Rudd, Anti-Smoking Action Media Release, (Exhibits AUS-115, HND-4, DOM-52); *Excise Tariff Amendment (Tobacco) Act 2010* (Cth), (Exhibit AUS-418), Schedule 1; and Tobacco Excise Increase PIR, (Exhibits AUS-292, HND-80, DOM-119, CUB-64, IDN-21), paras. 24-26.

³⁰⁶ Tobacco Excise Media Release, (Exhibits AUS-421, HND-85, DOM-114, IDN-5); Statements of the Hon. Chris Bowen MP, Treasurer, and Senator the Hon. Penny Wong, Minister for Finance and Deregulation, (Exhibit AUS-265), p. 33.

³⁰⁷ Australia's first written submission, para. 51 and Annexure B, Section B.

³⁰⁸ Australia's first written submission, para. 51, Annexure B, Section B(3)(b), Annexure C, Section A(5), para. 13; *Tobacco Products Regulation (Prohibited Tobacco Products) Notice 2006* (SA), (Exhibit AUS-362); *Public Health (Tobacco) Act 2008* (NSW), (Exhibit AUS-267), Section 29; *Tobacco Act 1987* (Vic), (Exhibit AUS-363), Sections 15N and 15O; *Tobacco Act 1927* (ACT), (Exhibit AUS-347), Section 21; *Tobacco Products Regulation Act 1997* (SA), (Exhibit AUS-348), Section 34A; *Public Health Act 1997* (Tas), (Exhibit AUS-456), Section 68A; and *Health Legislation Amendment Act 2011* (Qld), (Exhibit AUS-364), Section 72. Western Australia prohibits the display of any package that contains tobacco with fruit or confectionery flavours.

Tobacco Products Control Regulations 2006 (WA), (Exhibit AUS-365), Regulation 33.

³⁰⁹ Australia's first written submission, para. 710 and Annexure B, Section B(2)(a). *Tobacco (Amendment) Act 1990* (ACT), (Exhibit AUS-351), Section 5; *Public Health Act 1991* (NSW), (Exhibit AUS-352), Section 59; *Tobacco Products (Prevention of Supply to Children) Act 1998* (Qld), (Exhibit AUS-353), Schedule (defining "child" as someone under 18 years of age); *Tobacco Products Control (Miscellaneous) Amendment Act 1993* (SA), (Exhibit AUS-354), Section 3(a); *Tobacco Act 1992* (NT), (Exhibit AUS-355), Sections 3, 9; *Public Health Amendment Act 1996* (Tas), (Exhibit AUS-356), Section 4; and *Tobacco (Amendment) Act 1993* (Vic), (Exhibit AUS-357), Section 4. According to Australia, the legal purchase age in Western Australia has been 18 years since 1916. Australia's second written submission, para. 557 fn 623.

³¹⁰ *Tobacco Products Control Act 1986* (SA), (Exhibit AUS-366), Section 11(2); *Tobacco Act 1987* (Vic), (Exhibit AUS-462), Section 13; *Tobacco Advertising Prohibition Act 1991* (NSW), (Exhibit AUS-372), Section 9; *Tobacco (Amendment) Act 1990* (ACT), (Exhibit AUS-351), Section 5; *Tobacco Products (Prevention Of Supply To Children) Act 1998* (Qld), (Exhibit AUS-353), Section 15; *Tobacco Products Control (Miscellaneous) Amendment Act 1993* (SA), (Exhibit AUS-354), Section 8; *Public Health Amendment Act 1996* (Tas), (Exhibit AUS-356), Section 4. The Northern Territory prohibits vending machines except within areas of licensed premises where children are not permitted. *Tobacco Control Act 2002* (NT), (Exhibit AUS-374), Section 26. Western Australia restricts tobacco vending machines to licensed premises or mines amenities. *Tobacco Products Control Act 2006* (WA), (Exhibit AUS-350), Section 27. On 1 September 2006, the ACT banned tobacco vending machines completely. *Tobacco (Vending Machine Ban) Amendment Act 2004* (ACT), (Exhibit AUS-375), Sections 2(2) and 9.

³¹¹ For example, only Western Australia and South Australia prohibit sale by internet, telephone, and facsimile. See *Tobacco Products Control Act 2006* (WA), (Exhibit AUS-376), Section 18; *Tobacco Products Regulation (Miscellaneous) Amendment Act 2007* (SA), (Exhibit AUS-377), Section 4.

³¹² This is the case for the ACT, South Australia, Tasmania, Western Australia and the Northern Territory. See Australia's first written submission, Annexure B, Section B(1); *Tobacco Act 1927* (ACT), (Exhibit AUS-347), Part 7, Sections 61 and 63; *Tobacco Products Regulation Act 1997* (SA), (Exhibit AUS-348), Section

Others have what Australia describes as "'negative' licensing schemes that similarly assist in the enforcement of tobacco laws".³¹³

2.67. All Australian states and territories have implemented requirements concerning the point of sale of tobacco products, including bans on the display of tobacco products and tobacco advertising at retail premises.³¹⁴ Certain exemptions to display bans are maintained in Victoria for specialist tobacconist outlets and duty-free shops³¹⁵, and in Western Australia for specialist tobacconist outlets.³¹⁶ A typical point-of-sale display ban in Australia requires that tobacco products be kept in an opaque, closed cabinet that is inaccessible to consumers and is behind the counter of a retail outlet.³¹⁷

2.68. Australian states and territories also regulate other means through which information about the tobacco products available in a given retail outlet can be communicated to consumers. In all states and territories except Queensland and the Australian Capital Territory (ACT), price boards are visible and display certain information. The information displayed varies from jurisdiction to jurisdiction, as does the size, font, and other features of the board.³¹⁸ Retailers may also, or alternatively, use price tickets.³¹⁹ The information displayed varies from jurisdiction to jurisdiction, and limitations apply to the font and other features of each ticket.

⁶; *Public Health Act 1997* (Tas), (Exhibit AUS-349), Section 74A; *Tobacco Products Control Act 2006* (WA), (Exhibit AUS-350), Sections 16-18; *Tobacco Control Act 2002* (NT), (Exhibit AUS-346), Section 28.

³¹³ Australia's first written submission, Annexure B, Section B(1).

³¹⁴ Australia's first written submission, paras. 56 and 354 and Annexure C, paras. 15-16; *Tobacco Amendment Act 2008* (ACT), (Exhibit AUS-470), Section 10; *Public Health (Tobacco) Act 2008* (NSW), (Exhibit AUS-404), Section 9; *Tobacco Control Legislation Amendment Act 2010* (NT), (Exhibit AUS-395), Section 20; *Hospital and Health Boards Act 2011* (Qld), (Exhibit AUS-471), Sections 26A and 26C; SA Health, "Point of sale restrictions for tobacco retailers", <<http://www.sahealth.sa.gov.au/wps/wcm/connect/public+content/sa+health+internet/protecting+public+health/tobacco+laws+and+businesses/requirements+for+licensed+tobacco+premises/point+of+sale+display+restrictions+for+tobacco+retailers>>, accessed 4 March 2015, (Exhibit AUS-481); Department of Health and Human Services, *Tobacco Retailers Guide and Guidelines for the Sale of Tobacco products*, (February 2012), (Exhibit AUS-477); Department of Health (Vic), "Tobacco Retailers Fact Sheet", October 2010, (Exhibit AUS-478); VIC Department of Health, "Tobacco Retailer Guide", February 2013, (Exhibit AUS-279); *Tobacco Products Control Act 2006* (WA), (Exhibit AUS-376), Section 22; *Tobacco (Amendment) Act 1999* (ACT), (Exhibit AUS-463), Sections 4-5, 12 and 13; *Public Health (Tobacco) Regulation 1999* (NSW), (Exhibit AUS-466), Regulations 8, 9 and 11; *Tobacco Control Regulations 2002* (NT), (Exhibit AUS-385), Regulation 21; *Tobacco and Other Smoking Products (Prevention of Supply to Children) Amendment Act 2001* (Qld) (Exhibit AUS-387), Section 26; *Tobacco Products Variation Regulations 2006* (SA), (Exhibit AUS-467), Regulation 4(3); *Public Health Act 1997* (Tas), (Exhibit AUS-360), Sections 70-72; *Tobacco (Amendment) Act 2000* (Vic), (Exhibit AUS-390), Sections 8 and 9; *Tobacco Products Control Act 2006* (WA), (Exhibit AUS-350), Sections 22-23 and 31-32; *Public Health Amendment (Tobacco Advertising) Act 1997* (NSW), (Exhibit AUS-450), Schedule 1, item 10; *Tobacco Control Act 2002* (NT) (as made), (Exhibit AUS-374), Section 15; and *Tobacco Products Regulation (Further Restrictions) Amendment Act 2004* (SA), (Exhibit AUS-402), Section 15.

³¹⁵ Australia's first written submission, Annexure C, paras. 15-16; Dominican Republic's second written submission, para. 754; Honduras's second written submission, para. 315; and VIC Department of Health, "Tobacco Retailer Guide", February 2013, (Exhibit AUS-279), Section 5.

³¹⁶ Australia's first written submission, Annexure C, paras. 15-16; Dominican Republic's second written submission, para. 754; Honduras's second written submission, para. 315; and *Tobacco Products Control Act 2006* (WA), (Exhibit AUS-376), Sections 22-23.

³¹⁷ Australia's first written submission, para. 354; Dominican Republic's second written submission, para. 755; and *Tobacco in Australia 2012*, CUB excerpts, (Exhibit CUB-13), p. 39.

³¹⁸ See Australia's first written submission, Annexure C, para. 24. See also Tasmanian Department of Health and Human Services, "Tobacco Retailers Guide and Guidelines for the Sale of Tobacco products", (Exhibit AUS-477); Department of Health (Vic), "Tobacco Retailers Fact Sheet", October 2010, (Exhibit AUS-478); and VIC Department of Health, "Tobacco Retailer Guide", February 2013, (Exhibit AUS-279); Department of Health (NSW), *Retailer Factsheet 5, "Ban on Display of Tobacco and Smoking Products in Retail Outlets from 1 July 2013"*, May 2013, (Exhibit AUS-479); Queensland Government, "Requirements for retailers", October 2011, (Exhibit AUS-480); SA Health, "Point of sale restrictions for tobacco retailers" (Exhibit AUS-481); WA Department of Health, "Tobacco Products Control Act 2006 Guideline: Price Tickets", (Exhibit AUS-482); WA Department of Health, "Retailer Fact Sheet No 2: New Tobacco Display Laws for all Retailers", October 2010, (Exhibit AUS-483); NT Government, "Displays and Point of Sale Banning Tobacco Retail Displays, Frequently Asked Questions", 2010, (Exhibit AUS-484); and Department of Health (ACT), "Guide to the Sale of Smoking Products in the ACT", May 2012, (Exhibit AUS-485).

³¹⁹ Australia's first written submission, Annexure C, para. 24. See also Tasmanian Department of Health and Human Services, "Tobacco Retailers Guide and Guidelines for the Sale of Tobacco products", February

2.69. A number of states and territories have different requirements for the storage or display of cigars. For example, in Queensland, customers may view cigars in a humidified room, accompanied by the tobacco retailer. In Victoria, cigars may be displayed in a humidor. In Western Australia, certain tobacco retailers may keep cigars in cigar cabinets. New South Wales (NSW) and Western Australia allow tobacco retailers to open cigar packages to sell single cigars. Western Australia permits additional signage to provide information about the availability and price of cigars in a cigar cabinet.³²⁰

2.2.5 Other measures

2.70. Full or partial bans on the consumption of tobacco products in various locations have also been implemented in Australia at the Commonwealth and state and territory levels. These bans apply in various places, including enclosed public places, certain outdoor public areas (outdoor eating areas, beaches, outdoor swimming areas and around playground equipment, areas used for outdoor spectacles and events), airplanes, train stations, vehicles carrying minors, restaurants, bars, workplaces, cafes, shopping and community centres, public transport, bus stops, taxi ranks, and wharves.³²¹

2.71. The Australian Government has undertaken to invest AUD 135 million in anti-smoking social marketing campaigns between 2009 and 2016.³²² It has also invested in campaigns that use different media (such as direct mail and online resources) and campaigns targeting certain groups

2012, (Exhibit AUS-477); Department of Health (Vic), "Tobacco Retailers Fact Sheet", October 2010, (Exhibit AUS-478); VIC Department of Health, "Tobacco Retailer Guide", February 2013, (Exhibit AUS-279); Department of Health (NSW), Retailer Factsheet 5, "Ban on Display of Tobacco and Smoking Products in Retail Outlets from 1 July 2013", May 2013, (Exhibit AUS-479); Queensland Government, "Requirements for retailers", October 2011, (Exhibit AUS-480); SA Health, "Point of sale restrictions for tobacco retailers", (Exhibit AUS-481); WA Department of Health, "Tobacco Products Control Act 2006 Guideline: Price Tickets", (Exhibit AUS-482); WA Department of Health, "Retailer Fact Sheet No 2: New Tobacco Display Laws for all Restailers", October 2010, (Exhibit AUS-483); NT Government, "Displays and Point of Sale Banning Tobacco Retail Displays, Frequently Asked Questions", 2010, (Exhibit AUS-484); and Department of Health (ACT), "Guide to the Sale of Smoking Products in the ACT", May 2012, (Exhibit AUS-485).

³²⁰ Australia's first written submission, Annexure C, Section B(4), paras. 27-28. See, with respect to NSW, *Public Health (Tobacco) Act 2008* (NSW), (Exhibit AUS-267), Section 6(3).

³²¹ These restrictions are not uniformly applicable across all states and territories. See Australia's first written submission, Annexure B, Section C. See also *Air Navigation Regulations (Amendment) 1987* (Cth), (Exhibit AUS-378); *Air Navigation Regulations (Amendment) 1990* (Cth), (Exhibit AUS-379); *Smoke-free Areas (Enclosed Public Places) Act 1994* (ACT), (Exhibit AUS-383), Section 5; *Tobacco Control Act 2002* (NT), (Exhibit AUS-374), Sections 5, 7, 9, 11; *Tobacco Control Regulations 2002* (NT), (Exhibit AUS-385), Regulation 11; *Smoke-Free Environment Act 2000* (NSW), (Exhibit AUS-386), Sections 6, 7(1), Schedule 1; *Tobacco and Other Smoking Products (Prevention of Supply to Children) Amendment Act 2001* (Qld), (Exhibit AUS-387), Section 26, Part 2B; *Tobacco Products Regulation Act 1997* (SA), (Exhibit AUS-388), Section 47; *Public Health Amendment (Smoke-free areas) Act 2001* (Tas), (Exhibit AUS-389), Section 5; *Tobacco (Amendment) Act 2000* (Vic), (Exhibit AUS-390), Section 7; *Occupational Safety and Health Amendment Regulations (No 2) 1997* (WA), (Exhibit AUS-391), Regulation 6; *Health (Smoking in Enclosed Public Places) Regulations 1999* (WA), (Exhibit AUS-392), Regulations 4-10; *Smoking (Prohibition in Enclosed Public Places) Amendment Act 2009* (ACT), (Exhibit AUS-393), Section 11; *Tobacco Legislation Amendment Act 2012* (NSW), (Exhibit AUS-394), Schedule 1 item 8; *Tobacco Control Legislation Amendment Act 2010* (NT), (Exhibit AUS-395), Section 16-18; *Tobacco and Other Smoking Products Amendment Act 2004* (Qld), (Exhibit AUS-396), Section 40; *Tobacco Products Regulation (Further Restrictions) Amendment Act 2012* (SA), (Exhibit AUS-397), Section 4; *Public Health Amendment Act 2004* (Tas), (Exhibit AUS-398), Section 6; *Tobacco (Amendment) Act 2005* (Vic), (Exhibit AUS-399), Sections 5 and 24; *Tobacco Products Control Amendment Act 2009* (WA), (Exhibit AUS-400), Section 9; *Smoking (Prohibition in Enclosed Public Places) Act 2003* (ACT) (as made), (Exhibit AUS-401), Section 6; *Tobacco Products Regulation (Further Restrictions) Amendment Act 2004* (SA), (Exhibit AUS-402), Section 17; *Tobacco Products Regulation (Smoking in Cars) Amendment Act 2007* (SA), (Exhibit AUS-403); *Public Health (Tobacco) Act 2008* (NSW), (Exhibit AUS-404), Section 30; *Public Health Amendment Act 2007* (Tas), (Exhibit AUS-405), Section 4; *Tobacco Amendment (Protection of Children) Act 2009* (Vic), (Exhibit AUS-406), Section 19; *Health and Other Legislation Amendment Act 2009* (Qld), (Exhibit AUS-407), Sections 180 and 181; *Smoking in Cars with Children (Prohibition) Act 2011* (ACT), (Exhibit AUS-408), Section 7; *Tobacco and Other Smoking Products Regulation 2010* (Qld), (Exhibit AUS-409), Regulations 14-15, Schedules 1-2; *Public Health Amendment Act 2011* (Tas), (Exhibit AUS-410), Section 12; *Tobacco Products (Smoking Bans in Public Areas – Longer Term) Regulations 2012* (SA) (AUS-411), Regulation 4; and *Tobacco Amendment (Smoking at Patrolled Beaches) Act 2012* (Vic), (Exhibit AUS-412), Section 3.

³²² In 1997, the Australian Government initiated a mass media anti-smoking campaign, the "National Tobacco Campaign" (NTC). Background Paper, National Tobacco Strategy 1999 to 2002-03, (Exhibit AUS-435), para. 4.7; Australia's National Tobacco Campaign: Evaluation Report, (Exhibit AUS-436).

and sectors of the population (for example, pregnant women, culturally and linguistically diverse groups, prisoners, people with mental illness, socially disadvantaged groups, and Aboriginal and Torres Strait Islander communities).³²³

2.72. The Australian Government has implemented measures to provide access to nicotine replacement therapies and other smoking cessation medicines (such as nicotine patches and gums).³²⁴ It has enacted several initiatives that target Aboriginal and Torres Strait Islander communities.³²⁵ All Australian states and territories have put in place "Quitlines" and other smoking cessation support services.³²⁶

2.73. In 2000, the Australian Government introduced measures with respect to illicit tobacco trade, which created offences and penalties for unlicensed manufacture, production, possession, dealing with or moving tobacco seed, tobacco plant or tobacco leaf.³²⁷ In 2012, the Australian Government introduced legislation that created criminal offences under the *Customs Act 1901* specifically in relation to the smuggling of tobacco products.³²⁸

2.3 Protection of trademarks and GIs in Australia

2.74. In the course of the proceedings, the parties have referred to various aspects of the framework for the protection of trademarks and GIs in Australia. General aspects of this framework are described below.

2.75. Trademarks and GIs are protected in Australia through a range of mechanisms, including statutory protections under the TM Act³²⁹, other statutory protections against unfair competition, and common law actions such as passing off that protect the reputation associated with a trademark.

2.76. The TM Act establishes the legal requirements for the registration of trademarks for goods and services (which may, as discussed below, also include signs that constitute GIs). It also provides for the corresponding rights accorded to owners and authorised users of registered trademarks.

2.77. Section 17 of the TM Act defines a trademark as:

[A] sign used, or intended to be used, to distinguish goods or services dealt with or provided in the course of trade by a person from goods or services so dealt with or provided by another person.³³⁰

2.78. The TM Act defines a "sign" as including "any letter, word, name, signature, numeral, device, brand, heading, label, ticket, aspect of packaging, shape, colour, sound or scent", or any combination thereof.³³¹

2.79. A trademark must be registered unless the application is rejected. An application must be rejected if the trademark consists of or includes a sign prohibited under the Regulations³³²; cannot be represented graphically³³³; is not capable of distinguishing between goods and services of the

³²³ Response to NPHT, The Roadmap for Action, (Exhibits AUS-116, JE-15), p. 10-11.

³²⁴ Australian Department of Health and Ageing, Pharmaceutical Benefits Scheme, "New Listings and Changes 1 January 2012", (Exhibit AUS-443).

³²⁵ Australia's first written submission, Annexure B, Section F(6).

³²⁶ "Quitlines" are smoking cessation helplines. See Young et al. 2014, (Exhibits AUS-214, JE-24(67), DOM-285), p. 29.

³²⁷ *Excise Amendment (Compliance Improvement) Act 2000* (Cth) (Exhibit AUS-426); and *Excise Act 1901* (Cth), (Exhibit AUS-428), Sections 25, 28, 33, 117C-117H.

³²⁸ *Customs Act 1901* (Cth), (Exhibit AUS-429), Section 233BABAD.

³²⁹ *Trade Marks Act 1995* (Cth), (TM Act), (Exhibits JE-6). Exhibit JE-6 includes all amendments to the TM Act through Act No. 13 of 2013. Australia provided a version of the TM Act current through Act No. 174 of 2011 as Exhibit AUS-244.

³³⁰ TM Act, (Exhibit JE-6), Section 17.

³³¹ TM Act, (Exhibit JE-6), Section 6.

³³² TM Act, (Exhibit JE-6), Section 39.

³³³ TM Act, (Exhibit JE-6), Section 40.

applicant and those of other persons³³⁴; contains or consists of scandalous matter or its use would be contrary to law³³⁵; is likely to deceive or cause confusion³³⁶; or is substantially identical or deceptively similar to a prior registered trademark.³³⁷ The TM Act makes the registrability of non-inherently distinctive marks such as colours dependent on distinctiveness acquired through use.³³⁸

2.80. The registration of a trademark can also be opposed on these grounds³³⁹ as well as certain additional grounds.³⁴⁰

2.81. The registration of a trademark expires ten years after the filing date³⁴¹, unless renewed.³⁴² The registration of a trademark may be cancelled, revoked, amended and the Register may be rectified under specific circumstances.³⁴³ A trademark owner can oppose an application for removal for non-use in "circumstances (whether affecting traders generally or only the registered owner of the trade mark) that were an obstacle to use of the trade mark during that period".³⁴⁴

2.82. Section 20 of the TM Act states that the owner of a registered trademark has the "exclusive rights" "to use", and "to authorise other persons to use", that trademark in relation to the goods and/or services in respect of which the trademark was registered.³⁴⁵ They also include "the right to obtain relief under this Act if the trade mark has been infringed"³⁴⁶ as well as the right to assign or transfer the trademark.³⁴⁷ Under the TM Act, a person infringes a registered trademark if the person uses as a trademark a sign that is substantially identical with, or deceptively similar to, the trademark in relation to (a) goods or services in respect of which the trademark is registered; (b) goods or services of the same description as those in respect of which the trademark is registered; (c) services that are closely related to the registered goods; or (d) goods that are closely related to the registered services.³⁴⁸

2.83. In addition to the rights accorded to registered trademarks under the TM Act, owners of trademarks that are "well known in Australia" may pursue infringement action against unauthorized use of that sign, or of substantially identical or deceptively similar signs, by third parties if certain conditions are met.³⁴⁹ Owners of well-known trademarks may pursue

³³⁴ TM Act, (Exhibit JE-6), Section 41.

³³⁵ TM Act, (Exhibit JE-6), Section 42.

³³⁶ TM Act, (Exhibit JE-6), Section 43.

³³⁷ TM Act, (Exhibit JE-6), Section 44. The application must also be rejected if it was not made in accordance with the TM Act or if it is successfully opposed. See TM Act, (Exhibit JE-6), Sections 27(1), 33.

³³⁸ TM Act, (Exhibit JE-6), Section 41(3).

³³⁹ TM Act, (Exhibit JE-6), Section 57.

³⁴⁰ Additional grounds include: if the applicant is not the owner of the trademark; the applicant does not intend to use the trademark; another trademark had acquired a reputation in Australia and the use of the trademark being registered would be likely to deceive or cause confusion, or the trademark contains or consists of a false geographical indication. TM Act, (Exhibit JE-6), Sections 58-61.

³⁴¹ TM Act, (Exhibit JE-6), Section 72(3).

³⁴² TM Act, (Exhibit JE-6), Part 7, Division 2.

³⁴³ TM Act, (Exhibit JE-6), Part 8. For instance, a registered trademark (other than a certification trademark) may be removed from the Register for non-use where, at the time of registration, the trademark was never intended to be used in Australia. It may also be removed where it has not been used in Australia for a continuous period of three years or more. TM Act, (Exhibit JE-6), Sections 92(4)(a) and 92(4)(b).

³⁴⁴ TM Act, (Exhibit JE-6), Section 100(3)(c).

³⁴⁵ TM Act, (Exhibit JE-6), Section 20(1).

³⁴⁶ TM Act, (Exhibit JE-6), Section 20(2).

³⁴⁷ TM Act, (Exhibit JE-6), Section 106.

³⁴⁸ TM Act, (Exhibit JE-6), Sections 120(1)-120(2).

³⁴⁹ TM Act, (Exhibit JE-6), Section 120(3). The Act provides that a person infringes a registered trademark if:

- (a) the trade mark is well known in Australia; and
- (b) the person uses as a trade mark a sign that is substantially identical with, or deceptively similar to, the trade mark in relation to:
 - (i) goods (**unrelated goods**) that are not of the same description as that of the goods in respect of which the trade mark is registered (**registered goods**) or are not closely related to services in respect of which the trade mark is registered (**registered services**); or
 - (ii) services (**unrelated services**) that are not of the same description as that of the registered services or are not closely related to registered goods;

infringement actions beyond those available to owners of trademarks that are not well known.³⁵⁰ In deciding whether a trademark is "well known in Australia", "one must take account of the extent to which the trade mark is known within the relevant sector of the public, whether as a result of the promotion of the trade mark or for any other reason".³⁵¹

2.84. Under the TM Act, a sign that constitutes a GI may be eligible for registration as a trademark in Australia. Pursuant to the TM Act, a GI is defined as follows:

[I]n relation to goods, means a sign that identifies the goods as originating in a country, or in a region or locality in that country, where a given quality, reputation or other characteristic of the goods is essentially attributable to their geographical origin.³⁵²

2.85. To the extent that GIs are registered as trademarks in Australia, they are generally registered as certification trademarks³⁵³, which are defined as:

[A] sign used, or intended to be used, to distinguish goods or services: (a) dealt with or provided in the course of trade; and (b) certified by a person ... or by another person approved by that person, in relation to quality, accuracy or some other characteristic, including (in the case of goods) origin, material or mode of manufacture; from other goods or services dealt with or provided in the course of trade but not so certified.³⁵⁴

2.86. A person who has filed an application for the registration of a certification trademark must, in accordance with the regulations, file a copy of the rules governing the use of the certification trademark.³⁵⁵ The Registrar may only reject an application for registration of a certification trademark on certain grounds, which are, with some exceptions, the same as those applied to for other trademark registration applications.³⁵⁶ Certification trademarks are subject to the same provisions concerning duration and renewal as trademarks.³⁵⁷ However, a certification trademark is not liable to be removed from the register for non-use, because the owner of the certification trademark is not required to use the trademark.³⁵⁸

2.87. Collective trademarks may also provide protection for signs that are GIs in Australia. Most of the provisions of the TM Act concerning trademarks, including registration and grounds of opposition, apply to collective trademarks.³⁵⁹ A collective trademark is defined under the TM Act as:

-
- (c) because the trade mark is well known, the sign would be likely to be taken as indicating a connection between the unrelated goods or services and the registered owner of the trade mark; and
 - (d) for that reason, the interests of the registered owner are likely to be adversely affected.

Ibid. (emphasis original)

³⁵⁰ Compare TM Act, (Exhibit JE-6), Section 120(3), with ibid. Sections 120(1) and 120(2).

³⁵¹ TM Act, (Exhibit JE-6), Section 120(4).

³⁵² TM Act, (Exhibit JE-6), Section 6.

³⁵³ Australia's first written submission, Annexure D, para. 8.

³⁵⁴ TM Act, (Exhibit JE-6), Section 169.

³⁵⁵ TM Act, (Exhibit JE-6), Section 173.

³⁵⁶ These exceptions are the following: (a) the application cannot be rejected on the ground that the trademark is not capable of distinguishing the designated goods or services from the goods or services of other persons (rather, the relevant ground is that the trademark "is not capable of distinguishing goods or services certified by the applicant ... from goods or services not so certified"); (b) an applicant for registration of a certification trademark need not itself intend to use the trademark; and (c) a certificate from the Australian Competition and Consumer Commission (ACCC), as per Section 175(2), is required. TM Act, (Exhibit JE-6), Sections 170, 176(1)(c), and 177.

³⁵⁷ TM Act, (Exhibit JE-6), Section 170. See also Part 7, Division 2.

³⁵⁸ TM Act, (Exhibit JE-6), Section 170. See also fn 343 above.

³⁵⁹ TM Act, (Exhibit JE-6), Section 163. There are some exceptions and variations, for example, the use of a registered collective trademark by a member of the association that is the registered owner of the collective trademark is taken to be a use of the collective trademark by the registered owner. See ibid. Section 163(2)(b).

[A] sign used, or intended to be used, in relation to goods or services dealt with or provided in the course of trade by members of an association to distinguish those goods or services from goods or services so dealt with or provided by persons who are not members of the association.³⁶⁰

2.88. Finally, in the same way as with other registered trademarks, an owner of a registered certification trademark or registered collective trademark is able to pursue infringement action against unauthorized use of a sign by third parties.³⁶¹

2.89. Australia also maintains protection with respect to trademarks and GIs under other areas of Australian law, including through consumer protection measures addressing misleading representations in Australia.³⁶²

2.90. The *Competition and Consumer Act 2010* (Cth) (CCA) establishes a general ban on misleading or deceptive conduct in trade or commerce. The Australian Consumer Law (ACL) constitutes Schedule 2 of the CCA. Section 18 of the ACL provides that "[a] person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive".³⁶³ Similarly, Section 29(1) prohibits the making of a range of false or misleading representations in connection with the supply, possible supply or promotion of goods or services, including statements concerning the place of origin of goods.³⁶⁴ Sections 33 and 34 address goods and services, respectively, and provide that a person must not, in trade or commerce, engage in conduct "that is liable to mislead the public as to the nature, ... the characteristics ... of any goods".³⁶⁵

2.91. A special division of the Australian Competition and Consumer Commission (ACCC) undertakes investigations of possible breaches of the ACL. The ACCC has a number of enforcement powers, including the power to initiate proceedings in the Federal Court of Australia.³⁶⁶ Practices in contravention of the ACL may give rise to both criminal and civil liabilities, including damages, injunction and rescission of contract.³⁶⁷

2.92. Under the *Commerce Trade Descriptions Act 1905* (Cth), Australia also prohibits the importation of any good bearing a false trade description.³⁶⁸ A false trade description is defined as "a trade description which, by reason of anything contained therein or omitted therefrom, is false or likely to mislead in a material respect as regards the goods to which it is applied, and includes every alteration of a trade description, whether by way of addition, effacement, or otherwise,

³⁶⁰ TM Act, (Exhibit JE-6), Section 162.

³⁶¹ TM Act, (Exhibit JE-6), Sections 163 and 170. However, with respect to certification trademarks, the registered owner must exercise his or her exclusive rights "only in accordance with the rules governing the use of the certification trade mark". See Section 171. With respect to collective trademarks, a member of an association in whose name a collective trademark is registered does not have the right to prevent another member of the association from using the collective trademark in accordance with the rules of the association. See *ibid*. Section 165.

³⁶² We note, but do not address, certain protections included in the *Australian Grape and Wine Authority Act 2013* (Cth), (Exhibit AUS-490), and the *Australia New Zealand Food Standards Code, Standard 1.2.11 Country of Origin Labelling (Australia Only)* (Cth), (Exhibit AUS-568). These measures address, respectively, wine and certain food items, which are not at issue in these proceedings.

³⁶³ *Competition and Consumer Act 2010* (Cth), Schedule 2 (Australian Consumer Law), (ACL), (Exhibit DOM-110), Section 18. The Dominican Republic's exhibit includes amendments through Act No. 83 of 2014. We note that Australia and Honduras also submitted as exhibits excerpts from the *Competition and Consumer Act 2010* (Cth), which included amendments up to Act No. 148 of 2010. See Exhibits AUS-127 and HND-66.

³⁶⁴ ACL, (Exhibit DOM-110), Section 29(1).

³⁶⁵ ACL, (Exhibit DOM-110), Sections 33-34.

³⁶⁶ D. Shavin, "Prohibitions against misleading and deceptive conduct pursuant to the Australian Consumer Law, and the Australian Competition & Consumer Commission's history of effective enforcement thereof", 26 September 2014, (Shavin Report), (Exhibit DOM/HND-1), paras. 73-74.

³⁶⁷ Australia's first written submission, Annexure D, para. 20. The ACCC has used its power in the context of tobacco products, specifically with respect to cigarettes marketed as "light", "mild", "medium", "ultra-light", and "micro". The ACCC concluded that the use of these representations were misleading and likely to breach Section 52 of the *Trade Practices Act 1974* (Cth) (now Section 18 of the ACL, (Exhibit DOM-110)). See R. Sims, "Report Concerning the Australia Consumer Law and the Packaging of Tobacco Products", 24 February 2015, (Sims Report), (Exhibit AUS-22) (SCI), para. 4.9.

³⁶⁸ *Commerce (Trade Descriptions) Act 1905* (Cth), (CTD Act), (Exhibit AUS-248), Section 9.

which makes the description false or likely to mislead in a material respect".³⁶⁹ A "trade description" means any description, statement, indication, or suggestion, direct or indirect, as to, *inter alia*, the country or place in or at which the goods were made or produced.³⁷⁰

2.93. Australia also maintains "common law" protection for the reputation of a business through the tort of "passing off", which can provide additional protection against misrepresentations. Australia has described the elements of the tort of passing off as "(a) a misrepresentation (b) by a trader in the course of trade to prospective customers of the trader (c) calculated to injure the business reputation of another trader, and (d) resulting in damage or the probability of damage to that other trader's business reputation".³⁷¹ Neither trademarks nor GIs are protected *per se* under this tort, though they may be probative with respect to the existence of, and damage to, a trader's reputation in the relevant market.³⁷²

2.4 The FCTC

2.94. The FCTC, negotiated under the auspices of the WHO, has been referred to by the parties in the course of the proceedings. As described above, the TPP Act states that one of its objectives is "to give effect to certain obligations that Australia has as a party to the Convention on Tobacco Control".³⁷³

2.95. This section provides a general description of the FCTC and relevant guidelines adopted in the framework of the FCTC, taking into account information provided to the Panel by the WHO and FCTC Secretariat.³⁷⁴

2.4.1 Background

2.96. In 1995, the 49th World Health Assembly (WHA) of the WHO launched the negotiation of an international tobacco control instrument.³⁷⁵ These negotiations concluded with the adoption of the FCTC by the WHA in May 2003.³⁷⁶ The Convention entered into force in February 2005.³⁷⁷

2.97. The FCTC has 180 parties (FCTC Parties).³⁷⁸ 149 of the FCTC Parties are also Members of the World Trade Organization (WTO). Among the five parties to these disputes, Australia and Honduras have signed and ratified the FCTC. Cuba has signed, but not ratified, the FCTC, and the Dominican Republic and Indonesia are not signatories.³⁷⁹ Thus Cuba, the Dominican Republic and Indonesia are not FCTC Parties.

2.4.2 Structure and governance

2.98. The FCTC is served by a Secretariat, which is hosted in the WHO, with an independent workplan and budget adopted by the COP.³⁸⁰ The main functions of the FCTC Secretariat are governed by the FCTC itself as well as COP decisions.³⁸¹

³⁶⁹ CTD Act, (Exhibit AUS-248), Section 3.

³⁷⁰ CTD Act, (Exhibit AUS-248), Section 3.

³⁷¹ Australia's first written submission, para. 458 and Annexure D, para. 23 (referring to Shanahan's Law of Trade Marks, (Exhibit AUS-104), p. 688).

³⁷² Shanahan's Law of Trade Marks, (Exhibit AUS-104), pp. 687-699.

³⁷³ TPP Act, (Exhibits JE-1, AUS-1), Section 3.

³⁷⁴ See discussion in sections 1.6.5 and 1.6.7.1, above.

³⁷⁵ Pursuant to Article 19 of the WHO Constitution, the WHA is empowered to adopt "conventions and agreements with respect to any matter within the competence of the Organization". WHO/FCTC Request for Permission to Submit Information, (Exhibit AUS-42 (revised)), para. 7.

³⁷⁶ FCTC, (Exhibits AUS-44, JE-19), Annex 2.

³⁷⁷ FCTC, (Exhibits AUS-44, JE-19), Foreword, p. vi.

³⁷⁸ WHO/FCTC Request for Permission to Submit Information, (Exhibit AUS-42 (revised)), para. 7; WHO/FCTC *amici curiae* brief, (Exhibit AUS-42 (revised)), para. 12.

³⁷⁹ WHO/FCTC *amici curiae* brief, (Exhibit AUS-42 (revised)), para. 12.

³⁸⁰ FCTC, (Exhibits AUS-44, JE-19), Article 24; and WHO/FCTC Request for Permission to Submit Information, (Exhibit AUS-42 (revised)), paras. 8 and 12.

³⁸¹ The FCTC Secretariat's functions are (a) to make arrangements for sessions of the COP and any subsidiary bodies and to provide them with services as required; (b) to transmit reports received by it pursuant

2.99. The FCTC COP is the governing body of, and comprises all parties to, the FCTC.³⁸² The FCTC COP, *inter alia*, "keep[s] under regular review the implementation of the Convention and take[s] the decisions necessary to promote its effective implementation".³⁸³ It may also adopt protocols³⁸⁴, annexes³⁸⁵ and amendments³⁸⁶ to the FCTC as well as other documents and instruments, such as guidelines with respect to particular topics.³⁸⁷ International intergovernmental organizations and nongovernmental organizations "whose aims and activities are in conformity with the spirit, purpose and principles" of the FCTC may be granted "observer status" by the COP. The Rules of Procedure of the COP limit participation by tobacco companies other than through the relevant bodies of States.³⁸⁸

2.4.3 Selected provisions of the FCTC

2.100. The FCTC's objective, as set out in Article 3, is to:

[P]rotect present and future generations from the devastating health, social, environmental and economic consequences of tobacco consumption and exposure to tobacco smoke by providing a framework for tobacco control measures to be implemented by the Parties at the national, regional and international levels in order to reduce continually and substantially the prevalence of tobacco use and exposure to tobacco smoke.³⁸⁹

2.101. Article 5, entitled "General Obligations", provides the following in its first paragraph:

Each Party shall develop, implement, periodically update and review comprehensive multisectoral national tobacco control strategies, plans and programmes in accordance with this Convention and the Protocols to which it is a party.³⁹⁰

2.102. The Convention defines "tobacco control" as "a range of supply, demand and harm reduction strategies that aim to improve the health of a population by eliminating or reducing their consumption of tobacco products and exposure to tobacco smoke".³⁹¹

2.103. Part III of the Convention, entitled "Measures relating to the reduction of demand for tobacco", contains provisions entitled "Packaging and labelling of tobacco products" (Article 11) and "Tobacco advertising, promotion and sponsorship" (Article 13).

2.104. Article 11 addresses "packaging and labelling of tobacco products" and provides as follows:

to the Convention; (c) to provide support to the Parties, particularly developing country Parties and Parties with economies in transition, on request, in the compilation and communication of information required in accordance with the provisions of the Convention; (d) to prepare reports on its activities under the Convention under the guidance of the COP and submit them to the COP; (e) to ensure, under the guidance of the COP, the necessary coordination with the competent international and regional intergovernmental organizations and other bodies; (f) to enter, under the guidance of the COP, into such administrative or contractual arrangements as may be required for the effective discharge of its functions; and (g) to perform other secretariat functions specified by the Convention and by any of its protocols and such other functions as may be determined by the COP. FCTC, (Exhibits AUS-44, JE-19), Article 24.

³⁸² FCTC, (Exhibits AUS-44, JE-19), Article 23; WHO/FCTC Request for Permission to Submit Information, (Exhibit AUS-42 (revised)), para. 8.

³⁸³ FCTC, (Exhibits AUS-44, JE-19), Article 23.5.

³⁸⁴ FCTC Protocols are only binding on parties to the protocol in question. FCTC, (Exhibits AUS-44, JE-19), Article 33.

³⁸⁵ FCTC, (Exhibits AUS-44, JE-19), Article 29.

³⁸⁶ FCTC, (Exhibits AUS-44, JE-19), Article 28.

³⁸⁷ For example, with respect to "non-price measures to reduce the demand for tobacco", the COP "shall propose appropriate guidelines for the implementation of the provisions of these Articles". FCTC, (Exhibits AUS-44, JE-19), Article 7.

³⁸⁸ FCTC, (Exhibits AUS-44, JE-19), Article 23.6; WHO/FCTC Additional Information to Panel, paras. 26-30, at fn 63 above.

³⁸⁹ FCTC, (Exhibits AUS-44, JE-19), Article 3.

³⁹⁰ FCTC, (Exhibits AUS-44, JE-19), Article 5.1.

³⁹¹ FCTC, (Exhibits AUS-44, JE-19), Article 1(d).

Article 11

Packaging and labelling of tobacco products

1. Each Party shall, within a period of three years after entry into force of this Convention for that Party, adopt and implement, in accordance with its national law, effective measures to ensure that:

(a) tobacco product packaging and labelling do not promote a tobacco product by any means that are false, misleading, deceptive or likely to create an erroneous impression about its characteristics, health effects, hazards or emissions, including any term, descriptor, trademark, figurative or any other sign that directly or indirectly creates the false impression that a particular tobacco product is less harmful than other tobacco products. These may include terms such as "low tar", "light", "ultra-light", or "mild"; and

(b) each unit packet and package of tobacco products and any outside packaging and labelling of such products also carry health warnings describing the harmful effects of tobacco use, and may include other appropriate messages. These warnings and messages:

(i) shall be approved by the competent national authority,

(ii) shall be rotating,

(iii) shall be large, clear, visible and legible,

(iv) should be 50% or more of the principal display areas but shall be no less than 30% of the principal display areas,

(v) may be in the form of or include pictures or pictograms.

2. Each unit packet and package of tobacco products and any outside packaging and labelling of such products shall, in addition to the warnings specified in paragraph 1(b) of this Article, contain information on relevant constituents and emissions of tobacco products as defined by national authorities.

3. Each Party shall require that the warnings and other textual information specified in paragraphs 1(b) and paragraph 2 of this Article will appear on each unit packet and package of tobacco products and any outside packaging and labelling of such products in its principal language or languages.

4. For the purposes of this Article, the term "outside packaging and labelling" in relation to tobacco products applies to any packaging and labelling used in the retail sale of the product.³⁹²

2.105. Article 13 addresses "tobacco advertising, promotion and sponsorship" and reads as follows:

Article 13

Tobacco advertising, promotion and sponsorship

1. Parties recognize that a comprehensive ban on advertising, promotion and sponsorship would reduce the consumption of tobacco products.

2. Each Party shall, in accordance with its constitution or constitutional principles, undertake a comprehensive ban of all tobacco advertising, promotion and

³⁹² FCTC, (Exhibits AUS-44, JE-19), Article 11.

sponsorship. This shall include, subject to the legal environment and technical means available to that Party, a comprehensive ban on cross-border advertising, promotion and sponsorship originating from its territory. In this respect, within the period of five years after entry into force of this Convention for that Party, each Party shall undertake appropriate legislative, executive, administrative and/or other measures and report accordingly in conformity with Article 21.

3. A Party that is not in a position to undertake a comprehensive ban due to its constitution or constitutional principles shall apply restrictions on all tobacco advertising, promotion and sponsorship. This shall include, subject to the legal environment and technical means available to that Party, restrictions or a comprehensive ban on advertising, promotion and sponsorship originating from its territory with cross-border effects. In this respect, each Party shall undertake appropriate legislative, executive, administrative and/or other measures and report accordingly in conformity with Article 21.

4. As a minimum, and in accordance with its constitution or constitutional principles, each Party shall:

- (a) prohibit all forms of tobacco advertising, promotion and sponsorship that promote a tobacco product by any means that are false, misleading or deceptive or likely to create an erroneous impression about its characteristics, health effects, hazards or emissions;
- (b) require that health or other appropriate warnings or messages accompany all tobacco advertising and, as appropriate, promotion and sponsorship;
- (c) restrict the use of direct or indirect incentives that encourage the purchase of tobacco products by the public;
- (d) require, if it does not have a comprehensive ban, the disclosure to relevant governmental authorities of expenditures by the tobacco industry on advertising, promotion and sponsorship not yet prohibited. Those authorities may decide to make those figures available, subject to national law, to the public and to the Conference of the Parties, pursuant to Article 21;
- (e) undertake a comprehensive ban or, in the case of a Party that is not in a position to undertake a comprehensive ban due to its constitution or constitutional principles, restrict tobacco advertising, promotion and sponsorship on radio, television, print media and, as appropriate, other media, such as the internet, within a period of five years; and
- (f) prohibit, or in the case of a Party that is not in a position to prohibit due to its constitution or constitutional principles restrict, tobacco sponsorship of international events, activities and/or participants therein.

5. Parties are encouraged to implement measures beyond the obligations set out in paragraph 4.

6. Parties shall cooperate in the development of technologies and other means necessary to facilitate the elimination of cross-border advertising.

7. Parties which have a ban on certain forms of tobacco advertising, promotion and sponsorship have the sovereign right to ban those forms of cross-border tobacco advertising, promotion and sponsorship entering their territory and to impose equal penalties as those applicable to domestic advertising, promotion and sponsorship originating from their territory in accordance with their national law. This paragraph does not endorse or approve of any particular penalty.

8. Parties shall consider the elaboration of a protocol setting out appropriate measures that require international collaboration for a comprehensive ban on cross-border advertising, promotion and sponsorship.³⁹³

2.4.4 FCTC Guidelines

2.106. The FCTC provides that the COP shall propose guidelines for the implementation of the provisions of Articles 8 to 13 of the FCTC. FCTC Guidelines are "intended to assist the Parties in meeting their obligations and in increasing the effectiveness of measures adopted".³⁹⁴

2.107. The FCTC COP adopted FCTC Guidelines for the Implementation of Article 11 (Article 11 FCTC Guidelines) and FCTC Guidelines for the Implementation of Article 13 (Article 13 FCTC Guidelines) in November 2008.³⁹⁵ Although "plain packaging" is not referred to in Articles 11 and 13 of the FCTC, it is referred to in both of these Guidelines.³⁹⁶

2.108. The Article 11 FCTC Guidelines, entitled "*Packaging and labelling of tobacco products*", provide:

46. Parties should consider adopting measures to restrict or prohibit the use of logos, colours, brand images or promotional information on packaging other than brand names and product names displayed in a standard colour and font style (plain packaging). This may increase the noticeability and effectiveness of health warnings and messages, prevent the package from detracting attention from them, and address industry package design techniques that may suggest that some products are less harmful than others.³⁹⁷

2.109. The Article 13 FCTC Guidelines, entitled "*Tobacco advertising, promotion and sponsorship*", provide:

15. Packaging is an important element of advertising and promotion. Tobacco pack or product features are used in various ways to attract consumers, to promote products and to cultivate and promote brand identity, for example by using logos, colours, fonts, pictures, shapes and materials on or in packs or on individual cigarettes or other tobacco products.

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

17. If plain packaging is not yet mandated, the restriction should cover as many as possible of the design features that make tobacco products more attractive to

³⁹³ FCTC, (Exhibits AUS-44, JE-19), Article 13. Also relevant to the above FCTC provisions are the definitions of "tobacco advertising and promotion" ("any form of commercial communication, recommendation or action with the aim, effect or likely effect of promoting a tobacco product or tobacco use either directly or indirectly"), "tobacco products" ("products entirely or partly made of the leaf tobacco as raw material which are manufactured to be used for smoking, sucking, chewing or snuffing"), and "tobacco sponsorship" ("any form of contribution to any event, activity or individual with the aim, effect or likely effect of promoting a tobacco product or tobacco use either directly or indirectly"). See *ibid.* Articles 1(c), 1(f) and 1(g), respectively.

³⁹⁴ WHO/FCTC *amici curiae* brief, (Exhibit AUS-42 (revised)), para. 22.

³⁹⁵ WHO/FCTC *amici curiae* brief, (Exhibit AUS-42 (revised)), para. 19; WHO/FCTC Additional Information to Panel, pp. 7-8, at fn 63 above; Article 11 FCTC Guidelines, FCTC/COP/3(10), (Exhibit JE-20); and Article 13 FCTC Guidelines, FCTC/COP/3(12), (Exhibit JE-21).

³⁹⁶ Article 11 FCTC Guidelines, FCTC/COP/3(10), (Exhibit JE-20), Annex, para. 46; and Article 13 FCTC Guidelines, FCTC/COP/3(12), (Exhibit JE-21), Annex, paras. 16-17 and "Recommendation" following para. 17.

³⁹⁷ Article 11 FCTC Guidelines, FCTC/COP/3(10), (Exhibit JE-20), Annex, para. 46.

consumers such as animal or other figures, "fun" phrases, coloured cigarette papers, attractive smells, novelty or seasonal packs.

Recommendation

Packaging and product design are important elements of advertising and promotion. Parties should consider adopting plain packaging requirements to eliminate the effects of advertising or promotion on packaging. Packaging, individual cigarettes or other tobacco products should carry no advertising or promotion, including design features that make products attractive.³⁹⁸

2.4.5 FCTC provisions concerning the relationship between the FCTC and other international agreements and bodies

2.110. Article 2.1 of the FCTC states that this Convention does not prevent Parties "from imposing stricter requirements that are consistent with [the provisions of the FCTC and its protocols] and are in accordance with international law".³⁹⁹ Article 2.2 further provides that the FCTC does not "affect the right of Parties to enter into bilateral or multilateral agreements, including regional or subregional agreements, on issues relevant or additional to the Convention and its protocols, provided that such agreements are compatible with their obligations under the FCTC and its protocols".⁴⁰⁰

2.111. Additionally, Article 15.2 of the FCTC (on illicit tobacco trade) requires that Parties "adopt ... measures to ensure that all [tobacco product packaging is] marked to assist Parties in determining the origin of tobacco products, and in accordance with national law and relevant bilateral or multilateral agreements, assist Parties in determining the point of diversion and monitor, document and control the movement of tobacco products and their legal status".⁴⁰¹

2.112. Finally, the FCTC contains various provisions on the cooperation between the FCTC Parties and other international organizations and bodies. For instance, Article 5.5 states that the FCTC Parties "shall cooperate, as appropriate, with competent international and regional intergovernmental organizations and other bodies to achieve the objectives of the Convention and the protocols to which they are Parties".⁴⁰² Article 7 provides that, in implementing, *inter alia*, Articles 11 and 13, FCTC Parties "shall cooperate, as appropriate, with each other directly or through competent international bodies".⁴⁰³

3 PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

3.1 Honduras (DS435)

3.1. Honduras requests that the Panel find that:

- a. Australia's plain packaging trademark restrictions in the TPP measures are inconsistent with Article 15.4 of the TRIPS Agreement;
- b. Australia's plain packaging trademark restrictions in the TPP measures are inconsistent with Article 16.1 of the TRIPS Agreement;
- c. Australia's plain packaging trademark restrictions in the TPP measures are not justified under Article 17 of the TRIPS Agreement;

³⁹⁸ Article 13 FCTC Guidelines, FCTC/COP/3(12), (Exhibit JE-21), Annex, paras. 15-17 and "Recommendation" following para. 17.

³⁹⁹ FCTC, (Exhibits AUS-44, JE-19), Article 2.1. See also FCTC, (Exhibits AUS-44, JE-19), Article 13(5) ("Parties are encouraged to implement measures beyond the obligations set out in paragraph 4.").

⁴⁰⁰ FCTC, (Exhibits AUS-44, JE-19), Article 2.2.

⁴⁰¹ FCTC, (Exhibits AUS-44, JE-19), Article 15.2.

⁴⁰² FCTC, (Exhibits AUS-44, JE-19), Article 5.5.

⁴⁰³ FCTC, (Exhibits AUS-44, JE-19), Article 7.

- d. Australia's plain packaging trademark restrictions in the TPP measures are inconsistent with Article 2.1 of the TRIPS Agreement, which incorporates provisions of the Paris Convention, in particular, Article 6*quinquies* of the Paris Convention;
- e. Australia's plain packaging trademark restrictions in the TPP measures are inconsistent with Article 20 of the TRIPS Agreement;
- f. Australia has acted inconsistently with Article 10*bis* of the Paris Convention, as incorporated by Article 2.1 of the TRIPS Agreement;
- g. Australia infringes Article 24.3 of the TRIPS Agreement;
- h. Australia contravenes Article 22.2(b) of the TRIPS Agreement; and
- i. Australia's plain packaging measures are inconsistent with Article 2.2 of the TBT Agreement.

3.2. Honduras further requests the Panel to recommend, in accordance with Article 19.1 of the DSU, that the DSB request Australia to bring the measures at issue into conformity with the TRIPS Agreement and the TBT Agreement.⁴⁰⁴

3.2 Dominican Republic (DS441)

3.3. The Dominican Republic requests that the Panel find that by virtue of its adoption and imposition of the TPP measures, Australia violates:

- a. Article 15.4 of the TRIPS Agreement;
- b. Article 16.1 of the TRIPS Agreement;
- c. Article 16.3 of the TRIPS Agreement;
- d. Article 20 of the TRIPS Agreement;
- e. Article 22.2(b) of the TRIPS Agreement;
- f. Article 24.3 of the TRIPS Agreement;
- g. Article 10*bis* of the Paris Convention (as incorporated into the TRIPS Agreement through Article 2.1); and
- h. Article 2.2 of the TBT Agreement.

3.4. The Dominican Republic requests that the Panel recommend to the DSB that Australia be required to bring its TPP measures into conformity with the above-mentioned provisions of the TRIPS Agreement and the TBT Agreement.⁴⁰⁵

3.3 Cuba (DS458)

3.5. Cuba requests the Panel to find that the TPP measures violate:

- a. Article 20 of the TRIPS Agreement;
- b. Article 24.3 of the TRIPS Agreement;
- c. Article 10*bis* of the Paris Convention (read with Article 2.1 of the TRIPS Agreement);

⁴⁰⁴ Honduras's first written submission, paras. 936 and 938-939.

⁴⁰⁵ Dominican Republic's first written submission, paras. 1032-1033.

- d. Article 2.2 of the TBT Agreement;
- e. Article IX:4 of the GATT 1994;
- f. Article 15.4 of the TRIPS Agreement;
- g. Article 16.1 of the TRIPS Agreement;
- h. Article 16.3 of the TRIPS Agreement;
- i. Article 22.2(b) of the TRIPS Agreement; and
- j. Article *6quinquies* of the Paris Convention (read with Article 2 of the TRIPS Agreement).

3.6. Cuba further requests the Panel to recommend, in accordance with Article 19.1 of the DSU, that the DSB request Australia to bring its measures into conformity with the TRIPS Agreement and the GATT 1994.⁴⁰⁶

3.4 Indonesia (DS467)

3.7. Indonesia requests the Panel to find that the TPP measures, collectively and individually, violate Australia's obligations under the following provisions:

- a. Article 2.2 of the TBT Agreement;
- b. Article 2.1 of the TRIPS Agreement, which incorporates the provisions of the Paris Convention, in particular Article 10*bis*;
- c. Article 15.4 of the TRIPS Agreement;
- d. Article 16.1 of the TRIPS Agreement;
- e. Article 16.3 of the TRIPS Agreement;
- f. Article 20 of the TRIPS Agreement;
- g. Article 22.2(b) of the TRIPS Agreement; and
- h. Article 24.3 of the TRIPS Agreement.

3.8. Indonesia also requests that the Panel find that Australia's TPP measures, collectively and individually, are inconsistent with Australia's obligations under Article XXIII:1(a) of the GATT because it has nullified or impaired benefits accruing directly or indirectly to Indonesia under the TBT Agreement.

3.9. Indonesia further requests that the Panel recommend that Australia bring its measures into conformity with its obligations under the TRIPS and TBT Agreements.⁴⁰⁷

3.5 Australia

3.10. Australia requests that the Panel reject the complainants' claims under Articles 2.1 (incorporating Article *6quinquies* A(1) and Article 10*bis* of the Paris Convention), 15.1, 15.4, 16.1, 16.3, 20, 22.2(b), and 24.3 of the TRIPS Agreement, Article 2.2 of the TBT Agreement, and Article IX:4 of the GATT 1994 in their entirety.⁴⁰⁸

⁴⁰⁶ Cuba's first written submission, paras. 429-430.

⁴⁰⁷ Indonesia's first written submission, paras. 463-465.

⁴⁰⁸ Australia's first written submission, paras. 762-763.

4 ARGUMENTS OF THE PARTIES

4.1. The arguments of the parties are reflected in their executive summaries, provided to the Panel in accordance with paragraph 27 of the Working Procedures adopted by the Panel (see Annex B).

5 ARGUMENTS OF THE THIRD PARTIES

5.1. The arguments of Argentina, Brazil, Canada, China, the European Union, Japan, the Republic of Korea, Malawi, New Zealand, Nicaragua, Norway, Oman, Singapore, South Africa, Turkey, Uruguay, Zambia, and Zimbabwe are reflected in their executive summaries, provided in accordance with paragraph 28 of the Working Procedures adopted by the Panel (see Annex C).

5.2. Chile, Ecuador, Egypt, India, Malaysia, Mexico, Panama, the Russian Federation, the Kingdom of Saudi Arabia, Trinidad and Tobago and the United States did not submit written or oral arguments to the Panel. Guatemala, Nigeria, Peru, the Philippines, Chinese Taipei, and Thailand provided arguments in these proceedings. These third parties did not provide an executive summary of their arguments as envisaged in paragraph 28 of the Panel's Procedures and item (n) of the Panel's timetable. However as their written submissions and/or oral statements are within the page limits specified in the Panel's Working Procedures for the third parties' executive summaries, they have been included as a substitute for an executive summary (see Annex C).

5.3. Ukraine⁴⁰⁹ submitted a third-party written submission in these proceedings. However, it did not provide an executive summary of its arguments as envisaged in paragraph 28 of the Panel's Working Procedures and item (n) of the Panel's timetable. Ukraine's written submission exceeded the page limits specified in the Panel's Working Procedures for the third parties' executive summaries. Therefore, it cannot be annexed to these Panel Reports. Nonetheless, Ukraine's written submission is reflected in these Panel Reports pursuant to Article 10 of the DSU.

6 INTERIM REVIEW

6.1 Introduction

6.1. On 2 May 2017, the Panel issued its Interim Reports to the parties. On 6 June 2017, Honduras, the Dominican Republic, Indonesia, and Australia each submitted written requests for the Panel to review aspects of the Interim Reports. On 4 July 2017, Honduras, the Dominican Republic, and Indonesia submitted comments on Australia's requests for review, and Australia submitted comments on the complainants' requests for review. Cuba did not submit any requests for review and did not comment on any other party's requests for review. None of the parties requested an interim review meeting.

6.2. In accordance with Article 15.3 of the DSU, this section of the Reports describes the parties' requests for review at the interim review stage and the Panel's response to them. In addition, the Panel made some typographical and other corrections, including those identified by the parties. In this context, the Panel in particular modified footnote 1 to Table A to clarify the manner in which Table A describes the outcomes of the papers that it refers to and adjusted some of the language in section 7.2.5.3.6 to align the text in this section to that of the related Appendices.

6.3. Australia made several requests to amend or add additional footnotes. These requests have been considered in light of comments made by Honduras, the Dominican Republic, and Indonesia, and have been implemented as deemed appropriate, resulting in modifications to, or additional references at, paragraphs 7.231, 7.1446, and 7.2566, and footnotes 269, 515, 653, 710, 866 to 868, 871, 872, 891, 914, 916, 1339, 1352, 1358, 1359, 1450, 1518, 1661, 1669, 1671, 1761, 1763, 1780, 1795, 1806, 2111, 2256, 2402, 2443, 2570, 2571, 2609, 2617, 2695, 2855, 2857, 2885, 3198, 3201, 3486, 3596, 3613, 3620, 3623, 3625, 3656, 3728, 3804, 3807, 4042, 4043, 4045, 4824, 5004, 5088, and 5200.

⁴⁰⁹ See section 1.6.6 above.

6.4. The numbering of some of the paragraphs and footnotes in the Final Reports is different from the numbering in the Interim Reports. Unless otherwise indicated, references to sections, paragraph numbers, and footnotes in this section relate to those of the Final Reports.

6.2 Requests for review of section 7.1 (Order of Analysis)

6.5. Honduras requested the Panel to modify the second sentence of paragraph 7.11 to more closely reflect the language used in Article 15.4 of the TRIPS Agreement and Article 6*quinquies* of the Paris Convention (1967). In response, we adjusted the wording of paragraph 7.11 to describe the relevant provisions with reference to their titles in the TRIPS Agreement. Regarding the additional language suggested by Honduras, we note that the phrase "protectable subject matter", which is contained in the heading of Article 15, is already used in the sentence at issue, while "protection of marks registered in one country of the Union in the other countries of the Union" is not used in the title of either of the provisions in question.⁴¹⁰ We therefore decline to add these phrases as suggested.

6.3 Requests for review of section 7.2.5.1 (Whether the TPP measures pursue a "legitimate objective")

6.6. Honduras requests the Panel to add a specific reference to its arguments at paragraph 7.52, which the Panel has accepted as reflected at paragraph 7.52 and footnote 493.

6.7. Honduras also requests the Panel to reflect more completely its arguments on the objectives of the TPP measures in paragraph 7.200, which the Panel has accepted partially only, as the argument at issue is already reflected elsewhere, including at paragraph 7.208.

6.8. Honduras requests the Panel to add a further reference to its rebuttal arguments relating to the "mechanisms" and "objectives" of the measures in paragraph 7.208. The Panel does not find it necessary to make this addition, given the detailed analysis of this issue in the paragraphs that follow.

6.9. Honduras requests the Panel to modify the language in paragraph 7.213 describing "undisputed" aspects of the objectives of the TPP measures, in relation to the objective of reduced "exposure" as distinct from reducing "consumption". Australia did not object to this request but requested that its arguments on the objective of reducing exposure to tobacco products be also considered, if the Panel agrees to Honduras's proposed edits. We have modified the first sentence in paragraph 7.213 to avoid creating any misunderstanding in respect of its implications with respect specifically to "consumption" or "exposure" to tobacco products.

6.10. Australia requests the Panel to modify parts of paragraphs 7.212, 7.214, 7.215 and 7.227 to reflect that "Australia and the parties were ... *in agreement* that reducing the appeal of tobacco products to consumers; increasing the effectiveness of health warnings; and reducing the ability of the retail packaging of tobacco products to mislead consumers" were the specific mechanisms through which the TPP measure contributes to achieving its public health objectives. Honduras, the Dominican Republic and Indonesia opposed this request, disagreeing with Australia that there has been any agreement between the parties, during the course of the proceedings, on whether the three "mechanisms" of the TPP Act were "objectives" of the measures. The Panel considers that the existing text correctly reflects the exchanges of the parties in the course of the proceedings on this issue. We accordingly decline to make the requested changes at paragraphs 7.212, 7.214, and 7.215 but have edited relevant parts of paragraph 7.227 for further clarity.

6.4 Requests for review of section 7.2.5.2 (Whether the TPP measures are "in accordance with relevant international standards" under Article 2.5 (second sentence))

6.11. Honduras requests the Panel to modify the description of its arguments on the interpretation of the term "relevant international standards", to avoid incorrectly suggesting that

⁴¹⁰ We note that, in some published versions of the Paris Convention (1967), its articles have been given titles by the WIPO Secretariat to facilitate their identification. In such published versions, these titles are indicated in square brackets. There are no titles in the authentic French text of the Paris Convention (1967).

Honduras modified its arguments on this issue in the course of the proceedings. While the Panel does not consider its initial description of Honduras's arguments to have been incorrect, it has simplified the description of the relevant arguments at paragraph 7.265.

6.12. Honduras requests that the description of key arguments of the parties on the meaning of the terms "in accordance with" in the second sentence of Article 2.5 be expanded. In response, the Panel has expanded this discussion at paragraph 7.274 and footnotes 958 and 959.

6.13. Honduras requests that the Panel expand its summary of Honduras's arguments on the elements relevant to a determination on the existence of "international standards" under the second sentence of Article 2.5. The Panel has expanded this description in paragraph 7.277 and footnote 963, to a level of detail comparable with that provided in respect of the related arguments of other parties.

6.14. Honduras requests the Panel to clarify the description of the nature of commitments under the FCTC and its Guidelines at paragraph 7.305, to avoid a suggestion that certain actions "must" be taken under the FCTC Guidelines. Australia commented that it did not understand the Panel's use of terms in this paragraph to suggest that the FCTC Guidelines are binding but suggests that the language be clarified to avoid any confusion. In response to these comments, the Panel has adjusted the language of this paragraph to clarify the distinction between obligations under the FCTC itself and the role of the related FCTC Guidelines.

6.15. Honduras requests the Panel to add a reference to its arguments that it "does not consider that the FCTC or its Guidelines have any legal or factual relevance to the questions raised under Article 2.2 of the TBT Agreement or the relevant provision of the TRIPS Agreement". In response, the Panel has expanded its description and discussion of all parties' arguments on the relevance of the FCTC and relevant FCTC Guidelines if they do not constitute an "international standard" for tobacco plain packaging for the purposes of Article 2.5 of the TBT Agreement. This is reflected at paragraphs 7.404 to 7.417.

6.5 Requests for review of section 7.2.5.3 (The degree of contribution of the TPP measures to their objective)

6.16. Honduras requests the Panel to amend the description of its arguments on the lack of contribution of the measures to their objectives. In particular, Honduras states that its argument is not that smoking prevalence increased, but rather that the measures did not contribute to the reduction of smoking. Honduras considers that the Panel's attribution to Honduras of arguments about an increase in prevalence is based on a misrepresentation of what Honduras has argued, as the reference to an increase in smoking prevalence, Honduras explains, is "nothing but a reference to the possible effect of another phenomenon, namely downtrading and its effect on prices". Honduras therefore requests the Panel to delete "the suggestion that Honduras' argument is essentially that smoking increased as a result of plain packaging, even if for some groups of the population there seems to have been such a correlation". Honduras states that it has pointed out that the downward substitution that plain packaging is causing may lead to lower prices, which in turn may mean higher consumption and that this is the only impact that can be expected of plain packaging. It argues that this, however, is different from a position that plain packaging caused an increase in smoking prevalence when it is clear that the overall smoking trend is negative and has been for many years.

6.17. Australia considers the Panel's summaries to be accurate reflections of Honduras's submissions. It observes that in its first written submission Honduras repeatedly argues that the TPP measures either have, would or are "likely to" result in an increase in smoking prevalence.⁴¹¹ While some of Honduras's arguments relate to downtrading, Honduras also provides distinct arguments relating to social theory, the analysis of post-implementation data, and illicit tobacco trade. To the extent that the Panel agrees to Honduras's request in regard to these paragraphs, Australia requests that the Panel fully reflect Honduras's arguments on these points. In response to these comments, the Panel has amended paragraph 7.430 and expanded its description of the

⁴¹¹ See Honduras's first written submission, paras. 346, 347, 372, 392-400, 888, and p. 89 subheading 5(c), titled "research in social sciences theories indicate that the trademark requirements will not only fail to contribute to Australia's objective but *will also lead to an increase in smoking prevalence*". (emphasis added)

relevant arguments at paragraphs 7.426 to 7.429 to provide additional context for the statements of Honduras in respect of the effects of the TPP measures, including in relation to their possible impact on smoking prevalence.

6.18. Honduras also requests the Panel to amend its description of its arguments on the drivers of cessation and relapse and the impact of plain packaging. Specifically, Honduras explains that its "forbidden fruit" argument was made "as a 'final' point" and "is not the essence" of the argument it developed. Honduras requests the Panel to replace its initial text with a summary of its position taken from its second written submission, highlighting the complexity of drivers of smoking behaviours and the absence of credible evidence that logos, branding and other aspects of tobacco packaging contribute, or may in principle contribute, to smoking behaviours such as cessation or relapse. In response to this request, the Panel has expanded its description of Honduras's arguments at paragraph 7.428, to better distinguish the different aspects referred to by Honduras, including arguments relating to the drivers of cessation and relapse and to a possible "forbidden fruit" effect.

6.19. Honduras requests the Panel to remove a reference to its arguments on the expected impact of the TPP measures on smoking prevalence at paragraph 7.430. Australia considers the existing language to be an accurate reflection of Honduras's submissions. In response to this comment, the Panel has deleted the sentence at issue, as the relevant argument is adequately reflected in paragraph 7.427, as modified in response to Honduras's separate comments described above in relation to the description of its arguments on the effects of the TPP measures on tobacco consumption.

6.20. Honduras requests the Panel to delete a reference, in its summary of arguments at paragraph 7.431, to two studies relating to the assessment of actual behaviours in the presence of plain packaging, or to complement the reference to avoid possible misleading implications in respect of the outcomes of these studies. In response, the Panel has removed the reference to these studies, which was not necessary at this stage of the description of arguments, as specific studies are discussed in later parts of the Panel's analysis.

6.21. Honduras requests the Panel to add a reference to some of its arguments in rebuttal, concerning Australia's reliance on behavioural theories. The Panel added a sentence to paragraph 7.433 and footnote 1299 to address this comment.

6.22. Australia requests the Panel to clarify Australia's arguments and its reference to prior jurisprudence concerning the role of qualitative evidence in demonstrating contribution. Honduras, the Dominican Republic, and Indonesia request that, if the Panel agrees to the requested changes, Australia's arguments be reflected in full, including by citing more completely the relevant findings in *EC – Seal Products* relied on by Australia. In response to this comment, the Panel has expanded the description of Australia's arguments in paragraph 7.455, including the additional detail identified by Honduras and the Dominican Republic.

6.23. Australia requests the Panel to amend the final sentence of paragraph 7.486, to add a reference to its argument that a determination in qualitative terms is the methodology best suited to a correct assessment of contribution in the circumstances of this case. The Dominican Republic and Indonesia object to the requested modification, as the argument at issue is already reflected in other paragraphs. In response to these comments, the Panel has only partially accepted the insertion requested by Australia, in light of the fact that, as pointed out by the Dominican Republic and Indonesia, this argument is already reflected in other surrounding paragraphs.

6.24. Australia also requests the Panel to clarify that it explicitly acknowledged that quantitative analysis of the post-implementation effects of the TPP measures is relevant to the Panel's contribution analysis, by including additional references to its arguments. The Dominican Republic objects to the additional reference suggested by Australia, as the argument is already adequately summarized elsewhere. Honduras also does not consider necessary the changes requested by Australia, as the existing text correctly reflects the Panel's agreement with the position of the complainants that evidence of actual smoking behaviour is to be an integral part of the contribution assessment. The Dominican Republic does not object to some of the modifications requested by Australia, provided that Australia's position is clarified. The Dominican Republic notes that Australia fundamentally changed its position on the relevance of post-implementation

evidence relating to actual smoking behaviour, so that if the Panel accepts Australia's amendments, it should add text at the end of the paragraph to reflect the evolution of Australia's position over the course of the proceedings in this respect. In response to these comments, the Panel has elaborated the description of Australia's arguments at paragraph 7.494 and footnote 1448 and rephrased the formulation of its conclusion at paragraph 7.497.

6.25. Australia requests a modification of the second sentence of paragraph 7.510 to reflect that it has not relied upon the White et al. 2015b paper referred to in this sentence. Honduras considers however that this text refers back to the descriptive section of these Reports, which the parties have already had an opportunity to comment on. The Dominican Republic and Indonesia observe that Australia's experts rely on the paper at issue, and thus request that if the Panel modifies this text, it modify it to indicate this. In response, the Panel has modified the relevant text to clarify that the material at issue relates to studies relied on by Australia or its experts.

6.26. Australia requests the Panel to add, at paragraph 7.535, a reference to Professor Fong's point that an analysis of post-implementation evidence by the complainants' own experts confirms that the measures have had the effects predicted by the pre-implementation studies. The Dominican Republic and Indonesia observe that this section of these Reports does not address post-implementation evidence and request that, if the Panel adds the arguments requested by Australia, the response to these arguments by the Dominican Republic's and Honduras's experts also be reflected. The Panel declines to make the requested edits since, as noted by Honduras and Indonesia, this section of these Reports does not address post-implementation evidence, which is addressed separately in section 7.2.5.3.6.

6.27. Australia requests the Panel to amend the first sentence of paragraph 7.536 to avoid incorrectly suggesting that Australia's arguments regarding the analysis of the TPP literature were confined to the challenges inherent in evaluating national-level policies. The Dominican Republic objects to Australia's request, noting that the existing language summarizes almost verbatim Professor Fong's argument, while the requested addition is not part of this argument and would alter its meaning. In response, the Panel has modified the text at issue to avoid the potential implication identified by Australia but declines to add the additional argument requested by Australia, which is addressed separately later in the same section.

6.28. Honduras requests the Panel to add a reference, at paragraph 7.557, to Professor Klick's observations on the use of randomized field experiments to inform public policy "in other contexts". Australia requests that if the Panel accepts the requested reference, it also reflect Australia's evidence and arguments on the unique public health context for testing tobacco control measures. The Panel does not find it necessary to expand, in this part of its analysis, on the role of randomized experiments in "other contexts", as the focus of discussion is limited to the specific context before the Panel, i.e. the TPP measures.

6.29. Australia requests the Panel to include at paragraph 7.557 a cross-reference to the Panel's later conclusion on the practical and ethical constraints on the conduct of an "ideal" study. The Dominican Republic does not object to this request. Honduras considers it neither necessary nor appropriate to insert the requested reference, as it would confuse the discussion of the focus of the TPP studies with the more general "overall assessment" that follows. The Panel does not consider it necessary to add the cross-reference requested by Australia, given that a detailed discussion of the practical and ethical constraints on the conduct of "ideal" experimental studies in the context of tobacco plain packaging follows immediately after this paragraph, concluding at paragraph 7.561.

6.30. Honduras requests the Panel to modify paragraph 7.562, to avoid a suggestion that the lack of an ideal experiment was the only reason for which the complainants argued that the pre-implementation studies should be rejected as the evidentiary base for the adoption of the TPP measures. Australia sees no basis for removing the passage at issue, as it does not, in its view, suggest the implication that Honduras asserts. In response to this comment, the Panel has clarified the wording of the relevant passage.

6.31. Honduras requests the Panel to consider reformulating its general summary of the conclusions of its expert reviews of the TPP literature to show the focus of the complainants on the fact that the studies "do not provide a sound basis upon which to base claims about the expected

effects of plain packaging on smoking behaviour". Australia considers that the existing text accurately reflects a conclusion of the reviewers of the studies at issue. In response to this comment, the Panel has reformulated its description of the conclusions of the complainants' experts on the TPP literature at paragraphs 7.583 and 7.626.

6.32. Honduras requests the Panel to revise its reference to the medical qualifications of Sir Cyril Chantler, in paragraph 7.598, to reflect the statement of Professor Klick qualifying the relevance of this medical training for the purposes of reviewing the methodological soundness of the pre-implementation TPP studies. In response, the Panel has removed the reference to Sir Cyril Chantler's qualifications, in line with its overall approach, which does not refer to the individual qualifications of specific experts.

6.33. Australia requests that the Panel add, at paragraph 7.608, a reference to its arguments that, when adopting tobacco plain packaging "as a world first public health measure", it relied on the explicit recommendation of FCTC parties and on the nearly unanimous consensus on the causal link between tobacco advertising and smoking behaviour reflected in published analyses conducted by highly respected international bodies. Honduras considers that if the Panel accepts to include the arguments by Australia "in which it seeks to justify" the absence of a systematic or other thorough review of the evidence before adopting the measures, the Panel then also needs to address whether these arguments are relevant and pertinent in this context, and address the many counter-arguments of the complainants on these points. The Dominican Republic does not object to Australia's request, provided that Australia's arguments and the Dominican Republic's responses are both fully reflected. Indonesia observes that the additions requested by Australia are unrelated to the subject-matter of the paragraph at issue, and requests that, if the Panel accepts the additions requested by Australia, it also adds Indonesia's and the other complainants' arguments on these points. In response, the Panel has added a reference, in footnote 1687, to Australia's indications as to the evidentiary base that it relied upon in adopting the TPP measures. The Panel did not find it necessary however to engage in a detailed discussion of the relative merits or limits of each of these sources as evidentiary basis for the measures in this section of its Reports, which reviews surveys of the TPP literature. These questions are discussed in other parts of the Panel's analysis, including, with respect to the FCTC and associated instruments, in paragraphs 7.404 to 7.417, which, as described above, have been expanded in response to a separate request for review by Honduras.

6.34. Honduras requests the Panel to clarify the subject of one of the sentences in paragraph 7.634. The Panel has modified the sentence to clarify its subject.

6.6 Requests for review of section 7.2.5.3.5.2 (First mechanism: impact of plain packaging on the appeal of tobacco products to consumers)

6.35. Honduras requests the Panel to mention in paragraph 7.656 the distinction it has outlined between communication and advertising. Although this distinction was already reflected in earlier paragraphs, the Panel has added a reference to it in this paragraph.

6.36. Honduras requests the Panel to add a further reference, at paragraph 7.692, to its argument that the behavioural theories referred to by Australia are intention-based and not action-based theories. Australia noted that this point was already reflected in a preceding paragraph and asked that, if the Panel accepted Honduras's addition, it also include a reference to the sentence immediately following that referred to by Honduras in its arguments, to the effect that these theories may generate useful hypotheses about the possible presence or absence of a causal link between certain constructs and specific behaviours. In response, the Panel has expanded its reference to Professor Ajzen's relevant points in the paragraph where these were already discussed, at paragraph 7.696.

6.37. Australia requests the Panel to amend the references, in paragraph 7.693, to its reliance on behavioural theories. Australia explains that it has not relied on Professor Ajzen's TRA or TPB and that Professor Fong, rather, made a single reference to the TRA as part of his review of existing evidence on the link between the appeal of tobacco products and smoking behaviours. Honduras objects to Australia's request, noting that Australia and its experts have undoubtedly relied on this theory and related behavioural theories. The Dominican Republic similarly objects to the requested modification, citing to Professor Fong's report stating that "[s]ocial psychological theories, notably

the 'Theory of Reasoned Action' (Fishbein & Ajzen 1975), and research arising from such theories, have demonstrated clearly that attitudes are indeed related to behaviour" and the associated figure relied on by Professor Fong, describing the TPB. In this light, the Dominican Republic considers that the Panel correctly finds that Australia has relied on Professor Ajzen's behavioural theories during the proceedings. Indonesia also objects to Australia's request, similarly pointing to the reference, in Professor Fong's report, to Professor Ajzen's TRA as a basis for an explanation of why attitudes are important to behaviour and the argument that achieving changes to attitudes and behaviour through specific objectives will lead to changes in smoking behaviour over time. In response, the Panel has rephrased its description of Australia's reliance on the relevant theories at paragraphs 7.693 and 7.697, to track more closely the terminology used by Professor Fong, who refers to "social psychological theories", including the TRA and related research.

6.38. Honduras requests the Panel to revise its summary of the level of "disagreement" between the parties in relation to the relationship between attitudes and perceptions, on the one hand, and intentions and subsequent behaviours, on the other hand. Australia considers the Panel's summary to be an accurate assessment of the evidence before the Panel and of the points of difference between the parties. In response to these comments, the Panel has modified the formulation of this passage in paragraph 7.699, to focus more directly on what the Panel understands to be the key relevant point of disagreement.

6.39. Honduras requests the Panel to review the formulation of its description of certain elements of the expert reports submitted by the Dominican Republic and Honduras relating to the role of branding elements such as colours or logos on the salience of a pack. Australia considers that the passage of Honduras's submission referred to by Honduras in support of this request does not contradict the Panel's conclusions. In response to these comments, we have clarified the relevant passages in paragraphs 7.768 and 7.769.

6.7 Requests for review of section 7.2.5.3.5.3 (Second mechanism: impact of the TPP measures on the effectiveness of graphic health warning)

6.40. Honduras requests the Panel to add a reference to Professor Viscusi's discussion of the results of the study based on eye movements in respect of regular smokers (i.e. that "the results of the study failed to indicate any advantage of plain packs for regular smokers even though the nature of the eye tracking test would make the study predisposed to finding such an effect for plain packs"). In response, we have introduced the requested reference in footnote 2228 to paragraph 7.818 and added a summary of the main findings and conclusions of Munafò et al. 2011 (Exhibits AUS-199, JE-24(47)) with respect to the three studied subgroups.

6.41. Australia requests the addition of the term "avoidance" in the description of the conceptual model for the assessment of the effectiveness of GHWs in the second sentence of paragraph 7.851. Honduras observes that the exhibit cited by Australia in support of this request does not contain this term and that in any event the existing text fits well with the title of the section (which concerns quit intentions and smoking behaviours), making the requested addition neither necessary nor appropriate. The Dominican Republic did not object to the request. In response, the Panel has accepted the addition of the term "avoidance" in the sentence at issue. While, as noted by Honduras, the exhibit reference cited by Australia does not shed light on the relevance of this term, its inclusion in the description of the model is consistent with its depiction at Figure 14.

6.42. Honduras requests the Panel to revise the text of paragraph 7.862, which it considers contains two "logical leaps" in the analysis and incorrectly reflects the views of Honduras and its experts. Australia contends that Honduras's arguments in support of this request for review are consistent with the Panel's statements in the preceding paragraph of these Reports and submits that Honduras has misconstrued the Panel's conclusion. In response to these comments, the Panel has revised paragraph 7.862 to clarify its reasoning.

6.8 Requests for review of section 7.2.5.3.5.4 (Third mechanism: reducing the ability of the pack to mislead consumers about the harmful effects of smoking)

6.43. Honduras submits that paragraph 7.892 does not accurately reflect its "primary argument" with respect to the capacity of the TPP measures to reduce the ability of the pack to mislead consumers regarding the harmful effects of smoking. Honduras states that its "primary argument"

with respect to this issue is that there is no likelihood that a trademark appearing on the remaining space of a pack with a 75% GHW will generate misleading effects, and not that the TPP measures are unnecessary because Australia's existing regulatory framework provides a legal mechanism through which any misleading packaging elements can be removed from the market. We note that Honduras provides no specific reference to support its assertion regarding the primacy of this argument over its argument that any misleading packaging design elements can be effectively dealt with under the Australian Consumer Law.⁴¹² The parties' arguments on the ability of the TPP measures to contribute through their mechanisms to their public health objective in the specific Australian context, where a 75% GHW covers the front of the pack, are acknowledged and discussed at paragraphs 7.615 to 7.620 as part of the discussion of the TPP literature and the evidentiary base underlying the design and structure of the measures. Nevertheless, in light of Honduras's request, we have clarified our cross-reference to the discussion of the TPP literature in paragraph 7.872, added cross-references to this discussion to paragraphs 7.896 and 7.918, and expanded our summary of the findings of Parr et al. 2011b at footnote 1718 to paragraph 7.620. We also added clarifying sentences at paragraph 7.660 and footnote 1813 regarding the communicative capacity of a pack with a 75% GHW. We also made additional edits to paragraphs 7.876, 7.892 to 7.894, 7.896 to 7.899, 7.902, 7.905, 7.907, 7.918, and 7.928 to clarify the Panel's conclusions and the parties' arguments in respect of this mechanism.

6.44. Honduras requests the Panel to add a reference to its own argument similar to that of the Dominican Republic reflected in paragraph 7.935. The Panel has accepted this request.

6.45. Honduras requests the Panel to either include in footnote 2546 at paragraph 7.979 a reference to Professor Neven's rebuttal arguments or delete the footnote. Australia notes that it has filed a surrebuttal report from Professor Katz that responds in detail to Professor Neven's rebuttal. While Australia considered that the existing text of the footnote represents an accurate assessment of the evidence before the Panel, it requests that the Panel also include a reference to Professor Katz's surrebuttal report, if it accepts Honduras's request to refer to Professor Neven's rebuttal report. In response to these comments, the Panel has expanded its analysis to include references to both Professor Neven's rebuttal report and Professor Katz's surrebuttal report.

6.9 Requests for review of section 7.2.5.3.7 (Impact of the TPP measures on illicit trade)

6.46. Australia requests the Panel to clarify the source of the data used by Professor Chaloupka to estimate illicit tobacco use at paragraph 7.1005. The Panel has modified the paragraph as requested.

6.10 Requests for review of section 7.2.5.4 (The trade-restrictiveness of the TPP measures)

6.47. Honduras requests the Panel to consider relying on a different text, taken from its second written submission, as the basis for the summary of its arguments on the trade-restrictiveness of the measures at paragraph 7.1090. The Panel has accepted the requested change.

6.48. Australia requests the Panel to revise the final sentence of paragraph 7.1131. to clarify that its argument regarding evidence of actual trade effects was made specifically in light of the Appellate Body's statements in *US – COOL (Article 21.5 – Canada and Mexico)*. Honduras considers the requested revision to be unnecessary, as the Panel reflects this jurisprudence elsewhere. The Dominican Republic and Indonesia do not object to Australia's request, provided that Australia's original argument is accurately reflected. The Panel has modified this paragraph partly as requested, considering the comments of the complainants.

⁴¹² We note that in its first written submission, Honduras states, "the plain packaging measures seem to be based on the assumption that the *residual portions of the package* that they regulate could mislead consumers about the harmful effects of smoking or using tobacco products." Honduras's first written submission, para. 518 (emphasis original). This statement appears in an introductory paragraph to a section entitled, "[t]he plain packaging measures are superfluous because Australia already has a robust legislative framework to address misleading or deceptive conduct".

6.49. Honduras requests the Panel to "more accurately summarize" its arguments regarding the impact of the measures on barriers to entry and participation in the market at paragraph 7.1172, at the beginning of section on "Whether the TPP measures raise barriers to entry onto the Australian market". The Panel declines to make this change, as this section is concerned with barriers to entry rather than barriers to "participation" in the market more generally, which is addressed in other parts of section 7.2.5.4.2.3.

6.50. Honduras requests the Panel to modify paragraph 7.1189 to start with an overview of its arguments on downtrading with reference to its second written submission. The Panel has added references to the passage identified by Honduras, though not at the level of detail that it requested.

6.11 Requests for review of section 7.2.5.5.2.2 (The gravity of the consequences of non-fulfilment)

6.51. Australia requests that the Panel modify its description of the operation of Section 15 of the TPP Act in paragraph 7.1320 to reflect that it is a "savings provision" that is intended to preserve the requirements of the TPP Act to the greatest extent possible in the event that it was found to be inconsistent with the Australian Constitution. Indonesia asserts that Australia's request is unnecessary and maintains that the paragraph at issue correctly describes the practical effect of Section 15. The Panel has rephrased this paragraph to more clearly distinguish the purpose of Section 15 from its practical consequences.

6.12 Requests for review of section 7.2.5.6.1 (Whether less trade-restrictive alternative measures are reasonably available to Australia: Approach of the Panel)

6.52. Australia requests that the Panel clarify that the arguments Australia has advanced in relation to trade-restrictiveness and "competitive opportunities" or "freedoms", as set forth in the fourth sentence of paragraph 7.1361, have been made in response to arguments articulated by the complainants. Honduras and Indonesia object to Australia's proposed characterization of the complainants' arguments. The Dominican Republic and Indonesia also submit that the proposed clarification is unnecessary as it is clear from the context of the sentence at issue that Australia's arguments are in response to those of the complainants. The Panel partly accepts Australia's request and has modified the sentence at issue to indicate that Australia's arguments are in response to those of the complainants on the limitation of "competitive opportunities" and "freedoms".

6.53. Honduras requests the Panel to add, at paragraph 7.1379, a reference to its arguments similar to that of the Dominican Republic with reference to the panel rulings in *China – Rare Earths*. The Panel has added this reference at footnote 3349.

6.13 Requests for review of section 7.2.5.6.2 (First proposed alternative measure: Increase in the MLPA)

6.54. Honduras requests additional detail of the proposed increase in the MLPA and the reasons for which Honduras proposes it at paragraph 7.1395. The Panel has accepted to include some of the requested additional detail, to a level comparable with that provided in relation to other complainants.

6.55. Australia requests the Panel to clarify, at paragraph 7.1412, that its argument in relation to the impact of an increase in the MLPA on competitive opportunities was made in response to the complainants' interpretation of trade-restrictiveness. Honduras had no objection to the request, but the Dominican Republic and Indonesia objected to it as unnecessary. The Panel accepted to insert the requested clarification.

6.56. Australia requested the Panel to add a reference in paragraph 7.1433 to its reliance on the Chaloupka Public Health Report. The Panel has accepted to make the requested addition.

6.57. Australia requested the Panel to clarify that its argument on the absence of certainty of the immediate impact of the proposed alternative was made in response to arguments by the complainants and more closely reflect the formulation of its arguments in this respect. The Panel

clarified the relevant text of paragraph 7.1440 to reflect more closely the terms of Australia's argument.

6.58. Australia requests that the Panel delete the reference to a "meaningful" contribution from the first sentence of paragraph 7.1453 and from the first half of the second sentence of paragraph 7.1470 and instead find that an increase in the MLPA to 21 years would, in principle, be apt to contribute to Australia's objective. The Dominican Republic, Honduras, and Indonesia requested the Panel to reject Australia's request because it, *inter alia*, contradicts the Panel's stated approach of assessing first whether the proposed alternative measure would make any contribution to the TPP measure's objective, and then the degree of such contribution. In paragraphs 7.1366-7.1370, we explain our approach to assessing whether a proposed alternative measure makes a contribution to the objective equivalent to that of the challenged measure and state that this assessment relies on ascertaining "as precisely as possible, in light of the entirety of the relevant evidence before us, the degree of contribution that the proposed alternatives would make to the objective". As some complainants note, the language that Australia seeks to modify reflects the Panel's assessment of the degree of contribution that this alternative is apt to make to Australia's objective, as a component of the Panel's overall assessment of this proposed measure as a potential less trade-restrictive alternative to the TPP measures. We therefore declined to modify the first sentence of paragraph 7.1453 and the first half of the second sentence of paragraph 7.1470.

6.59. Australia requests the Panel to consider adding, in its overall conclusion on an increased MLPA as an alternative to the TPP measures, a reference to its earlier finding that "an increase in the MLPA would not address initiation, cessation or relapse in any age group over 21". The Dominican Republic requests the Panel to reject this request, as Australia does not explain why the Panel should single out this intermediate finding to include in this paragraph where it was merely reflecting its overall conclusions. Indonesia similarly requests the Panel to reject this request, as this sentence would be unnecessary to the Panel's summary of its overall conclusion. The Panel declined to add the requested sentence to paragraph 7.1470, which is intended to reflect its overall conclusion rather than the detail of its earlier findings that are the basis for this conclusion. This in no way diminishes, however, the Panel's determinations made at paragraphs 7.1459 and 7.1460 or their importance to the Panel's assessment of whether an increase in the MLPA to 21 years would make a contribution to Australia's objective equivalent to that of the TPP measures.

6.60. Australia requests the Panel to amend paragraph 7.1505 to clarify its arguments regarding the distinction between the objectives and specific mechanisms of the TPP measures and reflect its further arguments on assessing the equivalent degree of contribution in the context of a comprehensive policy. Australia further requests the Panel to add, in this paragraph, a reference to Professor Chaloupka's rebuttal of the Dominican Republic's assertion that he did not consider taxation to be effective in relation to smoking initiation. Honduras, the Dominican Republic, and Indonesia oppose these requests, observing that the passages that Australia requests to be removed are an accurate reflection of its arguments. The Dominican Republic notes that the arguments that Australia requests be added in relation to the Appellate Body's findings in *Brazil – Retreaded Tyres* are addressed elsewhere in the Panel's analysis. In response, the Panel declines to delete and replace the references in this paragraph to arguments made in Australia's first written submission, but has accepted the addition of a reference to Professor Chaloupka's response to the Dominican Republic's statements concerning his conclusions on the effect of taxation on smoking initiation and has added supplementary references at footnotes 3581 and 3583.

6.14 Requests for review of section 7.2.5.6.3 (Second proposed alternative measure: Increased taxation of tobacco products)

6.61. Honduras requests the Panel to reflect at paragraph 7.1497 its argument that Australia failed to rebut Honduras's submissions that Australia's tobacco taxes are below the level recommended by the WHO. Australia disagrees with Honduras's assertion that it failed to rebut this argument and refers to a number of its submissions and relevant expert reports addressing this point. The Panel declines to make additional references to these arguments in the requested paragraph, as this issue is discussed later in its analysis, at paragraph 7.1521.

6.62. Australia requests the Panel to remove the term "meaningful" from paragraphs 7.1523 and 7.1544 of the Panel's analysis of the contribution that increased taxation would be apt to make to Australia's objective. Honduras, the Dominican Republic, and Indonesia object to these requests,

for reasons similar to those described above in relation to the same term as used in relation to the first proposed alternative measure. For the same reasons provided in response to the same request made in the context of the MLPA, the Panel declines to modify the language of these paragraphs as requested. However, the Panel slightly amended paragraph 7.1523 for consistency of language across the analyses of all four alternatives.

6.63. Australia requests the Panel to amend some of the language of paragraph 7.1682 to align it with the description of the pre-vetting scheme in previous paragraphs. The Panel has accepted to amend this text as proposed by Australia.

6.64. Australia requests the Panel to include in paragraph 7.1694 a reference to its arguments that litigation costs under the pre-vetting scheme would make it prohibitively costly. The Panel has accepted to add this reference.

6.65. Australia requests the Panel to add in paragraph 7.1719 a reference to its argument that since the complainants' proposed alternatives are unable to stand alone and must be implemented cumulatively to make an equivalent contribution to that of the TPP measures, their trade-restrictiveness must be evaluated cumulatively, which will necessarily increase the degree of trade-restrictiveness of the alternatives relative to the TPP measures. Honduras considers that as this paragraph sets forth the Panel's assessment of the main arguments, it would not appear appropriate to add a description of an argument "buried in a comment on a reply" or seek to modify the Panel's findings in respect of this argument. The Dominican Republic did not object to this request. The Panel did not find it necessary to amend paragraph 7.1719 to reflect this argument, in light of its other determinations in this section.

6.15 Requests for review of section 7.3.2 (Article 15.4 of the TRIPS Agreement)

6.66. Honduras requests that the Panel's summary of the complainants' arguments under Article 15.4 of the TRIPS Agreement in paragraph 7.1879 be expanded to include an argument that signs which have already acquired distinctiveness and have been registered could not maintain distinctiveness or remain registered, and will thus lose the protection flowing from registration as a result of the TPP measures. Honduras submits that it referred to this effect in paragraphs 245 and 261 of its second written submission. Honduras refers to two passages of its submissions to support its request. The first expresses Honduras's disagreement with Australia's argument that Section 28 of the TPP Act remedies the TPP measures' negative effects on the *registrability* of inherently non-distinctive marks but does not refer to *already registered* marks.⁴¹³ In the second passage, Honduras argues that the distinctiveness of registered trademarks that include a non-inherently distinctive sign will be diminished by the TPP measures, and the trademark owner will thus lose its ability to restrain infringing use *in violation of Article 16.1*. This paragraph does not relate to Article 15.4, nor does it refer to an inability of a registered trademark to *remain registered*.⁴¹⁴ We therefore decline to modify the description of Honduras's arguments under Article 15.4. Nonetheless, we have made additional references to the passages referred to by Honduras in footnotes 4252 and 4302 to paragraphs 7.1879 and 7.1919, respectively.

6.16 Requests for review of section 7.3.3 (Article 16.1 of the TRIPS Agreement)

6.67. Honduras requests that the Panel amend its summary of Cuba's argument in paragraph 7.1916 to reflect that it also argued that the TPP measures violate Article 16.1 of the TRIPS Agreement by reducing the distinctiveness of non-inherently distinctive trademarks and thus making them liable to cancellation procedures. Honduras also requests that paragraph 7.2033 be similarly amended.

6.68. In paragraph 7.1916, we provide an overview of the arguments made by the complainants regarding Article 16.1. In this overview, we identify only Cuba as having explicitly argued that the fact that certain trademarks may be *liable to cancellation* procedures as a result of the TPP

⁴¹³ The view expressed in paragraph 245 of Honduras's second written submission is reflected in the fourth sentence of paragraph 7.1879 of these Reports and referred to in corresponding footnote 4252.

⁴¹⁴ The view expressed in paragraph 261 of Honduras's second written submission is reflected in paragraph 7.1919 of these Reports in the section summarizing the complainants' main arguments with respect to their claims under Article 16.1.

measures constitutes a violation of Article 16.1. Paragraph 7.2033 summarizes more fully this set of arguments by Cuba. Honduras submits that it also made this argument in paragraph 261 of its second written submission, as supported by paragraph 243 of its first written submission. We note that in paragraph 261 of its second written submission, Honduras argues that, as a result of the TPP measures, the distinctiveness of a registered trademark will be diminished to the extent that it will no longer be considered distinctive, and the owner of that registered trademark will lose its *ability to restrain infringing use*. Paragraph 243 of Honduras's first written submission elaborates that this is because "the universe of similar trademarks that a consumer could confuse with the original trademark ... shrinks", and that the trademark owner's right to *prevent third parties from unauthorized use* will be compromised since other trademarks will no longer be considered "similar" to the original trademark. Honduras has also argued that Section 28 of the TPP Act does "not address the ... erosion of distinctiveness, and consequently the scope of protection", or the "maintenance of protection of tobacco-related marks vis-à-vis their potential use by third parties".⁴¹⁵ We have summarized and addressed in section 7.3.3.4.2 the arguments by the complainants, including Honduras, on whether the TPP measures violate Article 16.1 because the prohibition on the use of certain trademarks reduces their distinctiveness and thus the trademark owner's ability to demonstrate a likelihood of confusion.⁴¹⁶

6.69. Given that we have addressed the arguments presented in the paragraphs referred to by Honduras in another section, and that none of those paragraphs mention the TPP measures' potential implications relating to *cancellation of a registered trademark*, we decline to modify paragraphs 7.1916 and 7.2033. In response to Honduras's requests, we have, however, modified footnote 4526 to paragraph 7.2033, including by adding a cross-reference to section 7.3.3.4.2.

6.70. Honduras requests that, in paragraph 7.1919, the Panel refer to Professor Dinwoodie not as "Ukraine's expert", but as an expert "relied upon" by the complainants, as it does in paragraph 7.1752. We note that Honduras itself refers to Professor Dinwoodie as Ukraine's expert in paragraphs 240 and 244 of its first written submission. Nonetheless, we have amended paragraph 7.1919 for further clarity and to align the language with that of paragraph 7.1752.

6.71. Honduras alleges that the Panel's focus on the ability to show confusion in the first sentence of paragraph 7.1966 is not an accurate reflection of its argument which, it submits, focuses on the impact of the strength of the mark on the normative assessment of the likelihood of confusion that is relevant in the context of infringement proceedings. Honduras requests that the phrase "to show confusion in the market, and thus infringement" be replaced by the phrase "to protect the mark and thus defend against infringement". Australia objects to this request as it sees the relevant text as an accurate reflection of Honduras's previous submissions. Australia points out that, in its second written submission, Honduras itself refers to the responsibility of the trademark owner to demonstrate a likelihood of confusion.

6.72. We note that Honduras has argued that "the 'likelihood of confusion' is a normative assessment that is relevant in the context of any infringement proceeding", and that "[t]he strength of the mark is a key aspect of such a 'likelihood of confusion' assessment".⁴¹⁷ Honduras adds that "[t]he 'likelihood of confusion' must always be demonstrated by the trademark owner in the context of an infringement proceeding when trying to prevent the use of similar signs on similar products by unauthorized third parties and protect the distinctiveness of the mark."⁴¹⁸ In response to this request, we have amended paragraph 7.1966 to reflect more closely the language used by Honduras on the ability to demonstrate a likelihood of confusion and included additional references in footnotes 4448 and 4471 to paragraphs 7.1982 and 7.1999 to more fully reflect Honduras's arguments.

⁴¹⁵ Honduras's second written submission, para. 262. (emphasis added)

⁴¹⁶ Honduras's main arguments relating to its claim under Article 16.1 are summarized in greater detail in section 7.3.3.2 of these Reports.

⁴¹⁷ Honduras's second written submission, para. 259.

⁴¹⁸ Honduras's second written submission, para. 259 (emphasis added). This corresponds to another formulation by Honduras of its claim under Article 16.1, which asserts that the TPP measures void rights conferred under Article 16.1 because, "[c]ontrary to this provision, the legitimate owner of a tobacco-related trademark will not be able to prevent unauthorised third-party use of the trademark as he or she will not be able to demonstrate a likelihood of confusion with its original trademark." Honduras's first written submission, para. 249. (emphasis added)

6.73. With respect to the Panel's quote from Professor Dinwoodie's expert report in paragraph 7.1990, Honduras requests that the Reports also reflect certain other statements by Professor Dinwoodie that provide context for the quoted remark. In paragraphs 7.1989 to 7.1993, we discuss the complainants' allegation that the TPP measures' prohibition of use of certain registered trademarks will cause these marks to lose their distinctiveness and thus reduce the occurrence of situations in which right owners can demonstrate a "likelihood of confusion" between the registered trademarks and similar or identical signs on similar products.⁴¹⁹ In response to Honduras's request to provide further context for a statement made by Professor Dinwoodie, we have expanded footnote 4463 to paragraph 7.1990.

6.74. Honduras also asks the Panel to revise paragraph 7.2003 to reflect that it has made an argument similar to that attributed to the Dominican Republic, Cuba, by reference, and Indonesia. In support of this request, it refers to paragraphs 260 and 263 of its second written submission.

6.75. In its second written submission, Honduras argues that an owner of a tobacco-related trademark will not be able to demonstrate a likelihood of confusion because the trademark has lost much of its strength as a result of the TPP measures. We have referred to the relevant paragraph in footnotes 4457 and 4459 to paragraph 7.1986, which summarizes the complainants' arguments relating to the alleged reduction of the effective scope of the right. In its second written submission, Honduras cites MARQUES's *amicus curiae* submission, according to which "[a] measure that prevents the mark from maintaining its scope of protection or from growing its notoriety and strength through use as intended is thus inconsistent with the rights conferred on registered trademark owners under Article 16.1". In response to Honduras's request, we have added a reference to this text in footnote 4459 to paragraph 7.1986. We address the complainants' arguments, including those made by Honduras, relating to the alleged reduction in the effective scope of the right as a result of a reduction in the instances in which a "likelihood of confusion" can be demonstrated in paragraphs 7.1994 to 7.2002.

6.76. In paragraph 7.2003 and those that follow, we summarize a separate set of arguments, according to which Article 16.1 protects a trademark owner's ability to develop and maintain the distinctiveness of a trademark by means additional to third-party infringement actions and thus contains a general obligation for Members to refrain from adopting measures that undermine or eliminate the distinctiveness of trademarks. As we have addressed the arguments to which Honduras refers in paragraphs 7.1994 to 7.2002, we decline to add a further reference to them in paragraph 7.2003.

6.77. With respect to the Panel's quote from Professor Dinwoodie's expert report in paragraph 7.2012, Honduras requests that, to put the statement in context, the Panel also quote the paragraph immediately preceding it and the sentences that follow it. In response, we have modified footnote 4489 to paragraph 7.2012 to reflect the sentences that follow the quoted statement. In the preceding paragraph of his expert report, Professor Dinwoodie argues that, due to the nature of IP rights as private rights, Australia could not claim to achieve through regulation what Article 16 requires to be achieved by trademark rights. In our view, this point is not relevant to the issue under discussion in this paragraph, i.e. whether trademark distinctiveness may vary in the market.

6.17 Requests for review of section 7.3.5 (Article 20 of the TRIPS Agreement)

6.78. Honduras requests that the Panel more fully reflect Honduras's position on the meaning of the term "unjustifiably" in paragraph 7.2134.⁴²⁰ The overview of the claims in section 7.3.5.1 is intended to capture the elements that the parties identified as needing to be established to find a violation of the core obligation contained in the first sentence of Article 20 of the TRIPS

⁴¹⁹ See para. 7.1988 below.

⁴²⁰ Honduras identifies "the three different points why it considers Australia's TPP measures to be an unjustifiable encumbrance ... i.e. (i) TPP measures are the 'ultimate encumbrance'; (ii) TPP measures are unjustifiable by their nature because they are not based on an individual assessment; and (iii) in the alternative, the Panel should determine whether the TPP measures make a material contribution to the achievement of the public policy objective and whether these measures constitute the least-restrictive means to achieve that objective." Honduras's requests for review of the Interim Report, para. 59 (referring to arguments found at paragraphs 269-272 of Honduras's second written submission).

Agreement. It does not elaborate on arguments on whether and, if so, why the parties consider that these elements in fact are established in this particular case. We have, nonetheless, reflected in footnote 4645 Honduras's arguments in its first written submission on why it considers that the TPP measures are, by nature, unjustifiable and additional arguments from its second written submission.

6.79. Honduras requests that the Panel add a reference in paragraph 7.2140 to Honduras's arguments on the need to conduct an individual assessment and the need for a proportionate and limited exception. In response, we have included in paragraph 7.2140 language from Honduras's first written submission and added references in the related footnotes to paragraphs 7.2436 and 7.2443 to 7.2449, where Honduras's arguments on the need for individual assessment and the extreme nature of the encumbrance are more fully summarized.

6.80. Honduras also requests that the Panel modify the order in which it summarizes Honduras's arguments on the meaning of the term "unjustifiably" in section 7.3.5.5.1.1 and emphasizes that paragraph 7.2296 contains its rebuttal argument. Honduras also requests that the Panel include references to Honduras's arguments why it considers the TPP measures to be unjustifiable by their very nature. We have maintained the order of the summary of Honduras's arguments in this section, consistently with the order in which related arguments of other parties are summarized. However, we amended paragraph 7.2296, to clarify that Honduras makes its argument in response to Australia's arguments and added text to paragraph 7.2305 to reflect additional arguments by Honduras. We have also added a reference in a footnote to the related arguments in Honduras's second written submission. We decline to reflect in this section additional arguments identified by Honduras concerning the unjustifiability of the TPP measures specifically, which are referenced and addressed in subsequent sections.⁴²¹

6.81. Australia considers that the Panel's discussion in paragraphs 7.2414 and 7.2415 incorrectly suggested that Australia had argued that the proper meaning of the term "unjustifiably" should be discerned primarily in opposition to any other term, rather than from the proper meaning of the term actually used. Australia adds that it has applied a Vienna Convention analysis to determine the meaning of "unjustifiably" and that its arguments in relation to the interpretative distinction between "necessity" and "justifiable" are rebuttal points in response to what it sees as the complainants' attempts to conflate the two terms. Accordingly, Australia requests the Panel to make certain amendments to these paragraphs. The Dominican Republic and Indonesia object to the suggested changes. In their view, they are unnecessary given that the Panel presents in detail the parties' positions in paragraphs 7.2294-7.2348 and it is clear from the context that, in paragraphs 7.2414 and 7.2415, the Panel is focusing on a specific area of contention between the parties, namely the difference between the "necessity" and "justifiable" standards.

6.82. In response, we have clarified in paragraph 7.2413 that the parties first described their understanding of the ordinary meaning of the term "unjustifiably" in Article 20 and then sought contextual guidance, *inter alia*, by contrasting it to certain other terms. We also added a sentence in paragraph 7.2414, clarifying that Australia made the argument reflected in that paragraph in response to the complainants' arguments. We also slightly modified paragraph 7.2415. As indicated in footnote 5012 to paragraph 7.2412, the parties' arguments on the meaning of the term "unjustifiably" are summarized more extensively in section 7.3.5.5.1.1.

6.83. Australia considers that the Panel's analysis in paragraph 7.2420 incorrectly states that Australia has argued that the term "unjustifiably" in Article 20 of the TRIPS Agreement should be assumed to have "exactly the same meaning" as the term "unjustifiable" in the *chapeau* of Article XX of the GATT 1994. It requests the Panel to amend the first sentence of that paragraph accordingly. The Dominican Republic and Indonesia do not object to the modification suggested by Australia but request that the Panel also add a sentence indicating that Australia argues that the

⁴²¹ See paragraphs 269-270 of Honduras's second written submission regarding the three primary reasons why Honduras considers the TPP measures to be an unjustifiable encumbrance. These arguments concern the unjustifiability of the TPP measures in particular and appear to cover the same ground as the general interpretative arguments contained in paragraph 315 of Honduras's first written submission and paragraphs 361-372 of its second written submission, to which we have added references in para. 7.2305 below. Honduras's related main arguments concerning the TPP measures are summarized in subsequent parts of these Reports, including in sections 7.3.5.3.1.1 and 7.3.5.5.2.1 below.

meaning of the term "unjustifiably" in Article 20 of the TRIPS Agreement must be at least as permissive as the meaning of the term "unjustifiable" in Article XX of the GATT 1994. In response to these comments, we have modified paragraph 7.2420 and added footnote 5020 to paragraph 7.2420 containing a cross-reference to paragraph 7.2329. In addition, we have complemented the reference in footnote 4903 to paragraph 7.2329 with an additional reference to Australia's response to Panel question No. 107.

6.18 Requests for review of section 7.3.6 (Article 10bis of the Paris Convention (1967), as incorporated by Article 2.1 of the TRIPS Agreement)

6.84. Honduras requests that the term "constitutive" be added to the last sentence of paragraph 7.2634. We have made the requested change and have made minor adjustments to the references in related footnote 5285.

6.85. Indonesia requests the Panel to add a reference to its related arguments from its first written submission regarding Article 10bis to paragraph 7.2693. We have adjusted the text by moving details regarding the arguments of Honduras, the Dominican Republic, and Indonesia, formerly contained in a footnote, into the main body of the text. The complainants' arguments are now summarized in paragraphs 7.2693 to 7.2696. We further note that Indonesia's arguments are also cited at paragraph 7.2708 in the section that summarizes the parties' main arguments relating to Article 10bis(3)(1).

6.86. Honduras requests that the phrase "does not render" in what was footnote 5297 of the Interim Reports be corrected to "renders". We have corrected the text, which now appears in paragraph 7.2694.⁴²² We have also made the same correction to the third sentence of paragraph 7.2790.

6.87. Referring to paragraph 7.2701, Honduras requests that the Panel change its order of analysis by presenting and assessing Honduras's claims under Article 10bis of the Paris Convention (1967), as incorporated by Article 2.1 of the TRIPS Agreement, in the order set out in its submissions, namely first the claim under paragraph 1 of Article 10bis and then the claim under paragraph 3(3) of that Article. In response, we have expanded our discussion of the order of analysis under Article 10bis in paragraph 7.2691. For the reasons set out therein, we decline to change the order of our analysis.

6.88. Honduras suggests that paragraph 7.2764 be modified to reflect that it is unaware of an empirical study assessing whether consumers have been unable to distinguish the commercial source of tobacco products of one undertaking from those of other undertakings following the implementation of the TPP measures but considers that such quantitative data would not assist the Panel in resolving the claims in the present disputes. We expanded footnote 5488 to paragraph 7.2764 to include an additional reference to this argument and to the parts of these Reports where the complainants' responses to Panel question No. 168 on this subject are more fully reflected. We have also made minor corresponding adjustments to footnote 5210 at paragraph 7.2548.

6.19 Requests for review of the Appendices

6.89. In Appendix A, the Panel has added references or made corrections at paragraphs 12, 35, 37, 54, 67, and 68, in response to requests for review by Australia that the complainants have not objected to.

6.90. The Panel has also amended the summary of the parties' arguments at paragraphs 12, 16, 36, 41, and 76 to reflect further arguments in response to requests for review by Australia, taking into account also the comments of the Dominican Republic and Indonesia. The Panel has declined to make some of the requested additions, as they are already reflected at paragraphs 4, 12, 36, and 76.

⁴²² We moved this text from the footnote to the main body of the text in response to a request by Indonesia, as described at para. 6.85 above.

6.91. In paragraphs 38, 41, and 54, the Panel has added additional references to evidence from Australia's expert, Professor Chaloupka, and the Dominican Republic and Indonesia's experts, Ajzen et al., in response to a request by Australia that the Dominican Republic does not object to, provided that its own arguments in response are also incorporated. The Panel declines to incorporate some of the additional references requested by the Dominican Republic as they are already discussed at paragraph 83.

6.92. At footnote 58, the Panel has added references to the third rebuttal report by Professor Chaloupka, in response to a request by Australia. Indonesia objects to this request on the basis that the exhibit referred to by Australia does not address the questions that its request relates to. We understand Australia to have misidentified, in its request, the title of the exhibit at issue, referring to the "second" rather than the "third" rebuttal report by Professor Chaloupka.

6.93. In paragraph 56, the Panel has amended its reference to White et al. 2015b in response to a request by Australia that the Dominican Republic and Indonesia do not object to, provided that the findings of the study are accurately described. The Panel declines to include two additional sentences proposed by the Dominican Republic, to paragraph 56, as the issues covered by these sentences are already discussed at sections 1.1.3 and 2.1.4 of Appendix A. However, the Panel has added a sentence to paragraph 64 of Appendix B in response to the Dominican Republic's comments.

6.94. In Appendix B, the Panel has added a reference at footnote 165, in response to a request for review by Australia that the complainants have not objected to.

6.95. At footnotes 27, 29, 30, 31, and 140 of Appendix B, the Panel has added references to the third rebuttal report by Professor Chaloupka, in response to a request by Australia. The Dominican Republic and Indonesia object to this request on the basis that the exhibit referred to by Australia does not provide support for the referenced statements, as they address different issues. We understand Australia to have misidentified, in its request, the title of the exhibit at issue, referring to the "second" rather than the "third" rebuttal report by Professor Chaloupka but to paragraph numbers corresponding to the relevant aspects addressed in the third rebuttal report.

6.96. In paragraphs 25 and 57, the Panel has amended its description of the conclusions of Ajzen et al. and Australia's response. The Dominican Republic and Indonesia do not object to this request for review by Australia, provided that the Panel likewise reflects the Dominican Republic's response to this argument, which the Panel has done at paragraphs 25 and 56.

6.97. In Appendix C, the Panel has added references or made corrections at paragraphs 11, 12, 23, 36, 38, 65, and 117, footnotes 15, 24, 25, 34, 42, and 64, and Figures C.1, C.13, C.15, and C.17 in response to requests for review by Australia that the complainants have not objected to.

6.98. The Panel has also corrected Figure C.19, in response to requests for review by Australia and the related comments by Honduras and the Dominican Republic. Specifically, the Panel has clarified the source of Figure C.19 and adjusted the time-frame reflected in it, to match the range reflected in Figure 2 in the Chipty Second Rebuttal Report (Exhibit AUS-591).

6.99. The Panel has amended paragraphs 4, 59, and 62 to clarify the manner in which Australia's expert Dr Chipty used the RMSS data, in response to a request for review by Australia that the Dominican Republic does not object to, provided that Australia's arguments are accurately reflected.

6.100. The Panel has also amended paragraph 72 to clarify the nature of the use by Australia's expert Dr Chipty of the RMSS data and her re-estimation of Professor List's micro-economic model, in response to a request for review by Australia and the Dominican Republic's comments on this request.

6.101. The Panel has clarified, in paragraph 95, its description of Professor Chaloupka's discussion of issues relevant to Professor Klick's analysis of the NTPPTS data, in response to a request for review by Australia and Honduras's related comments, which have been endorsed by the Dominican Republic and Indonesia.

6.102. In Appendix D, the Panel has added references or made corrections at paragraphs 62, 66, 73, 82, footnotes 14, 63, and 109, and Figure D.4 in response to requests for review by Australia that the complainants have not objected to.

6.103. The Panel has clarified, in paragraph 96, its description of Professor Chaloupka's discussion of issues relevant to Professor Klick's analysis of the NTPPTS data, in response to a request for review by Australia and Honduras's related comments, which have been endorsed by the Dominican Republic and Indonesia.

7 FINDINGS

7.1 Order of analysis

7.1. The complainants have made claims under the TRIPS Agreement and the TBT Agreement. In addition, Cuba has made a claim under the GATT 1994. We therefore first consider the order in which we should address these claims.

7.2. Honduras, the Dominican Republic and Cuba agree that panels are in general free to structure the order of their analysis of multiple claims in the manner they see fit. They add that there is no hierarchy between the agreements raised in these proceedings (and in particular between the TRIPS Agreement and the TBT Agreement), and that they apply cumulatively and concurrently. Though suggesting that the Panel begin its analysis with the claims under the TRIPS Agreement, they do not express a firm preference.⁴²³ Indonesia argues that it is "a general principle of international law that claims concerning multiple treaties be considered in the order of specificity to the underlying facts, beginning with the highest degree of specificity"⁴²⁴, and that there "is no particular order in which the Panel should address the claims under the TBT Agreement and TRIPS Agreement because these agreements are equally specific to the measures at issue".⁴²⁵ Australia argues that the Panel is free to structure the order of its analysis as it sees fit but, because Article 20 of the TRIPS Agreement "deals 'more specifically, and in detail' with the subject matter falling within its scope", the Panel would need to begin its analysis of the trademark requirements in the TPP measures with that provision.⁴²⁶

7.3. As observed by some of the complainants, panels are free to structure the order of their analysis as they see fit, and may find it useful to do so taking account of the manner in which a claim is presented to them by a complaining Member.⁴²⁷ However, this is true only to the extent that, based on the "structure and logic" of the provisions at issue, there is no "mandatory sequence of analysis which, if not followed, would amount to an error of law" or would "affect the substance of the analysis itself".⁴²⁸

7.4. We note that there is no explicit hierarchy between the TRIPS Agreement and the TBT Agreement, which appear in distinct parts of Annex 1 of the Marrakesh Agreement Establishing the World Trade Organization (WTO Agreement). We therefore see nothing on the face of those two agreements that would suggest that the adoption of a specific sequence of analysis is mandated. We also note that the complainants have presented arguments, first, under the TRIPS Agreement; second, under the TBT Agreement; and third (in Cuba's complaint) under the GATT 1994. Australia has also presented its responses to these claims in the same order. The complainants generally see the cumulative nature of the obligations invoked as indicating that there is no obligation for us to address their claims in a particular order, and none of them contends that there is any mandatory sequence of analysis which, if not followed, would amount to an error of law.

⁴²³ Honduras's response to Panel question No. 1; Dominican Republic's response to Panel question No. 1; and Cuba's response to Panel question No. 1 (annexed to its response to Panel question No. 138).

⁴²⁴ Indonesia's response to Panel question No. 1 (referring to Panel Report, *US – 1916 Act (EC)*, para. 6.76).

⁴²⁵ Indonesia's response to Panel question No. 1.

⁴²⁶ Australia's response to Panel question No. 1.

⁴²⁷ Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, paras. 126-127.

⁴²⁸ Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, para. 109. See also Appellate Body Reports, *Canada – Renewable Energy / Feed-in Tariff Program*, para. 5.5; and Panel Reports, *EC – Seal Products*, para. 7.63.

7.5. It has also been established that a claim under the more specific and detailed WTO agreement should be addressed before a claim under a similar more general provision in another agreement.⁴²⁹ In line with this principle, the panel in *EC – Sardines* stated that, "if the [measure at issue] is a technical regulation, then the analysis under the TBT Agreement would precede any examination under the GATT 1994".⁴³⁰ Accordingly, to the extent that the challenged measure was found to be covered by the TBT Agreement, several panels have addressed claims under the TBT Agreement before addressing concurrent claims under the GATT 1994.⁴³¹

7.6. In respect of the claims before us under the TBT Agreement and under the GATT 1994, this reasoning would suggest that we consider the former before the latter. Such an approach would also be consistent with the fact that the TBT Agreement and the GATT 1994 both form part of Annex 1A (entitled "Multilateral Agreements on Trade in Goods"), and that the TBT Agreement articulates in its preamble that it sets out "to further the objectives of the GATT 1994".⁴³² The obligation in the TBT Agreement invoked by the complainants in these disputes (Article 2.2) applies to "technical regulations", thereby setting out an obligation in respect of that subset of measures that satisfies the definition in Annex 1.1 of the TBT Agreement.

7.7. In respect of the claims before us under the TBT Agreement and under the TRIPS Agreement, Australia considers that, by virtue of its understanding of the relationship between Article 20 of the TRIPS Agreement and Article 2.2 of the TBT Agreement, the Panel should consider Article 20 first, ultimately to the exclusion of Article 2.2 of the TBT Agreement in respect of those aspects of the TPP measures that relate to the use of trademarks on tobacco products and their retail packaging. Australia argues that the TRIPS Agreement deals more specifically and in detail with those aspects of the TPP measures that relate to the use of trademarks⁴³³, and adds that the TBT Agreement is not concerned with measures that address the exploitation of intellectual property (IP) rights.⁴³⁴ We do not wish to prejudge, at this stage of our analysis, our own analysis of the questions raised by Australia, namely (i) whether those aspects of the TPP measures that affect the use of trademarks are covered by the disciplines of Article 2.2 of the TBT Agreement or fall exclusively within the purview of the TRIPS Agreement, and (ii) the interpretation of the term "unjustifiably" in Article 20 and its relationship with the term "necessary" in Article 2.2 of the TBT Agreement.

7.8. For the purpose of determining our order of analysis, however, we note that certain claims before us relate to the same aspects of the measures at issue, and that the complainants use much of the same evidence in connection with a number of their claims, in particular in respect of their claims under Article 20 of the TRIPS Agreement and Article 2.2 of the TBT Agreement. In particular, we note that the complainants rely on essentially the same body of evidence in respect of a number of aspects of the effects of the challenged measures, under both covered agreements. Without prejudice to our assessment of whether the trademark requirements in the TPP measures are (contrary to Australia's argument) covered by the disciplines of Article 2.2 of the TBT Agreement, a finding that they are covered by those disciplines would render evidence in relation to the effect of both the "trademark-related" and "format" requirements relevant in the context of our assessment under Article 2.2 of the TBT Agreement.

⁴²⁹ The Appellate Body in *EC – Bananas III* stated:

Although Article X:3(a) of the GATT 1994 and Article 1.3 of the *Licensing Agreement* both apply, the Panel, in our view, should have applied the *Licensing Agreement* first, since this agreement deals specifically, and in detail, with the administration of import licensing procedures. If the Panel had done so, then there would have been no need for it to address the alleged inconsistency with Article X:3(a) of the GATT 1994.

Appellate Body Report, *EC – Bananas III*, para. 204. See also Panel Report, *EC – Sardines*, paras. 7.15-7.16; and Panel Report, *EC – Asbestos*, paras. 8.16-8.17.

⁴³⁰ Panel Report, *EC – Sardines*, para. 7.16. See also Panel Report, *EC – Asbestos*, paras. 8.16-8.17; Panel Reports, *US – COOL*, para. 7.73.

⁴³¹ See Panel Reports, *EC – Sardines*; *US – Clove Cigarettes*; *US – Tuna II (Mexico)*; *EC – Seal Products*; *US – COOL*; and *US – COOL (Article 21.5 – Canada/Mexico)*. We also note that, in accordance with the General interpretative note to Annex 1A, in the event of a conflict between a provision of the GATT 1994 and the TBT Agreement, the provisions of the TBT Agreement would prevail to the extent of the conflict.

⁴³² TBT Agreement, preamble, 2nd recital.

⁴³³ Australia's response to Panel question No. 1.

⁴³⁴ Australia's first written submission, para. 509.

7.9. It seems to us, therefore, that a more practical approach to our analysis would be one in which we consider, first, the evidence concerning the combined operation of both the trademark and format requirements in the TPP measures and then, to the extent necessary, relevant aspects of the evidence for the purpose of our analysis under Article 20. On this basis, we consider first the complainants' claim that the TPP measures are inconsistent with Article 2.2 of the TBT Agreement.

7.10. We will then assess the complainants' claims under the various provisions of the TRIPS Agreement that they identify as legal bases for their claims.

7.11. We will start by considering the complainants' claims relating to the provisions of the TRIPS Agreement that concern the protection of trademarks. We will first take up the provisions that concern the protectable subject matter, namely Article 2.1 of the TRIPS Agreement in conjunction with Article 6*quinquies* of the Paris Convention (1967) and then Article 15.4 of the TRIPS Agreement. We will next turn to the provisions concerning the rights conferred to the owner of a trademark, namely Article 16.1 and then Article 16.3. Finally, we will address the claims under Article 20 that concern "other requirements" relating to the use of a trademark. As noted above, the complainants use essentially the same set of evidence in respect of their claims under Article 2.2 of the TBT Agreement and some aspects of their claims under Article 20 claims of the TRIPS Agreement.

7.12. We will then address the complainants' claims under Article 2.1 of the TRIPS Agreement in conjunction with Article 10*bis* of the Paris Convention (1967). We then turn to the complainants' claims relating to the protection of geographical indications (GIs) under Articles 22.2(b) and 24.3 of the TRIPS Agreement. In light of the reference in Article 22.2(b) to "use which constitutes an act of unfair competition within the meaning of Article 10*bis* of the Paris Convention (1967)", we consider it appropriate to take up the claims under Article 22.2(b) after first addressing the claims under Article 10*bis* of the Paris Convention (1967).

7.13. Finally, we will consider Cuba's argument that the TPP measures are inconsistent with Article IX:4 of the GATT, in accordance with the approach of past panels that addressed claims under the TBT Agreement before addressing concurrent claims under the GATT 1994.⁴³⁵

7.14. In the context of our examination of the claims under the TRIPS Agreement and the GATT 1994, we will refer, as appropriate, to our analysis of the evidence and our factual findings in the context of our assessment under Article 2.2 of the TBT Agreement.

7.2 Article 2.2 of the TBT Agreement

7.15. Article 2.2 of the TBT Agreement provides that:

Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create. Such legitimate objectives are, *inter alia*: national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment. In assessing such risks, relevant elements of consideration are, *inter alia*: available scientific and technical information, related processing technology or intended end-uses of products.

7.16. Honduras, the Dominican Republic, Cuba and Indonesia claim that the TPP measures are inconsistent with Article 2.2 because they are "more trade-restrictive than necessary to fulfil a legitimate objective" within the meaning of Article 2.2. Australia considers that some aspects of the TPP measures should not be reviewed under Article 2.2 of the TBT Agreement and, to the extent that they do fall within the purview of this provision, it considers that the complainants have not made a *prima facie* case that they are inconsistent with Article 2.2.

⁴³⁵ Panel Reports, EC – Sardines; US – Clove Cigarettes; US – Tuna II (Mexico); EC – Seal Products; US – COOL; and US – COOL (Article 21.5 – Canada/Mexico).

7.2.1 Overview of the claims

7.17. Honduras submits that the trademark and format restrictions stipulated in Australia's plain packaging legislation are inconsistent with Article 2.2 of the TBT Agreement as these measures constitute a technical regulation that is more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks of non-fulfilment.⁴³⁶

7.18. The Dominican Republic claims that Australia violates Article 2.2 of the TBT Agreement because the TPP measures are severely trade-restrictive and are not necessary in view of their failure to contribute to Australia's objective and the reasonable availability of more effective and less trade-restrictive alternatives.⁴³⁷

7.19. Cuba claims that the TPP measures violate Article 2.2 of the TBT Agreement, as they are technical regulations, are "trade-restrictive" and are "more trade-restrictive than necessary" to achieve Australia's public health objective.⁴³⁸

7.20. Indonesia claims that the TPP measures violate Australia's obligations under Article 2.2 of the TBT Agreement, because the technical regulations at issue create unnecessary obstacles to trade as they are more trade-restrictive than necessary to fulfil a legitimate objective.⁴³⁹

7.21. Australia accepts that the "physical requirements" under the TPP measures are technical regulations within the scope of the TBT Agreement⁴⁴⁰ but expresses "significant concerns" with the "systemic implications" of the complainants' contention that the "trademark requirements" under the TPP measures can also be reviewed under the TBT Agreement. It argues that the TBT Agreement addresses technical regulations and does not, on its face, appear to be concerned with the exploitation of IP.⁴⁴¹ Australia considers that, should the Panel take the view that requirements affecting the use of trademarks can be "technical regulations" within the scope of the TBT Agreement, Article 20 of the TRIPS Agreement would remain "the applicable provision in respect of the trademark requirements imposed by the tobacco plain packaging measure", to the exclusion of Article 2.2 in respect of those requirements.⁴⁴²

7.22. Australia further argues that the TPP measures are "in accordance with relevant international standards" for tobacco plain packaging and therefore must be, by virtue of the second sentence of Article 2.5, rebuttably presumed not to be more trade-restrictive than necessary: a presumption, it claims, the complainants did not rebut.⁴⁴³ As a consequence, Australia claims, the Panel "need not proceed any further with its analysis of the complainants' claims under Article 2.2".⁴⁴⁴

7.23. Australia argues that the complainants have failed to establish that the TPP measures are "trade-restrictive" at all. As a result, even if the Panel concludes that the presumption under Article 2.5 is inapplicable, Australia submits that any further relational analysis with respect to the substance of the claim under Article 2.2 would not be required to examine the inconsistency of the TPP measures, as the complainants have failed to establish a *prima facie* case that they are inconsistent with Article 2.2.⁴⁴⁵

⁴³⁶ Honduras's first written submission, para. 787.

⁴³⁷ Dominican Republic's first written submission, para. 35.

⁴³⁸ Cuba's first written submission, para. 390.

⁴³⁹ Indonesia's first written submission, para. 463.

⁴⁴⁰ Australia's first written submission, para. 507.

⁴⁴¹ Australia's first written submission, para. 509.

⁴⁴² Australia's first written submission, para. 511.

⁴⁴³ See Australia's first written submission, paras. 519 and 584; second written submission, para. 356; opening statement at the first meeting of the Panel, paras. 82 and 84; opening statement at the second meeting of the Panel, para. 143; and response to Panel question No. 76, para. 209.

⁴⁴⁴ Australia's second written submission, para. 357. See also Australia's first written submission, paras. 519 and 584; second written submission, para. 320; opening statement at the second meeting of the Panel, para. 143; and response to Panel question No. 76, para. 209.

⁴⁴⁵ See Australia's first written submission, para. 585; second written submission, para. 358; and opening statement at the second meeting of the Panel, para. 144. See also response to Panel question No. 76,

7.24. The complainants reject these arguments by Australia. They consider that the measures cannot enjoy the rebuttable presumption under the second sentence of Article 2.5 because they are not "in accordance with relevant international standards" for tobacco plain packaging; and even if they were, such presumption has been successfully rebutted by them.⁴⁴⁶ They also consider that the TPP measures are not only trade-restrictive, but "highly" so.⁴⁴⁷ The complainants therefore request these two preliminary substantive arguments be rejected and, as a consequence, that the Panel proceed into a full analysis of the consistency of the TPP measures with Article 2.2.

7.25. Australia argues that, even if the Panel considered that the complainants had established some degree of trade-restrictiveness, and assuming that the measures cannot enjoy the presumption under the second sentence of Article 2.5, the complainants have nonetheless failed to establish that the measures are inconsistent with Article 2.2, i.e. that they are more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create. Therefore, the Panel would still need to reject the complainants' claims under Article 2.2 of the TBT Agreement in their entirety.⁴⁴⁸

7.2.2 Overall approach of the Panel

7.26. We recall that Article 2.2 of the TBT Agreement provides that:

Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create. Such legitimate objectives are, *inter alia*: national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment. In assessing such risks, relevant elements of consideration are, *inter alia*: available scientific and technical information, related processing technology or intended end-uses of products.

7.27. It is undisputed that, in accordance with the applicable rules on burden of proof⁴⁴⁹, the burden of establishing that the TPP measures are inconsistent with Article 2.2 rests on the complainants:

With respect to the burden of proof in showing that a technical regulation is inconsistent with Article 2.2, the complainant must prove its claim that the challenged measure creates an unnecessary obstacle to international trade. In order to make a *prima facie* case, the complainant must present evidence and arguments sufficient to establish that the challenged measure is more trade restrictive than necessary to achieve the contribution it makes to the legitimate objectives, taking account of the risks non-fulfilment would create.⁴⁵⁰

7.28. Article 2.2 applies to measures that are "technical regulations" within the meaning of the TBT Agreement. The first step of an analysis of the consistency of the TPP measures with Article 2.2 must therefore be to determine whether they constitute a "technical regulation". In this respect, Australia argues that the TBT Agreement "addresses technical regulations and does not, on its face, appear to be concerned with the exploitation of intellectual property"⁴⁵¹, so that the

para. 210 (noting that trade-restrictiveness need only be demonstrated with respect to the portion of the TPP measures that constitute "technical regulations").

⁴⁴⁶ See, e.g. Honduras's response to Panel question No. 67, pp. 27 and 29; Dominican Republic's response to Panel question No. 66, paras. 292-294; Cuba's response to Panel question No. 67 (annexed to its response to Panel question No. 138) (agreeing with Honduras's response to Panel question No. 67); and Indonesia's response to Panel question No. 66, para. 84.

⁴⁴⁷ Honduras's second written submission, paras. 328-580; and Dominican Republic's second written submission, paras. 924-961. See also Cuba's second written submission, paras. 225-253; and Indonesia's second written submission, paras. 220-273.

⁴⁴⁸ Australia's first written submission, para. 513.

⁴⁴⁹ See Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14, DSR 1997:I, 323, p. 335.

⁴⁵⁰ Appellate Body Report, *US – Tuna II (Mexico)*, para. 323. (footnote omitted)

⁴⁵¹ Australia's first written submission, para. 509.

"trademark requirements" under the TPP measures do not fall within the scope of the TBT Agreement. We will therefore first consider, to the extent necessary to address Australia's arguments in this respect, whether such impediment to the applicability of the TBT Agreement exists.

7.29. Should we determine that the TBT Agreement may be applicable, we will consider the extent to which the TPP measures constitute a "technical regulation" within the meaning of the TBT Agreement.⁴⁵² To the extent that we find that the measures are a technical regulation, such that the obligation in Article 2.2 applies to them, we will then need to consider whether they are inconsistent with that provision.

7.30. As described by the Appellate Body, an assessment of whether a technical regulation is "more trade-restrictive than necessary" within the meaning of Article 2.2 involves a number of considerations:

In sum, we consider that an assessment of whether a technical regulation is "more trade-restrictive than necessary" within the meaning of Article 2.2 of the *TBT Agreement* involves an evaluation of a number of factors. A panel should begin by considering factors that include: (i) the degree of contribution made by the measure to the legitimate objective at issue; (ii) the trade-restrictiveness of the measure; and (iii) the nature of the risks at issue and the gravity of consequences that would arise from non-fulfilment of the objective(s) pursued by the Member through the measure. In most cases, a comparison of the challenged measure and possible alternative measures should be undertaken. In particular, it may be relevant for the purpose of this comparison to consider whether the proposed alternative is less trade restrictive, whether it would make an equivalent contribution to the relevant legitimate objective, taking account of the risks non-fulfilment would create, and whether it is reasonably available.⁴⁵³

7.31. An assessment of the consistency of a technical regulation with Article 2.2 thus involves in the first instance a "relational analysis"⁴⁵⁴ of three factors:

- i. the degree of contribution made by the measure to the legitimate objective at issue;
- ii. the trade-restrictiveness of the measure; and
- iii. the nature of the risks at issue and the gravity of consequences that would arise from non-fulfilment of the objective(s) pursued by the Member through the measure.

7.32. These factors will, in turn, inform the "comparative analysis" that is, in most cases⁴⁵⁵, required to determine whether the challenged measure is *more* trade-restrictive than necessary:

The use of the comparative "more ... than" in the second sentence of Article 2.2 suggests that the existence of an "unnecessary obstacle[] to international trade" in the first sentence may be established on the basis of a comparative analysis of the above-mentioned factors. In most cases, this would involve a comparison of the trade-restrictiveness and the degree of achievement of the objective by the measure at issue with that of possible alternative measures that may be reasonably available and less trade restrictive than the challenged measure, taking account of the risks non-fulfilment would create. The Appellate Body has clarified that a comparison with reasonably available alternative measures is a conceptual tool for the purpose of

⁴⁵² Appellate Body Report, *US – Tuna II (Mexico)*, para. 323.

⁴⁵³ Appellate Body Report, *US – Tuna II (Mexico)*, para. 322. (footnote omitted)

⁴⁵⁴ See Appellate Body Reports, *US – COOL*, para. 374 (referring to Appellate Body Report, *US – Tuna II (Mexico)*, para. 318).

⁴⁵⁵ We note in this regard that it is "not mandatory in respect of Article 2.2 of the TBT Agreement for a panel to draw a preliminary conclusion on 'necessity' based on the factors with respect to the technical regulation itself before engaging further in a comparison with proposed alternative measures". Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.235. See also *ibid.* paras. 5.227-5.229. In respect of Article XX of the GATT 1994, see Appellate Body Reports, *EC – Seal Products*, para. 5.215 fn 1299.

ascertaining whether a challenged measure is more trade restrictive than necessary.⁴⁵⁶

7.33. As described above, in the present proceedings, the complainants argue that the TPP measures are trade-restrictive, and that they are more trade-restrictive than necessary to fulfil the legitimate objective they pursue, taking into account the risks that non-fulfilment of this objective would create. The complainants address all elements of the above test, including the three factors forming part of the "relational analysis", and identify certain alternative measures that are, in their view, reasonably available to Australia, would make an equivalent contribution to its objective, and would be less trade-restrictive than the TPP measures.

7.34. Australia considers, however, that the complainants have not established that the measures are trade-restrictive⁴⁵⁷ in the first place, and that therefore, to the extent that the TPP measures are examined under this provision, the Panel should reject these claims "at the threshold".⁴⁵⁸ Australia also argues, in the context of its analysis of the "trade-restrictiveness" of the measures, that the complainants have failed to address the fact that, since the TPP measures were adopted in accordance with the Article 11 and Article 13 FCTC Guidelines, these measures are "in accordance with relevant international standards" within the meaning of the second sentence of Article 2.5 of the TBT agreement.⁴⁵⁹ Consequently, it claims that, to the extent that the definition of a "technical regulation" also encompasses measures affecting the use of a trademark, the TPP measures are "rebuttably presumed" not to create an unnecessary obstacle to international trade under the second sentence of Article 2.5 and that the complainants have not rebutted this presumption.⁴⁶⁰

7.35. Australia concludes that, given the complainants' failure to establish that the measures are trade-restrictive, the Panel should conclude its analysis under Article 2.2 at that stage and is not required to engage in any further "relational" analysis under Article 2.2.⁴⁶¹ Australia submits in the alternative, i.e. only in the event that the Panel would determine that the complainants have made a *prima facie* case that the TPP measures are trade-restrictive, that the complainants have failed to establish a violation of article 2.2, with reference to the additional factors of the "relational analysis" described above.⁴⁶² In particular, Australia argues that the measure pursues a legitimate public health objective and is not more trade-restrictive than necessary to achieve that objective. Australia further considers that the complainants have not established that alternative measures would be reasonably available to it, that would achieve an equivalent contribution to its objective and be less trade-restrictive than the TPP measures.⁴⁶³

7.36. We consider that the possibility that the challenged measures may benefit from the rebuttable presumption conferred by the second sentence of Article 2.5, as invoked by Australia, may have significant implications for the manner in which we must conduct our analysis of the claims under Article 2.2.

7.37. The second sentence of Article 2.5 of the TBT Agreement provides as follows:

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

⁴⁵⁶ Appellate Body Report, *US – Tuna II (Mexico)*, para. 320 (emphasis original; footnote omitted). See also *ibid.* para. 318.

⁴⁵⁷ Australia's first written submission, para. 583.

⁴⁵⁸ Australia's first written submission, para. 513.

⁴⁵⁹ Australia's first written submission, paras. 567 and 584.

⁴⁶⁰ Australia's first written submission, paras. 519, 567-568 and 584.

⁴⁶¹ Australia's first written submission, para. 585.

⁴⁶² Australia's first written submission, paras. 586-590.

⁴⁶³ Australia's first written submission, paras. 21, 595, and 700-742.

7.38. By its express terms, therefore, the second sentence of Article 2.5 embodies a "rebuttable" presumption, which applies in respect of measures meeting the following two sets of cumulative conditions⁴⁶⁴:

- a. that they are "technical regulations"⁴⁶⁵ prepared, adopted or applied "for one of the legitimate objectives explicitly mentioned" in Article 2.2; and
- b. that they are "in accordance with relevant international standards".

7.39. The requirement to ensure that technical regulations are not prepared, adopted or applied "with a view to or with the effect of creating unnecessary obstacles to trade" is contained in the first sentence of Article 2.2.⁴⁶⁶ In turn, the second sentence of Article 2.2 provides that "[f]or this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create" (emphasis added).

7.40. There is therefore a close nexus between the first and second sentences of Article 2.2, both of which establish certain obligations with which WTO Members must comply when preparing, adopting, and applying technical regulations.⁴⁶⁷ Specifically, the requirement for technical regulations not to be "more trade-restrictive than necessary" (in the second sentence) qualifies and elaborates on the scope of the requirement for technical regulations not to create "unnecessary obstacles to trade" (in the first sentence):

Both the first and second sentence of Article 2.2 refer to the notion of "necessity". These sentences are linked by the terms "[f]or this purpose", which suggests that the second sentence qualifies the terms of the first sentence and elaborates on the scope and meaning of the obligation contained in that sentence.⁴⁶⁸

7.41. Against this context, it appears to us that if a technical regulation benefits from a "rebuttable presumption" that it does not create "unnecessary obstacles to trade" pursuant to the second sentence of Article 2.5, this would have a direct impact⁴⁶⁹ on the content and structure of the analysis to be conducted in relation to a claim that the same measure is "more trade-restrictive than necessary" within the meaning of the second sentence of Article 2.2.

7.42. The presumption established under the second sentence of Article 2.5 only applies with respect to technical regulations that are adopted "for one of the legitimate objectives explicitly mentioned" in Article 2.2. An early consideration of this factor will therefore allow us to determine

⁴⁶⁴ The parties seem to follow this same approach of perceiving the second sentence of Article 2.5 as containing two broad set of cumulative conditions. See, e.g. Honduras's response to Panel question No. 66, p. 26; Dominican Republic's response to Panel question No. 66, para. 288; Cuba's response to Panel question No. 66, p. 16 (annexed to its response to Panel question No. 138) (endorsing Honduras's response to question No. 66); Australia's first written submission, para. 569; and Australia's second written submission, para. 314.

⁴⁶⁵ The second sentence of Article 2.5 does not therefore concern the other two types of TBT measures: "standards" and "conformity assessment procedures". We also note that the second sentence of Article 2.5, on its face, only concerns technical regulations that, like the TPP measures, have been prepared, adopted or applied by *central government bodies*. Technical regulations from *local* or *non-governmental* bodies are disciplined in a separate provision, Article 3. The present proceedings, we note, do not involve such types of measures. Therefore, we need not, and do not, examine the question of whether Article 2.5 can be also invoked with respect technical regulations from *local* or *non-governmental* bodies.

⁴⁶⁶ The text of Article 2.2 is set out at paras. 7.15 and 7.26 above.

⁴⁶⁷ See Appellate Body Reports, *US – COOL*, para. 369:

In accordance with the first sentence, [Members] must ensure that such preparation, adoption, and application is not done "with a view to or with the effect of creating unnecessary obstacles to international trade"; and, in accordance with the second sentence, they must ensure that their technical regulations are "not ... more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create".

⁴⁶⁸ Appellate Body Report, *US – Tuna II (Mexico)*, para. 318.

⁴⁶⁹ What precisely the impact of this presumption will be, and when and how it can be rebutted, is a question we need not decide now. Instead, we may return to it later, as needed, after we have considered all elements of the two sets of conditions under the second sentence of Article 2.5.

whether the TPP measures, to the extent that we will have found them to be a technical regulation, fall within the scope of measures to which the presumption of the second sentence of Article 2.5 applies. As described above, the "legitimate objective" at issue is also one of the aspects to be considered in an assessment of whether a technical regulation is "more trade-restrictive than necessary" within the meaning of the second sentence of Article 2.2, independently of the applicability of the rebuttable presumption embodied in the second sentence of Article 2.5.

7.43. In light of these elements, we consider it appropriate, in the circumstances of this case, to start our analysis with a consideration of whether the TPP measures, in whole or in part, constitute a technical regulation within the meaning of the TBT Agreement.⁴⁷⁰ If this is the case, we will consider further whether they pursue a "legitimate objective" within the meaning of Article 2.2 of the Agreement, and, if so, more specifically whether they have been prepared, adopted or applied "for one of the legitimate objectives explicitly mentioned" in Article 2.2.

7.44. Should we determine that the TPP measures are a technical regulation *and* have been prepared, adopted or applied "for one of the legitimate objectives explicitly mentioned" in Article 2.2, we would need to consider further whether they are, as Australia argues, "in accordance with relevant international standards", such that the "rebuttable presumption" under the second sentence of Article 2.5 is applicable. If this is the case, we will also need to determine what this implies for the remainder of our analysis of the claims before us under Article 2.2, including how the complainants may "rebut" this presumption.⁴⁷¹

7.45. Should we determine that the TPP measures are a technical regulation but that the rebuttable presumption embodied in Article 2.5 does not apply, we would then need to pursue our analysis on the basis of the general approach described above, to determine whether the measures are "more trade-restrictive than necessary" within the meaning of Article 2.2. This would include a consideration of the degree to which the measures contribute to a legitimate objective, their trade-restrictiveness and the nature and gravity of the risks that non-fulfilment of the objective would create ("relational analysis"). This would be followed, as relevant, by a consideration of possible alternative measures that may be reasonably available to Australia and would make an equivalent contribution to the objective while being less trade-restrictive ("comparative analysis").

7.46. As described above, we first consider, as a preliminary matter, Australia's argument that the TBT Agreement "does not, on its face, appear to be concerned with the exploitation of intellectual property"⁴⁷², and whether this constitutes an impediment to the application of the TBT Agreement to the "trademark requirements" of the TPP measures.

⁴⁷⁰ On the approach to be followed in considering Australia's arguments under Article 2.5, see, e.g. Honduras's response to Panel question No. 66, p. 26; Dominican Republic's response to Panel question No. 66, paras. 288-289 and 292; Cuba's response to Panel question No. 66, p. 216 (annexed to its response to Panel question No. 138) (endorsing Honduras's response to question No. 66); Indonesia's response to Panel question No. 66, para. 73; Australia's response to Panel question No. 66, para. 156; and Australia's second written submission, para. 313. With the exception of Indonesia (which considers that we should first make all our determinations under the second sentence of Article 2.5 before even "commencing" assessing Article 2.2), we do not consider that the parties' views on this matter are in contradiction with the approach we take here, that is: first, considering the elements that belong to *both* Articles 2.2 and 2.5 (whether the measures constitute a "technical regulation" and the identification of their "objectives"); and then proceeding, as relevant, to the remaining elements that determine the applicability of the rebuttable presumption under the second sentence of Article 2.5 (whether the measures are "in accordance with relevant international standards" and if they are, what the consequences of the presumption conferred are and how it can be rebutted). Finally, having considered the applicability of the presumption under the second sentence of Article 2.5, we would then return to the completion of our analysis under Article 2.2 in light of our earlier determinations in relation to Article 2.5.

⁴⁷¹ See also para. 7.187 and fn 824 below.

⁴⁷² Australia's first written submission, para. 509. See also para. 7.21 above.

7.2.3 Applicability of the TBT Agreement to measures relating to trademarks

7.2.3.1 Main arguments of the parties

7.47. Australia expresses "significant concerns about the systemic implications" of the complainants' contention that the trademark requirements of the TPP measures are covered by the TBT Agreement.⁴⁷³ It considers that an interpretation according to which a measure affecting the use of IP may fall within the scope of the TBT Agreement "has the potential to expand the scope of the TBT Agreement to encompass matters that ... were meant to be reserved for the domestic law of each Member".⁴⁷⁴ As an example, Australia refers to the exclusion, under Article 27.2 of the TRIPS Agreement, of certain inventions from the scope of patentability in certain circumstances.⁴⁷⁵

7.48. In Australia's view, the TBT Agreement addresses technical regulations and does not, on its face, appear to be concerned with the exploitation of IP.⁴⁷⁶ Contrary to Article 20 of the TRIPS Agreement, "Article 2.2 of the TBT Agreement does not refer to the use of a trademark at all, but instead encompasses all manner of 'technical regulations'".⁴⁷⁷ Should the Panel agree that the trademark requirements are outside of the scope of the TBT Agreement, Australia submits that the Panel must dismiss the complainants' claim under this provision, as the complainants have not advanced or substantiated a claim that the non-trademark requirements alone are inconsistent with Article 2.2.⁴⁷⁸ Australia also notes that its claim that the TPP measures constitute a relevant "international standard" under Article 2.5 is independent of whether the Panel finds that the trademark requirements constitute "technical regulations" under Article 2.2.⁴⁷⁹

7.49. Australia adds that "if the Panel takes the view that requirements affecting the use of trademarks can be 'technical regulations' within the scope of the TBT Agreement, Article 20 of the TRIPS Agreement would remain the applicable provision in respect of the trademark requirements imposed by the tobacco plain packaging measure".⁴⁸⁰ According to Australia, "Article 20 of the TRIPS Agreement would apply to the exclusion of Article 2.2 [of the TBT Agreement] in respect of th[e] requirements [affecting the use of trademarks]"⁴⁸¹, for "Article 20 of the TRIPS Agreement would clearly address this subject matter more 'specifically, and in detail' as compared to Article 2.2 of the TBT Agreement".⁴⁸² Australia recalls "the statement by the Appellate Body in *EC – Bananas III* that, as between two agreements or norms addressing the same subject matter, a panel should apply the agreement or norm that 'deals specifically, and in detail' with the particular subject matter".⁴⁸³ Australia refers to other disputes as examples of the application of the *lex specialis* principle⁴⁸⁴, arguing that "the correct application of the principle of *lex specialis* is to apply the agreement or norm that 'deals specifically, and in detail' with the particular subject matter, which, in respect of the trademark requirements, is Article 20 of the TRIPS Agreement".⁴⁸⁵

7.50. While maintaining that "it is possible to comply with both agreements simultaneously and indeed the [tobacco plain packaging] measure does so"⁴⁸⁶, in Australia's view, "the application of two very different standards of review to the same subject matter would constitute a conflict."⁴⁸⁷ According to Australia, "the concurrent application of Article 20 of the TRIPS Agreement and Article 2.2 of the TBT Agreement to the trademark requirements of the tobacco plain packaging measure would mean 'in effect' that the standard of 'unjustifiability' under the former would be supplanted by the standard of 'necessity' under the latter."⁴⁸⁸ In other words, "[a] measure that a

⁴⁷³ Australia's first written submission, para. 509.

⁴⁷⁴ Australia's response to Panel question No. 62, para. 128.

⁴⁷⁵ Australia's response to Panel question No. 62, para. 128.

⁴⁷⁶ Australia's first written submission, para. 509.

⁴⁷⁷ Australia's first written submission, para. 510.

⁴⁷⁸ Australia's response to Panel question No. 62, para. 129; and response to Panel question No. 76, para. 208.

⁴⁷⁹ See Australia's response to Panel question No. 73, para. 200.

⁴⁸⁰ Australia's first written submission, para. 511.

⁴⁸¹ Australia's first written submission, para. 511.

⁴⁸² Australia's first written submission, para. 511.

⁴⁸³ Australia's first written submission, para. 511.

⁴⁸⁴ Australia's response to Panel question No. 74.

⁴⁸⁵ Australia's response to Panel question No. 89, para. 21.

⁴⁸⁶ Australia's response to Panel question No. 145, para. 1.

⁴⁸⁷ Australia's response to Panel question No. 75, para. 206.

⁴⁸⁸ Australia's response to Panel question No. 145, para. 2.

Member is allowed to maintain under Article 20 of the TRIPS Agreement as long as it is not unjustifiable could be found to be inconsistent with the standard of least trade-restrictiveness under Article 2.2 of the TBT Agreement.⁴⁸⁹

7.51. According to Australia, such an "approach would not do justice to the separate requirements of the different standards embodied in the two provisions".⁴⁹⁰ For Australia, "Article 20 of the TRIPS Agreement requires that the use of a trademark in the course of trade shall not be unjustifiably encumbered by special requirements, whereas Article 2.2 of the TBT Agreement requires that technical regulations not create unnecessary obstacles to trade and not be more trade-restrictive than necessary to fulfil a legitimate objective."⁴⁹¹ According to Australia, "[t]he Panel should resist the temptation to think that every measure taken by a Member must be challengeable in every respect under the covered agreements and to try to interpret the WTO agreements to achieve such an end"; "[t]he covered agreements have simply not been designed in such a manner to ensure a uniform coverage whereby every aspect of every measure taken by a Member can be challenged before the WTO."⁴⁹²

7.52. For Honduras and the Dominican Republic, by raising this preliminary defense, Australia "tries to shield [the TPP measures] from WTO scrutiny".⁴⁹³ According to Honduras and the Dominican Republic, "it is Australia's arguments that give rise to systemic concerns" because "Australia's line of argument effectively removes the trademark requirements from scrutiny under both Article 20 of the TRIPS Agreement, and Article 2.2 of the TBT Agreement"⁴⁹⁴, thus "allow[ing] Members to defeat the basic treaty function of a trademark without any scrutiny under the WTO agreements".⁴⁹⁵ For the Dominican Republic, "Article 27.2 of the *TRIPS Agreement* serves only to highlight that, when the drafters intended to reserve specific matters to domestic law they did so expressly".⁴⁹⁶

7.53. According to Honduras, the Dominican Republic and Cuba, Australia "selectively quotes from, and misstates" the Appellate Body Report in *EC – Bananas III*.⁴⁹⁷ Honduras adds that "the order of analysis bears no relation with the issue of applicability of one provision to the exclusion of another": "[o]n various occasions, the Appellate Body has recalled its findings in *EC – Bananas III* to reiterate the rule concerning the order of analysis, which is that panels should examine first the provision that deals with specifically and in detail with a certain issue".⁴⁹⁸ The Dominican Republic also addresses some of the other disputes referenced by Australia.⁴⁹⁹

7.54. Referencing the concurrent applicability of the covered agreements as a cardinal principle of the interpretation of the covered agreements, the Dominican Republic, supported by Indonesia⁵⁰⁰, argues that it is Australia's contrary position that raises serious systemic concerns.⁵⁰¹ For the Dominican Republic, the same measure is, in principle, subject to all of the different obligations

⁴⁸⁹ Australia's response to Panel question No. 75, para. 206.

⁴⁹⁰ Australia's response to Panel question No. 89, para. 20.

⁴⁹¹ Australia's response to Panel question No. 89, para. 20.

⁴⁹² Australia's response to Panel question No. 116, para. 107.

⁴⁹³ Dominican Republic's opening statement at the first meeting of the Panel, para. 57. See also Honduras's second written submission, paras. 11 and 13.

⁴⁹⁴ Dominican Republic's second written submission, para. 840. See also Honduras's second written submission, paras. 13 and 18.

⁴⁹⁵ Dominican Republic's second written submission, para. 841 (also recalling that, when asked by the Panel, in question No. 116, whether prohibitions on the use of a trademark on a product that is lawfully on the market are covered by either the TRIPS Agreement or the TBT Agreement, Australia responded that "such measures are not subject to scrutiny").

⁴⁹⁶ Dominican Republic's response to Panel question No. 115. See also second written submission, paras. 838-839.

⁴⁹⁷ Dominican Republic's second written submission, para. 835. See also Honduras's second written submission, para. 455; Dominican Republic's opening statement at the first meeting of the Panel, para. 58; and Cuba's second written submission, para. 201.

⁴⁹⁸ Honduras's second written submission, para. 458 (referring to Appellate Body Reports, *Canada – Renewable Energy/Canada – Feed-in Tariff Program*, para. 5.6; *US – Softwood Lumber IV*, para. 134; and *Chile – Price Band System*, para. 183).

⁴⁹⁹ Dominican Republic's second written submission, paras. 835-836 (addressing Panel Reports, *US – Customs Bond Directive*; and *US – 1916 Act*).

⁵⁰⁰ Indonesia's comments on Australia's response to Panel question No. 145, para. 2.

⁵⁰¹ Dominican Republic's response to Panel question No. 115, para. 203. See also second written submission, para. 829.

under the covered agreements, unless the contrary is stated in the text of the agreements, or there is conflict in the application of the agreements.⁵⁰² According to the Dominican Republic, the "principle of effectiveness" dictates that covered agreements be read harmoniously, as a whole.⁵⁰³

7.55. Cuba adds that the application of various WTO Agreements to the same measure does not raise any major problem for the WTO system of trade rules.⁵⁰⁴ Cuba points out that the Appellate Body in *EC – Bananas III* discussed the possibility that the GATT 1994 and the GATS could apply to a single measure⁵⁰⁵, and that in *EC – Trademarks and Geographical Indications (Australia)* the panel assessed the same measure under the TBT and TRIPS Agreements.⁵⁰⁶

7.56. Honduras further argues that, by virtue of the principle of the Single Undertaking, as a general rule, WTO obligations apply cumulatively.⁵⁰⁷ WTO jurisprudence confirms that different obligations contained in different agreements can co-exist since one does not override the other, and that there is no hierarchy between different WTO Agreements.⁵⁰⁸

7.57. Cuba argues that neither the WTO Agreement nor the case law make clear which law is more specific between the TBT and the TRIPS Agreements.⁵⁰⁹ Honduras adds that departures from the rule that WTO agreements apply cumulatively are rare and, where applicable, are clearly stipulated in the text of the covered agreements⁵¹⁰, and that in contrast, there is no provision in WTO law indicating that, as argued by Australia, the TRIPS Agreement applies to the exclusion of the TBT Agreement.⁵¹¹ Honduras maintains that if this had been the drafters' intention, they would have included a specific clause to that effect.⁵¹² The Dominican Republic and Indonesia similarly argue if Members had wanted to exclude the application of the TBT Agreement to measures falling under the TRIPS Agreement, they would have done so expressly, as was done in Article 1.5 of the TBT Agreement with respect to measures covered by the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement).⁵¹³

7.58. According to the Dominican Republic, a conflict arises when it is impossible to comply concurrently with the obligations in two different provisions, and in this case, it is perfectly possible for a Member to comply concurrently with its obligations under Article 20 of the TRIPS Agreement and Article 2.2 of the TBT Agreement.⁵¹⁴

7.2.3.2 Arguments of the third parties

7.59. Argentina agrees with Australia that the TPP measures' "trademark requirements" should be only examined under the TRIPS Agreement because it is the Agreement that "deals specifically"

⁵⁰² Dominican Republic's second written submission, para. 829.

⁵⁰³ Dominican Republic's second written submission, para. 829. See also opening statement at the first meeting of the Panel, para. 58; response to Panel question No. 115; and Appellate Body Report, *US – Tuna II (Mexico)*, para. 322.

⁵⁰⁴ Cuba's second written submission, para. 200.

⁵⁰⁵ Cuba's second written submission, para. 199 (quoting Appellate Body Report, *EC – Bananas III*, paras. 220 and 221).

⁵⁰⁶ Cuba's second written submission, para. 202 fn 115 (referring to Panel Report, *EC – Trademarks and Geographical Indications (Australia)*, paras. 7.450-7.459).

⁵⁰⁷ Honduras's second written submission, para. 455 (referring to Appellate Body Report, *Korea – Dairy*, paras. 74, 80, and 89).

⁵⁰⁸ Honduras's second written submission, para. 455 (referring to Appellate Body Report, *Canada – Periodicals*, p. 17, DSR 1997:I; and Panel Report, *EC – Trademarks and Geographical Indications (Australia)*, para. 7.244).

⁵⁰⁹ Cuba's second written submission, para. 201.

⁵¹⁰ Honduras's second written submission, para. 456.

⁵¹¹ Honduras's second written submission, para. 457.

⁵¹² Honduras's second written submission, para. 457.

⁵¹³ Dominican Republic's response to Panel question No. 115, para. 202; Indonesia's second written submission, para. 214; Indonesia's response to Panel question No. 115, para. 44; and Indonesia's comments on Australia's response to Panel question No. 145, para. 4.

⁵¹⁴ Dominican Republic's second written submission, para. 831.

with the issue of the relationship between Members' right to regulate health and the protection of trademarks.⁵¹⁵

7.60. Brazil "understands that a measure may fall under more than one of the Covered Agreements. In this sense, a measure dealing with intellectual property issues may also be a technical regulation within the meaning of the TBT Agreement insofar as it deals with product characteristics, labelling or other TBT-related matters concerning trade in products."⁵¹⁶ Brazil also believes that analysis of the TBT Agreement and the TRIPS Agreement should be independent from one another, as there is not a relationship of *lex specialis* between them. While the TBT Agreement deals with technical regulations and their effects on the trade of goods, the TRIPS Agreement establishes IP rights relating to trade. Brazil continues that each agreement integrates different annexes of the Marrakesh Agreement and deals with substantially different obligations. Inconsistency with the obligations in one agreement does not bring about necessarily a violation of the other.⁵¹⁷

7.61. Canada considers that the TBT and TRIPS Agreements "are not mutually exclusive" in the sense that both can apply to the same measure, including a measure that deals with IP. Moreover, says Canada, "intellectual property measures have not been carved out of the TBT Agreement and may constitute, *inter alia*, 'technical regulations', within the meaning of the term under Annex 1.1 of that Agreement."⁵¹⁸ Canada considers that because both the TRIPS and TBT Agreements can apply to IP measures, "it would be incorrect for the Panel to employ the *lex specialis* principle in this case." Canada says that, in fact, "[b]oth the TBT and TRIPS Agreements are *lex specialis* and discipline defined categories of measures." The *lex specialis* principle, notes Canada, "does not apply if the two treaties in issue deal with the same subject matter from different points of view, apply in different circumstances, or one provision is more far-reaching than, but is not inconsistent with, the other." In this respect, Canada does not see the relationship between the TRIPS and TBT Agreements as indicating that "one is not more specialized than the other", as both agreements "have the potential to apply to the same subject matter from different points of view, and the provisions under these covered agreements are cumulative and are not in conflict".⁵¹⁹ Canada thus concludes that the Panel "must make an assessment of whether the measure in issue satisfies the threshold elements under both [the TBT and TRIPS Agreements]", i.e. whether the TPP measures constitute a "technical regulation" and are trade-restrictive for the purposes of the TBT Agreement, and whether, *inter alia*, they are "special requirements" for the purposes of Article 20 of the TRIPS Agreement. Should the TPP measures satisfy these threshold elements under both the TBT and TRIPS Agreements, "the measure must then be assessed for consistency with the relevant provisions under these agreements."⁵²⁰

7.62. China first notes that it is undisputed that the TPP measures' "form requirements" are technical regulations under the TBT Agreement.⁵²¹ With respect to the measures' "trademark requirements", in particular, China considers that they meet the definition in Annex 1.1 of the TBT Agreement because they are mandatory requirements in respect of "product characteristics" and/or "packaging, marking or labelling".⁵²² China also considers the *lex specialis* principle inapposite to the present disputes and says that it is "well established by the Appellate Body that different aspects of a measure(s) at issue can be scrutinized under different provisions of the WTO covered agreements". Therefore, says China, "[w]hile the trademark requirements are subject to Article 20 of the TRIPS Agreement, these requirements, as technical regulations, are concurrently subject to Article 2.2 of the TBT Agreement, although the two provisions apply to different aspects of the trademark requirements."⁵²³

⁵¹⁵ Argentina's third-party submission, para. 37; Argentina's third-party response to Panel question No. 1, paras. 1-8 (agreeing with Australia's first written submission, para. 511); and Argentina's third-party statement, para. 15 (agreeing with Australia's first written submission, para. 511).

⁵¹⁶ Brazil's third-party response to Panel question No. 1a, p. 1.

⁵¹⁷ Brazil's third-party response to Panel question No. 1b, p. 1.

⁵¹⁸ Canada's third-party response to Panel question No. 1, paras. 1-2.

⁵¹⁹ Canada's third-party response to Panel question No. 1, para. 3.

⁵²⁰ Canada's third-party response to Panel question No. 1, para. 5.

⁵²¹ China's third-party submission, para. 72.

⁵²² China's third-party response to Panel question No. 1a, p. 1.

⁵²³ China's third-party response to Panel question No. 1b, pp. 1-2.

7.63. The European Union considers that if a "document prohibits, restricts or conditions the use of terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method, it falls within the definition of technical regulation, assuming that the other elements of the definition are fulfilled". For the European Union, the fact that any such requirement "is also a trademark or a geographical indication (terms that are not used in the TBT Agreement) does not, without more, take the document outside the scope of Article 2.2 of the TBT Agreement". The same is also true, claims the European Union, when terminology, symbol, packaging, marking or labelling requirements also fall within the scope of Article 20 (or other provisions) of the TRIPS Agreement: this "does not, without more, remove [those requirements] from the scope of Article 2.2 of the TBT Agreement". This indicates, therefore, that the respective obligations under these two agreements "apply concurrently",⁵²⁴ as evidenced by the fact that the TBT Agreement has been applied with respect to both "geographical indications" and "origin labelling", when neither of these terms are "expressly referenced" in the TBT Agreement's definition of technical regulations.⁵²⁵ As to the *lex specialis* principle, while the European Union considers it as "a useful analytical tool", it also believes that it is "not to be mechanistically applied". The European Union, more specifically, believes that the *lex specialis* principle "does not, without more, lead to the disapplication of Article 2.2 of the TBT Agreement, in favour of Article 20 or other provisions of the TRIPS Agreement".⁵²⁶ If anything, the European Union sees this issue "more in terms of order of analysis, a matter with respect to which the Panel has significant discretion, provided that it faithfully addresses all of the issues that need to be resolved for the purposes of this dispute".⁵²⁷

7.64. Guatemala considers that the provisions of the TRIPS Agreement are not "applicable to the exclusion of the provisions of the TBT Agreement".⁵²⁸ Guatemala says that, consistent with Article II of the WTO Agreement as well as Appellate Body jurisprudence, "covered agreements must be interpreted in a coherent and consistent manner", in the sense that "[w]henever a measure imposed by a Member falls within the scope of two or more covered agreements, the analysis of such measure should be made in a way that all the covered agreements concerned are taken into account and the obligations contained in each of them are carefully observed."⁵²⁹ Guatemala considers, as it says Australia does also, that the TBT and TRIPS Agreements deal with different subject-matter.⁵³⁰ In Guatemala's view, even assuming *arguendo* that these Agreements "might deal with the same subject matter, they do that from a different point of view and apply in different circumstances".⁵³¹

7.65. Japan believes that "[t]here is nothing in the TBT Agreement that *a priori* excludes measures regulating the use of a trademark from the scope of Article 2.2 of the Agreement. Thus, whether the measures' "trademark requirements" fall within the scope of that TBT provision "depends on whether they constitute a technical regulation".⁵³² In this sense, Japan considers that the TPP measures meet the definition of "technical regulation" in Annex 1.1 of the TBT Agreement because they not only lay down "product characteristics" for tobacco products themselves, but also for their packaging.⁵³³ As to the relationship between the TRIPS and TBT Agreements, Japan first posits that the Appellate Body decision in *EC – Bananas*, cited by Australia, only relates "to the order of analysis and do[es] not stand for the proposition that a provision of one covered

⁵²⁴ European Union's third-party submission, para. 43. See also European Union's third-party response to Panel question No. 1, paras. 1-13.

⁵²⁵ European Union's third-party response to Panel question No. 1, para. 1. For the European Union, "[a] similar approach has been followed with respect to origin labelling, origin also being something not expressly mentioned in the definition of a technical regulation, and origin marking being specifically regulated by Article IX of the GATT and origin by the Agreement on Rules of Origin." European Union's third-party submission, para. 44 (referring to Appellate Body Reports, *US – COOL*, para. 256).

⁵²⁶ European Union's third-party submission, para. 44. See also European Union's third-party response to Panel question No. 1, paras. 2-13.

⁵²⁷ European Union's third-party response to Panel question No. 1, para. 1.

⁵²⁸ Guatemala's third-party submission, para. 15.

⁵²⁹ Guatemala's third-party submission, paras. 8-10 (referring to Appellate Body Reports, *US – Countervailing and Anti-Dumping Measures (China)*, and *Argentina – Footwear (EC)*).

⁵³⁰ Guatemala's third-party submission, para. 11 (referring to Australia's first written submission, paras. 508-510).

⁵³¹ Guatemala's third-party submission, para. 14.

⁵³² Japan's third-party submission, para. 39.

⁵³³ Japan's third-party submission, paras. 40-42. See also Japan's third-party response to Panel question No. 1a, p. 1.

agreement which 'deals specifically, and in detail' with the particular subject matter applies to the exclusion of a provision on another agreement which also deal with the same matter".⁵³⁴ Japan then draws attention to the Appellate Body decision in *China – Publications and Audiovisual Products*, which it considers more appropriate to this case⁵³⁵, and supports the view that both the TRIPS and TBT Agreements are "integral part[s]" of the same treaty – the WTO Agreement – and, consequently, their provisions should be interpreted in a way "that gives meaning to *all* of them, harmoniously".⁵³⁶

7.66. Nicaragua argues that in the present dispute, it is "clear" that the TPP measures constitute a technical regulation. Nicaragua finds that the distinction between the trademark and the format requirements is not entirely clear because format elements and physical features of packaging (e.g. types of opening, edges or embossing) can also be trademarked. Similarly, format elements, like colors of logos or figurative trademarks, are part and parcel of the "terminology, symbols, packaging, marking or labelling requirements" that make up physical product characteristics. Thus, while descriptively convenient, Nicaragua does not find it analytically helpful to distinguish "trademark" requirements from "physical" requirements. For Nicaragua, the trademark and the physical requirements of the TPP measures satisfy the requirements of a "technical regulation" in Annex 1.1 of the TBT Agreement, and constitute a single measure covered by the TBT Agreement, as confirmed by Australia's notification of the measure under Article 2.9.2 of the TBT Agreement.⁵³⁷

7.67. Nicaragua disagrees with Australia's reading of the panel findings in *US – 1916 Act (Japan)* and *US – Customs Bond Directive* as supporting its *lex specialis* argument in this case. In those cases, the question concerned the relationship of the GATT 1994 to a specific Agreement found in Annex 1A of the WTO Agreement, and the relationship between different provisions of the GATT 1994, respectively. The situation is entirely different in the current disputes, which concern two equally applicable WTO covered agreements that apply to the same factual situation with different obligations. Nicaragua submits that applying both sets of agreements to the same factual situation does not raise any systemic concern and the rule of *lex specialis* therefore does not apply.⁵³⁸

7.68. Norway finds that the requirements relating to packaging, marking or labelling must be considered as "technical regulations", and does not find it necessary to distinguish between the restriction on the use of a trademark and the physical requirements in the assessment of Article 2.2 of the TBT Agreement.⁵³⁹

7.69. Singapore is of the view that the Panel should consider both the trademark requirements and format requirements together, in assessing the consistency of the TPP measures with Article 2.2 of the TBT Agreement. Both the trademark requirements and format requirements are "technical regulations" within the meaning of Annex 1.1 of the TBT Agreement and thus are subject as a whole to the TBT Agreement.⁵⁴⁰

7.70. Singapore submits that a measure may engage one or more of the covered agreements at the same time, and agrees with Japan that the Appellate Body's findings in *EC – Bananas III* relate to the *order of analysis*, rather than the exclusion of a provision of another agreement which deals with the same matter. Singapore asserts that Annex 1.1 of the TBT Agreement, which concerns terminology, symbols, packaging, marking or labelling requirements as they apply to a product, is

⁵³⁴ Japan's third-party submission, paras. 43-44. See also Japan's third-party response to Panel question No. 1b, pp. 2-3 (suggesting that Australia's reliance on Appellate Body Report, *EC – Bananas III* and Panel Reports, *US – 1916 Act (Japan)*, and *US – Customs Bond Directive* is misplaced).

⁵³⁵ Japan's third-party submission, paras. 45-46. See also Japan's third-party response to Panel question No. 1b, pp. 2-4.

⁵³⁶ Japan's third-party submission, para. 38 (referring to Appellate Body Report, *Argentina – Footwear (EC)*, para. 81). See also Japan's third-party response to Panel question No. 1b, pp. 2-4.

⁵³⁷ Nicaragua's third-party response to Panel question No. 1, pp. 1-2. See also third-party response to Panel question Nos. 2 and 3, pp. 2-4.

⁵³⁸ Nicaragua's third-party response to Panel question No. 1, pp. 1-2 (referring to Panel Report, *EC – Trademarks and Geographical Indications (Australia)*, para. 7.87, for the notion that applying two covered agreements to a single regulatory measure is "quite common in WTO jurisprudence").

⁵³⁹ Norway's third-party submission, para. 78.

⁵⁴⁰ Singapore's third-party response to Panel question No. 1, pp. 1-2 (referring to Appellate Body Reports, *EC – Sardines*, para. 176; and *EC – Asbestos*, para. 67).

as specific and detailed in this context as the TRIPS Agreement is with regard to trademark requirements. Singapore concludes that there is nothing that prevents the Panel from examining the trademark requirements in this case under Article 2.2 of the TBT Agreement.⁵⁴¹

7.71. South Africa states that "it would be cogent to argue that the same measure could be examined under two different agreements". It submits that Article 20 of the TRIPS Agreement, unlike Article 2.2 of the TBT Agreement, does not incorporate a necessity test and as a result it would be unwarranted to read such a test into the current provisions. "If the use of a trademark as a 'symbol or mark' is nonetheless also considered in context of Annex 1.1 of the TBT Agreement ... the Panel should be able to assess whether such a 'technical regulation' (to the extent that a trade mark may be said to be a 'technical regulation') complies with the requirement of Article 2.2 of the TBT Agreement."⁵⁴²

7.72. Peru notes Australia's indication that the TPP measures are in conformity with the Article 11 FCTC Guidelines, which is a relevant international standard under Article 2.4 of the TBT Agreement. Peru recalls, in this respect, that paragraph 46 of these Guidelines exhorts FCTC Parties to consider adopting measures to restrict or prohibit the use of logos, colours, brand images or promotional information on packaging other than brand names and product names displayed in a standard colour and font. In this regard, in addition of assessing certain TRIPS provisions, resolving this dispute also requires determining whether the FCTC COP is a body with activities in standardization and, if this is the case, whether their Guidelines constitute a relevant international standard. In the present proceedings, Peru considers that the Panel must decide on these two aspects. The Panel cannot therefore apply the principle of the judicial economy because the TPP measures contain two aspects: one related to IP (trademark use) and another related to technical regulations (tobacco product labelling and other related aspects).⁵⁴³

7.73. Uruguay submits that the TPP measures may be defined as a set in the shape of a policy designed to protect human, animal or plant life and human health. They may also be characterized as technical regulations and thus come within the scope of the TBT Agreement by requiring the presence of certain physical features on the packaging.⁵⁴⁴

7.74. Zimbabwe is of the view that all of the TPP measures' aspects provide for "mandatory" requirements "which lay down product characteristics" with respect to "symbols, packaging, marking or labelling requirements" and apply to an identifiable group of products. Zimbabwe thus considers that the attempt to distinguish the form or physical requirements from the trademark requirements is not meaningful, as all aspects of the challenged measures are covered by the disciplines of the TBT Agreement.⁵⁴⁵

7.2.3.3 Analysis by the Panel

7.75. We now consider whether, as Australia argues, certain aspects of the TPP measures relating to the use of trademarks on tobacco products and their retail packaging, which it describes as the "trademark requirements", should be considered not to be covered by the disciplines of Article 2.2 of the TBT Agreement, because they would fall within the purview of the TRIPS Agreement, which addresses IP rights. This argument requires us to consider the relationship between these agreements, and their relevant provisions, to the extent necessary to determine whether it would be inappropriate to consider under Article 2.2 of the TBT Agreement these aspects of the measures.

7.76. As observed by the Appellate Body, it is now well established that the WTO Agreement is a "Single Undertaking", such that WTO obligations are generally cumulative and Members must comply with all of them simultaneously.⁵⁴⁶ This is expressed in Article II:2 of the WTO Agreement, which provides that:

⁵⁴¹ Singapore's third-party response to Panel question No. 1, pp. 2-3.

⁵⁴² South Africa's third-party response to Panel question No. 1b, p. 2.

⁵⁴³ Peru's third-party statement, paras. 4-6.

⁵⁴⁴ Uruguay's third-party submission, para. 66.

⁵⁴⁵ Zimbabwe's third-party statement, para. 9.

⁵⁴⁶ Appellate Body Report, *Korea – Dairy*, para. 74.

The agreements and associated legal instruments included in Annexes 1, 2 and 3 (hereinafter referred to as "Multilateral Trade Agreements") are integral parts of this Agreement, binding on all Members.

7.77. In the words of the Appellate Body, Article II:2 of the WTO Agreement "expressly manifests the intention of the Uruguay Round negotiators that the provisions of the *WTO Agreement* and the Multilateral Trade Agreements included in its Annexes 1, 2 and 3 must be read as a whole".⁵⁴⁷ Thus, "an appropriate reading of this 'inseparable package of rights and disciplines' must, accordingly, be one that gives meaning to *all* the relevant provisions of these two equally binding agreements".⁵⁴⁸ As the Appellate Body pointed out, "[i]t is important to understand that the *WTO Agreement* is one treaty" and the different agreements annexed to it "are integral parts of that treaty and are equally binding on all Members pursuant to Article II:2 of the *WTO Agreement*".⁵⁴⁹

7.78. This cumulative and concurrent application of the WTO covered agreements was confirmed by the Appellate Body in *Canada – Periodicals* in relation to the GATT 1994 (trade in goods) and the GATS (trade in services), which appear under Annexes 1A and 1B of the WTO Agreement, respectively. The Appellate Body stated, in this regard, that "[t]he entry into force of the GATS ... does not diminish the scope of application of the GATT 1994."⁵⁵⁰ The Appellate Body explicitly agreed with the Panel's statement that: "The ordinary meaning of the texts of GATT 1994 and GATS as well as Article II:2 of the WTO Agreement, taken together, indicates that obligations under GATT 1994 and GATS can co-exist and that one does not override the other."⁵⁵¹ As expressed by the Appellate Body, the potential overlap in scope of application between the GATT and GATS depends ultimately on the measure at issue:

Given the respective scope of application of the two agreements, they may or may not overlap, depending on the nature of the measures at issue. Certain measures could be found to fall exclusively within the scope of the GATT 1994, when they affect trade in goods as goods. Certain measures could be found to fall exclusively within the scope of the GATS, when they affect the supply of services as services. There is yet a third category of measures that could be found to fall within the scope of both the GATT 1994 and the GATS. These are measures that involve a service relating to a particular good or a service supplied in conjunction with a particular good. In all such cases in this third category, the measure in question could be scrutinized under both the GATT 1994 and the GATS. However, while the same measure could be scrutinized under both agreements, the specific aspects of that measure examined under each agreement could be different.⁵⁵²

7.79. These elements make clear, in our view, that the fact that the covered agreements may overlap in scope does not imply that the scope of application of each agreement should be diminished or otherwise modified. Rather, the various covered agreements co-exist and apply cumulatively, and it is possible, therefore, for a measure to be simultaneously covered by the disciplines of one or more covered agreements. This is also consistent with the well-established tenet of treaty interpretation that, "[i]n light of the interpretive principle of effectiveness, it is the duty of any treaty interpreter to 'read all applicable provisions of a treaty in a way that gives meaning to *all* of them, harmoniously'.⁵⁵³ Further, as observed by the panel in *Indonesia – Autos*, "in public international law there is a presumption against conflict", and "[t]his presumption is

⁵⁴⁷ Appellate Body Report, *Korea – Dairy*, para. 81.

⁵⁴⁸ Appellate Body Report, *Argentina – Footwear (EC)*, para. 81 (emphasis original) (quoting Panel Report, *Argentina – Footwear (EC)*, para. 8.58).

⁵⁴⁹ Appellate Body Report, *Korea – Dairy*, para. 75. (emphasis original)

⁵⁵⁰ Appellate Body Report, *Canada – Periodicals*, p. 19, DSR 1997:I, 449, p. 465.

⁵⁵¹ Appellate Body Report, *Canada – Periodicals*, p. 19, DSR 1997:I, 449, p. 465 (quoting Panel Report, *Canada – Periodicals*, para. 5.17).

⁵⁵² Appellate Body Report, *EC – Bananas III*, para. 221. See also Appellate Body Report, *Canada – Periodicals*, p. 19, DSR 1997:I, 449, p. 465; and Panel Report, *China – Publications and Audiovisual Products*, paras. 7.127-7.128.

⁵⁵³ Appellate Body Report, *Korea – Dairy*, para. 81. (emphasis original)

especially relevant in the WTO context since all WTO agreements ... were negotiated at the same time, by the same Members and in the same forum."⁵⁵⁴

7.80. We therefore see no basis to assume that, as a matter of principle, measures affecting the use of IP, and thus potentially covered by the TRIPS Agreement, could not also be covered by relevant provisions of the TBT Agreement, to the extent that they would also fall within the scope of application of these provisions.⁵⁵⁵

7.81. This potential overlap in scope of application has already been noted in respect of the relationship between another agreement relating to trade in goods under Annex 1A, the GATT 1994, and the TRIPS Agreement, which is contained in Annex 1C of the WTO Agreement. In *EC – Trademarks and Geographical Indications (Australia)*, Australia challenged certain EC measures both under specific provisions of the TRIPS Agreement concerning the protection of GIs and trademarks, and under specific provisions of the GATT 1994 concerning non-discrimination in relation to imported products. In that case, the panel "d[id] not consider that the conclusion of the TRIPS Agreement reduced the scope of application of GATT"⁵⁵⁶:

[T]here is no hierarchy between the TRIPS Agreement and GATT 1994, which appear in separate annexes to the WTO Agreement. The ordinary meaning of the texts of the TRIPS Agreement and GATT 1994, as well as Article II:2 of the WTO Agreement, taken together, indicates that obligations under the TRIPS Agreement and GATT 1994 can co-exist and that one does not override the other. This is analogous to the finding of the Panel in *Canada – Periodicals*, with which the Appellate Body agreed, concerning the respective scopes of GATS and GATT 1994. Further, a "harmonious interpretation" does not require an interpretation of one that shadows the contours of the other. It is well established that the covered agreements apply cumulatively and that consistency with one does not necessarily imply consistency with them all.⁵⁵⁷

7.82. On the same basis, that panel also reviewed, under both the TBT and TRIPS Agreements, certain requirements of the measure at issue affecting "geographical indications", which, like "trademarks", constitutes one of the categories of IP rights covered by the TRIPS Agreement.⁵⁵⁸

7.83. Thus, we conclude that, where a measure falls within the scope of more than one covered agreement, including agreements on trade in goods under Annex 1A (such as the GATT 1994 or the TBT Agreement) and the TRIPS Agreement, these covered agreements apply concurrently and cumulatively, to the extent that the measure at issue, or aspects thereof, fall within the scope of each relevant agreement. *A priori*, this concurrent coverage entails the possibility of reviewing the same measure or aspect of a measure under all applicable provisions. Indeed, in the present dispute, Australia has not suggested that the applicability of the provisions of the TRIPS Agreement invoked by the complainants other than Article 20 would constitute an obstacle to the applicability of the TBT Agreement to the TPP measures.

⁵⁵⁴ Panel Report, *Indonesia – Autos*, para. 14.28. (footnotes omitted)

⁵⁵⁵ Indeed, we note that matters relating to the protection of intellectual property were not, as such, excluded from the scope of the GATT 1947, as illustrated by the terms of Article XX(d) and the proceedings in *US – Section 337*. In *US – Section 337*, patent-related matters were reviewed under Articles III:4 and XX(d) of the GATT 1947 to ensure that intellectual property (IP) rules do not unnecessarily discriminate against imported goods or constitute a disguised restriction on trade. IP matters also appear elsewhere in the GATT 1994, e.g. Articles IX:6, XII:3(c)(iii), and XVIII:10. Additionally, IP matters are also explicitly mentioned in various other WTO Agreements, including the Agreement on Subsidies and Countervailing Measures (SCM Agreement) (Article 8.2(a)(iii)); the Customs Valuation Agreement (Article 15.2(b) and para. 1 of Note to Article 8.1(c)); the Preshipment Inspection Agreement (Articles 2.12(a), 2.12(b), and 20(c)); the Agreement on Government Procurement (GPA) (Articles VI:3, XV:1(b), and XXIII:2); and the Agreement on Government Procurement, as amended by the 2012 Protocol (Amended GPA) (Articles. III:2(c), X:4, XIII:1(b)(ii), XVII:3(b), and XVII:3(c)). See also Article 7.1(b) of the Agreement on Textile and Clothes, which is no longer in force.

⁵⁵⁶ Panel Report, *EC – Trademarks and Geographical Indications (Australia)*, para. 7.267 fn 260. See also Panel Report, *EC – Trademarks and Geographical Indications (United States)*, para. 7.227 fn 234.

⁵⁵⁷ Panel Report, *EC – Trademarks and Geographical Indications (Australia)*, para. 7.244 (footnotes omitted). See also *ibid.* para. 7.87; and Panel Report, *EC – Trademarks and Geographical Indications (United States)*, paras. 7.36 and 7.208.

⁵⁵⁸ Panel Report, *EC – Trademarks and Geographical Indications (Australia)*, paras. 7.443-7.515.

7.84. Therefore, while not prejudging, at this stage of our analysis, the extent to which requirements affecting the use of trademarks may be considered to constitute "technical regulations" within the meaning of the TBT Agreement⁵⁵⁹, we find that the mere fact that a measure, or a certain aspect of a measure, is covered by a specific provision of the TRIPS Agreement is not, in itself, an obstacle to its potentially also falling within the scope of relevant provisions of the TBT Agreement.

7.85. We also recall that the fact that one of several covered agreements that apply concurrently to the same measure might be considered to be more "specific" to the subject-matter at issue in a given dispute has not been understood to imply, as Australia suggests, that the more specific agreement should apply *to the exclusion* of the more "general" one. Rather, as reflected in the rulings of the Appellate Body in *EC – Bananas III* referred to by Australia⁵⁶⁰:

*Although Article X:3(a) of the GATT 1994 and Article 1.3 of the Licensing Agreement both apply, the Panel, in our view, should have applied the Licensing Agreement first, since this agreement deals specifically, and in detail, with the administration of import licensing procedures. If the Panel had done so, then there would have been no need for it to address the alleged inconsistency with Article X:3(a) of the GATT 1994.*⁵⁶¹

7.86. While the Appellate Body refers in this context to the principle of *lex specialis*, it addresses the order of analysis and the subsequent possibility of exercising judicial economy, rather than conflict. Determining the order of analysis is different from the resolution of conflict between provisions, as "[t]he latter entails the use of conflict resolution rules or interpretative techniques."⁵⁶² Order of analysis is an analytical tool to determine the sequence in which an adjudicator addresses different, possibly related, claims, whereas conflict of norms relates to how cumulatively applicable provisions should be interpreted relative to each other.⁵⁶³

7.87. Other disputes invoked by Australia with reference to the *lex specialis* principle⁵⁶⁴ also do not support the view that a "more specific" covered agreement should, as a matter of principle, apply *to the exclusion* of the more general one. As the European Union observes, *US – 1916 Act (Japan)* "was not a case in which [specific provisions of covered agreements] were

⁵⁵⁹ See section 7.2.4 below on this question.

⁵⁶⁰ Australia's first written submission, para. 511.

⁵⁶¹ Appellate Body Report, *EC – Bananas III*, para. 204 (emphasis added). See also Appellate Body Report, *US – Upland Cotton*, paras. 549–550:

We recall that the *Agreement on Agriculture* and the *SCM Agreement* "are both Multilateral Agreements on Trade in Goods contained in Annex 1A of the *Marrakesh Agreement Establishing the World Trade Organization* (the "WTO Agreement"), and, as such, are both 'integral parts' of the same treaty, the *WTO Agreement*, that are 'binding on all Members'". Furthermore, as the Appellate Body has explained, "a treaty interpreter must read all applicable provisions of a treaty in a way that gives meaning to *all* of them, harmoniously". We agree with the Panel that "Article 3.1(b) of the *SCM Agreement* can be read together with the *Agreement on Agriculture* provisions relating to domestic support in a coherent and consistent manner which gives full and effective meaning to all of their terms".

In sum, we are not persuaded by the United States' submission that the prohibition in Article 3.1(b) of the *SCM Agreement* is inapplicable to import substitution subsidies provided in connection with products falling under the *Agreement on Agriculture*. WTO Members may still provide domestic support that is consistent with their reduction commitments under the *Agreement on Agriculture*. In providing such domestic support, however, WTO Members must be mindful of their other WTO obligations, including the prohibition in Article 3.1(b) of the *SCM Agreement* on the provision of subsidies that are contingent on the use of domestic over imported goods. (emphasis original) (footnotes omitted)

⁵⁶² Panel Report, *India – Autos*, para. 7.158 fn 380.

⁵⁶³ Overlap between two provisions *ratione materiae* is the precondition for the application of the principle *lex specialis derogat legi generali*. As the panel in *Thailand – Cigarettes (Philippines)* noted, "[t]he *lex specialis* principle has been defined by the International Law Commission ('ILC') as 'a generally accepted technique of interpretation and conflict resolution in international law. It suggests that whenever two or more norms deal with the same subject matter, priority should be given to the norm that is more specific'". Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.1047. (footnote omitted)

⁵⁶⁴ Australia's first written submission, para. 511 fn 695.

applied to the exclusion of Article III:4 of the GATT 1994, but merely a case in which judicial economy was exercised⁵⁶⁵ by the panel. Although the passage⁵⁶⁶ referenced by Australia⁵⁶⁷ addresses the principle of *lex specialis*, subsequent paragraphs of the panel's analysis address⁵⁶⁸ and explicitly reference judicial economy.⁵⁶⁹ Likewise, the paragraphs of the panel report in *US – Customs Bond Directive*⁵⁷⁰, also referred to by Australia⁵⁷¹, discuss the principle of *lex specialis* in the context of the question faced by the panel in *US – 1916 Act (Japan)* as to "whether it must also analyse a claim under [another provision of another covered agreement]".⁵⁷² The paragraphs referenced by Australia constitute the final part of an analysis of reasons supporting the panel's earlier conclusion that "on the basis of judicial economy, [it] refrains from ruling on"⁵⁷³ "a number of additional *as applied* claims under the GATT 1994".⁵⁷⁴ We consider the notion of judicial economy to be distinct from that of order of analysis, even if "[t]he order selected for examination of the claims may also have an impact on the potential to apply judicial economy."⁵⁷⁵ In our understanding, judicial economy⁵⁷⁶ is also distinct from conflict of norms. Judicial economy entails the adjudicator's choice of not entering into the analysis of a claim, provided this does not jeopardize effective resolution of the dispute⁵⁷⁷, whereas conflict of norms relates to how the rules underlying those claims should be interpreted relative to each other.

7.88. For the above reasons, we find that, in principle, the TBT and TRIPS Agreements may apply concurrently and cumulatively to different aspects of the same measures. We approach our further analysis under the TBT Agreement with this understanding, noting that the TBT and TRIPS Agreements should be interpreted harmoniously.

7.89. Nonetheless, the fact that each of the Multilateral Trade Agreements is an integral part of the Marrakesh Agreement does not, in and of itself, make clear how specific rights and obligations contained in those Multilateral Trade Agreements relate to each other, "particularly when they are contained in different instruments that nevertheless relate to the same subject matter".⁵⁷⁸ It cannot be excluded, therefore, that the concurrent application of different covered agreements may give rise to conflicts, including between specific provisions of these different agreements.

7.90. This possibility is expressly recognized, in respect of Agreements within Annex 1A of the WTO Agreement (i.e. the multilateral agreements on trade in goods), through the "General Interpretative note to Annex 1A", which provides that:

In the event of conflict between a provision of the General Agreement on Tariffs and Trade 1994 and a provision of another agreement in Annex 1A to the Agreement Establishing the World Trade Organization (referred to in the agreements in Annex 1A as the "WTO Agreement"), the provision of the other agreement shall prevail to the extent of the conflict.

7.91. The panel in *EC – Bananas III* understood this provision as follows:

In light of the wording, the context, the object and the purpose of th[e General Interpretative] Note, ... it is designed to deal with (i) clashes between obligations

⁵⁶⁵ European Union's third-party response to Panel question No. 1, para. 8.

⁵⁶⁶ Panel Report, *US – 1916 Act (Japan)*, para. 6.269.

⁵⁶⁷ Australia's first written submission, para. 511 fn 695.

⁵⁶⁸ Panel Report, *US – 1916 Act (Japan)*, paras. 6.270-6.272.

⁵⁶⁹ Panel Report, *US – 1916 Act (Japan)*, para. 6.272.

⁵⁷⁰ Panel Report, *US – Customs Bond Directive*, paras. 7.170-7.172.

⁵⁷¹ Australia's first written submission, para. 511 fn 695.

⁵⁷² Panel Report, *US – Customs Bond Directive*, para. 7.170.

⁵⁷³ Panel Report, *US – Customs Bond Directive*, para. 7.165.

⁵⁷⁴ Panel Report, *US – Customs Bond Directive*, para. 7.163. (emphasis original)

⁵⁷⁵ Panel Report, *India – Autos*, para. 7.161.

⁵⁷⁶ "The practice of judicial economy, which was first employed by a number of GATT panels, allows a panel to refrain from making multiple findings that the same measure is *inconsistent* with various provisions when a single, or a certain number of findings of inconsistency, would suffice to resolve the dispute. Although the doctrine of judicial economy *allows* a panel to refrain from addressing claims beyond those necessary to resolve the dispute, it does not *compel* a panel to exercise such restraint." Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, para. 133. (emphasis original)

⁵⁷⁷ See Appellate Body Report, *Argentina – Import Measures*, paras. 5.185-5.203.

⁵⁷⁸ Appellate Body Reports, *China – Rare Earths*, para. 5.53.

contained in GATT 1994 and obligations contained in agreements listed in Annex 1A, where those obligations are mutually exclusive in the sense that a Member cannot comply with both obligations at the same time, and (ii) the situation where a rule in one agreement prohibits what a rule in another agreement explicitly permits.⁵⁷⁹

7.92. No equivalent provision exists, however, in respect of the relationship between covered agreements contained in Annex 1A (Multilateral Agreements on Trade in Goods, including the TBT Agreement) and Annex 1B (GATS) or Annex 1C (TRIPS), that would provide specific guidance on whether a conflict exists between provisions of these different agreements or clarify how such conflicts should be addressed. Against this context, recourse to other interpretative elements will be necessary to determine the specific relationship among individual terms and provisions of the Multilateral Trade Agreements, and between such provisions and the Marrakesh Agreement.⁵⁸⁰ As expressed by the Appellate Body:

[T]he specific relationship among individual terms and provisions of the Multilateral Trade Agreements, and between such provisions and the Marrakesh Agreement, must be determined on a case-by-case basis through a proper interpretation of the relevant provisions of these agreements. In other words, this specific relationship must be ascertained through scrutiny of the provisions concerned, read in the light of their context and object and purpose, with due account being taken of the overall architecture of the WTO system as a single package of rights and obligations, and any specific provisions that govern or shed light on the relationship between the provisions of different instruments (such as the General Interpretative Note to Annex 1A).⁵⁸¹

7.93. Further, as observed by the panel in *Indonesia – Autos*, "in public international law there is a presumption against conflict", and "[t]his presumption is especially relevant in the WTO context since all WTO agreements ... were negotiated at the same time, by the same Members and in the same forum."⁵⁸² That panel also considered that a conflict between the Agreement on Subsidies and Countervailing Measures (SCM Agreement) and Article III of the GATT 1994 would only arise in "the narrow situation of mutually exclusive obligations for provisions that cover the same type of subject matter"⁵⁸³:

In international law for a conflict to exist between two treaties, three conditions have to be satisfied. First, the treaties concerned must have the same parties. Second, the treaties must cover the same substantive subject matter. Were it otherwise, there would be no possibility for conflict. Third, the provisions must conflict, in the sense that the provisions must impose mutually exclusive obligations. "... [T]echnically speaking, there is a conflict when two (or more) treaty instruments contain obligations which cannot be complied with simultaneously. ... Not every such divergence constitute a conflict, however. ... Incompatibility of contents is an essential condition of conflict".⁵⁸⁴

7.94. In *Guatemala – Cement I*, the Appellate Body, in interpreting the term "difference" in Article 1.2 of the DSU in the context of the relationship between the rules and procedures of the DSU and Article 17 of the Anti-Dumping Agreement, adopted a similarly restrictive definition of "conflict", albeit not explicitly limited to conflicting "obligations":

[I]t is only where the provisions of the DSU and the special or additional rules and procedures of a covered agreement *cannot* be read as *complementing* each other that the special or additional provisions are to *prevail*. A special or additional provision should only be found to *prevail* over a provision of the DSU in a situation where

⁵⁷⁹ Panel Reports, *EC – Bananas III*, para. 7.159. (footnote omitted)

⁵⁸⁰ Appellate Body Reports, *China – Rare Earths*, para. 5.56.

⁵⁸¹ Appellate Body Reports, *China – Rare Earths*, para. 5.55. See also, in respect of Agreements under Annex 1A, Appellate Body Report, *Brazil – Desiccated Coconut*, p. 14, DSR 1997:I, 167, pp. 178-179.

⁵⁸² Panel Report, *Indonesia – Autos*, para. 14.28. (footnotes omitted)

⁵⁸³ Panel Report, *Indonesia – Autos*, para. 14.49.

⁵⁸⁴ Panel Report, *Indonesia – Autos*, para. 14.28 fn 649.

adherence to the one provision will lead to a violation of the other provision, that is, in the case of a *conflict* between them.⁵⁸⁵

7.95. These rulings address somewhat different situations as regards the legal nature of the provisions among which a conflict may arise (i.e. "obligations", explicit rights, "provisions", and prohibitions). They also appear to reflect partly different definitions of "conflict". The panel in *Indonesia – Autos* considered that "under public international law a conflict exists in the narrow situation of mutually exclusive obligations for provisions that cover the same type of subject matter."⁵⁸⁶ A variant of this narrow concept of conflict involves two positive obligations, as under the first situation of "conflict" identified by the panel in *EC – Bananas III* ("obligations are mutually exclusive in the sense that a Member cannot comply with both obligations at the same time"⁵⁸⁷). Another variant entails the type of logical conflict between two provisions identified by the Appellate Body in *Guatemala – Cement I* in the context of Article 1.2 of the DSU between a positive and a negative obligation, i.e. between two provisions, one of which prescribes what the other forbids.⁵⁸⁸ Finally, and somewhat differently, the second type of situation identified by the panel in *EC – Bananas III* ("where a rule in one agreement prohibits what a rule in another agreement explicitly permits"⁵⁸⁹) would not involve two obligations but rather a prohibition, i.e. a negative obligation, and an explicit authorization.

7.96. In these proceedings, we must consider the specific relationship between the terms of Article 20 of the TRIPS Agreement and those of Article 2.2 of the TBT Agreement. At their core, both Article 20 of the TRIPS Agreement and Article 2.2 of the TBT Agreement disallow certain measures, in that they require Members *not* to adopt or maintain certain types of measures ("shall not"). In essence, Article 20 prohibits the adoption of "special requirements" that "unjustifiably encumber" the use of a trademark in the course of trade, whereas Article 2.2 of the TBT Agreement prohibits the preparation, adoption, or application of "technical regulations" (including those dealing with "terminology, symbols, packaging, marking or labelling requirements") that are more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create. We consider that these two obligations are not in substantive contradiction or "mutually exclusive". Nor do we see any logical conflict between them.⁵⁹⁰ Because these two provisions contain prohibitions that are neither mutually exclusive nor in substantive contradiction, it is possible to comply with both of them at the same time: "adherence to the one provision will [not] lead to a violation of the other provision".⁵⁹¹

7.97. In the present proceedings, Australia has recognized that "it is possible to comply with both agreements simultaneously and indeed the [TPP] measure does so".⁵⁹² As we understand it, therefore, Australia is not alleging the existence of a conflict between Article 20 of the TRIPS Agreement and Article 2.2 of the TBT Agreement in the narrow sense of mutually exclusive obligations, whereby it would be impossible to comply with both provisions at the same time. We understand Australia to argue instead that complying with the requirements under Article 2.2 of the TBT Agreement, in relation to the trademark requirements of the TPP measures, would undermine the flexibility available to it under Article 20 of the TRIPS Agreement in respect of such requirements. This is closer, though not identical – to the second type of situation identified by the panel in *EC – Bananas III* as giving rise to a conflict, namely "the situation where a rule in one agreement prohibits what a rule in another agreement explicitly permits".⁵⁹³ In fact, whereas the panel in *EC – Bananas III* referred to an "explicit[] permission]", Australia invokes a flexibility that is indirect and implicit: it emanates from what is *not prohibited* by Article 20 of the

⁵⁸⁵ Appellate Body Report, *Guatemala – Cement I*, para. 65 (emphasis original). See also Appellate Body Report, *US – FSC*, para. 159.

⁵⁸⁶ Panel Report, *Indonesia – Autos*, para. 14.49.

⁵⁸⁷ Panel Reports, *EC – Bananas III*, para. 7.159.

⁵⁸⁸ Appellate Body Report, *Guatemala – Cement I*, para. 65 (emphasis added). See also Appellate Body Report, *US – Carbon Steel*, para. 51.

⁵⁸⁹ Panel Reports, *EC – Bananas III*, para. 7.159. (footnote omitted)

⁵⁹⁰ Appellate Body Report, *Guatemala – Cement I*, para. 65. See also Appellate Body Report, *US – Carbon Steel*, para. 51.

⁵⁹¹ Appellate Body Report, *Guatemala – Cement I*, para. 65. See also Appellate Body Report, *US – Carbon Steel*, para. 51.

⁵⁹² Australia's response to Panel question No. 145.

⁵⁹³ Panel Reports, *EC – Bananas III*, para. 7.159.

TRIPS Agreement, i.e. what, Australia argues, does not amount to an unjustifiable encumbrance on the use of trademarks in the sense of that provision.

7.98. We note that this understanding of conflict is broader in scope than previous descriptions of this concept by panels and the Appellate Body, as reflected above. We also recall that in *US – Upland Cotton* the Appellate Body addressed the relationship of the SCM Agreement and the Agreement on Agriculture. Notwithstanding the existence of a specific provision in the Agreement on Agriculture giving precedence to the latter⁵⁹⁴, the Appellate Body concluded that absent an explicit carve-out or authorization to depart from the prohibition in Article 3.1(b) of the SCM Agreement⁵⁹⁵, this prohibition applies concurrently with relevant provisions of the Agreement on Agriculture:

We recall that the *Agreement on Agriculture* and the *SCM Agreement* "are both Multilateral Agreements on Trade in Goods contained in Annex 1A of the *Marrakesh Agreement Establishing the World Trade Organization* (the "WTO Agreement"), and, as such, are both 'integral parts' of the same treaty, the *WTO Agreement*, that are 'binding on all Members'". Furthermore, as the Appellate Body has explained, "a treaty interpreter must read all applicable provisions of a treaty in a way that gives meaning to *all* of them, harmoniously". We agree with the Panel that "Article 3.1(b) of the SCM Agreement can be read together with the *Agreement on Agriculture* provisions relating to domestic support in a coherent and consistent manner which gives full and effective meaning to all of their terms".

In sum, we are not persuaded by the United States' submission that the prohibition in Article 3.1(b) of the *SCM Agreement* is inapplicable to import substitution subsidies provided in connection with products falling under the *Agreement on Agriculture*. WTO Members may still provide domestic support that is consistent with their reduction commitments under the *Agreement on Agriculture*. In providing such domestic support, however, WTO Members must be mindful of their other WTO obligations, including the prohibition in Article 3.1(b) of the *SCM Agreement* on the provision of subsidies that are contingent on the use of domestic over imported goods.⁵⁹⁶

7.99. We note that there is no provision similar to Article 21.1 of the Agreement on Agriculture that would give precedence to the provisions of the TRIPS Agreement over the TBT Agreement. Nor does the TRIPS Agreement, and its Article 20 in particular, contain an explicit carve-out or authorization to depart from the prohibition contained in Article 2.2 of the TBT Agreement.

7.100. By its terms, Article 20 of the TRIPS Agreement prohibits "special requirements" that "unjustifiably encumber" the use of a trademark in the course of trade. While Article 20 does not prohibit, and thus, tolerates encumbrances that are not unjustifiable, it does not explicitly identify, authorize or encourage encumbrances that would not be unjustifiable. Likewise, Article 2.2 of the TBT Agreement does not prohibit, and thus, tolerates technical regulations that are not more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create; however, Article 2.2 of the TBT Agreement does not explicitly encourage such technical regulations. In short, each provision disallows certain measures and

⁵⁹⁴ According to Article 21.1 of the Agreement on Agriculture, "[t]he provisions of GATT 1994 and of other Multilateral Trade Agreements in Annex 1A to the WTO Agreement shall apply subject to the provisions of this Agreement." See Appellate Body Report, *US – Upland Cotton*, para. 531.

⁵⁹⁵ According to the Appellate Body, Article 21.1 of the Agreement on Agriculture "could apply in ... three situations: where, for example, the domestic support provisions of the Agreement on Agriculture would prevail in the event that an *explicit carve-out or exemption* from the disciplines in Article 3.1(b) of the SCM Agreement existed in the *text* of the Agreement on Agriculture. Another situation would be where it would be impossible for a Member to comply with its domestic support obligations under the Agreement on Agriculture and the Article 3.1(b) prohibition simultaneously. Another situation might be where there is an *explicit authorization* in the *text* of the Agreement on Agriculture that would authorize a measure that, in the absence of such an *express authorization*, would be prohibited by Article 3.1(b) of the SCM Agreement." Appellate Body Report, *US – Upland Cotton*, para. 532, referring to Panel Report, *US – Upland Cotton*, para. 7.1038 (underlining original; italics added). The Appellate Body also recalled its earlier finding that "[i]f the negotiators [of the Agreement on Agriculture] had intended to permit Members to act inconsistently with Article XIII of the GATT 1994, they would have said so explicitly". Appellate Body Report, *US – Upland Cotton*, para. 548, referring to Appellate Body Report, *EC – Bananas III*, para. 157.

⁵⁹⁶ Appellate Body Report, *US – Upland Cotton*, paras. 549-550. (emphasis original) (footnotes omitted)

establishes a balance to assess, on a case-by-case basis, whether specific measures are permitted. On their face, the explicit prohibitions contained in Article 20 of the TRIPS Agreement and Article 2.2 of the TBT Agreement respectively must be read and, absent a conflict, applied together. The principle of harmonious reading dictates that the flexibilities implicitly left by those prohibitions also need to be viewed together, without *a priori* giving precedence to one over, and to the exclusion of, the other.

7.101. We do not exclude that certain aspects of the TPP measures may fall within the scope of application of both the TBT Agreement and Article 20 of the TRIPS Agreement, to the extent that they would constitute both a "technical regulation" within the meaning of the TBT Agreement and "special requirements" falling within the scope of Article 20 of the TRIPS Agreement. Assuming *arguendo* that this would be the case, to determine whether one provision prohibits what the other permits, we would need to consider whether their concurrent application to the same measures or aspects of these measures would lead to "conflicting" outcomes. Australia argues that they do because by applying Article 2.2 of the TBT Agreement "the standard of 'unjustifiability' under [Article 20 of the TRIPS Agreement] would be supplanted by the standard of 'necessity' under the [Article 2.2 of the TBT Agreement]".⁵⁹⁷ In other words, "[a] measure that a Member is allowed to maintain under Article 20 of the TRIPS Agreement as long as it is not unjustifiable *could* be found to be inconsistent with the standard of least trade-restrictiveness under Article 2.2 of the TBT Agreement."⁵⁹⁸

7.102. Implicit in Australia's arguments is the assumption that the "necessity test" under Article 2.2 of the TBT Agreement is more stringent than the "justifiability test" under Article 20 of the TRIPS Agreement, or at least that their concurrent application "could" lead to outcomes that Australia describes as conflicting. Specifically, the situation that Australia envisages is that Article 20 of the TRIPS Agreement would allow scope for the maintenance of a measure that would be disallowed if considered under Article 2.2 of the TBT Agreement. We consider, however, that the relative stringency of these two tests is very difficult to establish in the abstract. As described by Australia, the two provisions entail "two very different standards"⁵⁹⁹, informed by the specific context of each Agreement.⁶⁰⁰ Given these differences, the outcome of the analysis under each provision would depend on the circumstances of the case, and it is conceivable that a measure would not be found to be "more trade-restrictive than necessary" under Article 2.2 of the TBT Agreement, while "unjustifiably" "encumbering" the use of trademarks within the meaning of Article 20 of the TRIPS Agreement, or vice-versa.⁶⁰¹ We see no basis, therefore, to assume that the concurrent application of these two provisions to aspects of the same measures that may fall within the scope of both agreements would necessarily lead to the type of outcomes identified by Australia as conflicting.

7.103. We further note that, while the TBT and TRIPS Agreements are contained in distinct parts of Annex 1 of the WTO Agreement, they pursue complementary objectives. The TBT Agreement serves to "further the objectives of GATT 1994"⁶⁰², while the TRIPS Agreement serves to address the "applicability of the basic principles of GATT 1994".⁶⁰³ We note in this regard the preambular language of the General Agreement on Tariffs and Trade 1947 (GATT 1947), incorporated into the GATT 1994⁶⁰⁴, setting forth Members' objective of "expanding the... exchange of goods" and Members' desire to "contribute[e] to th[is] objective[] by entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce".⁶⁰⁵ We also note that very similar objectives figure in the preamble to the WTO Agreement itself, to which both

⁵⁹⁷ Australia's response to Panel question No. 145, para. 2.

⁵⁹⁸ Australia's response to Panel question No. 75, para. 206. (emphasis added)

⁵⁹⁹ Australia's response to Panel question No. 75, para. 206. See also para. 7.50 above.

⁶⁰⁰ Australia's response to Panel question No. 75, para. 206. See also Australia's response to Panel question No. 89, para. 20.

⁶⁰¹ We also note in this respect that certain technical regulations may, under the second sentence of Article 2.5 of the TBT Agreement, enjoy a rebuttable presumption of consistency with Article 2.2, where they are "in accordance with relevant international standards". This legal presumption has no equivalent in Article 20 of the TRIPS Agreement. See also para. 7.37 above.

⁶⁰² TBT Agreement, preamble, second recital.

⁶⁰³ TRIPS Agreement, preamble, second recital (a).

⁶⁰⁴ GATT 1994, para. 1(a).

⁶⁰⁵ GATT 1947, preamble, second and third recitals.

the TBT and the TRIPS Agreement are annexed.⁶⁰⁶ The first recital of the TRIPS Agreement underscores the Agreement's objective of reducing trade barriers and avoiding the creation of trade restrictions: "Desiring to reduce distortions and impediments to international trade, and taking into account the need to promote effective and adequate protection of intellectual property rights, and to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade".⁶⁰⁷

7.104. Further, the TBT Agreement needs to be interpreted in light of its preambular objective that "no country should be prevented from taking measures necessary ... for the protection of human ... life or health". By virtue of the same preambular paragraph, this prerogative of Members is "subject to the requirement that [such measures] are not applied in a manner which would constitute a ... disguised restriction on international trade, and are otherwise in accordance with the provisions of th[e TBT] Agreement".⁶⁰⁸ Likewise, in setting forth that "Members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health", Article 8.1 of the TRIPS Agreement makes this conditional on "such measures [being] consistent with the provisions of th[e TRIPS] Agreement".

7.105. Taken in context, therefore, Article 2.2 of the TBT Agreement and Article 20 of the TRIPS Agreement may each be assumed to reflect a certain balance between at least three dimensions: (i) the objective of reducing and avoiding trade barriers; (ii) the possibility of adopting measures for legitimate public policy purposes, including public health; and (iii) the imperative of complying with applicable requirements under the relevant provisions of each agreement. The requirements under these two provisions may thus be seen as complementary rather than contradictory.⁶⁰⁹

7.106. In light of the above, we see no basis to assume the existence of a conflict between Article 20 of the TRIPS Agreement and Article 2.2 of the TBT Agreement – either under the various definitions of conflict described above, or in the sense suggested by Australia, that would require us to abstain from examining aspects of the TPP measures that may fall within the scope of application of both the TBT and TRIPS Agreements. Rather, as elaborated above, we must assume that both agreements apply cumulatively and harmoniously.⁶¹⁰

7.107. Having reached these initial determinations, we now consider whether the TPP measures are covered by the TBT Agreement, and more specifically, whether they constitute a technical regulation within the meaning of that agreement. We will address in that context whether the trademark-related requirements of the TPP measures constitute a technical regulation within the

⁶⁰⁶ See WTO Agreement, preamble, first ("expanding the production of and trade in goods") and third recitals ("contribut[e] to these objectives by entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international trade relations"). As the Appellate Body held:

At the end of the Uruguay Round, negotiators fashioned an appropriate preamble for the new *WTO Agreement*, which strengthened the multilateral trading system by establishing an international organization, *inter alia*, to facilitate the implementation, administration and operation, and to further the objectives, of that Agreement and the other agreements resulting from that Round. In recognition of the importance of continuity with the previous GATT system, negotiators used the preamble of the GATT 1947 as the template for the preamble of the new *WTO Agreement*.

Appellate Body Report, *US – Shrimp*, para. 152.

⁶⁰⁷ TRIPS Agreement, preamble, first recital. The final recital of the TRIPS preamble further refers to the desire to establish a "mutually supportive relationship" between, on the one hand, the WTO, and on the other, WIPO, as well as "other relevant international organizations".

⁶⁰⁸ TBT Agreement, preamble, sixth recital.

⁶⁰⁹ The two provisions strike such balance from *different perspectives* which, rather than *contradictory*, may be seen instead as *complementary*. A WTO Member needs to strike the health/trade balance when regulating labelling and packaging that may also affect the use of trademarks, from both the perspective of Article 20 of the TRIPS Agreement and Article 2.2 of the TBT Agreement.

⁶¹⁰ The reference in Article 19 of TRIPS to "other government requirements for goods ... protected by the trademark" may also indicate the negotiators' intention to ensure that requirements under the TRIPS Agreement harmoniously co-exist with measures that both fall (*inter alia*) under the TBT Agreement ("government requirements for goods") and the TRIPS Agreement ("which constitute an obstacle to the use of the trademark" for that "good"). Such "other requirements" are considered as "valid reasons for non-use".

meaning of the TBT Agreement. It is only in the event that we would determine that the measures are inconsistent with Article 2.2 of the TBT Agreement while being permitted under Article 20 of the TRIPS Agreement that the situation alleged by Australia to constitute a conflict would arise. Should we find that this is the case, we would subsequently need to consider whether this situation gives rise to a "conflict", as argued by Australia.

7.2.4 Whether the TPP measures constitute a technical regulation within the meaning of Annex 1.1 of the TBT Agreement

7.108. The complainants claim that the TPP measures are covered by the TBT Agreement, as they fall within the definition of "technical regulation" in Annex 1.1 of the Agreement.⁶¹¹ Australia, as described above, "accepts that the physical requirements [under the TPP measures] are technical regulations within the scope of the TBT Agreement".⁶¹² However, it considers that "[t]he TBT Agreement addresses technical regulations and does not, on its face, appear to be concerned with the exploitation of intellectual property".⁶¹³

7.109. Article 2.2 of the TBT Agreement applies to "technical regulations" by central government bodies. A "technical regulation" is defined in Annex 1.1 to the TBT Agreement⁶¹⁴ as a:

Document which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method.

7.110. Whether a measure constitutes a technical regulation depends on three criteria⁶¹⁵:

- a. "[f]irst, the document must apply to an identifiable product or group of products";
- b. "[s]econd, the document must lay down one or more characteristics of the product"; and
- c. "[t]hird, compliance with the product characteristics must be mandatory".⁶¹⁶

7.111. The parties do not contest the relevance of these criteria for determining whether a measure is a technical regulation.⁶¹⁷

7.112. As the Appellate Body has noted:

[A] determination of whether a measure constitutes a technical regulation "must be made in the light of the characteristics of the measure at issue and the circumstances of the case". ... [T]his analysis should give particular weight to the "integral and essential" aspects of the measure. In determining whether a measure is a technical regulation, a panel must therefore carefully examine the design and operation of the measure while seeking to identify its "integral and essential" aspects. It is these features of the measure that are to be accorded the most weight for purposes of

⁶¹¹ Honduras's first written submission, paras. 829-846; Honduras's second written submission, paras. 445-460; Dominican Republic's first written submission, paras. 936-950; Dominican Republic's second written submission, paras. 815-841; Cuba's first written submission, paras. 391-397; Cuba's second written submission, paras. 192-197; Indonesia's first written submission, paras. 369-384; and Indonesia's second written submission, paras. 211-219.

⁶¹² Australia's first written submission, para. 507.

⁶¹³ Australia's first written submission, para. 509.

⁶¹⁴ Under Article 1.2 of the TBT Agreement, "for the purposes of this Agreement the meaning of the terms given in Annex 1 applies". See also the second paragraph of the introduction to Annex 1 to the TBT Agreement.

⁶¹⁵ Appellate Body Report, *EC – Sardines*, para. 176.

⁶¹⁶ Appellate Body Report, *EC – Sardines*, para. 176 (emphasis original) (referring to Appellate Body Report, *EC – Asbestos*, paras. 66-70).

⁶¹⁷ Honduras's first written submission, para. 791; Dominican Republic's first written submission, para. 937; Cuba's first written submission, para. 392; Indonesia's first written submission, para. 370; and Australia's first written submission, paras. 507 and 563.

characterizing the measure, and, thereby, for determining whether it is subject to the disciplines of the TBT Agreement. The ultimate conclusion as to the legal characterization of the measure must be made in respect of, and having considered, the measure as a whole.⁶¹⁸

7.113. With these considerations in mind, we address the three criteria identified above, that must be satisfied in order for the TPP measures to constitute a technical regulation.

7.114. We note at the outset that each of the legal instruments comprising the TPP measures satisfies the requirement in Annex 1.1 that technical regulations be contained in a "document".⁶¹⁹ We therefore consider further below whether the TPP measures (i) apply to an identifiable group of products, and (ii) lay down one or more characteristics of the products, (iii) with which compliance is mandatory.

7.2.4.1 Whether the TPP measures apply to an identifiable group of products

7.2.4.1.1 Main arguments of the parties

7.115. The complainants argue that the TPP measures (including the TMA Act) apply to an identifiable product or group of products in accordance with Annex 1.1 of the TBT Agreement.⁶²⁰ They note that Section 4(1) of the TPP Act contains a definition of "tobacco products"⁶²¹ for the purposes of the same Act.⁶²² Honduras adds⁶²³ that the Explanatory Memorandum to the TPP Bill clarifies the breadth of this definition.⁶²⁴ Cuba references the subtitle of the TPP Act ("An Act to discourage the use of tobacco products, and for related purposes")⁶²⁵, and observes that Australia indicates that "[t]he tobacco plain packaging requirements apply to *all tobacco products*".⁶²⁶

⁶¹⁸ Appellate Body Reports, *EC – Seal Products*, para. 5.19 (referring to Appellate Body Reports, *US – Tuna II (Mexico)*, para. 188 (in turn referring to Appellate Body Reports, *EC – Asbestos*, para. 64; and *EC – Sardines*, paras. 192 and 193)); and *EC – Asbestos*, para. 72.

⁶¹⁹ In *US – Tuna II (Mexico)*, the Appellate Body held that:

Annex 1.1 [of the TBT Agreement] defines the term "technical regulation" by reference to a "document", which is defined quite broadly as "something written, inscribed, etc., which furnishes evidence or information upon any subject".³⁹¹ The use of the term "document" could therefore cover a broad range of instruments or apply to a variety of measures.

[*fn original] ³⁹¹ *Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 1, p. 731. We note that the ISO/IEC Guide 2: 1991, General Terms and Their Definitions Concerning Standardization and Related Activities (the "ISO/IEC Guide 2: 1991") establishes that "[a] document is to be understood as any medium with information recorded on or in it."

Appellate Body Report, *US – Tuna II (Mexico)*, para. 185. See also Appellate Body Reports, *EC – Seal Products*, paras. 5.9-5.10 (stating that "the scope of Annex 1.1 appears to be limited to those documents that establish or prescribe something and thus have a certain normative content."). See also para. 7.291 and fns 1153, 1001 and 1007 below.

⁶²⁰ Honduras's first written submission, paras. 831-833; Dominican Republic's first written submission, paras. 939-940; Dominican Republic's second written submission, para. 820; Cuba's first written submission, para. 394; Cuba's second written submission, para. 194; and Indonesia's first written submission, paras. 371-374.

⁶²¹ Cuba's first written submission, para. 394; Dominican Republic's first written submission, para. 940; Honduras's first written submission, para. 831; and Indonesia's first written submission, para. 372.

⁶²² According to the TPP Act, "*tobacco product* means processed tobacco, or any product that contains tobacco, that: (a) is manufactured to be used for smoking, sucking, chewing or snuffing; and (b) is not included in the Australian Register of Therapeutic Goods maintained under the *Therapeutic Goods Act 1989*". TPP Act, (Exhibits AUS-1, JE-1), Section 4(1).

⁶²³ Honduras's first written submission, para. 832.

⁶²⁴ Honduras quotes the following portion of the Explanatory Memorandum: "This definition is based on the definition in the WHO FCTC. It is intended to encompass all tobacco products designed for human consumption, and will include, for example, cigarettes, cigars, roll-your-own tobacco, bidis, kreteks, little cigars, and dissolvable tobacco products such as tablets containing tobacco for sucking". TPP Bill Explanatory Memorandum, (Exhibits AUS-2, JE-7), p. 9.

⁶²⁵ Cuba's second written submission, para. 194 fn 100.

⁶²⁶ Cuba's second written submission, para. 194 fn 100 (emphasis added by Cuba) (quoting Australia's first written submission, para. 125 and referring to Australia's first written submission, para. 132).

Indonesia invokes the title of Chapter 2 of the TPP Act ("Requirements for plain packaging and appearance of tobacco products") and notes that, according to the "Simplified Outline" of its Chapter 2⁶²⁷, "Part 2 of this Chapter specifies requirements for the retail packaging and appearance of tobacco products".⁶²⁸ Thus, Indonesia argues⁶²⁹, the situation under the TPP measures is similar to *US – Clove Cigarettes*, where the panel had found that the relevant measure "explicitly identifie[d] the products it cover[ed]"; hence, the products were "not merely 'identifiable', as was apparently the case in *EC – Asbestos*" but "[r]ather ... 'expressly identified'".⁶³⁰ For Indonesia, this is confirmed by the TPP Regulations' stated "[p]urpose": to "prescribe requirements for the retail packaging and appearance of tobacco products for Part 2 of Chapter 2 of the [TPP] Act".⁶³¹

7.116. As noted, *Australia* accepts that the "physical requirements" of the TPP measures lay down product characteristics⁶³²; however, it contests the applicability of the TBT Agreement to the "trademark requirements" of the TPP measures.⁶³³ In doing so, Australia does not explicitly address the above arguments of the complainants as regards the applicability of the TPP measures to an identifiable product or group of products.

7.2.4.1.2 Analysis by the Panel

7.117. A "technical regulation" must be applicable to an identifiable product, or group of products", but the term "identifiable" does not require that a technical regulation "expressly identify" its product scope, as long as the products to which it applies are "identifiable".⁶³⁴ In assessing whether this criterion is satisfied, we give the most weight to those provisions of the TPP measures that, in our view, represent their integral and essential aspects.⁶³⁵

7.118. The terms of the *TPP Act* reveal that it applies to an expressly identified group of products. The "simplified outline" in Section 12 of the TPP Act provides that "[t]his Act regulates the retail packaging and appearance of tobacco products".⁶³⁶ The TPP Act contains the following definition of "tobacco product"⁶³⁷:

processed tobacco, or any product that contains tobacco, that:

⁶²⁷ TPP Act, (Exhibits AUS-1, JE-1), p. 18.

⁶²⁸ Indonesia's first written submission, para. 372; response to Panel question Nos. 62 and 115; and second written submission, para. 215.

⁶²⁹ Indonesia's first written submission, paras. 371-372.

⁶³⁰ Panel Report, *US – Clove Cigarettes*, para. 7.27.

⁶³¹ Indonesia's first written submission, para. 374; and response to Panel question No. 62 (referring to TPP Regulations, (Exhibits AUS-3, JE-2), Regulation 1.1.4).

⁶³² Australia's first written submission, para. 507.

⁶³³ Australia's first written submission, paras. 509-512.

⁶³⁴ According to the Appellate Body:

A "technical regulation" must, of course, be applicable to an *identifiable* product, or group of products. Otherwise, enforcement of the regulation will, in practical terms, be impossible. This consideration also underlies the formal obligation, in Article 2.9.2 of the *TBT Agreement*, for Members to notify other Members, through the WTO Secretariat, "of the products to be covered" by a proposed "technical regulation". (emphasis added) Clearly, compliance with this obligation requires identification of the product coverage of a technical regulation. However, in contrast to what the Panel suggested, this does not mean that a "technical regulation" must apply to "*given*" products which are actually *named*, *identified* or *specified* in the regulation. (emphasis added) Although the *TBT Agreement* clearly applies to "products" generally, nothing in the text of that Agreement suggests that those products need be named or otherwise *expressly* identified in a "technical regulation". Moreover, there may be perfectly sound administrative reasons for formulating a "technical regulation" in a way that does *not* expressly identify products by name, but simply makes them identifiable – for instance, through the "characteristic" that is the subject of regulation.

Appellate Body Report, *EC – Asbestos*, para. 70 (emphasis original; footnote omitted).

⁶³⁵ Appellate Body Reports, *EC – Seal Products*, para. 5.19.

⁶³⁶ TPP Act, (Exhibits AUS-1, JE-1), Section 12.

⁶³⁷ TPP Act, (Exhibits AUS-1, JE-1), Section 4(1). See Cuba's first written submission, para. 394; Dominican Republic's first written submission, para. 940 and fns 116 and 805; Honduras's first written submission, para. 831; and Indonesia's first written submission, para. 372.

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- (a) is manufactured to be used for smoking, sucking, chewing or snuffing; and
 (b) is not included in the Australian Register of Therapeutic Goods maintained under the *Therapeutic Goods Act 1989*.

Note: Loose tobacco for roll-your-own cigarettes is an example of processed tobacco. A cigar or cigarette is an example of a product that contains tobacco.⁶³⁸

7.119. As Honduras notes⁶³⁹, the Explanatory Memorandum to the TPP Bill relevantly clarifies the scope of this definition as follows:

The definition of "tobacco product" in the [TPP Act] means that generally any product containing tobacco, no matter how small the amount, will be within the scope of the [TPP Act] if it was manufactured for smoking, sucking, chewing or snuffing.

This definition is based on the definition in the WHO FCTC. It is intended to encompass all tobacco products designed for human consumption, and will include, for example, cigarettes, cigars, roll-your-own tobacco, bidis, kreteks, little cigars, and dissolvable tobacco products such as tablets containing tobacco for sucking.

It is important to note that therapeutic goods, which are aimed at helping people to quit their use of tobacco products, will not be regulated by the [TPP Act] Products that contain nicotine but do not contain any tobacco will not be regulated by the [TPP Act].

The broad definition of "tobacco products" may encompass some tobacco products which are unlawful, under Commonwealth, State or Territory laws that regulate the use and sale of tobacco, and that are not affected by the operation of this Bill.⁶⁴⁰

7.120. Also, as Indonesia points out⁶⁴¹, Section 3 of the TPP Act (entitled "Objects of the Act") relates to "tobacco products"⁶⁴² and, as discussed further below, defines the objects of the Act with reference to the effects of the Act on use of those products.⁶⁴³

7.121. Moreover, the TPP Act explicitly defines "tobacco product requirement" as:

⁶³⁸ TPP Act, (Exhibits AUS-1, JE-1), Section 4(1).

⁶³⁹ Honduras's first written submission, para. 832.

⁶⁴⁰ TPP Bill Explanatory Memorandum, (Exhibits AUS-2, JE-7), p. 9.

⁶⁴¹ Indonesia's first written submission, para. 374; and response to Panel question No. 62 (referring to TPP Regulations, (Exhibits AUS-3, JE-7), Regulation 1.1.4).

⁶⁴² Section 3 defines the "Objects of this Act" as follows:

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

TPP Act, (Exhibits AUS-1, JE-1), Section 3. (emphasis added)

⁶⁴³ This observation is without prejudice to our assessment, in Section 7.2.5.1 below, of whether the TPP measures pursue a legitimate objective.

[T]he following requirements in relation to the retail packaging or appearance of tobacco products:

- (a) a requirement specified in Part 2 of Chapter 2;
- (b) a requirement prescribed by regulations made under Part 2 of Chapter 2;
- (c) if subsection 15(2) applies (acquisition of property)—a requirement prescribed by regulations made under section 15.⁶⁴⁴

7.122. As Indonesia notes⁶⁴⁵, Chapter 2 of the TPP Act is entitled "Requirements for plain packaging and appearance of tobacco products" and, according to the Simplified Outline of Chapter 2⁶⁴⁶, Part 2 of Chapter 2 "specifies requirements for the retail packaging and appearance of tobacco products".⁶⁴⁷ Thus, on its express terms, the TPP Act sets out requirements in respect of the packaging and appearance of an expressly identified group of products, namely "tobacco products". Part 2 of Chapter 2 contains the substantive requirements of the TPP Act challenged by the complainants under the TBT Agreement.

7.123. The TPP Regulations elaborate on the "tobacco product requirements" in the TPP Act. Specifically, Section 27 of the TPP Act provides that regulations "may prescribe additional requirements in relation to (a) the retail packaging of tobacco products; and (b) the appearance of tobacco products".⁶⁴⁸ This is reflected in the "Purpose" of the TPP Regulations.⁶⁴⁹ Significantly, the TPP Regulations specify that a number of words and expressions used therein have the same meaning as provided in the TPP Act, including "tobacco product".⁶⁵⁰ Moreover, the TPP Act defines "this Act" as "includ[ing] the regulations".⁶⁵¹ Thus, like the TPP Act, the TPP Regulations apply, on the express terms of the instrument, to "tobacco products" in that they are intended to prescribe requirements for "tobacco products" as defined in, and in addition to those prescribed in, the TPP Act.

7.124. The TMA Act does not expressly identify its product scope. We therefore consider whether it nonetheless applies to a group of products that are "identifiable".⁶⁵² We recall that the TMA Act inserts into the *Trade Marks Act 1995* (Cth) (TM Act) a new provision, Section 231A, which provides as follows:

- (1) The regulations [made by Governor-General pursuant to their authority under Section 231 of the *Trade Marks Act 1995* (Cth)] may make provision in relation to the effect of the operation of the *Tobacco Plain Packaging Act 2011*, and any regulations made under that Act, on:
 - (a) a provision of this Act; or
 - (b) a regulation made under this Act, including:
 - (i) a regulation that applies a provision of this Act; or

⁶⁴⁴ TPP Act, (Exhibits AUS-1, JE-1), Section 4(1).

⁶⁴⁵ Indonesia's first written submission, para. 372; response to Panel question Nos. 62 and 115; and second written submission, para. 215.

⁶⁴⁶ According to the Explanatory Memorandum to the Tobacco Plain Packaging Bill 2011, "Part 1 (clause 17) provides a simplified outline of Chapter 2, to aid in understanding of relevant clauses". TPP Bill Explanatory Memorandum, (Exhibits AUS-2, JE-7), p. 12.

⁶⁴⁷ TPP Act, (Exhibits AUS-1, JE-1), Section 17.

⁶⁴⁸ TPP Act, (Exhibits AUS-1, JE-1), Section 27. According to the Explanatory Memorandum to the Tobacco Plain Packaging Bill 2011, "Chapter 2 outlines general requirements for plain packaging of tobacco products, and some specific requirements for cigarette packs and cartons. Chapter 2 also provides for the Governor-General to make regulations specifying requirements for plain packaging and the appearance of tobacco products among other things, to further the objects of the Bill". TPP Bill Explanatory Memorandum, (Exhibits AUS-2, JE-7), p. 12.

⁶⁴⁹ TPP Regulations, (Exhibits AUS-3, JE-2), Regulation 1.1.4.

⁶⁵⁰ TPP Regulations, (Exhibits AUS-3, JE-2), Regulation 1.1.3. The other words and expressions having the same meaning as in the TPP Act include "retail packaging", "tobacco advertising and promotion", and "variant name".

⁶⁵¹ TPP Act, (Exhibits AUS-1, JE-1), Section 4 (definition of "this Act"). See also *ibid*. Section 109.

⁶⁵² Appellate Body Report, *EC – Asbestos*, para. 70.

- (ii) a regulation that applies a provision of this Act in modified form.
- (2) Without limiting subsection (1), regulations made for the purposes of that subsection may clarify or state the effect of the operation of the *Tobacco Plain Packaging Act 2011*, and any regulations made under that Act, on a provision of this Act or a regulation made under this Act, including by taking or deeming:
 - (a) something to have (or not to have) happened; or
 - (b) something to be (or not to be) the case; or
 - (c) something to have (or not to have) a particular effect.
- (3) Regulations made for the purposes of subsection (1):
 - (a) may be inconsistent with this Act; and
 - (b) prevail over this Act (including any other regulations or other instruments made under this Act), to the extent of any inconsistency.⁶⁵³

7.125. The TMA Bill Explanatory Memorandum explains that:

Regulations made under new section 231A are not intended to have any effect on the operation of the Trade Marks Act in relation to goods or services not governed by the Plain Packaging Act.⁶⁵⁴

7.126. This indicates that regulations made pursuant to the TMA Act are intended only to address the potential impact of the operation of the TPP Act and TPP Regulations in relation to trademarks whose use is affected by the TPP Act – i.e. those relating to tobacco products.

7.127. A consideration of the terms of Section 231A confirms this view. Specifically, the TMA Act grants to the Governor-General the power to make regulations, which is circumscribed only by the requirement that such regulations be made "in relation to the effect of the operation" of the TPP Act and the TPP Regulations, which themselves apply in relation to tobacco products, on a provision of the TM Act or regulations made thereunder.

7.128. In light of the above, we find that the TPP Act and the TPP Regulations apply to an expressly identified group of products; namely, "tobacco products" as defined⁶⁵⁵ by Section 4.1 of the TPP Act. While the TMA Act does not identify expressly the products to which it applies in the same manner, we understand it to apply in relation to the same group of products (namely, tobacco products).

7.2.4.2 Whether the TPP measures lay down one or more product characteristics

7.2.4.2.1 Main arguments of the parties

7.129. The complainants contend that the TPP measures, in particular the TPP Act and the TPP Regulations, lay down product characteristics. According to the complainants, both the trademark and form requirements⁶⁵⁶ under the TPP measures prescribe packaging, marking and labelling requirements.⁶⁵⁷ The Dominican Republic also argues that the TPP measures lay down product characteristics for tobacco products, including cigarette packs and cartons, relating to their

⁶⁵³ TMA Act, (Exhibits AUS-4, JE-3), Schedule 1(2). (note omitted)

⁶⁵⁴ TMA Bill Explanatory Memorandum, (Exhibits AUS-5, JE-5), p. 1.

⁶⁵⁵ See Appellate Body Reports, *EC – Seal Products*, para. 5.21; and Panel Reports, *EC – Seal Products*, para. 7.114.

⁶⁵⁶ Dominican Republic's first written submission, para. 945; and Honduras's first written submission, paras. 834-840.

⁶⁵⁷ Dominican Republic's first written submission, para. 947. See also Cuba's first written submission, para. 395; and Indonesia's first written submission, paras. 379-380.

composition, size, shape, colour, that are applied through "applicable administrative requirements" as prescribed by the TPP measures.⁶⁵⁸

7.130. Australia accepts that the requirements concerning the physical characteristics of tobacco products and packages "lay[] down product characteristics' and/or 'deal ... with terminology, symbols and packaging, marking or labelling requirements as they apply to a product'" within the meaning of Annex 1.1 to the TBT Agreement.⁶⁵⁹ However, Australia has "significant concerns about the systemic implications" of the proposition that the trademark requirements can also be reviewed under the TBT Agreement.⁶⁶⁰ According to Australia, the TBT Agreement "does not, on its face, appear to be concerned with the exploitation of intellectual property"⁶⁶¹, and "Article 2.2 ... does not refer to the use of a trademark at all, but instead encompasses all manner of 'technical regulations'".⁶⁶² Accordingly, Australia contends, only the "physical requirements" of the TPP measures are properly subject to examination under Article 2.2.⁶⁶³

7.131. The complainants contend that both the physical and trademark requirements of the TPP measures are covered by the definition of technical regulations under the TBT Agreement and should be addressed together⁶⁶⁴, a view that is shared by a "large number" of third-parties to these proceedings, including "several who are otherwise very supportive" of Australia's TPP measures.⁶⁶⁵ Honduras argues that the trademark requirements govern the packaging, presentation and appearance of tobacco products⁶⁶⁶, whereas the format requirements affect packaging of tobacco products and products themselves.⁶⁶⁷ Honduras maintains that nothing in the text of Annex 1.1 suggests that trademark requirements would be excluded from the definition of technical regulations⁶⁶⁸, and notes that "[n]owhere in the Appellate Body's criteria is there a suggestion that measures affecting intellectual property rights fall outside the definition provided in Annex 1.1".⁶⁶⁹ In a similar vein, the Dominican Republic argues that Australia advances no arguments for its position based on the text of Annex 1.1.⁶⁷⁰ According to Cuba, Australia does not address the definition of technical regulations.⁶⁷¹ The Dominican Republic notes, in this respect, the "absence of express language, such as 'trademarks' or 'geographical indications' in the definition of 'technical regulation' does not mean that the [T]PP measures are not qualified as 'technical regulations'".⁶⁷² According to Indonesia, "[t]he terms 'packaging or labelling' in the TBT Agreement are not qualified" and "[t]he Agreement does not limit itself to the 'non-intellectual property' aspects of packaging and labeling".⁶⁷³ In fact, argues Indonesia, "there are a multitude of topics that could conceivably be addressed by a technical regulation and the TBT Agreement refers specifically to none of them."⁶⁷⁴ For instance, while "rules of origin" are nowhere mentioned in the TBT Agreement, both the panel and the Appellate Body in *US – COOL* "recognized that origin labelling was covered by the TBT Agreement".⁶⁷⁵

7.132. The complainants also note that the TBT Agreement contains provisions expressly excluding certain subject-matter from its scope. They point out, more specifically, to Articles 1.4 and 1.5 of the Agreement, according to which only purchasing specifications prepared by

⁶⁵⁸ Dominican Republic's first written submission, para. 944.

⁶⁵⁹ Australia's first written submission, para. 507.

⁶⁶⁰ Australia's first written submission, para. 509.

⁶⁶¹ Australia's first written submission, para. 509.

⁶⁶² Australia's first written submission, para. 510.

⁶⁶³ Australia's first written submission, para. 512.

⁶⁶⁴ Honduras's response to Panel question No. 62; Dominican Republic's response to Panel question No. 62; Cuba's second written submission, para. 190; Cuba's response to Panel question Nos. 1 and 62 (annexed to its response to Panel question No. 138); Indonesia's second written submission, paras. 217, 219 and 294; and Indonesia's response to Panel question No. 62.

⁶⁶⁵ Indonesia's second written submission, paras. 217-219 (referring to, *inter alia*, Canada, China, the European Union, Brazil, Nicaragua, Norway and South Africa).

⁶⁶⁶ Honduras's first written submission, para. 837.

⁶⁶⁷ Honduras's first written submission, paras. 838-839.

⁶⁶⁸ Honduras's second written submission, para. 448.

⁶⁶⁹ Honduras's second written submission, para. 452.

⁶⁷⁰ Dominican Republic's second written submission, para. 833.

⁶⁷¹ Cuba's second written submission, para. 193.

⁶⁷² Dominican Republic's second written submission, para. 827.

⁶⁷³ Indonesia's response to Panel question No. 115, para. 44.

⁶⁷⁴ Indonesia's response to Panel question No. 62, para. 61.

⁶⁷⁵ Indonesia's response to Panel question No. 115, para. 39.

governmental bodies for production or consumption requirements of governmental bodies and sanitary and phytosanitary measures fall outside of the scope of the TBT Agreement.⁶⁷⁶ To the complainants, this indicates that "when the drafters wanted to exclude certain subject matter from the TBT Agreement, they did so expressly".⁶⁷⁷

7.133. With reference to the second sentence of Annex 1.1, the Dominican Republic adds that the trademark requirements also amount to "at least"⁶⁷⁸ "packaging", "marking", and "labelling" requirements.⁶⁷⁹ Indonesia concurs.⁶⁸⁰ Likewise, Cuba maintains that the terms "[t]erminology, symbols, packaging, marking or labelling"⁶⁸¹ also cover the trademark requirements of the TPP measures. Honduras and Indonesia add that the terms of the second sentence are "unqualified", and make no reference to a trademark exception.⁶⁸² The Dominican Republic points out that the second sentence of Annex 1.1 has been interpreted as a standalone basis for finding that a document qualifies as a technical regulation.⁶⁸³

7.134. Australia responds that "terminology, symbols, packaging, marking or labelling requirements" under the second sentence of Annex 1.1 of the TBT Agreement must convey information about an intrinsic characteristic of a product. According to Australia, "[a] proper understanding of the scope of a 'technical regulation' encompasses measures that regulate intrinsic characteristics of a product or the physical characteristics of its package, as well as terminology, symbols, packaging, marks or labels *insofar as they convey information about the intrinsic characteristics of the product*".⁶⁸⁴ Whilst Australia recognizes that "[t]he function of a trademark is to distinguish the products of one enterprise from those of another in the course of trade" and that "[s]ome symbols that convey information about a product characteristic may ... be trademarked", it points out that "[n]othing in the trademark requirements imposed by the [TPP] measure[s] regulates what information a trademark may or may not convey about the intrinsic characteristics of tobacco products".⁶⁸⁵ Australia maintains that "[u]nder a proper interpretation of the second sentence of Annex 1.1 ... a measure constitutes a 'technical regulation' only to the extent that it regulates what information a symbol may or may not convey about an intrinsic characteristic of a product".⁶⁸⁶

7.135. According to Cuba, the TPP measures lay down both "intrinsic" and related characteristics, such as packaging, marking and labelling requirements, for tobacco products.⁶⁸⁷ Honduras and Indonesia add that the Appellate Body explained that product characteristics may include not only features and qualities intrinsic to the product itself, but also related characteristics, such as the means of identification, the presentation and appearance of a product.⁶⁸⁸ Honduras, the Dominican Republic, and Cuba recall that in *EC – Trademarks and Geographical Indications (Australia)*, Australia itself argued that a labelling requirement affecting the use of a GI, which is an IP right

⁶⁷⁶ Honduras's second written submission, para. 449; Dominican Republic's second written submission, para. 830; Cuba's response to Panel question No. 1 (annexed to its response to Panel question No. 138) and No. 115; Indonesia's response to Panel question No. 115.

⁶⁷⁷ Indonesia's response to Panel question No. 115, para. 44. See also Honduras's second written submission, para. 449; Dominican Republic's second written submission, para. 830; Cuba's response to Panel question No. 1 (annexed to its response to Panel question No. 138) and No. 115; and Indonesia's second written submission, para. 214.

⁶⁷⁸ Dominican Republic's second written submission, para. 823.

⁶⁷⁹ Dominican Republic's response to Panel question No. 115; and Dominican Republic's second written submission, para. 823.

⁶⁸⁰ Indonesia's first written submission, paras. 379-380.

⁶⁸¹ Cuba's second written submission, para. 195.

⁶⁸² Honduras's response to Panel question No. 115; Indonesia's response to Panel question No. 115; and Indonesia's second written submission, para. 214.

⁶⁸³ Dominican Republic's response to Panel question No. 115; and Dominican Republic's second written submission, para. 822.

⁶⁸⁴ Australia's response to Panel question No. 72, para. 197. (emphasis added)

⁶⁸⁵ Australia's response to Panel question No. 72, para. 198.

⁶⁸⁶ Australia's response to Panel question No. 72, para. 198.

⁶⁸⁷ Cuba's first written submission, para. 395; and response to Panel question No. 1.

⁶⁸⁸ Honduras's first written submission, para. 791; and Indonesia's response to Panel question No. 115.

covered by the TRIPS Agreement, is a technical regulation under the TBT Agreement, and that the panel agreed with that position.⁶⁸⁹

7.2.4.2.2 Analysis by the Panel

7.136. Annex 1.1 of the TBT Agreement defines the term "technical regulation" as follows:

Document which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method. (emphasis added)

7.137. As described by the Appellate Body, "[t]he heart of the definition of a 'technical regulation' is that the 'document' at issue must 'lay down' — that is, set forth, stipulate or provide — 'product characteristics'".⁶⁹⁰ The Appellate Body interpreted "product characteristics" in the following manner:

The word "characteristic" has a number of synonyms that are helpful in understanding the ordinary meaning of that word, in this context. Thus, the "characteristics" of a product include, in our view, any objectively definable "features", "qualities", "attributes", or other "distinguishing mark" of a product. Such "characteristics" might relate, *inter alia*, to a product's composition, size, shape, colour, texture, hardness, tensile strength, flammability, conductivity, density, or viscosity. In the definition of a "technical regulation" in Annex 1.1, the *TBT Agreement* itself gives certain examples of "product characteristics" – "terminology, symbols, packaging, marking or labelling requirements". These examples indicate that "product characteristics" include, not only features and qualities intrinsic to the product itself, but also related "characteristics", such as the means of identification, the presentation and the appearance of a product. ... Further, we note that the definition of a "technical regulation" provides that such a regulation "may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements". (emphasis added) The use here of the word "exclusively" and the disjunctive word "or" indicates that a "technical regulation" may be confined to laying down only one or a few "product characteristics".⁶⁹¹

7.138. We note that such "[p]roduct characteristics" may ... be prescribed or imposed with respect to products in either a positive or a negative form":

[T]he document may provide, positively, that products *must possess* certain "characteristics", or the document may require, negatively, that products *must not possess* certain "characteristics". In both cases, the legal result is the same: the document "lays down" certain binding "characteristics" for products, in one case affirmatively, and in the other by negative implication.⁶⁹²

7.139. Also, as a general matter, "a determination of whether a measure constitutes a technical regulation 'must be made in the light of the characteristics of the measure at issue and the

⁶⁸⁹ Honduras's response to Panel question No. 115; Honduras's second written submission, para. 450 (referring to Panel Report, *EC – Trademarks and Geographical Indications (Australia)*, paras. 7.433 and 7.459); Dominican Republic's second written submission, para. 834; Cuba's response to Panel question No. 1 (annexed to its response to Panel question No. 138); Cuba's second written submission, para. 192; and Cuba's response to Panel question No. 115. See also Indonesia's first written submission, para. 378; and Indonesia's second written submission, para. 213.

⁶⁹⁰ Appellate Body Report, *EC – Asbestos*, para. 67. (emphasis original)

⁶⁹¹ Appellate Body Report, *EC – Asbestos*, para. 67. (emphasis original)

⁶⁹² Appellate Body Report, *EC – Asbestos*, para. 69. (emphasis original)

circumstances of the case"⁶⁹³, and "this analysis should give particular weight to the 'integral and essential' aspects of the measure".⁶⁹⁴

7.140. Turning to the measures at issue, as set out in section 2.1.2, the requirements in the TPP Act and the TPP Regulations, operating in conjunction with other legislative requirements that are not challenged in these proceedings (such as those relating to GHWs), have the cumulative effect of requiring that tobacco products (including their retail packaging) appear in a standardized manner, as depicted in section 2.1.2.3.7. The elements of the TPP measures that prescribe that tobacco products (including their retail packaging) appear in this uniform manner, taken together, constitute the integral and essential aspects of the TPP Act and TPP Regulations.⁶⁹⁵ We thus give particular weight to these elements in assessing whether the TPP measures lay down one or more product characteristics.

7.141. As we observed in section 2.1.2.4, the TPP Act and the TPP Regulations regulate various elements of the appearance of *tobacco products* themselves. Specifically, Section 26 of the TPP Act provides that no trademark or mark may appear anywhere on a tobacco product, other than as permitted by the TPP Regulations⁶⁹⁶. Moreover, Section 27 of the TPP Act provides that the TPP Regulations may prescribe additional requirements in relation to the appearance of tobacco products.⁶⁹⁷ In so doing, Division 3.1 of the TPP Regulations specifies requirements with respect to cigarettes. As discussed⁶⁹⁸, it regulates the colour of the paper casing⁶⁹⁹, the marking of a cigarette with an alphanumeric code⁷⁰⁰; and the colour of filter tips.⁷⁰¹ Division 3.2 of the TPP Regulations specifies requirements with respect to other tobacco products, including cigars, and stipulate that a colour and content (with respect to the brand, business or variant name) of the single band which may appear around the circumference of a cigar.⁷⁰² The requirements of the TPP Act also include a "prohibit[ion of] trade marks from generally appearing on the tobacco products themselves".⁷⁰³

7.142. Accordingly, we find that in laying down the requirements for the appearance of tobacco products in this way, the TPP Act and the TPP Regulations, operating together, lay down product characteristics for tobacco products.

7.143. As described in section 2.1.2.3, the TPP Act and the TPP Regulations also set out detailed requirements for the retail *packaging* of tobacco products. Specifically, the "tobacco product requirements" set out in Part 2, Chapter 2 of the TPP Act, and elaborated in the TPP Regulations, govern the packaging of tobacco products. According to the Simplified Outline of Chapter 2⁷⁰⁴, Part 2 of Chapter 2 "specifies requirements for the retail packaging and appearance of tobacco products"⁷⁰⁵, including, in respect of packaging, "the physical features of retail packaging", "the colour and finish of retail packaging", "marks on retail packaging (including a prohibition on trade marks generally appearing on retail packaging)", "wrappers", "retail packaging after retail

⁶⁹³ Appellate Body Reports, *EC – Seal Products*, para. 5.19 (referring to Appellate Body Report, *US – Tuna II (Mexico)*, para. 188 (referring to Appellate Body Reports, *EC – Asbestos*, para. 64; and *EC – Sardines*, paras. 192 and 193)).

⁶⁹⁴ Appellate Body Reports, *EC – Seal Products*, para. 5.19 (referring to Appellate Body Report, *EC – Asbestos*, para. 72).

⁶⁹⁵ Appellate Body Reports, *EC – Seal Products*, para. 5.19.

⁶⁹⁶ TPP Act, (Exhibits AUS-1, JE-1), Section 26.

⁶⁹⁷ TPP Act, (Exhibits AUS-1, JE-1), Section 27(1)(b).

⁶⁹⁸ See Section 2.1.2.4.1 above.

⁶⁹⁹ TPP Regulations, (Exhibits AUS-3, JE-2), Regulation 3.1.1.

⁷⁰⁰ TPP Regulations, (Exhibits AUS-3, JE-2), Regulation 3.1.2(2).

⁷⁰¹ TPP Regulations, (Exhibits AUS-3, JE-2), Regulation 3.1.3.

⁷⁰² TPP Regulations, (Exhibits AUS-3, JE-2), Regs. 3.2.1(1)-3.2.1(3).

⁷⁰³ TPP Act, (Exhibits AUS-1, JE-1), Section 17.

⁷⁰⁴ According to the Explanatory Memorandum to the Tobacco Plain Packaging Bill 2011, "Part 1 (clause 17) provides a simplified outline of Chapter 2, to aid in understanding of relevant clauses". TPP Bill Explanatory Memorandum, (Exhibits AUS-2, JE-7), p. 12.

⁷⁰⁵ TPP Act, (Exhibits AUS-1, JE-1), Section 17.

sale".⁷⁰⁶ Accordingly, we find that the TPP Act and the TPP Regulations, operating together, lay down product characteristics by regulating the packaging of tobacco products.

7.144. Moreover, key requirements under both the TPP Act and the TPP Regulations deal with the *terminology* and *symbols* that may appear on tobacco products or packaging. For instance, the TPP Act⁷⁰⁷ and the TPP Regulations⁷⁰⁸ contain detailed "[r]equirements for brand, business, company or variant names"⁷⁰⁹ and appearance of names on the packaging of tobacco products. As regards symbols and marking, the TPP Act defines marks as "includ[ing] (without limitation) any line, letters, numbers, symbol, graphic or image; but (other than when referring to a trade mark) does not include a trade mark".⁷¹⁰ The TPP Act and TPP Regulations contain detailed requirements concerning *inter alia* "trade marks or marks on retail packaging"⁷¹¹, "origin marks"⁷¹², a "calibration mark"⁷¹³, a "measurement mark"⁷¹⁴, the "marking of name and address on packaging"⁷¹⁵, a "mark on wrapper to conceal bar codes"⁷¹⁶, and the "alphanumeric code for cigarettes".⁷¹⁷ Further, as mentioned, the TPP Act and the TPP Regulations contain a wide array of "[r]equirements for retail packaging of tobacco products"⁷¹⁸ ranging from the "[p]hysical features"⁷¹⁹, "colour and finish of retail packaging"⁷²⁰, "[t]rade marks and marks on retail packaging"⁷²¹, "[b]rand, business, company and variant names" on tobacco packaging⁷²², "[w]rappers"⁷²³, and "[i]nserts and onserts".⁷²⁴ Finally, in some respects, *labelling* is regulated: for instance, in the context of "[i]nserts and onserts", the TPP Regulations contain requirements relating to "adhesive label health warnings".⁷²⁵ In respect of each of these requirements, the TPP Act and/or the TPP Regulations specify requirements that must be met in order for a tobacco product to be legally placed on the market in Australia. These requirements therefore amount to "terminology, symbols, packaging, marking or labelling requirements" within the meaning of the second sentence of Annex 1.1.

7.145. As described above, among its requirements on the appearance of tobacco packaging, the TPP Act contains a "[p]rohibition on trade marks and marks generally appearing on retail packaging"⁷²⁶ of tobacco products, combined with rules addressing "permitted trade marks and marks".⁷²⁷ Further, the TPP Act stipulates that "[n]o mark" and "[n]o trade mark may appear anywhere on a tobacco product, other than as permitted by the regulations".⁷²⁸ The TPP Regulations elaborate on these rules.⁷²⁹ In regulating the appearance and packaging of tobacco products, an essential function of the TPP Act and TPP Regulations is to address comprehensively how both word and figurative signs, whether protected as trademarks or not,

⁷⁰⁶ TPP Act, (Exhibits AUS-1, JE-1), Section 17. These terms largely correspond to the headers contained in Division 1 of Chapter 2, Part 2, of the TPP Act, entitled "Requirements for retail packaging of tobacco products".

⁷⁰⁷ See TPP Act, (Exhibits AUS-1, JE-1), Section 21.

⁷⁰⁸ See TPP Regulations, (Exhibits AUS-3, JE-2), Regulation 2.4.1.

⁷⁰⁹ TPP Act, (Exhibits AUS-1, JE-1), Section 21, title.

⁷¹⁰ TPP Act, (Exhibits AUS-1, JE-1), Section 4, definition of a "mark".

⁷¹¹ TPP Regulations, (Exhibits AUS-3, JE-2), Division 2.3, title. See also TPP Act, (Exhibits AUS-1, JE-1), Section 20.

⁷¹² TPP Regulations, (Exhibits AUS-3, JE-2), Regulation 2.3.2, title.

⁷¹³ TPP Regulations, (Exhibits AUS-3, JE-2), Regulation 2.3.3, title.

⁷¹⁴ TPP Regulations, (Exhibits AUS-3, JE-2), Regulation 2.3.4, title.

⁷¹⁵ TPP Regulations, (Exhibits AUS-3, JE-2), Regulation 2.3.8, title.

⁷¹⁶ TPP Regulations, (Exhibits AUS-3, JE-2), Regulation 2.5.1, title.

⁷¹⁷ TPP Regulations, (Exhibits AUS-3, JE-2), Regulation 3.1.2, title.

⁷¹⁸ TPP Act, (Exhibits AUS-1, JE-1), Chapter 2, Part 2, Division 1, title. See also TPP Regulations, (Exhibits AUS-3, JE-2), Part 2, title.

⁷¹⁹ TPP Regulations, (Exhibits AUS-3, JE-2), Part 2, Division 2.1, title.

⁷²⁰ TPP Regulations, (Exhibits AUS-3, JE-2), Part 2, Division 2.2, title.

⁷²¹ TPP Regulations, (Exhibits AUS-3, JE-2), Part 2, Division 2.3, title.

⁷²² TPP Regulations, (Exhibits AUS-3, JE-2), Part 2, Division 2.4, title.

⁷²³ TPP Regulations, (Exhibits AUS-3, JE-2), Part 2, Division 2.5, title.

⁷²⁴ TPP Regulations, (Exhibits AUS-3, JE-2), Part 2, Division 2.6, title.

⁷²⁵ TPP Regulations, (Exhibits AUS-3, JE-2), Part 2, Division 2.6.1, title.

⁷²⁶ TPP Act, (Exhibits AUS-1, JE-1), Section 20.

⁷²⁷ See TPP Act, (Exhibits AUS-1, JE-1), Section 20(3).

⁷²⁸ TPP Act, (Exhibits AUS-1, JE-1), Section 26(1)-(2).

⁷²⁹ See TPP Regulations, (Exhibits AUS-3, JE-2), Part 2, Division 2.3 (entitled "Trade marks or marks on retail packaging"), Division 2.4 (entitled "Brand, business, company and variant names"), and Part 3 (entitled "Requirements for appearance of tobacco products").

shall or shall not appear, i.e. what "terminology" and "symbols" may be represented and how, on tobacco products and their packaging. The trademark-related requirements of the TPP Act and TPP Regulations fall within the scope of several examples of product characteristics under the second sentence of Annex 1.1: "'terminology, symbols, packaging ... requirements'".

7.146. Australia contends that "[u]nder a proper interpretation of the second sentence of Annex 1.1, a measure constitutes a 'technical regulation' only to the extent that it regulates what information a symbol may or may not convey about an intrinsic characteristic of the product".⁷³⁰ For Australia, a "trademark need not relate to any feature or quality intrinsic to the trademarked product, or to a related process or production method, in order to fulfil these functions".⁷³¹

7.147. We recall that the second sentence of the definition of "technical regulation" indicates that a technical regulation "may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements".⁷³² The use of the words "also include" and "deal exclusively with" at the beginning of this sentence indicates that it includes elements that are *additional to*, and may be *distinct from*, those covered by the first sentence.⁷³³

7.148. In addition, the Appellate Body has found that "[t]he[] examples [in the second sentence of Annex 1.1] indicate that 'product characteristics' include, not only features and qualities intrinsic to the product itself, but also related 'characteristics', such as the means of identification, the presentation and the appearance of a product".⁷³⁴ In *EC – Sardines*, the Appellate Body confirmed this⁷³⁵, adding that "[i]n any event, ... a 'means of identification' is a product characteristic"⁷³⁶ in itself. Specifically, "product characteristics include not only 'features and qualities intrinsic to the product', but also those that are related to *it*, such as 'means of identification'".⁷³⁷

7.149. A "characteristic" within the meaning of Annex 1.1 of the TBT Agreement may refer to, *inter alia*, "any objectively definable 'features', 'qualities', 'attributes', or other 'distinguishing mark' of a product"; "terminology, symbols, packaging, marking or labelling requirements"; as well as characteristics "related" to the product itself, such as "the means of identification, the presentation and the appearance of a product".⁷³⁸ This definition of "characteristics" is sufficiently broad to encompass requirements relating to terminology, marking or labelling that affect the manner in which a sign, including one that is protected as a trademark, may be displayed on the relevant product.

7.150. Furthermore, as described above, the integral and essential aspects of the TPP measures are to ensure that tobacco products (including their packaging) appear in the uniform manner depicted above, i.e. in a specific prescribed manner in terms of their shape, fonts and colours, and other features. These requirements govern all aspects of "the means of identification, the presentation and appearance" of tobacco products, as well as all "terminology, symbols, packaging, marking or labelling requirements" for tobacco products and their retail packaging, with the exception of those governed by measures that are not at issue in these proceedings. That the scope of these measures is so broad as to encompass all these elements, including, *inter alia*, the display of signs protected as trademarks on the product, does not change the fact that their integral and essential aspects relate to "the means of identification, the presentation and appearance" of tobacco products, as well as all "terminology, symbols, packaging, marking or

⁷³⁰ Australia's response to Panel question No. 72, para. 198.

⁷³¹ Australia's response to Panel question No. 72, para. 198.

⁷³² See Appellate Body Report, *EC – Asbestos*, para. 67. (emphasis original)

⁷³³ See Appellate Body Reports, *EC – Seal Products*, para. 5.14, in relation to the same sentence in Annex 1.1.

⁷³⁴ Appellate Body Report, *EC – Asbestos*, para. 67. In *EC – Asbestos*, the Appellate Body concluded that the measure at issue laid down one or more "product characteristics". *Ibid.* para. 74. See also Appellate Body Report, *EC – Sardines*, para. 189 (quoting Appellate Body Report, *EC – Asbestos*, para. 67). In *EC – Sardines*, the Appellate Body agreed with the panel's conclusion that the measure at issue laid down one or more "product characteristics". *Ibid.* para. 193.

⁷³⁵ Appellate Body Report, *EC – Sardines*, para. 189 (quoting Appellate Body Report, *EC – Asbestos*, para. 67). In *EC – Sardines*, the Appellate Body agreed with the panel's conclusion that the measure at issue laid down one or more "product characteristics". *Ibid.* para. 193.

⁷³⁶ Appellate Body Report, *EC – Sardines*, para. 191 (emphasis original) (quoting Appellate Body Report, *EC – Asbestos*, para. 67 fn 15).

⁷³⁷ Appellate Body Report, *EC – Sardines*, para. 189. (emphasis added)

⁷³⁸ Appellate Body Report, *EC – Asbestos*, para. 67.

labelling requirements"; nor, in our view, does it modify or diminish the scope of the definition under Annex 1.1 of the TBT Agreement.

7.151. We note in this respect the analysis of the panel in *EC – Trademarks and Geographical Indications (Australia)*, which considered whether a measure requiring the country of origin to be clearly and visibly indicated on the label laid down "product characteristics" within the meaning of Annex 1.1 of the TBT Agreement:

The parties disagree as to whether the second indent of Article 12(2) of the Regulation lays down a *product characteristic*. The Panel notes that it expressly sets out a requirement that concerns what must be indicated on "the label" of a product. That is a labelling requirement. The second sentence of the definition of "technical regulation" in Annex 1.1 of the TBT Agreement expressly refers to "labelling requirements" as an example of a technical regulation.

The Panel notes that this example in the definition in Annex 1.1 is qualified by the words "as they apply to a product, process or production method". The text does not limit the scope of the example by stating what the labels must indicate in order for them to constitute a technical regulation. Rather, they explain to what the labelling requirements "apply". This simply means that a requirement concerning a product label is a labelling requirement that applies to a product. The context shows that the subject of the second sentence, "[i]t" refers back to the noun "[d]ocument" as qualified by the relative clause beginning "which lays down" and ending with the word "mandatory". Were this not so, the element that "compliance is mandatory", for example, would not apply to the items described in the second sentence, which would be contrary to the object and purpose of the obligations concerning technical regulations. As a result, a document that "deal[s] exclusively with ... labelling requirements as they apply to a product" can be an example of a "[d]ocument that lays down product characteristics". The issue is not whether the content of the label refers to a product characteristic: the label on a product *is* a product characteristic. Therefore, the second indent of Article 12(2) of the Regulation deals exclusively with a labelling requirement "as it applies to a product".⁷³⁹

7.152. The panel concluded that "a document that lays down a requirement that a product label must contain a particular detail, in fact, lays down a product characteristic".⁷⁴⁰ The panel found support for this interpretation in a Decision of the TBT Committee, in which Members agreed as follows:

In conformity with Article 2.9 of the Agreement, Members are obliged to notify all mandatory labelling requirements that are not based substantially on a relevant international standard and that may have a significant effect on the trade of other Members. That obligation is not dependent upon the kind of information which is provided on the label, whether it is in the nature of a technical specification or not.⁷⁴¹

7.153. In the present case, the fact that the content of the labelling and marking requirements at issue relates in part to the use of signs protected as trademarks does not imply that they no longer constitute "labelling requirements", and therefore a "product characteristic", within the meaning of Annex 1.1 of the TBT Agreement.

7.154. In addition, as observed by some of the complainants⁷⁴², the TBT Agreement contains certain explicit carve-outs for those measures that do not fall within the definition of "technical

⁷³⁹ Panel Report, *EC – Trademarks and Geographical Indications (Australia)*, paras. 7.448 and 7.449. (emphasis original)

⁷⁴⁰ Panel Report, *EC – Trademarks and Geographical Indications (Australia)*, para. 7.451.

⁷⁴¹ See Committee on Technical Barriers to Trade, "Decisions and Recommendations adopted by the Committee since 1 January 1995", G/TBT/1/Rev.8 (23 May 2003), cited in Panel Report, *EC – Trademarks and Geographical Indications (Australia)*, para. 7.451.

⁷⁴² See Honduras's second written submission, para. 457; Dominican Republic's second written submission, paras. 830-832; and Indonesia's second written submission, para. 214.

regulation". Such carve-outs relate to sanitary or phytosanitary measures⁷⁴³ and "[p]urchasing specifications prepared by governmental bodies for production or consumption requirements of governmental bodies".⁷⁴⁴ No similar carve-out exists for terminology, symbols, markings and other elements protected by IP rights. Likewise, in defining the scope of TBT disputes subject to the DSU, Article 14.1 of the TBT Agreement references "disputes with respect to *any matter affecting the operation of the TBT Agreement*" (emphasis added). If anything, this broad definition suggests that all requirements falling within the definition of technical regulations should be subject to dispute settlement, rather than implying that specific types of requirements should be carved out from the scope of the definition of a technical regulation under Annex 1.1 or from the scope of review under the TBT Agreement in the context of dispute settlement proceedings.

7.155. A consideration of the object and purpose of the TBT Agreement does not lead us to a different conclusion. The fifth recital of the preamble⁷⁴⁵ to the TBT Agreement references Members' "[d]esir[e] ... to ensure that technical regulations ... including packaging, marking and labelling requirements ... do not create unnecessary obstacles to international trade". The explicit and unqualified reference to technical regulations, further elaborated by the phrase "including packaging, marking and labelling requirements", in this preambular provision⁷⁴⁶ also does not suggest an intention to carve out requirements relating to signs that are protected as trademarks from the coverage of "technical regulations" or of the TBT Agreement in general. Although the sixth recital of the TBT Agreement⁷⁴⁷ "counterbalanc[es] the trade-liberalization objective expressed in the fifth recital"⁷⁴⁸, the "balance set out in the preamble of the TBT Agreement", in particular in its fifth and sixth recitals, is "between ... the desire to avoid creating unnecessary obstacles to international trade and ... the recognition of Members' right to regulate".⁷⁴⁹ This does not suggest a consideration of whether the requirements at issue relate to signs that may also be protected as trademarks or an exclusion of such signs from the coverage of the Agreement. We therefore do not consider that the fact that some of the specific requirements contained in the TPP measures relate to trademarks should *per se* lead us to conclude that they cannot be covered by the disciplines of the TBT Agreement, or specifically of Article 2.2, provided that they otherwise meet the relevant criteria in Annex 1.1.

7.156. We further note that the above view does not imply that any and all requirements relating to the use of trademarks would be covered by the disciplines of the TBT Agreement on technical regulations. The definition of a "technical regulation" in Annex 1.1 covers terminology, symbols, packaging, marking or labelling requirements "as they apply to a product". This limits the scope of the definition, to the extent that it excludes instances when terminologies, symbols, packaging, marking or labelling requirements do not "apply to a product". For instance, it does not address the availability, scope and use of IP rights⁷⁵⁰ as such, which are addressed separately in the TRIPS Agreement.

⁷⁴³ According to Article 1.5 of the TBT Agreement, "[t]he provisions of this Agreement do not apply to sanitary and phytosanitary measures as defined in Annex A of the Agreement on the Application of Sanitary and Phytosanitary Measures."

⁷⁴⁴ According to Article 1.4 of the TBT Agreement, "[p]urchasing specifications prepared by governmental bodies for production or consumption requirements of governmental bodies are not subject to the provisions of this Agreement but are addressed in the Agreement on Government Procurement".

⁷⁴⁵ According to the Appellate Body, "[t]he preamble of the *TBT Agreement* ... sheds light on the object and purpose of the Agreement". Appellate Body Report, *US – Clove Cigarettes*, para. 89.

⁷⁴⁶ Appellate Body Report, *US – Clove Cigarettes*, para. 92.

⁷⁴⁷ The sixth recital of the preamble to the TBT Agreement states:

Recognizing that no country should be prevented from taking measures necessary to ensure the quality of its exports, or for the protection of human, animal or plant life or health, of the environment, or for the prevention of deceptive practices, at the levels it considers appropriate, subject to the requirement that they are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade, and are otherwise in accordance with the provisions of this Agreement.

⁷⁴⁸ Appellate Body Report, *US – Clove Cigarettes*, para. 95.

⁷⁴⁹ Appellate Body Report, *US – Clove Cigarettes*, para. 96.

⁷⁵⁰ See paragraph (b) of the second recital of the preamble and footnote 3 of the TRIPS Agreement.

7.157. Overall, taking into account the characteristics of the measures at issue and the circumstances of this case, the requirements of the TPP Act and the TPP Regulations relating to the use of trademarks of tobacco products and packaging are one component of a broader set of requirements, the essence of which is to regulate in a comprehensive manner the appearance of tobacco products and tobacco packaging, with a view to making them uniformly "plain". Thus, the "integral and essential aspects" of the TPP measures are to regulate comprehensively the appearance of tobacco products and their retail packaging. As described above, this involves a regulation generally of the use of colours, shapes and other signs and features on such tobacco packaging and tobacco products. It is in this broader context that specific requirements are imposed, that affect the display on these products and their packaging, of signs that may also be protected as trademarks. Taking the TPP measures as a whole, therefore, these requirements are only one aspect of the regulation, through the TPP measures, of the appearance, labelling and packaging of tobacco products, all of which fall within the scope of what constitutes a "technical regulation" within the meaning of Annex 1.1 the TBT Agreement.

7.158. On the basis of the foregoing, we find that the TPP Act and the TPP Regulations, in setting forth requirements relating to the appearance and packaging of tobacco products, including requirements relating to the manner in which trademarks may be displayed on tobacco products and packaging, lay down product characteristics within the meaning of Annex 1.1.

7.159. With respect to the TMA Act, we note that its text does not lay down any product characteristics. Indeed, it appears to us that it is not the purpose of the TMA Act to lay down such requirements. As the Explanatory Memorandum for the TMA Bill explains, "[n]ew subsection 231A(1) of the Trade Marks Act will provide for the making of regulations under the Trade Marks Act, to govern the effect of the operation of the [TPP Act] and [the TPP Regulations] made under that Act, on the Trade Marks Act, and the Trade Mark Regulations".⁷⁵¹

7.2.4.3 Whether compliance with the TPP measures is mandatory

7.2.4.3.1 Main arguments of the parties

7.160. The complainants argue that the TPP measures are "mandatory" within the meaning of Annex 1.1 of the TBT Agreement. According to Honduras, this applies to both "the trademark and format requirements" of the TPP measures as these regulate product characteristics "in a binding and compulsory fashion".⁷⁵² The Dominican Republic⁷⁵³ and Indonesia⁷⁵⁴ both reference the interpretation of the term "mandatory"⁷⁵⁵, and Indonesia refers also to the interpretation of "compliance" by the Appellate Body.⁷⁵⁶ All complainants mention the enforcement mechanisms and penalties under the TPP measures, in particular Chapter 3 of the TPP Act, and how such mechanisms and sanctions were taken into account in previous disputes.⁷⁵⁷ Cuba adds that Section 18(1) of the TPP Act⁷⁵⁸ demonstrates that the TPP measures are mandatory "under [their] own wording".⁷⁵⁹ Likewise, Indonesia⁷⁶⁰ refers to the Simplified Outline of the TPP Act, which

⁷⁵¹ TMA Bill Explanatory Memorandum, (Exhibits AUS-5, JE-5), Note on Schedule 1, Item 2, p. 3.

⁷⁵² Honduras's first written submission, para. 841. See also *ibid.* para. 791 (referring to Appellate Body Report, *EC – Asbestos*, para. 68).

⁷⁵³ Dominican Republic's first written submission, para. 948.

⁷⁵⁴ Indonesia's first written submission, para. 381.

⁷⁵⁵ Appellate Body Report, *US – Tuna II (Mexico)*, para. 185 (definition of "mandatory").

⁷⁵⁶ Indonesia's first written submission, para. 381.

⁷⁵⁷ Honduras's first written submission, para. 791 (referring to enforcement mechanisms and Panel Reports, *US – COOL*, paras. 7.157-159); Honduras's first written submission, paras. 843-844 (discussing enforcement mechanisms); Honduras's first written submission, para. 845 (referring to case law on enforcement mechanisms); Dominican Republic's first written submission, para. 948 (referring to Appellate Body Report, *EC – Asbestos*, para. 72 and noting mandatory and enforceable through criminal sanctions with reference to Panel Report, *EC – Sardines*, para. 7.30); Dominican Republic's first written submission, para. 949 (noting offences and civil penalties for tobacco products or retail packaging that do not comply, with reference to Chapter 3 of the TPP Act and *ibid.* Annex I); Cuba's first written submission, para. 396 and Section II.B.4 (noting "mandatory" compliance as non-compliance with TPP measures can attract civil and criminal penalties); and Indonesia's first written submission, para. 383 (referring to Chapter 3 of the TPP Act).

⁷⁵⁸ Section 18(1) of the TPP Act states: "[t]he retail packaging of tobacco products must comply with the following requirements". TPP Act, (Exhibits AUS-1, JE-1), Section 18(1).

⁷⁵⁹ Cuba's second written submission, para. 194.

⁷⁶⁰ Indonesia's first written submission, para. 382.

states that "[t]he retail packaging and appearance of tobacco products must comply with the requirements of th[e TPP] Act".⁷⁶¹ Indonesia also refers to the use of "must" and "must not" "throughout" the TPP Regulations⁷⁶², whereas Honduras references the same terms in both the TPP Act and the TPP Regulations⁷⁶³ as well as previous disputes relying on the modal verbs used in the challenged measure to find that the latter was mandatory.⁷⁶⁴

7.161. Australia accepts that the "physical requirements" of the TPP measures are technical regulations "within the scope of the TBT Agreement" as "[c]ompliance with these requirements is mandatory".⁷⁶⁵ In advancing systemic arguments concerning the trademark requirements of the TPP measures, Australia is silent on whether it also considers these requirements to be mandatory.

7.2.4.3.2 Analysis by the Panel

7.162. As the Dominican Republic⁷⁶⁶ and Indonesia⁷⁶⁷ point out, in *US – Tuna II (Mexico)* the Appellate Body defined the terms "mandatory" and "compliance" as follows:

The noun "compliance" is defined as "[t]he action of complying".⁷⁶⁸ The verb "comply" refers to an "[a]ct in accordance with or *with* a request, command, etc."⁷⁶⁹ The word "mandatory" means "obligatory in consequence of a command, compulsory"⁷⁷⁰, or "being obligatory".⁷⁷¹

7.163. As noted, "a panel's determination of whether a measure constitutes a technical regulation must be made in the light of the characteristics of the measure at issue and the circumstances of the case"⁷⁷², and "this analysis should give particular weight to the 'integral and essential' aspects of the measure".⁷⁷³ We have found that the integral and essential aspects of the TPP Act and the TPP Regulations are to regulate the packaging and appearance of tobacco products by laying down product characteristics. "Tobacco products", as defined for the purposes of the TPP Act and the TPP Regulations, may be legally marketed in Australia only in accordance with the appearance and packaging requirements, including the trademark requirements, set out in these instruments. The Simplified Outline of the TPP Act is explicit: "[t]he retail packaging and appearance of tobacco

⁷⁶¹ TPP Act, (Exhibits AUS-1, JE-1), p. 14.

⁷⁶² Indonesia's first written submission, para. 383.

⁷⁶³ Honduras's first written submission, para. 842.

⁷⁶⁴ Honduras's first written submission, para. 791 (referring to Panel Report, *US – Clove Cigarettes*, para. 7.39); and Honduras's first written submission, para. 842 (referring to Panel Reports, *US – Clove Cigarettes*, para. 7.39; and *US – COOL*, paras. 7.157-159).

⁷⁶⁵ Australia's first written submission, para. 507.

⁷⁶⁶ Dominican Republic's first written submission, para. 948.

⁷⁶⁷ Indonesia's first written submission, para. 381.

⁷⁶⁸ (footnote original) *Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 1, p. 472.

⁷⁶⁹ (footnote original) *Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 1, p. 473.

⁷⁷⁰ (footnote original) *Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 1, p. 1694.

⁷⁷¹ Appellate Body Report, *US – Tuna II (Mexico)*, para. 185 (footnote omitted). Likewise, the panel in the same dispute held that:

[D]ictionary definitions of the term "mandatory" include "binding" as well as "obligatory, compulsory, not discretionary", or "required by law or mandate; compulsory". This suggests that the notion of "mandatory" may encompass the legally binding and enforceable character of the instrument, and may also relate to its contents, prescribing/imposing a certain behaviour. We also note that the ISO/IEC Guide 2 establishes that the expression "mandatory requirement", should be used to mean only "a requirement made compulsory by law or regulation".

Panel Report, *US – Tuna II (Mexico)*, para. 7.103 (footnotes omitted). See also Panel Report, *EC - Trademarks and Geographical Indications (Australia)*, para. 7.453.

⁷⁷² Appellate Body Report, *US – Tuna II (Mexico)*, para. 188 (referring to Appellate Body Reports, *EC – Asbestos*, para. 64; and *EC – Sardines*, paras. 192 and 193).

⁷⁷³ Appellate Body Reports, *EC – Seal Products*, para. 5.19 (quoting Appellate Body Report, *EC – Asbestos*, para. 72).

products must comply with the requirements of this Act".⁷⁷⁴ Also, as Indonesia notes⁷⁷⁵, the TPP Regulations' declared "[p]urpose" is to "prescribe requirements for the retail packaging and appearance of tobacco products for Part 2 of Chapter 2 of the [TPP] Act".⁷⁷⁶

7.164. Accordingly, the language of the TPP Act and the TPP Regulations is prescriptive in relation to the requirements at issue. The tobacco product requirements use terms such as "must"⁷⁷⁷, "must not"⁷⁷⁸, and the word "may" combined with terms in the negative⁷⁷⁹, and they do so pervasively and in regard to all aspects of the appearance and packaging of tobacco products. In this context, we note that the panel in *EC – Trademarks and Geographical Indications (Australia)* considered that the terms of the measure at issue, such as the use of the word "shall", may be indicative of mandatory compliance.⁷⁸⁰

7.165. Further, several of the provisions of the TPP Act and the TPP Regulations in question appear under titles that contain the term "requirements"⁷⁸¹, underscore the universal nature of such requirements ("Retail packaging of all tobacco products"⁷⁸²), or are termed as categorical prohibitions ("Prohibition on..."⁷⁸³, "Retail packaging not to..."⁷⁸⁴, "Retail packaging must not..."⁷⁸⁵, "No marks"⁷⁸⁶, and "No trade marks"⁷⁸⁷). The less numerous permissive provisions of the TPP Act and TPP Regulations that relate to product characteristics and use "may" appear either in a restrictive context ("may ... only"⁷⁸⁸ or "may appear once on no more than 2 of ..."⁷⁸⁹), or as limited, precisely circumscribed, often conditional exceptions to obligations using the above terms⁷⁹⁰, or as provisions not contradicting the limits of the above obligations.⁷⁹¹

⁷⁷⁴ TPP Act, (Exhibits AUS-1, JE-1), Section 12.

⁷⁷⁵ Indonesia's response to Panel question No. 62, para. 63.

⁷⁷⁶ TPP Regulations, (Exhibits AUS-3, JE-2), Regulation 1.1.4.

⁷⁷⁷ TPP Act, (Exhibits AUS-1, JE-1), Sections 18.1 (*chapeau*), 18.1(b), 18.2 (*chapeau*), 18.2(a), 18.2(b)(i), 18.2(b)(ii), 18.2(c), 18.3 (*chapeau*), 18.3, 18.3(a), 18.3(b), 18.3(c), 18.3(d), 19.2(a), 19.2(b)(i)-19.2(b)(ii), 21.1, 21.2(d)-21.2(e), 21.3 table, 21.4, 22.1, 22.2, 22.2(a), and 25 (title); and TPP Regulations, (Exhibits AUS-3, JE-2), Regs. 2.1.1(1) (*chapeau*), 2.1.1(1)(a), 2.1.1(2), 2.1.3(2), 2.1.4(1)(a), 2.1.4(2), 2.1.5 (*chapeau*), 2.1.5(a)-2.1.5(b), 2.2.1(1)-2.2.1(4), 2.3.2(1)-2.3.2(2), 2.3.3(a)-2.3.3(b), 2.3.4(1)-2.3.4(4), 2.3.5(1), 2.3.6(1)(a)-2.3.6(1)(c), 2.3.6(2), 2.3.6(4), 2.3.7(2), 2.3.8(2)-2.3.8(3), 2.3.9(1)(a)-2.3.9(1)(b), 2.4.1, 2.4.2(2), 2.4.2(3)(a)-2.4.2(3)(d), 2.4.3(1)(b)-2.4.3(1)(c), 2.4.3(2)(a)-2.4.3(2)(c), 2.4.4(2)(b), 2.4.4(2)(e)-2.4.4(2)(f), 2.5.2(2), 2.5.2(4)-2.5.2(5), 2.6.2(2), 2.6.3(2), 3.1.1(1), 3.1.2(2), 3.1.3, and 3.2.1(5)-3.2.1(6).

⁷⁷⁸ TPP Act, (Exhibits AUS-1, JE-1), Sections 18.1(a), 21.2(a)-21.2(b), 23, 25 (title), and 25; and TPP Regulations, (Exhibits AUS-3, JE-2), Regs. 2.1.3(3), 2.1.6, 2.3.1(5), 2.3.5(2), 2.3.7(1), 2.3.9(1)(c), 2.4.3(1)(a), 2.4.4(2)(a)-2.4.4(2)(c), 2.6.3(3), 3.1.2(3), and 3.2.1(7).

⁷⁷⁹ For example, Section 18.3(b) of the TPP Act provides that, with respect to the opening of a cigarette pack, "neither the lid, nor the edges of the lid, *may be* rounded, bevelled or otherwise shaped or embellished in any way" (emphasis added). See also *ibid.* Sections 18.3(c), 20.1, 20.2, 22.2(b)-22.2(c), 24, 26.1, and 26.2.

⁷⁸⁰ Panel Report, *EC – Trademarks and Geographical Indications (Australia)*, para. 7.453. See also Appellate Body Report, *EC – Sardines*, para. 194 fn 111; and Panel Reports, *US – COOL*, para. 7.160.

⁷⁸¹ TPP Act, (Exhibits AUS-1, JE-1), Chapter 2 (title, Part 2 title, Part 2 Div. 1 title, and Part 2, Div. 2 title), and Sections 18.1-18.3, 21 (title), 21.1 (title), 21.2 (title), 21.3 (table), 21.4 (title), 22 (title), 22.1, 22.2, 26 (title), and 27A; and TPP Regulations, (Exhibits AUS-3, JE-2), Part 2 (title), and Regulation 2.3.6(1) (*chapeau*).

⁷⁸² TPP Act, (Exhibits AUS-1, JE-1), Section 18.1 (title).

⁷⁸³ TPP Act, (Exhibits AUS-1, JE-1), Section 20 (title).

⁷⁸⁴ TPP Act, (Exhibits AUS-1, JE-1), Sections 23 (title), and 24 (title).

⁷⁸⁵ TPP Act, (Exhibits AUS-1, JE-1), Section 25 (title).

⁷⁸⁶ TPP Act, (Exhibits AUS-1, JE-1), Section 20.2 (title).

⁷⁸⁷ TPP Act, (Exhibits AUS-1, JE-1), Section 20.1 (title).

⁷⁸⁸ TPP Act, (Exhibits AUS-1, JE-1), Section 21.2(c); and TPP Regulations, (Exhibits AUS-3, JE-2), Regulation 2.4.4(2)(d).

⁷⁸⁹ TPP Regulations, (Exhibits, AUS-3, JE-2), Sections 2.3.4(3)(b) and 2.3.4(4)(b). See also *ibid.* Section 2.5.2(3).

⁷⁹⁰ TPP Act, (Exhibits AUS-1, JE-1), Section 20.3; and TPP Regulations, (Exhibits, AUS-3, JE-2), Regs. 2.3.1(1)-2.3.1(4), 2.3.7(1), 2.3.8(1), 2.5.1-2.5.2, 2.6.1, 2.6.2(1), 2.6.3(1), 3.1.2(1), 3.2.1(1)-3.2.1(4), and 3.2.2.

⁷⁹¹ See, e.g. Section 2.1.2 of the TPP Regulations (Exhibits, AUS-3, JE-2) on the "[p]hysical features of cigarette cartons" relative to Sections 18-25 of the TPP Act, (Exhibits AUS-1, JE-1), in particular Sections 18(2) and 19. See also Regulation 2.1.3(1) of the TPP Regulations, on the "[p]hysical features of lining of primary packaging of tobacco products" relative to Sections 18.3(d) and 19 of the TPP Act. See also Regulation 2.1.4(1)(b) of the TPP Regulations, relative to Regulation 2.1.4(1)(a). See also Regulation 2.3.2(3) of the TPP Regulations, relative to TPP Regulations 2.3.2(1)-2.3.2(2).

7.166. As the complainants note, the TPP Act is supported by an elaborate enforcement mechanism.⁷⁹² The Simplified Outline of the Act indicates that "[o]ffences and civil penalties apply if tobacco products are supplied, purchased or manufactured and either the retail packaging, or the products themselves, do not comply with the requirements".⁷⁹³ Accordingly, Chapter 3 of the TPP Act addresses "[o]ffences and civil penalty provisions"⁷⁹⁴, in particular "[g]eneral offences and civil penalty provisions for non-compliant retail packaging and tobacco products"⁷⁹⁵ and "[o]ffences and civil penalty provisions relating to constitutional corporations".⁷⁹⁶ Chapter 4 establishes "[p]owers to investigate contraventions of th[e TPP] Act".⁷⁹⁷ In turn, Chapter 5 contains provisions addressed at "[e]nforcing compliance with th[e TPP] Act"⁷⁹⁸, such as "[o]btaining a civil penalty order"⁷⁹⁹, "[c]ivil proceedings and criminal proceedings"⁸⁰⁰, and "[i]nfringement notices".⁸⁰¹

7.167. The enforcement mechanism of the TPP Act applies also in the context of the TPP Regulations. As the Notes to Sections 27(1) and 27A of the TPP Act indicate, Chapters 3 and 5 apply for failure to comply with a tobacco product requirement, which includes "a requirement in relation to the retail packaging or appearance of tobacco products ... specified in Part 2 of Chapter 2 [of the TPP Act or] ... prescribed by regulations made under Part 2 of Chapter 2", i.e. the TPP Regulations.

7.168. We note that the enforceability of a measure through sanctions, in particular criminal sanctions, has been found to be indicative of mandatory compliance⁸⁰², and that the fact that certain measures are "legally enforceable and binding under [a Member's] law (they are issued by the government and include legal sanctions)" is "an important component of the 'mandatory' character of the measures".⁸⁰³

7.169. For the foregoing reasons, we find that the TPP Act and the TPP Regulations are "mandatory" within the meaning of the definition of a technical regulation under Annex 1.1 of the TBT Agreement.

7.170. The TMA Act makes no mention of compliance or requiring compliance. We also note that, since the TMA Act does not lay down any product characteristics, there is no prescribed product characteristic in that instrument "with which compliance [could be] mandatory" for the purpose of Annex 1.1 of the TBT Agreement. However, this is a law enacted by Australia and a provision to be applied by virtue of a governmental mandate.

7.2.4.4 Overall conclusion

7.171. We have determined above that the TPP Act and the TPP Regulations each satisfy the three criteria of technical regulations within the meaning of Article 1.1 of the TBT Agreement, in that they apply to an identifiable product or group of products (tobacco); lay down one or more characteristics of those products (including with respect to their marking, packaging or labelling); and mandate compliance with those characteristics.

7.172. With respect to the third legal instrument that forms part of the TPP measures, the TMA Act, we have determined above that, taken in isolation, it applies to an identifiable group of products (tobacco). We have also concluded that it does not lay down product characteristics for

⁷⁹² Article 27A of the TPP Act, (Exhibits AUS-1, JE-1), addresses the "[l]egal effect of sections 18 to 27" as follows: "Sections 18 to 27 have no legal effect other than to specify requirements, and provide for regulations specifying requirements, for the purposes of the definition of *tobacco product requirement* in subsection 4(1)." (emphasis original)

⁷⁹³ TPP Act, (Exhibits AUS-1, JE-1), Section 12.

⁷⁹⁴ TPP Act, (Exhibits AUS-1, JE-1), Chapter 3 (title).

⁷⁹⁵ TPP Act, (Exhibits AUS-1, JE-1), Chapter 3, Part 2 (title).

⁷⁹⁶ TPP Act, (Exhibits AUS-1, JE-1), Chapter 3, Part 3 (title).

⁷⁹⁷ TPP Act, (Exhibits AUS-1, JE-1), Chapter 4, Part 2 (title). This includes reference to "[s]earch warrants" and the "[p]owers to require persons to give information, produce documents or answer questions".

⁷⁹⁸ TPP Act, (Exhibits AUS-1, JE-1), Chapter 5 (title).

⁷⁹⁹ TPP Act, (Exhibits AUS-1, JE-1), Chapter 5, Part 2, Division 1 (title).

⁸⁰⁰ TPP Act, (Exhibits AUS-1, JE-1), Chapter 5, Part 2, Division 2 (title).

⁸⁰¹ TPP Act, (Exhibits AUS-1, JE-1), Chapter 5, Part 3 (title).

⁸⁰² Appellate Body Report, *EC – Asbestos*, para. 72. See also Panel Reports, *US – COOL*, para. 7.160.

⁸⁰³ Panel Report, *US – Tuna II (Mexico)*, para. 7.142.

tobacco products (including with respect to their marking, packaging or labelling), with which compliance is mandatory and therefore would not, taken in isolation, constitute a technical regulation.

7.173. We recall, however, that the definition of "technical regulation" in Annex 1.1 of the TBT Agreement includes "applicable administrative provisions":

Document which lays down product characteristics or their related processes and production methods, *including the applicable administrative provisions*, with which compliance is mandatory. (emphasis added)

7.174. We therefore consider whether the TMA Act constitutes an "applicable administrative provision" in relation to the TPP Act and TPP Regulation, within the meaning of Annex 1.1.

7.175. The appositive clause "including the applicable administrative provisions" has been interpreted to mean that:

[W]here a mandatory document laying down product characteristics or their related processes and production methods also contains "administrative provisions" that refer to those "product characteristics" or "related processes and production methods", those administrative provisions are to be considered as an integral part of the technical regulation and are thus subject to the substantive provisions of the TBT Agreement.⁸⁰⁴

7.176. Whether a measure constitutes an "applicable administrative provision" depends on whether there exist "provisions to be applied by virtue of a governmental mandate in relation to either product characteristics or their related processes and production methods".⁸⁰⁵ A key consideration for determining whether the TMA Act is an "applicable administrative provision" in the matter before us is therefore whether it is to be applied "in relation to either product characteristics or their related processes and production methods".⁸⁰⁶

7.177. As discussed in paragraph 7.127 above, the TMA Act grants to the Governor-General the power to make regulations "in relation to the effect of the operation" of the TPP Act and the TPP Regulations on a provision of the TM Act or regulations made thereunder. The TMA Act therefore provides a legal basis to address certain potential consequences of the marking, labelling and packaging requirements contained in the TPP Act and TPP Regulations in respect of the application of trademark law. Specifically, it creates a power to make regulations that will limit the effect of the requirements in the TPP Act and the TPP Regulations that set out product characteristics, insofar as that effect might disadvantage applicants for trademark registration and registered owners of trademarks.⁸⁰⁷

7.178. The power to make regulations established by the TMA Act is "in relation to ... product characteristics"⁸⁰⁸, insofar as such regulations would ensure that the effect of the requirements mandated by the TPP Act and TPP Regulations does not extend beyond that which is intended by the drafters of those two instruments. On this basis, insofar as its provisions relate to aspects of the TPP Act and Regulations related to the product characteristics that these instruments lay down, we conclude that the TMA Act is an "applicable administrative provision" within the meaning of Annex 1.1 of the TBT Agreement.⁸⁰⁹

7.179. Overall, therefore, we find that the TPP measures (i.e. the TPP Act, the TPP Regulations and the TMA Act, taken together), prescribe a number of detailed characteristics for tobacco products (including in terms of marking, labelling and packaging requirements) falling within the scope of the definition of "technical regulation" under Annex 1.1 of the TBT Agreement.

⁸⁰⁴ Appellate Body Reports, *EC – Seal Products*, para. 5.13.

⁸⁰⁵ Appellate Body Reports, *EC – Seal Products*, para. 5.13.

⁸⁰⁶ We consider it clear that the TMA Act, as an act of the Australian Parliament, is "applied by virtue of a governmental mandate". See Section 2.1.1 above and para. 7.177 below.

⁸⁰⁷ TMA Bill Explanatory Memorandum, (Exhibits AUS-5, JE-5), p. 1.

⁸⁰⁸ Appellate Body Reports, *EC – Seal Products*, para. 5.13.

⁸⁰⁹ Appellate Body Reports, *EC – Seal Products*, para. 5.13.

7.180. We note the following observation of the Appellate Body in relation to measures comprised of several legal instruments:

[T]he issue of how best to characterize a measure at issue which comprises several different elements is one that arises in many disputes. ... A panel may, in some cases, find it appropriate to treat several domestic legal instruments together as a single measure in order to facilitate its analysis of that measure in the light of the claims raised or defences invoked. Conversely, there may be instances where a panel may choose to consider different elements set out in a single legal instrument as different "measures", for purposes of its analysis.⁸¹⁰

7.181. As we have already concluded, the "integral and essential aspects"⁸¹¹ of the TPP Act and the TPP Regulations have the effect of ensuring that tobacco products and their retail packaging comply with the requirements set out in those provisions. This appearance is the combined effect of the TPP Act and the TPP Regulations, through the mandatory requirements set out in both instruments.⁸¹²

7.182. For these reasons, we consider that the TPP measures⁸¹³ constitute a technical regulation, laying down characteristics for the appearance and packaging of tobacco products (including requirements relating to the manner in which trademarks may be displayed on tobacco products and packaging)⁸¹⁴, and mandating compliance with those characteristics.⁸¹⁵ To the extent that the TMA Act is an "applicable administrative provision" in respect of the requirements contained in the TPP Act and the TPP Regulations, it is an "integral part"⁸¹⁶ of that technical regulation.

7.183. Having established that the TPP measures constitute a technical regulation within the meaning of Annex 1.1 of the TBT Agreement, we now consider the claim that they are inconsistent with Article 2.2 of the TBT Agreement.

7.2.5 Whether the TPP measures are "more trade-restrictive than necessary to fulfil a legitimate objective" within the meaning of Article 2.2

7.184. As described above, an assessment of the consistency of a technical regulation under Article 2.2 involves in the first instance a "relational analysis"⁸¹⁷ of three factors:

- i. the degree of contribution made by the measure to the legitimate objective at issue;
- ii. the trade-restrictiveness of the measure; and
- iii. the nature of the risks at issue and the gravity of consequences that would arise from non-fulfilment of the objective(s) pursued by the Member through the measure.

7.185. These factors will inform the "comparative analysis" that is, in most cases⁸¹⁸, required in order to determine whether the challenged measure is *more trade-restrictive than necessary*.⁸¹⁹

⁸¹⁰ Appellate Body Reports, *EC – Seal Products*, para. 5.20. (footnotes omitted)

⁸¹¹ Appellate Body Reports, *EC – Seal Products*, para. 5.19.

⁸¹² We recall, for example, that Section 27 of the TPP Act provides that regulations "may prescribe additional requirements in relation to (a) the retail packaging of tobacco products; and (b) the appearance of tobacco products", and that these requirements are so prescribed in the TPP Regulations. We also recall that the Notes to Sections 27(1) and 27A of the TPP Act indicate that Chapters 3 and 5 apply for failure to comply with a tobacco product requirement, which includes "a requirement in relation to the retail packaging or appearance of tobacco products ... specified in Part 2 of Chapter 2 [of the TPP Act or] ... prescribed by regulations made under Part 2 of Chapter 2", i.e. the TPP Regulations.

⁸¹³ While the TPP Act, the TPP Regulations and the TMA Act, taken together, have been identified throughout these Reports as "the TPP measures", in the plural, this usage is not intended to signal that the Panel considers these three legal instruments to constitute distinct measures that would need to be considered separately for the purposes of its analysis of the claims before it.

⁸¹⁴ See para. 7.158 above.

⁸¹⁵ See para. 7.169 above.

⁸¹⁶ Appellate Body Reports, *EC – Seal Products*, para. 5.13.

⁸¹⁷ See Appellate Body Report, *US – COOL*, para. 374 (referring to Appellate Body Report, *US – Tuna II*, para. 318).

7.186. As described earlier, the complainants argue that the TPP measures are trade-restrictive, and that they are more trade-restrictive than necessary to fulfil the legitimate objective they pursue, taking into account the risks that non-fulfilment of this objective would create. The complainants address all elements of the above test, including the three factors identified above as forming part of the "relational analysis" and alternative measures that are, in their view, reasonably available to Australia, would make an equivalent contribution to its objective, and would be less trade-restrictive than the TPP measures.

7.187. Australia considers, however, that the complainants have not established that the measures are trade-restrictive.⁸²⁰ Australia also argues that the TPP measures were adopted in accordance with the Article 11 FCTC Guidelines and Article 13 FCTC Guidelines, and thus these measures are "in accordance with relevant international standards" within the meaning of the second sentence of Article 2.5 of the TBT Agreement.⁸²¹ Consequently, it claims that, to the extent that the definition of a "technical regulation" also encompasses measures affecting the use of a trademark, the TPP measures are "rebuttably presumed" not to create an unnecessary obstacle to international trade under the second sentence of Article 2.5 and that the complainants have not rebutted this presumption.⁸²² It is undisputed that the burden rests on Australia, as the party invoking the second sentence of Article 2.5, to demonstrate that these conditions are met.⁸²³ Should Australia do so, the burden would shift to the complainants to rebut the presumption that the TPP measures "[do] not create an unnecessary obstacle to international trade".⁸²⁴

7.188. Australia concludes that, given the complainants' failure to establish that the measures are trade-restrictive, the Panel is not required to engage in any further "relational" analysis under Article 2.2.⁸²⁵ Australia submits in the alternative, i.e. only in the event that the Panel would determine that the complainants have made a *prima facie* case that the TPP measures are trade-restrictive, that the complainants have failed to establish a violation of Article 2.2, with reference to the additional factors of the "relational analysis" described above.⁸²⁶ Australia further considers that the complainants have not established that alternative measures would be

⁸¹⁸ We note in this regard that it is "not mandatory in respect of Article 2.2 of the TBT Agreement for a panel to draw a preliminary conclusion on 'necessity' based on the factors with respect to the technical regulation itself before engaging further in a comparison with proposed alternative measures". Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.235. See also *ibid.* paras. 5.227-5.229. In respect of Article XX of the GATT 1994, see Appellate Body Reports, *EC – Seal Products*, para. 5.215 fn 1299.

⁸¹⁹ Appellate Body Report, *US – Tuna II (Mexico)*, para. 320. See also *ibid.* para. 318.

⁸²⁰ Australia's first written submission, para. 583.

⁸²¹ Australia's first written submission, paras. 567 and 584.

⁸²² Australia's first written submission, paras. 519, 567-568 and 584. See also Australia's response to Panel question No. 73, para. 200 (stating that "[t]he FCTC Guidelines address both the *trademark elements* of tobacco plain packaging (such as the use of logos, colours, or brand images) and the *physical elements* of tobacco plain packaging (such as the shape, size, and materials of tobacco packaging). The FCTC is therefore a relevant international standard whether the Panel considers the term 'technical regulation' to encompass only the physical requirements of the tobacco plain packaging measure, or whether it considers that term to encompass both the trademark and physical requirements." (footnote omitted) (emphasis added)).

⁸²³ See Honduras's response to Panel question No. 66, p. 27; Honduras's second written submission, para. 852; Dominican Republic's response to Panel question No. 66, paras. 293 and 323; Cuba's response to Panel question No. 66, p. 16 (annexed to its response to Panel question No. 138) (endorsing Honduras's response to this question); Indonesia's response to Panel question No. 66, para. 85; Indonesia's second written submission, para. 220; and Australia's response to Panel question No. 66, para. 160.

⁸²⁴ We note, in this respect, that in *Russia – Pigs (EU)*, the panel, addressing a similar situation (i.e. the sequential assessment of various elements before concluding whether the measure could enjoy the presumption of consistency established under Article 3.2 of the SPS Agreement), reserved its consideration of how to assess "rebuttability" to a later stage of its analysis:

Pursuant to the terms of Article 3.2, a finding that Russia's measures "conform to" relevant international standards would establish a presumption of consistency of Russia's measures with its relevant SPS obligations, and thus would have implications for this Panel's disposition of other claims in this dispute. Should we find "conformity to", as we understand that this presumption is "rebuttable", we would further need to consider how to assess whether or not this presumption has been rebutted in respect of each of the relevant provisions.

Panel Report, *Russia – Pigs (EU)*, para. 7.888. (footnote omitted)

⁸²⁵ Australia's first written submission, para. 585.

⁸²⁶ Australia's first written submission, paras. 586-590.

reasonably available to it, achieve an equivalent contribution to its objective, and be less trade-restrictive than the TPP measures.⁸²⁷

7.189. For the reasons described earlier⁸²⁸, we consider that the possibility that the challenged measures may benefit from the rebuttable presumption conferred by the second sentence of Article 2.5, as invoked by Australia, may have significant implications on the manner in which we must conduct the remainder of our analysis under Article 2.2 in these proceedings.

7.190. The presumption established under the second sentence of Article 2.5 only applies with respect to technical regulations that are adopted "for one of the legitimate objectives explicitly mentioned" in Article 2.2. An early consideration of this factor will therefore allow us to determine whether the TPP measures fall within the scope of measures to which the presumption of the second sentence of Article 2.5 applies. As described above, the "legitimate objective" at issue is also one of the aspects to be considered in an assessment of whether a technical regulation is "more trade-restrictive than necessary" within the meaning of the second sentence of Article 2.2, independently of the applicability of the rebuttable presumption embodied in the second sentence of Article 2.5.

7.191. In light of these elements, we deem it appropriate, in the circumstances of this case, to continue our analysis⁸²⁹ with a consideration of the objective of the TPP measures and whether such objective is "legitimate" within the meaning of Article 2.2. Should we determine that the TPP measures have been prepared, adopted or applied "for one of the legitimate objectives explicitly mentioned" in Article 2.2⁸³⁰, we will need to consider further whether, as invoked by Australia, the other conditions under the second sentence of Article 2.5 are met, such that the rebuttable presumption under Article 2.5 is applicable and, if so, what this implies for the remainder of our analysis of the claims before us under Article 2.2.⁸³¹

7.2.5.1 Whether the TPP measures pursue a "legitimate objective"

7.192. In adjudicating a claim under Article 2.2 of the *TBT Agreement*, a panel must first assess what a Member seeks to achieve by means of a technical regulation. Subsequently, the analysis must turn to the question of whether a particular objective is legitimate.⁸³² This analysis therefore involves both an identification of the objective being pursued by the Member through the measure and an assessment of its "legitimate" character, within the meaning of Article 2.2.

7.193. In addition, as observed above, an identification of the objective of the TPP measures is also necessary, in the circumstances of this case, to determine whether they pursue "one of the

⁸²⁷ Australia's first written submission, paras. 21, 595, and 700-742.

⁸²⁸ See para. 7.36 above.

⁸²⁹ We understand this general approach to be consistent with the manner in which the parties have articulated their understanding of Article 2.5. See, e.g. Honduras's response to Panel question No. 66, p. 26; Dominican Republic's response to Panel question No. 66, paras. 288-289 and 292; Cuba's response to Panel question No. 66, p. 216 (annexed to its response to Panel question No. 138) (endorsing Honduras's response to question No. 66); Indonesia's response to Panel question No. 66, para. 73; Australia's response to Panel question No. 66, para. 156; and Australia's second written submission, para. 313. With the exception of Indonesia (which considers that we should first make all our determinations under the second sentence of Article 2.5 before even "commencing" assessing Article 2.2), we do not consider that the parties' views on this matter are in contradiction with the approach we take here, that is: first, considering the elements that belong to *both* Articles 2.2 and 2.5 (whether the measures constitute a "technical regulation" and the identification of their "objectives"); and then proceeding, as relevant, to the remaining elements that determine the applicability of the rebuttable presumption under the second sentence of Article 2.5 (whether the measures are "in accordance with relevant international standards" and if they are, what the consequences of the presumption conferred are and how it can be rebutted). Finally, having considered the applicability of the presumption under the second sentence of Article 2.5, we would then return to the completion of our analysis under Article 2.2 in light of our earlier determinations in relation to the second sentence of Article 2.5.

⁸³⁰ The other element of the first set of conditions under the second sentence of Article 2.5 is that the measure seeking the rebuttable presumption must be a "technical regulation". We consider that this element has been met when we found, at para. 7.182 above, that the TPP measures are a "technical regulation" for the purposes of Article 2.2.

⁸³¹ See also paras. 7.36, 7.41, 7.187, 7.189 and fns 824 and 829 above.

⁸³² Appellate Body Report, *US – Tuna II (Mexico)*, para. 314.

legitimate objectives *explicitly* mentioned in paragraph 2" (emphasis added) within the meaning of the second sentence of Article 2.5, invoked by Australia.

7.194. We therefore first consider what the objective of the TPP measures is, or, as the Appellate Body expressed it, what Australia "seeks to achieve" through these measures, before considering whether this objective is "legitimate" within the meaning of Article 2.2 of the TBT Agreement, and to what extent it falls within the scope of the specific objectives listed in the second sentence of Article 2.5.

7.2.5.1.1 The objective of the TPP measures

7.195. As described by the Appellate Body:

[T]he proper approach to be followed by a panel in determining the objective a Member seeks to achieve by means of a technical regulation ... calls for an independent and objective assessment, based on an examination of the text of the measure, its design, architecture, structure, legislative history, as well as its operation. While a panel may take as a starting point the responding Member's characterization of the objective it pursues through the measure, a panel is not bound by such characterization. This is so especially where the objective of a measure is contested between the parties, and competing arguments have been raised on the basis of the text of the measure, its design, architecture, structure, legislative history, and evidence relating to its operation.⁸³³

7.196. We are mindful, in approaching this question, of the important distinction to be made, for the purposes of Article 2.2, between the identification of the *objective* that is pursued through the measure, which we now seek to ascertain, and the *level* at which the Member aims to achieve this objective, which we need not establish in the abstract at this stage of our analysis. As the Appellate Body observed:

Neither Article 2.2 in particular, nor the *TBT Agreement* in general, requires that, in its examination of the objective pursued, a panel must discern or identify, in the abstract, the level at which a responding Member wishes or aims to achieve that objective.⁸³⁴

7.197. Similarly, we are mindful of the fact that the identification of the objective pursued by a technical regulation is distinct also from the question of *how* or through what means, that objective is to be pursued. This distinction may have an impact on later parts of our analysis, to the extent that a comparison would be required between the degree to which the objective at issue is achieved by means of the challenged measures and the degree to which an equivalent contribution could be achieved through other less trade-restrictive measures attaining the same objective through different means.⁸³⁵

7.198. As we understand it, the identification of the "objective" pursued by a measure is designed to identify the underlying purpose of the challenged measure. The specific list of "legitimate objectives" identified in Article 2.2 provides an indication that this determination in essence relates to an identification of the underlying policy concern that the Member seeks to address through the measures (and, subsequently, whether this is "legitimate" within the meaning of Article 2.2). *How*

⁸³³ Appellate Body Reports, *US – COOL*, para. 395.

⁸³⁴ Appellate Body Reports, *US – COOL*, para. 390 (referring to Appellate Body Report, *US – Tuna II (Mexico)*), para. 316: "a WTO Member, by preparing, adopting, and applying a measure in order to pursue a legitimate objective, articulates either implicitly or explicitly the level at which it seeks to pursue that particular legitimate objective"). See also para. 7.231 below. The cited passage includes the following original footnote: "We have noted above that the sixth recital of the preamble of the *TBT Agreement* provides that a Member shall not be prevented from taking measures necessary to achieve a legitimate objective 'at the levels it considers appropriate'. ... This does not, however, require a separate assessment of a *desired* level of fulfilment." Appellate Body Reports, *US – COOL*, para. 390 fn 779. (emphasis original)

Appellate Body Reports, *US – COOL*, para. 390 (referring to Appellate Body Report, *US – Tuna II (Mexico)*), para. 316).

⁸³⁵ See Appellate Body Reports, *US – COOL*, para. 387. See also Panel Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, paras. 7.320 and 7.326.

the specific challenged measure seeks to address the concern at issue, and the degree to which it actually contributes to achieving its objective, are distinct questions that we will consider, as relevant, in later parts of our analysis.

7.199. With this general guidance in mind, we outline the main arguments of the parties in respect of the objective of the TPP measures, before turning to our own assessment of this objective.

7.2.5.1.1.1 Main arguments of the parties

7.200. Honduras describes the objective pursued by Australia through the TPP measures as "the improvement of public health by reducing smoking prevalence".⁸³⁶ Honduras considers that this position is supported by the TPP Act itself and the legislative history of the TPP Act.⁸³⁷ It explains that the relevant *objective* that must be identified is the government's policy objective, which must be distinguished from the *mechanism* chosen by the government to achieve that objective, and that in the present case, Australia's *policy objective is the reduction of smoking prevalence among its population*, which is reflected in Section 3.1 of the TPP Act and related evidence.⁸³⁸

7.201. The Dominican Republic also considers that the explicit objective of the TPP measures, as stated in the TPP Act, is the improvement of public health by reducing smoking prevalence.⁸³⁹

7.202. Cuba explains that the text of the TPP Act establishes that its objective is to "improve public health" through a reduction in smoking prevalence as a result of reducing initiation, increasing cessation and reducing relapse. It considers that the legislative history of the measure, as reflected in the Explanatory Memorandum accompanying the TPP Bill when it was first proposed, confirms this objective, as it explains that "the objects of this bill are to improve public health by reducing people's use of and exposure to tobacco products; and to give effect to certain of Australia's obligations under the WHO FCTC". Thus, in Cuba's view, the objective of Australia's plain packaging measure is "the protection of human health through the reduction of smoking prevalence (i.e. reducing initiation, increasing cessation, and reducing relapse) that will result, in combination with other measures, in reducing the national smoking rate to 10% by 2018 and halving the smoking rate of Aboriginal and Torres Strait Islander people".⁸⁴⁰

7.203. Indonesia explains that the Government of Australia stated early in the development of its proposal that the TPP measures' overall objective is to contribute to "reducing the smoking rate {prevalence} among the Australian population to 10 per cent by 2018, and halving the smoking rate among Aboriginal and Torres Strait Islander people" and that "[t]hus, the objective of PP is to protect health by reducing smoking prevalence".⁸⁴¹

7.204. Australia explains that "the objectives of Australia's tobacco plain packaging measure are set out in section 3 of the TPP Act".⁸⁴² It explains that Subsection 3(1) of the TPP Act sets out the general objects of the Act concerning smoking behaviour, which are shared by all comprehensive tobacco control strategies and are the means by which to improve public health overall: discouraging uptake, encouraging quitting, and discouraging relapse will necessarily result in a reduction of exposure to smoke, furthering public health by benefitting even non-smokers.⁸⁴³

7.205. Australia further explains that the implementing legislation and regulations, the Explanatory Memorandum and legislative history of the measure as well as its overall design, structure and operation, and the measure's objectives – which include giving effect to Australia's obligations under the FCTC – each clearly describes how the measure is intended to contribute, as part of Australia's comprehensive strategy of tobacco control measures, to achieving Australia's

⁸³⁶ Honduras's first written submission, para. 847.

⁸³⁷ Honduras's second written submission, para. 519.

⁸³⁸ Honduras's first written submission, paras. 122-123.

⁸³⁹ Dominican Republic's first written submission, para. 972.

⁸⁴⁰ Cuba's second written submission, para. 205.

⁸⁴¹ Indonesia's first written submission, para. 89.

⁸⁴² Australia's first written submission, para. 135.

⁸⁴³ Australia's first written submission, para. 136.

overall objective of protecting human health.⁸⁴⁴ Australia explains that Subsection 3(1) of the TPP Act sets out the "general objectives" of the TPP Act, which are "to improve public health by discouraging uptake, encouraging quitting, discouraging relapse, and reducing exposure to smoke" and are shared by all comprehensive tobacco control strategies, which operate to improve public health by reducing smoking prevalence and tobacco-related disease and mortality.⁸⁴⁵ It further explains that the operation of subsection 3(2) of the TPP Act is designed to contribute to improving public health through three specific mechanisms, or "specific objectives": reducing the appeal of tobacco products; increasing the effectiveness of health warnings; and reducing the ability of retail packaging of tobacco products to mislead consumers about the harmful effects of smoking and use of tobacco products.⁸⁴⁶

7.206. Australia considers that focusing exclusively on "smoking prevalence" in formulating the measure's objective, as proposed by the complainants, would have an impact on how the Panel will assess the degree of contribution of the measure:

[T]he complainants in effect [would be asking] the Panel to ignore the causal pathway through which the tobacco plain packaging measure will ultimately contribute to the achievement of its broader objectives of improving public health by discouraging uptake, encouraging quitting, discouraging relapse and reducing exposure to smoke. This is an attempt by the complainants to artificially sever the causal link between the behavioural effects of the tobacco plain packaging measure, and their long-term effects on smoking prevalence.⁸⁴⁷

7.207. Australia thus describes the TPP measures' objective, "properly defined", as "reducing smoking rates in Australia by reducing the appeal of tobacco products, increasing the effectiveness of graphic health warnings, and reducing the ability of packages to mislead consumers about the harms of smoking".⁸⁴⁸

7.208. Honduras considers that Australia tries to conflate its policy objective with the mechanisms it chose to achieve that objective and that, contrary to Australia's suggestions, the mechanisms contained in the TPP Act are not themselves Australia's objective, they are merely means to an end – the end or "objective" being the reduction of smoking prevalence.⁸⁴⁹

7.209. The Dominican Republic also observes that Australia seeks to characterize the three mechanisms as "specific objectives" that are ends in themselves, and that "[u]nsurprisingly, Australia was unable to maintain a consistent argument that the mechanisms are both the means to achieve the ends and the ends themselves".⁸⁵⁰

7.210. Cuba considers Australia's reference to reduction in smoking as the "general objective" to be achieved through three "specific objectives" or "mechanisms" to be confusing.⁸⁵¹ It argues that, taking as reference the text of the TPP Act, its legislative history, and the structure and design of the measure, there can be no doubt that the goal or "objective" of plain packaging is the improvement of public health through a change in smoking behaviour and not simply the reduction of the aesthetic appeal of tobacco products or their packaging.⁸⁵²

7.211. Indonesia also cautions the Panel against allowing Australia to "move the goal posts" by using terminology related to the "general objectives" and "specific measures" set out in the TPP measures. It argues that Australia tries to "have it both ways" by attempting to re-characterize the "specific mechanisms" as "objectives" themselves and that this is misleading,

⁸⁴⁴ Australia's first written submission, para. 141.

⁸⁴⁵ Australia's first written submission, para. 598.

⁸⁴⁶ Australia's first written submission, para. 599.

⁸⁴⁷ Australia's first written submission, para. 602.

⁸⁴⁸ Australia's first written submission, para. 604. See also Australia's second written submission, paras. 210 and 535.

⁸⁴⁹ See Honduras's second written submission, paras. 523 and 524.

⁸⁵⁰ Dominican Republic's second written submission, para. 280.

⁸⁵¹ Cuba's second written submission, para. 207.

⁸⁵² Cuba's second written submission, para. 213.

as the specific mechanisms are the "levers" that Australia hopes will drive down prevalence, but the objective of Australia's plain packaging regime is to reduce prevalence.⁸⁵³

7.212. In addition, the Dominican Republic comments on Australia's stated objective of giving effect to certain obligations as a party to the FCTC. In the Dominican Republic's view, the FCTC does not oblige Australia to adopt plain packaging, and a WTO Member may not invoke, in any event, an obligation under a separate international agreement to justify imposing restrictions that would otherwise be contrary to WTO law. It argues that if they were so entitled, Members could reach agreements outside of the WTO as a means of evading their WTO obligations.⁸⁵⁴

7.2.5.1.1.2 Analysis by the Panel

7.213. In these proceedings, it is undisputed that the objective of the TPP measures relates to public health protection and more specifically to the protection of public health in relation to the use of tobacco products in Australia.

7.214. However, the parties articulate the particular objective pursued by Australia through the TPP measures somewhat differently. As described above, the complainants define the objective pursued by Australia with specific reference to the improvement of public health "by reducing smoking prevalence". Australia considers that a focus exclusively on smoking prevalence would "ignore the causal pathway through which the measures will contribute to their objective". As described above, Australia considers that the objective of the measures, properly defined, is to "reduc[e] smoking rates in Australia by reducing the appeal of tobacco products, increasing the effectiveness of graphic health warnings, and reducing the ability of packages to mislead consumers about the harms of smoking".⁸⁵⁵ In the complainants' view, these three aspects constitute "mechanisms" in the operation of the measures, i.e. the means through which the general objectives identified in the TPP Act are intended to be carried out, and cannot properly be characterized as "objectives" of the TPP measures within the meaning of article 2.2 of the TBT Agreement.

7.215. In light of the diverging descriptions by the parties of the objective of the TPP measures, we next consider further how exactly it should be characterized. In doing so, we should take into account Australia's own articulation of what objective it pursues through its measures. However, as noted above, we are not bound by this characterization. In order to make an objective and independent assessment of the objective that a Member seeks to achieve, we must take account of all the evidence put before us in this regard, including "the texts of statutes, legislative history, and other evidence regarding the structure and operation" of the technical regulation at issue.⁸⁵⁶

7.216. We therefore consider the relevant evidence before us, including the text of the measures, their legislative history and other evidence on the operation of the TPP measures, to identify their objective.

7.217. The text of the TPP Act is the principal legal instrument embodying the plain packaging requirements under the TPP measures and defines its object. It is subtitled "An Act to discourage the use of tobacco products, and for related purposes".⁸⁵⁷ Section 3 defines the "Objects of this Act" as follows:

(1) The objects of this Act are:

(a) to improve public health by:

(i) discouraging people from taking up smoking, or using tobacco products; and

⁸⁵³ Indonesia's second written submission, para. 166.

⁸⁵⁴ Dominican Republic's second written submission, para. 287.

⁸⁵⁵ Australia's first written submission, para. 604. See also Australia's second written submission, paras. 210 and 535.

⁸⁵⁶ Appellate Body Reports, *US – COOL*, para. 371.

⁸⁵⁷ TPP Act, (Exhibits AUS-1, JE-1), cover page.

- (ii) encouraging people to give up smoking, and to stop using tobacco products; and
 - (iii) discouraging people who have given up smoking, or who have stopped using tobacco products, from relapsing; and
 - (iv) reducing people's exposure to smoke from tobacco products; and
- (b) to give effect to certain obligations that Australia has as a party to the Convention on Tobacco Control.⁸⁵⁸

7.218. On its face, therefore, the TPP Act identifies two main "objects". The first, under subparagraph (a), is "to improve public health" through certain actions listed in subparagraphs (i)–(iv). The second specific object is identified in subparagraph (b), namely "to give effect to certain obligations that Australia has as a party to the [FCTC]". These "objects" are summarized as follows in the Simplified Outline of the Act contained in the TPP Act itself:

This Act regulates the retail packaging and appearance of tobacco products in order to:

- (a) improve public health; and
- (b) give effect to certain obligations in the Convention on Tobacco Control.⁸⁵⁹

7.219. We consider these two "objects" in turn.

Improvement of public health

7.220. With respect to the first "object" identified in the TPP Act, we note that Section 3(1)(a) refers to improving public health by *discouraging* smoking uptake, use of tobacco products or relapse into smoking, *encouraging* cessation and *reducing* exposure to smoke. As the title of the Act itself suggests, this formulation turns around "*discourag(ing)* the use of tobacco products" (emphasis added).

7.221. According to the TPP Bill Explanatory Memorandum⁸⁶⁰, "[t]his clause provides that the objects of this Bill are to improve public health by *reducing people's use of and exposure to tobacco products*"⁸⁶¹ (emphasis added). The Explanatory Memorandum also describes the broader context against which the TPP Act is adopted:

The Australian Government is implementing a comprehensive suite of reforms *to reduce smoking and its harmful effects*. As part of these reforms the Government committed to introduce legislation requiring plain packaging of tobacco products, to remove one of the last frontiers for tobacco advertising.⁸⁶²

7.222. Throughout these proceedings, Australia has used various formulations to describe the general objective of the TPP measures. It has described it both in terms of "improvi[ng] public health by *discouraging* uptake, *encouraging* quitting, *discouraging* relapse and *reducing* exposure to smoke"⁸⁶³ and in terms of "*reducing smoking rates in Australia ...*".⁸⁶⁴ These two formulations differ, to the extent the first focuses on encouraging or discouraging certain specific behaviours relating to the use of tobacco products, while the other refers more directly to a reduction of smoking and smoking rates. Australia has also described its objective, "properly defined" for the

⁸⁵⁸ TPP Act, (Exhibits AUS-1, JE-1), Section 3.

⁸⁵⁹ TPP Act, (Exhibits AUS-1, JE-1), Section 12.

⁸⁶⁰ See para. 2.13 above, and related footnotes, for an explanation of the legal value of Explanatory Memoranda under Australian domestic law.

⁸⁶¹ TPP Bill Explanatory Memorandum, (Exhibits AUS-2, JE-7), p. 6.

⁸⁶² TPP Bill Explanatory Memorandum, (Exhibits AUS-2, JE-7), p. 1. (emphasis added)

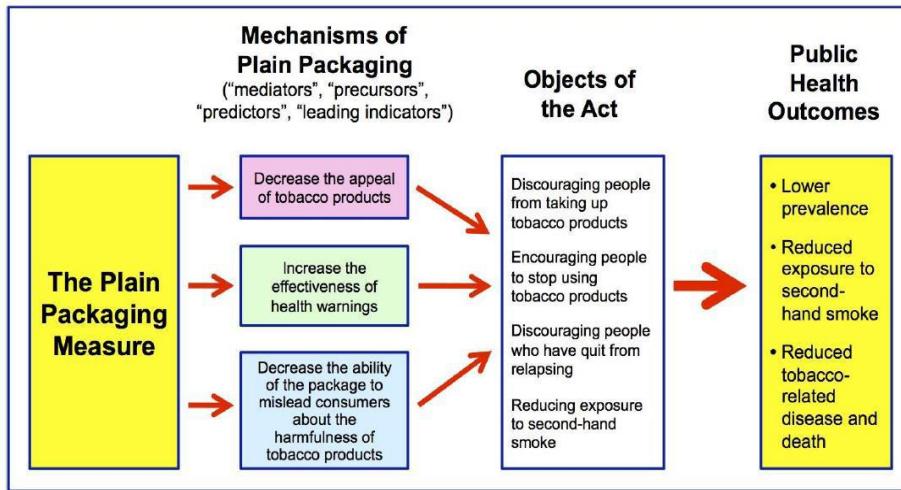
⁸⁶³ Australia's first written submission, para. 602. (emphasis added)

⁸⁶⁴ Australia's first written submission, para. 604. (emphasis added)

purposes of the analysis under Article 2.2, with reference to the improvement of public health by "reducing smoking rates".

7.223. The overall operation of the measures is described as follows by Australia:

Figure 11: Australia's depiction of the operation of the TPP measures



Source: Figure 9 of Australia's first written submission, at para. 144.

7.224. The complainants describe the objective of the TPP measures as the improvement of public health by "reducing smoking prevalence" (emphasis added), prevalence being defined as the number of smokers as a percentage of the total population.⁸⁶⁵

7.225. As we understand it, the underlying objective pursued by Australia through the TPP measures, as reflected in the text of the TPP Act and in its Explanatory Memorandum, is the improvement of public health, specifically through an effort to "reduce smoking" and "reduce smoking rates".⁸⁶⁶ The TPP Act does not expressly refer to the reduction of smoking or smoking rates as one of its objects. It is clear however from the Explanatory Memorandum that these measures are one element of what Australia describes as "a comprehensive suite of reforms to reduce smoking and its harmful effects".⁸⁶⁷ As expressed in the Explanatory Memorandum, the

⁸⁶⁵ See Honduras's first written submission, para. 351; Dominican Republic's first written submission, para. 50 fn 7; Cuba's first written submission, para. 86; and Indonesia's first written submission, para. 6, fn 3.

⁸⁶⁶ TPP Bill Explanatory Memorandum, (Exhibits AUS-2, JE-7), p. 1. See also TPPA Regulation Explanatory Statement, (Exhibit JE-22), pp. 11-15; and Consultation Paper Non-Cigarette Tobacco Products, (Exhibit JE-11), pp. 3 and 16.

⁸⁶⁷ TPP Bill Explanatory Memorandum, (Exhibits AUS-2, JE-7), p. 1. The Explanatory Memorandum further identifies the "rationale for plain packaging" as follows:

This Bill will prevent tobacco advertising and promotion on tobacco products and tobacco product packaging in order to:

- reduce the attractiveness and appeal of tobacco products to consumers, particularly young people;
- increase the noticeability and effectiveness of mandated health warnings;
- reduce the ability of the tobacco product and its packaging to mislead consumers about the harms of smoking; and
- through the achievement of these aims in the long term, as part of a comprehensive suite of tobacco control measures, contribute to efforts to reduce smoking rates.

Ibid. See also TMA Bill Explanatory Memorandum (Exhibits AUS-5, JE-5), p. 1, outline; Australian Department of Health and Ageing, "Consultation Paper: Tobacco Plain Packaging Bill 2011 Exposure Draft", 7 April 2011, (Consultation Paper TPP Bill Exposure Draft), (Exhibits AUS-120, JE-10), pp. 1-2; 1-2; Australian Department of Health and Ageing, "Consultation Paper: Tobacco Plain Packaging: Proposed Approach to Non-Cigarette Tobacco Products", 30 September 2011, (Consultation Paper Non-Cigarette Tobacco Products), (Exhibit JE-11), pp. 3 and 13-14.

TPP Act is intended "to improve public health by reducing people's use of and exposure to tobacco products".⁸⁶⁸

7.226. We agree with Australia that a characterization of the objective of the TPP measures based exclusively on the reduction of smoking *prevalence*, as proposed by the complainants, would not fully reflect the objective that it pursues through the TPP measures, to the extent that this would reflect only one dimension of the reduction of smoking that Australia seeks to achieve through the measures. While the objects of the TPP Act make reference to encouraging quitting and discouraging uptake, which may be seen to relate in particular to reducing smoking prevalence as defined above, the TPP Act is also intended, by its own terms, to discourage people more generally "from using tobacco products" and reducing "exposure to smoke from tobacco products". The objective of the TPP measures therefore cannot, in our view, be reduced exclusively to the reduction of smoking prevalence, i.e. a reduction in the proportion of the population that smokes. As we understand it, the objective of the measures encompasses more broadly an intention to reduce "use" of, and exposure to, tobacco products.

7.227. We do not consider, however, that the objective of the TPP measures, for the purposes of our analysis under Article 2.2, should be understood as encompassing the additional aspects identified by Australia as the "specific objectives" or "mechanisms" under the TPP Act, i.e. "reducing the appeal of tobacco products, increasing the effectiveness of graphic health warnings, and reducing the ability of packages to mislead consumers about the harms of smoking". In our view, these "specific objectives" are more properly described as the means, or "mechanisms", as Australia itself describes them, by which the measures are intended to achieve Australia's objective of improving public health. We agree with the view expressed by the complainants, and some of the third parties, that the means should not be confused with the ends in this context.⁸⁶⁹

7.228. As Australia itself explains, the TPP Act and its Explanatory Memorandum describe "*how the measure is intended to contribute*, as part of Australia's comprehensive strategy of tobacco control measures to achieving Australia's overall objective of protecting human health" (emphasis added). Specifically, Section 3.2 of the TPP Act introduces the three "mechanisms" that Australia describes as "specific objectives" in the following manner:

- (2) It is the intention of the Parliament to *contribute to achieving the objects in subsection (1)* by regulating the retail packaging and appearance of tobacco products in order to:
 - (a) reduce the appeal of tobacco products to consumers; and

⁸⁶⁸ TPP Bill Explanatory Memorandum, (Exhibits AUS-2, JE-7), p. 6. See also TMA Bill Explanatory Memorandum (Exhibits AUS-5, JE-5), p. 1, outline; Consultation Paper TPP Bill Exposure Draft, (Exhibits AUS-120, JE-10), pp. 1-2;1-2; Consultation Paper Non-Cigarette Tobacco Products, (Exhibit JE-11), pp. 3 and 16; and TPPA Regulation Explanatory Statement, (Exhibit JE-22), pp. 11, 12, 14, and 15.

⁸⁶⁹ See, e.g. European Union's third-party submission, para. 68:

The overarching legitimate objective and the subsidiary aims should not be conflated. If the "objective" is cast in an artificial way to include matters that are not *per se* legitimate, but that merely draw their legitimacy from the overarching objective and the context, then the analysis becomes circular and the measure self-justifying. That is because even if, hypothetically, an alternative measure would exist that would in fact eliminate or almost eliminate smoking, and thus make a greater contribution to the objective of protecting public health, but do nothing to reduce the appeal of the packaging, in purely legal terms it would fail as an alternative measure under Article 2.2 simply because it would not address the issue of the appeal of the packaging (leaving aside the question of whether or not it would be more trade-restrictive).

In this respect, we also note the observation by the panel in *US – COOL (Article 21.5 – Canada and Mexico)* that:

[T]he assessment of the degree of contribution would be confounded and would become virtually meaningless if the objective pursued by the amended COOL measure were to be equated with the way in which the same measure pursues that objective. A meaningful review of a Member's challenged measure entails a review against objective standards, not those of the challenged measure itself.

Panel Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 7.326.

- (b) increase the effectiveness of health warnings on the retail packaging of tobacco products; and
- (c) reduce the ability of the retail packaging of tobacco products to mislead consumers about the harmful effects of smoking or using tobacco products.⁸⁷⁰

7.229. As described above, what we are seeking to establish, at this stage of our analysis, is what Australia seeks to achieve through the TPP measures, or, in other words, what policy concern it seeks to address. This question is distinct, in our view, from the question of *how* the specific measures at issue are intended to achieve this objective. What we are concerned with here is the identification of the underlying *purpose* of the measures, rather than the specific operational mechanisms through which they are intended to achieve that purpose.

7.230. This determination does not imply that the specific mechanisms through which the measures are intended to operate will not be relevant to our overall analysis of the measures' consistency with Article 2.2 of the TBT Agreement. On the contrary, these may form the basis of further aspects of our analysis, should we determine in the first instance that the "objective" of the measures is legitimate. They may become highly relevant, *inter alia*, to our analysis of the measures' contribution to its objective. At this stage of our analysis however, the focus of our enquiry is on the general policy goal that the measures seek to address or, as the Appellate Body expressed it, what Australia "seeks to achieve" through the TPP measures.

7.231. In describing Australia's objective under the TPP measures, Cuba and Indonesia have also referred to the "performance benchmarks set under the COAG [Council of Australian Governments] National Healthcare Agreement" of "reducing the national smoking rates to 10 per cent of the population by 2018 and halving the Aboriginal and Torres Strait Islander smoking rate". These "performance benchmarks" are referred to in the TPP Bill Explanatory Memorandum.⁸⁷¹ They constitute general targets set in relation to the reduction of smoking rates in Australia, through the TPP measures and other tobacco control measures.⁸⁷² These "benchmarks" thus identify a certain targeted *level* of achievement of the objective. As described above however, Article 2.2 does not require that we discern or identify *in abstracto* the *level* at which Australia wishes or aims to achieve its objective.⁸⁷³ We thus need not consider, as such, the existence of a specific target or benchmark in the achievement of the objective for which Australia may aim as a component of that objective itself.⁸⁷⁴ Rather, as described above⁸⁷⁵, the focus of our enquiry is the underlying purpose or rationale of the measures. We are not persuaded, therefore, that the objective of the TPP measures needs to be characterized, at this stage of our analysis, with reference to the above performance benchmarks.

7.232. In light of the above, we understand the objective pursued by Australia by means of the TPP measures to be to improve public health by reducing the use of, and exposure to, tobacco products.

Giving effect to the Framework Convention on Tobacco Control (FCTC)

7.233. The TPP Act identifies, in Section 3(1)(b), a second "Object", namely "to give effect to certain obligations that Australia has as a party to the Convention on Tobacco Control".

⁸⁷⁰ TPP Act, (Exhibits AUS-1, JE-1), Section 3. (emphasis added)

⁸⁷¹ TPP Bill Explanatory Memorandum, (Exhibits AUS-2, JE-7), p. 1. See also Consultation Paper TPP Bill Exposure Draft, (Exhibits AUS-120, JE-10), pp. 1 and 3-5; and Consultation Paper Non-Cigarette Products, (Exhibit JE-11), pp. 13-14.

⁸⁷² See, e.g. Consultation Paper TPP Bill Exposure Draft, (Exhibits AUS-120, JE-10), pp. 1 and 3-5; and Consultation Paper Non-Cigarette Products, (Exhibit JE-11), pp. 13-14 (listing "the introduction of plain packaging for tobacco products" among ten "reforms initiated ... to meet [the Council of Australian Governments'] target").

⁸⁷³ See para. 7.196 above.

⁸⁷⁴ See paras. 7.197-7.198 above.

⁸⁷⁵ See para. 7.229 above.

7.234. As described above, the term "Convention on Tobacco Control" is defined in the TPP Act as meaning the FCTC.⁸⁷⁶ Further, the TPP Bill Explanatory Memorandum states that the "introduction of plain packaging for tobacco products is one of the means by which the Australian Government will give effect to Australia's obligations under the [FCTC]" and, in this context, refers to Articles 5, 11 and 13 of the FCTC.⁸⁷⁷ The TPP Bill Explanatory Memorandum adds that Section 3(2) "is not intended to be an exhaustive list of ways in which ... Australia's obligations under the WHO FCTC may be met".⁸⁷⁸

7.235. As discussed above, Australia has described its "legitimate objectives", "properly defined", for the purposes of Article 2.2 of the TBT Agreement as "reducing smoking rates in Australia by reducing the appeal of tobacco products, increasing the effectiveness of graphic health warnings, and reducing the ability of packages to mislead consumers about the harms of smoking".⁸⁷⁹ In describing its objectives, however, Australia also makes reference to its intention of giving effect to the FCTC, as referred to in Subsection 3(2) of the TPP Act:

The structure and operation of subsections 3(1) and 3(2), operating together, make clear that the TPP Act specifies a causal pathway by which Australia's objectives of improving public health and giving effect to the FCTC may be achieved. That is, the achievement of the specific objectives under subsection 3(2) is a *direct means* by which the objective of improving public health under subsection 3(1) of the TPP Act is achieved.⁸⁸⁰

7.236. In response to a question from the Panel, Australia clarified that it considers the implementation of its obligations under the FCTC to be one of its "objectives" for the purposes of Article 2.2:

Tobacco plain packaging is recommended as a means by which parties to the FCTC may implement their obligations under Articles 11 and 13 of the FCTC. Australia therefore considers the introduction of tobacco plain packaging to give effect to Australia's "General Obligation" to implement and update comprehensive multi-sectoral strategies under Article 5.1 of the FCTC, as well as its specific obligations under Articles 11 and 13. As such, giving effect to certain obligations that Australia has as a party to the FCTC is one of the measure's legitimate objectives for the purposes of Article 2.2 of the TBT Agreement.⁸⁸¹

7.237. Honduras, the Dominican Republic and Cuba argue that the implementation of the FCTC does not oblige Australia to adopt plain packaging, and that a WTO Member may, in any event, not invoke an obligation under a separate international agreement to justify imposing restrictions that would otherwise be contrary to WTO law.⁸⁸² For these reasons, they consider that the consistency of the TPP measures with Article 2.2 of the TBT Agreement must only be assessed against the stated objective of reducing smoking behaviour⁸⁸³, improving "public health by reducing smoking prevalence"⁸⁸⁴ and "reducing tobacco prevalence".⁸⁸⁵

⁸⁷⁶ TPP Act, (Exhibits AUS-1, JE-1), Section 4(1). See also para. 2.16 above.

⁸⁷⁷ TPP Bill Explanatory Memorandum, (Exhibits AUS-2, JE-7), p. 2.

⁸⁷⁸ TPP Bill Explanatory Memorandum, (Exhibits AUS-2, JE-7), p. 7.

⁸⁷⁹ Australia's first written submission, para. 604.

⁸⁸⁰ Australia's first written submission, para. 600. (emphasis original; footnote omitted)

⁸⁸¹ Australia's response to Panel question No. 78, para. 220.

⁸⁸² See Honduras's first written submission, paras. 11, 121 and 138-140; Honduras's second written submission, para. 465; Dominican Republic's first written submission, paras. 187 and 422-423; Dominican Republic's second written submission, paras. 286-288 and 962; Cuba's first written submission, paras. 289-291, 320 fn 406, and 406; Cuba's response to Panel question No. 130, p. 17; Indonesia's first written submission, paras. 92-98; Indonesia's comments on Australia's Post-Implementation Report, paras. 12-13. Honduras also argues that, even if the FCTC required its parties to implement plain packaging, this Panel, by virtue of Article 3.2 of the DSU, would not have the mandate to interpret such obligation from a non-WTO treaty. Honduras's first written submission, paras. 138-139. See also Dominican Republic's first written submission, para. 423; Dominican Republic's second written submission, para. 287; and Cuba's first written submission, paras. 290 and 292.

⁸⁸³ Dominican Republic's second written submission, paras. 288 and 962.

⁸⁸⁴ Honduras's first written submission, para. 140.

7.238. We do not understand Australia to be suggesting that its objective of "giving effect to certain obligations" it has under the FCTC should be considered, for the purposes of determining the "legitimate objective" of the TPP measures under Article 2.2, in abstraction of, and independently from, its objective in relation to the improvement of public health. Rather, we understand Australia's intention of giving effect to certain of its obligations under the FCTC through the TPP measures, including the TPP Act, to be directly related to, and in pursuance of, its objective of improving public health by reducing the use of, and exposure to, tobacco products.

7.239. As expressed by Australia, "[t]he public health rationale underlying the TPP Act, and the means by which to achieve this objective, is supported by both the Explanatory Memorandum to the TPP Act and the FCTC Guidelines".⁸⁸⁶ Australia further explains that "there is no dispute that measures recommended by the FCTC are 'legitimate' public health measures".⁸⁸⁷ As Australia further expressed it:

Subsection 3(1)(b) of the TPP Act expressly provides that the tobacco plain packaging measure will *improve public health* by giving effect to certain obligations that Australia has as a party to the FCTC. As outlined in paragraph 140 of Australia's first written submission, the Explanatory Memorandum to the TPP Bill refers explicitly to the FCTC Guidelines, which recommend that Parties consider introducing tobacco plain packaging (emphasis added).⁸⁸⁸

7.240. The objective of the FCTC is set out in Article 3 as follows:

[T]o protect present and future generations from the devastating *health, social, environmental and economic consequences of tobacco consumption and exposure to tobacco smoke* by providing a framework for tobacco control measures to be implemented by the Parties at the national, regional and international levels *in order to reduce continually and substantially the prevalence of tobacco use and exposure to tobacco smoke*.⁸⁸⁹ (emphasis added)

7.241. We note the recognition, in the FCTC, of the major public health concerns raised by tobacco consumption and exposure, and its express objective of addressing the "devastating ... consequences for tobacco consumption and exposure to tobacco smoke", including on health.

7.242. As indicated by Australia⁸⁹⁰ and as reflected in the measures' legislative history⁸⁹¹, the TPP measures intend, more specifically, to reflect certain recommendations in the Article 11 FCTC Guidelines and Article 13 FCTC Guidelines to "consider adopting" tobacco

⁸⁸⁵ Cuba's first written submission, para. 320 fn 406 (stating that "the further objective of giving effect to the FCTC cannot be treated as one which is capable of separately justifying the [T]PP Measures if the [T]PP Measures fail to reduce tobacco use"). But see Cuba's second written submission, paras. 203, 214, and 224.

⁸⁸⁶ Australia's first written submission, para. 601. (emphasis added; footnotes omitted)

⁸⁸⁷ Australia's response to Panel question No. 78, para. 219. (emphasis added)

⁸⁸⁸ Australia's response to Panel question No. 78, para. 217. (emphasis added)

⁸⁸⁹ FCTC (Exhibits AUS-44, JE-19), Article 3 (emphasis added). See also para. 2.100 above, and Australia's response to Panel question No. 78, para. 218.

⁸⁹⁰ See, e.g. Australia's first written submission, paras. 2, 4, 9, and 108. Australia links the TPP measures' "three mechanisms" with the "likely benefits of tobacco plain packaging ... identified in the [FCTC] Guidelines":

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

Ibid. para. 108 (quoting part of paragraph 46 of the Article 11 FCTC Guidelines).

⁸⁹¹ See, e.g. TPP Bill Explanatory Memorandum, (Exhibits AUS-2, JE-7), pp. 2-3, 6-9, 11, 14; Consultation Paper TPP Bill Exposure Draft, (Exhibits AUS-120, JE-10), pp. 6-7, 11, and 13-14; TPPA Regulation Explanatory Statement, (Exhibit JE-22), p. 14 of Attachment B. See also Australia's first written submission, para. 140.

plain packaging as one of the ways to implement those obligations in Articles 11 and 13 of the FCTC.⁸⁹²

7.243. In light of these elements, we consider that the reference made, in the TPP Act and its Explanatory Memorandum and related documents, to Australia's intention to give effect to certain obligations under the FCTC through the adoption of the TPP measures further supports and *confirms* that the objective of these measures, for the purposes of our determination under Article 2.2 (i.e. identifying the underlying policy concern being addressed through the challenged measures) is to improve public health by reducing the use of, and exposure to, tobacco products.⁸⁹³

7.244. We therefore need not consider further whether the implementation of certain obligations under the FCTC might be considered to constitute a separate "legitimate objective" *independently* of Australia's public health objective described above.⁸⁹⁴

7.2.5.1.2 Whether the objective pursued by Australia through the TPP measures is a "legitimate objective" within the meaning of Article 2.2

7.245. The Appellate Body has observed that a "legitimate objective" refers to an "aim or target that is lawful, justifiable, or proper".⁸⁹⁵ While Article 2.2 does not provide an exhaustive list of such objectives, it expressly identifies a number of objectives as "legitimate objectives". As noted by the Appellate Body, a finding that the objective of a measure is among those listed in Article 2.2 will end the inquiry into its legitimacy.⁸⁹⁶

7.246. We have determined above⁸⁹⁷ that the objective pursued by Australia through the TPP measures is the protection of human health, and more precisely the improvement of public health by reducing the use of, and exposure to, tobacco products.

7.247. The "protection of human health or safety" is one of the "legitimate objectives" explicitly identified in Article 2.2.⁸⁹⁸ We note in this respect that, in the context of Article XX(b) of the GATT 1994, the preservation of human life and health through the elimination or reduction of well-known and life-threatening health risks (in that instance, as caused by asbestos fibers) was considered to be a value "both vital and important in the highest degree".⁸⁹⁹

⁸⁹² FCTC parties have undertaken in Article 11 of the Convention to implement "effective measures" with respect to the use of health warnings and other appropriate messages in tobacco product packaging and labelling, as well as to ensure tobacco product packaging and labelling "do not promote" these products by any means that are misleading or deceptive. FCTC, (Exhibits AUS-44, JE-19), Articles 11.1(a) and 11.1(b). Under Article 13 of the Convention, FCTC parties have undertaken to apply a "comprehensive ban on all tobacco advertisement, promotion and sponsorship" which, "[a]s a minimum" shall provide, *inter alia*, for a prohibition of "all forms of tobacco advertisement ... that promote a tobacco product by any means that are false, misleading or deceptive". Ibid. Articles 13.1, 13.2, and 13.4(a). "Tobacco advertisement and promotion" is, in turn, defined by the Convention as "any form of commercial communication, recommendation or action with the aim, effect or likely effect of promoting a tobacco product or tobacco use either directly or indirectly". Ibid. Article 1(c). We also note that the TPP Act expressly adopts this FCTC definition. TPP Act, (Exhibits AUS-1, JE-1), Section 4(1). See also paras. 2.100-2.109 above.

⁸⁹³ We note in this respect the acknowledgement by the Dominican Republic that the FCTC Guidelines could "at most ... confirm the legitimacy of the plain packaging as a measure with the *objective* of promoting public health". Dominican Republic's response to panel question No. 130, para. 315. (emphasis original)

⁸⁹⁴ This determination that, for the purposes of identifying the "objective" of the measures under Article 2.2 of the TBT Agreement, the implementation of the FCTC need not be considered to constitute an *independent* objective separate from Australia's public health objective, in no way implies that the FCTC and its related instruments will be of no relevance, or of lesser relevance, for the remainder of our assessment under Article 2.2 of the TBT Agreement or in relation to other claims before us.

⁸⁹⁵ Appellate Body Reports, *US – Tuna II (Mexico)*, para. 313; and *US – COOL*, para. 370. (footnote omitted)

⁸⁹⁶ Appellate Body Reports, *US – COOL*, para. 372.

⁸⁹⁷ See para. 7.232 above.

⁸⁹⁸ The other legitimate objectives explicitly listed in Article 2.2 are: "national security requirements"; "the prevention of deceptive practices"; "protection of ... animal or plant life or health"; and "protection of ... the environment".

⁸⁹⁹ See Appellate Body Report, *EC – Asbestos*, para. 172.

7.248. It is undisputed, in these proceedings, that tobacco use and exposure to tobacco smoke cause death and disease⁹⁰⁰, and that the protection of human health from such risks is thus a legitimate public health objective within the meaning of Article 2.2 of the TBT Agreement.

7.249. We also note Honduras's observation that it has itself implemented comprehensive tobacco regulation measures and shares Australia's goal of "reducing smoking prevalence and tobacco consumption".⁹⁰¹ The Dominican Republic considers "the improvement of public health by reducing smoking prevalence" to be a legitimate objective within the meaning of Article 2.2.⁹⁰² Cuba also accepts that the objective of reducing smoking prevalence is an entirely legitimate objective and that tobacco consumption and exposure to tobacco smoke cause death and disability.⁹⁰³ Indonesia also does not dispute that measures to reduce smoking prevalence protect public health and does not challenge the legitimacy of the objective pursued by Australia's TPP measures.⁹⁰⁴

7.250. We further note that "curbing and preventing youth smoking" has already been recognized as a "legitimate health objective" in the context of the TBT Agreement⁹⁰⁵ and that the Appellate Body has also, in the context of applying the TBT Agreement, already recognized "the importance of Members' efforts in the World Health Organization on tobacco control".⁹⁰⁶ As described above, the "spread of the tobacco epidemic" as "a global problem with serious consequences for public health", and "the devastating worldwide health ... consequences of tobacco consumption and exposure to tobacco smoke"⁹⁰⁷ have been expressly recognized by the FCTC. As also described above, the very objective of the FCTC, an international convention with 180 parties (the vast majority of which are also WTO Members)⁹⁰⁸, is to provide "a framework for tobacco control measures to be implemented by the Parties at the national, regional and international levels in order to reduce continually and substantially the prevalence of tobacco use and exposure to tobacco smoke".⁹⁰⁹

7.251. It is clear, in light of the above⁹¹⁰, that the improvement of public health by reducing the use of, and exposure to, tobacco products is a "legitimate objective" within the meaning of Article 2.2 of the TBT Agreement.

⁹⁰⁰ See section 7.2.5.5 below, on the nature of the risks and gravity of the consequences of non-fulfilment of the objective. See also FCTC, (Exhibits AUS-44, JE-19), preamble, second and third recitals, and Article 3; and WHO/FCTC *amici curiae* brief, (Exhibit AUS-42 (revised)), para. 13. See further paras. 7.240-7.241 above.

⁹⁰¹ See Honduras's first written submission, paras. 2 and 850.

⁹⁰² See Dominican Republic's first written submission, para. 972.

⁹⁰³ See Cuba's first written submission, paras. 3 and 406.

⁹⁰⁴ See Indonesia's first written submission, para. 389.

⁹⁰⁵ Appellate Body Report, *US – Clove Cigarettes*, para. 236.

⁹⁰⁶ Appellate Body Report, *US – Clove Cigarettes*, para. 235.

⁹⁰⁷ FCTC, (Exhibits AUS-44, JE-19), preamble, second and third recitals, and Article 3; and WHO/FCTC *amici curiae* brief, (Exhibit AUS-42 (revised)), para. 13. See also paras. 7.240-7.241 above.

⁹⁰⁸ We note that most FCTC Parties are also WTO Members (149 out of 180, or around 83%). See Australia's response to Panel question No. 128, paras. 188-189; Australia's first written submission, para. 578; and Australia's second written submission, para. 336 (referring however to 148 WTO Members, as these submissions were made before Kazakhstan, also a FCTC Party, became a WTO Member in November 2015).

Similarly, the vast majority of WTO Members are also FCTC Parties (149 out of 160, or around 93%). Two of the parties of these proceedings are FCTC Parties: Australia and Honduras. Cuba signed the FCTC in June 2004, but has never become a FCTC Party via ratification, acceptance or accession. The Dominican Republic and Indonesia are neither FCTC Parties nor Signatories. WHO/FCTC Request for Permission to Submit Information, (Exhibit AUS-42, revised), para. 12; and WHO/FCTC *amici curiae* brief, (Exhibit AUS-42 (revised)), para. 12 and fn 18. See also Honduras's first written submission, para. 124; Dominican Republic's first written submission, para. 178; Cuba's second written submission, para. 383; Indonesia's first written submission, para. 93; and Australia's first written submission, para. 103. Additionally, "[a]ll parties to [these disputes] are WHO Member States." WHO/FCTC Request for Permission to Submit Information, (Exhibit AUS-42 (revised)), para. 12.

Most third parties to these proceedings are also FCTC Parties. The only third parties to these proceedings that are not FCTC Parties are: Argentina, Malawi, and the United States (although both Argentina and the United States are FCTC Signatory states, having signed it in 2003 and 2004, respectively). A list of all FCTC Parties and signatories is contained in Exhibit IND-29 (indicating 179 Parties given that it was submitted before Zimbabwe became a Party in March 2015). See also para. 2.97 above.

⁹⁰⁹ FCTC, (Exhibits AUS-44, JE-10), Article 3. See also Australia's response to Panel question No. 78, para. 218.

⁹¹⁰ See, e.g. paras. 7.232, 7.246, and 7.247 above.

7.252. We understand the reference in the second sentence of Article 2.5 to the "objectives explicitly mentioned in Article 2.2" (emphasis added) to relate to those objectives listed in Article 2.2 and identified in paragraph 7.247 above, which includes "the protection of human health". We therefore also find, and the parties do not dispute⁹¹¹, that the TPP measures are "prepared, adopted or applied for one of the objectives explicitly mentioned in paragraph 2", within the meaning of the second sentence of Article 2.5 of the TBT Agreement.

7.253. Accordingly, we now consider whether the TPP measures are, as Australia argues, "in accordance with relevant international standards".

7.2.5.2 Whether the TPP measures are "in accordance with relevant international standards" under Article 2.5 (second sentence)

7.2.5.2.1 Overview of the arguments of the parties

7.254. Australia argues that the FCTC Guidelines for Implementation of Article 11 of the FCTC and the FCTC Guidelines for Implementation of Article 13 of the FCTC (Article 11 and Article 13 FCTC Guidelines)⁹¹², constitute a "relevant international standard" for tobacco plain packaging, and the TPP measures have been prepared, adopted or applied "in accordance with" these Guidelines.

7.255. With respect to the first element ("relevant international standards"), Australia contends that the Article 11 and Article 13 FCTC Guidelines are "standards" within the meaning of the TBT Agreement because they are "documents" that, through "conditional" as opposed to "obligatory" language, provide "guidelines" for "common and repeated use" by the FCTC Parties to "meet their obligations under the respective provisions of the convention" as they relate to a "product" (tobacco), including with respect to their packaging, as well as "related processes and production methods" (manufacture and sale of tobacco products).⁹¹³ It further considers that the Article 11 and Article 13 FCTC Guidelines are, in addition, "international" in character because they were adopted by an "international standardizing body": the FCTC COP. Australia argues that the FCTC COP is an "international standardizing body" because it is a body with "recognized activities in standardization", whose membership is open to the relevant bodies of at least all Members. Australia also contends that the complainants do not dispute that these two FCTC Guidelines are "relevant" to the TPP measures.

7.256. With respect to the second element, Australia contends that the TPP measures have been adopted "in accordance with" the Article 11 and Article 13 FCTC Guidelines because, as the measures themselves state, they have been adopted to "give effect" to "certain obligations" that Australia has under the FCTC.⁹¹⁴ Australia recalls, in this respect, that the Article 11 and Article 13 FCTC Guidelines specifically recommend tobacco plain packaging measures as a means to implement the obligations in Articles 11 and 13 of the FCTC regarding packaging and labelling of tobacco products and tobacco advertising, promotion and sponsorship, respectively. Australia argues that when the scope of these plain packaging recommendations in these FCTC Guidelines is "properly identified", it is clear that the TPP measures are "in accordance with" them, including insofar as the TPP measures "extend[] to: regulation of the use of manufacturer or brand names

⁹¹¹ See, e.g. Dominican Republic's response to Panel question No. 66, para. 290; Dominican Republic's second written submission, paras. 850-851; Australia's first written submission, para. 269; and Australia's second written submission, para. 314.

⁹¹² For simplicity and convenience, when mentioned *individually*, we will refer to the FCTC Guidelines for Implementation of Article 11 of the FCTC and the FCTC Guidelines for Implementation of Article 13 of the FCTC, as, respectively, the Article 11 FCTC Guidelines and Article 13 FCTC Guidelines. See also paras. 2.107-2.109 above.

⁹¹³ See also Australia's response to Panel question No. 73, para. 200 (stating that "[t]he FCTC Guidelines address both the *trademark elements* of tobacco plain packaging (such as the use of logos, colours, or brand images) and the *physical elements* of tobacco plain packaging (such as the shape, size, and materials of tobacco packaging). The FCTC is therefore a relevant international standard whether the Panel considers the term 'technical regulation' to encompass only the physical requirements of the tobacco plain packaging measure, or whether it considers that term to encompass both the trademark and physical requirements.") (footnote omitted) (emphasis added)).

⁹¹⁴ Although the TPP Act itself does not specify what these "certain obligations" in the FCTC are, Australia indicates that the TPP Bill Explanatory Memorandum refers specifically to the Article 11 and Article 13 FCTC Guidelines (see, e.g. Australia's first written submission, para. 140). See also paras. 7.233-7.234 above.

on individual cigarettes and other tobacco products such as cigars; restrictions on wrappers inside tobacco packs; specification of location and orientation of information permitted to appear on tobacco packaging; and the number of times certain information may appear on the pack."⁹¹⁵

7.257. Based on the foregoing, Australia requests the Panel to find that the TPP measures meet the conditions under the second sentence of Article 2.5, and should therefore be "rebuttably presumed not to create an unnecessary obstacle to international trade" under Article 2.2 of the TBT Agreement.⁹¹⁶ Australia argues, in addition, that the complainants have "failed to adduce any evidence of the type that would be required to rebut" this presumption.⁹¹⁷ As a consequence, Australia requests the Panel "to reject all of the complainants' claims under Article 2.2 on the grounds that they had not rebutted the presumption established under Article 2.5".⁹¹⁸

7.258. The complainants consider that Australia has not demonstrated that the conditions of the second sentence of Article 2.5 are met. They argue that the Article 11 and Article 13 FCTC Guidelines do not constitute a "relevant international standard" for tobacco plain packaging, first, because they do not meet the definition of "standard" under Annex 1.2 of the TBT Agreement. Second, even if they could, the complainants argue that these two FCTC Guidelines could not be considered an "international" standard because they were not adopted by an "international standardizing body".⁹¹⁹ The complainants further contend that, even assuming that the Article 11 and Article 13 FCTC Guidelines were "relevant international standards", the TPP measures could not be considered as being "in accordance with" this international standard, given the insufficient degree of correspondence between them and the FCTC Guidelines. The complainants submit, in this respect, that the TPP measures implement "plain packaging" by regulating certain tobacco product or packaging features that are not even set forth in the Article 11 and Article 13 FCTC Guidelines (thus going "beyond" these instruments)⁹²⁰ and regulate certain other "plain packaging" features in a manner that is different from the way they are addressed under these Guidelines.⁹²¹

7.259. The complainants therefore ask the Panel to find that the conditions under the second sentence of Article 2.5 have not been satisfied and that, as a consequence, the

⁹¹⁵ See, e.g. Australia's first written submission, paras. 519 and 584; Australia's second written submission, paras. 316, 318 and 321-345; Australia's opening statement at the first meeting of the Panel, para. 83; Australia's response to Panel question No. 135, paras. 21-32; and Australia's response to Panel question No. 150, paras. 35-36.

⁹¹⁶ See, e.g. Australia's first written submission, paras. 519, 567-582 and 584; and Australia's second written submission, para. 345. Australia also claims that the complainants "have failed to adduce any evidence of the type that would be required to rebut" this presumption under the second sentence of Article 2.5. Australia's second written submission, paras. 347-353.

⁹¹⁷ Australia's second written submission, paras. 308 and 347-355.

⁹¹⁸ Australia's second written submission, para. 356.

⁹¹⁹ The Dominican Republic also makes the point that, even assuming that the WHO or the FCTC COP engage in recognized standard-setting activities in some specific areas, such activities do not include those that are "relevant" to the technical regulation at issue in these proceedings. Consequently, it says, the Article 11 and Article 13 FCTC Guidelines cannot be considered as "relevant" international standards. See, e.g. Dominican Republic's opening statement at the second meeting of the Panel, para. 28 and fn 37; and Dominican Republic's comments on Australia's response to Panel question No. 147, paras. 9, 11 and 24.

⁹²⁰ See, e.g. Indonesia's response to Panel question No. 136, para. 6 (claiming that, "[by] regulating every imaginable feature of tobacco products and their packaging, well beyond anything that was suggested in the FCTC Guidelines, Australia has forfeited any presumption that its measures are 'in accordance' with the FCTC Guidelines").

⁹²¹ See, e.g. Honduras's second written submission, paras. 7, 462 and 476-517 (including, its *arguendo* arguments, as per paras. 507-508 and 515); Honduras's response to Panel question No. 66, pp. 26 and 34; Honduras's response to Panel question No. 129, pp. 41-42; Honduras's opening statement at the second meeting of the Panel, para. 22; Dominican Republic's second written submission, paras. 842-911 (including, its *arguendo* argument, as per para. 908); Dominican Republic's response to Panel question No. 66, paras. 283 and 294; Dominican Republic's opening statement at the second meeting of the Panel, para. 28; Cuba's second written submission, paras. 165-188; Cuba's opening statement at the second meeting of the Panel, para. 43; Indonesia's second written submission, paras. 220-253 and 254-258; and Indonesia's response to Panel question No. 150, para. 13. See also the parties' respective responses to Panel question No. 150 as well Australia's and the complainants' comments on each other's responses to that question.

TPP measures cannot be rebuttably presumed not to create an unnecessary obstacle to international trade.⁹²²

7.2.5.2.2 Approach of the Panel

7.260. As described above⁹²³, the second sentence of Article 2.5 of the TBT Agreement provides that a technical regulation "shall be rebuttably presumed not to create an unnecessary obstacle to international trade" when it meets the following two sets of cumulative conditions:

- a. it is a "technical regulation"⁹²⁴ prepared, adopted or applied "for one of the legitimate objectives explicitly mentioned" in Article 2.2; and
- b. it is "in accordance with relevant international standards".

7.261. Having determined above that the TPP measures constitute a technical regulation⁹²⁵ prepared for a legitimate objective expressly mentioned in Article 2.2⁹²⁶, and therefore meet the first of these conditions, we now consider whether these measures are "in accordance with relevant international standards", as argued by Australia.⁹²⁷

7.262. On its face, a technical regulation is "in accordance with relevant international standards", if two cumulative elements are met: first, "relevant international standards" exist, and, second, the measure(s) at issue is "in accordance with" these international standards.

7.263. We therefore first need to consider whether the Article 11 and Article 13 FCTC Guidelines, or elements thereof, as identified by Australia, constitute a "relevant international standard" for tobacco plain packaging. Should we find that this is the case, we will proceed to assess whether the TPP measures are "in accordance with" those Guidelines. Should we, however, find otherwise, we will not need to proceed any further.⁹²⁸

⁹²² See, e.g. Honduras's second written submission, para. 462. Additionally, assuming *arguendo* that the TPP measures are rebuttably presumed not to create an unnecessary obstacle to international trade, the complainants consider that they have rebutted such presumption. See, e.g. Dominican Republic's second written submission, para. 912 (stating that because the "strength" of the presumption under the second sentence of Article 2.5 "must be calibrated to the level of specificity of the international standard", this means that "there could be no, or at most a very weak, presumption created by the FCTC Guidelines, given the loose manner in which they are formulated", and then arguing that the "evidence and arguments in support of its *prima facie* case under Article 2.2 are sufficient to overcome any such presumption").

⁹²³ See paras. 7.37 and 7.38 above.

⁹²⁴ We note that, as part of one of the twelve paragraphs of Article 2 of the TBT Agreement, the second sentence of Article 2.5, on its face, only concerns technical regulations that, like the TPP measures at issue here, have been prepared, adopted or applied by *central government bodies*. Technical regulations from *local* or *non-governmental* bodies (as defined in Annexes 1.7 and 1.8 of the TBT Agreement, respectively), are addressed in a separate provision of the Agreement: Article 3. The present dispute, we note, does not involve such types of measures.

⁹²⁵ See para. 7.182 above, where we conclude that the TPP measures constitute a technical regulation, laying down characteristics for the appearance and packaging of tobacco products (including requirements relating to the manner in which trademarks may be displayed on tobacco products and packaging), and mandating compliance with those characteristics.

⁹²⁶ See para. 7.252 above. See also para. 7.246 above, where we recall our conclusion in para. 7.232 that the objective pursued by Australia through the TPP measures is the protection of human health, and more precisely the improvement of public health by reducing the use of, and exposure to, tobacco products.

⁹²⁷ See, e.g. Honduras's second written submission, para. 477; and Australia's second written submission, para. 314 (stating that "the only point of contention between the parties refers to the second requirement in Article 2.5, namely, whether the [TPP measures are] 'in accordance with relevant international standards'").

⁹²⁸ As we have stated in para. 7.187 above, it is undisputed that, in these proceedings, the burden of demonstrating that all the conditions under the second sentence of Article 2.5 are met rests on Australia, as the party invoking this provision.

7.2.5.2.3 Whether the Article 11 and Article 13 FCTC Guidelines constitute "relevant international standards"

7.264. These are the first panel proceedings in which a party invokes the existence of "relevant international standards" within the meaning of the second sentence of Article 2.5 of the TBT Agreement.⁹²⁹ We will therefore first determine what elements must be present for a "relevant international standard" to exist within the meaning of this provision. We will then examine, in light of these determinations, whether the Article 11 and Article 13 FCTC Guidelines, or relevant elements thereof, as identified by Australia, constitute a "relevant international standard" for tobacco plain packaging for the purposes of that provision.

7.2.5.2.3.1 The notion of "relevant international standards" in Article 2.5 (second sentence)

Main arguments of the parties

7.265. Honduras considers that "an instrument constitutes a relevant international standard if it meets the requirements outlined"⁹³⁰ as follows: (i) "[t]he instrument is a 'standard' according to the definition established in Annex 1.2 of the TBT Agreement"⁹³¹; (ii) "[t]he standard must be 'international'"⁹³²; and (iii) "[t]he standard must be 'relevant'"⁹³³.

7.266. The Dominican Republic takes the view that assessing whether a document is a "relevant international standard" requires the following "cumulative" and "sequential steps" be addressed: (i) whether "the document was prepared by an 'international standardizing body'; (ii) whether "the document constitutes an 'international standard'; and (iii) whether "the document is 'relevant' to the measure at issue".⁹³⁴ The Dominican Republic considers that Australia "does not dispute" that this assessment consists of these "sequential steps".⁹³⁵

7.267. Cuba initially endorsed Honduras's view that the two questions to be assessed are: (i) whether the body that adopted the "document" is an "international standardizing body"; and (ii) whether the "document" at issue sets forth an "international standard".⁹³⁶ It later expressed the second question in terms of whether the "document" is a "standard" as defined in Annex 1.2 to the TBT Agreement.⁹³⁷ Specifically, it argued that the Article 11 and Article 13 FCTC Guidelines are not relevant international standards, "first", because they do not meet the definition of "standard", and "second", because the FCTC COP "is not a recognized international standardization body".⁹³⁸

7.268. Indonesia considers that the first question to be answered under "relevant international standards" is whether "an 'international standard' exists".⁹³⁹ It argues that responding to this

⁹²⁹ In *US – Clove Cigarettes*, noting the parties' agreement that no "relevant international standard" within the meaning of the second sentence of Article 2.5 existed, the panel remarked that it would not therefore begin assessing the claim under Article 2.2 "from any rebuttable presumption that the ban on clove cigarettes is not an unnecessary obstacle to trade." Panel Report, *US – Clove Cigarettes*, para. 7.331 (also cited in Honduras's comments on Australia's response to Panel question No. 147, para. 40; and in Cuba's second written submission, paras. 179-180 and 188).

⁹³⁰ Honduras's second written submission, para. 478. Honduras considered that these three elements constituted the "legal standard" for this particular assessment. *Ibid.* para. 492.

⁹³¹ Honduras's second written submission, paras. 479-485 (in particular, the heading for subsection VI.B.2(a) of this submission).

⁹³² Honduras's second written submission, paras. 486-489 (in particular, the heading for subsection VI.B.2(b) of this submission).

⁹³³ Honduras's second written submission, paras. 490-492 (in particular, the heading for subsection VI.B.2(c) of this submission).

⁹³⁴ Dominican Republic's response to Panel question No. 66, para. 291 (emphasis omitted). See also Dominican Republic's second written submission, para. 851.

⁹³⁵ Dominican Republic's second written submission, para. 852.

⁹³⁶ Cuba's response to Panel question No. 66, pp. 15-16 (annexed to its response to Panel question No. 138).

⁹³⁷ Cuba's second written submission, paras. 168-181 and 182-188.

⁹³⁸ Cuba's second written submission, para. 47.

⁹³⁹ Indonesia's response to Panel question No. 66, para. 74. See also Indonesia's second written submission, para. 222.

question requires, first, assessing whether a "standard" exists in the sense of the definition in Annex 1.2 to the TBT Agreement⁹⁴⁰, and second, if so, whether such "standard" is more precisely an "international standard". Whether an "international standard" exists, Indonesia claims, depends therefore on the presence of three elements: "(i) standard; (ii) adopted by an international standardizing/standards organization; and (iii) made available to the public".⁹⁴¹

7.269. Australia initially considered that, in order to show a "relevant international standard" exists under the second sentence of Article 2.5, "a party must demonstrate that there is: (i) a 'standard'; (ii) adopted by an international standardizing/standards body or organization; and (iii) 'made available to the public'".⁹⁴² This party should, in addition, demonstrate that the international standard is (iv) "relevant".⁹⁴³ Later in the proceedings, Australia expressed element (iii) differently, describing it as whether the standardizing body or organization was one "whose Membership is open to the relevant bodies of at least all Members".⁹⁴⁴ Subsequently, Australia stated that "the parties are largely in agreement that" demonstrating "relevant international standards" depends on three "cumulative conditions", namely: "(i) the document must meet the definition of 'standard'; (ii) it must be 'international' in character, in that it has been approved by an 'international standardizing body'; (iii) the international standard must be 'relevant' to the technical regulation at issue".⁹⁴⁵

Analysis by the Panel

7.270. The term "relevant international standards" is common to Articles 2.4 and 2.5 of the TBT Agreement. The meaning of this term, as used in Article 2.4, has been addressed in prior rulings. All parties to these proceedings rely on the interpretations developed in that context, to inform their understanding of the meaning of "relevant international standards" under the second sentence of Article 2.5.⁹⁴⁶ We agree that the use of the same terms in consecutive paragraphs of the same Article of the TBT Agreement suggests that they are intended to have the same meaning in both paragraphs. Nonetheless, in considering this term as used in Article 2.4 as context for interpreting the same term in the second sentence of Article 2.5, we should also be guided more generally by the similarities and differences between these provisions.⁹⁴⁷

⁹⁴⁰ Indonesia's response to Panel question No. 66, para. 74.

⁹⁴¹ Indonesia's response to Panel question No. 66, para. 75 (footnote omitted) (referring to Panel Report, *US – Tuna II (Mexico)*, para. 7.663).

⁹⁴² Australia's first written submission, para. 570 (including fn 750, omitted, referring to Panel Report, *US – Tuna II (Mexico)*, para. 7.664).

⁹⁴³ Australia's first written submission, para. 581.

⁹⁴⁴ Australia's response to Panel question No. 66, para. 157 (recalling, in fn 179, omitted, that in *US – Tuna II (Mexico)*, the Appellate Body refrained from addressing whether this consideration should necessarily also include demonstrating that the international standard was "based on consensus" and "made available to the public"). See also Australia's second written submission, para. 315.

⁹⁴⁵ Australia's second written submission, para. 315 (footnote omitted). We note that Australia and the complainants always (correctly, in our view) include in their lists of elements for the second set of conditions under the second sentence of Article 2.5, a final "cumulative condition": that the technical regulation is "in accordance with" the relevant international standard. This condition is, however, a separate one that, as explained further below, a panel only reaches if it concludes that the "document" at issue is a "relevant international standard". The parties' references to this final condition have been omitted from our summary of the arguments here in order to facilitate assessing "relevant international standard" separately from "relevant".

⁹⁴⁶ See, e.g. Honduras's second written submission, paras. 476-490 (see, in particular, *ibid.* para. 477); Honduras's response to Panel question No. 70, pp. 32-33; Dominican Republic's response to Panel question No. 66, paras. 291-308; Dominican Republic's second written submission, paras. 851-901; Cuba's response to Panel question No. 66, p. 16 (annexed to its response to Panel question No. 138) (endorsing Honduras's response to this question); Cuba's second written submission, paras. 168-170; Indonesia's response to Panel question No. 66, paras. 74-76; Indonesia's second written submission, paras. 222-224; Australia's first written submission, paras. 567-581; Australia's response to Panel question No. 66, para. 157 (first indent); and Australia's second written submission, paras. 315-341. See, however, Honduras's response to Panel question No. 66, p. 27 (stating that it "does not see any interaction between [Articles 2.4 and 2.5, second sentence] for the purposes of this dispute").

⁹⁴⁷ See, e.g. Appellate Body Report, *US – Tuna II (Mexico)* (Article 21.5 – Mexico), para. 7.347 (stating that, "so long as the similarities and differences between Article 2.1 of the TBT Agreement and Article XX of the GATT 1994 are taken into account, it may be permissible to rely on reasoning developed in the context of one agreement for purposes of conducting an analysis under the other" (emphasis added)). See *ibid.* paras. 7.89-7.90 and 7.345. See also Appellate Body Report, *US – Carbon Steel (India)*, para. 4.423

7.271. In this respect, we note that Article 2.4 and the second sentence of Article 2.5 both serve, together with other provisions of the TBT Agreement, the purpose of "harmonizing technical regulations on as wide a basis as possible".⁹⁴⁸ This is a key purpose of the TBT Agreement.⁹⁴⁹ As the Appellate Body observed:

In several of its provisions, the *TBT Agreement* recognizes the important role that international standards play in promoting harmonization and facilitating trade. For example, Article 2.5 of the *TBT Agreement* establishes a rebuttable presumption that technical regulations that are in accordance with relevant international standards do not create unnecessary obstacles to trade. Article 2.6, for its part, encourages Members to participate in international standardizing bodies with a view to harmonizing technical regulations on as wide a basis as possible.

The significant role of international standards is also underscored in the Preamble to the *TBT Agreement*. The third recital of the Preamble recognizes the important contribution that international standards can make by improving the efficiency of production and facilitating the conduct of international trade. The eighth recital recognizes the role that international standardization can have in the transfer of technology to developing countries. In our view, excluding existing technical regulations from the obligations set out in Article 2.4 would undermine the important role of international standards in furthering these objectives of the *TBT Agreement*. Indeed, it would go precisely in the opposite direction.⁹⁵⁰

7.272. Article 2.4 and the second sentence of Article 2.5 aim to promote harmonization in distinct but complementary ways: the former by creating an "obligation" and the latter by conferring, in the words of the Appellate Body, a "privilege".⁹⁵¹ In this respect, we note that Article 2.4 consists of an *obligation*⁹⁵² that is applicable to *all* technical regulations, irrespective of the specific legitimate objective they pursue. This obligation is triggered when a Member decides to adopt a technical regulation to fulfil a legitimate objective, and where either "relevant international standards" already "exist" or, if they do not yet exist, "their completion is imminent". In such a situation, that Member "shall use them" (or their "relevant parts") "as a basis for" its technical

(identifying various "textual similarities and differences" between Article 12.7 of the SCM Agreement and Article 6.8 of the Anti-Dumping Agreement, and its associated Annex II, to conclude that the latter provides "[a]dditional context for the interpretation of" the former). But see Appellate Body Report, *Japan – DRAMs (Korea)*, para. 272 (stating that "[a]lthough both Articles 6.3 and 15.5 [of the SCM Agreement] refer to effects of the subsidies, the meaning of this phrase must be interpreted in the light of the substantive obligations within which the phrase is located. Articles 6.3 and 15.5 deal with different subject matters and therefore it is not appropriate to accord an *identical meaning* to the *common phrase* in these Articles" (emphasis added)).

⁹⁴⁸ Article 2.6 of the TBT Agreement. See also Japan's third-party submission, para. 66; and Uruguay's third-party submission, para. 72. The TBT Agreement also articulates this "harmonization" purpose with respect to "conformity assessment procedures" and national "standards" (see Articles 5.5 and Annex 3.G, respectively). We also note that in *EC – Sardines* the Appellate Body agreed with the Panel's reliance on Articles 2.5 (including its second sentence) and 2.6 as providing useful context to the interpretation that Article 2.4 "applies" to measures adopted before the entry into force of the TBT Agreement on 1 January 1995, but which have not ceased to exist. Appellate Body Report, *EC – Sardines*, paras. 210-216.

⁹⁴⁹ The relevance of "harmonization" is also reflected in other covered agreements, in particular, the SPS Agreement (see, e.g. preamble (sixth recital), Articles 3.1 and 3.2). Harmonization, as a driver for economic development, is also recognized in Article XXXVIII:2(e) of the GATT 1994 (GATT being an agreement the "objectives" of which the TBT Agreement is intended to "further", as stated in the second recital of the preamble to the TBT Agreement). See also WTO Staff Paper, International Standards and TBT Agreement, (Exhibit AUS-530), para. 2.1, p. 3 (stating that "[i]nternational standards are used by the Agreement as a means of promoting international harmonization of technical regulations, conformity assessment procedures, and national standards; in other words international standards can help promote greater regulatory alignment on a global scale.").

⁹⁵⁰ Appellate Body Report, *EC – Sardines*, paras. 214-215.

⁹⁵¹ Appellate Body Report, *US – Tuna II (Mexico)*, paras. 379 and 390. We note, however, that the first sentence of Article 2.5, not at issue in the present disputes, does provide for an *obligation*: the obligation for a Member, when so requested, to "explain the justification" for its technical regulation. See, in this respect, Appellate Body Report, *EC – Sardines*, para. 277; and Panel Report, *US – Clove Cigarettes*, paras. 7.447-7.448.

⁹⁵² Appellate Body Report, *EC – Sardines*, para. 275. See also Appellate Body Report, *US – Tuna II (Mexico)*, paras. 379 and 390.

regulation.⁹⁵³ The second sentence of Article 2.5, for its part, provides for a "rebuttable presumption" – or, a "privilege" – of conformity with a particular obligation (i.e. that under Article 2.2). That is, technical regulations that are "in accordance with" relevant international standards are "rebuttably presumed" not to create an unnecessary obstacle to international trade within the meaning of Article 2.2. However, unlike Article 2.4, this privilege is available only in respect of a subset of technical regulations: those pursuing one of the legitimate objectives "explicitly mentioned" in Article 2.2.⁹⁵⁴ A determination that "relevant international standards" exist, under either of these provisions, therefore has important implications for all WTO Members: "the obligations and privileges associated with international standards pursuant to the *TBT Agreement* apply with respect to *all* WTO Members, not merely those who participated in the development of the respective standard".⁹⁵⁵

7.273. We further note that Article 2.4 covers not only "relevant international standards" that already "exist" but also those the completion of which is "imminent". The second sentence of Article 2.5, by contrast, only refers to "relevant international standards". This difference suggests that the scope of the second sentence of Article 2.5 is narrower in the sense that it only covers a subset of the "relevant international standards" that may be covered by Article 2.4, i.e. only those that already "exist".⁹⁵⁶ Additionally, the second sentence of Article 2.5 requires a technical regulation to be "in accordance with" the "relevant international standard" without also permitting, as it is the case in Article 2.4, that the measure simply rely, alternatively, on "the relevant parts" of those international standards.⁹⁵⁷

7.274. Finally, we note that Article 2.4 and the second sentence of Article 2.5 establish distinct criteria in terms of the degree of correspondence required between the relevant international standard and the technical regulation at issue, as reflected by the terms "use ... as a basis for", in the former, and "in accordance with", in the latter. The parties discussed in detail the extent to which the meaning of the terms "in accordance with" in the second sentence of Article 2.5 of the TBT Agreement, seen in light of the terms "as a basis for" in Article 2.4 of the same Agreement, should be informed by the relationship between the terms "conform to" in Article 3.2 of the SPS Agreement and "based on" in Articles 3.1 and 3.3 of the same Agreement, as clarified by the Appellate Body in *EC – Hormones*.⁹⁵⁸ We note in this respect the conceptual similarities between

⁹⁵³ This obligation is not, however, absolute: a Member is not required to use relevant international standards "as a basis for" its technical regulation when such standards (or "relevant parts" thereof) would be an "ineffective" or "inappropriate" means for the fulfilment of the legitimate objectives pursued. See Appellate Body Report, *EC – Sardines*, para. 274 (comparing the requirements under Article 3.1 of the SPS Agreement with those under Article 2.4 of the TBT Agreement with respect to "relevant international standards", and stating that "[n]either of these requirements in these two agreements is *absolute*" (emphasis added)).

⁹⁵⁴ These are: "national security requirements"; the "prevention of deceptive practices"; the "protection of human health or safety, animal or plant life or health, or the environment". See also para. 7.252 above.

⁹⁵⁵ Appellate Body Report, *US – Tuna II (Mexico)*, para. 390. (emphasis original)

⁹⁵⁶ The context provided by other provisions of the TBT Agreement supports this understanding. Had the drafters of the Agreement intended the second sentence of Article 2.5 to include not only already adopted international standards but also those not yet adopted, but the adoption of which is imminent, they could have used terms such as those used in Article 2.4: i.e. the phrase "exist or their completion is imminent". Rather, when TBT drafters intend a given obligation to cover already *adopted* international standards, they either used the term "exist" (see, e.g. Articles 2.9, 5.6, and 12.4) or, as in the second sentence of Article 2.5, refer to "international standards", without qualification (see, e.g. Article 6.1.1 and Annex 3.1 (second paragraph), Article 5.4 and Annex 3.F).

⁹⁵⁷ See also, in the same vein, Indonesia's response to Panel question No. 150, para. 11; and Indonesia's comments on Australia's response to Panel question No. 150, para. 22.

⁹⁵⁸ The complainants consider the term "in accordance with" to require a high degree of correspondence between the measure and the international standard. In explaining the basis for such interpretation they first note that Article 2.4 of the TBT Agreement and the second sentence of Article 2.5 of the TBT Agreement use different terms – "as a basis for" and "in accordance with", respectively – when referring to international standards and that this difference should be given meaning. They also note that a similar situation occurs under the SPS Agreement, whereby Article 3.1, the SPS parallel of Article 2.4 of the TBT Agreement, uses the term "base ... on", while Article 3.2, the SPS parallel of the second sentence of Article 2.5 of the TBT Agreement, uses the term "conform to". The complainants then argue that the interpretation of "in accordance with" in the second sentence of Article 2.5 has to be based on the ordinary meaning of these terms, seen in light of the object and purpose of the TBT Agreement as well as under their proper context, which include, in particular, the term "conform to" in Article 3.2 of the SPS Agreement, as clarified by the Appellate Body in *EC – Hormones*. Based on these considerations the complainants argue that for a technical regulation to be "in accordance with" an international standard for the purpose of the second sentence of Article 2.5 of the TBT Agreement, there should be a "sufficient degree of correspondence" between that

these TBT provisions and the corresponding provisions in the SPS Agreement.⁹⁵⁹ The different wording reflected in Articles 2.4 and 2.5 of the TBT Agreement suggests that, similarly to the comparable provisions in the SPS provisions, the second sentence of Article 2.5 may require a closer or higher degree of correspondence between the measure at issue and the relevant international standard than that required under Article 2.4. As indicated above⁹⁶⁰, we will consider this aspect further if we first find that the Article 11 and Article 13 FCTC Guidelines are "relevant international standards".

7.275. Taken together, these differences suggest to us that the more limited scope of application and the higher degree of correspondence required under the second sentence of Article 2.5 between a technical regulation adopted by a Member and the relevant international standard

measure and that international standard, such that, as in the case of Article 3.2 of the SPS Agreement, the measure "embodies" the standard "completely". This means, they continue, that the measure would be, as in the case of Article 3.2 of the SPS Agreement, "for practical purposes", basically "converting" the international standard "into a municipal standard". The complainants also consider that this interpretation also indicates that the level of specificity of an international standard is an element for assessing "in accordance with". For them, this means that in assessing the degree of correspondence required between the technical regulation and the international standard, a panel must consider whether such a standard "is sufficiently precise" so as to be able to be "converted into a municipal standard". Finally, the complainants also consider that the above interpretation means that a measure that fully incorporated the elements of an international standard, but that also goes *beyond* the standard, cannot be considered as being "in accordance with" that standard. Australia considers that the complainants' analogy with Article 3.1 of the SPS Agreement, and the corresponding jurisprudence on the meaning of its terms, "is inapposite" for the interpretation of the term "in accordance with" in the second sentence of Article 2.5 of the TBT Agreement. While acknowledging that one of the ordinary meanings of "accordance" is "conformity", Australia argues that a panel should instead be guided by the other relevant ordinary meanings for "accordance", namely: "agreement", "harmony". For Australia, these meanings of the term "in accordance with", as used in the second sentence of Article 2.5, indicate not a "high" but, instead, a "lower degree of correspondence between the technical regulation and the international standard." Finally, Australia considers that whether a measure is "in accordance with" a relevant international standard should depend on an "objective assessment of the facts" in accordance with Article 11 of the DSU. See, e.g. Parties' respective responses to Panel question No. 150 as well Australia's and the complainants' comments on each other's responses to that question. See also Honduras's response to Panel question No. 66, p. 27; Dominican Republic's second written submission, paras. 903-907; Indonesia's second written submission, para. 255; and Australia's second written submission, paras. 342-343. On the similarities between the second sentence of Article 2.5 of the TBT Agreement and Article 3.2 of the SPS Agreement, see fn 961 below.

⁹⁵⁹ In *EC – Sardines*, the Appellate Body observed the existence of "strong conceptual similarities" between, on the one hand, Article 2.4 of the TBT Agreement and, on the other hand, Articles 3.1 and 3.3 of the SPS Agreement. The Appellate Body explained that such "strong conceptual similarities" stemmed from the fact that "the heart" of Article 3.1 of the SPS Agreement consisted of a requirement that Members *base* their SPS measures *on* international standards, guidelines, or recommendations, much like "the heart" of Article 2.4 of the TBT Agreement consisted of a requirement that Members *use* international standards *as a basis* for their technical regulations. The Appellate Body thus concluded that its previous reasoning in *EC – Hormones* on the meaning of Articles 3.1 and 3.3 of the SPS Agreement to be "equally apposite" for their task in *EC – Sardines* to clarify the meaning of Article 2.4 of the TBT Agreement. Appellate Body Report, *EC – Sardines*, paras. 274-275. See also Appellate Body Report, *India – Agricultural Products*, para. 5.77. Similarly, we note the conceptual similarities between the second sentence of Article 2.5 of the TBT Agreement and Article 3.2 of the SPS Agreement, and the conceptual parallelism in the relationships between Articles 3.2 and 3.3 of the SPS Agreement and Articles 2.4 and 2.5 of the TBT Agreement, respectively. See also fn 961 below.

It appears to us that indeed Article 3.2 of the SPS Agreement in general, and the term "conform to", in particular, may constitute useful context for understanding the meaning of the term "in accordance with" in the second sentence of Article 2.5, which is the counterpart of that SPS provision in the TBT Agreement. This is particularly so given that, as the parties agree, "conformity" is one (even if it is not, as Australia notes, the only one) of the ordinary meanings of the term "in accordance with". We note, in this respect, that in *EC – Hormones*, the Appellate Body, after considering that the term "base ... on" in Article 3.1 of the SPS Agreement connotes a different and less stringent meaning than "conform to" in Article 3.2 of that same Agreement, concluded that:

Under Article 3.2 of the *SPS Agreement*, a Member may decide to promulgate an SPS measure that conforms to an international standard. Such a measure would embody the international standard completely and, for practical purposes, converts it into a municipal standard. Such a measure enjoys the benefit of a presumption (albeit a rebuttable one) that it is consistent with the relevant provisions of the *SPS Agreement* and of the GATT 1994.

Appellate Body Report, *EC – Hormones*, para. 170 (underlining added). See, more generally, *ibid.* paras. 160-172. See also, more recently, Panel Report, *US – Animals*, paras. 7.218-7.220.

⁹⁶⁰ See paras. 7.44 and 7.263 above.

reflect the fact that, through this provision, Members confer the "privilege" of a rebuttable presumption of conformity with a key obligation under the TBT Agreement, which is uncommon in the covered agreements.⁹⁶¹ We take due account of this overall context in considering how the existence of "relevant international standards" within the meaning of the second sentence of Article 2.5 may be established.

7.276. The core component of "relevant international standards" is the existence of "international standards".⁹⁶² The parties have identified the elements that, in their view, must be considered in assessing whether "international standards" exist for the purposes of the second sentence of Article 2.5 of the TBT Agreement.

7.277. Honduras considers that the existence of "international standards" requires demonstrating two elements: that the document is a "standard" according to the definition established in Annex 1.2 of the TBT Agreement⁹⁶³, which is, in addition, "international" in character.⁹⁶⁴ The Dominican Republic understands the notion of "international standard" as included in the first two of the "four cumulative, sequential steps" that it considers "must be established" in order to show that a technical regulation is "in accordance with relevant international standards" for the purposes of the second sentence of Article 2.5, namely: "1. the document was prepared by an 'international standardizing body'; 2. the document constitutes an 'international standard' ...".⁹⁶⁵ The Dominican Republic further states that whether "international standards" exist includes assessing conformity with the definition of "standard" in Annex 1.2.⁹⁶⁶ Cuba considers the "international standard" assessment as requiring a demonstration that the "measure" must be adopted by an "international standardizing body".⁹⁶⁷ Indonesia considers that an "international standard" exists "where there is: (i) a standard; (ii) adopted by an international standardizing/standards organization; and (iii) that is made available to the public".⁹⁶⁸ Australia, like Indonesia, considers that such assessment

⁹⁶¹ The only other covered agreement that confers a similar presumption of conformity with treaty obligations is the SPS Agreement (in Articles 2.4 and 3.2). We note, in particular, that under Article 3.2 of the SPS Agreement, measures "which conform to international standards, guidelines or recommendations shall be deemed to be necessary to protect human, animal or plant life or health, and presumed to be consistent with the relevant provisions of this Agreement and of GATT 1994". Although the latter SPS provision does not expressly state it, the Appellate Body has clarified that such presumption is not absolute, but instead a "rebuttable" one. Appellate Body Report, *EC – Hormones*, para. 170. Article 3.2 of the SPS Agreement is, in this sense, similar to the second sentence of Article 2.5 of the TBT Agreement. These provisions are, however, only *similar*, not identical, because the resulting rebuttable presumption of consistency conferred by Article 3.2 is with respect to "relevant provisions" of not only the SPS Agreement, but also of the GATT 1994, whereas Article 2.5 of the TBT Agreement provides a presumption only with respect to Article 2.2 of the TBT Agreement. We further note that the covered agreements may also occasionally confer types of presumptions other than those in the form of *consistency* with an obligation. But even those are uncommon. For instance, recently, in *India – Agricultural Products*, the Appellate Body clarified that a finding of a violation of Articles 5.1 and 5.2 of the SPS Agreement "may give rise" to a rebuttable presumption of *inconsistency* with Article 2.2 of that Agreement. Appellate Body Report, *India – Agricultural Products*, paras. 5.24 and 5.29. Another example is Article 3.8 of the DSU, which provides that where there is an infringement of an obligation under a WTO agreement, such action is rebuttably presumed to have nullified and impaired benefits accrued under that agreement.

⁹⁶² As to the term "relevant", we note that the Appellate Body in *EC – Sardines* agreed with the panel's interpretation of the ordinary meaning of this term as "bearing upon or relating to the matter at hand; pertinent". Appellate Body Report, *EC – Sardines*, paras. 229-230. Thus, to be "relevant", an international standard must "bear upon, relate to, or be pertinent to" the technical regulation under analysis.

⁹⁶³ Honduras's second written submission, paras. 479-485 (stating *inter alia* that this requires, in particular, assessing whether the "document" at issue is suitable for "common and repeated use" i.e. that "the product specifications must be stipulated with sufficient precision and detail so as to permit a uniform adoption across different jurisdictions").

⁹⁶⁴ Honduras's response to Panel question No. 66, pp. 25-26; and second written submission, paras. 478-489.

⁹⁶⁵ Dominican Republic's second written submission, paras. 850-851 (emphasis original). See also Dominican Republic's response to Panel question No. 66, para. 291.

⁹⁶⁶ Dominican Republic's second written submission, para. 894. See also Dominican Republic's response to Panel question No. 66, para. 305.

⁹⁶⁷ Cuba's second written submission, para. 168.

⁹⁶⁸ Indonesia's second written submission, para. 222; and Indonesia's response to Panel question No. 66, para. 75 (relying on the Panel Report, *US – Tuna II (Mexico)*, para. 7.663).

entails "demonstr[ating] that there is: (i) a 'standard'; (ii) adopted by an international standardizing/standards body or organization; and (iii) 'made available' to the public".⁹⁶⁹

7.278. The Panel notes that, while the composite term "international standards" is not defined in the TBT Agreement⁹⁷⁰, Annex 1 to the Agreement contains definitions of relevant related terms, including definitions of the terms "standard" (Annex 1.2)⁹⁷¹ and "international body or system" (Annex 1.4). In interpreting the term "international standards" as used in Article 2.4 of the TBT Agreement, the Appellate Body relied on these two definitions, concluding that the Agreement "establishes the characteristics of a *standard* and of an *international body*".⁹⁷²

7.279. A "standard" is thus defined in Annex 1.2 to the TBT Agreement⁹⁷³ as a:

Document approved by a recognized body, that provides, for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods, with which compliance is not mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method.

7.280. This definition is accompanied by the following *Explanatory note*:

The terms as defined in ISO/IEC Guide 2 cover products, processes and services. This Agreement deals only with technical regulations, standards and conformity assessment procedures related to products or processes and production methods. Standards as defined by ISO/IEC Guide 2 may be mandatory or voluntary. For the purpose of this Agreement standards are defined as voluntary and technical regulations as mandatory documents. Standards prepared by the international standardization community are based on consensus. This Agreement covers also documents that are not based on consensus.

⁹⁶⁹ Australia's first written submission, para. 570 (relying on the Panel Report, *US – Tuna II (Mexico)*, para. 7.664). Australia, however, seems to indicate the elements for "international standards" somewhat differently when listing them as part of the broader term "relevant international standards". Australia considers that proving that the Article 11 and Article 13 FCTC Guidelines are "relevant international standards" requires demonstrating that they constitute: "(i) a 'standard'; (ii) adopted by an international standardizing/standards body or organization; (iii) whose membership is open to the relevant bodies of at least all Members; and that it is (iv) 'relevant'". Australia's response to Panel question No. 66, para. 157. (footnote omitted)

⁹⁷⁰ See Appellate Body Report, *US – Tuna II (Mexico)*, para. 350. We observe, however, that the 1979 Tokyo Round Agreement on Technical Barriers to Trade (Tokyo Round Standards Code), which preceded the WTO's TBT Agreement, contained a definition for "international standard" in its Annex 1.10 ("[a] standard adopted by an international standardizing body"). The provisions of the Tokyo Round Standards Code, were, however, "never the subject of even a single ruling by a panel". Appellate Body Report, *EC – Asbestos*, para. 81. This GATT plurilateral agreement was terminated with the entry into force of the WTO. Panel Report, *EC – Sardines*, para. 7.86 fn 85. We also note that footnote 2 to Article 2.4 of the Agreement on Preshipment Inspection (on the application of international standards with respect to quantity and quality inspections) defines "international standard" as being "a standard adopted by a governmental or non-governmental body whose membership is open to all Members, one of whose recognized activities is in the field of standardization". This definition appears not to be in contradiction with the meaning of this term for the purposes of the TBT Agreement, as understood by the Appellate Body in *US – Tuna II (Mexico)*. Appellate Body Report, *US – Tuna II (Mexico)*, para. 359. See also, in the same vein, the parties' respective responses to Panel question No. 131.

⁹⁷¹ In other contexts in the TBT Agreement, this definition is relevant for instances when "standard" appears as a stand-alone term, rather than as one forming the composite term "international standards". For instance, in *US – Tuna II (Mexico)*, a threshold question before the Panel and the Appellate Body was whether the measure at issue was a "technical regulation" or a "standard"; which, in turn, depended on whether the measure fell within the definitions for these terms in Annexes 1.1 and 1.2 to the TBT Agreement, respectively. See, e.g. Panel Report, *US – Tuna II (Mexico)*, paras. 7.48-7.49; and Appellate Body Report, *US – Tuna II (Mexico)*, paras. 171 and 178.

⁹⁷² Appellate Body Report, *US – Tuna II (Mexico)*, paras. 350-352. (emphasis original)

⁹⁷³ All three Annexes to the TBT Agreement, including Annex 1, "constitute an integral part" of the Agreement. Article 15.5 of the TBT Agreement. For the purpose of the Agreement, the meaning of the terms given in Annex 1 apply (Article 1.2 and introductory clause of Annex 1), including with respect to any term used in the other two Annexes. See, e.g. Annex 3.A of the TBT Agreement.

7.281. Overall, this definition suggests that a "standard" exists for the purpose of the TBT Agreement⁹⁷⁴, including the second sentence of Article 2.5, when a given instrument:

- is a "document"⁹⁷⁵ ...;
- ... "approved by a recognized body"⁹⁷⁶ ...;
- ... that provides "rules", "guidelines" or "characteristics"⁹⁷⁷ ...;
- ... "for products" or "related processes and production methods"⁹⁷⁸ ...;
- ..."for common and repeated use"⁹⁷⁹; and
- "compliance" with these rules, guidelines or characteristics is "not mandatory".⁹⁸⁰

7.282. Each of these elements describes a specific aspect of the conditions that, taken together, would allow an instrument be defined as a "standard" under Annex 1.2 of the TBT Agreement. A "document" will therefore constitute a "standard" when all of these elements are met cumulatively.⁹⁸¹ We note that this understanding is consistent with the manner in which the parties have presented their arguments in these proceedings.⁹⁸²

⁹⁷⁴ See Honduras's second written submission, para. 479; Dominican Republic's second written submission, para. 894; Cuba's second written submission, para. 182; Indonesia's second written submission, paras. 222-223; and Australia's first written submission, paras. 571-572.

⁹⁷⁵ This element also applies to "terminology, symbols, packaging, marking or labelling requirements", as described in the second sentence of the definition. See fn 979 below.

⁹⁷⁶ This element also applies to "terminology, symbols, packaging, marking or labelling requirements", as described in the second sentence of the definition. See fn 979 below.

⁹⁷⁷ In addition, it "may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements".

⁹⁷⁸ When the "document" includes or deals exclusively with terminology, symbols, packaging, marking or labelling requirements, the definition refers to such requirements "as they apply to a product, processes or production method". See also fn 979 below.

⁹⁷⁹ The composite term "for common and repeated use" only appears in the first sentence of the definition of "standard" in Annex 1.2, but not in the second, which refers to a "document" that includes or deals exclusively with "terminology, symbols, packaging, marking or labelling requirements". We consider that when the whole text of this definition is seen in the context of those from the other definitions in Annex 1, and in light of the object and purpose of the TBT Agreement, it becomes clear that, to be a "standard", instrument(s) dealing, exclusively or not, with terminology, symbols, packaging, marking or labelling requirements must equally comply with certain key elements that are expressly mentioned in the first sentence of that definition, but which are not repeated in the second. These elements are: that these requirements should be contained in a "document" that was "approved by a recognized body"; that these requirements are "for common and repeated use"; and that they are requirements "with which compliance is not mandatory". A different interpretation would, in our view, render any meaningful application of the definition of "standard" in Annex 1.2 unworkable in certain situations, including for situations when taking into consideration the definition of "technical regulation" is also necessary. For instance, because neither of these two definitions in Annexes 1.1 and 1.2 expressly refers to the "mandatory/not mandatory" nature of the "document" in their respective second sentences (which are identically worded), it would be impossible to use these elements to assess whether a "document" that "deal[s] exclusively with" product "packaging requirements" is a "technical regulation" or a (national) "standard". In any event, no party or third-party of these proceedings, implicitly or explicitly, expressed a view that any of these key elements from the first sentence of the Annex 1.2 definition (in particular "for common and repeated use") should not equally apply to instruments providing for the "requirements" described in the second sentence of that definition.

⁹⁸⁰ This element also applies to "terminology, symbols, packaging, marking or labelling requirements", as described in the second sentence of the definition. See fn 979 above. The Explanatory Note to Annex 1.2, which is set out in full at para. 7.280 above, referring to the mandatory nature of technical regulations, further clarifies that for the purpose of TBT Agreement "standards are defined as voluntary ... documents".

⁹⁸¹ This understanding is consistent with prior interpretations and application of the definitions in Annexes 1.1 ("technical regulation") and 1.2 ("standard") to the TBT Agreement, which are similarly drafted. See, e.g. Appellate Body Report, *EC – Asbestos*, paras. 66-75 (assessing, sequentially and cumulatively, the measure at issue against the elements forming the definition of "technical regulation" in Annex 1.1 to the TBT Agreement); Appellate Body Report, *EC – Sardines*, para. 176 (recalling its previous report in *EC – Asbestos* and disaggregating the text of Annex 1.1 into "three criteria" a document "must meet" in order to fall within that definition of "technical regulation"); Appellate Body Report, *US – Tuna II (Mexico)*,

7.283. The Appellate Body also considered certain definitions in the ISO/IEC Guide 2: 1991⁹⁸³ as applicable and relevant⁹⁸⁴, to the extent that Annex 1 definitions do not depart from them.⁹⁸⁵ The Appellate Body noted, in particular, that the ISO/IEC Guide 2: 1991 defines the term "international standard" as a "standard that is adopted by an international standardizing/standards organization and made available to the public".⁹⁸⁶

7.284. The Appellate Body further found that this definition suggests that "it is primarily the characteristics of the entity approving a standard that lends the standard its 'international' character". By contrast, it added, "the subject matter" of a standard would not appear to be "material" for determining whether the standard is "international".⁹⁸⁷ The Appellate Body concluded that "in order to constitute an 'international standard', a standard has to be adopted by an 'international standardizing body' for the purposes of the *TBT Agreement*".⁹⁸⁸

7.285. Whether an "international standardizing body" exists requires, in turn, assessing whether this body is one that has *recognized activities* in standardization and whose membership is open to the relevant bodies of at least all Members.⁹⁸⁹

7.286. Overall, the foregoing suggests that, for an instrument to be considered an "international standard" under the second sentence of Article 2.5, it must:

- a. constitute a "standard" under Annex 1.2; and
- b. be also "international", a condition primarily⁹⁹⁰ predicated upon whether it was adopted by an "international standardizing body".⁹⁹¹

paras. 183-189 (also with respect to elements in the Annex 1.1 definition of "technical regulation"); and Panel Report, *EC – Sardines*, paras. 7.63-7.65 (with respect to the individual elements in the Annex 1.2 definition of "standard").

⁹⁸² See, in particular, Indonesia's response to Panel question No. 66, para. 74. See also Honduras's second written submission, paras. 493-507; Honduras's response to Panel question No. 129, pp. 41-42; Dominican Republic's second written submission, para. 894; Dominican Republic's response to Panel question No. 66, para. 305; Cuba's second written submission, para. 182; and Australia's first written submission, paras. 571-574. See also, e.g. Canada's third-party response to Panel question No. 1 (disaggregating the definition of "technical regulation" in Annex 1.1 into "three, cumulative, criteria" that a measure must meet).

⁹⁸³ *International Organization for Standardization (ISO) / International Electrotechnical Commission (IEC) Guide 2, General Terms and Their Definitions Concerning Standardization and Related Activities*, 6th edn (1991) (ISO/IEC Guide 2:1991). See also Appellate Body Report, *US – Tuna II (Mexico)*, para. 353 fn 702.

⁹⁸⁴ The introductory clause of Annex 1 to the *TBT Agreement* states that the "terms presented in the [ISO/IEC Guide 2:1991], shall, when used in this Agreement, have the same meaning as given in the definitions in the said Guide ... For the purpose of this Agreement, however, the following definitions shall apply: ...".

⁹⁸⁵ The Appellate Body cautioned therefore that panels must "carefully scrutinize" the extent of such departure. Appellate Body Report, *US – Tuna II (Mexico)*, para. 354 (referring to Appellate Body Report, *EC – Sardines*, paras. 224-225). See the introductory clause of Annex 1 to the *TBT Agreement*. See also Article 1.2 of the *TBT Agreement*.

⁹⁸⁶ ISO/IEC Guide 2:1991, sub-clause 3.2.1 (as quoted in Appellate Body Report, *US – Tuna II (Mexico)*, para. 353).

⁹⁸⁷ Appellate Body Report, *US – Tuna II (Mexico)*, para. 353.

⁹⁸⁸ Appellate Body Report, *US – Tuna II (Mexico)*, para. 356 (emphasis original). The Appellate Body also explained that:

Annex 1.2 to the *TBT Agreement* refers to a "body", not to an "organization", and Annex 1.4 defines an "international body or system", but not an "international organization". This suggests that, for the purposes of the *TBT Agreement*, "international" standards are adopted by "bodies", which may, but need not necessarily, be "organizations".

Ibid. para. 356.

⁹⁸⁹ Appellate Body Report, *US – Tuna II (Mexico)*, para. 359.

⁹⁹⁰ As noted in para. 7.284 above, "it is primarily the characteristics of the entity approving a standard that lends the standard its 'international' character." Appellate Body Report, *US – Tuna II (Mexico)*, para. 353 (emphasis added). However, as observed by the Appellate Body, the texts of the definition of "international standard" in the ISO/IEC Guide 2: 1991 and the "*Explanatory note*" to the definition of "standard" in Annex 1.2 to the *TBT Agreement* both suggest that, besides the adoption by an "international standardizing body", there

7.287. Taking into account the broader context described above, including the complementary role of Articles 2.4 and 2.5 in promoting harmonization through the use of relevant international standards⁹⁹², we see no basis to assume that the above guidance, given in respect of the term "international standards" as contained in Article 2.4, would not be equally relevant to the determination of the meaning of the same term in the second sentence of Article 2.5.⁹⁹³

7.288. It is undisputed that the burden rests on Australia, as the party invoking the presumption under Article 2.5, to demonstrate that all of the conditions under this provision are met.⁹⁹⁴

7.289. We therefore consider first whether the instruments identified by Australia as constituting a "relevant international standard" for tobacco plain packaging constitute a "standard" for tobacco plain packaging. If we find that this is the case, we would then proceed to consider whether such standard is also "international" in character. However, should we not find that the instruments identified by Australia constitute such a "standard", we would not need to proceed any further.⁹⁹⁵

may be "additional procedural conditions" to be met for a standard to be considered "international" for the purposes of the Agreement, i.e. whether, in addition, the standard was "based on consensus" and "made available to the public". Appellate Body Report, *US – Tuna II (Mexico)*, para. 353. In that dispute, however, the question before the Appellate Body was limited to the *characteristics of the entity* approving an "international" standard. The Appellate Body therefore considered it unnecessary, in that case, to address further whether the document at issue complied with those two "additional procedural conditions". In these proceedings, as described at paras. 7.268, 7.269 and 7.277 above, some parties have, for instance, identified demonstrating that the document was "made available to the public" as elements forming the "international standards" assessment under the second sentence of Article 2.5. This element, together with other "additional procedural conditions", however, belongs to the second ("international") and not the first ("standard") prong of the assessment of whether a document is an "international standard". See, e.g. Appellate Body Report, *US – Tuna II (Mexico)*, paras. 353 and 359 fn 709.

⁹⁹¹ Appellate Body Report, *US – Tuna II (Mexico)*, paras. 353 and 356. See also paras. 7.284 and 7.285 above.

⁹⁹² See para. 7.271 above.

⁹⁹³ Additionally, as we stated in para. 7.270 above, the use of the same terms in consecutive paragraphs of the same Article of the TBT Agreement suggests that they are intended to have the same meaning in both paragraphs. Nonetheless, in considering this term as used in Article 2.4 as context for interpreting the same term in the second sentence of Article 2.5, we should also be guided more generally by the similarities and differences between these provisions. We considered such similarities and differences in paras. 7.271 to 7.275 above.

⁹⁹⁴ See para. 7.187 above. In considering whether the above guidance of the Appellate Body for the "comparative assessment" under Article 3 of the SPS Agreement can be of use for the equivalent provisions in the TBT Agreement, we also note that an important difference between these two Agreements is that, unlike the TBT Agreement, the SPS Agreement lists (see, e.g. Annex A(3)) the three bodies that adopt international standards for its purpose. This difference, in turn, may impact the burden of proof for the party invoking the second sentence of Article 2.5 of the TBT Agreement (as well as the role of the Panel examining that provision), in terms of identifying and discerning the meaning of the instrument claimed to be an "international standard". Under the second sentence of Article 2.5 it is incumbent on the party invoking that provision to properly identify the contents and scope of the instrument(s) it claims is a relevant international standard, starting with the need to clearly identify all the relevant elements or components of said instrument(s) that, together, are alleged to form a "document" in the sense of the definition of "standard" in Annex 1.2 of the TBT Agreement.

⁹⁹⁵ And, for the same reason, we would need not assess whether these instruments are "relevant" nor whether the measures are "in accordance with" them. See para. 7.263 above. See, also, in the same vein, Honduras's second written submission, para. 507. We note that the Appellate Body has clarified that the interpretation of the term "international standardizing body", for the purpose of assessing the "international" character of a standard under Article 2.4, is a "holistic exercise in which the components of the definition are to be considered together". Appellate Body Report, *US – Tuna II (Mexico)*, para. 359. We further note that in that dispute, the Appellate Body based its decision that the AIDPC was not an "international standardizing body" solely on one of the components of that definition (as opposed to its various components, "considered together"), namely that the AIDPC was "not opened to the relevant bodies of at least all Members". As a consequence, the Appellate Body considered it unnecessary to address the other "components" of that assessment, namely, whether the AIDPC was a "body and has 'recognized activities in standardization'". Appellate Body Report, *US – Tuna II (Mexico)*, para. 399 and fn 763. We understand, however, the Appellate Body's reference to a "holistic exercise" to concern the cumulative nature of the various "components" for assessing the "international" character of the "document" at issue. The Appellate Body did not suggest that such an approach is required in all cases, or that all of the three relevant components of "relevant international standards" (i.e. "standard", "international" and "relevant") should be individually and

7.2.5.2.3.2 Whether the Article 11 and Article 13 FCTC Guidelines constitute a "standard" for tobacco plain packaging within the meaning of Annex 1.2 of the TBT Agreement

7.290. As indicated above⁹⁹⁶, the first element of a "standard" is that it is a "document". We therefore first consider the identification, by Australia, of certain FCTC instruments as being the "document" that it argues constitutes a standard with respect to tobacco plain packaging.

Identification of the relevant "document"

The notion of "document" in Annex 1.2

7.291. The term "document" is used in the definitions for both "technical regulation" and "standard" in Annexes 1.1 and 1.2 to the TBT Agreement, respectively. As the Appellate Body observed, this term, as used in Annex 1.1:

[I]s defined quite broadly as "something written, inscribed, etc., which furnishes evidence or information upon any subject". The use of the term "document" could therefore cover a broad range of instruments or apply to a variety of measures. Annex 1.1 to the *TBT Agreement*, however, narrows the scope of measures that can be characterized as a "technical regulation" by referring to a document that "lays down product characteristics or their related processes and production methods, including the applicable administrative provisions".⁹⁹⁷

7.292. Similarly, the surrounding terms in Annex 1.2 to the TBT Agreement "narrow[] the scope" of the measures that can be characterized as a "standard"⁹⁹⁸ under that definition. For instance, it only defines as a standard those "documents" that provide "rules, guidelines or characteristics" for products, or related processes and production methods, (including those that "include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements").⁹⁹⁹ Additionally, as discussed below, the scope of the term "document" under this definition is further narrowed by the fact that it only concerns those that "provide" product characteristics (or deal with or include packaging or other requirements)¹⁰⁰⁰ with a specific purpose, i.e. "for common and repeated use".¹⁰⁰¹ The Appellate Body has also clarified that the term "documents", as used in that "*Explanatory note*", "must refer to standards *in general*, and not only to those adopted by entities *other than* international bodies".¹⁰⁰²

7.293. We also consider the Appellate Body's observation that under Annex 1.1, "a 'document' may comprise multiple legal instruments in a given circumstance" to be equally relevant in the context of Annex 1.2.¹⁰⁰³ Depending on the circumstances, the "document" that constitutes a standard may take a variety of forms. It could thus be contained within an instrument that simultaneously addresses other issues, and one which, together with various other instruments,

cumulatively (or "holistically") considered, where this is not necessary to the determination in light of the circumstances.

⁹⁹⁶ See para. 7.281.

⁹⁹⁷ Appellate Body Report, *US – Tuna II (Mexico)*, para. 185 (footnote omitted). See also Appellate Body Reports, *EC – Seal Products*, paras. 5.9-5.10.

⁹⁹⁸ We also note, as the Appellate Body did in *US – Tuna II (Mexico)*, that the ISO/IEC Guide 2: 1991 establishes, broadly, that "[a] document is to be understood as any medium with information recorded on or in it". Appellate Body Report, *US – Tuna II (Mexico)*, para. 185 fn 391. However, as we have explained at para. 7.283 and fns 985-986 above, the applicability and relevance of any ISO/IEC Guide definition, if any, is subject to the qualifications under the introductory clause of Annex 1 to the TBT Agreement.

⁹⁹⁹ We further discuss the meaning of these terms at paras. 7.335-7.340 below.

¹⁰⁰⁰ See para. 7.337 and fn 1085 below.

¹⁰⁰¹ We further discuss the meaning of the phrase "common and repeated use" later in these findings, in particular at paras. 7.361-7.370 below. We also note that, while the text of the definition of "standard" in Annex 1.2 refers to "document", the text of its "*Explanatory note*" refers to "documents". Nonetheless, as clarified by the Appellate Body, these two terms "must be interpreted as having the same meaning" for the purposes of this provision. Appellate Body Report, *EC – Sardines*, para. 222.

¹⁰⁰² Appellate Body Report, *EC – Sardines*, para. 222 (emphasis original). See also European Union's third-party submission, para. 45 and fn 44 (also referring to Appellate Body Report, *EC – Sardines*).

¹⁰⁰³ Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, fn 708. See also fn 1007 below.

forms part of a broader context or framework. These situations, in themselves, would not be an obstacle to demonstrating the existence of a "document" that can be characterized as a "standard", or as a "relevant international standard" within the meaning of Article 2.5.

7.294. We consider that, properly understood in the above context, the term "document" indicates that an assessment of whether a "standard" exists under Annex 1.2 requires, as a first step, a sufficiently clear and distinctive identification of the components or elements of the instrument(s) claimed by a party to constitute that "standard". This is particularly important where the "document" argued to be a "relevant international standard" is contained in "multiple legal instruments", each one addressing a range of matters, including some that are distinct from, even if related to, the specific matter at issue in the challenged technical regulation.¹⁰⁰⁴

7.295. We note that this initial task of precisely identifying the components of the instrument(s) at issue forming the "document" is a necessary first step for both the second sentence of Article 2.5, and Article 2.4. Under both provisions, such identification is necessary for the subsequent "comparative assessment" needed to assess the degree of correspondence between the international standard and the technical regulation, as specified under each provision.¹⁰⁰⁵ In the context of Article 2.4 of the TBT Agreement, an examination of whether a relevant international standard was "use[d] ... as a basis for" a technical regulation "must be limited to those parts of the relevant international standards that relate to the subject-matter of the challenged prescriptions or requirements" and such examination "must be broad enough to address *all* of those relevant parts [of the international standard]".¹⁰⁰⁶ Similarly, under the second sentence of Article 2.5, a clear and distinctive identification of all components of the instrument that form the "document" at issue is necessary to allow an assessment of whether a "standard" exists and also to allow, subsequently (if the standard is also "international" and "relevant"), an

¹⁰⁰⁴ See also fn 1007 below.

¹⁰⁰⁵ That is: "in accordance with", under the second sentence of Article 2.5, or "use ... as a basis for", under Article 2.4. We also note that, under those provisions of the SPS Agreement which are equivalent to these two TBT provisions (those under Article 3 of the SPS Agreement, for instance), there is a similar need to first properly identify the components of the instrument allegedly containing the SPS standard in order to, then, undertake a "comparative assessment" of the degree of correspondence between the measure and the international standard, as specified under each SPS provision (that is: "based on", "conforms to", or "results in a higher level of protection than", as per Articles 3.1, 3.2 or 3.3 of the SPS Agreement, respectively). See also para. 7.274 and fn 961 above, where we also discuss these TBT and SPS terms.

¹⁰⁰⁶ Appellate Body Report, *EC – Sardines*, para. 250 (emphasis original). The Appellate Body based this understanding on the composite term "or relevant parts of them", used in Article 2.4. As we noted at para. 7.273 and fn 956 above, the second sentence of Article 2.5, however, does not contain this composite term. This, in turn, appears to indicate that, under the second sentence of Article 2.5, it may not be possible for technical regulations to be "in accordance with" international standards by only assessing these measures against the "relevant parts", rather than the entirety, of these standards. We also note the following observations by the Appellate Body in *EC – Sardines* when applying this understanding to the facts of that case:

This dispute concerns the WTO-consistency of the requirement set out in Article 2 of the EC Regulation that only products prepared exclusively from the species *Sardina pilchardus* may be marketed in the European Communities as preserved sardines. Consequently, the "relevant parts" of Codex Stan 94 are those elements of Codex Stan 94 that bear upon or relate to the marketing of preserved fish products under the name "sardines". The term "relevant parts of them", as used in Article 2.4, implies two things for the case before us. First, the determination whether Codex Stan 94 has been used "as a basis for" the EC Regulation must stem from an analysis that is limited to those "parts" of Codex Stan 94 relating to the use of the term "sardines" for the identification and marketing of preserved fish products. Those parts include not only sections 6.1.1(i) and 6.1.1(ii), but also section 2.1.1 of Codex Stan 94, which sets out the various species that may be given the names contemplated in sections 6.1.1(i) and 6.1.1(ii). Second, this analysis must address *all* of those relevant provisions of Codex Stan 94, and must not ignore any one of them.

Appellate Body Report, *EC – Sardines*, para. 251. (emphasis original)

In that dispute, the Appellate Body also rejected the respondent's argument that Article 2.4 required that "the whole of the standard and the whole of the EC Regulation should be compared". The Appellate Body said such a holistic comparative assessment was not possible because "several parts of Codex Stan 94 [were] not relevant to the use of the term 'sardines' for the identification and marketing of preserved fish products" and, therefore, "[t]here [was] simply no purpose served in examining other provisions of the EC Regulation that [were] irrelevant to [that] dispute." *Ibid.* para. 252.

assessment of whether the challenged technical regulation is "in accordance with" such standard.¹⁰⁰⁷

7.296. We note that the Appellate Body has provided similar guidance, in the context of Article 3 of the SPS Agreement, on the manner in which a panel should conduct the "comparative assessment" between an SPS measure and the relevant international standard, for the purpose of determining whether that measure is "based on", "conforms to", or "results in a higher level of protection than", that international standard. Articles 3.1, 3.2 and 3.3 of the SPS Agreement, respectively, as observed above¹⁰⁰⁸, have a comparable structure and function to Articles 2.4 and 2.5 in the TBT Agreement:

[A] panel must engage in a comparative assessment between the challenged measure and that international standard. In this respect, because the international standard serves as the benchmark against which a Member's compliance under Article 3 is to be assessed, it is incumbent on a panel to discern the meaning of that standard. In conducting such an assessment, panels have various means available to them. A panel may be guided by any relevant interpretative principles, including relevant customary rules of interpretation of public international law. In addition, a panel may find additional sources to be useful in discerning the meaning of the international standard. For example, panels may wish to have recourse to the views of the relevant standard-setting body, as referred to in Annex A(3) to the SPS Agreement, through evidence on the panel record or through direct consultation with that body, or with other experts in the relevant fields, pursuant to Article 11.2 of the SPS Agreement and Article 13 of the DSU.¹⁰⁰⁹

¹⁰⁰⁷ We note, in this respect, the determination of the Appellate Body in *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.239 and fn 708, similarly stressing the need for a precise identification of the "document" that constitutes a technical regulation under Annex 1.1 (even when it "may comprise multiple legal instruments"), as an essential requirement for a proper assessment of the measure's consistency with the obligation in Article 2.2, and in particular for an analysis of the "contribution" of the challenged technical regulations under the relational analysis:

In our view, a technical regulation should, in principle, be reviewed in its entirety in order to assess its degree of contribution to its objective. We note that paragraph 1 of Annex 1 to the TBT Agreement defines a "technical regulation", in relevant part, as a "[d]ocument which lays down product characteristics or their related processes and production methods". It is, thus, the "document" constituting the technical regulation that should be assessed under Article 2.2, rather than isolated or disconnected portions of that document. ... In assessing the relevant document constituting the technical regulation at issue under Article 2.2, the elements contained within it that contribute to the objective of the technical regulation should first be identified, with all of those elements then being taken into account when assessing the degree of contribution of the technical regulation to its objective. Otherwise, to exclude certain elements from that assessment could yield an incorrect finding as to the technical regulation's degree of contribution to its objective, and could lead to an imbalance or asymmetry in a comparison with proposed alternatives.

Ibid. (emphasis original; footnotes omitted). See also Dominican Republic's response to Panel question No. 150, para. 21; Dominican Republic's comments on Australia's' response to Panel question No. 147, para. 49 fn 74 (also referring, in addition to the above passage of the Appellate Body Report in *US – COOL (Article 21.5 – Canada and Mexico)*, to Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.15); Indonesia's response to Panel question No. 150, para. 11; and Indonesia's comments on Australia's' response to Panel question No. 140, paras. 21-23.

¹⁰⁰⁸ See fn 1005 above. See also para. 7.274 and fn 961 above.

¹⁰⁰⁹ Appellate Body Report, *India – Agricultural Products*, para. 5.79. Applying the above understanding to the "circumstances of that dispute", the Appellate Body then said:

Annex A(3)(b) [of the SPS Agreement] provides that the relevant international standards ... are those set out in the [World Organization for Animal Health (OIE)] Code, in particular, Chapter 10.4. Chapter 10.4 of the OIE Code therefore serves as the benchmark against which India's AI measures must be compared in order to determine whether they are "based on", or "conform to", that standard. Accordingly, in keeping with the guidance outlined above, it was incumbent on the Panel in this dispute to discern the meaning of relevant portions of the OIE Code in order to determine whether India's AI measures satisfy the elements under Articles 3.1 and 3.2 of the SPS Agreement.

7.297. The above statements provide, *mutatis mutandis*, relevant guidance for properly identifying the document identified by Australia as "relevant international standards" in relation to tobacco plain packaging. Once the relevant instruments have been identified, their meaning will also need to be discerned and understood.¹⁰¹⁰

7.298. With the foregoing in mind, we now examine the instruments that Australia identifies as forming the "document" that, within the meaning of the definition of "standard" in Annex 1.2, constitutes a "relevant international standard" for tobacco plain packaging for the purposes of the second sentence of Article 2.5.

Main arguments of the parties

7.299. Australia considers that the FCTC Guidelines, "as a whole", could be considered "relevant international standards" for the purposes of the second sentence of Article 2.5 of the TBT Agreement.¹⁰¹¹

7.300. Australia further explains that, for the purpose of determining whether "relevant international standards" exist for tobacco plain packaging, the "document(s)" to be assessed are, more specifically, the Article 11 and Article 13 FCTC Guidelines.¹⁰¹² Australia further clarifies that it makes this assertion "rel[ying] primarily" on the following paragraphs of these two FCTC Guidelines:

- a. paragraph 46 of the Article 11 FCTC Guidelines; and
- b. paragraphs 16 and 17 of the Article 13 FCTC Guidelines.¹⁰¹³

7.301. Australia also notes that, besides these three specific paragraphs, the Article 11 and Article 13 FCTC Guidelines also contain "other elements" that "do not specify 'plain packaging'" but are nonetheless "relevant" for characterizing these FCTC instruments as an international standard for tobacco plain packaging. Australia considers the following paragraphs of the Article 11 and

Ibid. para. 5.80 (footnotes omitted). This approach was applied by the panel in *Russia – Pigs (EU)*, which considered that its task of assessing whether the challenged measure conformed with Article 3 of the SPS Agreement consisted of: (i) identifying the relevant international standards; (ii) discerning the meaning of such international standards; and (iii) assessing the measures at issue in light of these international standards in order to determine whether the measures are "based on" the standards. Panel Report, *Russia – Pigs (EU)*, paras. 7.262 and 7.274. See also ibid. paras. 7.263-7.272 (on the legal test for "identifying") and 7.273-7.283 (on the legal test for "discerning meaning").

¹⁰¹⁰ We note in this respect the observations of the panel in *Russia – Pigs (EU)*, referring to the Appellate Body's determinations in *India – Quantitative Restrictions*:

In essence, in connection with our own assessment of the meaning of the Terrestrial Code, this Panel has remained vigilant in terms of how it has treated the responses received from the OIE and how it has undertaken its assessment of the meaning of the Terrestrial Code. In this respect, the Panel has remained mindful of the reasoning of the Appellate Body in *India – Quantitative Restrictions* that a panel may not delegate its judicial function to an international organization that it consults, but must instead critically assess the views of that international organization. The Appellate Body's findings in *India – Agricultural Products* reaffirm that the Panel must make its own assessment of the meaning of the Terrestrial Code and not simply rely on the views of the OIE regarding the meaning of the Terrestrial Code. A Panel may, in respect of each of the interpretative issues it addresses, refer to and accord weight to the OIE's responses to its questions; however, a Panel must indicate, in each instance, that its conclusions are also based on its own examination of the wording or text of the relevant recommendations of the Terrestrial Code.

Panel Report, *Russia – Pigs (EU)*, para. 7.282 (footnotes omitted). See also Appellate Body Report *India – Agricultural Products*, paras. 5.93-5.94.

¹⁰¹¹ Australia's response to Panel question No. 129, para. 201.

¹⁰¹² Australia's first written submission, para. 567.

¹⁰¹³ Australia's response to Panel question No. 129, para. 202. See also, e.g. Australia's opening statement at the first meeting of the Panel, para. 83. We assume Australia's reference to "paragraph 17" of the Article 13 FCTC Guidelines is intended to refer to the "Recommendation" following paragraph 17, as paragraph 17 itself does not concern "plain packaging" *per se*. See also para. 7.311 and fn 1031 below.

Article 13 FCTC Guidelines to be "examples" of these "other elements", in particular given that they "set out" requirements that the TPP measures "incorporate[]"¹⁰¹⁴:

- a. paragraphs 10 and 54 of the Article 11 FCTC Guidelines (dealing, respectively, with "inserts and onserts" and "adhesive labels"); and
- b. paragraph 15 of the Article 13 FCTC Guidelines (dealing with "packaging and product features").

7.302. Australia further submits that "other aspects" of the Article 11 and Article 13 FCTC Guidelines that are "relevant", include those addressing "misleading or deceptive packaging and labelling" and "misleading or deceptive advertisement and promotion".¹⁰¹⁵

7.303. The complainants do not contest Australia's identification of paragraph 46 of the Article 11 FCTC Guidelines and paragraphs 16-17 of the Article 13 FCTC Guidelines as being the parts of these instruments expressly addressing "plain packaging".¹⁰¹⁶ Honduras questions, however, Australia's broad claim that all the currently adopted FCTC Guidelines, "as a whole", qualify as an international standard for the purpose of these proceedings. Honduras recalls that the FCTC COP has adopted FCTC Guidelines for the implementation of other provisions of that Convention, such as those for Articles 8, 9, 10 and 14. Honduras considers that, "absent further clarification by Australia, [such] general assertions are insufficient to discharge Australia's burden under [the second sentence of] Article 2.5 of the TBT Agreement".¹⁰¹⁷

Analysis by the Panel

7.304. As described above, Australia identifies specific paragraphs of two Guidelines adopted by the FCTC COP (the Article 11 FCTC Guidelines and the Article 13 FCTC Guidelines) as constituting a relevant (international) "standard" in respect of tobacco plain packaging.

7.305. We first note that various Guidelines adopted by the FCTC COP to date contain extensive text dealing with a broad range of regulatory aspects of various types of tobacco-control measures addressed in the specific FCTC provisions that these Guidelines relate to.¹⁰¹⁸ Like other FCTC Guidelines, the Article 11 FCTC Guidelines and the Article 13 FCTC Guidelines are non-binding instruments "intended to assist the Parties in meeting their obligations and in increasing the effectiveness of measures adopted".¹⁰¹⁹ Both set of guidelines contain extensive text addressing a variety of regulatory measures concerning the packaging, labelling or marketing of tobacco products, to assist FCTC Parties in meeting their obligations and increasing the effectiveness of measures adopted pursuant to Articles 11 and 13 of the Convention respectively.¹⁰²⁰ It is notable in this respect that, as indicated by the complainants,

¹⁰¹⁴ Australia's response to Panel question No. 129, para. 202.

¹⁰¹⁵ Australia's response to Panel question No. 129, para. 203.

¹⁰¹⁶ See, e.g. Honduras's second written submission, para. 495; and Indonesia's second written submission, paras. 183 and 186.

¹⁰¹⁷ Honduras's second written submission, para. 504.

¹⁰¹⁸ See FCTC Guidelines for Implementation (2013 edition), (Exhibits AUS-109, DOM-44), containing a compilation of all adopted Guidelines, except the Article 6 FCTC Guidelines (Exhibit AUS-111), adopted in 2014.

¹⁰¹⁹ WHO/FCTC *amici curiae* brief, (Exhibit AUS-42 (revised)), paras. 20-22 (referring to the texts of the respective opening paragraphs of these two FCTC Guidelines). We further discuss the non-binding nature of these FCTC Guidelines when discussing this element of the definition of "standard" in Annex 1.2, at paras. 7.390-7.394 below.

¹⁰²⁰ For instance, the Article 11 FCTC Guidelines contain various recommendations on the development and use of health warnings, including with respect to their "rotation" (paras. 19-22) and their "content" (paras. 23-27), and the Article 13 FCTC Guidelines contain recommendations on various components of a comprehensive ban of tobacco advertising, promotion and sponsorship, including with respect to: "retail sale and display" of tobacco products (paras. 12-14, recommending banning them); "internet sales" (paras. 18-21, recommending banning them); "brand stretching and brand sharing", i.e. the use of tobacco brands in non-tobacco products (paras. 22-23, recommending banning them); "depiction of tobacco in entertainment media" (para. 31, *inter alia* recommending "prohibiting the use of identifiable tobacco brands or imagery" in entertainment media products); and "domestic enforcement of laws on tobacco advertising, promotion and sponsorship" (paras. 60-68, *inter alia* recommending to "introduce and apply effective, proportionate and dissuasive penalties"). Further, with further respect to paragraphs 22-24 the Article 13 FCTC Guidelines, which define and recommend banning "brand stretching" and "brand sharing", they state that these types of branding

"plain packaging" is not, as such, a specific type of tobacco control measure expressly identified in either Article 11 or Article 13 of the FCTC themselves (or in any other provision of the Convention).¹⁰²¹

7.306. In light of this and our observations above on the importance of a precise identification of the "document" at issue for the remainder of our analysis¹⁰²², we agree with Honduras that, as an initial step in our assessment, "it is necessary to identify *which parts* of the FCTC Guidelines have been invoked by Australia as the alleged relevant international standards".¹⁰²³

7.307. As described above, Australia states that the FCTC Guidelines "as a whole" could be considered "relevant international standards" for the purposes of the second sentence of Article 2.5. Nonetheless, Australia also identifies the relevant instruments in respect of tobacco plain packaging as being, more specifically, the Article 11 FCTC Guidelines and the Article 13 FCTC Guidelines. It then further identifies three specific paragraphs of these two Guidelines upon which it "relies primarily" for the purposes of determining the existence of a "relevant international standard" in respect of tobacco plain packaging: paragraph 46 of the Article 11 FCTC Guidelines, and paragraphs 16 and 17 of the Article 13 FCTC Guidelines (in fact, the "*recommendation*" text following paragraph 17).¹⁰²⁴ These are the specific texts, within these two sets of Guidelines, in which tobacco "plain packaging" is expressly mentioned and described.

7.308. Paragraph 46 of the Article 11 FCTC Guidelines (entitled "*Packaging and labelling of tobacco products*") is the sole provision under a heading entitled "Plain packaging", which states:

Parties should consider adopting measures to restrict or prohibit the use of logos, colours, brand images or promotional information on packaging other than brand names and product names displayed in a standard colour and font style (plain packaging). This may increase the noticeability and effectiveness of health warnings and messages, prevent the package from detracting attention from them, and address industry package design techniques that may suggest that some products are less harmful than others.¹⁰²⁵

7.309. Paragraph 16 of the Article 13 FCTC Guidelines (entitled "*Tobacco advertising, promotion and sponsorship*"), provide that:

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

¹⁰²¹ "should be also regarded as forms of tobacco advertisement and promotion". See also Canada's third party submission, para. 41 and fns. 20-21 (referring to this recommendation and informing that "many WTO Members", including Ukraine and Indonesia", have implemented measures regulating "brand stretching").

¹⁰²² See, e.g. Honduras's first written submission, paras. 125-127; Honduras's second written submission, para. 468; Dominican Republic's first written submission, paras. 183 and 194; Cuba's first written submission, paras. 291-294; and Indonesia's first written submission, para. 94. We note, however, that certain other specific types of tobacco-control measures are expressly addressed in both the FCTC itself and in the corresponding FCTC Guidelines. For instance, regulations on the use/design/size/rotation of health warnings or GHWs in tobacco packaging are measures that are expressly addressed both in Article 11 of the FCTC as well as in various parts of the Article 11 FCTC Guidelines. See FCTC, (Exhibits AUS-44, JE-19), Article 11; and Article 11 FCTC Guidelines, FCTC/COP/3(10), (Exhibit JE-20), Annex, paras. 12-22.

¹⁰²³ See paras. 7.291-7.297 above.

¹⁰²⁴ Honduras's second written submission, para. 495. (emphasis added)

¹⁰²⁵ We assume Australia's reference to "paragraph 17" of the Article 13 FCTC Guidelines is intended to refer to the recommendation following paragraph 17, as paragraph 17 itself does not concern "plain packaging" *per se*.

¹⁰²⁵ Article 11 FCTC Guidelines, FCTC/COP/3(10), (Exhibit JE-20), Annex, para. 46.

inside or attached to the package or on individual cigarettes or other tobacco products.¹⁰²⁶

7.310. Paragraph 16 of the Article 13 FCTC Guidelines is contained (together with paragraphs 15 and 17, both quoted below) under a heading entitled "Packaging and product features". This heading contains the following footnote:

See also the guidelines for implementation of Article 11 of the Convention, which address plain packaging with regard to health warnings and misleading information.¹⁰²⁷

7.311. Paragraph 17 of the Article 13 FCTC Guidelines, which refers to, but does not *per se* prescribe "plain packaging", states:

If plain packaging is not yet mandated, the restriction should cover as many as possible of the design features that make tobacco products more attractive to consumers such as animal or other figures, "fun" phrases, coloured cigarette papers, attractive smells, novelty or seasonal packs.¹⁰²⁸

7.312. Paragraph 17 of the Article 13 FCTC Guidelines is immediately followed by this Recommendation:

Packaging and product design are important elements of advertising and promotion. Parties should consider adopting plain packaging requirements to eliminate the effects of advertising or promotion on packaging. Packaging, individual cigarettes or other tobacco products should carry no advertising or promotion, including design features that make products attractive.¹⁰²⁹

7.313. We observe that there seems to be no disagreement, among the parties, on the identification of these three paragraphs of the Guidelines as relating to plain packaging of tobacco products.¹⁰³⁰ The WHO and FCTC Secretariat similarly identify these three provisions of the FCTC Guidelines, as specifically addressing "plain packaging".¹⁰³¹

7.314. The WHO and FCTC Secretariat identify, in addition, paragraph 15 of the Article 13 FCTC Guidelines as addressing "plain packaging". Australia instead argues that paragraph 15 is one of the "other elements" in these Guidelines that "do not specify 'plain packaging'" but are nonetheless "relevant" for characterizing these FCTC instruments as an international standard for tobacco plain packaging. Paragraph 15 of the Article 13 FCTC Guidelines, like paragraphs 16 and 17, is contained under the heading "Packaging and product features". It states:

¹⁰²⁶ Article 13 FCTC Guidelines, FCTC/COP/3(12), (Exhibit JE-21), Annex, para. 16.

¹⁰²⁷ Article 13 FCTC Guidelines, FCTC/COP/3(12), (Exhibit JE-21), Annex, fn 2 accompanying "Packaging and product features" heading above para. 15; and FCTC Guidelines for Implementation (2013 edition), (Exhibits AUS-109, DOM-44), Article 13, fn 4. For simplicity, we will henceforth refer to this footnote as footnote 4 to the Article 13 FCTC Guidelines.

¹⁰²⁸ Article 13 FCTC Guidelines, FCTC/COP/3(12), (Exhibit JE-21), Annex, para. 17.

¹⁰²⁹ Article 13 FCTC Guidelines, FCTC/COP/3(12), (Exhibit JE-21), Annex, "Recommendation" following para. 17.

¹⁰³⁰ As we observe at para. 7.315 below, unlike Australia, the WHO and FCTC Secretariat also identify paragraph 15 of the Article 13 FCTC Guidelines as specifically addressing "plain packaging".

¹⁰³¹ See WHO/FCTC Additional Information to Panel, paras. 60 and 62-63, at fn 63 above. See also WHO/FCTC *amicus curiae* brief, (Exhibit AUS-42 (revised)), paras. 59-71. We note that, like Australia, the WHO and FCTC Secretariat refer to the text of the "Recommendation" for plain packaging in the Article 13 FCTC Guidelines as being the one contained in "paragraph 17" of these Guidelines. The evidence presented to us suggests, however, that paragraph 17 contains another text. Instead, as we see it, the text of this "Recommendation", which is unnumbered, follows, rather than is contained within, paragraph 17 of the Article 13 FCTC Guidelines. This is different from the way "plain packaging" is addressed in the Article 11 FCTC Guidelines. There, "plain packaging" is expressly addressed in a single paragraph, the sole one under a heading called "plain packaging", and nowhere else in the Article 11 FCTC Guidelines is "plain packaging" also presented as a "Recommendation", as in the Article 13 FCTC Guidelines.

Packaging is an important element of advertising and promotion. Tobacco pack or product features are used in various ways to attract consumers, to promote products and to cultivate and promote brand identity, for example by using logos, colours, fonts, pictures, shapes and materials on or in packs or on individual cigarettes or other tobacco products.¹⁰³²

7.315. Australia also considers "other aspects" of the Article 11 and Article 13 FCTC Guidelines to be "relevant" for plain packaging, citing, as "examples", certain specific provisions from these instruments. Specifically, it identifies as "relevant" paragraphs 10¹⁰³³ and 54¹⁰³⁴ of the Article 11 FCTC Guidelines and, as we already noted above, paragraph 15 of the Article 13 FCTC Guidelines. Australia further submits that "other aspects" of the Article 11 and Article 13 FCTC Guidelines that are "relevant" include those addressing "misleading or deceptive packaging and labelling" and "misleading or deceptive advertisement and promotion".¹⁰³⁵ The WHO and FCTC Secretariat, but not Australia, also refer to paragraph 43 of the Article 11 FCTC Guidelines as forming part of the "broader context" for plain packaging as expressly addressed in paragraph 46 of these same Guidelines. They explain that paragraph 43 is relevant because it "stress[es] that the terms included in Article 11.1(a) [of the FCTC] are indicative of misleading terms, but that the list is not exhaustive".¹⁰³⁶ Similarly as context, the WHO and FCTC Secretariat, but not Australia, refer to paragraph 3 of the Article 11 FCTC Guidelines, which, in its relevant part, states that "[e]ffective health warnings and messages and other tobacco product packaging and labelling measures are key components of a comprehensive, integrated approach to tobacco control".¹⁰³⁷

7.316. Finally, Australia and the WHO and FCTC Secretariat agree that both the FCTC itself and its Guidelines contain "a number of provisions relevant to plain packaging"¹⁰³⁸ and that, consequently, the parts of the Article 11 and Article 13 FCTC Guidelines expressly addressing plain packaging "must be read in light" of the context provided by these provisions.¹⁰³⁹

7.317. Having identified the parts of the Article 11 and Article 13 FCTC Guidelines on which Australia "relies primarily ... as international standards for the TPP measures"¹⁰⁴⁰, as well as the

¹⁰³² Article 13 FCTC Guidelines, FCTC/COP/3(12), (Exhibit JE-21), Annex, para. 15.

¹⁰³³ Paragraph 10 of the Article 11 FCTC Guidelines states, under a heading entitled "Design elements":

Parties should ensure that health warnings and messages are not obstructed by other required packaging and labelling markings or by commercial inserts and onserts. Parties should also ensure, when establishing the size and position of other markings, such as tax stamps and markings as per the requirements of Article 15 of the Convention, that such markings do not obstruct any part of the health warnings and messages.

Article 11 FCTC Guidelines, FCTC/COP/3(10), (Exhibit JE-20), Annex, para. 10.

¹⁰³⁴ Paragraph 54 of the Article 11 FCTC Guidelines, the sole provision under a heading entitled "Adhesive labels and covers", states:

Parties should ensure that adhesive labels, stickers, cases, covers, sleeves, wrapping and tobacco manufacturers' promotional inserts and onserts do not obscure, obliterate or undermine health warnings and messages. For example, adhesive labels might be allowed only if they cannot be removed and are used only on metal or wood containers that hold products other than cigarettes.

Article 11 FCTC Guidelines, FCTC/COP/3(10), (Exhibit JE-20), Annex, para. 54.

¹⁰³⁵ See paras. 7.299-7.302 above.

¹⁰³⁶ WHO/FCTC *amici curiae* brief, (Exhibit AUS-42 (revised)), para. 62. The WHO and FCTC Secretariat also refer, as context to the plain packaging recommendation in paragraph 46 of the Article 11 FCTC Guidelines, to paragraph 12 of these same Guidelines, which "provides specific guidance with respect to the size of health warnings", recognizing that "the effectiveness of health warnings increases with their size" (*Ibid.* para. 64). They also point out to paragraph 60 of the Article 11 FCTC Guidelines (which recommends health warnings be reviewed and updated periodically), to, more broadly, "impl[y] [that] the effectiveness of packaging and labelling measures is greatest when they are updated periodically [...]" (*Ibid.* para. 65).

¹⁰³⁷ Article 11 FCTC Guidelines, FCTC/COP/3(10), (Exhibit JE-20), Annex, para. 3, as quoted in WHO/FCTC *amici curiae* brief, (Exhibit AUS-42 (revised)), para. 63.

¹⁰³⁸ WHO/FCTC *amici curiae* brief, (Exhibit AUS-42 (revised)), para. 59.

¹⁰³⁹ WHO/FCTC Additional Information to Panel, paras. 61 and 64, at fn 63 above.

¹⁰⁴⁰ Australia's response to Panel question No. 129, para. 202.

"other elements" or "aspects" (at least those that it lists expressly)¹⁰⁴¹ that Australia identifies as "relevant" in this context, we need to consider whether, taken together, those parts of these instruments constitute a "document" that could be considered to contain a "standard" for tobacco plain packaging, within the meaning of Annex 1.2 of the TBT Agreement.

7.318. We first recall that the Article 11 and Article 13 FCTC Guidelines referred to above, adopted by the FCTC COP are, as stated in their respective opening paragraphs, "intended to assist the Parties in meeting their obligations and in increasing the effectiveness of measures adopted".¹⁰⁴² The WHO and FCTC Secretariat further explain that "the status of each set of Guidelines is governed by its own wording".¹⁰⁴³

7.319. Specific FCTC provisions can thus be, and most are, supplemented by certain instruments aimed at furthering them and their implementation, chief among them being Protocols and Guidelines.¹⁰⁴⁴ Article 7 of the FCTC thus provides that the FCTC COP shall propose Guidelines for the implementation of the provisions of Articles 8 to 13 of the FCTC.¹⁰⁴⁵ Towards this end, the FCTC COP adopted in November 2008, by consensus,¹⁰⁴⁶ two separate Guidelines: one for the implementation of Article 11 and another for the implementation of Article 13, i.e. the Article 11 and Article 13 FCTC Guidelines at issue in these proceedings.¹⁰⁴⁷

7.320. The WHO and FCTC Secretariat also note that the "overarching obligation to implement effective measures" is reflected not only in Article 7 of the FCTC, but also, importantly, in the wording of Articles 11 and 13 of the FCTC.¹⁰⁴⁸ The WHO and FCTC Secretariat thus explain that:

Article 11 obliges Parties to implement *effective measures* to ensure that tobacco packaging and labelling does not promote tobacco products by means that are false, misleading or deceptive (Article 11.1(a)) and to ensure that tobacco packaging carries health warnings describing the harmful effects of tobacco use (Article 11.1(b)). Similarly, Article 13 obliges Parties to undertake a *comprehensive ban* on tobacco advertising, promotion and sponsorship.¹⁰⁴⁹

¹⁰⁴¹ That is: paragraphs 10 and 54 of the Article 11 FCTC Guidelines and paragraph 15 of the Article 13 FCTC Guidelines, set out, respectively, in fns 1033 and 1034, and para. 7.314 above. See also paras. 7.301 and 7.307 above.

¹⁰⁴² WHO/FCTC *amici curiae* brief, (Exhibit AUS-42 (revised)), paras. 20-22 (referring to the texts of the respective opening paragraphs of these two guidelines).

¹⁰⁴³ WHO/FCTC *amici curiae* brief, (Exhibit AUS-42 (revised)), paras. 20-22 (referring to the texts of the respective opening paragraphs of these two guidelines).

¹⁰⁴⁴ See section 2.4 above, in particular para. 2.99.

¹⁰⁴⁵ WHO/FCTC Additional Information to Panel, para. 50, at fn 63 above.

¹⁰⁴⁶ On the adoption of the Article 11 and Article 13 FCTC Guidelines by consensus, see WHO/FCTC *amici curiae* brief, (Exhibit AUS-42 (revised)), para. 19; and WHO/FCTC Additional Information to Panel, para. 19, at fn 63 above. (containing "timetable 2" and "timetable 3", more specifically the seventh bullet in p. 7 and seventh bullet in p. 8). See also *ibid*, para. 46. See also Australia's first written submission, para. 106 and fn 166; and UICC and CCA *amici curiae* brief, (Exhibit AUS-38), para. 7.2. Indonesia, but not the other complainants, argues that "consensus" in the Guidelines with respect to tobacco plain packaging only means consensus on recommendations for FCTC Parties to "consider adopting" tobacco plain packaging, rather than recommendations to "adopt" plain packaging. Indonesia considers that this means that the Article 11 and Article 13 FCTC Guidelines were not in fact "adopted by consensus" and for this reason cannot be "international standards" under Article 2.5 of the TBT Agreement. Indonesia's second written submission, para. 225. We disagree. We consider that the particular way the final texts of these Guidelines were drafted to be, on their face, immaterial for asserting that these instruments were not adopted by consensus; nor have we been presented with any other evidence demonstrating otherwise.

¹⁰⁴⁷ WHO/FCTC *amici curiae* brief, (Exhibit AUS-42 (revised)), para. 19; and WHO/FCTC Additional Information to Panel, pp. 7-8 and Annexes 6 and 9, at fn 63 above. See also section 2.4.4 above. Honduras was one of the FCTC Parties involved in the intercessional Working Group established to develop the Article 11 FCTC Guidelines, which was "primarily devoted to the development of health warning and messages." Honduras's first written submission, para. 130. See also Honduras's response to Panel question No. 164, pp. 18-20; and Australia's comments on Honduras's response to Panel question Nos. 164, paras. 121-124. See, e.g. WHO/FCTC Additional Information to Panel, para. 19 (first bullet under "timetable 2", p. 6) and Annex 3, p. 33, at fn 63 above.

¹⁰⁴⁸ WHO/FCTC Additional Information to Panel, paras. 50-51, at fn 63 above.

¹⁰⁴⁹ WHO/FCTC Additional Information to Panel, paras. 51 and 54, at fn 63 above (emphasis original). See WHO/FCTC *amici curiae* brief, (Exhibit AUS-42 (revised)), paras. 60 and 67-68. We note here that with

7.321. The WHO and FCTC Secretariat note that the "overarching obligation to implement effective measures" is further articulated in the opening paragraphs of the Article 11 and Article 13 FCTC Guidelines¹⁰⁵⁰, which enunciate the "purpose" of each set of Guidelines. These state, respectively:

[Article 11 FCTC Guidelines]:

Consistent with other provisions of the [FCTC] and the intentions of the [FCTC COP], these guidelines are intended to assist Parties in meeting their obligations under Article 11 of the Convention, and to propose measures that Parties can use to increase the effectiveness of their packaging and labelling measures. Article 11 stipulates that each Party shall adopt and implement effective packaging and labelling measures within a period of three years after entry into force of the Convention for that Party.¹⁰⁵¹

[Article 13 FCTC Guidelines]:

The purpose of these guidelines is to assist Parties in meeting their obligations under Article 13 of the [FCTC]. They draw on the best available evidence and the experience of Parties that have successfully implemented effective measures against tobacco advertising, promotion and sponsorship. They give Parties guidance for introducing and enforcing a comprehensive ban on tobacco advertising, promotion and sponsorship or, for those Parties that are not in a position to undertake a comprehensive ban owing to their constitutions or constitutional principles, for applying restrictions on tobacco advertising, promotion and sponsorship that are as comprehensive as possible.¹⁰⁵²

7.322. To us, the above descriptions of the context in which the Article 11 and Article 13 FCTC Guidelines were adopted make clear that the relevant prescriptions relating to tobacco plain packaging in these Guidelines must be understood and implemented as part of "the broader tobacco control context"¹⁰⁵³ established by the FCTC, and also in light of the immediate context provided by, and together with, certain other specific provisions of the FCTC Guidelines as well as the provisions of the FCTC itself.¹⁰⁵⁴

7.323. Thus, as explained by the WHO and FCTC Secretariat, paragraph 46 of the Article 11 FCTC Guidelines must be "read in light" of the obligations in Article 11 of the FCTC itself, as well as

respect to certain terms used in FCTC Article 11(1), *caput*, and Article 11(1)(b), respectively, Indonesia observes that the Convention "does not define or further explain what constitutes 'effective measures' or means of promotion that are 'false, misleading, deceptive' or 'likely to create an erroneous impression'". Indonesia's first written submission, para. 95. Indonesia also cites a legal article in which, we note, the author argues that because those and other terms in Article 11 are not defined, FCTC Parties "have broad discretion in interpreting these terms". D. Layton and J. Lowe, "The Framework Convention on Tobacco Control and the World Trade Organization: A Conflict Analysis under International Law", *Global Trade and Customs Journal*, Vol. 9, Issue 6 (2014), (Layton and Lowe, The FCTC and the WTO), (Exhibit IDN-30), p. 248) (cited at Indonesia's first written submission, para. 95 fn 119).

¹⁰⁵⁰ WHO/FCTC Additional Information to Panel, paras. 52-53, at fn 63 above. See also WHO/FCTC *amici curiae* brief, (Exhibit AUS-42 (revised)), para. 61.

¹⁰⁵¹ Article 11 FCTC Guidelines, FCTC/COP/3(10), (Exhibit JE-20), Annex, para. 1.

¹⁰⁵² Article 13 FCTC Guidelines, FCTC/COP/3(12), (Exhibit JE-21), Annex, para. 1. See also *ibid.* para. 2 (stating that these guidelines "provide guidance on the best ways to implement Article 13 of the Convention in order to eliminate tobacco advertising, promotion and sponsorship effectively at both domestic and international levels"). We note, however, that unlike Article 11, Article 13 does not expressly refer to "packaging" or "labelling" measures. We note, on the other hand, that "tobacco advertising, promotion and sponsorship" is broadly defined in Article 1(c) of the FCTC, as including "*any form* of commercial communication" and Article 13 itself, in its paragraph (4)(a) includes a "minimum" obligation that each FCTC Party shall "prohibit *all forms* of tobacco advertising, promotion and sponsorship that promote a tobacco by *any means* that are false, misleading". FCTC, (Exhibits AUS-44, JE-19), Articles 1 and 13 (emphasis added). Finally, in paragraph 15 of the Article 13 FCTC Guidelines, set out at para. 7.314 above, it is stated that "[p]ackaging is an important element of advertising and promotion". Article 13 FCTC Guidelines, FCTC/COP/3(12), (Exhibit JE-21), Annex, para. 15.

¹⁰⁵³ WHO/FCTC *amici curiae* brief, (Exhibit AUS-42 (revised)), para. 73.

¹⁰⁵⁴ See, e.g. para. 7.315 above.

"other provisions" of that Convention that are "also relevant to implementation of plain packaging".¹⁰⁵⁵ They explain that plain packaging, as addressed in paragraph 46 "is set out in a broader context of other packaging and labelling measures", including those with respect to the size of health warnings, which are also the object of "specific guidance" in these same Guidelines.¹⁰⁵⁶ This "broader context", they explain, means that the Article 11 FCTC Guidelines:

[R]ecommend adoption of plain packaging *in addition* to a number of other packaging and labelling measures, including health warnings that cover as much of the principal display areas as possible and other measures prohibiting misleading packaging.¹⁰⁵⁷

7.324. With respect to the three paragraphs of the Article 13 FCTC Guidelines that they describe as specifically addressing tobacco plain packaging (paragraphs 15, 16 and 17), the WHO and FCTC Secretariat similarly explain that "these paragraphs need to be read in their context". For the WHO and FCTC Secretariat, such context includes "other passages" in the Article 13 FCTC Guidelines; the text of Article 13 of the FCTC itself, and "other obligations set out in the Convention".¹⁰⁵⁸

7.325. We note, in this respect, that the FCTC defines "tobacco control" as "a range of supply, demand and harm reduction strategies that aim to improve the health of a population by eliminating or reducing their consumption of tobacco products and exposure to tobacco smoke".¹⁰⁵⁹ Article 11 of the FCTC (entitled "Packaging and labelling of tobacco products") and Article 13 (entitled, "Tobacco advertising, promotion and sponsorship") are part of a wide family of measures covered by the Convention addressing the "demand-side" of tobacco products.¹⁰⁶⁰

7.326. Overall, we consider that the above elements, taken together, including the text of the FCTC and its Guidelines as well as the relevant information provided by the WHO and FCTC Secretariat, suggest that, while certain specific paragraphs and texts of the Article 11 and Article 13 FCTC Guidelines expressly refer or relate to tobacco plain packaging, and invite FCTC parties to "consider adopting" such measures, these recommendations can only be fully understood as part of a broader set of inter-related tobacco control measures and policies. This, in our view, includes not only those measures and policies recommended under the Article 11 and Article 13 FCTC Guidelines and other Guidelines (among which is "plain packaging"), but also those mandated under the FCTC itself. From the texts of the FCTC and its Guidelines, and consistent with the FCTC's legal nature as a "framework convention"¹⁰⁶¹, it is clear that FCTC Parties adopt

¹⁰⁵⁵ WHO/FCTC Additional Information to Panel, para. 61, at fn 63 above.

¹⁰⁵⁶ WHO/FCTC *amici curiae* brief, (Exhibit AUS-42 (revised)), paras. 62-65.

¹⁰⁵⁷ WHO/FCTC *amici curiae* brief, (Exhibit AUS-42 (revised)), para. 66 (emphasis added). See also *ibid.* paras. 72-73 (first, explaining that the "approach set out in the [FCTC]" is that "tobacco control relies upon implementation of comprehensive multi-sectoral measures that work together as cumulative interventions in a complementary regulatory scheme"; and then, as a corollary of this affirmation, stating that the "plain packaging should be viewed in this broader tobacco control context", in particular given its effect of "augment[ing] packaging and labelling measures and measures prohibiting tobacco promotion and advertising").

¹⁰⁵⁸ WHO/FCTC Additional Information to Panel, para. 64, at fn 63 above.

¹⁰⁵⁹ FCTC (Exhibits AUS-44, JE-19), Article 1(d). See also para. 2.102 above, and more broadly, paras. 7.233-7.244 below.

¹⁰⁶⁰ These measures are addressed in Part III of the Convention, entitled "Measures relating to the reduction of demand for tobacco". In contrast with Part IV of the FCTC (which only covers three "supply-side" measures), Part III of the Convention covers a variety (9) of *demand-side* tobacco-control measures. These are: "price and tax" measures (Article 6); "non-price" measures (Article 7); measures for "protection from exposure to tobacco smoke" (Article 8); regulations of "content of tobacco products" (Article 9); regulations of "tobacco product disclosures" (Article 10); measures on "packaging and labelling of tobacco products" (Article 11); measures on "education, communication, training and public awareness" (Article 12); measures on "tobacco advertising, promotion and sponsorship" (Article 13); and "demand reduction measures concerning tobacco dependence and cessation" (Article 14). FCTC, (Exhibits AUS-44, JE-19). See also paras. 2.102-2.105 above and paras. 7.233-7.244 below.

¹⁰⁶¹ See, e.g. Framework Convention/Protocol Approach, FCTC Paper 1, (Exhibits HND-141, IDN-31); and Vadi 2012, (Exhibit IDN-32), pp. 100-104. We do not consider, however, that, just because an instrument is in the form of a "framework convention", or was adopted in the context of such type of convention, this, in and of itself, *ipso facto* renders such instrument incapable of constituting a "standard" under Annex 1.2 of the TBT Agreement, or more broadly, a "relevant international standard" under the second sentence of Article 2.5 of the Agreement.

Guidelines with the *specific* purpose of assisting them to meet their *obligations* under certain provisions of that convention.¹⁰⁶² As described by Australia:

[T]he Guidelines are intended to help Parties to the FCTC to meet their obligations under the respective provisions of the Convention to which the Guidelines are directed, and "aim to reflect and promote best practices and standards that governments would benefit from in the treaty-implementation process".¹⁰⁶³

7.327. Based on all the evidence and information before us in these proceedings, therefore, it appears to us that, under the legal regime established by the FCTC, parties commit to implementing various supply-side and demand-side tobacco control measures in a comprehensive and multi-sectoral manner.¹⁰⁶⁴ By their own terms, when the Article 11 and Article 13 FCTC Guidelines propose certain measures or otherwise make certain policy recommendations to FCTC Parties, they do so within the particular context of being part of a comprehensive international instrument conferring certain rights and obligations towards the attainment of the objectives that those parties jointly agree that instrument should pursue.¹⁰⁶⁵ In other words, the Article 11 and Article 13 FCTC Guidelines, like all other FCTC Guidelines¹⁰⁶⁶, have been drafted with the sole aim of helping FCTC Parties meet certain specific Convention obligations to adopt a particular type of tobacco control measure, and are part of, and interlinked with, the implementation of a constellation of other tobacco control measures under Convention obligations.¹⁰⁶⁷

7.328. The interrelated nature of the relevant FCTC obligations and their respective Guidelines makes it difficult to isolate the specific elements of the Guidelines that are argued by Australia to form a "document" under Annex 1.2 from the broader context under which these instruments were adopted, which informs their specific purpose, namely to assist Parties in the implementation of

¹⁰⁶² As explained by Dr H. Nikogosian, former Head of the FCTC Secretariat, in the foreword to the 2013 edition of the official publication compiling all FCTC Guidelines adopted until that year:

The guidelines are intended to help Parties to meet their obligations under the respective provisions of the Convention. They reflect the consolidated views of Parties on different aspects of implementation, their experiences and achievements, and the challenges faced. The guidelines also aim to reflect and promote best practices and standards that governments would benefit from in the treaty-implementation process. The guidelines were prepared through the work of representatives of the Parties in the intergovernmental working groups established by the Conference of the Parties, intergovernmental and nongovernmental organizations accredited as observers to the COP and invited experts, with further input from Parties during the commentary process and the discussions during sessions of the COP. As a result of this wide consultative process and the consensus reached by the Parties, the guidelines have become widely acknowledged as a valuable tool in the implementation of the Convention.

FCTC Guidelines for Implementation (2013 edition), (Exhibits AUS-109, DOM-44). (emphasis added)

¹⁰⁶³ Australia's first written submission, para. 573 (footnote omitted) (quoting part of this statement by Dr H. Nikogosian, quoted in full at fn 1062 above).

¹⁰⁶⁴ See FCTC, (Exhibits AUS-44, JE-10), Article 5.1, set out at para. 2.101 above. See also para. 7.236 and fn 1057 above. See also, e.g. WHO/FCTC *amici curiae* brief, (Exhibit AUS-42 (revised)), paras. 66 and 72-73; and Australia's first written submission, paras. 38, 46-50.

¹⁰⁶⁵ Article 3 of the FCTC states that:

The objective of this Convention and its protocols is to protect present and future generations from the devastating health, social, environmental and economic consequences of tobacco consumption and exposure to tobacco smoke by providing a framework for tobacco control measures to be implemented by the Parties at the national, regional and international levels in order to reduce continually and substantially the prevalence of tobacco use and exposure to tobacco smoke.

FCTC, (Exhibits AUS-44, JE-10), Article 3. See also para. 2.100 above.

¹⁰⁶⁶ See the respective paragraph(s) of the Articles 5.3, 8, 9-10, 12, and 14 FCTC Guidelines, where, under the heading "Purpose", this same aim is stated, although sometimes in slightly different ways.

FCTC Guidelines for Implementation (2013 edition), (Exhibits AUS-109, DOM-44), pp. 4, 19, 33, 73 and 117, respectively. For the Article 6 FCTC Guidelines, see Exhibit AUS-111, p. 1.

¹⁰⁶⁷ See also, e.g. Australia's opening statement at the second meeting of the Panel, para. 8 (stating that, "[i]n order to combat the global epidemic of tobacco use, the [FCTC] recommends that parties adopt comprehensive tobacco control strategies that optimize synergies from a mix of policies."); and Australia's response to Panel question No. 158, para. 74 fn 101.

the broad range of treaty obligations (FCTC) undertaken by FCTC Parties in relation to tobacco control.¹⁰⁶⁸ In this respect, we note the existence of certain differences in the manner in which Australia and the WHO and FCTC Secretariat identify the "core" plain packaging elements of the Article 11 and Article 13 FCTC Guidelines.¹⁰⁶⁹ Australia and the WHO and FCTC Secretariat also appear to identify differently the other parts of these two FCTC Guidelines, which do not expressly refer to or describe "plain packaging", that are to be considered "relevant" and what implications these have on the scope of the "document" claimed to constitute the "relevant international standard" and its contents. For instance, while Australia considers paragraphs 10 and 54 of the Article 11 FCTC Guidelines as "other provisions" that are "relevant" for plain packaging, the WHO and FCTC Secretariat do not expressly identify these when describing the context provided by other provisions of these Guidelines.¹⁰⁷⁰ Conversely, none of the paragraphs in the Article 11 FCTC Guidelines that the WHO and FCTC Secretariat identify as forming part of the "broader context" for plain packaging as addressed in paragraph 46 of those Guidelines¹⁰⁷¹ has been, at least expressly, identified by Australia among the examples of "other elements" that it considers to be "also relevant".¹⁰⁷²

7.329. We also note that some of the references made by Australia and the WHO and FCTC Secretariat to related or relevant provisions of the Article 11 and Article 13 FCTC Guidelines, or more generally to certain obligations in the FCTC itself, are presented in a non-exhaustive and/or generic manner. For instance, the WHO and FCTC Secretariat refer generically to those paragraphs of the Article 11 FCTC Guidelines "addressing industry design techniques that may suggest some products are less harmful than others and paragraphs addressing the size of health warnings".¹⁰⁷³ They also state that paragraph 46 of the Article 11 FCTC Guidelines "is set out in a broader context of other packaging and labelling measures", including those with respect to the size of health warnings, which are also object of "specific guidance" in these same Article 11 FCTC Guidelines. The WHO and FCTC Secretariat also refer, this time more specifically, to a number of paragraphs of the Article 11 FCTC Guidelines as forming part of the "broader context" of the plain packaging recommendation of paragraph 46: paragraphs 3, 12, 43, and 60.¹⁰⁷⁴ Finally, the WHO and FCTC Secretariat state that Articles 11 and 13 of the FCTC itself, along with "other provisions" of the Convention, are also important context for implementing tobacco plain packaging, as addressed in each set of Guidelines.¹⁰⁷⁵ The fact that these FCTC elements have been referred to in a non-exhaustive, or generic, manner further confirms that the three (or four, in the description of the WHO and FCTC Secretariat) paragraphs of the Article 11 and Article 13 FCTC Guidelines relating specifically to plain packaging are intended to be read as an integral part of a comprehensive set of Guidelines supporting the implementation of a broad range of effective tobacco control measures.

7.330. Overall, therefore, it is not clear to us which elements or components within the Article 11 and Article 13 FCTC Guidelines would form a "document" encapsulating the totality of the "rules, guidelines or characteristics", that a WTO Member would be required to follow if it decides to adopt a measure providing for tobacco plain packaging "in accordance with" an international standard. It follows that we are not persuaded that the elements of these two FCTC Guidelines that have been identified by Australia can be read independently of, or separately from, their broader context as part of the FCTC, for the purpose of establishing the existence of a "relevant international standard" on tobacco plain packaging, within the meaning of the second sentence of Article 2.5. As

¹⁰⁶⁸ In this respect, we consider it telling the fact that, as noted above, Australia itself has submitted that the FCTC Guidelines, "as a whole", could be considered "relevant international standards" for the purposes of the second sentence of Article 2.5 of the TBT Agreement. Australia's response to Panel question No. 129, para. 201. See also paras. 7.299, 7.303 and 7.307 above.

¹⁰⁶⁹ See paras. 7.307 and 7.315 above. Specifically, the WHO and FCTC Secretariat identify paragraph 15 of the Article 13 FCTC Guidelines among the "plain packaging" requirements, while Australia does not.

¹⁰⁷⁰ See, e.g. paras. 7.301, 7.307, and 7.314-7.316 above. See also fn 1183 below.

¹⁰⁷¹ That is, Article 11 FCTC Guidelines, FCTC/COP/3(10), (Exhibit JE-20), Annex, paragraphs 3, 12, 43 and 60. See also para. 7.315 (where, *inter alia*, paragraph 3 is partially quoted) and fn 1036 above. See also para. 7.323 above.

¹⁰⁷² See paras. 7.301, 7.302 and 7.307 above.

¹⁰⁷³ WHO/FCTC Additional Information to Panel, para. 61, at fn 63 above. They also included, in this respect, the Article 13 FCTC Guidelines.

¹⁰⁷⁴ See, *inter alia*, fn 1071 above.

¹⁰⁷⁵ WHO/FCTC Additional Information to Panel, para. 61, at fn 63 above. See also *ibid.* para. 64 (specifically referring to the text of Article 13 of the FCTC, and then, generically, to "other obligations set out in the Convention") See also paras. 7.314-7.316 above.

we observed above, the Appellate Body, addressing a comparable situation under Article 2.4 of the TBT Agreement, determined that "this analysis must address *all* of those relevant provisions of [the document], and must not ignore any one of them".¹⁰⁷⁶ Similarly here, we must be able to ascertain what parts of the relevant instruments at issue (the Article 11 and Article 13 FCTC Guidelines) constitute the "document" at issue. In the absence of clarity in this respect, we will not be able to properly assess the content of the relevant "document" against the other elements of the definition of "standard" in Annex 1.2 or, more broadly, the existence of a "relevant international standard" and whether, for the purpose the second sentence of Article 2.5, the TPP measures are "in accordance with" such standard.

7.331. In making this determination, as described above, we are not suggesting that a "document", for the purposes of meeting the definition of "standard" in Annex 1.2 (and, specifically, constituting a "relevant international standard" under the second sentence of Article 2.5), could not be contained within an instrument that simultaneously addresses other issues or, together with various other instruments, form part of a broader context or framework.¹⁰⁷⁷ Rather, what is relevant is that all relevant product requirements, or other specifications related to the specific subject matter that is claimed to be the object of the "relevant international standard" (in the present case, "tobacco plain packaging") be identifiable with sufficient clarity to allow a "comparative assessment" to be properly conducted, to determine whether the challenged measure is "in accordance with" with that international standard.¹⁰⁷⁸

7.332. The next element of the definition of "standard" under Annex 1.2 of the TBT Agreement, as outlined above¹⁰⁷⁹, is whether the "document" at issue has been "approved by a recognized body". As described above¹⁰⁸⁰, in respect of an "*international* standard" under the second sentence of Article 2.5, this requirement is informed by the definition of "standardizing body" in the ISO/IEC Guide 2: 1991¹⁰⁸¹, "[w]ith respect to other necessary features of a body that can approve an '*international*' standard".¹⁰⁸²

7.333. The "*international*" character of a standard is thus primarily predicated upon whether the instrument was adopted by an "*international standardizing body*". Whether an "*international standardizing body*" exists requires, in turn, assessing, *inter alia*, whether this body is one that has *recognized activities* in standardization. A discussion of the characteristics of the body having adopted the document at issue may therefore be considered in the context of determining whether

¹⁰⁷⁶ Appellate Body Report, *EC – Sardines*, para. 251 (emphasis original). See also fn 1006 above.

¹⁰⁷⁷ See, e.g. para. 7.293 and fn 1061 above.

¹⁰⁷⁸ The identification of the parts of the instrument claimed to be an "(international) standard" containing all "relevant" requirements to a given subject-matter is also important because, without it, an "assessment of conformity" with such requirements cannot be properly performed. We note, in this respect, that "conformity assessment procedures", which are also covered by the TBT Agreement, are defined in Annex 1.3 of the Agreement as "[a]ny procedure used, directly or indirectly, to determine that *relevant requirements* in technical regulations or *standards* are fulfilled". (emphasis added)

¹⁰⁷⁹ See para. 7.281 above.

¹⁰⁸⁰ See para. 7.278 above.

¹⁰⁸¹ The ISO/IEC Guide 2: 1991, 4.3 defines "standardizing body" as a "body that has recognized activities in standardization". See Appellate Body Report, *US – Tuna II (Mexico)*, para. 357.

¹⁰⁸² Appellate Body Report, *US – Tuna II (Mexico)*, para. 357. The Appellate Body found, in particular, that:

Annex 1.2 to the *TBT Agreement* provides that a "standard" must be approved by a "recognized body". As we see it, the definition of "standardizing body" in the ISO/IEC Guide 2: 1991 does not conflict with the definition in the *TBT Agreement*. Instead, the definition in the ISO/IEC Guide 2: 1991 adds to and complements the definition in the *TBT Agreement*, specifying that a body must be "recognized" with respect to its "activities in standardization".

Ibid. The Appellate Body, based in particular on the text of the last two sentences of the *Explanatory note* to that Annex, has also clarified that "the definition of a 'standard' ... does not require approval by consensus for standards adopted by a 'recognized body' of the international standardization community." Appellate Body Report, *EC – Sardines*, para. 227. See also Panel Report, *US – Animals*, para. 7.224 fn 679 (stating that, in that panel's view, what the Appellate Body concluded in *EC – Sardines* when it interpreted the term "approved by a recognized body" in Annex 1.2, was "that the relevant issue [with respect to that term] is whether the document is *approved* by the recognized body and not how that approval comes about (i.e. consensus, voting, etc.)" (emphasis original)).

the alleged standard is "international" in character. At this stage of our analysis, we focus primarily on the nature and contents of the "document" alleged to be an international standard.

7.334. We therefore consider, next, following the order of elements of the Annex 1.2 definition¹⁰⁸³, whether the "document" alleged to constitute a "standard" provides "rules", "guidelines" or "characteristics" for products (or their related processes and production methods). Specifically, we consider whether the aspects of the Article 11 and Article 13 FCTC Guidelines argued by Australia to constitute a standard in respect of tobacco plain packaging provide "rules", "guidelines" or "characteristics" (including with respect to terminology, symbols, packaging, marking or labelling requirements for products or their related PPMs) and whether, in addition, they are "for common and repeated use". Finally, we consider whether compliance with such requirements is "not mandatory".

Whether the Article 11 and Article 13 FCTC Guidelines provide "rules, guidelines or characteristics for products"

The notion of "rules, guidelines or characteristics for products" in Annex 1.2

7.335. The definition of "standard" in Annex 1.2 refers to a document "that provides rules, guidelines or characteristics for products or related processes and production methods". Additionally, the second sentence of Annex 1.2 provides that it may also include or deal exclusively with terminology, symbols, packaging, marking or labelling "requirements".

7.336. Australia claims that the Article 11 and Article 13 FCTC Guidelines comply with these conditions because they constitute a document in the form of "guidelines" which provide for the "characteristics" of a "product" (tobacco) as well as its "related processes and production methods", i.e. manufacture and sale of tobacco products.¹⁰⁸⁴

7.337. As the use of the disjunctive "or" in the phrase "rules, guidelines or characteristics" indicates, a document can satisfy this component of the definition of a "standard" if it "provides"¹⁰⁸⁵ either one of these three elements. Dictionary definitions of the noun "rule" suggest that it may be defined, when used in relation to "regulations or principles", as "[a] principle, regulation, or maxim governing individual conduct"¹⁰⁸⁶, while the term "guidelines" can be defined as "a directing or standardizing principle laid down as a guide to procedure, policy, etc."¹⁰⁸⁷ These two terms, or variations thereof, are found in other provisions of the TBT Agreement¹⁰⁸⁸ as well as

¹⁰⁸³ See para. 7.281 above.

¹⁰⁸⁴ Australia's first written submission, para. 573; and second written submission, para. 316.

¹⁰⁸⁵ The verb "provide" can be defined as "to lay down as a provision or arrangement". Oxford English Dictionary Online, definition of "provide, v.", available at:

<<http://www.oed.com/view/Entry/153448?rskey=1jZVFC&result=2&isAdvanced=false#eid>>, accessed 2 May 2017 (emphasis added). The definition of "technical regulation" in Annex 1.1 similarly refers to a document "which lays down" product characteristics (emphasis added). As noted by the Appellate Body, the verb "lay down", is defined as to "establish, formulate definitely (a principle, a rule); prescribe (a course of action, limits, etc.)". Appellate Body Reports, *US – Tuna II (Mexico)*, para. 185; and *EC – Seal Products*, para. 5.10 (both referring to the *Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 1, p. 1562). Merriam-Webster defines the transitive verb "provide" as "to have as a condition: stipulate <the contract provides that certain deadlines will be met>". Merriam-Webster Dictionary online, definition of "provide", <<https://www.merriam-webster.com/dictionary/provide>>, accessed 2 May 2017. (emphasis added)

¹⁰⁸⁶ Oxford English Dictionary online, definition of "rule", available at:

<<http://www.oed.com/view/Entry/168717?rskey=0cxA2d&result=1#eid>>, accessed 2 May 2017.

¹⁰⁸⁷ *Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 1, pp. 15, 16, 488, 719, 1174, (*Shorter Oxford English Dictionary*, Vol. 1 AUS Excerpts, Part 2), (Exhibit AUS-539), p. 1174. See also Australia's second written submission, para. 232 (arguing that, "[i]nherent in the ordinary meaning of the term 'guideline' (a 'standardizing principle') is the notion that a standard may allow for a certain degree of flexibility in the relevant product characteristic or related processes and production methods." (footnote omitted)). See also Australia's comments on complainants' responses to Panel question No. 150, para. 32; and No. 163, para. 119.

¹⁰⁸⁸ In the TBT Agreement, the term "guidelines" is only found in the definition of "standard" in Annex 1.2, while the term "rules" can be found in other provisions of the Agreement (e.g. Articles 1.6 and 5.1.1). The TBT Agreement, however, also refers to "guides", as in "relevant guides or recommendations issued by international standardizing bodies", mostly in the context of its disciplines on conformity assessment procedures. See, e.g. Articles 5.4 to 5.6. See also Article 12.4.

in other covered agreements¹⁰⁸⁹, including the SPS Agreement¹⁰⁹⁰, GATT 1994¹⁰⁹¹, the SCM Agreement¹⁰⁹², GATS¹⁰⁹³, and the Customs Valuation Agreement.¹⁰⁹⁴ We note that the term "rules" has also been discussed in the context of the application of the Antidumping Agreement (but not, *per se*, as a term of that Agreement). In that context, the Appellate Body considered that it was irrelevant whether a given prescription was binding or not in order to determine the existence of a "rule or norm". The question, concluded the Appellate Body, is rather whether it was an "act[] ... setting forth rules or norms that are intended to have general and prospective application".¹⁰⁹⁵ The term "guidelines", as used in Article 14 of the SCM Agreement, has been found to refer to a "framework" or "parameters" for calculation of "benefit", rather than a "detailed method of calculation", such that paragraphs (a) through (d) of that provision should not be interpreted as "rigid rules that purport to contemplate every conceivable factual circumstance".¹⁰⁹⁶ Rather, the term "guidelines" was understood as conveying "a certain degree of flexibility" in the analysis under Article 14(d).¹⁰⁹⁷

7.338. The above suggests, in our view, the need for the document at issue to have a certain degree of normative content. It also suggests that, in terms of the required degree of normative content, a distinction may be drawn between "guidelines" – which would establish broad frameworks or parameters for the adoption of a given measure with a degree of flexibility – and "rules" – which would define more clearly a norm or measure to be followed. The inclusion of both terms in the definition of a "standard" in Annex 1.2 indicates that either type of prescription may form the basis of a "standard" within the meaning of the TBT Agreement. The fact that the FCTC Guidelines, or relevant parts thereof, would constitute "guidelines", rather than strict "rules", and would thereby entail a certain degree of flexibility, would therefore not, in itself, be an obstacle to their being considered to fall within the scope of this definition, at least with respect of this particular element of the Annex 1.2 definition. The fact that the instrument at issue meets this

¹⁰⁸⁹ These terms are also found in the GPA, a WTO plurilateral agreement, which contains a definition of "standard" almost identical to that in Annex 1.2 to the TBT Agreement. Both the GPA (in fn 4 to Article VI:2(b)), and the Amended GPA (in Article I(s)), contain definitions of "standard" that, with the exception of the additional references to "service(s)", are virtually identical to that in Annex 1.2 to the TBT Agreement. However, to date, these definitions have not been discussed in any dispute involving either the GPA or the Amended GPA. With respect to the relationship between the TBT Agreement and the GPA, see Article 1.4 of the TBT Agreement (stating that, while "[p]urchasing specifications prepared by governmental bodies for production or consumption requirements of governmental bodies" are not subject to the provisions of the TBT Agreement, they are, on the other hand, "addressed in the Agreement on Government Procurement, according to its coverage").

¹⁰⁹⁰ The SPS Agreement contains various references to "international standards, guidelines and recommendations" (emphasis added). This composite term is defined in Annex A(3) to the SPS Agreement, but only with express reference to the types of SPS risks these documents address and the specific international bodies that "establish", "develop" or "promulgate" them. As recently noted by the panel in *Russia – Pigs (EU)*, however, individually, none of these three terms, including "guidelines", have been interpreted and, in any event, the SPS Agreement "does not require a fine distinction between [them] for its proper application." See Panel Report, *Russia – Pigs (EU)*, para. 7.274 fn 413.

¹⁰⁹¹ See, e.g. the reference to "rules" in Article I:1 of GATT 1994 (as used in the phrase: "all rules and formalities in connection with importation and exportation"). (emphasis added)

¹⁰⁹² See, e.g. the reference to "guidelines" in the *chapeau* of Article 14 of the SCM Agreement, requiring that "any method" for calculating the amount of a subsidy in terms of the benefit to the recipient, shall, *inter alia*, "be consistent with the following guidelines: ...". (emphasis added)

¹⁰⁹³ See, e.g. the reference to "guidelines" in Article III:3 of the GATS (as used in the phrase: "new, or any changes to existing, laws, regulations or administrative guidelines which significantly affect trade in services covered by its specific commitments"). (emphasis added)

¹⁰⁹⁴ See, e.g. the reference to "guidelines" in the Customs Valuation Agreement, under Annex I (*Interpretative Notes, General Note, Use of Generally Accepted Accounting Principles*), which defines what "generally accepted accounting principles" means, adding that "[t]hese standards may be broad guidelines of general application as well as detailed practices and procedures." (emphasis added)

¹⁰⁹⁵ Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 187 (emphasis added). In that case, the Appellate Body answered this question in the affirmative on the basis that the measure at issue had "normative value", as it provided administrative guidance and created expectations among the public and among private actors. *Ibid*. According to the Appellate Body, a measure will be considered "as such" when it may be seen as a "rule or norm of general and prospective application" as opposed to "as applied", in which case it will be considered "as an individual instance of the application of a rule or norm". Appellate Body Report, *US – Continued Zeroing*, para. 179. (emphasis added)

¹⁰⁹⁶ Appellate Body Report, *US – Softwood Lumber IV*, para. 92. (footnotes omitted)

¹⁰⁹⁷ Appellate Body Report, *US – Carbon Steel (India)*, para. 4.332. The same interpretation was recalled in Appellate Body Report, *US – Countervailing and Anti-Dumping Measures (China)*, para. 483.

element of the definition is not, however, dispositive for it does not suffice that the "document" be simply one providing "guidelines". As we shall see later, it also must be one that provides guidelines with a certain purpose, i.e. "for common and repeated use". Whatever degree of flexibility the meaning of the term "guidelines" may entail in isolation, it is qualified when seen in the context of the other terms of the Annex 1.2 definition, in particular the phrase "for common and repeated use".

7.339. As described above, the Annex 1.2 definition also identifies the type of subject-matter that needs to be addressed for a document to constitute a "standard".¹⁰⁹⁸ The definition thus encompasses documents that provide "characteristics for products or related processes and production methods". This part of the definition is almost¹⁰⁹⁹ identical to the relevant aspects of the definition of a "technical regulation" in Annex 1.1 to the TBT Agreement.¹¹⁰⁰ In the context of Annex 1.1, the "characteristics" of a product have been understood to include "... any objectively definable 'features', 'qualities', 'attributes', or other 'distinguishing mark' of a product"¹¹⁰¹, including, for instance, a product's "composition, size, shape, colour, texture, hardness, tensile strength, flammability, conductivity, density, or viscosity".¹¹⁰² As discussed earlier, "product characteristics" may "be prescribed or imposed with respect to products in either a positive or a negative form".¹¹⁰³ We see no reason not to understand the term "characteristics for products [or related processes and production methods]" to have the same meaning in the definition of a "standard" in Annex 1.2.

7.340. The second sentence of the definition in Annex 1.2 further clarifies that a standard "may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method". This part of the definition is identical to the second sentence of the definition of "technical regulation" in Annex 1.1.¹¹⁰⁴ In that context, as discussed earlier, these terms have been interpreted with reference to the term "characteristic", as used in the first sentence of the definition.¹¹⁰⁵ As above with respect to the term "characteristics", we see no reason not to apply the same understanding regarding these terms, as used in the definition of "standard" in Annex 1.2.¹¹⁰⁶ As is the case in Annex 1.1, the use of the words "also include" and "deal exclusively with" at the beginning of this sentence further indicates that it includes elements that are additional to, and may be distinct from, those covered by the first sentence.¹¹⁰⁷

¹⁰⁹⁸ As we said above in para. 7.337 above, the disjunctive "or" in the first sentence of Annex 1.2 appears to indicate that a document containing any of these four elements ("rules", "guidelines", "characteristics" or related "PPMs") may be a "standard", provided it also meets the other separate elements of that definition (being "for common and repeated use", "not mandatory", etc.). This means that a document that "provides guidelines" but does not, for instance, do so "for common and repeated use", cannot be a standard.

¹⁰⁹⁹ It is almost identical because, while the Annex 1.1 definition refers to "product characteristics or their related processes and production methods", the Annex 1.2 definition refers to "characteristics for products or related processes and production methods".

¹¹⁰⁰ Annex 1.1 to the TBT Agreement defines "technical regulation" as a "[d]ocument which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method."

¹¹⁰¹ Appellate Body Report, *EC – Asbestos*, para. 67.

¹¹⁰² Appellate Body Report, *EC – Asbestos*, para. 67.

¹¹⁰³ Appellate Body Report, *EC – Asbestos*, para. 69. See also Appellate Body Reports, *EC – Seal Products*, para. 5.11.

¹¹⁰⁴ Appellate Body Report, *US – Tuna II (Mexico)*, para. 187.

¹¹⁰⁵ Appellate Body Report, *EC – Asbestos*, para. 67 ("In the definition of a 'technical regulation' in Annex 1.1, the *TBT Agreement* itself gives certain examples of 'product characteristics' – 'terminology, symbols, packaging, marking or labelling requirements'. These examples indicate that 'product characteristics' include, not only features and qualities intrinsic to the product itself, but also related 'characteristics', such as the means of identification, the presentation and the appearance of a product.").

¹¹⁰⁶ We also recall our observations, at paras. 7.136-7.159 above, with respect to the meaning of this composite term when we assessed whether the TPP measures are technical regulations under the definition in Annex 1.1.

¹¹⁰⁷ See Appellate Body Reports, *EC – Seal Products*, para. 5.14, in relation to the same sentence in Annex 1.1.

Whether the Article 11 and Article 13 FCTC Guidelines contain "rules, guidelines or characteristics" for products

7.341. As we have determined above in relation to the TPP measures, we consider that prescriptions relating to tobacco packaging and labelling requirements relate to product characteristics within the meaning of Annex 1.1 and may also constitute packaging, marking or labelling requirements. Accordingly, to the extent that relevant aspects of the Article 11 and Article 13 FCTC Guidelines would prescribe requirements in relation to tobacco packaging and labelling, they could be considered to similarly prescribe "characteristics for products" within the meaning of the first sentence of the Annex 1.2 definition and relate to "terminology, packaging, marking or labelling requirements" as they apply to such products, within the meaning of the second sentence of the definition in Annex 1.2.

7.342. We also note, however, that different parts of the Article 11 and Article 13 FCTC Guidelines identified by Australia as containing the "relevant international standard" for tobacco plain packaging describe somewhat differently the relevant product characteristics or marking, packaging or labelling requirements that are "recommended" under each set of Guidelines.

7.343. We first note that the scope of "tobacco plain packaging" measures seems narrower, as described in paragraph 46 of the Article 11 FCTC Guidelines, relative to the descriptions in the Article 13 FCTC Guidelines: paragraph 46 of the Article 11 FCTC Guidelines only concerns elements for regulating tobacco "packaging", with no express indication as to whether it also covers features concerning the labelling or appearance of individual tobacco products, such as cigarettes or cigars¹¹⁰⁸, while the Article 13 FCTC Guidelines do contain such references.¹¹⁰⁹

7.344. Secondly, the prohibitive elements relating to "plain packaging" in paragraph 46 of the Article 11 FCTC Guidelines seem to allow a certain degree of flexibility: under this part of the Guidelines, FCTC parties can implement "plain packaging" requirements that either "prohibit" the use of "logos", "colours", "brand images" or "other promotional information" in packaging or, instead, implement packaging requirements that only "restrict" these elements. Additionally, it seems that the permissive plain packaging elements addressed in paragraph 46 of the Article 11 FCTC Guidelines only cover two features: "brand names" and "product names" (these two elements are permitted when "displayed in a standard colour and font style"). No reference is made to other features, such as, for instance, government-mandated information (e.g. health warnings, tax stamps), variant names, package design or package materials. As observed by the complainants, no further guidance is given, for instance, on the choice of colour, font size or font type that should be used, nor on aspects such as the number of times, and where, "brand names" and "product names" may appear in packaging.¹¹¹⁰

7.345. The Article 13 FCTC Guidelines address tobacco "plain packaging" in more detail relative to paragraph 46 of the Article 11 FCTC Guidelines. Tobacco plain packaging measures are expressly addressed and described in two parts of Article 13 FCTC Guidelines: in paragraph 16 and in the "Recommendation" text that follows paragraph 17.¹¹¹¹ When read together, and in light of the information presented to us, including from the WHO and FCTC Secretariat, these texts seem to indicate that "plain packaging" adopted for the purpose of implementing Article 13 of the FCTC

¹¹⁰⁸ Article 11 FCTC Guidelines, FCTC/COP/3(10), (Exhibit JE-20), Annex, para. 46, set out at para. 7.308 above. We recall that the Article 11 FCTC Guidelines aim to assist FCTC parties with implementing Article 11 of the Convention, which addresses misleading information in tobacco packaging and labelling, and also includes certain requirements for the use of health warnings in these products. See also footnote 4 to the Article 13 FCTC Guidelines, set out at para. 7.310 above, which refer to the Article 11 FCTC Guidelines as being those "which address plain packaging with regard to health warnings and misleading information".

¹¹⁰⁹ See, e.g. Article 13 FCTC Guidelines, FCTC/COP/3(12), (Exhibit JE-21), Annex, para. 16 ("There should be no advertising or promotion ... on individual cigarettes or other tobacco products").

¹¹¹⁰ Article 11 FCTC Guidelines, FCTC/COP/3(10), (Exhibit JE-20), Annex, para. 46. Set out at para. 7.308 above.

¹¹¹¹ Set out, respectively, at paras. 7.309 and 7.312 above. As we indicated at fn 1031 above, the text of the "Recommendation" follows, rather than is contained within, the text of paragraph 17 of the Article 13 FCTC Guidelines. We also noted that although the text of paragraph 17 (set out at para. 7.311 above) refers to "plain packaging", it does not *per se* concern plain packaging measures. "Plain packaging" is also referred in footnote 4 to the Article 13 FCTC Guidelines, set out at para. 7.310 above, but only to direct to the Article 11 FCTC Guidelines, "which address plain packaging with regard to health warnings and misleading information".

covers both tobacco "packaging" as well as the appearance of tobacco "products" themselves.¹¹¹² This contrasts with the scope of paragraph 46 of the Article 11 FCTC Guidelines, which, as noted above, seems to only address "packaging" requirements. We note, however, that even here these relatively more detailed plain packaging requirements under the Article 13 FCTC Guidelines mostly concern tobacco "packaging", while relatively fewer specific guidance is given with respect to "features" related to the appearance (or labelling) of tobacco "products" themselves.¹¹¹³ Tobacco plain packaging requirements, as addressed and recommended in the Article 13 FCTC Guidelines, also seem to cover measures providing for certain prohibitive elements that, as compared to those under paragraph 46 of the Article 11 FCTC Guidelines, appear more stringent in that they allow for a lesser degree of flexibility in respect of their implementation. For instance, under the provisions in the Article 13 FCTC Guidelines expressly addressing plain packaging, the use of "logos" must be prohibited ("... without any logos ..."). This suggests that "logos" cannot be simply "restricted", as appears to be possible under paragraph 46 of the Article 11 FCTC Guidelines.¹¹¹⁴

7.346. The Article 13 FCTC Guidelines also appear to include and describe various other features in addition to, and sometimes differently from, those under the Article 11 FCTC Guidelines. For instance, under the Article 13 FCTC Guidelines, plain packaging measures should prohibit¹¹¹⁵ "advertisement and promotion" that appear either "inside or attached" to the tobacco package or "on" individual cigarettes or other tobacco products. The Article 11 FCTC Guidelines, in contrast, refer, more generically, to prohibiting or restricting the "use of ... promotional information on packaging".¹¹¹⁶ Under the Article 13 FCTC Guidelines, plain packaging measures are expressly permitted to, besides "brand and product names", allow certain other information to appear in packaging, such as the "manufacturer's name", "contact details", and "quantity of product". These Guidelines also expressly allow the inclusion of "government-mandated information or markings", such as "health warnings" and "tax stamps". Paragraph 46 of the Article 11 FCTC Guidelines, in contrast, only refers to "brand and product names" as those features expressly permitted in packaging.¹¹¹⁷ Further, the Article 13 FCTC Guidelines give some specific guidance on how packaging appearance should be standardized. For instance, as described in these Guidelines, tobacco packaging should be required to be in "black and white or two other contrasting colours, as prescribed by national authorities" and also in "standardized shape, size and materials". Under paragraph 46 of the Article 11 FCTC Guidelines, in contrast, no guidance is given with respect to the appearance of the packages themselves in terms, for instance, of their size, shape or materials; instead, the Article 11 FCTC Guidelines give general guidance with respect to the

¹¹¹² As indicated at para. 7.310 above, these key "plain packaging" texts of the Article 13 FCTC Guidelines are contained under a heading entitled "*Packaging and product features*".

¹¹¹³ As set out at para. 7.309 above, the text of paragraph 16 of the Article 13 FCTC Guidelines starts with the phrase "[t]he effect of advertising or promotion on *packaging* can be eliminated by requiring plain packaging" (emphasis added). This is then followed by a description of certain packaging requirements (e.g. "black and white or two other contrasting colours, as prescribed by national authorities", "standardized shape, size and materials", etc.). This contrasts with the way requirements for "product features" are addressed in the last sentence of paragraph 16, which simply say, in relevant parts, that "[t]here should be no advertising or promotion ... on individual cigarettes or other tobacco products." The text of the "Recommendation" following paragraph 17 carries similar guidance that tobacco products "should carry no advertisement of promotion", although it further explains that these prohibited aspects "include[e] design features that make products attractive". We note that paragraphs 15 and 17 of the Article 13 FCTC Guidelines, set out, respectively, at paras. 7.314 and 7.311 above, do contain relatively more detailed references to restrictions to tobacco product features for the purpose of regulating tobacco advertisement and promotion. However, as we observed above, these paragraphs, although related, do not prescribe plain packaging requirements *per se*.

¹¹¹⁴ Compare Article 11 FCTC Guidelines, FCTC/COP/3(10), (Exhibit JE-20), Annex, para. 46 with Article 13 FCTC Guidelines, FCTC/COP/3(12), (Exhibit JE-21), Annex, para. 16 and "Recommendation" following para. 17. Paragraph 46 of the Article 11 FCTC Guidelines also refers to the restriction or prohibition of the use of, *inter alia*, "brand images" on packaging, a term not used in the parts of Article 13 FCTC Guidelines expressly addressing plain packaging (although in paragraph 31 and the "Recommendation" text that follows it, which address "depictions of tobacco in entertainment media", FCTC Parties are recommended to, *inter alia*, "prohibit[] the use of identifiable tobacco brands or *imagery*").(emphasis added)

¹¹¹⁵ Article 13 FCTC Guidelines, FCTC/COP/3(12), (Exhibit JE-21), Annex, para. 16, last sentence (" ... there should be no ...").

¹¹¹⁶ Article 11 FCTC Guidelines, FCTC/COP/3(10), (Exhibit JE-20), Annex, para. 46.

¹¹¹⁷ We note however that the second sentence of paragraph 46 of the Article 11 FCTC Guidelines explain that regulating the use of logos, colours, brand images and promotional information on tobacco packaging "may", *inter alia*, "increase the noticeability and effectiveness of health warnings and messages".

appearance of "brand names" and "product names" as they appear in packaging, stating that they should be only "displayed in a standard colour and front style".¹¹¹⁸

7.347. Overall, therefore, the specific parts of the Article 11 FCTC Guidelines and of the Article 13 FCTC Guidelines each describe certain recommended features of "plain packaging" for tobacco products, but do so in different terms and in different levels of detail.

Whether the Article 11 and Article 13 FCTC Guidelines provide rules, guidelines or characteristics "for common and repeated use"

7.348. We now consider, based on the sequence of elements of the definition of "standard" under Annex 1.2 of the TBT Agreement outlined above¹¹¹⁹, whether the relevant "rules, guidelines or characteristics" providing for the plain packaging of tobacco products under the Article 11 and Article 13 FCTC Guidelines are "for common and repeated use" within the meaning of Annex 1.2.

The notion of "common and repeated use" in Annex 1.2

7.349. The parties disagree on the meaning of the phrase "for common and repeated use" in the definition of "standard" in Annex 1.2 and for the purpose of applying the second sentence of Article 2.5 of the TBT Agreement.

7.350. The complainants argue that a "document" would be suitable "for common and repeated use" only when the product requirements it provides for "are sufficiently precise to achieve harmonization by permitting different countries to implement them uniformly".¹¹²⁰ If "documents" were not required to contain such "sufficient degree of precision", this would result in "each Member [being able] to adopt very different technical regulations"¹¹²¹, rendering such documents ill-suited to perform the functions of all standards – in particular international standards, i.e. promoting harmonization, improving efficiency, creating predictability and facilitating trade.¹¹²² For the complainants, such functions are, *inter alia*, reflected in the third, fourth and eighth recitals of the preamble of the TBT Agreement¹¹²³ as well as in certain TBT Committee instruments¹¹²⁴,

¹¹¹⁸ Compare Article 11 FCTC Guidelines, FCTC/COP/3(10), (Exhibit JE-20), Annex, para. 46 with Article 13 FCTC Guidelines, FCTC/COP/3(12), (Exhibit JE-21), Annex, para. 16. The two sets of Guidelines seem to differ slightly in this regard: paragraph 46 of the Article 11 FCTC Guidelines refers to brand names and product names displayed in a "standard colour and font style", while paragraph 16 of the Article 13 FCTC Guidelines refers to the standardization of these elements (along with others, like government-mandated information) in terms of "prescribed font style and size". *Ibid.* (emphasis added).

¹¹¹⁹ See para. 7.281 above.

¹¹²⁰ Honduras's second written submission, paras. 480-481. (emphasis added)

¹¹²¹ Dominican Republic's response to Panel question No. 66, para. 306. See also, e.g. Indonesia's response to Panel question No. 163, para. 21.

¹¹²² Honduras's second written submission, paras. 480-481; Honduras's response to Panel question No. 129, p. 42, and No. 163, pp. 16 and 18; Dominican Republic's second written submission, para. 896; Dominican Republic's response to Panel question No. 66, para. 306; Dominican Republic's second written submission, para. 868; Dominican Republic's response to Panel question No. 150, para. 150; Dominican Republic's comments on Australia's response to Panel question No. 163, para. 34; Cuba's second written submission, para. 182; Cuba's response to Panel question No. 163, p. 9; Indonesia's second written submission, paras. 227-228; Indonesia's response to Panel question No. 163, paras. 18-20; and Indonesia's comments on Australia's response to Panel question No. 163, paras. 37-38.

¹¹²³ Honduras's response to Panel question No. 70, p. 33 fn 145 (also referring to the Appellate Body's statement in *EC – Sardines*, para. 214, that "the TBT Agreement recognizes the important role that international standards play in promoting harmonization and facilitating trade"); Honduras's response to Panel question No. 163, p. 18 fn 97; Dominican Republic's second written submission, para. 895 fn 912; Dominican Republic's response to Panel question No. 66, paras. 297 and 305, and No. 163, para. 149; Cuba's response to Panel question No. 70, p. 16 (annexed to its response to Panel question No. 138) (agreeing with Honduras's response to this question), and No. 163, p. 9 fn 34; and Indonesia's response to Panel question No. 150, para. 10 (quoting the texts of the third and fourth recitals of the preamble of the TBT Agreement).

¹¹²⁴ More specifically, the statement in principle 4 ("Effectiveness and Relevance") of the "Decision of the Committee on Principles for the Development of International Standards, Guides and Recommendations with Relation to Articles 2, 5, and Annex 3 to the TBT Agreement", G/TBT/9, 13 November 2000, para. 20 and Annex 4, (TBT Committee Six Principles Decision), Annex 4, para. 10, that "[i]n order to serve the interests of the WTO membership in *facilitating international trade and preventing unnecessary trade barriers*, international standards need to be relevant and to effectively respond to regulatory and market needs, as well as scientific and technological developments in various countries. They *should not distort the global market, have adverse*

Members' statements before that body¹¹²⁵, and "certain [r]ecognized international standardizing bodies under the WTO Agreement [that] expressly mention trade facilitation in their mandate".¹¹²⁶

7.351. The complainants also consider that requiring standards to be "precise" is important for assessing whether a document is an *international* standard under the second sentence of Article 2.5, so as to avoid conferring a rebuttable presumption of consistency with Article 2.2 to technical regulations internalizing "documents" that could be implemented in different ways, including some that may constitute an unnecessary obstacle to trade.¹¹²⁷

7.352. Honduras and Cuba argue that standards must also be *prescriptive*.¹¹²⁸ In Honduras's view, this means that standards must also be documents the product specifications of which Members are "require[d]", as opposed to simply "suggest[ed]", to include in their measures.¹¹²⁹ Honduras says that there are "important systemic reasons" why "relevant international standards", in particular, must be prescriptive. For instance, according to Honduras, a "finding by a WTO panel that a hortatory instrument constitutes a relevant international standard under Article 2.5 would

effects on fair competition, or stifle innovation and technological development". Dominican Republic's second written submission, para. 858 (emphasis added by the Dominican Republic). Reference was also made to a statement the Committee made in paragraph 20 of the aforementioned document, when it adopted the Decision, that, "in order for international standards to make a maximum contribution to the achievement of the trade facilitating objectives of the [TBT Agreement], it was important that all Members had the opportunity to participate in the elaboration and adoption of international standards". Dominican Republic's second written submission, para. 857. (emphasis added by the Dominican Republic).

¹¹²⁵ Honduras refers to Australia's statement that "[i]t is important for the TBT Committee and international standardizing bodies to cooperate as far as possible in ensuring that international standards contribute to *improving the efficiency of production and facilitate the conduct of international trade*". Honduras's response to Panel question No. 70, p. 33 (emphasis added by Honduras) (quoting Australia's communication to the Committee on Technical Barriers to Trade, G/TBT/W/139, 28 July 2000, para. 8). Honduras further states that "this position [by Australia] was also supported by other WTO Members such as the United States and reflects the common understanding among WTO Members that international standards should be aimed at facilitating trade". Honduras's response to Panel question No. 70, p. 33 (referring to United States' communication to the Committee on Technical Barriers to Trade, G/TBT/W/305, 12 March 2009). See also Dominican Republic's second written submission, para. 859; and Dominican Republic's response to Panel question No. 66, para. 297.

¹¹²⁶ Honduras's response to Panel question No. 70, p. 33 fn 142 (referring to World Organization for Animal Health, "Procedures Used by the OIE to Set Standards and Recommendations for International Trade, with a Focus on the *Terrestrial and Aquatic Animal Health Codes*", (Exhibit HND-161), Introduction). See also Dominican Republic's second written submission, para. 874 fn 885 (observing that the OIE Terrestrial Code aims to allow "*trade in animals and animal products to take place* with an optimal level of sanitary safety *while avoiding unjustified restrictions on trade*", and referring to OIE, How to Use the Terrestrial Code to Set Health Measures for Trade in Terrestrial Animals and Products, (Exhibit DOM-339) (emphasis original)). The Dominican Republic notes, more broadly, that the ISO, Codex, OIE, and International Plant Protection Convention Commission (IPPC) all have "an express mandate to develop international standards, with [] the purpose of promoting international trade through harmonization". Dominican Republic's second written submission, para. 871 (emphasis original). The Dominican Republic provides the passages of the statutes and other similar documents of these bodies where this, or other related purposes, are, in its view, expressly indicated. See Dominican Republic's second written submission, para. 872 (stating the ISO's mandate includes "promot[ing] the development of *standardization* ... in the world ... with a view to *facilitating international exchange of goods and services*" (emphasis original)), para. 873 (noting that Codex is mandated to prepare "a collection of internationally adopted food standards presented in a *uniform form*", the purpose of which is "to promote the standardization of foodstuffs in the various parts of the world, to *facilitate harmonization of standards*, and in so doing to *further the development of the international food trade*" (emphasis original)), para. 874 (noting that the OIE is required to develop standards "to *facilitate safe international trade* in animals and their products" (emphasis original)), and para. 875 (noting the stated objectives of the International Plant Protection Convention (IPPC) include "provid[ing] a framework for the development and application of *harmonized phytosanitary measures* and the *elaboration of international standards to that effect*", while seeking to "minimize interference with international trade" (emphasis original)).

¹¹²⁷ Honduras's response to Panel question No. 163, p. 18 (arguing that, "[a]bsent detailed and specific content for the standard, the alleged standard would not be amenable to 'common and repeated' use and could in fact be implemented in ways that would still constitute an unnecessary obstacle to trade. The presumption established by Article 2.5 thus requires a sufficiently detailed standard"). See also Dominican Republic's response to Panel question No. 66, paras. 316-318; and Indonesia's response to Panel question No. 163, para. 20.

¹¹²⁸ Honduras's second written submission, paras. 482-485 and 493. See also Cuba's opening statement at the second meeting of the Panel, para. 49.

¹¹²⁹ Honduras's second written submission, para. 482.

effectively impose a WTO obligation to implement that instrument even though countries approved such instrument on their understanding that no legal obligations were being created.¹¹³⁰ This, adds Honduras, would be the "combined result" of, on the one hand, finding that an instrument is a relevant international standard under the second sentence of Article 2.5, with, on the other hand, the existing obligation Members also have under Article 2.4 of the TBT Agreement to use such instrument as a basis for their technical regulations.¹¹³¹

7.353. The Dominican Republic adds that the phrase "for common and repeated use" derives from the definition of "standardization", which, in turn, is defined in the ISO/IEC Guide 2: 1991 as the "[a]ctivity of establishing, with regard to actual or potential problems, provisions for *common and repeated use, aimed at achievement of the optimum degree of order in a given context.*"¹¹³² For the Dominican Republic, this means that a standard must set forth "standardized terms of international trade" that are capable of achieving "the optimum degree of order" through harmonization.¹¹³³ It concludes that, accordingly, to allow for "common and repeated use", an instrument must meet a minimum threshold of precision regarding the standardized terms of the national regulation. Loosely defined guidelines or general policy statements that allow for considerable variation in the content of national implementing measures do not meet this requirement.¹¹³⁴

7.354. Australia considers that, properly interpreted, the phrase "for common and repeated use" "does not set forth any minimum threshold of specificity or prescriptiveness"¹¹³⁵ and that the complainants' interpretation has no basis in the texts of either Annex 1.2 or the second sentence of Article 2.5.¹¹³⁶

7.355. With respect to *specificity*, Australia argues that, while the definition of "standard" in Annex 1.2 requires that the "document" provide requirements for "common and repeated use", it also establishes that such "document" can be one "that provide mere 'guidelines' for products and related process and production methods".¹¹³⁷ According to Australia, inherent in the ordinary meaning of the term "guidelines", as used in that definition, is the notion that a standard may allow for a "certain degree of flexibility" in terms of how relevant product characteristic, or related processes and production methods, are prescribed.¹¹³⁸ For Australia, the fact that "precise details

¹¹³⁰ Honduras's second written submission, para. 483.

¹¹³¹ Honduras further explains the implications of this "combined result" as follows:

Countries that participated in the elaboration of any instrument laying down product requirements may have expressed their approval precisely because of the use of hortatory language, which in their view signified that no legal obligations were created concerning the adoption of those product requirements in their national legislation. However, if a WTO panel subsequently finds that this hortatory instrument actually constitutes a "relevant international standard" in terms of Article 2.5, countries that approved that standard would now have a WTO obligation to base their national legislation on that hortatory international instrument. This is because Article 2.4 of the TBT Agreement requires that WTO Members base their technical regulations on international standards whenever they exist. While such countries may have originally understood the hortatory language to mean that no obligations were created, the panel's consideration of this instrument as a "relevant international standard" would, in effect, create a WTO obligation for those countries to adopt those international guidelines.

Honduras's second written submission, para. 484. (footnote omitted)

¹¹³² Dominican Republic's response to Panel question No. 163, para. 148 (referring, in turn, to Australia's reference to this definition in its response to Panel question No. 128, para. 183) (emphasis added by the Dominican Republic).

¹¹³³ Dominican Republic's response to Panel question No. 163, para. 149. See also Dominican Republic's second written submission, paras. 894-895.

¹¹³⁴ Dominican Republic's response to Panel question No. 163, para. 151 (footnote omitted). See also Dominican Republic's second written submission, para. 897 (adding that this means that in "setting a standard, an international standardizing body must, therefore, specify the *salient features* of an appropriate regulation to render the standard suitable for 'for common and repeated use' as a model for countries to adopt on a harmonized basis" (emphasis original)).

¹¹³⁵ Australia's second written submission, para. 323; and Australia's response to Panel question No. 67, para. 165.

¹¹³⁶ Australia's second written submission, paras. 322-323; and Australia's response to Panel question No. 67, para. 165.

¹¹³⁷ Australia's second written submission, para. 323.

¹¹³⁸ Australia's second written submission, para. 323 (referring to the definition of "guideline" as "a standardizing principle" and referencing Shorter Oxford English Dictionary, Vol. 1 AUS Excerpts, Part 2,

of a standard may be prescribed by sovereign states does not mean that guidelines are in any way ill-suited for 'common and repeated use'.¹¹³⁹

7.356. Australia also rejects the view that, in order to be suitable for "common and repeated use", a standard must be also *prescriptive*. For Australia, such a view is "directly contradicted" by another key element in the definition of a "standard": that it should be a document that provides for requirements with which compliance is "not mandatory". Therefore, and consistent with the non-mandatory nature of standards, Australia considers that the existence of "variations in how standards are implemented by States" is something "unremarkable", and, in fact, international standards "routinely allow" for such domestic implementation differences.¹¹⁴⁰

7.357. Australia also does not agree that the definition of "standard" in Annex 1.2 to the TBT Agreement contains a requirement that a "document" be *trade-facilitating* rather than *trade-restrictive*.¹¹⁴¹ Australia explains that international standards under Article 2.5 may pursue the legitimate objectives specified in Article 2.2, and nothing in Article 2.2 suggests that these objectives may only be pursued in a manner that facilitates trade. To the contrary, the Appellate Body expressly recognised, on the basis of the fifth and sixth recitals to the TBT Agreement, that its disciplines do not prevent a WTO Member from pursuing legitimate objectives in a manner that restricts trade.¹¹⁴²

7.358. Australia concludes that, overall, the text of the Annex 1.2 definition indicates that it is only by being flexible, and not strict or prescriptive, that standards can ensure that measures using them are effective and, ultimately, able to attain the objectives enshrined in Article 2.2 of the TBT Agreement.¹¹⁴³

7.359. In support of their respective views, and in response to a question by the Panel, the parties also refer to certain "international standards" adopted by certain international bodies, mostly from the International Organization for Standardization (ISO).¹¹⁴⁴

(Exhibit AUS-539), p. 1174). See also Australia's response to Panel question No. 163, para. 101; and Australia's comments on complainants' responses to Panel question No. 150, para. 32, and No. 163, para. 119.

¹¹³⁹ Australia's response to Panel question No. 163, para. 101. See also Australia's comments on complainants' responses to Panel question No. 163, para. 119.

¹¹⁴⁰ Australia's response to Panel question No. 163, para. 103 (listing as examples certain ISO standards).

¹¹⁴¹ Australia's second written submission, para. 328.

¹¹⁴² Australia's second written submission, para. 329 (referring to the Appellate Body Report, *US – Clove Cigarettes*, para. 95) (emphasis original; footnote omitted). See also Australia's opening statement at the second meeting of the Panel, para. 142 (agreeing that international standards "fulfil an important harmonization function", while also rejecting Dominican Republic's assertion that "international standards that protect human health are 'antithetical' to the objectives of the TBT Agreement") (footnote omitted). See, further, Australia's opening statement at the first meeting of the Panel, para. 97; Australia's response to Panel question No. 128, paras. 192-194; and Australia's comments on complainants' responses to Panel question No. 150, para. 35.

¹¹⁴³ Australia suggests that the fact that standards provide flexibility is not surprising and is indeed desirable if they are to be effective. For example, different cultures may react differently to particular colour combinations of packaging in the same way different cultures may react differently to particular GHWs. Hence prescribing the appearance of either element could in fact decrease, rather than enhance, their effectiveness. Australia's comments on complainants' responses to Panel question No. 163, para. 120.

¹¹⁴⁴ The Dominican Republic considers, in addition, that a "similar level of precision is manifest in the standards emerging from the [Codex Alimentarius Commission]". Dominican Republic's second written submission, para. 896 (referring to Codex List of Standards, (Exhibit DOM-345)).

Honduras refers to ISO International Standard 3394, "Packaging - Complete, Filled Transport Packages and Unit Loads - Dimensions of Rigid Rectangular Packages", ISO 3394:2012(E), (ISO 3394), (Exhibit HND-121). Honduras's response to Panel question No. 129, pp. 43-44 (noting that, as seen in the reproduction of the illustration and table of dimensions that form its content, this standard "sets forth precise dimensions for rigid rectangular transport packages"; and then concluding that this ISO standard is thus one that is "suitable for common and repeated use given the level of precision of its requirements"). See also Honduras's second written submission, para. 503; Honduras's response to Panel question No. 163, p. 17; Dominican Republic's second written submission, para. 896; Dominican Republic's response to Panel question No. 163, para. 151 fn 96; and Cuba's opening statement at the second meeting of the Panel, para. 48.

Australia claims that this ISO standard does not support the complainants' interpretation. Australia argues that ISO standard 3394 is, in fact, an example of a standard that allows for flexibility for its implementation given that it "provides choices as to which of the various packaging sizes to adopt, and

7.360. The Panel observes that the phrase "for common and repeated use" in Annex 1.2 of the TBT Agreement has never been interpreted by the Appellate Body. We therefore begin by discerning the meaning of this composite term with reference to the definitions of its key terms.¹¹⁴⁵

7.361. We first note that the adjectives "common" and "repeated", together ("common and repeated"), qualify the noun "use". The adjective "common" may be defined, *inter alia*, as: "[b]elonging equally to more than one"; "possessed or shared alike by both or all (the persons or things in question)"; "of general application, general".¹¹⁴⁶ The adjective "repeated" may be defined, *inter alia*, as "[d]one again or many times; renewed; frequent".¹¹⁴⁷

7.362. While the separate meanings of the words "for" and "use"¹¹⁴⁸ are relevant, we consider that the meaning most relevant to an interpretation of these terms in the phrase "for common and repeated use" is that of the composite term "for ... use", employed with a "modifying word". In this sense, "for ... use" is defined as something "[i]ntended or designed for a specific purpose". Examples of "for ... use", when employed with a "modifying word" (indicated in italics), include: "for *winter* use"; "for *needful* use"; and "for *recreational* use".¹¹⁴⁹ In the phrase "for common and repeated use", "common and repeated" are the "modifying words" preceding "use" and following "for", denoting the fact that something (in the context of Article 2.5, a document and its content) is intended or designed "for" a specific purpose, that is, "common and repeated use".

7.363. Taken together, these definitions therefore indicate that something can be said to be "for common and repeated use" when it is intended or designed for the specific purpose of being frequently shared alike by all persons or things in question. This provides us with a "useful starting

does not specify every possible variable that one could think of with regard to packaging". Australia's comments on complainants' responses to Panel question No. 163, para. 119. Australia also refers to certain other ISO standards as confirming the opposite view: that the TBT definition, overall, and the term "for common and repeated use", specifically, do not require that documents be precise and prescriptive. Australia refers, in this respect, to the following three standards adopted by the ISO: (1) ISO 6385, (Exhibit AUS-596); (2) ISO 26000, (Exhibit AUS-597); and (3) ISO 14001, (Exhibit AUS-598). See Australia's response to Panel question No. 163, para. 103. These and other ISO standards, according to Australia, confirm that, consistent with their non-mandatory nature, international standards "routinely allow for differences when implemented at the domestic level". Australia's response to Panel question No. 163, para. 103; and comments on complainants' responses to Panel question No. 163, para. 119.

¹¹⁴⁵ We observe that, among the WTO's Multilateral Trade Agreements, this composite term is unique to the TBT Agreement. There is no equivalent term(s) in the SPS Agreement, in particular, from which we could draw any useful contextual interpretative guidance. See, in this respect, Panel Report, *Russia – Pigs (EU)*, para. 7.274 fn 413; and Panel Report, *US – Animals*, para. 7.231 (both observing that Annex A to the SPS Agreement "does not set forth a specific definition of ... 'standards'" ... and that "[n]o panel has yet been faced with determining the meaning of [this] term[] in the context of the SPS Agreement"). We note, on the other hand, that the composite term "for common and repeated use" is present in one of the WTO's *Plurilateral* Trade Agreements: both the GPA (Article VI:2(b), fn 4), and the Amended GPA (Article I(s)), contain definitions for "standard" that, with the exception of the additional references to "service(s)", are virtually identical to that in Annex 1.2 to the TBT Agreement. However, to date, these definitions have not yet been discussed in any dispute involving the GPA.

¹¹⁴⁶ Oxford English Dictionary online, definition of "common, adj.", available at: <<http://www.oed.com/view/Entry/37216?rskey=Us5wII&result=3&isAdvanced=false#eid>>, accessed 2 May 2017. The Dominican Republic also partially quotes this definition to support the view that the word "common" suggests "that a standard must be capable of ensuring that domestic implementing measures have the same or shared characteristics: that is, through their 'sameness', standards must be capable of facilitating common terms of trade". Dominican Republic's comments on Australia's response to Panel question No. 147, para. 34 and fn 54. (footnote omitted)

¹¹⁴⁷ Oxford English Dictionary online, definition of "repeated", available at: <<http://www.oed.com/view/Entry/162715?redirectedFrom=repeated#eid>>, accessed 2 May 2017.

¹¹⁴⁸ See Oxford English Dictionary online, definition of "for, prep. and conj.", available at: <<http://www.oed.com/view/Entry/72761?rskey=j10ehq&result=2&isAdvanced=false#eid>>, definition of "use, n.", <<http://www.oed.com/view/Entry/220635?rskey=AX59R2&result=1&isAdvanced=false#eid>>, both accessed 2 May 2017.

¹¹⁴⁹ Oxford English Dictionary online, definition of "use, n.", "P11. for use", <<http://www.oed.com/view/Entry/220635?redirectedFrom=for+use#eid129699296>>, accessed 2 May 2017. (emphasis added)

point¹¹⁵⁰ for discerning the meaning of the term "for common and repeated use" as used in Annex 1.2 and in light of other relevant context.¹¹⁵¹

7.364. As used in the definition of a "standard" in Annex 1.2, it is the "rules, guidelines or characteristics" or packaging, marking or labelling requirements contained in the "document" at issue that must be intended or designed for "common and repeated use".

7.365. The phrase "for common and repeated use" is consistent with the normative dimension implied by the terms "rules, guidelines or characteristics" discussed in the previous section.¹¹⁵² It suggests that the content of the document at issue must be expressed in such a way as to provide "rules" or "guidelines" or "characteristics" – including labelling or packaging "requirements" – that are intended or designed for the specific purpose of being frequently shared alike by all persons or things in question, i.e. that are "for common and repeated use". At the same time, the fact that compliance must *not* be mandatory makes it clear that the condition that rules, guidelines or characteristics must be "for common and repeated use" does not relate to their legally binding status. Rather, this element of the definition addresses, in our view, the manner in which these rules, guidelines or characteristics (including labelling or packaging requirements) are formulated and the purpose for which they are intended.¹¹⁵³

7.366. In this respect, we agree with the complainants that a degree of precision and "prescriptiveness" may be expected, for the document to be considered to be for "common and repeated use". This understanding is also consistent with the object and purpose of the TBT Agreement in terms of promoting the harmonization of technical regulations, as described above¹¹⁵⁴, which assumes the intention of following certain commonly shared norms or practices. We consider, however, that for the purpose of applying this element of the definition under Annex 1.2, the *precise* degree of specificity of such requirements is a matter to be assessed on a case-by-case basis, depending on the particular context and the nature of the issue being addressed.

7.367. We note in this respect that paragraph "I" of Annex 3 of the TBT Agreement (containing the "Code of Good Practice for the Preparation, Adoption and Application of Standards") states that "[w]herever appropriate, the standardizing body shall specify standards based on product requirements in terms of performance rather than design or descriptive characteristics".¹¹⁵⁵ This

¹¹⁵⁰ As explained by the Appellate Body, while "dictionary definitions are a useful starting point for discerning the ordinary meaning of a treaty term, ... they are not necessarily dispositive", for a "term cannot be interpreted in isolation from the context in which it appears and in the light of the treaty's object and purpose". Appellate Body Report, *India – Additional Import Duties*, para. 167 fn 324 (also referring to Appellate Body Reports, *EC – Chicken Cuts*, para. 175; and *US – Softwood Lumber IV*, para. 59).

¹¹⁵¹ Article 3.2 of the DSU.

¹¹⁵² See para. 7.338 above.

¹¹⁵³ In this regard, we note that the Appellate Body considered that the terms "document" and "lays down product characteristics" and the term "with which compliance is mandatory" (only used for "technical regulation"), taken together, mean that "the scope of [the definition for technical regulation in] Annex 1.1 appears to be limited to those documents that establish or prescribe something and thus have a *certain normative content*." Appellate Body Reports, *EC – Seal Products*, para. 5.10 (emphasis added). We do not believe, however, that this statement contradicts our understanding, at para. 7.338 above, on the normative content as part of the definition of a standard. In this respect, we note again here that the texts of the second sentences of the definitions for "technical regulation" and "standard" in Annexes 1.1 and 1.2, respectively, are identical. This, according to the Appellate Body, *inter alia* means that "[c]ertain features exhibited by a measure may be common to both technical regulations ... and ... standards", including, for instance, that they could both "contain conditions that must be met in order to use a label"; conditions which, in both cases, "could be 'compulsory' or 'binding' and 'enforceable'". Appellate Body Report, *US – Tuna II (Mexico)*, para. 188. We also note, in this respect, that the ISO/IEC Guide 2: 1991, sub-clause 3.1, defines "normative document" as a "[d]ocument that provides rules, guidelines or characteristics for activities or their results". Note 1 to this definition states that "normative document" "is a generic term that covers such documents as *standards, technical specifications, codes of practice and regulations*". (emphasis original)

¹¹⁵⁴ See, e.g. para. 7.271 above.

¹¹⁵⁵ Emphasis added. See also, with respect to technical regulations, Article 2.8 of the TBT Agreement.

suggests that the level of specificity of requirements in standards, and the manner in which the relevant requirements are defined may vary, depending on the circumstances.¹¹⁵⁶

7.368. We also observe that the *Explanatory note* to Annex 1.2 to the TBT Agreement refers to "[s]tandards prepared by the international standardization community". The term "standardization" is present in various provisions of the TBT Agreement, but is not defined in the Agreement.¹¹⁵⁷ The reference to "standardization" in this *Explanatory note* indicates that the meaning of this term may provide additional useful context to the understanding of the term "for common and repeated use". The term "standardization" is defined in the ISO/IEC Guide 2:1991. In accordance with Article 1.2 of the Agreement and the introductory paragraph of Annex 1, the terms presented in the ISO/IEC Guide 2:1991, when used in the TBT Agreement, have the same meaning as given in the said Guide.¹¹⁵⁸ The term "standardization" is defined in this ISO/IEC Guide as:

[T]he "[a]ctivity of establishing, with regard to actual or potential problems, provisions for common and repeated use, aimed at the achievement of the optimum degree of order in a given context".¹¹⁵⁹

7.369. The definition of "standard" in Annex 1.2 to the TBT Agreement, read together with the above definition of "standardization" in the ISO/IEC Guide 2:1991, thus suggests that standardization is the activity that leads to the "establish[ment] ... [of] provisions for common and repeated use", as referred to in Annex 1.2. Relevant "provisions", in this context, should be understood to refer to those concerning, for example, product characteristics or packaging requirements. We note, in this respect, that the Appellate Body has related the term "provisions", as used in this ISO/IEC Guide definition, with elements of the definition of "standard" in Annex 1.2.¹¹⁶⁰ The definition of "standardization" suggests therefore that documents that constitute standards under Annex 1.2 are those providing such product characteristics (or other relevant features) "for common and repeated use" with a particular aim in mind, i.e. "the achievement of the optimum degree of order in a given context".¹¹⁶¹ This definition informs the definition of "standard" by suggesting that the objective of "standardization", and thus of the "provisions for common and repeated use" contained in a "standard", is to "achieve the optimum degree of order in a given context".

¹¹⁵⁶ We also note in this respect the findings of the panel in *US – Clove Cigarettes* concerning the level of "specificity" required of technical regulations for the purposes of applying Article 2.8. See Panel Report, *US – Clove Cigarettes*, paras. 7.468-7.497. See, in particular, paras. 7.473-7.484.

¹¹⁵⁷ The term "standardization" appears alone only once in the Agreement (in Article 1.1); it otherwise appears as part of the following composite terms: "international standardization"; "international standardization activity"; and "standardization activities". See, e.g. preamble, eighth recital; Annex 1.2, "*Explanatory note*"; and Annexes 3.C, 3.G and 3.J. These terms also appear in other WTO Agreements, e.g. the Agreement on Preshipment Inspection, footnote 2 to Article 2.4, as part of the definition of "international standard", quoted at fn 970 above, and the Agreement on Agriculture, Annex 2.2(e), referring to "standardization purposes".

¹¹⁵⁸ See also Appellate Body Reports, *EC – Asbestos*, para. 66; and *US – Tuna II (Mexico)*, para. 184.

¹¹⁵⁹ See sub-clause 1.1 of the ISO/IEC Guide 2: 1991 (emphasis added). See also Appellate Body Report, *US – Tuna II (Mexico)*, para. 360; Australia's response to Panel question No. 128, para. 183; and Dominican Republic's response to Panel question No. 163, para. 148. This definition for "standardization" has been kept unchanged in subsequent versions of this Guide. See, e.g. ISO/IEC Guide 2: 2004 (8th edn), sub-clause 1.1.

¹¹⁶⁰ Appellate Body Report, *US – Tuna II (Mexico)*, para. 360 ("With respect to the 'provisions' that are established through standardization, we recall that the definition of a standard in the *TBT Agreement* refers to a 'document ... that provides ... rules, guidelines or characteristics for products or related processes and production methods' and 'may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method'.").

¹¹⁶¹ Australia observes, in this respect, that the phrase "provisions for common and repeated use", also used in the definition of "standardization" in the ISO/IEC Guide 2: 1991, sub-clause 1.1, "is mirrored in the TBT Agreement as a 'document ... that provides ... rules, guidelines or characteristics for products or related processes and production methods'". Australia's response to Panel question No. 128, para. 184. Australia then, relying on the elements of the definition for "standard" in the ISO/IEC Guide 2: 1991, sub-clause 3.2, claims that the Article 11 and Article 13 FCTC Guidelines "are intended for common and repeated use by Parties to the FCTC, so that an optimum degree of order may be achieved in the implementation of the FCTC across all Parties". Ibid. para. 185.

7.370. Based on the above, we conclude that, for the purposes of the definition of "standard" in Annex 1.2 of the TBT Agreement, a document provides product characteristics (or other relevant features, such as packaging requirements) "for common and repeated use" when these are designed for the specific purpose of being frequently shared alike by all persons or things in question, with the aim of achieving the optimum degree of order in a given context. The need for the characteristics at issue to be amenable "for common and repeated use" further suggests that they need to possess a degree of clarity and precision sufficient to allow them to be implemented in a consistent and predictable manner, as documents lacking these attributes are unlikely to achieve the optimum degree of order required to address the "actual or potential problem" giving rise to them. At the same time, as clarified above¹¹⁶², the exact degree of specificity needed for such requirements to be "for common and repeated use" can only be assessed on a case-by-case basis, depending on the type of "problem" addressed by the document claimed to be a standard, and the "context" under which this problem arises.

7.371. With these clarifications in mind, we now examine whether, as claimed by Australia, any product characteristics or labelling, marking and packaging requirements provided by the Article 11 and Article 13 FCTC Guidelines in respect of tobacco plain packaging are "for common and repeated use" within the meaning of the definition in Annex 1.2 of the TBT Agreement.

Whether the product characteristics provided in the Article 11 and Article 13 FCTC Guidelines in respect of tobacco plain packaging are "for common and repeated use"

Main arguments of the parties

7.372. The complainants argue that the Article 11 and Article 13 FCTC Guidelines are not suitable "for common and repeated use" because, as mere hortatory general policy statements¹¹⁶³ developed as guidance on the implementation of a treaty (the FCTC)¹¹⁶⁴, they do not provide for tobacco plain packaging requirements that are sufficiently *specific* and *prescriptive* as required by the TBT Agreement¹¹⁶⁵ and cannot be uniformly transposed by Members into their technical regulations addressing tobacco products and their packaging.¹¹⁶⁶ The complainants consider that the Article 11 and Article 13 FCTC Guidelines may result in countries implementing plain packaging

¹¹⁶² See para. 7.366 above.

¹¹⁶³ See, e.g. Honduras's response to Panel question No. 66, p. 29 (stating that these instruments are not "sufficiently prescriptive" as they "incorporate[] non-binding guidelines that contain only hortatory references to plain packaging"). See also Indonesia's response to Panel question No. 67, para. 92 (submitting that these two FCTC Guidelines only possess "vague references to a general regulatory approach"). They point out, in particular, that such hortatory nature stems from the Guidelines' own terms, given that in both texts tobacco plain packaging is simply described as a measure that FCTC Parties "should consider adopting". See, e.g. Honduras's second written submission, paras. 22 and 499; Cuba's opening statement at the second meeting of the Panel, para. 49; and Indonesia's second written submission, para. 226.

¹¹⁶⁴ See, e.g. Dominican Republic's comments on Australia's response to Panel question No. 163, para. 43 (arguing that the Article 11 and Article 13 FCTC Guidelines were "designed as a policy recommendation for implementing a particular obligation under the FCTC" and were not therefore "intended to lay down specific guidance for common and repeated use by legislators on how to standardize the features of tobacco products, once design features were removed"; and then concluding that, while the flexibility these instruments conferred to each FCTC Party to implement plain packaging differently "is in keeping with the *raison d'être* of guidance on the implementation of a treaty, it is not in keeping with the *raison d'être* of an *international standard* to promote harmonization and facilitate common terms of trade." (emphasis original)). See also Dominican Republic's second written submission, paras. 901-902.

¹¹⁶⁵ See, e.g. Honduras's second written submission, para. 498 (accepting that these Guidelines "provide certain general parameters" for tobacco plain packaging, but nonetheless also arguing "they do not achieve the level of precision necessary for parties to implement them in a uniform fashion"); and Dominican Republic's response to Panel question No. 66, para. 319 (stating that, while these Guidelines suggest that countries "use two contrasting colours on packaging", "prescribe font size and style of the brand name" and "standardize the shape, size and materials", the "detailed choices for the content of plain packaging measures is not specified" as those choices are left to "national authorities", which, therefore, means that these instruments "lack the necessary precision to create the presumption under Article 2.5").

¹¹⁶⁶ See, e.g. Honduras's response to Panel question No. 70, p. 33 (submitting that these FCTC instruments lack the necessary "technical content"). See also Dominican Republic's response to Panel question No. 150, fn 44 (considering that Article 2.9 of the TBT Agreement confirms the view that "a measure that lacks any 'technical content' – like the generally worded recommendation to consider 'plain packaging' in the Guidelines – cannot be an 'international standard'").

specifications in different ways¹¹⁶⁷, so that they cannot perform the core functions of standards, namely¹¹⁶⁸ promoting harmonization, improving efficiency of production, and facilitating international trade.¹¹⁶⁹

7.373. The complainants identify certain elements in the texts of the Article 11 FCTC Guidelines and Article 13 FCTC Guidelines illustrating a lack of precision making them unsuitable "for common and repeated use".¹¹⁷⁰ They also point out that nowhere in the Article 11 and Article 13 FCTC Guidelines is it recommended that plain packaging measures should fully prohibit the display of brand names or variant names in tobacco products themselves, including in individual cigarettes or cigar sticks.¹¹⁷¹

7.374. The complainants also consider that other provisions identified as relevant by Australia, addressing "inserts and onserts", "adhesive labels" and the "importance of packaging" – are "even less detailed" than the provisions of the Guidelines expressly addressing "plain packaging". While acknowledging that the texts of these other paragraphs of the Article 11 and Article 13 FCTC Guidelines provide "general useful suggestions", the complainants describe them as only being "broad recommendations on ways to improve the visibility of health warnings". Consequently, as

¹¹⁶⁷ See, e.g. Dominican Republic's response to Panel question No. 66, para. 308 (arguing that the fact that the Article 11 and Article 13 FCTC Guidelines are just policy statements rather than standards, "is borne out by the fact that 100 Members could follow the policy statements by adopting 100 very different packaging requirements, which would not enhance efficiency or facilitate trade") (emphasis original). See also, e.g. Dominican Republic's response to Panel question No. 163, para. 154; Honduras's response to Panel question No. 129, p. 42; Cuba's response to Panel question No. 163, p. 9; Indonesia's second written submission, paras. 227-228 (referring to Nicaragua's third-party submission); Indonesia's response to Panel question No. 163, para. 21; and Indonesia's comments on Australia's response to Panel question No. 163, para. 39.

¹¹⁶⁸ See, e.g. Honduras's second written submission, paras. 493-507; Honduras's response to Panel question No. 70, p. 33; Dominican Republic's second written submission, paras. 894-902; Dominican Republic's response to Panel question No. 163, para. 154; Cuba's second written submission, paras. 182-188; Cuba's response to Panel question No. 70, p. 33 (agreeing with Honduras's response to the same question); Indonesia's second written submission, paras. 226-228; and Indonesia's response to Panel question No. 136, para. 10.

¹¹⁶⁹ The complainants observe, in particular, that the ultimate purpose of the Article 11 and Article 13 FCTC Guidelines is to eliminate the tobacco trade. This, they claim, provides further confirmation that these instruments are not intended, as documents "for common and repeated use" should, to facilitate international trade, but rather to restrict it. See, e.g. Honduras's response to Panel question No. 70, p. 33; Dominican Republic's response to Panel question No. 66, para. 307; and Cuba's response to Panel question No. 70, p. 33 (annexed to its response to Panel question No. 138) (agreeing with Honduras's response to the same question).

¹¹⁷⁰ Regarding the plain packaging elements in paragraph 46 of the Article 11 FCTC Guidelines, the complainants claim that the Guidelines give "no details on how Parties should implement plain packaging": Should regulators "restrict" the use of logos, colours, brand images or promotional information, or "prohibit" their use? Should regulators restrict or prohibit the use of logos, colours, brand images and promotional information, or only one of the four categories of brand identifiers? Should regulators actually "restrict or prohibit" the use of these logos, colours, brand images or promotional information, or only "consider" doing so? See Honduras's second written submission, para. 498. See also, e.g. Cuba's second written submission, paras. 183-185; and Indonesia's second written submission, para. 258. The complainants consider that the tobacco plain packaging elements in the text of paragraph 16 of the Article 13 FCTC Guidelines also "lack the necessary level of precision to allow parties to use them commonly and repeatedly". This is so, they argue, because countries wishing to internalize them must first decide details such as: (i) what colours to adopt; (ii) what font and size to require, and (iii) in what shape, size and materials must packs be manufactured. Honduras's second written submission, paras. 500-501 (also arguing that it was Australia's "own interpretation" of what "plain packaging" means, when it "chose to require that packs must have a background in drab dark brown (colour Pantone 448C), that the brand name must be displayed in Lucida Sans no larger than 14 points in size, and that packs may only be made of cardboard"). See also, e.g. Honduras's response to Panel question No. 129, pp. 42-44; and Cuba's second written submission, paras. 182-186.

¹¹⁷¹ Dominican Republic's second written submission, para. 910; Dominican Republic's response to Panel question No. 136, paras. 39-43; Indonesia's second written submission, paras. 257-258; and Indonesia's response to Panel question No. 136, para. 4 (noting that, while paragraph 16 and the "Recommendation" following paragraph 17 state that there should be no advertising or promotion on *individual cigarettes or other tobacco products (including cigar sticks)*, they do not recommend prohibiting the appearance of any mark at all, such as the brand name, on individual cigarette sticks). See also Indonesia's response to Panel question No. 136, para. 4 (noting that the TPP measures, while "permit[ing] the brand, company or business name and variant name to appear on a cigar, they do not allow for any marks, other than an alphanumeric code, to appear on individual cigarette sticks").

these paragraphs "do not stipulate precise product characteristics that are capable of being implemented in a common and repeated manner by authorities of different countries", they do not qualify as "standards" for purposes of the TBT Agreement.¹¹⁷²

7.375. The complainants further argue that, even seen in combination, the plain packaging elements contained in the Article 11 and Article 13 FCTC Guidelines still lack precision. In this respect, the Dominican Republic argues that for packaging requirements, the Guidelines do not specify standardized terms in respect of the type face, font colour, and font size for the brand and variant name; the background colour of the packaging; the location of the brand and variant name on the packaging; the size or shape of the packaging; the type of opening mechanism; and, the materials to be used (e.g. hard or soft pack). For individual cigars, the Guidelines lack specificity in terms of the type face, font colour and font size for the brand, variant and country name; and the background colour of the cigar band. National regulators are consequently left with considerable discretion to decide on these key features of a plain packaging measure.¹¹⁷³

7.376. Finally, the complainants compare the "general terms" of the Article 11 and Article 13 FCTC Guidelines' texts identified by Australia as addressing "plain packaging", against the "detailed" terms of two standards they consider as "documents" containing product requirements "for common and repeated use"¹¹⁷⁴: an ISO standard, setting forth precise dimensions for rigid rectangular transport packages¹¹⁷⁵, and a Codex Alimentarius Commission (Codex) standard on the description of sardines and sardine-type products.¹¹⁷⁶

7.377. Australia argues that the Article 11 and Article 13 FCTC Guidelines' tobacco plain packaging requirements are provided "for common and repeated use". Even assuming that minimum thresholds of specificity or prescriptiveness¹¹⁷⁷ would be relevant for that definition, Australia considers that the Article 11 and Article 13 FCTC Guidelines are, in any event, "sufficiently precise" and, consequently, suitable "for common and repeated use". This, in Australia's view, is attested by the fact that these Guidelines are already being used as such by other Members as a basis for their own tobacco plain packaging measures.¹¹⁷⁸ In this respect, Australia contends that, "consistent with the aims of enhancing the effectiveness of graphic health warnings and eliminating the effects of advertising and promotion on packaging", the key paragraphs of the Article 11 and Article 13 FCTC Guidelines "explicitly", "clearly" and "unequivocally" provide direction on the key permissive and prohibitive tobacco packaging and product requirements that any plain packaging measure should contain, including with respect to

¹¹⁷² Honduras's second written submission, para. 502 (also finding support to this view in the text of paragraph 15 of the Article 13 FCTC Guidelines, where it says that "[p]ackaging is an important element of advertising and promotion" and that "[t]obacco pack or product features are used in various ways to attract consumers [...]"; and then stating that "[i]t is hard to see how this type of policy statement can be regarded as a 'standard' for purposes of the TBT Agreement."). See also Cuba's second written submission, paras. 186-187.

¹¹⁷³ Dominican Republic's response to Panel question No. 163, para. 153 (noting, in fn 97, with respect to the "background colour of the packaging", that the Article 13 FCTC Guidelines refer to "black and white or two other contrasting colours, as prescribed by national authorities"). See also Dominican Republic's second written submission, para. 899.

¹¹⁷⁴ See, e.g. Honduras's second written submission, para. 503; Honduras's response to Panel question No. 70, p. 33; Honduras's response to Panel question No. 129, p. 42; Dominican Republic's second written submission, para. 896; and Cuba's opening statement at the second meeting of the Panel, paras. 48-49.

¹¹⁷⁵ ISO 3394, (Exhibit HND-121), referenced at fn 1144 above. Honduras also refers to the three other ISO standards Australia submitted as evidence that standards need not be specific. Honduras notes that each of these documents cover "from 20 to more than a 100 pages", and then claims that this stands in "sharp[] contrast with the one paragraph hidden in the FCTC Guidelines to Articles 11 and 13 that generally refers to 'plain packaging' without providing any further guidance or definitions to determine the parameters of this non-standard that does not allow for 'common' and repeated use". Honduras's comments on Australia's response to Panel question No. 163, para. 51. See also *ibid.* paras. 48-50.

¹¹⁷⁶ Codex Stan 94, referenced at fn 1006 above. See Honduras's response to Panel question No. 70, p. 33 (recalling that in *EC – Sardines*, the Appellate Body and the panel held that Codex Stan 94 constituted a "relevant international standard" for the purposes of Article 2.4 of the TBT Agreement; and also noting that this Codex standard "is six pages long [and] contains, *inter alia*, a detailed description of the product to which it applies, including its essential composition, quality factors and permissible food additives, and concrete specifications for labelling").

¹¹⁷⁷ Australia's second written submission, para. 323. See also Australia's response to Panel question No. 163, para. 102.

¹¹⁷⁸ Australia's response to Panel question No. 163, paras. 101-104. See also, e.g. Australia's first written submission, para. 573; and Australia's second written submission, para. 324.

the restriction or prohibition of the use of logos, colours, brand images or promotional information on packaging or on individual tobacco products, and with respect to permitting, *inter alia*, the use of brand names, product and/or manufacturer names, and certain government-mandated information. Australia also notes, in this regard, that these key provisions of the Article 11 and Article 13 FCTC Guidelines "specify in detail", *inter alia*, the following elements: (i) the *colours* ("black and white or two other contrasting colours"¹¹⁷⁹); (ii) the *content of a pack* ("nothing other than a brand name, a product name and/or manufacturer's name, contact details and the quantity of product in the packaging, without any logos other features apart from health warnings, tax stamps and other government-mandated information or markings"¹¹⁸⁰); (iii) the *font* (a "prescribed font style and size"¹¹⁸¹); and (iv) the *format* ("standardized shape, size and materials"¹¹⁸²).¹¹⁸³

7.378. Australia also rejects the argument that the Article 11 and Article 13 FCTC Guidelines do not include requirements prohibiting the display of brand names on individual cigarettes or cigars. Australia first notes that the Article 13 FCTC Guidelines recognise that "[p]romotional effects, both direct and indirect, may be brought about by the use of words, designs, images, sounds and colours, including brand names, trademarks, logos, names of tobacco manufacturers or importers, and colours or schemes of colours associated with tobacco products, manufacturers or importers, or by the use of a part or parts of words, designs, images and colours."¹¹⁸⁴ Australia also claims that, contrary to the complainants' assertions, the Article 13 FCTC Guidelines "specifically refer to packaging and product features, including individual cigarettes and other tobacco products".¹¹⁸⁵

7.379. Australia does not agree that the Article 11 and Article 13 FCTC Guidelines cannot be considered as being intended "for common and repeated use" because they are designed to limit, rather than facilitate, international trade. Australia argues that "there is no conflict between the trade liberalization goals of the WTO Agreements and the public health objectives of the [FCTC]. Trade and public health can and should be mutually supportive."¹¹⁸⁶

¹¹⁷⁹ Paragraph 16 of the Article 13 FCTC Guidelines.

¹¹⁸⁰ Paragraph 16 of the Article 13 FCTC Guidelines. Australia also refers to paragraph 46 of the Article 11 FCTC Guidelines. Australia's response to Panel question No. 135, para. 26.

¹¹⁸¹ Paragraph 16 of the Article 13 FCTC Guidelines.

¹¹⁸² Paragraph 16 of the Article 13 FCTC Guidelines. Australia notes that paragraphs 15 and 16 of the Article 13 FCTC Guidelines specifically refer to "materials on or in packs" as well as "advertising or promotion inside or attached to the package", and include within their scope "promotional packaging and product design features". Australia's response to Panel question No. 135, para. 29.

¹¹⁸³ Australia's second written submission, paras. 324-325; Australia's response to Panel question No. 135, paras. 21-32; Australia's response to Panel question No. 163, para. 102; and Australia's comments on complainants' responses to Panel question No. 163, paras. 114-116. Australia also makes references to the parallel plain packaging elements in paragraph 46 of the Article 11 FCTC Guidelines, "... measures to restrict or prohibit the use of logos, colours, brand images or promotional information on packaging *other than brand names and product names displayed in a standard colour and font style (plain packaging)* ...". Australia's response to Panel question No. 135, para. 26 (emphasis original). Australia also notes, referring to the text of its paragraph 10, that the Article 11 FCTC Guidelines "specifically require [FCTC] Parties to ensure that health warnings and messages are not obstructed by other required packaging and labelling markings or by commercial inserts and onserts". Australia also recalls that paragraph 46 of the Article 11 FCTC Guidelines recommends FCTC Parties to "consider adopting" plain packaging because it is a measure that "may increase the noticeability and effectiveness of health warnings and messages, prevent the package from detracting attention from them, and address industry package design techniques that may suggest that some products are less harmful than others." Australia's response to Panel question No. 135, para. 29.

¹¹⁸⁴ Australia's response to Panel question No. 135, para. 23 (quoting part of the text of paragraph 9 of the Article 13 FCTC Guidelines).

¹¹⁸⁵ Australia's response to Panel question No. 135, para. 24 (quoting, in particular, certain parts of paragraph 15, and the "*Recommendation*" following paragraph 17, of the Article 13 FCTC Guidelines, in which references are made to tobacco products, including "individual cigarettes"). Australia says that this therefore also means that the TPP measures' respective regulations on the use and appearance of brand names on individual cigarettes (prohibited) and on cigar sticks (restricted) are "in accordance with" the relevant parts of the Article 13 FCTC Guidelines addressing plain packaging measures with respect to the appearance of tobacco products. Australia's response to Panel question No. 135, paras. 27-28 (quoting the "*Recommendation*" following paragraph 17 and paragraph 15 of the Article 13 FCTC Guidelines, in which references are made to tobacco products, including "individual cigarettes").

¹¹⁸⁶ Australia's opening statement at the first meeting of the Panel, para. 97. See also Australia's second written submission, paras. 328-329 (arguing that the definition of "standard" in Annex 1.2 does not contain

7.380. The parties also refer in this context, to certain similarities or differences in the manner in which tobacco plain packaging requirements have been implemented in the TPP measures and in adopted or draft tobacco control legislation from other Members.¹¹⁸⁷ The parties submitted and discuss evidence relating to measures adopted or drafted by Ireland¹¹⁸⁸, the United Kingdom¹¹⁸⁹, France¹¹⁹⁰, Hungary¹¹⁹¹, New Zealand¹¹⁹² and Norway.¹¹⁹³

7.381. The complainants argue that the different ways in which the TPP measures and measures from other Members implemented tobacco plain packaging requirements domestically are evidence that the Article 11 and Article 13 FCTC Guidelines are not amenable "for common and repeated use".¹¹⁹⁴

7.382. Australia contends that significant similarities exist between the plain packaging requirements in the TPP measures and those in measures from other Members¹¹⁹⁵ and that these

any reference to such attributes); opening statement at the second meeting of the Panel, para. 142; response to Panel question No. 128, paras. 192-194; and comments on complainants' responses to Panel question No. 150, para. 35.

¹¹⁸⁷ Although in another context in these proceedings, Australia also made reference to a 2015 news report informing that Chile's Senate had approved a Bill introducing tobacco plain packaging, and that the Bill was awaiting "clearance in the lower house". Australia's second written submission, para. 245 fn 256 (referring to Packaging Business Review, Chile Proposes Plain Packaging for Cigarettes, (Exhibit AUS-554)).

¹¹⁸⁸ Ireland, Public Health (Standardized Packaging of Tobacco) Act 2015, (Exhibits AUS-612, CUB-94). See also the following evidence related to the legislative history of the 2015 Act: Ireland, Public Health (Standardized Packaging of Tobacco) Bill 2014 (Exhibit HND-167); Ireland House of the Oireachtas, Report, (Exhibit AUS-550); and D. Hammond, "Standardized Packaging of Tobacco Products: Evidence Review, Prepared on Behalf of the Irish Department of Health", March 2014, (Hammond Review), (Exhibit AUS-555). Ireland's *Public Health (Standardized Packaging of Tobacco) Bill 2014* was notified to the TBT Committee in June 2014 in document G/TBT/N/IRL/1. See, e.g. Honduras's comments on Australia's response to Panel questions, Introduction, para. 17 fn 1.

¹¹⁸⁹ United Kingdom, The Standardised Packaging of Tobacco Products Regulations 2015, (Exhibit AUS-613). The text of this measure is also indicated by the Dominican Republic. Dominican Republic's comments on Australia's response to Panel question No. 147, para. 42 fn 63. See also the following evidence related to the legislative history of this measure: "Standardised Packaging of Tobacco: Report of the Independent Review Undertaken by Sir Cyril Chantler", April 2014, (Chantler Report), (Exhibits AUS-81, CUB-61); and Statement of J. Ellison, UK Under-Secretary of State for Public Health, on publication of Chantler Report, (Exhibit AUS-551). The UK's draft "Standardised Packaging of Tobacco Products Regulations" was notified to the TBT Committee in September 2014 in document G/TBT/N/GBR/24. See, e.g. Honduras's comments on Australia's response to Panel questions, Introduction, para. 17 fn 1.

¹¹⁹⁰ See France, LOI n° 2016-41 du 26 janvier 2016 de Modernisation de Notre Système de Santé, Article 27, (Exhibit AUS-614); and Draft Decree, Neutrality and Standardisation for the Packaging of Cigarettes and Rolling Tobacco, (Exhibit AUS-615). This Draft Decree was notified to the TBT Committee on June 2015 in document G/TBT/N/FRA/163, submitted by Australia as Exhibit AUS-552. See also Honduras's comments on Australia's response to Panel questions, Introduction, para. 17 fn 1; and Dominican Republic's comments on Australia's response to Panel question No. 147, para. 42 fn 63.

¹¹⁹¹ Hungary, Draft Amendment to Government Decree 39/2013, (Exhibit AUS-616). This Draft Amendment was notified to the TBT Committee on December 2015 in document G/TBT/N/HUN/31. See, e.g. Honduras's comments on Australia's response to Panel questions, Introduction, para. 17 fn 1; and Dominican Republic's comments on Australia's response to Panel question No. 147, para. 42 fn 63.

¹¹⁹² New Zealand, Smoke-free Environments (Tobacco Plain Packaging) Amendment Bill (2014), (Exhibit AUS-617). See also Consultation Paper, New Zealand Ministry of Health, (Exhibit AUS-549). This Bill was notified to the TBT Committee on February 2014 in document G/TBT/N/NZL/62/Add.1. See, e.g. Indonesia's second written submission, para. 226 fn 338. The consultation document preceding the introduction of this Bill was notified to the TBT Committee in July 2012 in document G/TBT/N/NZL/62. See, e.g. Honduras's comments on Australia's response to Panel questions, Introduction, para. 17 fn 1.

¹¹⁹³ Norway, Draft Amendments, (Exhibit AUS-618). See also Norway Standardised Tobacco Packaging Consultation Paper, (Exhibit AUS-553). The draft amendments were notified to the TBT Committee in May 2015 in document G/TBT/N/NOR/23. See, e.g. Honduras's comments on Australia's response to Panel questions, Introduction, para. 17 fn 1; and Dominican Republic's comments on Australia's response to Panel question No. 147, para. 42 fn 63.

¹¹⁹⁴ See, e.g. Honduras's response to Panel question No. 163, pp. 17-18; Dominican Republic's comments on Australia's response to Panel question No. 163, paras. 41-43 and fn 63; Cuba's response to Panel question No. 163, p. 9; and Indonesia's second written submission, paras. 226-227 and fn 338.

¹¹⁹⁵ Australia's comments on complainants' responses to Panel question No. 163, para. 118 and fns 208-212 (describing in detail the specific provisions of these other tobacco plain packaging measures where such equivalent requirements are contained). With respect, in particular, to the Irish plain packaging legislation, Australia lists the following additional requirements as similar to those under the TPP measures: (i) prohibition to use in packaging of mark or trademark other than brand name or company name, and a

examples demonstrate that the "permissive and prohibitive elements of the FCTC Guidelines are sufficiently clearly expressed so as to allow for common and repeated use by countries in designing their own tobacco plain packaging measures".¹¹⁹⁶

7.383. The parties also discuss the relevance of the fact that Australia and other Members notified their TPP measures to the TBT Committee to the characterization of the Article 11 and Article 13 FCTC Guidelines as a "standard". The complainants point to the fact that these notifications have been made under Article 2.9.2 of the TBT Agreement, which requires notifications to be submitted only when a relevant international standard "does not exist".¹¹⁹⁷ Australia considers that the Panel "should afford no probative value" to its notification of the TPP measures to the TBT Committee since this notification was made in accordance with its practice "maintaining a high level of transparency in fulfilling obligations under the TBT Agreement".¹¹⁹⁸

Analysis by the Panel

7.384. As we have concluded above¹¹⁹⁹, a document may be considered to provide product characteristics and other relevant requirements "for common and repeated use", for the purposes of the definition of "standard" in Annex 1.2, if these characteristics or requirements were designed and intended for the specific purpose of being frequently shared alike by all persons or things in question, with the aim of achieving the optimum degree of order in a given context. We further found that, to fulfil such function, a degree of clarity and specificity sufficient to enable consistent and predictable implementation is required.¹²⁰⁰ This is particularly important where what it is being assessed is the existence of an "international standard"¹²⁰¹, given that "documents" not possessing sufficient specificity and clarity are unlikely to achieve the intended "optimum degree of order" necessary to address the "actual or potential problem" giving rise to these documents, and thereby contribute to the objective of harmonization on the basis of such international standards.

7.385. In this instance, as discussed above, those aspects of the Article 11 and Article 13 FCTC Guidelines that directly address tobacco plain packaging do not do so in a single location or in an uniform way; instead, tobacco "plain packaging" is addressed and described in paragraph 46 of the Article 11 FCTC Guidelines, on the one hand, and in paragraph 16 as well as in the "Recommendation" following paragraph 17 of the Article 13 FCTC Guidelines, on the other hand. Each of these Guidelines formulates the relevant plain packaging recommendation in terms that are related to the terms of the specific treaty obligation the implementation of which by FCTC Parties they intend to support.

variant name; (ii) prescribed colour and shape for cigarette packages; (iii) health warnings and other government mandated information permitted in standardized form; and (iv) standardized appearance of cigarettes. Australia's comments on complainants' responses to Panel question No. 163, para. 117. See also Australia's second written submission, para. 245; and Australia's response to Panel question No. 164, para. 104.

¹¹⁹⁶ Australia's comments on complainants' responses to Panel question No. 163, paras. 113 and 116. See also Australia's second written submission, para. 327 (arguing that the number of other Members considering tobacco plain packaging measures "fall[ing] within the parameters specified in the FCTC Guidelines" is evidence demonstrating that just because these instruments leave "details such as the exact colour and size ... to be prescribed by national authorities", this does not render them instruments ill-suited "for common and repeated use").

¹¹⁹⁷ See, e.g. Honduras's second written submission, paras. 516-517; Dominican Republic's second written submission, para. 845 and fns 859-860; Cuba's second written submission, paras. 160 and 167; and Indonesia's response to Panel question No. 70, paras. 98-99.

¹¹⁹⁸ Australia's response to Panel question No. 127, paras. 178-180 (also stating that if the Panel would "attribute dispositive value" to this notification to the issue of whether an international standard exists, this "would seriously undermine the core transparency obligations of the TBT Agreement, which are self-reporting").

¹¹⁹⁹ See para. 7.370 above.

¹²⁰⁰ We also said, however, that what the *precise* degree of specificity for such requirements should be can only be assessed in a case-by-case basis, depending on the type of "problem" addressed by the document claimed to be a standard, and the "context" under which this problem arises. See para. 7.370 above.

¹²⁰¹ And this is further more so when the task of considering the existence of an "international standard" is for the purpose of the second sentence of Article 2.5 of the TBT Agreement, which confers a "*privilege*" in the form of a rebuttable presumption of conformity with a treaty obligation (Article 2.2). See paras. 7.272 and 7.275 above.

7.386. We have discussed above¹²⁰² the different ways in which the Article 11 and Article 13 FCTC Guidelines address, and make recommendations in respect of, plain packaging of tobacco products. In this context, we observed that relevant parts of the Article 11 FCTC Guidelines and Article 13 FCTC Guidelines each describe certain recommended features of "plain packaging", or more generally, of tobacco packaging, but do so in different terms and in different levels of detail.¹²⁰³ These differences (including in scope, stringency of requirements, etc.) suggest that FCTC parties intending to devise tobacco "plain packaging" measures "in accordance with" one or the other set of Guidelines would have a range of options available to them, with respect in particular to the regulation in packaging and/or products themselves of "brand name", "brand imagery", "logos" etc. For instance, two Members may implement plain packaging measures that are both significantly different in terms of their packaging specifications, and may yet be equally consistent with the guidance provided under paragraph 46 of the Article 11 FCTC Guidelines. A party could decide to only "restrict" the use of "logos" and "brand images" in all tobacco packaging by determining that they only appear in one specific size and in one specific face of the package ("brand names" and "product names" would be, however, fully allowed on the packs, provided they are displayed in "standard colour and font style"), or, it could instead, go further and "prohibit" the use of any "logos" and "brand images" in all tobacco packaging (only allowing the use of "brand names" and "product names" provided they are displayed in "standard colour and font style").¹²⁰⁴

7.387. We recall our earlier observation that the specific elements of the Article 11 and Article 13 FCTC Guidelines that Australia has identified as constituting an international standard for tobacco plain packaging are part of the legal framework established under the FCTC, whereby FCTC Parties commit to implement a wide range of interconnected effective tobacco control measures. Against this context, the Article 11 and Article 13 FCTC Guidelines, by their own terms, may be understood as recommending "plain packaging" differently¹²⁰⁵ because they intend this measure solely to serve as a means of assisting FCTC Parties in the implementation of obligations that, although related, address different aspects or angles of policies to reduce demand¹²⁰⁶ for tobacco: Article 11 (by regulating tobacco labelling and packaging with respect to the obligation to avoid consumers being misled and also to enhance effectiveness of health warnings) and Article 13 (by regulating "packaging and product features" as part of a comprehensive ban on "[t]obacco advertising, promotion and sponsorship").¹²⁰⁷

7.388. These considerations are also an indication, in our view, that the specific elements of the Article 11 and Article 13 FCTC Guidelines addressing plain packaging that Australia has identified as constituting an international standard for tobacco plain packaging were not intended to provide a unified document "for common and repeated use" in respect of tobacco plain packaging, within the meaning of Annex 1.2 to the TBT Agreement (and therefore for the purpose of the second sentence of Article 2.5 of the Agreement), in isolation from the broader context of implementing a comprehensive range of tobacco control measures under the FCTC. Rather, we understand the different manners in which "plain packaging" is recommended under the two Guidelines to reflect the flexibility accorded to FCTC parties in determining the most appropriate manner of addressing packaging, including through the adoption of plain packaging, as a component of effective tobacco control measures under the FCTC. We find this approach to be consistent with the logic of the FCTC as an international framework convention establishing different obligations to adopt a range of effective tobacco control measures and setting out, through the FCTC Guidelines, various modalities through which parties to the Convention may implement these obligations in light of their particular circumstances.

¹²⁰² See paras. 7.335-7.347.

¹²⁰³ See para. 7.347 above.

¹²⁰⁴ The complainants have alluded to this possibility. See, e.g. Honduras's response to Panel question No. 163, p. 17.

¹²⁰⁵ See paras. 7.335-7.347 and 7.385 above.

¹²⁰⁶ As indicated at para. 7.325 and fn 1060 above, Articles 11 and 13 are both contained under Part III of the FCTC, entitled "Measures relating to the reduction of demand for tobacco". Article 7 of the FCTC lists Articles 11 and 13 as among those provisions under Part III of the Convention addressing, more specifically, "non-price measures to reduce the demand for tobacco".

¹²⁰⁷ We note again, in this respect, that footnote 4 to the Article 13 FCTC Guidelines, set out at para. 7.310 above, refers to the Article 11 FCTC Guidelines as being those "which address plain packaging with regard to health warnings and misleading information". See Article 13 FCTC Guidelines, FCTC/COP/3(12), (Exhibit JE-21), Annex, fn 4 (appearing erroneously as fn 2).

7.389. The parties have also discussed the extent to which differences or similarities between the TPP measures and certain tobacco plain packaging measures adopted or drafted by other Members confirm their respective views as to whether the Article 11 and Article 13 FCTC Guidelines are "documents" containing product specification "for common and repeated use". In this respect, they discussed adopted or drafted tobacco plain packaging measures by Ireland, the UK, France, Hungary, New Zealand and Norway. We do not consider an examination of these domestic practices to be necessary to our assessment. We are not persuaded, in particular, that evidence relating to domestic practices can directly inform whether these Guidelines, as such, constitute a standard. In particular, to the extent that such an assessment would imply an assessment or assumption on our part as to the extent to which these domestic practices reflect and are, or not, in accordance with the requirements of the standard at issue, we do not consider that we are in a position to make such assumptions.¹²⁰⁸

Whether compliance with the product characteristics and packaging requirements provided in the Article 11 and Article 13 FCTC Guidelines in respect of tobacco plain packaging is "not mandatory"

7.390. We now turn to whether compliance with the product characteristics and packaging requirements provided by the Article 11 and Article 13 FCTC Guidelines, as defined above, "is not mandatory", which is the final element of the definition of "standard" under Annex 1.2 of the TBT Agreement relating to the contents of the alleged standard, as outlined above.¹²⁰⁹

7.391. Australia claims that this condition has been also met because the Article 11 and Article 13 FCTC Guidelines "employ conditional rather than obligatory language."¹²¹⁰ Indonesia and Cuba disagree. Indonesia argues that the Article 11 and Article 13 FCTC Guidelines are instead "mandatory" and, thus, not in compliance with that definition. Indonesia argues that, while these FCTC Guidelines "purport to be non-binding recommendations", ultimately, they are intended to be "recommendations on how Parties should implement the 'mandatory' provisions of Articles 11 and 13 [of the FCTC itself]"¹²¹¹ on tobacco packaging and advertising. For Indonesia, the fact that no tobacco company has ever "adopted voluntarily" plain packaging requirements, as described in the Article 11 and Article 13 FCTC Guidelines, further confirms their non-voluntary nature.¹²¹² Cuba understands the reference to non-binding documents that provide product characteristics for common and repeated use, in the definition of "standard" in the TBT Agreement, as addressing these conditions to "producers" of these products, and not government authorities.¹²¹³ Based on such understanding, and after comparing how the Article 11 and Article 13 FCTC Guidelines address tobacco plain packaging with how an ISO standard¹²¹⁴ addresses dimensions for rigid rectangular transport packages, Cuba argues:

Unlike those [ISO] standards, the FCTC guidelines are completely different and aim to encourage the authorities to impose binding technical regulation on producers. The FCTC guidelines are not, and were never intended to be, binding technical standards to be directly observed by producers. That is why the FCTC guidelines are not precise and prescriptive: they are policy recommendations for regulators and legislators, not

¹²⁰⁸ We consider, for similar reasons, unnecessary to assess whether the fact that Australia or other Members have notified their respective tobacco plain packaging measures under Article 2.9.2 of the TBT Agreement can shed any light on the question of whether the Article 11 ad Article 13 FCTC Guidelines constitute a standard. We note, in this respect, Australia's point that if the Panel would "attribute dispositive value" to these notifications to the issue of whether an international standard exists, this "would seriously undermine the core transparency obligations of the TBT Agreement, which are self-reporting". Australia's response to Panel question No. 127, para. 180.

¹²⁰⁹ See para. 7.281 above.

¹²¹⁰ Australia's first written submission, para. 573. See also Australia's second written submission, para. 330.

¹²¹¹ Indonesia's second written submission, para. 229.

¹²¹² Indonesia's second written submission, para. 229 (also contrasting the Article 11 and Article 13 FCTC Guidelines with the US "dolphin-safe labelling scheme" at issue in *US – Tuna II (Mexico)*, and saying that, unlike the former, the latter represented the "nature of a truly 'voluntary' standard" for it did not require tuna product importers to comply with that label as a condition to access the US market).

¹²¹³ Cuba's opening statement at the second meeting of the Panel, para. 48.

¹²¹⁴ Standard ISO 3394:2012(E), entitled "*Packaging - Complete, filled transport packages and unit loads - Dimensions of rigid rectangular packages*" (Exhibit HND-121) (already referred at fns 1144 and 1175 above).

detailed technical guidance for producers. Paragraph 46 of the guidelines of Article 11 even explicitly addresses the FCTC Parties: "*Parties should consider adopting measures to restrict or prohibit the use of logos colours, trademark images or promotional information*". How could a producer ever be expected to apply and use these guidelines in the same way that he can apply and use an ISO standard? By contrast, companies seeking to produce and use rigid rectangular transport packages will know exactly what to do when using ISO 3394.¹²¹⁵

7.392. The definition of "standard" in Annex 1.2 to the TBT Agreement is relevant both for the legal characterization of a measure under the Agreement as a *national* (domestic) standard (as opposed to a technical regulation)¹²¹⁶ and for various TBT disciplines addressing *international* standards, including Articles 2.4 and 2.5. As can be inferred from the way they are disciplined in the TBT Agreement, international standards can serve, *inter alia*, as references for the development and adoption by governments of either *domestic* regulations or *domestic* standards.¹²¹⁷ From this perspective, given this "dual" purpose, we see no basis for, and therefore disagree with, Indonesia's and Cuba's arguments that the voluntary nature of a "standard", as defined under Annex 1.2 of the TBT Agreement, should only be assessed vis-à-vis the way the document is addressed to "producers" of the products concerned, and not governments.

7.393. With respect, more specifically, to the "not mandatory" nature of the Article 11 and Article 13 FCTC Guidelines, we note that in two of the relevant parts of these instruments expressly addressing "plain packaging" (paragraph 46 of the Article 11 FCTC Guidelines and in the text following paragraph 17 of the Article 13 FCTC Guidelines), both texts state that FCTC Parties "*should consider adopting*" plain packaging "measures" or "requirements".¹²¹⁸

7.394. Additionally, plain packaging is addressed in paragraph 46 of the Article 11 FCTC Guidelines in the form of a "recommendation". This language stands in contrast, for instance, with that employed by Articles 11 and 13 of the FCTC.¹²¹⁹ We also note that this contrasts also with the way certain other measures are addressed within these Guidelines themselves. For instance, paragraph 44 of the Article 11 FCTC Guidelines state that "*Parties should prohibit the display of figures for emission yields (such as tar, nicotine and carbon monoxide) on packaging and labelling, including when used as part of a brand name or trademark.*"¹²²⁰ Similarly, the Article 13 FCTC Guidelines contain a "recommendation" that "*Parties should ban 'brand stretching' and 'brand sharing'*, as they are means of tobacco advertising and promotion."¹²²¹

7.395. For the foregoing reasons, we find that compliance with the product characteristics and packaging requirements provided by the Article 11 and Article 13 FCTC Guidelines, as defined above, "is not mandatory", within the meaning of the definition of "standard" in Annex 1.2 to the TBT Agreement.¹²²²

¹²¹⁵ Cuba's opening statement at the second meeting of the Panel, para. 49. (emphasis original)

¹²¹⁶ A threshold question that was at issue, for instance, in *US – Tuna II (Mexico)*. Appellate Body Report, *US – Tuna II (Mexico)*, paras. 178 and 187–188.

¹²¹⁷ See, e.g. Article 2.4 and Annex 3.F to the TBT Agreement, respectively.

¹²¹⁸ Paragraph 1 of the Article 11 FCTC Guidelines also clarifies that the purpose of this instrument is, *inter alia*, to "propose measures that Parties can use to increase the effectiveness of their packaging and labelling measures". (emphasis added)

¹²¹⁹ See, e.g. Articles 11.1(b) and 13.4 of the FCTC. These FCTC provisions, however, seem to often describe such commitments in a qualified manner. For instance, the full text of Article 11.1(b) of the FCTC reads: "Article 11 [...] 1. Each Party *shall* [...] adopt and implement, in accordance with its national law, effective measures to ensure that: [...] (b) each unit packet and package of tobacco products [...] also carry health warnings [...] and *may* include other appropriate messages. These warnings and messages: (i) *shall* be approved by the competent national authority; (ii) *shall* be rotating; [...] (iv) *should* be 50% ... but *shall* be no less than 30% [...] (v) *may* be in the form of or include pictures or pictograms." The texts of these two FCTC provisions are set out in full in paras. 2.104 and 2.105 above.

¹²²⁰ Article 11 FCTC Guidelines, FCTC/COP/3(10), (Exhibit JE-20), Annex, para. 44. (emphasis added).

¹²²¹ Article 13 FCTC Guidelines, FCTC/COP/3(12), (Exhibit JE-21), Annex, "Recommendation" following paragraphs 22-24.

¹²²² In these proceedings we need not, however, express a view, either as a legal or factual matter, on whether binding international instruments, in general, and any obligations established under the FCTC (including those in Articles 11 and 13), in particular, could also be considered as "not mandatory" for the purposes of the definition of "standard" in Annex 1.2 to the TBT Agreement. In these proceedings, Australia

Conclusion on the Article 11 and Article 13 FCTC Guidelines as a "standard"

7.396. We have examined the instruments Australia claims constitute a "standard" for tobacco plain packaging: the Article 11 and Article 13 FCTC Guidelines. We have found that the relevant parts within these instruments, including those explicitly addressing plain packaging, taken in isolation from their context as part of the FCTC, do not constitute a "document" containing a "standard" within the meaning of the definition of "standard" in Annex 1.2 of the TBT Agreement. We also concluded that, while the parts of the Article 11 and Article 13 FCTC Guidelines explicitly addressing plain packaging could be considered to be "guidelines" providing for "product characteristics" (including with respect to packaging requirements), they do so in different ways, reflecting the flexibility provided to FCTC parties in determining how to implement their various obligations under the FCTC, including, as appropriate, plain packaging of tobacco products. This is consistent, overall, with the fact that FCTC Guidelines, by their own terms, are intended to "assist Parties in meeting their obligations" under, respectively, Article 11 and Article 13 of the FCTC. These Guidelines, and the obligations that they relate to, must be read "in light" of the relevant obligations in the FCTC itself, as well as "other provisions" of that Convention that are "also relevant to implementation of plain packaging".¹²²³

7.397. Overall, therefore, we find that, while the Article 11 and Article 13 FCTC Guidelines provide important guidance to FCTC parties in addressing packaging, and, as relevant, implementing plain packaging as an element of a comprehensive scheme of effective tobacco control policies, Australia has not demonstrated that they constitute a "standard" under Annex 1.2 of the TBT Agreement with respect to tobacco plain packaging.

7.2.5.2.4 Overall conclusion on whether the Article 11 and Article 13 FCTC Guidelines are "relevant international standards" and whether the TPP measures are "in accordance with" these Guidelines under Article 2.5 (second sentence)

7.398. We recall our statement above¹²²⁴ that, should we conclude that the Article 11 and Article 13 FCTC Guidelines meet the TBT definition of a "standard", we would then proceed to consider whether they are also "international" in character, including in terms of "recognition" of the body that has adopted them.¹²²⁵

7.399. In the present proceedings, the parties disagree on whether the body which adopted the Article 11 and Article 13 FCTC Guidelines, the FCTC COP¹²²⁶, is an "international standardizing body" for the purposes of assessing the "international" character of these instruments¹²²⁷, and whether it has "recognized activities in standardization" such that it should be considered an "international standardizing body" for the purposes of Article 2.5 of the TBT Agreement.

7.400. Having determined that Australia has not established that the Article 11 and Article 13 FCTC Guidelines constitute a "standard" for tobacco plain packaging within the meaning of Annex 1.2, we need not assess further whether they are "international" in character.¹²²⁸ We therefore make no determination in respect of whether the COP FCTC is an international standardizing body or has recognized activities in standardization within the meaning of the relevant definition of "international standard", for the purposes of the TBT Agreement.

only claims that the instruments that constitute a "relevant international standard" under the second sentence of Article 2.5 are specific aspects of the Article 11 and Article 13 FCTC Guidelines, not the Convention itself.

¹²²³ WHO/FCTC Additional Information to Panel, paras. 61 and 64, at fn 63 above.

¹²²⁴ See para. 7.289 above.

¹²²⁵ See para. 7.333 above.

¹²²⁶ See paras. 2.98-2.99 above.

¹²²⁷ See, e.g. Honduras's second written submission, paras. 508-515; Dominican Republic's second written submission, paras. 854-893; Cuba's second written submission, paras. 167-181; Indonesia's second written submission, paras. 222-225 and 230-253; and Australia's second written submission, paras. 331-341.

¹²²⁸ Or whether they are "relevant". See also, in a similar vein, Honduras's second written submission, para. 507. See also paras. 7.398 and 7.289 and, in particular, fn 995 above.

7.401. It also follows from these conclusions that we need not consider further whether the TPP measures are "in accordance with" the relevant parts of the Article 11 FCTC Guidelines or the Article 13 FCTC Guidelines.¹²²⁹

7.402. In light of the above, we find that Australia has not demonstrated that the TPP measures are "in accordance with relevant international standards" for the purpose of the second sentence of Article 2.5 of the TBT Agreement. We also find, therefore, that the TPP measures cannot be "rebuttably presumed not to create an unnecessary obstacle to international trade".

7.403. Notwithstanding this conclusion, we wish to make clear that the determinations we have reached above under the second sentence of Article 2.5 do not imply any determination concerning the relevance of the FCTC, or any its instruments (including the Article 11 and Article 13 FCTC Guidelines) to other aspects of our analysis of the claims before us in these proceedings.

7.404. A respondent's failure to successfully invoke the rebuttable presumption under the second sentence of Article 2.5 of the TBT Agreement does not, in our view, have any adverse implications for other aspects of its defence with respect to a claim under Article 2.2 of the same agreement. In the present proceedings, our determinations above in relation to whether the relevant parts of specific FCTC Guidelines constitute, for the purposes of the second sentence of Article 2.5 of the TBT Agreement, a "standard" within the meaning of Annex 1.2, therefore imply no determination on the potential relevance of the FCTC and related instruments, including relevant parts of the Article 11 and Article 13 FCTC Guidelines, to the remainder of our analysis under Article 2.2 of the TBT Agreement. The complainants continue to bear the burden of making a *prima facie* case that the TPP measures are inconsistent with this provision.¹²³⁰

7.405. More generally, the fact that a given instrument is not relevant or persuasive for one purpose under a given claim does not, in our view, render it *ipso facto* irrelevant for another purpose, including in the context of other aspects of the same claim. Rather, its relevance, if any, must be assessed in the context of each specific claim and the purpose for which it has been raised in that context. We note in this respect that all parties in these proceedings have discussed and/or relied on the FCTC and some of its instruments (including, in particular, the Article 11 and Article 13 FCTC Guidelines)¹²³¹, not only with respect to Australia's invocation of the second sentence of Article 2.5, but also regarding other aspects of the complainants' claims under Article 2.2 of the TBT Agreement and Article 20 of the TRIPS Agreement. The parties have, however, expressed different views on the relevance of these instruments for the analysis of the claims before us if they do not constitute an "international standard" under Article 2.5 of the TBT Agreement.

7.406. Honduras considers that "the only avenue contemplated in the TBT Agreement that would allow an international standard to temper [the] obligation [under Article 2.2] is Article 2.5. There is no TBT provision indicating that, even if a particular instrument does not qualify as a relevant international standard, panels must nonetheless consider such instrument in their examination under Article 2.2."¹²³² Honduras also submits that while the FCTC and its Guidelines confirm the

¹²²⁹ See paras. 7.263 and 7.289 above. Some parties have also suggested that we take this approach. See, e.g. Honduras's response to Panel question No. 66, p. 26; and Dominican Republic's response to Panel question No. 66, para. 292.

¹²³⁰ Our clarification finds support in certain statements by the Appellate Body in *EC – Hormones*. In that dispute, the measure at issue was found not to enjoy the presumption of consistency with the SPS Agreement (and the GATT 1994) because it did not "conform to international standards", as required by Article 3.2 of that Agreement. The question before the Appellate Body was whether any negative implications should ensue with respect to a respondent's defence against a claim of violation of Article 3.1 of the SPS Agreement, when the measure at issue cannot enjoy that presumption of conformity. The Appellate Body clarified that just because the "Member imposing [a] measure does not benefit from the presumption of consistency set up in Article 3.2", this does not mean that this Member is "penalized by exemption of a complaining Member from the normal burden of showing a *prima facie* case of inconsistency with Article 3.1 or any other relevant article of the SPS Agreement or of the GATT 1994." Appellate Body Report, *EC – Hormones*, para. 171. See also *ibid.* para. 102. See further, Appellate Body Report, *US – Continued Suspension*, para. 532; Panel Report, *Russia – Pigs (EU)*, paras. 7.254, 7.261, 7.331 and 7.860; and Brazil's third-party statement, paras. 4-5.

¹²³¹ The Panel also received information regarding the FCTC and the FCTC Guidelines directly from the WHO and the FCTC Secretariat. See section 1.6.7.1 above regarding the materials submitted by the WHO and the FCTC Secretariat and the Panel's request for additional information.

¹²³² Honduras's response to Panel question No. 130, pp. 44-45.

harmful nature of smoking and the existence of international consensus on the legitimacy of smoking reduction as an objective, the relevant question before the Panel is whether the TPP measures are more trade-restrictive than necessary. As the FCTC Guidelines do not suggest that tobacco plain packaging is not more trade-restrictive than necessary, they are not pertinent to this dispute. Honduras also argues that the FCTC Guidelines are not relevant because they do not constitute an element of interpretation of Article 2.2 of the TBT Agreement under Article 31 of the Vienna Convention (e.g. a subsequent agreement between the parties regarding the interpretation of Article 2.2 or a relevant rule of international law).¹²³³ Honduras also does not see any role for the FCTC Guidelines in the panel's analysis under Article 20 of the TRIPS Agreement, as this provision does not contain a "rebuttable presumption" of consistency for special requirements conforming to an "international standard".¹²³⁴ As "non-binding, soft law" instruments, Honduras submits that the FCTC Guidelines, in accordance with the Vienna Convention, are not relevant for interpreting Article 20, especially "terms of art" such as "unjustifiably".¹²³⁵ Finally, Honduras considers that the FCTC Guidelines cannot be used as facts to demonstrate that the TPP measures are capable of achieving Australia's objective of improving public health because "the scientific bases underlying [these instruments] are unclear".¹²³⁶

7.407. The Dominican Republic argues that if the presumption in the second sentence of Article 2.5 of the TBT Agreement is not applicable, the FCTC Guidelines "have no bearing on any of the legal or factual questions before the Panel".¹²³⁷ The Dominican Republic rejects, in particular, the notion that the adoption of the FCTC Guidelines "in themselves" can serve as evidence that the TPP measures "comply with all relevant aspects of the applicable legal standards" under both the TBT Agreement and the TRIPS Agreement, as "[t]he Guidelines do not, for example, demonstrate that [the TPP] measures will ever reduce smoking".¹²³⁸ The Dominican Republic considers, in this respect, that the Panel "has a duty to make an objective assessment of the facts, as required by Article 11 of the DSU[, and that it] cannot 'contract out' of this obligation through reliance on the work of another international body[, in particular] when the other body declines to share its evidence or its assessment of that evidence".¹²³⁹ "At most", the Dominican Republic continues, "the FCTC Guidelines ... could confirm the legitimacy of the plain packaging as a measure with the objective of promoting public health."¹²⁴⁰ The recommendation in the Article 11 and Article 13 FCTC Guidelines that parties consider implementing plain packaging "does not constitute proof of the effectiveness of plain packaging in reducing smoking behaviour" and cannot "be more reliable than the evidence on which it is based".¹²⁴¹

¹²³³ Honduras's response to Panel question No. 130, p. 45. See also Honduras's second written submission, para. 474. Honduras also states that neither the FCTC nor its Guidelines can "constitute a defence to a violation of the WTO agreements, for example that plain packaging would be necessary to comply with the FCTC Guidelines [given that i]t is well established that GATT Article XX may exempt WTO inconsistent measures when they are necessary to secure compliance with WTO-consistent domestic laws, not with international law." Honduras's second written submission, para. 475 (referring to Appellate Body Report, *Mexico – Taxes on Soft Drinks*, para. 75). See also ibid. para. 474.

¹²³⁴ Honduras's response to Panel question No. 130, p. 45. See also Honduras's second written submission, para. 463.

¹²³⁵ Honduras's response to Panel question No. 130, pp. 45-46. Honduras also states that, given that tobacco plain packaging measures "go beyond the obligations imposed on [FCTC Parties]" because they are not mandated by the FCTC, Australia's TPP measures, by virtue of the FCTC itself (Article 2.1), "can only be imposed if [...] consistent with international law, including the law of the WTO". Honduras's second written submission, para. 472. Honduras also adds that "the WTO dispute settlement system is intended to 'preserve the rights and obligations of Members under the covered agreements' and to clarify 'those agreements', not other international agreements, including the FCTC", as confirmed by Articles 3.2 and 19.2 of the DSU and the terms of reference under Article 7 of the DSU, which refer to the WTO covered agreements. Honduras's second written submission, para. 473.

¹²³⁶ Honduras's response to Panel question No. 130, p. 45. In this respect, Honduras also recalls its arguments concerning the lack of information available on the scientific basis for the preparation and adoption of the FCTC Guidelines. Honduras's first written submission, paras. 135-137. See also Honduras's response to Panel question No. 70.

¹²³⁷ Dominican Republic's second written submission, para. 917. See also responses to Panel question No. 89, para. 27; and No. 130, para. 314.

¹²³⁸ Dominican Republic's second written submission, para. 918.

¹²³⁹ Dominican Republic's second written submission, para. 920.

¹²⁴⁰ Dominican Republic's response to Panel question No. 130, para. 315. (emphasis original)

¹²⁴¹ Dominican Republic's second written submission, para. 543. The Dominican Republic recalls that "the FCTC Secretariat made publicly available the evidence considered by the COP in adopting the Article 11

7.408. Cuba considers that the FCTC Guidelines "are not pertinent" for the Panel's assessment under Article 2.2 of the TBT Agreement and Article 20 of the TRIPS Agreement.¹²⁴² Cuba argues that the WTO dispute settlement system seeks "to preserve the rights and obligations of Members under the covered agreements" and to clarify "those agreements", not other international agreements, such as the FCTC.¹²⁴³ Cuba considers that the FCTC Guidelines "will be of little importance" in these disputes, even as an "interpretative tool" under the Vienna Convention.¹²⁴⁴ For Cuba, the relevant question under WTO rules, i.e. whether the specific plain packaging measure adopted by Australia is more trade-restrictive than necessary or unjustifiably encumbers or in some other way violates trademark rights, is not dealt with by the FCTC or its Guidelines. "Since the harmful nature of smoking is not a question to be assessed in this dispute, [the FCTC and its Guidelines] should not be taken into account" when interpreting the TBT Agreement or TRIPS Agreement in the context of plain packaging measures.¹²⁴⁵

7.409. Indonesia "recognizes that the [FCTC] Guidelines are pertinent for th[ese] dispute[s] even though they are not a 'relevant international standard' under Article 2.5 of the TBT Agreement".¹²⁴⁶ It also considers, however, that due to their non-binding nature and hortatory language, the FCTC Guidelines "do not provide interpretive context for the TRIPS and TBT Agreements and nothing in [these instruments] can supplant obligations in the WTO".¹²⁴⁷ While noting that a Member, if faced with a conflict between what the FCTC recommends and what the WTO requires, "must comply with its WTO obligations",¹²⁴⁸ Indonesia also states that, "[f]ortunately, no such conflict exists in this case ... given that, "[i]n Indonesia's view there is sufficient policy latitude to address the packaging elements that raise concern under the FCTC, while still complying with all of the relevant WTO obligations."¹²⁴⁹

7.410. Australia considers that, even if the Panel were to conclude that the Article 11 and Article 13 FCTC Guidelines are not a relevant international standard under the second sentence of Article 2.5 of the TBT Agreement, they are still "highly relevant" at "each stage of the analysis" of the claims under both the TBT and TRIPS Agreements.¹²⁵⁰ Australia also considers that while the

Guidelines, but not the Article 13 Guidelines", and that "[o]f the 22 listed studies [that were considered by the COP in adopting the Article 11 Guidelines], just one study, consisting of 1 page, examined plain packaging". Dominican Republic's second written submission, para. 544 (footnotes omitted). The Dominican Republic also submits that any "evidence" relied upon by the FCTC could only consist of predictive research that suffers from a number of serious flaws. *Ibid.* paras. 545-546. See also Dominican Republic's second written submission, para. 919 and fn 926 and para. 927; and responses to Panel question No. 130, para. 316; and No. 66, para. 186.

¹²⁴² Cuba's response to Panel question No. 130, p. 17. Cuba also considers *amicus curiae* submissions by the WHO and FCTC Secretariat to be "irrelevant" for the settlement of the present disputes, pointing out that "the FCTC itself has not been signed and/or ratified by all WTO Members", including Cuba, which is not an FCTC Party and did not participate in the adoption of the FCTC Guidelines. Cuba submits that its WTO obligations cannot therefore "reasonably be determined by reference to the FCTC Guidelines". Cuba's second written submission, paras. 382-383. See also *ibid.* para. 361.

¹²⁴³ Cuba's second written submission, para. 355.

¹²⁴⁴ Cuba's second written submission, para. 356. See Cuba's second written submission, paras. 357-359; and Cuba's response to Panel question No. 130, p. 17.

¹²⁴⁵ Cuba's second written submission, para. 360. See also Cuba's response to Panel question No. 130, p. 17. Cuba also argues that neither the FCTC nor the non-binding FCTC Guidelines impose any obligation to adopt tobacco plain packaging, and notes that Article 2.2 of the FCTC permits "imposing stricter requirements that are consistent with the provisions of the FCTC 'and are in accordance with international law'". Cuba's second written submission, paras. 361, 366-368 and 370. Cuba also notes that during the debates for the preparation of the Guidelines with respect to plain packaging, "the representative of Australia indicated ... [that] the 'Guidelines proposed that Parties should consider other measures, going beyond the requirements of the [FCTC]'." *Ibid.* para. 368 (referring to Conference of the Parties to the WHO Framework Convention on Tobacco Control, Third Session, Durban, South Africa, FCTC/COP/3/REC/3 (17-22 November 2008), p. 11).

¹²⁴⁶ Indonesia's response to Panel question No. 130, para. 81.

¹²⁴⁷ Indonesia's response to Panel question No. 130, para. 81. See also Indonesia's opening statement at the first meeting of the Panel, para. 20.

¹²⁴⁸ Indonesia's opening statement at the first meeting of the Panel, para. 21.

¹²⁴⁹ Indonesia's opening statement at the first meeting of the Panel, para. 23. See also Indonesia's response to Panel question No. 130, para. 81 (stating that "the FCTC and WTO should be interpreted harmoniously as there is no conflict between FCTC and WTO obligations."); and Indonesia's response to Panel question No. 130, para. 83 (arguing that "compliance with the FCTC Guidelines and WTO obligations can be achieved by imposing prohibitions or restrictions only on those elements of tobacco products and packaging that have been shown, based on evidence, to mislead consumers or increase prevalence.").

¹²⁵⁰ Australia's response to Panel question No. 130, para. 204.

TBT Agreement encourages technical regulations to be in accordance with international standards, it "imposes no particular obligations on Members with respect to the nature and extent of evidence on which they may rely before adopting a technical regulation".¹²⁵¹ For Australia, tobacco plain packaging measures "reflect[] a world-wide consensus in the scientific community and among the 180 Parties to the FCTC that measures affecting consumer perceptions, intentions, and attitudes toward tobacco products are apt to contribute, as part of a comprehensive tobacco control policy, to reducing smoking behaviour, and ultimately, to saving lives."¹²⁵²

7.411. Some third parties also addressed this question in their submissions or statements.¹²⁵³

7.412. We note that it is not uncommon in WTO disputes for parties to refer to, and panels and the Appellate Body to rely on, non-WTO international instruments as evidence of fact¹²⁵⁴ or to

¹²⁵¹ Australia's closing statement at the first meeting of the Panel, para. 17.

¹²⁵² Australia's closing statement at the first meeting of the Panel, para. 24. See also Australia's second written submission, para. 256; and Australia's response to Panel question No. 126, para. 172.

¹²⁵³ Brazil believes that FCTC Guidelines should be taken into consideration as relevant context in the panel proceedings under the WTO dispute settlement system, especially if such guidelines are qualified as relevant international standards under the second sentence of Article 2.5 of the TBT Agreement. Brazil's third-party submission, paras. 13-17.

The European Union considers that irrespective of whether or not the FCTC Guidelines relating to plain packaging are a relevant international standard within the meaning of the second sentence of Article 2.5 of the TBT Agreement, they must be given appropriate weight in these proceedings. European Union's third-party statement, para. 12. The European Union observes that Article 2.2 of the TBT Agreement requires the Panel to take into account the "risks non-fulfilment would create" and that, in assessing such risks, relevant elements of consideration are, *inter alia*, available scientific and technical information, related processing technology or intended end-uses of products. The European Union considers that the Guidelines fall within the open category delimited by the final sentence of Article 2.2 of the TBT Agreement. European Union's response to Panel question No. 8, para. 37. In assessing that risk, the European Union contends that the FCTC Guidelines are "relevant", particularly because they speak precisely to the means by which the relevant international organisation considers that tobacco control can be effectively enhanced. Therefore, they will need to be considered and taken into account by the Panel, irrespective of whether or not they are a "relevant international standard" within the meaning of Article 2.5 of the TBT Agreement." Ibid. para. 38. With respect to the TRIPS Agreement, the European Union also considers it "important that these evidence-based international guidelines are accorded proper weight, by interpreting TRIPS provisions in a way that is supportive of WTO Members' right to protect public health." European Union's third-party submission, paras. 36-38.

Korea submits that, while in principle "the object and purpose of other international agreements should not be allowed to undermine the interpretation or application of WTO Agreement provisions, the value of the [FCTC] should be sufficiently respected", given it is "the most widely ratified convention among UN Member states". Korea's third-party statement, para. 5.

Uruguay notes that, in these disputes, three of the original complaining Members have signed the FCTC and have "played a role in the drafting of the [FCTC Guidelines], such as those on plain packaging". For Uruguay, while "[i]t could be argued that the plain packaging measures are not binding under the [FCTC], [they] form part of the repository of rules governed thereby and must therefore be shared by its members; the latter should not in principle challenge or undermine them in other forums." Uruguay's third-party submission, paras. 102-103.

¹²⁵⁴ For instance, in *EC – Asbestos*, the panel relied on documentation originating from the WHO and the International Labor Organization (ILO) as evidence that "regulations restricting the use of asbestos could have been anticipated". Panel Report, *EC – Asbestos*, para. 8.295. In *EC – Seal Products*, the panel considered that various sources submitted to it, including certain UN and ILO instruments (i.e. the 1989 UN Declaration on the Rights of Indigenous Peoples and the 1989 ILO Convention concerning Indigenous and Tribal Peoples in Independent Countries), "taken in their entirety as factual evidence", demonstrated that the rationale for including in the EU seal products' ban an exception for products from indigenous communities was "justifiable". Panel Reports, *EC – Seal Products*, para. 7.295. The panel explained the basis for and purpose of relying upon such instruments as follows:

In taking into account the recognition given by international instruments in the context of the United Nations and the ILO to the interests of Inuit and indigenous communities, the Panel is mindful that these instruments are not WTO instruments and they do not set out WTO obligations *per se*. We are considering the content of these instruments as part of the evidence submitted by the European Union to support its position concerning the interests of Inuit and indigenous communities, not as legal obligations of Members.

Ibid. para. 7.295 fn 475. See also Panel Report, *US – Clove Cigarettes* (relying on certain FCTC Guidelines, discussed in paras. 7.414-7.415 below).

inform the interpretation of specific provisions under a covered agreement.¹²⁵⁵ We also note, in particular, that the FCTC and certain FCTC Guidelines have been specifically discussed and relied upon as evidence in at least two previous WTO disputes, including one concerning claims under the TBT Agreement.

7.413. In *Dominican Republic – Import and Sale of Cigarettes*, the Dominican Republic cited the FCTC in support of its argument on the international recognition of tax stamps as a legitimate method to prevent the smuggling of cigarettes and the resulting loss of tax revenue, notwithstanding the fact that both parties had agreed that it was not legally binding on them.¹²⁵⁶ Specifically, the Dominican Republic argued that properly enforced tax stamps were required to mark, monitor, and collect data regarding cross-border trade in cigarettes in accordance with the FCTC.¹²⁵⁷ That panel took this and other information before it into account in finding that it did not disagree with the Dominican Republic's argument that "tax stamps may be a useful instrument to monitor tax collection on cigarettes and, conversely, to avoid tax evasion".¹²⁵⁸

7.414. The FCTC and certain FCTC Guidelines were also referenced and discussed in detail in *US – Clove Cigarettes* in the context of claims under the TBT Agreement.¹²⁵⁹ In that dispute, the panel, referring to certain FCTC Guidelines as "WHO Partial Guidelines"¹²⁶⁰, considered the FCTC as part of the "broader factual context" of the US measure at issue¹²⁶¹ and observed that it was "aware of the important international efforts to curb smoking within the context of the WHO FCTC and its WHO Partial Guidelines."¹²⁶² It further relied on certain FCTC Guidelines¹²⁶³ to corroborate its conclusion that "in the mind of youth, flavoured cigarettes, including those flavoured with clove or menthol, are similar".¹²⁶⁴ The panel, having noted that "[b]oth parties seem to agree that the WHO Partial Guidelines are potentially relevant to the dispute", agreed with the United States that

¹²⁵⁵ For instance, in *US – Shrimp*, the Appellate Body relied on several international conventions and international instruments (including *inter alia* the United Nations Convention on the Law of the Sea – UNCLOS, and Convention on Biological Diversity – CBD and the Convention on International Trade in Endangered Species of Wild Fauna and Flora – CITES) to support its conclusion that the meaning of the term "exhaustible natural resources" in Article XX(g) of the GATT 1994 was not limited to just "non-living" resources (e.g. minerals). See Appellate Body Report, *US – Shrimp*, paras. 130-132.

¹²⁵⁶ As explained above, the FCTC was adopted in 2003, but only entered into force in 2005. See para. 2.96 above. Honduras signed the FCTC on 18 June 2004, shortly before the second substantive meeting of that panel with the parties. See Panel Report, *Dominican Republic – Import and Sale of Cigarettes*, paras. 1.6 and 4.370.

¹²⁵⁷ See Panel Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 7.216.

¹²⁵⁸ See Panel Report, *Dominican Republic – Import and Sale of Cigarettes*, paras. 1.6 and 4.370. Ultimately, however, the panel concluded that the GATT-inconsistencies of the cigarette "tax stamp" requirements could not be justified because they were not necessary "[s]ince the Dominican Republic has not proved why other, reasonably available, less-GATT inconsistent, measures would not be able to achieve that same level of enforcement that it has chosen to attain". Ibid. para. 7.230. This finding was later upheld by the Appellate Body. See Appellate Body Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 128(a). As explained above, the FCTC was adopted in 2003, but only entered into force in 2005. See para. 2.96 above.

¹²⁵⁹ We note that neither of the parties to the dispute in *US – Clove Cigarettes* were parties to the FCTC. Australia also refers to the panel's use of certain FCTC instruments as evidence of fact in *US – Clove Cigarettes* as a precedent lending support for its view that FCTC instruments can be used in a similar way with respect to the claims at issue in these proceedings. See, e.g. Australia's response to Panel question No. 206, paras. 409-410; and Australia's comments on complainants' responses to Panel question No. 206, para. 406. See also Brazil's third-party submission, paras. 15-16.

¹²⁶⁰ *Partial Guidelines for implementation of Articles 9 and 10 of the Convention*, adopted at the fourth FCTC COP held in Punta del Este from 15 to 20 November 2010. Panel Report, *US – Clove Cigarettes*, para. 2.30.

¹²⁶¹ Panel Report, *US – Clove Cigarettes*, para. 2.2. We also note that that panel relied on the definition of "tobacco control" in Article 1(d) of the FCTC as meaning "a range of supply, demand and harm reduction strategies that aim to improve the health of a population by eliminating or reducing their consumption of tobacco products and exposure to tobacco smoke". Panel Report, *US – Clove Cigarettes*, para. 2.1 fn 3.

¹²⁶² Panel Report, *US – Clove Cigarettes*, para. 7.4. The FCTC and certain FCTC Guidelines were also described in the "factual context" section of the panel report. On appeal, although the Appellate Body did not make express reference to the FCTC, it "recognize[d] the importance of Members' efforts in the World Health Organization on tobacco control." Appellate Body Report, *US – Clove Cigarettes*, para. 235.

¹²⁶³ See Panel Report, *US – Clove Cigarettes*, paras. 7.229-7.231.

¹²⁶⁴ Panel Report, *US – Clove Cigarettes*, para. 7.232.

they "do not necessarily apply directly to the particular regulatory needs of a particular country".¹²⁶⁵ However, the panel also found that the FCTC Guidelines at issue:

"[D]rawing on the best available scientific evidence and the experience of Parties", do show a growing consensus within the international community to strengthen tobacco-control policies through regulation of the content of tobacco products, including additives that increase the attractiveness and palatability of cigarettes. Thus, we consider that the WHO *Partial Guidelines* corroborate our understanding.¹²⁶⁶

7.415. That panel further relied on certain FCTC Guidelines in its analysis under Article 2.2 of the TBT Agreement¹²⁶⁷ as evidence "reinforc[ing] its understanding"¹²⁶⁸ that "there is extensive scientific evidence supporting the conclusion that banning clove and other flavoured cigarettes could contribute to reducing youth smoking"¹²⁶⁹, notwithstanding the fact that the measure recommended was not expressly identified in the FCTC itself.¹²⁷⁰ We also note that the panel relied on particular FCTC Guidelines as factual evidence supporting certain findings under both Articles 2.1 and 2.2 of the TBT Agreement, despite the fact that it and the parties had agreed that, for the purpose of that dispute, no "relevant international standard" existed under either Article 2.4 or the second sentence of Article 2.5 of the TBT Agreement.¹²⁷¹

7.416. In the present proceedings, the FCTC and its Guidelines have been referred to as evidence in support of specific arguments not only by Australia, but also by certain complainants.¹²⁷² We see no basis to dismiss *ex ante* the relevance of these instruments, based solely on the fact that they do not constitute an "international standard" for the purposes of the second sentence of Article 2.5 of the TBT Agreement. In particular, we see no reason to assume that the FCTC, which has been

¹²⁶⁵ Panel Report, *US – Clove Cigarettes*, para. 7.230.

¹²⁶⁶ Panel Report, *US – Clove Cigarettes*, para. 7.230.

¹²⁶⁷ The panel's findings with respect to Article 2.2 of the TBT Agreement were not appealed. See Appellate Body Report, *US – Clove Cigarettes*, para. 9.

¹²⁶⁸ Panel Report, *US – Clove Cigarettes*, para. 7.414. The Panel also relied on a 2007 WHO Report entitled "The Scientific Basis of Tobacco Product Regulation". This report was produced by a study group, established pursuant to the FCTC, comprised of eleven experts in the field, supported by a secretariat. See *ibid.* para. 7.413.

¹²⁶⁹ Panel Report, *US – Clove Cigarettes*, para. 7.415. We also note that, in that dispute, Indonesia also referred to various measures set out in the FCTC "aimed at preventing cigarettes sales to minors" in its list of available less trade-restrictive alternatives to the US ban on clove cigarettes. *Ibid.* para. 7.317. The United States responded saying that "mere[ly] listing of a number of different restrictions drawn from ... the FCTC does not satisfy Indonesia's burden of proving that there is a less trade-restrictive measure that would achieve the U.S. objective at the level of protection that the United States finds appropriate". *Ibid.* para. 7.324. The Panel agreed with the United States in this respect. *Ibid.* paras. 7.420-7.423.

¹²⁷⁰ "Finally, while a ban on flavoured-cigarettes is not one of the various measures set out in the [FCTC] itself, we recall that prohibiting the sale of flavoured cigarettes is actually one of the measures that has now been recommended in the WHO *Partial Guidelines*". Panel Report, *US – Clove Cigarettes*, para. 7.427.

¹²⁷¹ As we previously noted in footnote 929 above, in *US – Clove Cigarettes*, the panel did not begin its assessment of the claim under Article 2.2 "from any rebuttable presumption that the ban on clove cigarettes is not an unnecessary obstacle to trade", in recognition of the parties' agreement that no "relevant international standard" within the meaning of the second sentence of Article 2.5 existed. Panel Report, *US – Clove Cigarettes*, para. 7.331 (cited in Honduras's comments on Australia's response to Panel question No. 147, para. 40; and in Cuba's second written submission, paras. 179-180 and 188). See also *ibid.* para. 7.458 and fn 831 (where the panel concludes that, "[g]iven the facts of the present dispute and the absence of any 'relevant international standards', [Article 2.4 of the TBT Agreement] would not appear to be of any relevance").

¹²⁷² For example, Honduras and Cuba cite Article 11 of the FCTC in the course of their arguments regarding "wear-out" effects of GHWs. Honduras's response to Panel question No. 126, p. 38 and fn 148; Honduras's second written submission, para. 51 and fn 50; and Cuba's second written submission, para. 155 and fn 56. The Dominican Republic also references Article 11 of the FCTC to support an assertion that GHWs are intended to ensure that people do not misunderstand the health risks of smoking. Dominican Republic's comments on Australia's response to Panel question No. 148, para. 87 and fn 105. The Dominican Republic also relies upon the FCTC Article 11 Guidelines when discussing the relative importance of the front and back faces of a pack as compared to the sides and the relationship between the size of health warnings and their effectiveness. Dominican Republic's comments on Australia's response to Panel question No. 204, para. 891 and fn 958, and para. 897 and fn 973.

adopted by 180 countries¹²⁷³, and related instruments adopted under its auspices could not inform, together with other relevant evidence before us, our understanding of relevant aspects of the matters with which they are concerned, namely "tobacco control measures ... to reduce ... the prevalence of tobacco use".¹²⁷⁴ Our determination above in respect of the second sentence of Article 2.5 is, therefore, without prejudice to the relevance and probative value to be given to the FCTC and related instruments in the context of other aspects of our analysis of the claims before us.¹²⁷⁵

7.417. Finally, we wish to stress that any assessment and observations we make under this, or any other section of these Reports, with respect to the FCTC, its Guidelines, or any other FCTC instrument, is for the sole purpose of resolving the specific legal and factual questions that stand before us in these proceedings, in relation to the claims before us under the relevant WTO covered agreements and pursuant to our limited mandate under the DSU.

7.418. Having determined that the TPP measures do not benefit from a rebuttable presumption under the second sentence of Article 2.5 that they are not more trade-restrictive than necessary, we pursue our analysis under Article 2.2, in accordance with the approach outlined at section 7.2.2 above.

7.419. Having determined that the objective pursued by the TPP measures is to improve public health by reducing the use of, and exposure to, tobacco products and that this is a legitimate objective within the meaning of Article 2.2 of the TBT Agreement, we must now conduct a relational analysis of different factors, including the degree to which the TPP measures contribute to this objective, the extent to which they are trade-restrictive, and the nature of the risks of non-fulfilment of the objective pursued and the gravity of the consequences that would arise from such non-fulfilment.

7.420. We note that no particular order is *a priori* required in all cases in considering the three aforementioned factors of the "relational analysis". However, in the circumstances of this case, we find it appropriate to consider first the degree of contribution of the TPP measures to their objective, to the extent that there may be a correlation between the extent to which the measures contribute to this objective and their trade-restrictiveness. In this respect, without prejudice to our later analysis of this question, we note Australia's observation that the TPP measures will result in a limiting effect on overall trade in tobacco products because "(i) the measure will reduce the use of tobacco products (by discouraging uptake and relapse and encouraging quitting); and (ii) since imports will soon represent the entirety of Australia's tobacco product market, with domestic production being phased out, a reduction in the use of tobacco products will necessarily limit overall trade in tobacco products".¹²⁷⁶

7.421. In light of the potential relationship, as identified by Australia itself, between the contribution of the measures to their objective and their effect on trade, we will consider first the contribution of the measures to their objective, and then their trade-restrictiveness. We will also identify the nature and gravity of the risks of non-fulfilment of the objective pursued by Australia through these measures.

7.422. These various factors will inform our further assessment, as relevant, of whether the complainants have shown that there are *less* trade-restrictive alternative measures reasonably available to Australia, that would achieve an equivalent contribution to its objective, such that the TPP measures would be *more* trade-restrictive than necessary within the meaning of Article 2.2.

¹²⁷³ WHO/FCTC Request for Permission to Submit Information, (Exhibit AUS-42 (revised)), para. 7; and WHO/FCTC *amici curiae* brief, (Exhibit AUS-42 (revised)), para. 12. See also paras. 2.97 and 7.250 and fn 908 above.

¹²⁷⁴ FCTC, (Exhibits AUS-44, JE-19), Article 3, entitled "Objectives". We also note that some of the complainants argue that the FCTC and its Guidelines are not relevant beyond their use for the purpose of the second sentence of Article 2.5 of the TBT Agreement, *inter alia* because they are not pertinent for the purpose of clarifying, in accordance with customary rules of interpretation of public international law, relevant provisions of the covered Agreements that are the object of the claims before us. We note however that neither the FCTC nor its Guidelines have been argued, in these proceedings, to inform the interpretation of a specific provision of the covered agreements before us.

¹²⁷⁵ See also footnote 894 above.

¹²⁷⁶ Australia's response to Panel question No. 119.

7.2.5.3 The degree of contribution of the TPP measures to their objective

7.423. Having determined that the objective pursued by the TPP measures is to improve public health by reducing the use of, and exposure to, tobacco products and that this is a legitimate objective within the meaning of Article 2.2 of the TBT Agreement, we now consider the extent to which the TPP measures contribute to this objective. This contribution "must be determined objectively, and then evaluated along with the other factors mentioned in Article 2.2".¹²⁷⁷ Specifically, "a panel must seek to ascertain to what degree, or if at all, the challenged technical regulation, as written and applied, actually contributes to the legitimate objective pursued by the Member".¹²⁷⁸

7.424. We therefore seek to determine, in this section, the degree to which the TPP measures, as written and applied, contribute, if at all, to Australia's legitimate objective of improving public health by reducing the use of, and exposure to, tobacco products.

7.425. The parties have presented extensive arguments and evidence in support of their respective positions on the existence and degree of the TPP measures' contribution to their objective. They also have different views on the approach that should be taken to this assessment. We therefore consider first our overall approach to the conduct of this assessment.

7.2.5.3.1 Overview of the parties' arguments

7.426. Honduras argues that the TPP measures make no contribution to Australia's objective, nor are they apt to do so. Honduras argues that the evidence relied on by Australia, both at the time of adoption of the measures and thereafter, was neither relevant nor probative.¹²⁷⁹ It argues that the studies upon which Australia relied on are seriously flawed, to the extent that no government should regard them as serious science.¹²⁸⁰ Honduras states that it and other complainants have provided robust evidence through market and sales data that confirm the lack of contribution of the TPP measures since their adoption.¹²⁸¹

7.427. Honduras states that market data shows that the TPP measures have not reduced smoking prevalence or tobacco consumption. It further argues that principles of social science confirm that the measures not only cannot reduce smoking prevalence but will actually result in consumption increase, and that economic theory indicates that by imposing a uniform appearance on all tobacco products, plain packaging reduces consumer loyalty to brands, thus increasing price competition, the inevitable consequence of which is increase in demand.¹²⁸²

7.428. Honduras further argues that medical science also demonstrates that the TPP measures will not contribute to a reduction in prevalence. Smoking prevalence is determined by assessing different types of behaviour: namely, whether people take up smoking (*initiation*), whether they stop smoking (*cessation*) and whether they resume smoking after a period of abstinence (*relapse*).¹²⁸³ Smoking is a complex, multifaceted activity, with well-documented drivers that are not related at all to the packaging of the product.¹²⁸⁴ Honduras further contends that cessation and relapse have well-documented drivers which are more complex than the mere appearance of tobacco products or attractive packaging.¹²⁸⁵ Plain packaging fails to address the idiosyncratic factors that influence adolescents' decision-making, and, therefore, cannot discourage adolescents from taking up smoking. Changing the packaging in which cigarettes are supplied is not likely to overpower the basic motives of an adolescent to smoke, which comes from the act of smoking

¹²⁷⁷ Appellate Body Reports, *US – COOL*, para. 461.

¹²⁷⁸ Appellate Body Reports, *US – COOL*, para. 461. (footnote omitted)

¹²⁷⁹ Honduras's second written submission, para. 33.

¹²⁸⁰ Honduras's first written submission, para. 888.

¹²⁸¹ Honduras's second written submission, para. 36.

¹²⁸² Honduras's first written submission, paras. 345-398 and 888 (referring to IPE Report, (Exhibit DOM-100); Klick Report, (Exhibit UKR-5); Gibson Report, (Exhibit DOM-92); and anecdotal state and federal-level data from Australia); Honduras's second written submission, paras. 58-61 and 100-121; and Honduras's response to Panel question No. 199.

¹²⁸³ Honduras's first written submission, para. 403.

¹²⁸⁴ Honduras's first written submission, paras. 442 and 888; and Honduras's second written submission, para. 211 (referring to Fischer Report, (Exhibit DOM/HND-7)).

¹²⁸⁵ Honduras's first written submission, para. 442.

itself, not from the tobacco package.¹²⁸⁶ In addition, it is possible that the aura of mystery, risk, or transgression created by the TPP measures may lure teens into smoking activities.¹²⁸⁷

7.429. Honduras further elaborates that Australia inappropriately relies upon behavioural theories to argue that the TPP measures will contribute to their objective via a causal chain whereby plain packaging impacts three mechanisms which in turn are supposed to impact smoking behaviour. Even if the TPP measures were to lower the appeal and increase the perceived risks of tobacco products, it may very well not affect ultimate smoking behaviour. Theories cannot demonstrate or prove a link between non-behavioural constructs, e.g. "surrogate" variables, such as attitudes, opinions, stated intentions, or perceptions of a cigarette pack, and whether study participants would stop smoking or smoke less if only plain packs were available.¹²⁸⁸

7.430. Honduras argues that Australia's comparison between tobacco packaging and advertising is inapplicable in the dark market of Australia and where there is a dominant GHW on packaging. Packaging does not constitute promotion or advertising according to basic principles of marketing science. Even if it were, it is difficult to conceive that a person would take the important decision to become a smoker simply because he or she was attracted to the package. At most, packaging could convince a person, who is already a smoker, to switch to another brand of tobacco products. Second, economic theory indicates that by imposing a uniform appearance on all tobacco products, the TPP measures create a market where producers must compete on the basis of price, resulting in lower prices and increased demand and prevalence.¹²⁸⁹

7.431. Under WTO law, domestic regulation must be objectively justifiable and, where relevant, based upon objective and scientific evidence.¹²⁹⁰ In Honduras's view, the studies that Australia has referred to before and after the implementation of the TPP measures to justify its belief that they will contribute to a reduction in smoking lack scientific rigour and are vitiated by many flaws that cast doubt on the scientific objectivity of the research and the authors.¹²⁹¹ Australia's studies were based on unreliable, self-reported statements about possible behavioural intentions on the basis of which the study authors drew unwarranted conclusions.¹²⁹² No government should regard the studies upon which Australia relied as sound science.¹²⁹³

7.432. Honduras argues that it would be reasonable to expect, and indeed the pre-implementation evidence predicted, that an intervention such as plain packaging would reveal its impact within the first two years of its implementation.¹²⁹⁴ Australia's argument that the TPP measures are expected to produce results over time and in combination with other measures is, Honduras argues, self-serving and not supported by qualitative or quantitative evidence that the measures are "apt" to make a material contribution, as required.¹²⁹⁵ The nature, architecture and design of the measures are not apt to contribute to changing smoking behaviour in the short or long term, because they do not deal with the drivers of smoking.¹²⁹⁶ Further, it is well-known

¹²⁸⁶ Honduras's first written submission, paras. 404-425 (referring to Steinberg Report, (Exhibit DOM/HND-6)); Honduras's second written submission, paras. 210-213 (referring to Steinberg Rebuttal Report, (Exhibit DOM/HND-10), among others).

¹²⁸⁷ Honduras's first written submission, para. 441 (referring to Satel Report, (Exhibit UKR-7); Steinberg Report, (Exhibit DOM/HND-6); and Honduras's second written submission, paras. 210-213).

¹²⁸⁸ Honduras's first written submission, paras. 462-463, 484, and 494 (referring to Kleijnen Systematic Review, (Exhibit DOM/HND-4) and Peer Review Report, (Exhibit DOM/HND-3)); Honduras's second written submission, paras. 142-156 (referring to Ajzen Report, (Exhibit DOM/HND/IDN-3) and Ajzen Supplemental Report, (Exhibit DOM/HND/IDN-4); and Honduras's response to Panel question No. 202.

¹²⁸⁹ Honduras's first written submission, paras. 443-454 and 888 (referring to Steenkamp Report, (Exhibit DOM/HND-5); and Winer Report, (Exhibit UKR-9)); and Honduras's second written submission, paras. 36 and 201-209 (referring to Steenkamp Rebuttal Report, (Exhibit DOM/HND-14), among others).

¹²⁹⁰ Honduras's first written submission, para. 459 (referring to Appellate Body Report, *US – Continued Suspension*, para. 591).

¹²⁹¹ Honduras's first written submission, paras. 455 and 457.

¹²⁹² Honduras's second written submission, para. 33.

¹²⁹³ Honduras's first written submission, para. 888.

¹²⁹⁴ Honduras's first written submission, paras. 343-344 (referring to Pechey et al. 2013, (Exhibit JE-24(51)). See also Honduras's comments on Australia's response to Panel question No. 160.

¹²⁹⁵ Honduras's second written submission, paras. 40 and 43-44 (referring to Appellate Body Report, *Brazil – Retreaded Tyres*). See also Honduras's response to Panel question No. 126.

¹²⁹⁶ Honduras's closing statement at the first meeting of the Panel, para. 16; and Honduras's second written submission, para. 53.

that a non-price based tobacco control measure has the strongest effect in the short run and is subject to "wear-out", an effect which researchers have already observed in Australia.¹²⁹⁷

7.433. Honduras argues that empirical evidence of the actual effect of a measure on behaviour is the best evidence against which to test whether the architecture, structure and design of the measure is apt to contribute to the objective. Reliable and probative empirical evidence of the lack of actual impact of the measure more than two and a half years after its introduction is available and must be given primacy in the analysis.¹²⁹⁸ It is not valid for Australia to focus only on theories when there are sufficient facts to assess the impact of the measures.¹²⁹⁹

7.434. The Dominican Republic states that Australia has offered a conceptual framework whereby the measures contribute to their objective at some unspecified time in the future via a chain of effects whereby the measures will work through three mechanisms (appeal, GHW effectiveness, deception); then, changes in those three mechanisms will, in turn, adversely affect beliefs, attitudes, and intentions (including perceptions and knowledge of smoking harm, enjoyment of smoking, and intentions to smoke); and, these changes will, ultimately, act as antecedents to behaviour, and reduce smoking. Australia and its experts posit that changes in smoking behaviour will follow inevitably from a change in beliefs, attitudes, and/or intentions. This assumption, the Dominican Republic argues, rests on fundamental misconceptions regarding behavioural theories.¹³⁰⁰

7.435. Further, the research relied upon by Australia to support its hypothesis suffers from many serious methodological flaws rendering it neither reliable nor probative. Applying standards of methodological rigour that apply in social science research into consumer behaviour to the body of literature investigating the predicted behavioural effects of plain packaging reveals fatal flaws. These flaws include, in the Dominican Republic's view, (a) measuring remote outcomes, such as visual appeal, beliefs, and attitudes and intentions towards smoking, rather than actual smoking behaviour; (b) employing non-experimental study designs that do not permit any conclusions to be reached regarding the effect of plain packaging on the outcome measured; and (c) other methodological failings that permit the study results to be influenced by factors other than the plain packaging intervention.¹³⁰¹ Further, the process by which the research in support of plain packaging developed raises serious questions about its objectivity and reliability.¹³⁰²

7.436. The Dominican Republic also rejects Australia's analogy between tobacco packaging and advertising, whereby (1) advertising causes people to smoke; (2) packaging is a form of advertising; and (3) removing branding from packaging is "*capable of affecting*" smoking behaviour. The Dominican Republic challenges the comparison between the small amount of space on the package not covered by the GHW and traditional advertising, and asserts that even before the TPP measures were introduced, Australia's packaging had negative appeal, in contrast with traditional advertising, which communicates strongly positive messages. The demand effects of plain packaging, according to Australia's own expert, cannot be discerned by analogy with the demand effects of traditional advertising.¹³⁰³

7.437. The Dominican Republic also contends that well-accepted axioms of social and medical science confirm that the TPP measures will not be effective in achieving Australia's stated goals. Branded packaging serves product identification and differentiation purposes. It does not change

¹²⁹⁷ Honduras's second written submission, paras. 28, 51 and 126 (referring to Zacher et al. 2015, (Exhibits AUS-223 (revised), DOM-287)). See also Honduras's response to Panel question No. 126, section a.

¹²⁹⁸ Honduras's second written submission, paras. 38 and 50. See also Honduras's response to Panel question No. 71; and Honduras's comments on Australia's response to Panel question No. 160.

¹²⁹⁹ Honduras's second written submission, para. 145.

¹³⁰⁰ Dominican Republic's second written submission, paras. 13-14 (referring to Ajzen Report, (Exhibit DOM/HND/IDN-3)). See also Dominican Republic's closing statement at the second meeting of the Panel, para. 12; and Dominican Republic's response to Panel question No. 2, section A.

¹³⁰¹ Dominican Republic's first written submission, paras. 56-65 (referring to the Kleijnen Systematic Review, (Exhibit DOM/HND-4); and Peer Review Report, (Exhibit DOM/HND-3)).

¹³⁰² Dominican Republic's first written submission, paras. 68-80.

¹³⁰³ Dominican Republic's opening statement at the second meeting of the Panel, paras. 43-50 (referring to Dubé Report, (Exhibit AUS-11)); and Dominican Republic's response to Panel question No. 102, paras. 92-99.

the overall size of the market for the product.¹³⁰⁴ Plain packaging will also not reduce smoking initiation, because adolescents have a propensity for risk-taking behaviour and are attracted to smoking by the social rewards of engaging in the behaviour itself, not because of any consumer packaging.¹³⁰⁵ Similarly, plain packaging will not increase smoking cessation or discourage relapse, because those behaviours are not driven by packaging.¹³⁰⁶

7.438. The Dominican Republic observes that the relative weight ascribed by a panel to evidence regarding a measure's structure and design, on one hand, and its expected or actual operation, or application, on the other, is necessarily case-specific and influenced by variables including the evidence available, the relevance of the evidence, and the nature of the claims and arguments of the parties.¹³⁰⁷ Evidence of actual operation may reveal that a measure's design and structure are misconceived, or are not operating as expected, and are thus not probative of whether the measure contributes to its objective. The Dominican Republic argues that, at this stage, evidence of actual operation is far more valuable than mere expectations.¹³⁰⁸ Real-word empirical data, which is not opinion-based or predictive, permits an objective assessment of the actual behavioural effects of changing the appearance of tobacco products and their packaging, and is the most reliable and credible evidence available to the Panel to assess the contribution these measures make to achieving their objective.¹³⁰⁹ With close to three years' worth of data available at the time of its submission, the Dominican Republic argues that there is no evidence that the TPP measures are having statistically significant effects on prevalence or consumption.¹³¹⁰ A survey conducted by Australia designed to evaluate the actual operation of the TPP measures after implementation also reveals that, "aside from certain obvious changes in pack appeal and the noticeability of health warnings that more-than-doubled in size", there is a consistent lack of evidence of changes in the so-called antecedents to smoking behaviour. Further, the "rather limited impact of the policies that we have seen to date will tend to weaken over time". Thus, the TPP measures have changed neither the antecedents of smoking behaviour nor smoking behaviour itself.¹³¹¹ In the Dominican Republic's view, the reality of the actual operation is that the TPP measures "have not lived up to the expectations of either tobacco control researchers or the Australian government".¹³¹²

7.439. The TPP measures cannot, the Dominican Republic argues, continue to be justified by short-term research-based predictions that have failed to materialize over an extended period.¹³¹³ Australia's assertion that the impact of tobacco plain packaging on smoking rates will be most pronounced in the long term must be supported by robust evidence, and cannot be a matter of speculation. To ensure that WTO Members cannot circumvent scrutiny of their restrictive measures by simply asserting long-term effects, beyond the timeline of the panel proceedings, the Appellate Body in *Brazil – Retreaded Tyres* explained that claims of future effects must be clearly defined and rigorously tested. The pathway must be established by "*quantitative projections* in the future, or *qualitative reasoning* based on a set of hypotheses that are *tested and supported by sufficient evidence*". Australia has failed to adduce either. Rather, the evidence on which Australia relies

¹³⁰⁴ Dominican Republic's first written submission, paras. 81-82 (referring to Steenkamp Report, (Exhibit DOM/HND-5)).

¹³⁰⁵ Dominican Republic's first written submission, para. 83 (referring to Steinberg Report, (Exhibit DOM/HND-6); and Dominican Republic's response to Panel question No. 102, paras. 87-88).

¹³⁰⁶ Dominican Republic's first written submission, para. 84 (referring to Fischer Report, (Exhibit DOM/HND-7)).

¹³⁰⁷ Dominican Republic's response to Panel question No. 71.

¹³⁰⁸ Dominican Republic's response to Panel question No. 2, para. 21; Dominican Republic's first written submission, paras. 555-556; and Dominican Republic's second written submission, paras. 310-312.

¹³⁰⁹ Dominican Republic's first written submission, paras. 47-55, 430, and 555-558 (referring to IPE Report, (Exhibit DOM-100); and Klick Report, (Exhibit UKR-5)). See also Dominican Republic's comments on Australia's response to Panel question No. 206, para. 313.

¹³¹⁰ Dominican Republic's second written submission, paras. 11-12 (referring to IPE Updated Report, (Exhibit DOM-303); and List Report (DOM/IDN-1)); and Dominican Republic's response to Panel question No. 199 (referring to IPE Third Updated Report, (Exhibit DOM-375)).

¹³¹¹ Dominican Republic's second written submission, paras. 16-25 (quoting Ajzen et al. Data Report, (Exhibit DOM/IDN-2)); and Dominican Republic's response to Panel question No. 146, para. 6.

¹³¹² Dominican Republic's response to Panel question No. 71, paras. 345 and 348.

¹³¹³ Dominican Republic's opening statement at the second meeting of the Panel, para. 55. See also Dominican Republic's response to Panel question No. 126, para. 279.

predicted that the effect of plain packaging would have materialized by now, and that its effect will only weaken over time.¹³¹⁴

7.440. Cuba argues that post-implementation data on consumption and prevalence demonstrates that the TPP measures have not contributed to reduced tobacco use in Australia. The complementary analysis of the data conducted by a number of independent experts fail to find evidence of an impact on prevalence or consumption either within Australia's overall population or within the relevant sub-groups with which health experts are most concerned.¹³¹⁵ Nor do Australia's own post-implementation surveys show that the TPP measures have impacted the mechanisms that Australia considers will lead to a change in smoking behaviour.¹³¹⁶ Ultimately, there is no better test of the effectiveness of a policy than its implementation in the real world. The post-implementation data on prevalence and consumption must be taken as decisive evidence of whether the TPP measures can actually achieve their intended aim. Abstract hypotheses and speculative conclusions will not be adequate in the presence of credible evidence of the measures' actual effects.¹³¹⁷ Given the absence of even any short-term "shock" effect, and the widely accepted fact that health communications are subject to "wear out", any longer term effects on smoking behaviour are unrealistic.¹³¹⁸

7.441. Cuba also argues that Australia's rationale for adopting the TPP measures was flawed, thus revealing why the measures have been ineffective. The studies that Australia relies upon do not provide a sound basis for concluding that the TPP measures will reduce tobacco use. None of the studies measure actual tobacco consumption. They utilise research designs which leave considerable doubts about the reliability of any conclusions reached, and were implemented in a manner that gives rise to further methodological concerns.¹³¹⁹ Further, research regarding the key determinants of initiation, cessation and relapse indicates that tobacco packaging is not a material factor.¹³²⁰

7.442. Cuba argues that Australia's argument that the TPP measures will "reduce the appeal of tobacco products to consumers" is flawed. First, studies do not establish that branded packaging is appealing in the Australian regulatory context, which includes a dominant 75% GHW on the front of the pack. Second, the effects of branding on the residual portion of the pack cannot be equated to advertising. Third, Australia fails to demonstrate a link between the concept of appeal and tobacco consumption.¹³²¹ Australia's attempt to hide behind convoluted behavioural theories to establish a relationship between smokers' intentions and attitudes and their behaviour is unconvincing.¹³²²

7.443. Cuba submits that Australia's claim that the TPP measures will "increase the effectiveness of health warnings", thereby reducing smoking rates, is also flawed. Specifically, "[i]t is implausible to suggest that consumers ... who ... fail to notice [a GHW covering 75% of the front

¹³¹⁴ Dominican Republic's response to Panel question No. 126, paras. 273-299; and Dominican Republic's second written submission, paras. 363-368. (emphasis original)

¹³¹⁵ Cuba's first written submission, paras. 95-144; and Cuba's second written submission, paras. 112-115 and 266-284 (referring to IPE Report, (Exhibit DOM-100); Klick Report (Exhibit UKR-5); Klick Rebuttal Report, (Exhibit HND-118); and Gibson Report, (Exhibit DOM-92), among others). See also Cuba's response to Panel question No. 199 (referring to Klick Supplemental Rebuttal Report, (Exhibit HND-122), among others).

¹³¹⁶ Cuba's second written submission, paras. 316-335.

¹³¹⁷ Cuba's second written submission, para. 40 (referring to Appellate Body Report, *US – Tuna II (Mexico)*, para. 317). See also Cuba's response to Panel question No. 2 (annexed to its response to Panel question No. 138); and Cuba's comments on Australia's response to Panel question No. 160.

¹³¹⁸ Cuba's second written submission, paras. 154-155 and 265. See also Cuba's response to Panel question No. 203 (referring to Ajzen response to Panel question Nos. 146, 202, and 203, (Exhibit DOM/HND/IDN-6)).

¹³¹⁹ Cuba's first written submission, paras. 169-184 (referring to Kleijnen Systematic Review, (Exhibit DOM/HND-4); Klick TPP Literature Report (Exhibit UKR-6); Peer Review Report (Exhibit DOM/HND-3); and Viscusi Report (Exhibit UKR-8), among others).

¹³²⁰ Cuba's first written submission, paras. 208-216; Cuba's second written submission, paras. 291-300 (referring to McKeganey Report, (Exhibits DOM-105, CUB-72); Viscusi Report (Exhibit UKR-8); Steinberg Report (Exhibit DOM/HND-6); and Satel Report (Exhibit UKR-7)).

¹³²¹ Cuba's first written submission, paras. 201-207.

¹³²² Cuba's second written submission, paras. 287-289. See also Cuba's response to Panel question No. 202 (referring to Ajzen response to Panel question Nos. 146, 202, and 203, (Exhibit DOM/HND/IDN-6)).

face of the pack] will have their capricious attention appropriately re-directed because of plain packaging". Findings from studies on this subject "provide no basis for concluding that plain packs make warnings more effective". Even if they were, it can have little effect on smoking behaviour, given that the overwhelming majority of the population is already aware of the relevant risks.¹³²³

7.444. Cuba, referring to Australia argument that packaging is a kind of advertising that can influence consumer responses, including purchasing and consumption behaviour, argues that Australia's own expert recognizes, however, that evidence on the effects of advertising is not relevant for tobacco plain packaging. Tobacco packaging does not serve as advertising in Australia's dark and mature market for tobacco, where GHGs dominate the pack.¹³²⁴ Further, the TPP measures may have adverse effects on public health, by causing prices to decline and consumption and prevalence to increase. The TPP measures may also increase the appeal of smoking to rebellious teens.¹³²⁵

7.445. Cuba endorses in general the arguments advanced by the other complainants with respect to the validity of the evidence presented in their first written submissions as well as the evidence put forward in their second written submissions to demonstrate that the TPP measures do not make a contribution to Australia's objective and that they have been ineffective.¹³²⁶

7.446. Indonesia notes that the Appellate Body has counselled that the contribution of a measure to its objective can be demonstrated quantitatively or qualitatively, and can involve (i) the assessment of evidence or data, pertaining to the past or the present; as well as (ii) quantitative projections in the future, or qualitative reasoning based on a set of hypotheses that are tested and supported by sufficient evidence.¹³²⁷

7.447. Indonesia claims that studies conducted by multiple researchers using different analytical approaches have failed to find any empirical evidence that the TPP measures have reduced prevalence after implementation. Further, state-level evidence shows that in some parts of Australia prevalence has increased.¹³²⁸ In instances, such as these proceedings, where there is actual evidence demonstrating the contribution (or in this case, absence of a contribution) from a challenged measure, the Panel should give more weight to this evidence than to "the design, structure, and operation of the technical regulation".¹³²⁹

7.448. Indonesia challenges Australia's assertion that the TPP measures will contribute to decreasing smoking initiation and increasing smoking cessation.¹³³⁰ Australia failed to provide a sound empirical basis for the hypothesis that the TPP measures will change the smoking behaviours targeted by them. Instead, it assumed that behavioural theory "proved" that attitudes toward the appeal of tobacco products and health risks affect actual smoking behaviour, which resulted in a number of flaws in the subsequent research.¹³³¹ The studies relied upon by Australia fail to reflect the reality of the marketplace, in which only plain packs, dominated by unappealing

¹³²³ Cuba's first written submission, paras. 222-227 (referring to Viscusi Report, (Exhibit UKR-8), among others).

¹³²⁴ Cuba's second written submission, paras. 301-309 (referring to Dubé Report, (Exhibit AUS-11); Winer Report (Exhibit UKR-9); and Neven Report (Exhibit UKR-3) (SCI), among others).

¹³²⁵ Cuba's first written submission, paras. 231-238 (referring to IPE Report, (Exhibit DOM-100); and Satel Report (Exhibit UKR-7), among others).

¹³²⁶ Cuba's second written submission, para. 119.

¹³²⁷ Indonesia's second written submission, para. 171 (referring to Honduras's first written submission, para. 299, which cites Appellate Body Report, *Brazil – Retreaded Tyres*, para. 150; Panel Report, *China – Raw Materials*, paras. 7.480-7.481, 7.484-7.486; and Panel Report, *China – Rare Earths*, para. 7.146).

¹³²⁸ Indonesia's first written submission, paras. 23, 114-117, 320-334, 341-352, and 412 (referring to IPE Report, (Exhibit DOM-100); and Klick Report (Exhibit UKR-5), among others). See also Indonesia's second written submission, paras. 192-193. Indonesia incorporates by reference the Dominican Republic's analysis of the post-implementation data in its second written submission. *Ibid.* para. 193.

¹³²⁹ Indonesia's response to Panel question No. 71.

¹³³⁰ Indonesia's first written submission, paras. 412-416 (referring to Fischer Report, (Exhibit DOM/HND-7); and Steinberg Report (Exhibit DOM/HND-6), among others).

¹³³¹ Indonesia's second written submission, para. 190.

GHWs, are available¹³³², and suffer from numerous serious methodological flaws that render their conclusions unreliable.¹³³³

7.449. Indonesia urges the Panel not to allow Australia to deny that the TPP measures are subject to scrutiny because they are part of a "suite of measures"¹³³⁴ or will contribute to reducing smoking "in the long run".¹³³⁵ Any contribution must be distinguished from the overall decline in smoking prevalence that has existed in Australia for years and from the effect of the expanded GHW.¹³³⁶

7.450. Australia responds that, by removing "one of the last remaining frontiers for tobacco advertising in Australia" through the introduction of tobacco plain packaging, it "sought to sever the link between tobacco product packaging and tobacco smoking behaviour, particularly for youth".¹³³⁷ As acknowledged by the tobacco industry, and evidenced in marketing and public health science, left unregulated, tobacco product packaging can perform the same function as other forms of marketing and promotion, including advertising, especially in a dark market¹³³⁸ like Australia.¹³³⁹ Branding, packaging innovation, and design elements influence consumer behaviour by producing positive perceptions of the brand and tobacco products.¹³⁴⁰ Youth can be motivated to begin smoking by tobacco packaging that communicates that the brand will fulfil important psychological needs, which outweigh any consideration of the potential risks.¹³⁴¹ Similarly, branded packaging can serve as a cue for maintaining tobacco use for smokers and those who have quit but are at risk of relapse.¹³⁴² Packaging thus functions as a form of advertising which influences initiation, cessation, and relapse behaviours, thereby increasing overall demand for tobacco products.¹³⁴³

7.451. Australia argues that "TPP fulfils its objectives" by way of a "mediational" model, or "causal chain", whereby the TPP measures improve public health by impacting the three mechanisms identified in the TPP Act.¹³⁴⁴ There is "strong empirical evidence" that each of the mechanisms will contribute to Australia's overall objective of protecting human health.¹³⁴⁵ Namely, plain packaging decreases the appeal of tobacco products by (i) reducing the attractiveness of tobacco packaging¹³⁴⁶; (ii) reducing positive perceptions of taste¹³⁴⁷; and (iii) reducing positive perceptions of smokers.¹³⁴⁸ Plain packaging also increases the effectiveness of health warnings by minimizing distractions of pack design and elements that suppress risk perception, as indicated by studies demonstrating (a) increases in visual attention paid to the warnings; and (b) increases in health warning recall and perceptions about the warnings' believability and seriousness.¹³⁴⁹ Pack

¹³³² Indonesia's opening statement at the first meeting of the Panel, paras. 32-33; and Indonesia's second written submission, paras. 186-187.

¹³³³ Indonesia's second written submission, para. 186.

¹³³⁴ Indonesia's opening statement at the first meeting of the Panel, para. 27; and Indonesia's second written submission, para. 177.

¹³³⁵ Indonesia's second written submission, paras. 178-179; and Indonesia's response to Panel question No. 126.

¹³³⁶ Indonesia's opening statement at the first meeting of the Panel, para. 27; and Indonesia's second written submission, paras. 172-176.

¹³³⁷ Australia's first written submission, paras. 60-61.

¹³³⁸ Australia explains that it is a "dark market" because it has a highly restricted regulatory environment for tobacco advertising and promotion. See Australia's first written submission, para. 8 fn 3.

¹³³⁹ Australia's first written submission, paras. 66-86 and 207-211 (referring to Tavassoli Report, (Exhibit AUS-10); and Dubé Report, (Exhibit AUS-11), among others).

¹³⁴⁰ Australia's first written submission, paras. 75-91 (referring to Slovic Report, (Exhibit AUS-12); Biglan Report (Exhibit AUS-13); and Fong Report (Exhibit AUS-14), among others).

¹³⁴¹ Australia's first written submission, paras. 92-96 (referring to Slovic Report, (Exhibit AUS-12); and Biglan Report, (Exhibit AUS-13), among others).

¹³⁴² Australia's first written submission, paras. 97-102 (referring to Brandon Report, (Exhibit AUS-15); Slovic Report, (Exhibit AUS-12); and Tavassoli Report, (Exhibit AUS-10), among others).

¹³⁴³ Australia's first written submission, paras. 60-102 and 615-645; Australia's second written submission, paras. 214-256 and 444-450; and Australia's opening statement at the second meeting of the Panel, paras. 33-47.

¹³⁴⁴ Australia's first written submission, Part II.I, paras. 142-205.

¹³⁴⁵ Australia's first written submission, paras. 145-147.

¹³⁴⁶ Australia's first written submission, paras. 148-152.

¹³⁴⁷ Australia's first written submission, paras. 153-155.

¹³⁴⁸ Australia's first written submission, paras. 156-162.

¹³⁴⁹ Australia's first written submission, paras. 169-181.

standardization also limits the ability of the pack to mislead by preventing the use of descriptors, packaging design, colour, and structural innovation to mislead consumers about the harmfulness of tobacco products.¹³⁵⁰ Both directly and via each mechanism, the TPP measures affect consumer intentions and behaviour with respect to smoking.¹³⁵¹

7.452. Australia adds that the evidence supporting tobacco plain packaging is extensive, comprehensive, and reliable, and the complainants' critiques fail to consider its "overwhelming weight" and "convergent nature". The complainants instead exaggerate the studies' limitations and ignore their strengths, among other errors.¹³⁵² The most appropriate approach to discerning the effects of the TPP measures in the early stages of its introduction was to rely upon experiments and surveys which consider drivers of choice, attitudes and, ultimately, the elicitation of behavioural intentions, one of the strongest predictors of future behaviour.¹³⁵³ The complainants' dismissal of this evidence is mistaken, as non-behavioural variables are commonly relied on in consumer, psychology, and marketing research journals and textbooks, and are considered strong predictors of behaviour in tobacco control.¹³⁵⁴ Further, empirical evidence demonstrates the effect of the TPP measures on smoking-related behaviour¹³⁵⁵, as the complainants necessarily concede as a consequence of their argument that the TPP measures have reduced consumers' willingness to pay for certain tobacco products.¹³⁵⁶

7.453. The principal basis on which the complainants argue that the TPP measures are not capable of contributing to their objective is their contention that the quantitative evidence does not indicate discernible reductions in smoking prevalence and tobacco consumption in Australia.¹³⁵⁷ The complainants have failed to establish that tobacco plain packaging will increase tobacco consumption¹³⁵⁸, or that prevalence and consumption have not declined since the introduction of tobacco plain packaging. Australia considers the complainants' empirical post-implementation evidence on prevalence and consumption to be fundamentally flawed, and submits that the post-implementation data indicates that the TPP measures have resulted in discernible reductions in prevalence and consumption.¹³⁵⁹

7.454. Australia argues, however, that it has always been its expectation that the TPP measures will have their greatest effects in the long term.¹³⁶⁰ As the measures have been in operation for a limited period of time, the utility of the short-term quantitative data is "limited", particularly in light of its "numerous difficulties". Short-term prevalence and consumption data is likely to "mask[]" changes in initiation, consumption, relapse, as demonstrated by the delayed impact that the introduction of GHWs had upon smoking prevalence rates in Canada.¹³⁶¹ The Appellate Body has acknowledged that the contribution of a technical regulation to its objectives, particularly in the case of a public health measure, need not be "immediately observable", and that effects of certain complex public health measures "can only be evaluated with the benefit of time".¹³⁶² Accordingly, "any inability on the part of the complainants' experts to isolate a statistically significant plain packaging effect in short term prevalence and consumption datasets at this point

¹³⁵⁰ Australia's first written submission, paras. 187-195.

¹³⁵¹ Australia's first written submission, paras. 163-168, 182-186 and 196-205.

¹³⁵² Australia's first written submission, paras. 212-214, 607-614, and Annexure E, paras. 1-10 (referring to Samet Report, (Exhibit AUS-7); Fong Report, (Exhibit AUS-14); Chantler Report, (Exhibits AUS-81, CUB-61); Stirling Review (Exhibits AUS-140, HND-130, CUB-59); and Stirling Review 2013 Update, (Exhibits AUS-216, CUB-60), among others); and Australia's second written submission, paras. 482-485.

¹³⁵³ Australia's first written submission, paras. 145-147.

¹³⁵⁴ Australia's first written submission, paras. 215-216.

¹³⁵⁵ Australia's second written submission, paras. 444-445 and 451-481.

¹³⁵⁶ Australia's second written submission, paras. 476-478.

¹³⁵⁷ Australia's second written submission, para. 487.

¹³⁵⁸ Australia's first written submission, paras. 659-663; and Australia's second written submission, paras. 479-480.

¹³⁵⁹ Australia's first written submission, paras. 664-682 (referring to Chipty Report, (Exhibit AUS-17), among others). See also *ibid.* Annexure E, paras. 11-86; Australia's second written submission, paras. 506-523; and Australia's opening statement at the second substantive meeting, paras. 13-20.

¹³⁶⁰ Australia's second written submission, paras. 495-499; and Australia's responses to Panel question Nos. 7 and 200.

¹³⁶¹ Australia's response to Panel question No. 71, para. 194; and Australia's second written submission, Annexure A, paras. 597-634. See also Australia's response to Panel question No. 7.

¹³⁶² Australia's second written submission, para. 436 (referring to Appellate Body Report, *Brazil – Retreaded Tyres*, para. 151).

in time does not prove that the tobacco plain packaging measure is not capable of contributing to its legitimate public health objectives".¹³⁶³

7.455. Australia further argues that "having regard to the nature of the objective of the tobacco plain packaging measure, its characteristics as revealed by its design and structure, and the nature, quantity and quality of evidence available, the Panel should determine the measure's degree of contribution in qualitative terms".¹³⁶⁴ Australia submits that there is no requirement to quantify the degree of contribution of a challenged technical regulation and that, depending upon the circumstances, it is sufficient to demonstrate contribution through "qualitative reasoning based on a set of hypotheses that are tested and supported by scientific evidence".¹³⁶⁵ Australia refers to the Appellate Body's finding in *EC – Seal Products* that, where evidence of the actual operation of the measure was "limited and uneven", contribution could be demonstrated by qualitative evidence indicating that the measure is "capable of making and does make some contribution to its objective, or that it did so to a certain extent".¹³⁶⁶ This, Australia submits, "is the methodology best suited to yielding a correct assessment of contribution in the circumstances" of this measure.¹³⁶⁷ Australia has presented evidence that "overwhelmingly establishes a causal link" between the specific mechanisms through which it is designed to operate and its general objectives – including evidence that tobacco packaging is a form of advertising, tobacco packaging affects perceptions of tobacco products, and tobacco packaging influences smoking behaviour. It adds that "[t]he aptness of tobacco plain packaging to contribute to its long term objectives is further bolstered by the fact that 130 parties to the FCTC recommended this precise measure as a means of furthering the FCTC's public health objectives".¹³⁶⁸

7.2.5.3.2 Main arguments of the third parties

7.456. Argentina, quoting the Appellate Body report in *US – COOL*, states that panels adjudicating a claim under TBT Article 2.2 must seek to ascertain the degree to which a technical regulation contributes to the achievement of a legitimate objective from "the design, structure, and operation of the technical regulation, as well as from evidence relating to its application". It further notes that the Appellate Body has explained, in the context of Article XX of the GATT 1994, that "a panel must assess the contribution to the legitimate objective actually achieved by the measure at issue".¹³⁶⁹

7.457. Brazil believes that the measures' "degree of achievement" should be discerned by the design, structure and operation of the measure.¹³⁷⁰ Brazil states that evidence relating to the application of the measure "should be taken into account as an objective piece of information with which to evaluate the design, structure, and operation of a measure", in part to ensure that measures that have not been fully implemented, but are apt to contribute, can still be deemed consistent with the covered agreements. It also suggests that in situations where measures have been recently implemented, panels may wish to apply "a longer temporal perspective".¹³⁷¹

7.458. Referring to the Appellate Body report in *US – COOL* (Article 21.5 – Canada and Mexico), Canada states that "the nature of the objective of the technical regulation, its characteristics as revealed by its design and structure, and the nature, quantity, and quality of evidence that is available will have a bearing on whether the technical regulation's degree of contribution to its objective can be assessed in quantitative or qualitative terms". Further, "it is the

¹³⁶³ Australia's second written submission, para. 492.

¹³⁶⁴ Australia's response to Panel question No. 71, para. 192.

¹³⁶⁵ Australia's second written submission, paras. 429 and 434-439 (referring to Appellate Body Report, *Brazil – Retreaded Tyres*, para. 151; and Appellate Body Reports, *EC – Seal Products*, para. 5.228); and Australia's response to Panel question No. 126 (referring to Appellate Body Reports, *US – COOL* (Article 21.5 – Canada and Mexico), para. 5.209).

¹³⁶⁶ Australia's second written submission, para. 435 (referring to Appellate Body Report, *EC – Seal Products*, para. 5.228). (emphasis original; footnote omitted)

¹³⁶⁷ Australia's response to Panel question No. 71, para. 192.

¹³⁶⁸ Australia's response to Panel question No. 126, paras. 171-172.

¹³⁶⁹ Argentina's third-party submission, para. 51 and fn 28.

¹³⁷⁰ Brazil's third-party response to Panel question No. 6.

¹³⁷¹ Brazil's third-party response to Panel question No. 6.

overall degree of contribution that a measure makes to its objective that is relevant in identifying the contribution of the measure in issue, rather than any isolated aspect of contribution".¹³⁷²

7.459. According to Canada, given the recent implementation of the plain packaging measure, and the fact that the TPP Act forms part of a comprehensive regime designed to address a complex public health problem, post-implementation empirical evidence should be viewed together with relevant quantitative and qualitative future projections of the contribution of the measure to its objective.¹³⁷³

7.460. China also recalls the Appellate Body's guidance that a measure's degree of contribution may be discerned from the design, structure, operation, and application of the measure. It notes that a Panel must assess the measure's actual contribution, not its intended contribution.¹³⁷⁴ The Appellate Body indicated in *US – COOL* (Article 21.5 – *Canada and Mexico*) that the degree of contribution can be assessed in either quantitative or qualitative terms, depending on the particular circumstances of a given case.¹³⁷⁵ In these proceedings, evidence concerning the post-implementation period may not offer decisive guidance, considering the relatively recent implementation of the measures.¹³⁷⁶ China also argues that compliance with Article 2.2 does not require a minimum threshold of contribution. Rather, a low degree of contribution might be sufficient if the extent of trade-restrictiveness is low.¹³⁷⁷

7.461. The European Union notes that the Appellate Body has indicated, in the context of Article XX of the GATT 1994, that contribution may be demonstrated by reference to "evidence or data, pertaining to the past or present" or by "a demonstration that the measure is apt to produce a ... contribution", possibly by reference to "quantitative projections into the future or qualitative reasoning based on a set of hypotheses that are tested and supported by sufficient evidence".¹³⁷⁸ It encourages the Panel to apply an appropriately "long term temporal perspective" that would permit the measures to produce their intended effects.¹³⁷⁹ It notes that the Panel "must consider" evidence that is offered regarding the post-implementation period, but believes the weight to be assigned to any particular evidence should be determined on a case-by-case basis.¹³⁸⁰

7.462. The European Union suggests that the Panel consider that the measures are "part of a comprehensive strategy of tobacco control measures" and that the Appellate Body has observed in similar situations that a measure's contribution may prove difficult to isolate in the short term.¹³⁸¹ In examining the actual effects of the measure, the Panel will need to consider whether or not there is a genuine and substantial relationship of cause and effect between the measure and the observed effects. In the event that the Panel is unable to separate and distinguish the causal impact of the measure at issue from other variables, the measure contributes to the objective within the meaning of Article 2.2 of the TBT Agreement.¹³⁸²

7.463. Japan notes that the Appellate Body has held that "a panel adjudicating a claim under Article 2.2 must seek to ascertain from the design, architecture, structure and operation of the technical regulation, as well as from evidence relating to its application - to what degree ... the challenged technical regulation actually contributes to the achievement of the legitimate objective pursued by the Member".¹³⁸³ The Appellate Body has also noted, in the context of assessing the contribution of a measure at issue, that "the nature of the objective of a technical regulation at issue, its characteristics as revealed by its design and structure, and the nature, quantity, and

¹³⁷² Canada's third-party statement, paras. 6-7.

¹³⁷³ Canada's third-party response to Panel question No. 6.

¹³⁷⁴ China's third-party submission, para. 76. See also China's third-party statement, para. 18.

¹³⁷⁵ China's third-party response to Panel question No. 5.

¹³⁷⁶ China's third-party response to Panel question No. 6.

¹³⁷⁷ China's third-party submission, para. 77.

¹³⁷⁸ European Union's third-party submission, para. 71.

¹³⁷⁹ European Union's third-party response to Panel question No. 6; and European Union's third-party statement, para. 4.

¹³⁸⁰ European Union's third-party response to Panel question No. 6. See also European Union's third-party submission, para. 72.

¹³⁸¹ European Union's third-party submission, para. 70.

¹³⁸² European Union's third-party statement, para. 5.

¹³⁸³ Japan's third-party response to Panel question No. 6 (quoting Appellate Body Report, *US – Tuna II (Mexico)*, para. 317; and Appellate Body Reports, *US – COOL*, para. 373).

quality of evidence available, may have a bearing on whether a relevant factor ... can be assessed in quantitative or qualitative terms under Article 2.2, as well as on the degree of precision with which such an analysis can be undertaken".¹³⁸⁴

7.464. Japan considers that evidence concerning the post-implementation period can be used as evidence relating to the measure's application, and thus may be used to confirm the analysis of the design, structure and operation of technical regulation for determining the contribution of the measure to its legitimate objectives. Such evidence should not be given decisive weight in part because it is difficult to isolate the actual contribution that can be attributed only to the measure in the post-implementation period.¹³⁸⁵

7.465. Malawi contends that evidence of an "actual effective contribution of technical regulations to the stated objective" is required to confirm the TPP measures.¹³⁸⁶ The information and data presented by the complainants indicate that the measures have not been effective and have failed to change smoking behaviour. Australia has relied upon research papers that do not examine the effect of the measures on smoking behaviour¹³⁸⁷, and its expert has noted that "the smoking rate is the result of many factors that have nothing to do with packaging".¹³⁸⁸ It contends that there is no information deficit in Australia with respect to the harmful effects of smoking, and argues that the measures have not had any impact on the health warnings or information on the relative harmful nature of tobacco products.¹³⁸⁹

7.466. New Zealand supports Australia's position that "the tobacco plain packaging measure contributes to its public health objectives by reducing the appeal of tobacco products, increasing the effectiveness of graphic health warnings, and reducing the ability of tobacco retail packaging to mislead consumers about the harmful effects of smoking or using tobacco products".¹³⁹⁰ New Zealand suggests that, when assessing the significance and weight to be assigned to each piece of evidence, the Panel consider that the measure is part of a comprehensive suite of measures whose impact will be most felt most significantly in the long term. The Panel is entitled to rely upon post-implementation evidence, but immediate post-implementation evidence will "clearly be less persuasive" when a measure's objective is to change behaviour over the long term.¹³⁹¹

7.467. New Zealand critiques the report submitted by Ukraine's expert, Professor Klick, which compared smoking status in Australia pre and post-plain packaging to smoking status in New Zealand (a country without tobacco plain packaging), over the same period of time. It agrees with Australia's expert Dr Chipty that the report contains flawed analysis and draws invalid conclusions. First, the study sets up a false and virtually impossible evaluation test by looking for a marked short-term reduction in long-term outcomes, namely population smoking prevalence and tobacco consumption. Significant changes in the rate of initiation and the likelihood of quitting or not relapsing – especially in the younger age groups that plain packaging targets – cannot be reliably detected by measuring the population-wide statistics in the short term. Second, the use of New Zealand as a comparison case is superficial and misleading, due to the failure to account for differences between the countries in the manner and timing of tobacco control interventions, particularly a 10% excise tax increase undertaken uniquely by New Zealand in January 2013. Third, the data sets used by Professor Klick cannot be relied upon. The sales data relied upon to measure consumption displays volatility, fails to control for confounding factors (such as stock-piling in advance of a tax increase), and contains gaps which were filled-in with data sourced from the tobacco industry. Survey data used to measure prevalence may not be representative of the population, and does not include people who have never smoked, thereby rendering it incapable of measuring initiation of new smokers. Fourth, the presentation of the survey results is misleading. Professor Klick used data sourced after tobacco products in plain packages were already on sale to represent the pre-plain packaging smoking rate, and utilized an averaging

¹³⁸⁴ Japan's response to Panel question No. 5 (quoting Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.211).

¹³⁸⁵ Japan's third-party response to Panel question No. 6.

¹³⁸⁶ Malawi's third-party submission, para. 12.

¹³⁸⁷ Malawi's third-party submission, para. 9 (referring to Vol. 24 of *Tobacco Control* (2015)).

¹³⁸⁸ Malawi's third-party submission, para. 9 (quoting Fong Report, (Exhibit AUS-14), para. 455).

¹³⁸⁹ Malawi's third-party submission, para. 10.

¹³⁹⁰ New Zealand's third-party submission, para. 96.

¹³⁹¹ New Zealand's third-party response to Panel question No. 6; and New Zealand's third-party statement, para. 16.

method that produced misleading results. A more natural presentation of the results reveals that smoking rates fell further in Australia than New Zealand and reached the same level at the end of the surveyed period. Due to its fundamental flaws, the report should not be taken into account or given any weight in the Panel's overall assessment of the disputing parties' evidence.¹³⁹²

7.468. Nicaragua notes that the Appellate Body has counselled that panels must assess the contribution "actually achieved" by the measure at issue¹³⁹³, and that "empirical evidence of the measure's actual effect on smoking behaviour is the most reliable way to test its effectiveness" and should be assigned "considerable weight".¹³⁹⁴ Nicaragua does not consider that the measure was implemented only "relatively recently", and submits that two years is a proper period for assessing the effectiveness of a measure.¹³⁹⁵

7.469. Qualitative survey and expert evidence as well as quantitative market evidence indicate that the plain packaging measure has not had any positive effect on the protection of health and is not likely to have any such effect in the future.¹³⁹⁶ Qualitative evidence which examines the reasons why people smoke and why they find it hard to quit also confirms that trademarks and packaging are not drivers of smoking behaviour.¹³⁹⁷ Economic analysis confirms that it is not plausible that the measure will contribute in any meaningful way to the reduction of prevalence.¹³⁹⁸ Compared to the complainants' reference to direct behavioural evidence, Australia's reliance on predictions by behavioural scientists and psychologists and studies demonstrating that people consider the plain packs with a 75% GHW to be less pretty is unpersuasive and fails to distinguish the effects of the larger GHW from the TPP measures. The empirical post-implementation data show that the measure has had no effect on smoking behaviour, and reliance on self-reported intentions or general beliefs and perceptions is insufficient to support an argument that plain packaging is contributing to its health protection objective.¹³⁹⁹

7.470. Nigeria considers that the evidence presented by the complainants demonstrates that the TPP measures have failed to contribute to the reduction of smoking and is not likely to reduce smoking in the future.¹⁴⁰⁰ The facts show that two years after the implementation of plain packaging, the measure has not contributed to the reduction of smoking or the changing of smoking behaviour more generally.¹⁴⁰¹ Economic analysis of supply and demand confirms the unlikely nature of any positive contribution of plain packaging.¹⁴⁰² It seems speculative to argue that the TPP measures are likely to contribute in the future. The experts consider that packaging and trademarks do not play a role in taking up smoking or quitting. Nigeria also notes there is general awareness that smoking is very dangerous to consumers' health.¹⁴⁰³

7.471. Norway argues that the Appellate Body has held that the degree of contribution "may be discerned from the design, structure and operation of the technical regulation, as well as from evidence relating to the application of the measure".¹⁴⁰⁴ It notes that in *US – COOL (Article 21.5 – Canada and Mexico)*, the Appellate Body indicated that the nature of the objective of the technical regulation at issue, its characteristics as revealed by its design and structure, and the nature,

¹³⁹² New Zealand's third-party submission, paras. 12-13 and 101-119; and New Zealand's third-party statement, para. 16.

¹³⁹³ Nicaragua's third-party statement, para. 35 (quoting Appellate Body Report, *US – Tuna II (Mexico)*, para. 317).

¹³⁹⁴ Nicaragua's third-party response to Panel question No. 6.

¹³⁹⁵ Nicaragua's third-party response to Panel question No. 6 (referring to Australia's two-year PIR period and Pechey et al. 2013, (Exhibit JE-24(51)).

¹³⁹⁶ Nicaragua's third-party statement, paras. 39-40 (referring to Klick Report, (Exhibit UKR-5); and Gibson Report, (Exhibit DOM-92)).

¹³⁹⁷ Nicaragua's third-party statement, para. 41 (referring to Viscusi Report, (Exhibit UKR-8); Satel Report, (Exhibit UKR-7); and Steinberg Report, (Exhibit DOM/HND-6)).

¹³⁹⁸ Nicaragua's third-party statement, para. 42 (referring to Neven Report (Exhibit UKR-3) (SCI)).

¹³⁹⁹ Nicaragua's third-party statement, para. 44; and Nicaragua's third-party response to Panel question No. 6.

¹⁴⁰⁰ Nigeria's third-party submission, paras. 28 and 33.

¹⁴⁰¹ Nigeria's third-party submission, para. 30 (referring to Klick Report, (Exhibit UKR-5), and "market data and other objective evidence" submitted by the complainants).

¹⁴⁰² Nigeria's third-party submission, para. 32.

¹⁴⁰³ Nigeria's third-party submission, para. 31.

¹⁴⁰⁴ Norway's third-party submission, para. 109 (quoting Appellate Body Report, *US – Tuna II (Mexico)*, para. 317). See also Norway's third-party statement, para. 15.

quantity and quality of evidence available, may have bearing on whether contribution can be assessed in quantitative or qualitative terms, as well as on the degree of precision with which such analysis can be undertaken. In the same report, the Appellate Body reiterated it may suffice to demonstrate via quantitative reasoning or qualitative projections that the measure was "apt to produce a material contribution" to its objective in cases where it is difficult to isolate a measure's contribution in the short term.¹⁴⁰⁵

7.472. Norway submits that "one cannot draw conclusions exclusively from data on smoking prevalence in itself" and "consumer perceptions are relevant for the purposes of assessing the effect of tobacco control policies".¹⁴⁰⁶ Norway suggests that the Panel "accord[] greater weight to the design, structure and operation of the measure", given the long-term nature of the measure and the challenges associated with obtaining robust empirical evidence.¹⁴⁰⁷

7.473. In assessing contribution, Norway suggests that the Panel take into account the difficulties in measuring the effects of an instrument working in synergy with other measures, the overarching objective of promoting public health, and the expectation that the full effects of the measure may manifest themselves gradually over several years.¹⁴⁰⁸ It agrees with Australia that the TPP measures make "a unique contribution to its general public health objectives".¹⁴⁰⁹

7.474. In Norway's view, it must amongst others be considered that (1) advertising is an effective means to enhance sales, especially to reach new and young customers, and that banning advertising effectively reduces tobacco use; (2) the more comprehensive the advertising ban is, the more efficient it is; and (3) the packaging of tobacco products has effects similar to those of traditional advertising.¹⁴¹⁰

7.475. Oman states that the TPP measures aim to prevent tobacco advertising and promotion, and achieve its stated goals of: reducing the attractiveness and appeal of tobacco products to consumers, particularly young people; increasing the noticeability and effectiveness of mandated health warnings; and reducing the ability of the tobacco product packaging to mislead consumers about the harms of smoking. It subscribes to the argumentation and factual evidence articulated by Australia that clearly demonstrates that plain packaging contributes to a reduction in smoking rates and tobacco consumption.¹⁴¹¹

7.476. Singapore states that the contribution of the TPP measures to its public health objectives has to be understood and evaluated in the context of the comprehensive suite of tobacco control measures in Australia.¹⁴¹² There is a wealth of evidence supporting the measures' effectiveness. No single study forms an evidence base by itself, but multiple well-conducted studies that point towards the same conclusions provide a strong evidence base for public policy. On the other hand, the expert reports relied on by the complainants to challenge the evidence base for plain packaging are flawed.¹⁴¹³

7.477. As the impact of new tobacco control policy measures on behaviour cannot be observed before implementation, new measures are inevitably based on predicted models of behavioural intention on subsequent tobacco use behaviours.¹⁴¹⁴ Singapore disagrees with the "complainants' narrow focus on smoking prevalence as the primary basis for assessing ... contribution"¹⁴¹⁵ and states that the Panel should consider "the totality of the evidence", which includes "post-hoc"

¹⁴⁰⁵ Norway's third-party response to Panel question No. 5. See also Norway's third-party statement, para. 16.

¹⁴⁰⁶ Norway's third-party submission, paras. 114-115.

¹⁴⁰⁷ Norway's third-party response to Panel question No. 6. See also Norway's third-party statement, paras. 18-19.

¹⁴⁰⁸ Norway's third-party submission, paras. 111-112 (quoting Appellate Body Report, *Brazil – Retreaded Tyres*, para. 151); Norway's third-party response to Panel question No. 6; and Norway's third-party statement, para. 19.

¹⁴⁰⁹ Norway's third-party submission, para. 113.

¹⁴¹⁰ Norway's third-party submission, para. 115.

¹⁴¹¹ Oman's third-party statement, paras. 3 and 8.

¹⁴¹² Singapore's third-party submission, para. 70.

¹⁴¹³ Singapore's third-party submission, para. 73; and Singapore's third-party statement, para. 21.

¹⁴¹⁴ Singapore's third-party response to Panel question No. 6.

¹⁴¹⁵ Singapore's third-party submission, para. 69.

evidence.¹⁴¹⁶ Researchers from Australia have produced post-implementation data to demonstrate the TPP measures have a) reduced the appeal of tobacco packs; b) increased the visibility of GHWs; and c) reduced the ability of tobacco packaging to mislead consumers about the harms of smoking. Nevertheless, the Appellate Body has cautioned that "the results obtained from certain actions ... can only be evaluated with the benefit of time".¹⁴¹⁷

7.478. Uruguay notes that the TPP measures are an important component of a comprehensive public health policy.¹⁴¹⁸ The measures are based on scientific and technical information, and Australia has demonstrated a reduction in consumption, an increase in the understanding of tobacco impacts on health, and a correlation and causal link to the measures.¹⁴¹⁹ Australia has shown that the measures affect the behaviour of consumers and potential consumers of tobacco, particularly adolescents.¹⁴²⁰ It is critical to note that, although Australia has provided reliable information and statistics, the TPP measures can take time before concrete results are demonstrated and assessments can be done.¹⁴²¹

7.479. Uruguay notes that tobacco manufacturers have used deceptive descriptors such as "light" and "mild" on packaging, ostensibly to denote flavour and taste; however, "light" and "mild" brands are often promoted, either subliminally or overtly, as "healthier" products although scientific evidence demonstrates beyond any doubt that all cigarettes are equally harmful. Tobacco manufacturers have also used numbers in the names of cigarette brands, with up to 80% of smokers interpreting a lower number as an indicator of less tar and reduced risk.¹⁴²² After misleading terms on cigarette packages were prohibited, the tobacco industry continued the deception by using brand colours and variants with the aim of making consumers believe that one brand presentation is less harmful than another.¹⁴²³

7.480. Uruguay contends that packaging design and colour is important in affecting consumer perceptions of relative safety, and even taste.¹⁴²⁴ So-called "plain" packaging brands, with the colours and brand images removed, are normally classified as less attractive and of lower quality than the designs of the original packs. "Plain" packages also increase the relevance and recall of health warnings on packages. Generally speaking, the findings suggest that many of the packaging elements currently used by manufacturers are inherently misleading to consumers and provide strong support for the effectiveness of "plain packaging".¹⁴²⁵

7.481. Zimbabwe contends that there is no probative evidence demonstrating a meaningful contribution of the TPP measures to the reduction of smoking prevalence in Australia. The studies to which Australia consistently referred in WTO committees and which were considered by Australia at the time of the adoption of the measure are speculative, partial and based on questionable methodologies. Based on the evidence submitted by the complainants, plain packaging does not contribute to raising the consumers' already universal awareness of the risks associated with smoking nor does it provide a positive stimulus to quit. More importantly, the market data available since the introduction of plain packaging does not reveal a further reduction in smoking or a positive change in smoking behaviour.¹⁴²⁶

7.482. Zambia states that it fails to see the contribution of the TPP measures to their objective. After two years, no evidence shows that it reduces smoking prevalence or changes in smoking behaviour. The qualitative and quantitative evidence placed before the Panel shows the absence of

¹⁴¹⁶ Singapore's third-party response to Panel question No. 6. See also Singapore's third-party statement, para. 21.

¹⁴¹⁷ Singapore's third-party response to Panel question No. 6. See also Singapore's third-party submission, para. 70.

¹⁴¹⁸ Uruguay's third-party statement, para. 6.

¹⁴¹⁹ Uruguay's third-party submission, paras. 15 and 65.

¹⁴²⁰ Uruguay's third-party submission, para. 73.

¹⁴²¹ Uruguay's third-party response to Panel question No. 6.

¹⁴²² Uruguay's third-party submission, paras. 88-91.

¹⁴²³ Uruguay's third-party submission, paras. 92-99.

¹⁴²⁴ Uruguay's third-party submission, paras. 92-99.

¹⁴²⁵ Uruguay's third-party submission, para. 99.

¹⁴²⁶ Zimbabwe's third-party submission, paras. 27-28. See also Zimbabwe's third-party statement, para. 12 (referring to Neven Report, (UKR-3) (SCI); Klick Report, (Exhibit UKR-5); and IPE Report, (Exhibit DOM-100)).

contribution to the fulfilment of Australia's stated objective and thus that there is no reason to expect any effect of the measure in the future.¹⁴²⁷

7.2.5.3.3 Approach of the Panel and structure of the analysis

7.483. As described above, our task at this stage is to determine, based on the arguments and evidence before us, "to what degree, or if at all", the TPP measures contribute to Australia's objective of improving public health by reducing the use of, and exposure to, tobacco products. In particular, we must seek to determine the actual contribution of the measures, "as written and applied", to this objective.¹⁴²⁸

7.484. As observed by the Appellate Body, "[t]he degree of achievement of a particular objective may be discerned from the design, structure, and operation of the technical regulation, as well as from evidence relating to the application of the measure".¹⁴²⁹ However, no single approach is suited to conducting this type of analysis in all cases. Rather, we must adopt or develop "a methodology that is suited to yielding a correct assessment"¹⁴³⁰ in the circumstances of this case.

7.485. As described above, all parties have presented arguments and evidence concerning the "design, structure and operation" of the TPP measures as well as on their post-implementation effects, or "application". The parties appear to agree that the relevant legal and evidentiary standards under Article 2.2 of the TBT Agreement require a panel to consider all of the relevant evidence before it.¹⁴³¹ However, they have conflicting interpretations of this evidence. In essence, the complainants consider that the TPP measures cannot contribute to their objective through the mechanisms identified in the TPP Act, and that post-implementation evidence shows that smoking prevalence has not in fact been reduced as a result of the TPP measures. Australia in essence responds that, contrary to the complainants' assertions, the measures are designed on the basis of a sound evidence base, and that available post-implementation evidence confirms that the measures are contributing to their objective of reducing smoking.

7.486. The parties also disagree generally on *how* the effects of the measures should be assessed, and the relative weight to be given, in the circumstances of this case, to qualitative and quantitative evidence regarding the measure's design and structure (mostly predating their implementation) and to post-implementation evidence relating to the application of the measures and their impact upon various smoking-related behaviours and outcomes. The complainants consider that, since post-implementation information about actual smoking behaviours is available, this should be the primary basis for the Panel's assessment of the contribution of the measures to their objective of reducing smoking in Australia.¹⁴³² Australia considers that in the early stages of the introduction of the measures, the most appropriate way to discern their effects was to rely on experiments and surveys which consider drivers of choice, attitudes and, ultimately, the elicitation of behavioural intentions.¹⁴³³ It argues that the Panel should determine the measures' degree of contribution to their objectives in qualitative terms, as this is, in Australia's view, the methodology best suited to yielding a correct assessment in the circumstances of these particular measures.¹⁴³⁴

7.487. We therefore first consider the overall approach that will be best suited to our assessment, taking into account both the characteristics of the measures at issue and the nature and extent of

¹⁴²⁷ Zambia's third-party statement, para. 9.

¹⁴²⁸ Appellate Body Reports, *US – COOL*, para. 461. (footnote omitted)

¹⁴²⁹ Appellate Body Reports, *US – COOL*, para. 461.

¹⁴³⁰ Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.210.

¹⁴³¹ See Australia's response to Panel question No. 160, paras. 91-92 and 95; Honduras's response to Panel question No. 206, p. 51; Honduras's comments on Australia's response to Panel question No. 160, para. 112; Dominican Republic's comments on Australia's response to Panel question No. 160, para. 239; Cuba's comments on Australia's response to Panel question No. 160, para. 21; and Indonesia's response to Panel question No. 206, para. 50.

¹⁴³² See, e.g. Honduras's response to Panel question No. 71, p. 34; Dominican Republic's response to Panel question No. 71, paras. 348-349; Cuba's response to Panel question No. 71 (annexed to its response to Panel question No. 138) (agreeing with the response to Honduras to Panel question No. 71); and Indonesia's response to Panel question No. 71, para. 102.

¹⁴³³ Australia's first written submission, para. 147. See also Australia's response to Panel question No. 71, paras. 192-194.

¹⁴³⁴ Australia's response to Panel question No. 71, para. 192.

the evidence presented to us. In approaching this determination, while we are mindful that the burden is on the complainants to demonstrate the existence of a violation of Article 2.2¹⁴³⁵, we find it appropriate to consider, as a starting point, the "design, structure and operation" of the TPP measures, as described by Australia, to inform our understanding of the nature of the assessment to be conducted in the circumstances of these proceedings. This understanding will inform the selection of an appropriate methodology to assess the degree of contribution of the measures to their objective.¹⁴³⁶

7.488. As described by Australia¹⁴³⁷, by design, the TPP measures are intended to operate on the basis of a "causal chain model" or "mediational model" based on three specific mechanisms through which their public health objectives are to be achieved.¹⁴³⁸ These objectives and mechanisms are reflected in Sections 3(1) and 3(2) of the TPP Act.

7.489. Specifically, as reflected in Section 3(1)(a) of the TPP Act, the TPP measures are intended to improve public health by (i) discouraging people from taking up smoking, or using tobacco products; (ii) encouraging people to give up smoking, and to stop using tobacco products; and (iii) discouraging people who have given up smoking, or who have stopped using tobacco products, from relapsing; and (iv) reducing people's exposure to smoke from tobacco products.¹⁴³⁹ Section 3(2) of the TPP Act provides, in turn, that:

- (2) It is the intention of the Parliament to contribute to achieving the objects in subsection (1) by regulating the retail packaging and appearance of tobacco products in order to:
 - (a) reduce the appeal of tobacco products to consumers; and
 - (b) increase the effectiveness of health warnings on the retail packaging of tobacco products; and

¹⁴³⁵ Appellate Body Report, *US – Tuna II (Mexico)*, para. 323; and *US – COOL*, para. 379.

¹⁴³⁶ We note the following observation of the Appellate Body in the context of Article 2.1 of the TBT Agreement:

[H]aving promulgated the technical regulation containing the regulatory distinctions that result in the detrimental impact, the responding Member will be best situated to adduce the arguments and evidence needed to explain why, contrary to the complainant's assertions, the technical regulation is even-handed and thus why the detrimental impact on imports stems exclusively from a legitimate regulatory distinction.

Appellate Body Report, *US – Tuna II (Mexico)* (Article 21.5 – Mexico), para. 7.33. (emphasis original)
Similarly, in an analysis of the measure's contribution to its legitimate objective in the context of Article 2.2, we consider that Australia, as the implementing Member, will be best situated to explain what the design and structure of the measures are and therefore how they are intended to operate to contribute to their objective. We also note the first sentence of Article 2.5, which states: "A Member preparing, adopting or applying a technical regulation which may have a significant effect on trade of other Members shall, upon the request of another Member, explain the justification for that technical regulation in terms of the provisions of paragraphs 2 to 4". See also para. 7.1087 below.

¹⁴³⁷ See para. 7.451 above.

¹⁴³⁸ See Australia's first written submission, section II.I.1 and para. 142 (referring to Fong Report, (Exhibit AUS-14), paras. 14-15).

¹⁴³⁹ TPP Act, (Exhibits AUS-1, JE-1), Section 3. Section 3 of the TPP Act states:

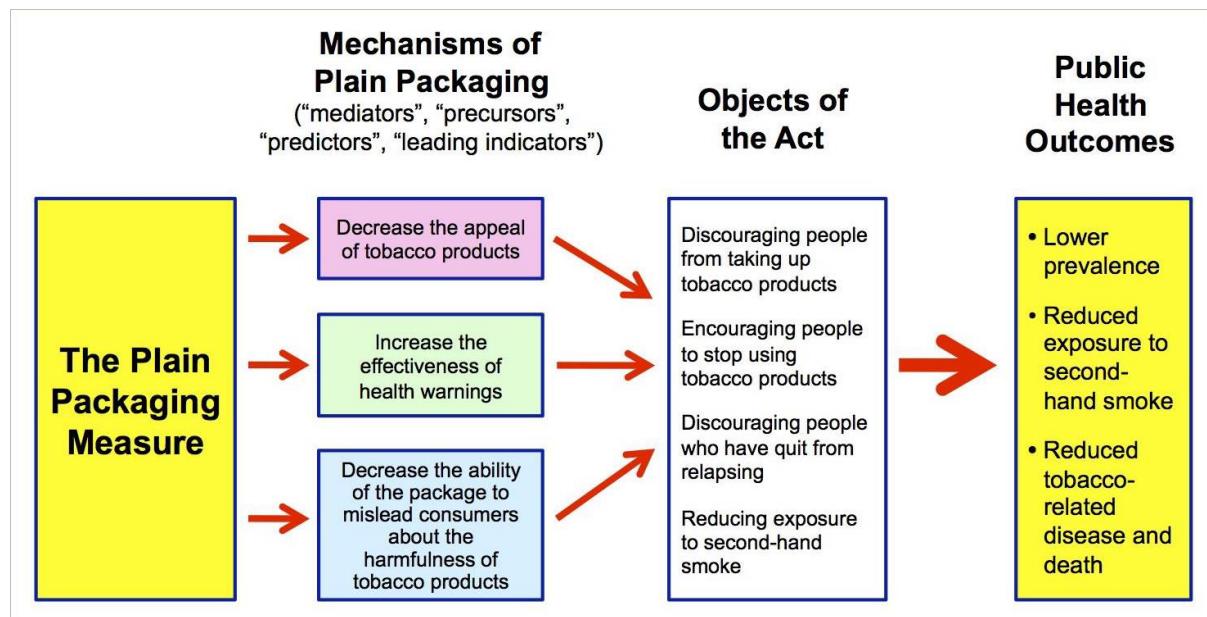
- (1) The objects of this Act are:
 - (a) to improve public health by:
 - (i) discouraging people from taking up smoking, or using tobacco products; and
 - (ii) encouraging people to give up smoking, and to stop using tobacco products; and
 - (iii) discouraging people who have given up smoking, or who have stopped using tobacco products, from relapsing; and
 - (iv) reducing people's exposure to smoke from tobacco products;

- (c) reduce the ability of the retail packaging of tobacco products to mislead consumers about the harmful effects of smoking or using tobacco products.¹⁴⁴⁰

7.490. As Australia describes it in Figure 12 below, the TPP measures are intended to contribute to Australia's objective in the following manner:

- Tobacco plain packaging is intended to reduce the appeal of tobacco products to consumers, increase the effectiveness of the health warnings, and reduce the ability of the packaging to mislead consumers about the harmful effects of smoking (see second column in Figure 12 below). Australia refers to these processes as the TPP mechanisms, as will the Panel.¹⁴⁴¹
- If the TPP measures operate as intended upon any one or any combination of the above three mechanisms, then Australian consumers are expected to be discouraged from taking up smoking (initiation) or resuming smoking (relapse), and to be encouraged to stop smoking (cessation) and reduce exposure to second-hand smoke (see third column in Figure 12 below). We will refer to initiation, relapse, cessation as, more generally, smoking behaviours relating to the use of tobacco products.¹⁴⁴²
- As a consequence, positive public health outcomes, specifically reduced use of, and exposure to, tobacco products, and an associated reduction in tobacco-related disease and death, would arise (see fourth column in Figure 12 below).

Figure 12: Australia's depiction of the TPP Act



Source: Australia's first written submission, para. 144 and Figure 9; and Fong Report, (Exhibit AUS-14), p. 25.

¹⁴⁴⁰ TPP Act, (Exhibits AUS-1, JE-1), Section 3(2). See also TPP Bill Explanatory Memorandum, (Exhibits AUS-2, JE-7), pp. 1-2 and 6-7; and TPPA Regulation Explanatory Statement, (Exhibit JE-22), pp. 1 and 10-11.

¹⁴⁴¹ At various points in time, Australia and its experts have also referred to these mechanisms also as "mediators", "precursors", "predictors", and "leading indicators". See Australia's first written submission, para. 144 and Figure 9; and Fong Report, (Exhibit AUS-14), p. 25.

¹⁴⁴² Australia has labelled these smoking behaviours "Objects of the Act". We note that we determined in section 7.2.5.1.1.2 that the objective of the measures within the meaning of Article 2.2 of the TBT Agreement is to improve public health by reducing the use of, and exposure to, tobacco products. For the purpose of these Reports, "smoking behaviours" are those directly related to the use of tobacco products, including, for example, initiation, cessation, relapse, and consumption. "Smoking-related behaviours" are behaviours that are associated with these behaviours, such as purchasing tobacco products, calling a Quitline, concealing a pack in public, and eye movements directed to GHWs.

7.491. By design, therefore, the TPP measures, by changing the packaging and appearance of tobacco products, are intended to act in the first instance on the appeal of tobacco products, the effectiveness of GHWs, and the ability of the pack to mislead consumers about the harmfulness of tobacco products (the *mechanisms*), which in turn is intended to influence smoking *behaviour*, resulting in positive public health outcomes. Impacts on the three mechanisms in the "causal chain" may be described as "non-behavioural" or "proximal" outcomes, while intention and behavioural outcomes, such as increased intentions to quit and increased quit attempts, which relate more closely to smoking behaviours such as initiation, relapse, cessation, and exposure to second-hand smoke, can be described as "distal" outcomes.¹⁴⁴³

7.492. In the words of Australia's expert Professor Fong, the expected "causal chain" reflected in the design of the TPP measures can be described as follows:

One can make reasonable and confident predictions that if the plain packaging measure is shown to decrease appeal and/or increase the effectiveness of health warnings and/or decrease the ability of the package to mislead consumers about the harmfulness of tobacco products, the Objectives of the Act will likely be achieved. If the Objectives of the Act are achieved then this will lead to positive short-term and longer-term public health outcomes.¹⁴⁴⁴

7.493. The complainants dispute the evidentiary base underlying this design, and therefore the capacity of the measures, as designed, to produce the intended outcomes on smoking behaviours through the specific mechanisms described in this "mediational model".¹⁴⁴⁵ They also consider that available evidence on the actual application of the measures demonstrates that they have not in fact had the intended impact on tobacco consumption and prevalence.¹⁴⁴⁶ Further, the complainants consider that, to the extent that such evidence of *actual* smoking behaviours is now available, this should be given preponderant weight in the Panel's assessment.¹⁴⁴⁷

¹⁴⁴³ Fong Report, (Exhibit AUS-14), paras. 14-15 and 88-90 (describing a "causal chain" and "mediational model"); Chaloupka Rebuttal Report, Exhibit (AUS-582), para. 2 (referring to "proximal" and "distal" outcomes); Australia's first written submission, paras. 142-144 and Figure 9 (describing a "causal chain"); NTPPTS Technical Report, (Exhibits AUS-570, HND-124, DOM-307), p. 21 (referring to "proximal" and "distal" outcomes).

"Distal" has been defined as follows: "outcomes such as increased interest in quitting, which ultimately lead to changes in tobacco use behaviors, including quit attempts" (Chaloupka Rebuttal Report, (Exhibit AUS-582), para. 2); "evaluation of tobacco control policies needs to focus on more proximal exposure, belief and intention outcomes ... before assessing more distal behavioural outcomes ... the relationship between proximal belief outcomes with more distal intention and behaviour outcomes is underpinned by a large body of literature". NTPPTS Technical Report, (Exhibits AUS-570, HND-124, DOM-307), pp. 6 and 21.

"Proximal outcomes" have been described as "reducing the appeal of tobacco products and increasing the noticeability of graphic health warnings" (Chaloupka Rebuttal Report, (Exhibit AUS-582), para. 2); and "belief outcomes". NTPPTS Technical Report, (Exhibits AUS-570, HND-124, DOM-307), pp. 6 and 21. We note that Australia's expert Professor Chaloupka also refers to "intermediate" outcomes, such as "greater knowledge about the health consequences of tobacco use and increased perceptions of the risks from tobacco use". Chaloupka Rebuttal Report, (Exhibit AUS-582), para. 2.

See also, referring to the "causal chain" offered by Australia, Honduras's second written submission, para. 150; Dominican Republic's second written submission, paras. 371-376; Cuba's second written submission, paras. 287-289; and Ajzen Report, (Exhibit DOM/HND/IDN-3), paras. 6-7 and 29-33. In analysing the results of the NTPPTS, the complainants' experts refer to "proximal" and "distal" outcomes, as they were denoted in the NTPPTS Technical Report. See Ajzen et al. Data Report, (Exhibit DOM/IDN-2), paras. 47, 51, 83, and 233. The complainants frequently refer to the three mechanisms as "non-behavioural". See *ibid.* para. 51; Honduras's second written submission, para. 150; Dominican Republic's second written submission, paras. 14 and 378; and Klick Supplemental Rebuttal Report, (Exhibit HND-122), para. 58.

¹⁴⁴⁴ Australia's first written submission, para. 143 (quoting Fong Report, (Exhibit AUS-14), para. 90).

¹⁴⁴⁵ See section 7.2.5.3.5.1 below.

¹⁴⁴⁶ See Appendices C and D below.

¹⁴⁴⁷ See, e.g. Honduras's response to Panel question No. 71, p. 34; Dominican Republic's second written submission, para. 310; Dominican Republic's response to Panel question No. 2, para. 21; Dominican Republic's response to Panel question No. 71, paras. 348-349; Cuba's second written submission, para. 40; Cuba's response to Panel question No. 71 (annexed to its response to Panel question No. 138) (agreeing with the response to Honduras to Panel question No. 71); and Indonesia's response to Panel question No. 71, para. 102.

7.494. In Australia's view, the focus of the Panel in its contribution analysis is not on quantitative evidence of immediately observable effects of the TPP measures in the limited period of time since its introduction. For Australia, while such evidence is relevant to the Panel's inquiry, the Panel must give due regard to the nature of the measure's public health objectives, the specific mechanisms through which the measure is designed to make its contribution to these objectives and the nature, quantity and quality of all the available evidence across a range of relevant fields.¹⁴⁴⁸ Australia considers that "[h]aving regard to the nature of the objective of the tobacco plain packaging measure, its characteristics as revealed by its design and structure, and the nature, quantity and quality of evidence available" the Panel should determine the measure's degree of contribution in *qualitative* terms and must accord greater weight to the design, structure and operation of the measure.¹⁴⁴⁹

7.495. As we have determined above, the objective of the measures is to improve public health by reducing the use of, and exposure to, tobacco products. The fulfilment of this objective through the TPP measures is predicated on their ability to influence smoking *behaviours*, such as initiation, cessation, and relapse. A consideration of the impact of the measures on such behaviours is therefore, *a priori*, directly relevant to an assessment of the degree of contribution of the measures to this objective. Specifically, it is consistent with the design and structure of the measures that evidence relating to their actual impact on the use of tobacco products in Australia should inform an assessment of their degree of contribution to their objective.

7.496. Indeed, Australia's expert Professor Fong points out that "tobacco control policies are best measured by their influence on downstream psychosocial variables such as knowledge, beliefs, attitudes and intentions, *and on subsequent tobacco use behaviours*".¹⁴⁵⁰ This is consistent with observations by researchers in the field of tobacco control that "the optimal test of plain packaging would be its implementation and evaluation in a population-based setting"¹⁴⁵¹ and that notwithstanding any intuitive appeal, tobacco control policies "must be evaluated to provide concrete evidence of their effects"¹⁴⁵² as "one cannot ... be certain of the effectiveness of interventions before they are implemented".¹⁴⁵³ Thus, "[t]obacco control practitioners and policy-makers need to be open to the possibility that data from evaluation efforts will reveal that the assumptions underpinning the intervention are flawed".¹⁴⁵⁴ We are also mindful that what we must ascertain is the *actual* degree of contribution of the measures, as designed and as applied.

7.497. We therefore consider that, to the extent that relevant evidence is available, information relating to actual smoking behaviours and the use of tobacco products in Australia following the implementation of the measures should be an integral part of our assessment of the TPP measures' contribution to Australia's objective of improving public health by reducing the use of, and exposure to, tobacco products.¹⁴⁵⁵ The exact weight to be accorded to this evidence will, however, depend on its nature, quality, and probative value in respect of the question before us.¹⁴⁵⁶

7.498. We also note that a significant part of the evidence before us consists of a number of studies, mostly predating Australia's implementation of the TPP measures, identified as the "plain packaging literature" (TPP literature), that sought to explore the expected operation in particular of the three mechanisms now reflected in the "causal chain" of the TPP Act. The complainants base their argument that the measures are not capable of achieving their intended outcomes in part on critiques of the reliability of these studies. The post-implementation evidence before us on the effects of the TPP measures since their entry into force also relates not only to smoking prevalence

¹⁴⁴⁸ Australia's second written submission, para. 438.

¹⁴⁴⁹ Australia's response to Panel question No. 71, paras. 192-193. (emphasis original)

¹⁴⁵⁰ Australia's first written submission, para. 146 (quoting Fong et al. 2006, (Exhibit AUS-132), pp. iii10-iii11). (emphasis added)

¹⁴⁵¹ Wakefield et al. 2012, (Exhibits AUS-557, JE-24(63)), p. 1166.

¹⁴⁵² Fong et al. 2006, (Exhibit AUS-132), p. iii3.

¹⁴⁵³ 2008 IARC Handbook, (Exhibits AUS-602, DOM-368), p. 15.

¹⁴⁵⁴ Borland and Cummings 2010, (Exhibit DOM-369), p. 632.

¹⁴⁵⁵ We note that Australia relies upon evidence relating to the actual implementation of the measures to counter the complainants' assertion that the TPP measures will cause the price of tobacco products to fall. Australia's first written submission, paras. 660-661.

¹⁴⁵⁶ See section 7.2.5.3.6 below on the nature of post-implementation evidence and the weight to be given to it.

and consumption, but also to the effect of the measures on the type of "proximal outcomes" underlying the three mechanisms described above, through which the TPP measures are designed to operate. We do not exclude, at this stage of our analysis, that such evidence relating to "proximal" outcomes reflecting the three mechanism of the TPP Act may, in combination with other relevant evidence before us, inform our assessment of the degree of contribution of the measures to their objective, to the extent that it would inform the impact of the measures on the smoking behaviours that are the ultimate target of the measures.

7.499. More generally, the relative weight to be attributed to specific evidence, including evidence relating to the design, structure and intended operation of the measures, on the one hand, and evidence relating to their application, on the other hand, will depend on the nature and quality of such evidence and its probative value for the question before us. We must assess the TPP measures' degree of contribution to their objective, as precisely as possible, based upon the totality of the relevant evidence before us.¹⁴⁵⁷ The level of precision to which this can be done will however depend on a number of factors:

[T]he nature of the objective of the technical regulation ..., its characteristics as revealed by its design and structure, and the nature, quantity, and quality of evidence available, may have a bearing on whether a relevant factor ... can be assessed in quantitative or qualitative terms ... as well as on the degree of precision with which such an analysis can be undertaken.¹⁴⁵⁸

7.500. In light of the above, we consider that evidence relating to the design, structure, and operation of the TPP measures (including their anticipated impact on "proximal" outcomes reflecting the specific mechanisms through which they are designed to operate and on smoking behaviours), as well as evidence relating to the application of the challenged measures (including evidence relating to their actual effect both on proximal outcomes reflecting the mechanisms under the TPP Act and on smoking behaviours) is *a priori* relevant to an assessment of the degree to which the TPP measures contribute to Australia's objective of reducing the use of, and exposure to, tobacco products.

7.501. The TPP measures cover "tobacco products", which the TPP Act defines as "processed tobacco, or any product that contains tobacco, that: (a) is manufactured to be used for smoking, sucking, chewing or snuffing; and (b) is not included in the Australian Register of Therapeutic Goods maintained under the *Therapeutic Goods Act 1989*".¹⁴⁵⁹ The Explanatory Memorandum to the TPP Bill adds that:

The definition of "tobacco product" in the Bill means that generally any product containing tobacco, no matter how small the amount, will be within the scope of the Bill if it was manufactured for smoking, sucking, chewing or snuffing.

This definition is based on the definition in the WHO FCTC. It is intended to encompass all tobacco products designed for human consumption, and will include, for example, cigarettes, cigars, roll-your-own tobacco, bidis, kreteks, little cigars, and dissolvable tobacco products such as tablets containing tobacco for sucking.

It is important to note that therapeutic goods, which are aimed at helping people to quit their use of tobacco products, will not be regulated by the Bill when they are included on the Australian Register of Therapeutic Goods. Products that contain nicotine but do not contain any tobacco will not be regulated by the Bill.

The broad definition of "tobacco products" may encompass some tobacco products which are unlawful, under Commonwealth, State or Territory laws that regulate the use and sale of tobacco, and that are not affected by the operation of this Bill.¹⁴⁶⁰

¹⁴⁵⁷ See Appellate Body Report, *Korea – Dairy*, para. 137.

¹⁴⁵⁸ Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.211.

¹⁴⁵⁹ TPP Act, (Exhibits AUS-1, JE-1), Section 4.

¹⁴⁶⁰ TPP Bill Explanatory Memorandum, (Exhibits AUS-2, JE-7), p. 9.

7.502. As a subcategory of tobacco products, the TPP Act defines "cigarette" as "a roll of cut tobacco for smoking, enclosed in paper".¹⁴⁶¹ The above definitions also apply in the context of the TPP Regulations¹⁴⁶², which additionally define "cigar" as "a roll of cut tobacco for smoking, enclosed in tobacco leaf or the leaf of another plant"¹⁴⁶³, and "bidi" as "a tobacco product for smoking, not enclosed in paper, commonly known as a bidi".¹⁴⁶⁴

7.503. A voluminous body of evidence was submitted by the parties in these proceedings. Most of this evidence either relates to cigarettes or generally to tobacco products. Some of the evidence before the Panel is specific to cigarillos and cigars.¹⁴⁶⁵

7.504. None of the parties suggests that the approach of the Panel should differ, in respect of its analysis of the contribution of the TPP measures in respect of different tobacco products.¹⁴⁶⁶ According to Australia, the relational and comparative analyses under Article 2.2 of the TBT Agreement should mirror each other, and therefore the Panel should conduct a holistic analysis of tobacco products, rather than separate analyses of cigarettes, cigars and other tobacco products.¹⁴⁶⁷ Cuba, while not suggesting that the approach taken to the analysis should be different in respect of different tobacco products,¹⁴⁶⁸ argues that the TPP measures have a disproportionate effect on LHM cigars¹⁴⁶⁹ and will not reduce LHM cigar prevalence and consumption.¹⁴⁷⁰

7.505. To the extent that the objective pursued, and the mechanisms through which the TPP measures are intended to contribute to this objective, are the same in respect of the various products covered by the TPP measures, we see no reason to assume that a different approach would be required, in considering the contribution of the measures to Australia's objective in relation to different types of tobacco products. Nonetheless, to the extent that specific evidence is presented, that would have an impact on our conclusions concerning the degree of contribution of the measures to their objective in respect of specific tobacco products, we will consider such evidence in the course of our analysis. Accordingly, we will assess the complainants' Article 2.2

¹⁴⁶¹ TPP Act, (Exhibits AUS-1, JE-1), Section 4.

¹⁴⁶² TPP Regulations, (Exhibits AUS-3, JE-2), Regulation 1.1.3.

¹⁴⁶³ TPP Regulations, (Exhibits AUS-3, JE-2), Regulation 1.1.3.

¹⁴⁶⁴ TPP Regulations, (Exhibits AUS-3, JE-2), Regulation 1.1.3.

¹⁴⁶⁵ Some evidence also addressed specifically RYO tobacco; however, no party made arguments with respect to this subgroup of tobacco products.

¹⁴⁶⁶ The Dominican Republic argues that it would be within the Panel's discretion to separately assess the evidence relating to cigars and cigarettes in its Article 2.2 analysis, but considers that there is no basis in the arguments or evidence before the Panel for a separate assessment of the trade-restrictiveness and contribution of the *alternative* measures as they apply to cigars and cigarettes, and that none of the parties has sought to make any relevant distinction in this respect. Dominican Republic's response to Panel question No. 152. Likewise, in the context of Articles 22.2 and 24.3 of the TRIPS Agreement, the Dominican Republic argues that distinctions between types of tobacco products entail no relevant factual or legal differences, although GIs are more likely to be relevant for LHM cigars. Dominican Republic's response to Panel question No. 44. Honduras similarly does not consider that a different assessment of the proposed alternative measures is required in respect of cigars and cigarettes. Honduras's response to Panel question No. 152. Further, in the context of Article 16.1 of the TRIPS Agreement, Honduras argues that there is no need for distinguishing tobacco products. Honduras's response to Panel question No. 29. Likewise, in the context of Articles 22.2 and 24.3 of the TRIPS Agreement, Honduras argues that as a matter of commercial reality, geographical indications are more likely to be relevant for LHM cigars, rather than for other tobacco products; however, the greater commercial relevance of geographical indications for LHM cigars "is not legally relevant." Honduras's response to Panel question No. 44. Indonesia states that it makes no claims regarding cigars in this dispute but incorporates by reference the above points of Honduras and the Dominican Republic. Indonesia's response to Panel question No. 152 (referring to Dominican Republic's response to Panel question No. 152; and Honduras's response to Panel question No. 152).

¹⁴⁶⁷ Australia's response to Panel question No. 152.

¹⁴⁶⁸ Cuba's response to Panel question No. 152. Likewise, in the context of Article 16.1 of the TRIPS Agreement, Cuba argues that "while the basic principles of analysis mentioned above also correspond to the effect of the plain packaging measures on cigars and cigarettes, for the reasons given, Cuba considers that the commercial impact of the measures is much greater for cigars than for cigarettes. Cigarettes are a "basic", low-value product; LHM cigars are higher value luxury products. The creation of an effective brand image and product differentiation are key for the promotion of the premium status of LHM cigars. For this reason, the obstacles on the effective use of trademarks have a much greater prejudicial impact on cigars than on cigarettes." Cuba's response to Panel question No. 29 (annexed to its response to Panel question No. 138).

¹⁴⁶⁹ Cuba's response to Panel question No. 29.

¹⁴⁷⁰ Cuba's first written submission, para. 273.

claims for tobacco products in general, while taking into account, as necessary, relevant evidence specific to certain types of tobacco products.

7.506. Finally, we note that the operation of the TPP measures, including their contribution to Australia's objective, must be viewed in the broader context of other tobacco control measures maintained by Australia. While this broader context does not remove or reduce the need to identify the contribution that the challenged measures themselves make to Australia's objective, it is a relevant consideration in our assessment, to the extent that it informs and affects the manner in which the measures are applied and operate, as a component of a broader suite of complementary tobacco control measures.¹⁴⁷¹

7.507. In the interest of clarity of exposition, we consider first the evidence before us on the design, structure, and intended operation of the TPP measures, and subsequently, the evidence relating to their actual application. However, as described above, our overall assessment will be based on the entirety of the relevant evidence, taken together.

7.508. We first address, as a preliminary matter, some general issues raised by the complainants concerning the probative value to be given to certain evidence before us.

7.2.5.3.4 Access to data and probative value of certain evidence

7.509. As described above, a considerable amount of factual evidence has been presented and relied upon by all parties in these proceedings. This includes numerous expert reports commissioned by the parties for these proceedings as well as published scientific studies in a variety of fields.

7.510. In the course of the proceedings, Australia, Ukraine¹⁴⁷², and the Dominican Republic asked the Panel to exercise its discretion pursuant to Article 13 of the DSU to request data, coding, and other materials, including material underlying expert reports commissioned for the purposes of these proceedings and certain publications relied upon by Australia or its experts.¹⁴⁷³ Taking into account the requirements of due process as well as the potential usefulness of this information to the Panel's own assessment, and without prejudice to the relevance or evidentiary weight to be ultimately accorded to this evidence, the Panel invited Cancer Council Victoria (CCV) and Cancer Council Queensland (CCQ) to provide, among other materials, the dataset underlying two published papers relied upon by Australia or its experts.¹⁴⁷⁴ Citing ethical and legal obligations, and concerns that providing the data would jeopardize its ability to conduct future studies, CCV and CCQ partly declined these requests.¹⁴⁷⁵

7.511. The Dominican Republic and Honduras have questioned the extent to which publications based upon data that they did not have direct access to can be relied upon in these proceedings. The Dominican Republic claims that it is not possible to make an objective assessment of the findings of those studies for which they have not received full access to the underlying data, and invites us to infer that the underlying data that has been withheld is less favourable to Australia.¹⁴⁷⁶ Honduras argues that it would be inappropriate for the Panel to rely on those studies, as the complainants have not had the opportunity to review the underlying data.¹⁴⁷⁷

7.512. We note that, in these proceedings, all parties have had access to, and submitted, a considerable – indeed, an unusually large – volume of evidence to support their claims and arguments. This has included the data and computer coding directly underlying numerous expert reports commissioned for the purposes of these proceedings, as well as a range of data underlying

¹⁴⁷¹ See Appellate Body Report, *Brazil – Retreaded Tyres*, para. 154.

¹⁴⁷² See section 1.6.6 above with respect to DS434.

¹⁴⁷³ See section 1.6.7.3 above.

¹⁴⁷⁴ The two papers are (a) White et al. 2015b, (Exhibits HND-135, DOM-236, DOM-288); and (b) White et al. 2015a, (Exhibits AUS-186, DOM-235). White et al. 2015b is referred to in the Slovic Report, (Exhibit AUS-12), para. 87 and in the Fong Report, (Exhibit AUS-14), para. 348.

¹⁴⁷⁵ See paras. 1.99-1.100 above.

¹⁴⁷⁶ Dominican Republic's second written submission, paras. 443-445; and Dominican Republic's response to Panel question No. 134, paras. 12-16.

¹⁴⁷⁷ Honduras's second written submission, para. 160.

certain publications relied on by Australia that sought to evaluate the effects of the TPP measures since their entry into force.¹⁴⁷⁸

7.513. We do not consider that lack of direct access to the full data underlying a peer-reviewed scientific publication should in itself lead the Panel to disregard such publication or its conclusions as evidence. We do not exclude that, where evidence is presented that may call into question the conclusions of certain research results reflected in scientific publications cited as evidence, this may be validly taken into account in assessing the probative value of that evidence in demonstrating the facts at issue. However, we see no basis for assuming that scientific publications presented as evidence in dispute settlement proceedings can only be validly considered by a panel, if access is also provided to the complete underlying research data. Indeed, as observed by Australia¹⁴⁷⁹, such an approach would render reliance on such information, and the management of evidence in dispute settlement proceedings, unduly complex and ultimately unmanageable. We note in this respect that a range of scientific sources including, where relevant, scientific publications, has been relied upon by parties and taken into account as admissible evidence in prior panel proceedings.¹⁴⁸⁰

7.514. More generally, in these proceedings, all parties have extensively discussed the validity and implications of conclusions drawn from a range of scientific studies in a variety of research fields, including on the basis of the many expert reports commissioned for these proceedings. In assessing the probative value of this evidence, we are mindful that our role is not to make scientific determinations or otherwise seek to resolve scientific debates. Rather, our task is to assist the DSB in resolving a dispute and, in this context, to make an objective assessment, based on the arguments and evidence before us, of the degree of contribution of the TPP measures to their objective, as part of a broader determination on their consistency with Article 2.2 of the TBT Agreement.

7.515. In this context, we will need to assess on the basis of the evidence before us to what extent relevant facts have been established, and the extent to which this evidence, taken as a whole, supports a conclusion that the challenged measures contribute to their objective. To the extent that this is the case, we will need to ascertain as precisely as possible to what degree they do so, in light of the nature and quality of the evidence before us. As observed above, the degree of precision with which this can be done will depend, *inter alia*, on the nature and quality of the evidence before us.

7.516. To the extent that scientific evidence is relied upon, our assessment may include in particular a consideration of whether such evidence "comes from a qualified and respected source"¹⁴⁸¹, whether it has the "necessary scientific and methodological rigor to be considered reputable science" or reflects "legitimate science according to the standards of the relevant scientific community"¹⁴⁸², and "whether the reasoning articulated on the basis of the scientific evidence is objective and coherent".¹⁴⁸³

7.517. These considerations were first identified as relevant in the context of Article 5.1 of the SPS Agreement. The assessment required in reviewing the consistency of an SPS measure under Article 5.1 of the SPS Agreement and the assessment that we are called upon to perform in the context of Article 2.2 of the TBT Agreement are not identical, but they similarly involve a consideration of relevant scientific evidence. The question that a panel must consider under Article 5.1 of the SPS Agreement relates to the existence of a proper risk assessment and whether the conclusions reached in that assessment sufficiently warrant the measure at issue. As described

¹⁴⁷⁸ See section 1.6.7.3 above.

¹⁴⁷⁹ Australia's response to Panel question No. 134, paras. 11-18.

¹⁴⁸⁰ See, e.g. Panel Reports, *US – Tuna II, (Mexico)*, paras. 7.438 fn 634 and 7.498 fn 693; and *US – Clove Cigarettes*, paras. 7.403-7.412.

¹⁴⁸¹ Appellate Body Report, *US – Continued Suspension*, paras. 591-592. See also *ibid.* paras. 598 and 601. These observations were made by the Appellate Body in the context of a consideration of the "scientific basis" of SPS measures under Article 5.1 of the SPS Agreement; however, we consider that they may be relevant, *mutatis mutandis*, to a consideration of the probative value of disputed scientific evidence in other comparable contexts.

¹⁴⁸² See Appellate Body Report, *US – Continued Suspension*, para. 591.

¹⁴⁸³ See Appellate Body Report, *US – Continued Suspension*, paras. 591-592. See also *ibid.* paras. 598 and 601.

above, we are called upon, at this stage of our analysis, to make an objective factual determination on the degree to which, "if at all", the measures contribute to their objective. In carrying out this task and arriving at factual findings in this respect, we have the duty to examine and consider all the evidence before us and to "evaluate the relevance and probative force of each piece thereof".¹⁴⁸⁴ We consider that, in this assessment, the types of considerations identified above as relevant in the context of a review of the scientific basis of a risk assessment under the SPS Agreement may, *mutatis mutandis*, shed important light on "the probative force" to be ascribed to disputed evidence of a scientific nature, also in the context of an assessment under Article 2.2 of the TBT Agreement.

7.2.5.3.5 Design, structure and operation of the measures

7.518. In this section, we focus on evidence relating to the manner in which the TPP measures are designed to operate, in other words, their "design, structure and operation". At this stage of our analysis, therefore, we focus primarily on evidence predating the implementation of the TPP measures in Australia. This is without prejudice to our subsequent consideration of evidence relating to the actual application of the TPP measures in the next section. As described earlier, our overall assessment of the degree of contribution of the measures to their objective will be based on a consideration of the entirety of this evidence.

7.519. As described above, the design underlying the structure of the TPP measures reflects a causal chain or "mediational model" whereby the adoption of a uniform, standardized presentation of tobacco products and their retail packaging (i.e. "plain" packaging) is intended to reduce the appeal of tobacco products to the consumer, enhance the effectiveness of GHWs and reduce the ability of the pack to mislead consumers about the harmful effects of smoking, and thereby affect smoking behaviours.

7.520. The complainants contest the capacity of the TPP measures to contribute to their objective through any of these mechanisms. They argue that the evidentiary base for the TPP measures, in particular the literature in support of tobacco plain packaging, is not of a quality or methodological rigour sufficient to provide a reliable basis to support the measures. They also argue that, even assuming that the measures would, as Australia argues, be apt to reduce the appeal of tobacco products, increase the effectiveness of GHWs or limit the ability of packaging to mislead consumers about the harmful effects of smoking, this will not have an impact on relevant smoking behaviours.

7.521. The complainants' critique of the body of tobacco plain packaging-related studies (TPP literature) cuts across an entire body of evidence relating to the anticipated effects of tobacco plain packaging, mostly consisting of studies predating the implementation of the TPP measures in Australia and seeking to evaluate the potential impact of tobacco plain packaging on the three mechanisms now reflected in the TPP Act. We therefore consider this horizontal critique first. We then turn to a consideration of the evidence relating to each specific mechanism and associated behavioural outcomes underlying the design and structure of the TPP measures.

7.2.5.3.5.1 Critique of the "plain packaging literature" (TPP literature)¹⁴⁸⁵

7.522. The complainants identify a group of 68 published papers, which report the results of studies conducted mostly prior to Australia's implementation of the TPP measures¹⁴⁸⁶ and primarily focusing on the potential for tobacco plain packaging to impact the "non-behavioural" or "proximal" outcomes identified in the TPP Act.

¹⁴⁸⁴ Appellate Body Report, *Korea – Dairy*, para. 137.

¹⁴⁸⁵ This expression is used by the Panel in these Reports without implying a specific list of relevant studies. As described below, the complainants have presented a set of 68 studies that they refer to as "the PP literature". They have also presented a number of expert reports containing reviews of relevant TPP-related studies, each of which defines the scope of review undertaken in the specific report. These lists overlap partially with the literature referred to by Australia. The Panel refers to this body of studies generally as "the TPP literature".

¹⁴⁸⁶ See Plain packaging literature, (Exhibit JE-24). Each of the 68 studies that were submitted as part of Exhibit JE-24 was assigned an individual exhibit number, from JE-24(1) through JE-24(68).

7.523. The complainants engage in individual critiques of specific studies, and also argue that the TPP literature as a whole, applying established social science research criteria¹⁴⁸⁷, suffers from serious methodological flaws and lacks the scientific rigour and objectivity required to form a reliable evidentiary base for a policy intervention of this kind.¹⁴⁸⁸ Australia responds that the TPP measures are based upon "a wealth of evidence supporting [their] effectiveness" and that the complainants' critiques of the TPP literature are "unjustified, irrelevant, and misrepresentative of the body of literature supporting the tobacco plain packaging measure".¹⁴⁸⁹

7.524. In this section, we consider the complainants' overall critique of this literature, without prejudice to the weight to be given to this body of evidence in our overall assessment.

Main arguments of the parties

7.525. The complainants argue that the TPP literature as a whole suffers from flaws that prevent it from serving as reliable scientific evidence of the short or long-term effectiveness of the TPP measures. More specifically, the complainants consider that the TPP literature does not meet the standards of objectivity or methodological rigour that generally apply to social science research on consumer behaviour. In support of this argument, the complainants commissioned expert reports, for the purpose of these proceedings, from three groups of experts: (1) Professor Inman et al.¹⁴⁹⁰; (2) Kleijnen Systematic Reviews¹⁴⁹¹; and (3) Professor Klick.¹⁴⁹² Each applied a distinct review methodology.

7.526. First, the Dominican Republic and Honduras¹⁴⁹³ commissioned a team of seven academics, led by Professor Inman, who have each published and served editorial functions in scholarly journals in the field of consumer behaviour, to conduct a "Peer Review Project" of 55 plain packaging papers (Peer Review Project).¹⁴⁹⁴ The reviewers were instructed to proceed as if each paper was assigned to them as a reviewer for a leading scholarly consumer research journal, and to apply as a benchmark the criteria and rigour by which they would normally judge submitted manuscripts.¹⁴⁹⁵ None of the reviewed studies were recommended for publication by any of the reviewers. Forty-six were "rejected" outright for methodological reasons, with no possibility of revision, while the perceived flaws in the remaining nine studies, if corrected, were deemed substantial enough to potentially alter the studies' results and conclusions.¹⁴⁹⁶

7.527. Second, the Dominican Republic and Honduras¹⁴⁹⁷ commissioned a group of researchers, led by Professor Kleijnen, to systematically "identify, select and critically appraise" plain packaging studies using objective criteria and predefined processes (Kleijnen Systematic Review).¹⁴⁹⁸ Among the 58 papers considered, Professor Kleijnen's team determined that 31 utilized an experimental

¹⁴⁸⁷ See Peer Review Project Rebuttal Report, (Exhibit DOM/HND-12), para. 6; and Kleijnen Systematic Review Second Rebuttal Report, (Exhibit DOM/HND-18), paras. 2 and 22-23.

¹⁴⁸⁸ See Honduras's first written submission, paras. 455-517; Dominican Republic's first written submission, paras. 551-659; and Cuba's first written submission, paras. 169-184. See also Indonesia's second written submission, para. 186.

¹⁴⁸⁹ Australia's first written submission, Annexure E, paras. 3 and 6.

¹⁴⁹⁰ See Peer Review Report, (Exhibit DOM/HND-3); Peer Review Project Rebuttal Report, (Exhibit DOM/HND-12); and Peer Review Project Second Rebuttal Report, (Exhibit DOM/HND-17).

¹⁴⁹¹ See Kleijnen Systematic Review, (DOM/HND-4); Kleijnen Systematic Review Rebuttal Report, (Exhibit DOM/HND-13); and Kleijnen Systematic Review Second Rebuttal Report, (Exhibit DOM/HND-18).

¹⁴⁹² Klick TPP Literature Report, (Exhibit UKR-6) (relied upon by Cuba: see Cuba's communication to the Panel of 13 July 2015).

¹⁴⁹³ Cuba has also relied upon this expert report. Cuba's first written submission, paras. 170 and 172. Indonesia has referenced discussions in the Dominican Republic's first written submission which refer to this report. See Indonesia's second written submission, para. 186 and fn 275.

¹⁴⁹⁴ See Honduras's first written submission, paras. 470-474; Dominican Republic's first written submission, paras. 569-572; and Peer Review Report, (Exhibit DOM/HND-3), paras. 12-14.

¹⁴⁹⁵ Peer Review Report, (Exhibit DOM/HND-3), para. 26 and Appendix A.

¹⁴⁹⁶ See Dominican Republic's first written submission, para. 575; and Peer Review Report, (Exhibit DOM/HND-3), para. 17.

¹⁴⁹⁷ Cuba has also relied upon this expert report. See Cuba's first written submission, paras. 170 and 172. Indonesia has referenced discussions in the Dominican Republic's first written submission which refer to this report. See Indonesia's second written submission, para. 186 and fn 275.

¹⁴⁹⁸ Honduras's first written submission, para. 476; Dominican Republic's first written submission, para. 578; and Kleijnen Systematic Review, (Exhibit DOM/HND-4), p. 9.

design capable of drawing conclusions regarding the causal impact of plain packaging on the measured outcome.¹⁴⁹⁹ These studies were then assessed for bias based upon "four generally accepted grounds of methodological 'validity'", each of which represents a potential source of bias: construct validity, internal validity, external validity, and conclusion validity.¹⁵⁰⁰ The assessment concluded that each study was "implemented in a manner that gives rise to a considerable or high risk of bias" and thus none of the studies constitute reliable or probative sources for assessing the effects of the TPP measures.¹⁵⁰¹

7.528. Third, Cuba relies upon a report reviewing the literature underlying the TPP measures conducted by Professor Klick (Klick TPP Literature Report).¹⁵⁰² The report focuses on 48 individual studies¹⁵⁰³ and five reviews of the literature conducted by public health academics and governmental bodies.¹⁵⁰⁴ Professor Klick concluded that the research is "an unsuitable foundation for public policy" due to methodological problems, concerns regarding objectivity, and a "disconnect between the research designs and the conclusions reached".¹⁵⁰⁵

7.529. The complainants have also submitted reports from other experts who critique to varying degrees certain studies in the TPP literature.¹⁵⁰⁶

7.530. The expert reports submitted by the complainants concluded that the research used by plain packaging advocates is "neither reliable nor relevant" for the purpose of implementing this policy in Australia.¹⁵⁰⁷ Overall, the complainants contend that the studies share the following primary flaws¹⁵⁰⁸:

- Measuring the impact of packaging on attitudes, perceptions, and intentions, rather than on actual smoking behaviour¹⁵⁰⁹;
- Relying on survey data or information solicited in focus groups or interviews, rather than employing an experimental design that is capable of drawing causal inferences¹⁵¹⁰;
- Failing to control for demand effects and socially desirable responses¹⁵¹¹;

¹⁴⁹⁹ See Kleijnen Systematic Review, (Exhibit DOM/HND-4), pp. 27-28.

¹⁵⁰⁰ Dominican Republic's first written submission, para. 589. *Construct validity* "concerns whether the way(s) a researcher has measured a construct of interest (e.g. appeal of a cigarette pack or an aspect of smoking behaviour) fully encapsulates that construct and whether the outcome measure has particular properties such as reliability"; *internal validity* concerns "whether the study has measured the true effect, in other words, whether the attribution of causality to the intervention is valid"; *external validity* is "concerned with the generalisability (applicability) of findings beyond the confines of the study"; and *conclusion validity* concerns "whether there is an appropriate correspondence between the methods actually employed, the results and the researchers' interpretation of findings concerning the relationship of interest". Kleijnen Systematic Review, (Exhibit DOM/HND-4), p. 23.

¹⁵⁰¹ See Dominican Republic's first written submission, para. 589.

¹⁵⁰² Cuba's first written submission, para. 172. Professor Klick is a law professor, economist, and expert in empirical legal studies. Klick TPP Literature Report, (Exhibit UKR-6), p. i and *curriculum vitae* attachment.

¹⁵⁰³ Klick TPP Literature Report, (Exhibit UKR-6), p. 16.

¹⁵⁰⁴ Klick TPP Literature Report, (Exhibit UKR-6), pp. 16 and 58-63.

¹⁵⁰⁵ Klick TPP Literature Report, (Exhibit UKR-6), pp. 1, 6, and 63-64.

¹⁵⁰⁶ See Satel Report, (Exhibit UKR-7) (relied upon by Honduras, the Dominican Republic, and Cuba: see Honduras's communication to the Panel of 8 July 2015; Dominican Republic's responses to Panel questions following the first substantive meeting, para. 1; and Cuba's communication to the Panel of 13 July 2015); Steinberg Report, (Exhibit DOM/HND-6); Ajzen Report, (Exhibit DOM/HND/IDN-3); Ajzen Supplemental Report, (Exhibit DOM/HND/IDN-4); and Ajzen Rebuttal Report, (Exhibit DOM/HND/IDN-5). See also Viscusi Report, (Exhibit UKR-8) (relied upon by Honduras and Cuba: see Honduras's communication to the Panel of 8 July 2015; and Cuba's communication to the Panel of 13 July 2015); Mitchell Report, (Exhibit UKR-154) (relied upon by Indonesia: see Indonesia's communication to the Panel of 8 July 2015); and McKeeganey Report, (Exhibits DOM-105, CUB-72).

¹⁵⁰⁷ See, e.g. Klick TPP Literature Report, (Exhibit UKR-6), p. 1.

¹⁵⁰⁸ See Dominican Republic's first written submission, para. 591.

¹⁵⁰⁹ See Klick TPP Literature Report, (Exhibit UKR-6), pp. 1; Kleijnen Systematic Review, (Exhibit DOM/HND-4), pp. 32-33; Peer Review Report, (Exhibit DOM/HND-3), para. 61.iv.b; Ajzen Supplemental Report, (Exhibit DOM/HND/IDN-4), paras. 60 and 61.e; Viscusi Report, (Exhibit UKR-8), paras. 45-48; and Mitchell Report, (Exhibit UKR-154), para. 11.

¹⁵¹⁰ See Honduras's first written submission, para. 497; Cuba's first written submission, paras. 174-175; and Kleijnen Systematic Review, (Exhibit DOM/HND-4), pp. 16-20, 31, and 49; and Figure 5.

- Extrapolating real-world results from samples and environments that are not representative¹⁵¹²;
- Failing to control for confounding variables¹⁵¹³, such as GHWs and novelty effects¹⁵¹⁴;
- Drawing conclusions that do not follow from the study's results¹⁵¹⁵;
- A lack of objectivity in favour of study outcomes that support plain packaging, given:

Most of the studies post-date Australia's announcement in April 2010 that it would adopt plain packaging;

The preferences of the public health community and its journals; and

The small size of the tobacco control community, where a small group of researchers conducted the majority of the studies.¹⁵¹⁶

7.531. Australia strongly criticizes the methodologies used in these reviews.¹⁵¹⁷ It considers that the complainants' granular critiques of the TPP literature deconstruct studies against unrealistic criteria that exaggerate shortcomings in an attempt to distract from and diminish the results, at odds with established methods for informing policy through evidence.¹⁵¹⁸ Australia criticizes the "strategy" used by the complainants in their review of the evidence base for plain packaging.¹⁵¹⁹

7.532. Professor Fong, in expert reports submitted by Australia, identifies the following general strategies and themes in the complainants experts' reports critiquing the TPP literature:

- Illusion of rigour and demanding the "perfect" study;
- Exclusive focus on smoking rates as the target of the TPP Act;
- Almost exclusive focus on outcome measures of real-world behaviour;
- Disregarding all non-experimental research;
- Misleading or inaccurate reporting of evidence;
- Presenting a minor point as a main conclusion;

¹⁵¹¹ See Honduras's first written submission, para. 496; Dominican Republic's first written submission, paras. 598-600; Cuba's first written submission, para. 176; Klick TPP Literature Report, (Exhibit UKR-6), p. 1; Peer Review Report, (Exhibit DOM/HND-3), paras. 18.i and 61.i-61.ii; Kleijnen Systematic Review, (Exhibit DOM/HND-4), pp. 36 and 48; Viscusi Report, (Exhibit UKR-8), paras. 34-35 and 46; Ajzen Report, (Exhibit DOM/HND/IDN-3), paras. 179-188; Peer Review Project Rebuttal Report, (Exhibit DOM/HND-12), paras. 41-51; Satel Report, (Exhibit UKR-7), para. 65; and Ajzen Supplemental Report, (Exhibit DOM/HND/IDN-4), para. 61.h.

¹⁵¹² See Cuba's first written submission, para. 178; Klick TPP Literature Report, (Exhibit UKR-6), pp. 2-3; Peer Review Report, (Exhibit DOM/HND-3), para. 18.ii; Kleijnen Systematic Review, (Exhibit DOM/HND-4), p. 36; and Viscusi Report, (Exhibit UKR-8), paras. 39-42.

¹⁵¹³ Peer Review Report, (Exhibit DOM/HND-3), para. 18.i; and Klick TPP Literature Report, (Exhibit UKR-6), pp. 50-51 and 56.

¹⁵¹⁴ Ajzen Supplemental Report, (Exhibit DOM/HND/IDN-4), paras. 61.f and 61.h; Kleijnen Systematic Review Second Rebuttal Report, (Exhibit DOM/HND-18), para. 38; and Klick TPP Literature Report, (Exhibit UKR-6), p. 13.

¹⁵¹⁵ See Klick TPP Literature Report, (Exhibit UKR-6), pp. 2 and 63-64; and Peer Review Report, (Exhibit DOM/HND-3), para. 18.iii.

¹⁵¹⁶ See Honduras's first written submission, paras. 461 and 464-466; Dominican Republic's first written submission, paras. 69-75; Indonesia's first written submission, paras. 29-30; Klick TPP Literature Report, (Exhibit UKR-6), pp. 1-2, 13, and 15-17; and Peer Review Report, (Exhibit DOM/HND-3), para. 40.

¹⁵¹⁷ Australia's first written submission, paras. 607-614 and Annexure E, paras. 3-10.

¹⁵¹⁸ Samet Report, (Exhibit AUS-7), paras. 137, 148, and 152; and Fong Report, (Exhibit AUS-14), paras. 446 and 489.

¹⁵¹⁹ Samet Report, (Exhibit AUS-7), para. 137; and Fong Second Supplemental Report, (Exhibit AUS-585), para. 35-36.

- Attributing any effects of plain packaging to novelty only;
- Overemphasis on social desirability bias;
- Overemphasis on demand effects;
- Failing to address how claimed flaws could actually account for the results;
- Exaggerating impact of limitations and ignoring study strengths;
- Claiming a small set of authors involved in a majority of papers is a bias; and
- Ignoring the convergence of evidence.¹⁵²⁰

7.533. Australia also notes that the vast majority of the studies reviewed by the complainants were published in peer-reviewed scientific journals, including some of the leading scientific journals on public health and tobacco.¹⁵²¹ Thus, Australia contends, the studies have already been subject to "rigorous scholarly review".¹⁵²²

7.534. The complainants respond that the peer-review process is not fool-proof, that it can fail to prevent the publication of studies with significant flaws¹⁵²³, and that publication is not a guarantee of reliable methodology and results.¹⁵²⁴ They point to the Peer Review Project, wherein seven marketing experts with experience in reviewing studies for publication provided an "objective critique ... to assess whether the papers that form the body of the [] plain packaging literature would be accepted for publication in high-quality peer-reviewed academic journals".¹⁵²⁵ These experts concluded that none of the studies were acceptable in their current form.¹⁵²⁶

7.535. Australia's expert Professor Fong observes that of the 55 articles considered as part of the Dominican Republic and Honduras's Peer Review Project, 39 had already been published in peer-reviewed journals. Yet none were "accepted" for publication as part of the complainants' hypothetical review. In other words, there was no overlap between the results of the peer review process of the 20 scientific journals across different scientific disciplines in which these articles had been published and the results of the Peer Review Project.¹⁵²⁷ Likewise, Australia notes, the "Kleijnen Systematic Review uniformly indicated a high potential for bias" among the 31 papers that were considered adequate for analysis.¹⁵²⁸ Australia submits that these results are the product of overly strict distorted review criteria, misapplied in a manner that is inconsistent with established principles and methods of review.¹⁵²⁹ Australia argues that the "implausible" conclusions of these reports, as well as their disparity with the results of the actual peer review process at a variety of journals, discredits the complainants' experts' assessments.¹⁵³⁰

7.536. Australia's expert Professor Fong submits that individual studies are inevitably subject to a range of limitations but that, considered collectively, the range of designs constitute a persuasive

¹⁵²⁰ Fong Report, (Exhibit AUS-14), paras. 446-493.

¹⁵²¹ Fong Report, (Exhibit AUS-14), para. 450.

¹⁵²² Fong Second Supplemental Report, (Exhibit AUS-585), para. 24.

¹⁵²³ Peer Review Project Rebuttal Report, (Exhibit DOM/HND-12), para. 149.

¹⁵²⁴ Peer Review Project Rebuttal Report, (Exhibit DOM/HND-12), para. 148; and Peer Review Project Second Rebuttal Report, (Exhibit DOM/HND-17), para. 5.

¹⁵²⁵ Peer Review Report, (Exhibit DOM/HND-3), para. 1.

¹⁵²⁶ Peer Review Report, (Exhibit DOM/HND-3), para. 17.

¹⁵²⁷ Fong Second Supplemental Report, (Exhibit AUS-585), paras. 24-25. See also Peer Review Report, (Exhibit DOM/HND-3), para. 17.

¹⁵²⁸ See Samet Report (Exhibit AUS-7), paras. 145-146. See also Kleijnen Systematic Review Second Rebuttal Report, (Exhibit DOM/HND-18), para. 32 ("Each individual PP study suffers from a high or considerable risk of bias, and virtually always for multiple facets of validity.").

¹⁵²⁹ See Fong Report, (Exhibit AUS-14), paras. 528, 554 and 562; Fong Second Supplemental Report, (Exhibit AUS-585), paras. 26-30; and Samet Report, (Exhibit AUS-7), para. 137.

¹⁵³⁰ See Australia's comments on the complainants' responses to Panel question No. 197, para. 345; Fong Report, (Exhibit AUS-14), para. 450; and Fong Second Supplemental Report, (Exhibit AUS-585), paras. 24-25 and 29.

body of evidence.¹⁵³¹ Australia commissioned two experts who undertook comprehensive qualitative reviews of the plain packaging literature to determine whether the evidence "taken together as a whole" supports the effectiveness of tobacco plain packaging.¹⁵³² They both concluded that the weight of the evidence, from diverse sources that employed a variety of research designs, outcome measures, and participants, converges upon the conclusion that plain packaging will reduce the use of tobacco products.¹⁵³³

7.537. Australia and its experts submit that their approach is that taken by "authoritative bodies of international standing" such as the US National Cancer Institute, the International Agency for Research on Cancer (the World Health Organisation's cancer research unit), and the US Surgeon General.¹⁵³⁴ Australia refers to US Surgeon General Reports, the US National Cancer Institute, the US Institute of Medicine (USIOM), and the WHO to support its qualitative approach to assessing the available literature "as a whole"¹⁵³⁵, while acknowledging that individual studies are inevitably subject to a range of limitations given the challenges inherent in evaluating national-level policies.¹⁵³⁶ According to Australia, the consistency of the results supports the conclusion that plain packaging has the potential to contribute to public health.¹⁵³⁷ Australia draws further support for this conclusion from several external reviews of the TPP literature, which also agree that the evidence base for plain packaging is sound.¹⁵³⁸

7.538. The complainants challenge the accuracy of the external reviews of the TPP literature.¹⁵³⁹ They also disagree with the approach followed by Australia's experts. The complainants argue that no matter how many studies point in the same direction, a review of the findings and conclusions alone tells nothing about the methodological quality of the body of literature. In their view, a

¹⁵³¹ See Fong Second Supplemental Report, (Exhibit AUS-585), paras. 11-13. See also Fong Report, (Exhibit AUS-14), para. 447 ("[I]f the findings of multiple studies, all flawed in some way, point to the same conclusion, then we can be more confident about the validity of that conclusion"). See also Australia's first written submission, Annexure E, para. 6 ("No one study makes an evidence base, but a significant number of studies reaching the same conclusions, regardless of individual limitations or flaws, provide a strong evidentiary base for developing public policy.").

¹⁵³² Australia's first written submission, Annexure E, para. 4. See Fong Report, (Exhibit AUS-14); Fong Supplemental Report, (Exhibit AUS-531); Fong Second Supplemental Report, (Exhibit AUS-585), para. 8; and Samet Report, (Exhibit AUS-7). Other experts commissioned by Australia have also discussed the nature of the TPP literature in their reports. See Chaloupka Public Health Report, (Exhibit AUS-9); Chaloupka Second Rebuttal Report, (Exhibit AUS-590); and Slovic Report, (Exhibit AUS-12).

¹⁵³³ Fong Second Supplemental Report, (Exhibit AUS-585), paras. 8-9. See also Fong Report, (Exhibit AUS-14), paras. 448 and 492; and Samet Report, (Exhibit AUS-7), paras. 6, 117 and 136-137.

¹⁵³⁴ Fong Second Supplemental Report, (Exhibit AUS-585), para. 10. See also Australia's second written submission, para. 255 (referring to Chaloupka Public Health Report, (Exhibit AUS-9), para. 74; and Samet Report, (Exhibit AUS-7), paras. 138-152).

¹⁵³⁵ See Australia's second written submission, paras. 238-243, 251, and 255; Fong Report, (Exhibit AUS-14), paras. 492-493; Fong Second Supplemental Report, (Exhibit AUS-585), paras. 10-14, 17 and 31; Samet Report, (Exhibit AUS-7), para. 117; and Chaloupka Public Health Report, (Exhibit AUS-9), para. 74.

¹⁵³⁶ Fong Report, (Exhibit AUS-14), paras. 447 and 489; and Fong Second Supplemental Report, (Exhibit AUS-585), paras. 11-13.

¹⁵³⁷ Australia's second written submission, paras. 254-255. See also Fong Report, (Exhibit AUS-14), para. 492; and Fong Second Supplemental Report, (Exhibit AUS-585), para. 14.

¹⁵³⁸ Australia's first written submission, paras. 612-613 and Annexure E, paras. 8-9; Australia's second written submission, paras. 246, 248-249, and 254; Fong Second Supplemental Report, (Exhibit AUS-585), para. 15; Samet Report, (Exhibit AUS-7), para. 122; and Slovic Report, (Exhibit AUS-12), paras. 116-117. See "Standardised Packaging of Tobacco: Report of the Independent Review Undertaken by Sir Cyril Chantler", April 2014, (Chantler Report), (Exhibits AUS-81, CUB-61); C. Moodie, M. Stead, L. Bauld, A. McNeill, K. Angusa, K. Hinds, I. Kwan, J. Thomas, G. Hastings and A. O'Mara-Eves, "Plain tobacco packaging: A systematic review", UK Centre for Tobacco Control Studies, University of Stirling (2012), (Stirling Review), (Exhibits AUS-140, HND-130, CUB-59); C. Moodie, K. Angus, M. Stead, and L. Bauld, "Plain Tobacco Packaging Research: An Update", Centre for Tobacco Control Research, Institute for Social Marketing, University of Stirling (2013), (Stirling Review 2013 Update), (Exhibits AUS-216, CUB-60); and D. Hammond, "Standardized Packaging of Tobacco Products: Evidence Review, Prepared on Behalf of the Irish Department of Health", March 2014, (Hammond Review), (Exhibit AUS-555).

¹⁵³⁹ Cuba's first written submission, para. 173; Cuba's second written submission, para. 312; Klick TPP Literature Report, (Exhibit UKR-6), pp. 60-63; Mitchell Report, (Exhibit UKR-154); and Kleijnen Systematic Review Second Rebuttal Report, (Exhibit DOM/HND-18), paras. 64-68.

convergence of evidence may simply be a reflection of repeated methodological flaws and biases in the literature.¹⁵⁴⁰

Analysis by the Panel

7.539. As described above, the complainants identify as the TPP literature a body of 68 published studies, mostly predating Australia's adoption of the TPP measures, that sought to explore the effect of "plain packaging" for tobacco products.

7.540. The complainants' general critique of this literature is reflected in three main expert reports¹⁵⁴¹ and encompasses a large number of studies. We note that it does not, however, cover the entire field of studies relied upon by Australia in these proceedings, and also covers studies that Australia has not expressly relied upon in these proceedings in support of its argument that the TPP measures contribute to their public health objective. Australia has expressly relied, in the context of the "contribution" analysis in these proceedings, on 47 of the 68 papers identified by the complainants as part of the TPP literature.¹⁵⁴² Australia has also relied upon 40¹⁵⁴³ of the 55 papers reviewed as part of the Dominican Republic and Honduras's Peer Review Project¹⁵⁴⁴; 41¹⁵⁴⁵

¹⁵⁴⁰ Kleijnen Systematic Review Second Rebuttal Report, (Exhibit DOM/HND-18), paras. 31-38. See also Honduras's first written submission, paras. 462-463; Cuba's second written submission, paras. 314-315; and Klick TPP Literature Report, (Exhibit UKR-6), pp. 15-17.

¹⁵⁴¹ See generally Klick TPP Literature Report, (Exhibit UKR-6); Peer Review Report, (Exhibit DOM/HND-3); and Kleijnen Systematic Review, (Exhibit DOM/HND-4).

¹⁵⁴² Australia has directly cited in its submissions, and provided as exhibits, 47 of the articles that the complainants submitted as part of Exhibit JE-24. (1) Brose et al. 2014, (Exhibits AUS-263, JE-24(11)); (2) Centre for Health Promotion 1993, (Exhibits AUS-142, JE-24(14)); (3) Donovan 1993, (Exhibits AUS-151, JE-24(16)); (4) Environics 2008a, (Exhibits AUS-179, JE-24(19)); (5) Ford et al. 2013a, (Exhibits AUS-137, JE-24(20)); (6) Galloper-Morvan et al. 2013, (Exhibits AUS-162, JE-24(24)); (7) Goldberg et al. 1995, (Exhibits AUS-221, JE-24(26)); (8) Goldberg et al. 1999, (Exhibits AUS-209, JE-24(27)); (9) Hammond 2010, (Exhibits AUS-91, JE-24(28)); (10) Hammond et al. 2009, (Exhibits AUS-166, JE-24(29)); (11) Bansal-Travers et al. 2011, (Exhibits AUS-150, JE-24(3)); (12) Hammond et al. 2013a, (Exhibits AUS-177, JE-24(32)); (13) Hoek et al. 2011, (Exhibits AUS-148, JE-24(34)); (14) Hoek et al. 2012, (Exhibits AUS-163, JE-24(35)); (15) Beede et al. 1990, (Exhibits AUS-147, JE-24(4)); (16) Maynard et al. 2013, (Exhibits AUS-200, JE-24(40)); (17) Moodie and Ford 2011, (Exhibits AUS-189, JE-24(42)); (18) Moodie and Mackintosh 2013, (Exhibits AUS-185, JE-24(43)); (19) Moodie et al. 2011, (Exhibits AUS-155, JE-24(44)); (20) Munafò et al. 2011, (Exhibits AUS-199, JE-24(47)); (21) CBRC 1992, (Exhibits AUS-198, JE-24(13)); (22) Parr et al. 2011a, (Exhibits AUS-117, JE-24(49)); (23) Beede and Lawson 1991, (Exhibits AUS-153, JE-24(5)); (24) Parr et al. 2011b, (Exhibits AUS-219, JE-24(50)); (25) Rootman and Flay 1995, (Exhibits AUS-145, JE-24(53)); (26) Rousu and Thrasher 2013, (Exhibits AUS-228, JE-24(54)); (27) Scollo et al. 2014, (Exhibits AUS-507, JE-24(57)); (28) Thrasher et al. 2011, (Exhibits AUS-229, JE-24(58)); (29) Beede and Lawson 1992, (Exhibits AUS-202, JE-24(6)); (30) Wakefield et al. 2008, (Exhibits AUS-149, JE-24(62)); (31) Wakefield et al. 2012, (Exhibits AUS-557, JE-24(63)); (32) Wakefield et al. 2013, (Exhibits AUS-184, JE-24(64)); (33) White et al. 2012, (Exhibits AUS-160, JE-24(66)); (34) Young et al. 2014, (Exhibits AUS-214, JE-24(67), DOM-285); (35) Bondy et al. 1994, (Exhibits AUS-143, JE-24(7)); (36) Borland and Savvas 2013a, (Exhibits AUS-135, JE-24(8)); (37) Borland et al. 2013, (Exhibits AUS-136, JE-24(9)); (38) Doxey and Hammond 2011, (Exhibits AUS-156, JE-24(17)); (39) Al-hamdan 2013, (Exhibits AUS-203, JE-24(1)); (40) Galloper-Morvan et al. 2012, (Exhibits AUS-152, JE-24(23)); (41) Germain et al. 2010, (Exhibits AUS-154, JE-24(25)); (42) Hammond et al. 2011, (Exhibits AUS-157, JE-24(30)); (43) Hammond et al. 2013b, (Exhibits AUS-158, JE-24(31)); (44) Borland and Savvas 2013b, (Exhibits AUS-175, JE-24(10)); and (45) Zacher et al. 2014, (Exhibits AUS-222 (revised), JE-24(68), DOM-286); (46) Moodie et al. 2012, (Exhibits AUS-174, JE-24(45)); (47) Van Hal et al. 2012, (Exhibits AUS-161, JE-24(60)).

We also note that Australia has submitted and relied upon a newsletter article that was authored by the same researchers, and appears to discuss the same study, as another paper that was submitted by the complainants as part of Exhibit JE-24. Compare Northrup and Pollard 1995, (Exhibit JE-24(48)), with ISR newsletter, (Exhibit AUS-146).

¹⁵⁴³ Australia has cited directly to, and provided as an exhibit, 40 of the papers considered as part of the Peer Review Project. See Table A: Papers Included in a Primary TPP Literature Review and/or Exhibit JE-24, at the back of these Reports. We also note that Australia has submitted and relied upon a newsletter article that was authored by the same researchers, and appears to discuss the same study, as another paper that was considered as part of the Dominican Republic and Honduras's Peer Review Project. Compare Northrup and Pollard 1995, (Exhibit JE-24(48)), with ISR newsletter, (Exhibit AUS-146).

¹⁵⁴⁴ See Honduras's first written submission, paras. 470-474; Dominican Republic's first written submission, paras. 569-572; and Peer Review Report, (Exhibit DOM/HND-3), paras. 12-14.

¹⁵⁴⁵ Australia has cited directly to, and provided as an exhibit, 41 of the papers considered as part of the "Systematic Review". See Table A: Papers Included in a Primary TPP Literature Review and/or Exhibit JE-24, at the back of these Reports. We also note that Australia has submitted and relied upon a newsletter article that

of the 58 papers considered as part of the Kleijnen Systematic Review¹⁵⁴⁶; and each of the five reviews of the literature¹⁵⁴⁷, and 36¹⁵⁴⁸ of the 48 individual studies identified by Professor Klick.¹⁵⁴⁹ Australia has relied, in addition, on a number of other sources¹⁵⁵⁰ as well as on expert reports that it commissioned for the purposes of these proceedings.¹⁵⁵¹

7.541. As described above, the complainants' critique of this literature reflects a range of underlying concerns. These can be broadly categorized as relating to:

- The objectivity of the research results and of the community of researchers conducting the studies;
- The object of the studies, in particular their focus on non-behavioural "proximal" outcomes rather than smoking behaviours; and
- The methodological rigour of the studies.

7.542. We address these aspects in turn.

Objectivity of the TPP literature

7.543. The complainants question the objectivity of the TPP literature on three grounds. First, they contend that most of the papers post-date the Australian Government's announcement in April 2010 that it would adopt plain packaging of cigarettes.¹⁵⁵² Second, the complainants also suggest that the TPP literature is predisposed in favour of study outcomes that support plain packaging due to the preferences of the public health community and its journals.¹⁵⁵³ Third, the complainants submit that the objectivity of the studies is compromised by the small size of the tobacco control community, where a small group of researchers conducted the majority of the studies.¹⁵⁵⁴

was authored by the same researchers, and appears to discuss the same study, as another paper that was included in the Dominican Republic and Honduras's "Systematic Review". Compare Northrup and Pollard 1995, (Exhibit JE-24(48)), with ISR newsletter, (Exhibit AUS-146).

¹⁵⁴⁶ Kleijnen Systematic Review, (Exhibit DOM/HND-4), pp. 7 and 27, and Appendix 2.

¹⁵⁴⁷ Cancer Council Victoria, "Plain Packaging of Tobacco Products: A Review of the Evidence", 12 August 2011, (CCV Review 2011), (Exhibit AUS-86); US Surgeon General's Report 2012, (Exhibit AUS-76); Goldberg et al. 1995, (Exhibits AUS-221, JE-24(26); Stirling Review, (Exhibits AUS-140, HND-130, CUB-59); Stirling Review 2013 Update, (Exhibits AUS-216, CUB-60); and Chantler Report (Exhibits AUS-81, CUB-61).

¹⁵⁴⁸ Australia has cited directly to, and provided as an exhibit, 36 of the papers considered as part of the Klick TPP Literature Report, (Exhibit UKR-6). See Table A: Papers Included in a Primary TPP Literature Review and/or Exhibit JE-24, at the back of these Reports. We also note that Australia has submitted and relied upon a newsletter article that was authored by the same researchers, and appears to discuss the same study, as another paper that was included in the Klick TPP Literature Report. Compare Northrup and Pollard 1995, (Exhibit JE-24(48)), with ISR newsletter, (Exhibit AUS-146).

¹⁵⁴⁹ Klick TPP Literature Report, (Exhibit UKR-6), pp. 16 and 58-63.

¹⁵⁵⁰ See, e.g. Kotnowski 2013, (Exhibit AUS-138); Kotnowski and Hammond 2013, (Exhibit AUS-139); d'Avernas et al. 1997, (Exhibit AUS-144); Al-hamdan 2011, (Exhibit AUS-159); Hammond and Parkinson 2009 (Exhibit AUS-165); Difranza et al. 2003, (Exhibit AUS-92); Wakefield et al. 2002, (Exhibits AUS-93, CUB-28); Createc 2008, (Exhibit AUS-167); Wakefield 2011, (Exhibit AUS-172); White 2011, (Exhibit AUS-173); Gallopel-Morvan et al. 2010, (Exhibit AUS-176); Moodie and Hastings, (Exhibit AUS-187); Mutti et al. 2011, (Exhibit AUS-217); and Gendall et al. 2012, (Exhibit AUS-178).

¹⁵⁵¹ See, e.g. Samet Report, (Exhibit AUS-7); Chaloupka Public Health Report, (Exhibit AUS-8); Tavassoli Report, (Exhibit AUS-10); Slovic Report, (Exhibit AUS-12); Biglan Report, (Exhibit AUS-13); Fong Report, (Exhibit AUS-14); Brandon Report, (Exhibit AUS-15); Fong Supplemental Report, (Exhibit AUS-531); Slovic Rebuttal Report, (Exhibit AUS-532); Brandon Rebuttal Report, (Exhibit AUS-534); and Chaloupka Rebuttal Report, (Exhibit AUS-582).

¹⁵⁵² See Honduras's first written submission, para. 461; Dominican Republic's first written submission, paras. 69-71; and Peer Review Report, (Exhibit DOM/HND-3), para. 40.

¹⁵⁵³ See Klick TPP Literature Report, (Exhibit UKR-6), pp. 1-2, 13, and 15; Honduras's first written submission, paras. 464-466; Dominican Republic's first written submission, paras. 73-75 and 78-79; and Indonesia's first written submission, paras. 27-30.

¹⁵⁵⁴ Dominican Republic's first written submission, paras. 72, 75, and 78. See also Klick TPP Literature Report, (Exhibit UKR-6), pp. 2, 13 and 15-17; and Peer Review Report, (Exhibit DOM/HND-3), para. 40.

7.544. With respect to the first point, we note that the evidence before us indicates that researchers began to explore the potential impact of tobacco plain packaging over two decades ago. Among the publications relied on by Australia or otherwise cited in these proceedings and referring to the possible merits of tobacco plain packaging, some date as far back as the early 1990s.¹⁵⁵⁵ The evidence before us also suggests that there was a noticeable increase in the number of publications relating to plain packaging in recent years, including following the announcement by Australia of its intention to implement tobacco plain packaging.¹⁵⁵⁶ However, this does not seem surprising, to the extent that one would expect scholarly interest in a policy intervention that has never before been implemented to intensify over time, as evidence develops on its potential impact. The intensification of research in this field may rather be taken as a sign of an interest of the research community in testing further this potential impact, without prejudice to the potential outcomes of such further research.

7.545. The complainants also suggest that the TPP literature is predisposed in favour of study outcomes that support plain packaging due to the alleged preferences of the public health community and the small size of the tobacco control community. Although "publication bias" is a known phenomenon¹⁵⁵⁷, we see no basis to assume that researchers in the tobacco control community or more broadly in the public health community would have an *a priori* vested interest in supporting one type of tobacco control intervention over another.¹⁵⁵⁸

7.546. At the same time, we note that a core group of researchers are frequent co-authors on multiple TPP literature papers¹⁵⁵⁹, and one of the most comprehensive literature reviews relied upon by Australia (and discussed below¹⁵⁶⁰) was conducted by researchers who also co-authored some of the reviewed studies.¹⁵⁶¹ The author of one plain packaging study¹⁵⁶² consulted 33 tobacco control experts, a number that she believed, in 2012, represented a "substantial

¹⁵⁵⁵ See, e.g. Beede et al. 1990, (Exhibits AUS-147, JE-24(4)); Centre for Health Promotion 1993, (Exhibits AUS-142, JE-24(14)); Bondy et al. 1994, (Exhibits AUS-143, JE-24(7)); Donovan 1993, (Exhibits AUS-151, JE-24(16)); Rootman and Flay 1995, (Exhibits AUS-145, JE-24(53)); Golberg et al. 1995, (Exhibits AUS-221, JE-24(26)); Beede and Lawson 1992, (Exhibits AUS-202, JE-24(6)); and J. Madill-Marshall, M. Goldberg, G. Gorn, J. Liefeld, H. Vredenburg, "Two Experiments Assessing the Visual and Semantic Images Associated with Current and Plain Cigarette Packaging", *Advances in Consumer Research*, Vol. 23 (1996), p. 267, (Madill-Marshall et al. 1996), (Exhibit JE-24(39)).

¹⁵⁵⁶ See Dominican Republic's first written submission, paras. 70-71; and Plain packaging literature, (Exhibit JE-24).

¹⁵⁵⁷ See, e.g. Klick TPP Literature Report, (Exhibit UKR-6), pp. 1-2.

¹⁵⁵⁸ See, e.g. Judge Kessler's response to this argument in United States v. Philip Morris, (Exhibit AUS-71), p. 8.

¹⁵⁵⁹ For example, among the 68 papers in Exhibit JE-24: David Hammond appeared as an author on 11 papers (see Hammond 2010, (Exhibits AUS-91, JE-24(28)); Bansal-Travers et al. 2011, (Exhibits AUS-150, JE-24(3)); Gallopel-Morvan et al. 2012, (Exhibits AUS-152, JE-24(23)); Doxey and Hammond 2011, (Exhibits AUS-156, JE-24(17)); Hammond et al. 2011, (Exhibits AUS-157, JE-24(30)); Hammond et al. 2013b, (Exhibits AUS-158, JE-24(31)); White et al. 2012, (Exhibits AUS-160, JE-24(66)); Hammond et al. 2009, (Exhibits AUS-166, JE-24(29)); Hammond et al. 2013a, (Exhibits AUS-177, JE-24(32)); Thrasher et al. 2011, (Exhibits AUS-229, JE-24(58)); and Wakefield et al. 2012, (Exhibits AUS-557, JE-24(63))); Melanie Wakefield authored or co-authored 7 papers (see Wakefield et al. 2013, (Exhibits AUS-184, JE-24(64)); Zacher et al. 2014, (Exhibits AUS-222 (revised), JE-24(68), DOM-286); Scollo et al. 2014, (Exhibits AUS-507, JE-24(57)); Wakefield et al. 2008, (Exhibits AUS-149, JE-24(62)); Wakefield et al. 2012, (Exhibits AUS-557, JE-24(63)); Wakefield et al. 2014, (Exhibit JE-24(65)); and Germain et al. 2010, (Exhibits AUS-154, JE-24(25))); Crawford Moodie appeared as an author or co-author on 7 papers (see Moodie and Ford 2011, (Exhibits AUS-189, JE-24(42)); Moodie and MacKintosh 2013, (Exhibits AUS-185, JE-24(43)); Moodie et al. 2011, (Exhibits AUS-155, JE-24(44)); Moodie et al. 2012, (Exhibits AUS-174, JE-24(45)); Moodie et al. 2012, (Exhibit JE-24(46)); Ford et al. 2013a, (Exhibits AUS-137, JE-24(20)); and Ford et al. 2013b, (Exhibit JE-24(21))); and Anne Marie MacKintosh co-authored 6 papers (see Ford et al. 2013b, (Exhibit JE-24(21)); Moodie and MacKintosh 2013, (Exhibits AUS-185, JE-24(43)); Moodie et al. 2011, (Exhibits AUS-155, JE-24(44)); Moodie et al. 2012 (Exhibits AUS-174, JE-24(45)); Ford et al. 2013a, (Exhibits AUS-137, JE-24(20)); and Moodie et al. 2011, (Exhibits AUS-155, JE-24(44))).

¹⁵⁶⁰ See paras. 7.585 et seq. below.

¹⁵⁶¹ See Stirling Review, (Exhibits AUS-140, HND-130, CUB-59), pp. 91-96 (lead author C. Moodie co-authored five of the 37 reviewed studies); and Stirling Review 2013 Update, (Exhibits AUS-216, CUB-60), pp. 15-18 (lead author C. Moodie co-authored three of the 17 reviewed papers).

¹⁵⁶² Pechey et al. 2013, (Exhibit JE-24(51)).

proportion" of international experts in the field.¹⁵⁶³ Several authors of TPP literature studies were also members of Australia's National Preventative Health Taskforce (NPHT) Tobacco Working Group (TWG), which recommended that the Government adopt plain packaging.¹⁵⁶⁴

7.547. Australia's expert, Professor Fong, notes that "reviews of research studies in a given field should be undertaken by those with knowledge of the research domain and of the research norms of that research domain".¹⁵⁶⁵ Nevertheless, the authors of a systematic review of the TPP literature (the Stirling Review) acknowledged that reviewing one's own work can create the appearance of a conflict of interest. Those authors took measures accordingly to minimize the risk of bias.¹⁵⁶⁶ We also note that the author of a subsequent review, Sir Cyril Chantler, drew upon the involvement of the independent Evidence for Policy and Practice Information and Co-ordinating Centre, based at the University of London, to discount allegations of bias against the Stirling Review by the tobacco industry and its experts.¹⁵⁶⁷ We further note the presence of common principles governing authors and peer-reviewers that are designed to avoid conflicts-of-interest in published studies.¹⁵⁶⁸

7.548. Moreover, some of the TPP studies identify and discuss a number of potential downsides to the introduction of tobacco plain packaging¹⁵⁶⁹, which suggests to us that, where concerns are identified, these are disclosed and discussed. We have also noticed that some of the studies report mixed outcomes.¹⁵⁷⁰ In our view, this is a sign that those authors aim to objectively report study results notwithstanding the impact they may have on the perception of the utility of plain packaging as an instrument of tobacco control policy.

7.549. Overall, therefore, we do not consider that we should *a priori* discount the body of studies identified by the complainants as the TPP literature, based upon either the size of the research community from which it originates or assumptions relating to potential bias within this community. We further note that the studies reviewed by the complainants were authored by a total of more than 110 individuals, affiliated with a number of different institutions, including University College London, the University of Surrey, the University of Melbourne, Sydney Medical School, the University of Paris 1-Sorbonne, Pennsylvania State University, the University of Calgary, and the University of Ottawa. These elements support the view that these studies "come from ... qualified and respected source[s]".¹⁵⁷¹

7.550. Finally, we agree with Australia that, to the extent that convergent research outcomes would reflect the results of a range of studies consistent with accepted standards in their respective fields¹⁵⁷², this may confirm the strength of the conclusions reached in individual

¹⁵⁶³ See Author's response to peer reviews of Pechey et al. 2013, available at <<http://www.biomedcentral.com/1471-2458/13/18/prepub>>, accessed 7 October 2014, (Exhibit DOM-165), p. 2.

¹⁵⁶⁴ Compare NPHT Technical Report 2, (Exhibits AUS-52, JE-12), Acknowledgments (listing Rob Moodie as Chair of the Taskforce, Michelle Scollo as the writer of the report and TWG member, and Melanie Wakefield and Simon Chapman as members of the TWG) with the 68 papers included in Plain packaging literature, (Exhibit JE-24).

¹⁵⁶⁵ Fong Report, (Exhibit AUS-14), para. 449. See also Australia's first written submission, Annexure E, para. 6 (noting that "good evidence synthesis" requires collaboration among those who work in the same field and share relevant expertise).

¹⁵⁶⁶ See Stead et al. 2013, (Exhibit CUB-58), p. 8 (noting a "perceived conflict of interest can arise in systematic reviews conducted in specialised research areas" and indicating that "no member of the research team who had been previously involved in packaging research extracted data, assessed study relevance or quality, or decided upon study inclusion").

¹⁵⁶⁷ See Chantler Report, (Exhibits AUS-81, CUB-61), p. 26, para. 4.7.

¹⁵⁶⁸ See, e.g. Samet Report, (Exhibit AUS-7), para. 140 (referring to the International Committee of Medical Journal Editors and the conflict-of-interest policy of the British Medical Journal as reflective of current standards regarding authors and reviewers of scientific publications).

¹⁵⁶⁹ See Stirling Review, (Exhibits AUS-140, HND-130, CUB-59), section 4.6.2, p. 81 ("Benefits or Harms Identified with the Policy Introduction"); and section 4.6.3, p. 82 ("Studies that Address the Potential Harms Identified").

¹⁵⁷⁰ See, e.g. Brose et al. 2014, (Exhibits AUS-263, JE-24(11)); Goldberg et al. 1999, (Exhibits AUS-209, JE-24(27)); Beede et al. 1990, (Exhibits AUS-147, JE-24(4)); Uppal et al. 2013, (Exhibit JE-24(59)); Wakefield et al. 2013, (Exhibits AUS-184, JE-24(64)); and White et al. 2012, (Exhibits AUS-160, JE-24(66)).

¹⁵⁷¹ See Appellate Body Report, *US – Continued Suspension*, paras. 591-592. See also *ibid.* paras. 598 and 601.

¹⁵⁷² See Stirling Review, (Exhibits AUS-140, HND-130, CUB-59), p. v. (noting the diversity of research methods, samples, and study sites across the reviewed studies); Hammond Review, (Exhibit AUS-555), p. 30

studies¹⁵⁷³, rather than demonstrate publication or researcher bias.¹⁵⁷⁴ We note in this respect the observation formulated by a number of reviewers that "consistency of association" and "coherence of association" are of "particular relevance to evaluating the evidence related to plain packaging"¹⁵⁷⁵, and that the TPP literature studies demonstrate both.¹⁵⁷⁶

7.551. In light of the above, we are not persuaded that the time-frame over which the TPP literature studies were conducted, preferences among researchers or publications for outcomes favourable to tobacco plain packaging, or the size of the relevant scientific community, provide, *in themselves*, a basis for us to question the objectivity, and hence the general reliability, of the entire body of studies identified by the complainants as the TPP literature. Rather, at this stage of our analysis, and without prejudice to our further consideration of the contents of this research and the extent to which it supports the conclusions drawn from it, we note that these studies originate from qualified and respected sources within their respective communities.

Focus of the TPP studies on "non-behavioural" outcomes

7.552. The complainants submit that one of the greatest methodological weakness of the TPP literature, which sought to inform the potential effectiveness of tobacco plain packaging as a population-level behaviour change intervention, is that the "studies fail to measure smoking behaviour", the "outcome of interest from a policy perspective".¹⁵⁷⁷

7.553. We first note that Australia does not dispute that many of the studies that form part of the TPP literature focus on the impact of tobacco packaging on "proximal" or "non-behavioural" outcomes. In particular, as will be discussed in more detail below, much of the TPP literature focuses on the ability of plain packaging to have an impact on the three "mechanisms" through which the TPP measures are intended to act: reducing the appeal of tobacco packaging, increasing the effectiveness of GHWs and reducing the ability of the pack to mislead the consumer about the harmful effects of smoking.¹⁵⁷⁸

7.554. Australia argues that the complainants' experts err in their "exclusive focus on prevalence as the only outcome of the [TPP measures]", and in "insisting on outcome measures of real-world behaviour".¹⁵⁷⁹ Australia's expert, Professor Fong, considers that the complainants' experts have misidentified the target of the TPP Act, and ignored the actual stated objects of the Act and the mechanisms through which plain packaging will achieve these effects. The emphasis on prevalence, Australia argues, also fails to appreciate the many different causal influences on smoking prevalence, including Australia's other tobacco control measures.¹⁵⁸⁰

7.555. The focus of the TPP literature on "non-behavioural" outcomes does not, in our view, constitute an inherent flaw, provided that this is understood as constituting one component of a broader evidence base. We note in this respect that the TPP measures were designed to act on these "non-behavioural" or "proximal" outcomes, with a view to ultimately affecting smoking

(noting the "heterogenous mix of research designs" and wide variety of outcome measurements from different research domains); and Chantler Report (Exhibits AUS-81, CUB-61), para. 4.10 (noting the "wide range of research methods").

¹⁵⁷³ See Fong Supplemental Report, (Exhibit AUS-531), para. 151; and Fong Second Supplemental Report, (Exhibit AUS-585), paras. 8-9. See also Hammond Review, (Exhibit AUS-555), p. 30 (noting that the quantity of studies is sufficient to provide an informed opinion).

¹⁵⁷⁴ See, e.g. Klick TPP Literature Report, (Exhibit UKR-6), p. 15.

¹⁵⁷⁵ Samet Report, (Exhibit AUS-7), paras. 117 and 119. See also Hammond Review, (Exhibit AUS-555), p. 31.

¹⁵⁷⁶ Stirling Review, (Exhibits AUS-140, CUB-59), p. 90; Samet Report, (Exhibit AUS-7), paras. 125 and 128; Fong Report, (Exhibit AUS-14), para. 71; Fong Second Supplemental Report, (Exhibit AUS-585) para. 31; and Hammond Review, (Exhibit AUS-555), p. 31.

¹⁵⁷⁷ Dominican Republic's first written submission, paras. 591-592. See also Honduras's first written submission, para. 463; Dominican Republic's first written submission, paras. 560 and 593-597; Cuba's first written submission, paras. 171-172; Indonesia's first written submission, paras. 317 and 416; Peer Review Report, (Exhibit DOM/HND-3), para. 61.iv.b; Kleijnen Systematic Review, (Exhibit DOM/HND-4), pp. 32-33; McKeganey Report, (Exhibits DOM-105, CUB-72), pp.43-50; Ajzen Supplemental Report, (Exhibit DOM/HND/IDN-4), paras. 61i-61j; and Mitchell Report, (Exhibit UKR-154), para. 11.

¹⁵⁷⁸ See sections 7.2.5.3.5.2, 7.2.5.3.5.3, and 7.2.5.3.5.4.

¹⁵⁷⁹ Australia's first written submission, Annexure E, para. 6.

¹⁵⁸⁰ Fong Report, (Exhibit AUS-14), paras. 451-462.

behaviours. The three "mechanisms" identified in the TPP measures¹⁵⁸¹ adopted by Australia closely reflect the specific "non-behavioural" outcomes that were studied in a large proportion of the TPP literature predating the adoption of the TPP measures.¹⁵⁸² We note that these are also referenced in the Article 11 and Article 13 FCTC Guidelines.¹⁵⁸³

7.556. The complainants also criticize the TPP literature for its failure to measure smokers' actual tobacco use following exposure to plain versus branded packaging.¹⁵⁸⁴

7.557. There appears to be some convergence among researchers that the ideal test of the effectiveness of plain packaging would have been a longitudinal randomized controlled trial in a population-based setting, where packaging is manipulated in some markets but not in others.¹⁵⁸⁵ The complainants' expert, Professor Ajzen, thus states that "it was essential to test the impact of plain packaging on actual smoking behaviour prior to implementation of the TPP Act over a sufficiently long period of time". He asserts that "[v]ery few studies conducted in Australia before the TPP Act attempted to measure the impact of plain packaging on actual smoking behavior, and the researchers readily acknowledged some of the limitations of such studies".¹⁵⁸⁶ Specifically, Professor Ajzen suggests that Australia should have conducted a controlled experiment in which participants would be assigned at random into branded and plain pack conditions, and the cigarette packs used would differ only in the presence or absence of brand imagery¹⁵⁸⁷, to test the impact of plain packaging on actual smoking behaviour.

7.558. We note, however, that Professor Ajzen also identifies important limitations to the possibility of conducting such randomised controlled experiments. Specifically, Professor Ajzen explains that "the difficulty lies in the fact that the experimental situation created prior to implementation of the TPP Act is not an exact reproduction of the situation that would be encountered afterwards" and that this can jeopardize the experiment's external validity.¹⁵⁸⁸ Australia's expert Professor Fong also observes that it would be "unrealistic" to expect that participants assigned to the group to which branded packs are shown, could be convinced that the branded packs that they are being shown are new experimental plain packs, given even non-smokers' familiarity with current cigarette packs.¹⁵⁸⁹ The feasibility or utility of such experiments is similarly questioned in other evidence before us.¹⁵⁹⁰ For example:

¹⁵⁸¹ See, e.g. TPP Act, (Exhibits AUS-1, JE-1), Section 3.

¹⁵⁸² See, e.g. Environics 2008a, (Exhibits AUS-179, JE-24(19)); Wakefield et al. 2008, (Exhibits AUS-149, JE-24(62)); Germain et al. 2010, (Exhibits AUS-154, JE-24(25)); Beede and Lawson 1992, (Exhibits AUS-202, JE-24(6)); Gallopel-Morvan et al. 2010, (Exhibit AUS-176); Centre for Health Promotion 1993, (Exhibits AUS-142, JE-24(14)); Rootman and Flay 1995, (Exhibits AUS-145, JE-24(53)); Hammond et al. 2009, (Exhibits AUS-166, JE-24(29)); Hoek et al. 2009, (Exhibit JE-24(33)); and Donovan 1993, (Exhibits AUS-151, JE-24(16)).

¹⁵⁸³ See Article 11 FCTC Guidelines, FCTC/COP/3(10), (Exhibit JE-20), Annex, para. 46 ("address[ing] plain packaging with regard to health warnings and misleading information", according to the Article 13 FCTC Guidelines); and Article 13 FCTC Guidelines, FCTC/COP/3(12), (Exhibit JE-21), Annex, para. 16 and "Recommendation" following para. 17 (addressing plain packaging with regard to "packaging and product features" as elements of "advertisement and promotion").

¹⁵⁸⁴ See, e.g. McKeganey Report, (Exhibits DOM-105, CUB-72), p.43; and Ajzen Supplemental Report, (Exhibit DOM/HND/IDN-4), paras. 61.i-61.j.

¹⁵⁸⁵ See, e.g. Cuba's first written submission, para. 175 (referring to Klick TPP Literature Report, (Exhibit UKR-6), pp. 6-7 and 14; and Kleijnen Systematic Review, (Exhibit DOM/HND-4), pp. 16-19). See also Wakefield et al. 2012, (Exhibits AUS-557, JE-24(63), p. 1166; Stirling Review, (Exhibits AUS-140, HND-130, CUB-59), p. 89; and Chantler Report, (Exhibits AUS-81, CUB-61), para. 1.19.

¹⁵⁸⁶ Ajzen Supplemental Report, (Exhibit DOM/HND/IDN-4), para. 61.i.

¹⁵⁸⁷ Ajzen Supplemental Report, (Exhibit DOM/HND/IDN-4), para. 55. See also Klick TPP Literature Report, (Exhibit UKR-6), p. 6. Cf. Viscusi Report, (Exhibit UKR-8), para. 32 (noting the importance of an across-subject versus within-subject study design). We note that several TPP literature studies did implement a between-subject design, albeit with non-behavioural outcome measurements. See, e.g. Wakefield et al. 2008, (Exhibits AUS-149, JE-24(62)); Germain et al. 2010, (Exhibits AUS-154, JE-24(25)); Doxey and Hammond 2011, (Exhibits AUS-156, JE-24(17)); and Hammond et al. 2011, (Exhibits AUS-157, JE-24(30)).

¹⁵⁸⁸ Ajzen Supplemental Report, (Exhibit DOM/HND/IDN-4), para. 56, pp. 12-13.

¹⁵⁸⁹ Fong Supplemental Report, (Exhibit AUS-531), paras. 167-168. Professor Fong also notes that a more realistic version of Professor Ajzen's proposed study was in fact conducted prior to the implementation of the TPP measures. Smokers in several different cities in Scotland were provided with plain cigarette packages, and asked to smoke for one week from the plain packs, another week from branded packs, and to complete questionnaires twice a week measuring behavioural indicators such as forgoing cigarettes, thinking about

It was suggested that the "ideal" SP [standardized packaging] study, in line with "proper research design", would be a randomized controlled trial that randomized different cities over a "long time period" to having/not having SP. This is clearly an unfeasible proposition not least because population mobility would mean that *both* groups have access to branded and standardized packages, rendering the results meaningless.¹⁵⁹¹

7.559. Professor Ajzen further observes that "a limitation on the study of smoking behavior is of an ethical nature".¹⁵⁹² This observation is also consistent with other evidence before us suggesting that executing studies comparing smoking uptake among subjects exposed to plain versus branded packs is impossible for ethical reasons.¹⁵⁹³

7.560. Professor Ajzen thus observes that, while it would have been possible and useful to test the impact of plain packaging on smoking behaviour prior to the implementation of the TPP Act¹⁵⁹⁴, the "practical limitations of studying the impact of plain packaging on behavior prior to implementation of the [TPP] Act draw attention to the importance of the research ... regarding the impact of plain packaging on the *theoretical determinants of smoking behavior*".¹⁵⁹⁵

7.561. This conclusion suggests that, as Professor Ajzen himself acknowledges, while it may have been desirable in principle to conduct randomised controlled trials or large-scale longitudinal studies directly seeking to evaluate the potential impact of plain packaging on smoking behaviour, there were legitimate practical and ethical reasons for which this would have been difficult to carry out, prior to the introduction of such a measure anywhere in the world. As Australia was the first country to implement plain packaging of tobacco products, the opportunity directly to observe actual smoking behaviours in the presence of plain packaging was also very limited prior to the implementation of the TPP Act.

7.562. In light of the above, while we agree that the relevant evidence base underlying a policy intervention should seek to reflect as closely as possible the conditions under which the intervention will take place, we are not persuaded that the evidence discussed above demonstrates that the absence of a study, prior to the implementation of the measures, that utilized an "ideal" experimental design allowing an observation of actual smoking behaviours constitutes a flaw in the TPP literature, of such nature as to fundamentally undermine its probative value and the evidentiary base underlying the adoption of the TPP measures. We also note that certain studies within the pre-implementation TPP literature predating the implementation of the TPP measures in Australia did in fact seek to assess smoking-related behavioural outcomes, although these studies were found to have "quite weak predictive value".¹⁵⁹⁶

quitting, and consumption. Differences favouring the plain packs were found in each of the indicators. Fong Supplemental Report, (Exhibit AUS-531), paras. 169-171. We also note that the merits of this study have been the subject of debate among the parties. See, e.g. Klick TPP Literature Report, (Exhibit UKR-6), pp. 47-48.

¹⁵⁹⁰ See Stirling Review, (Exhibits AUS-140, HND-130, CUB-59), pp. 17-18 and 88-89; and Stead et al. 2013, (Exhibit CUB-58), p. 8 (noting that randomized controlled trials and longitudinal studies of a policy intervention, such as plain packaging, are not feasible prior to implementation).

¹⁵⁹¹ S. Ulucanlar, G. Fooks, J. Hatchard, and A. Gilmore, "Representation and Misrepresentation of scientific evidence in contemporary tobacco regulation: a review of tobacco industry submissions to the UK Government consultation on standardised packaging", PLoS Medicine, Vol. 11 (2014), p. 6, (Ulucanlar et al. 2014), (Exhibit AUS-501). (emphasis original; footnote omitted)

¹⁵⁹² Ajzen Supplemental Report, (Exhibit DOM/HND/IDN-4), p. 13, para. 57.

¹⁵⁹³ See Chantler Report, (Exhibits AUS-81, CUB-61), p. 13, para. 1.19 (noting that a trial comparing the uptake of smoking among children exposed to branded versus plain packaged cigarettes could "never receive ethical approval"). See also Hammond Review, (Exhibit AUS-555), p. 35 ("there is no ethical or feasible way to test the appeal of packaging or products among youth other than to measure perceptions of appeal and interest in trying a product"). But see Cuba's first written submission, para. 175 (arguing that assuming a trial is unethical presumes that packaging design causes smoking).

¹⁵⁹⁴ Ajzen Supplemental Report, (Exhibit DOM/HND/IDN-4), para. 58.

¹⁵⁹⁵ Ajzen Supplemental Report, (Exhibit DOM/HND/IDN-4), para. 59. (emphasis original)

¹⁵⁹⁶ See, e.g. Stirling Review, (Exhibits AUS-140, HND-130, CUB-59), p. 89:

It is also worth noting that findings regarding smoking-related attitudes, beliefs and behaviour from both the surveys and qualitative studies in the review are reliant upon self-report. Without any form of validation (such as validating reported changes in cigarette consumption) these have

7.563. At the same time, the constraints associated with measuring the impact of plain packaging on actual smoking behaviours prior to the implementation of the TPP measures do not dispose of the need to inform this question in the context of our assessment of the contribution of the challenged measures to their objective.

7.564. To the extent that the "mediational model" underlying the TPP measures relies on a combination of the three mechanisms identified in the TPP Act (leading to the "proximal outcomes" that are the main focus of the TPP literature) *and* their resulting impact on smoking behaviours (e.g. initiation, cessation, and relapse), a consideration of "proximal outcomes" alone would not be sufficient to draw conclusions about the contribution of the TPP measures to their public health objective. Rather, it would be necessary to consider, in addition, the impact of these mechanisms on the relevant smoking behaviours leading to the desired public health outcomes, i.e. a reduction in the use of, and exposure to, tobacco products. As suggested by Professor Ajzen, an absence of direct empirical evidence on actual behaviours may make reliance on "*the theoretical determinants of smoking behaviour*" important in this context.¹⁵⁹⁷

Methodological rigour of the TPP literature

7.565. The complainants argue generally that the TPP literature fails to meet accepted standards of methodological rigour, including in respect of study design and implementation, and in respect of the ability to draw the stated conclusions from the results of the studies.

7.566. The complainants rely in particular on three expert reports commissioned for the purposes of these proceedings (Inman et al.'s Peer Review Project¹⁵⁹⁸, the Kleijnen Systematic Review¹⁵⁹⁹, and the Klick TPP Literature Report¹⁶⁰⁰, respectively), each of which assessed the quality of the TPP literature under a distinct methodology. Other external reviews of the TPP literature have been referred to in these proceedings. We describe these various reviews of the literature below, before turning to an overall assessment in light of these reviews.

The complainants' commissioned reviews of the TPP literature

The Peer Review Project

7.567. Inman et al.'s Peer Review Project, as described above, involved the review of 55 tobacco plain packaging studies, applying as a benchmark the criteria and rigour by which the reviewers would normally judge submitted manuscripts in the field of consumer behaviour.¹⁶⁰¹ On the basis of this review, none of the studies at issue were considered fit for publication by any of the reviewers. Forty-six were "rejected" outright for methodological reasons, with no possibility of revision, while the perceived flaws in the remaining nine studies, if corrected, were deemed substantial enough to potentially alter the studies' results and conclusions.¹⁶⁰² Professor Inman concludes that:

In sum, having studied all relevant plain packaging papers and the reviewer reports, and applying mainstream criteria for methodological rigor that are found in standard textbooks, I must conclude that the plain packaging literature is of surprisingly low quality. The serious methodological flaws identified by the reviewers across the plain packaging studies make them unacceptable for publication in a major consumer

quite weak predictive validity. A common argument is that plain packaging research can never truly replicate real market conditions and, as such, the suggested impacts on consumption, cessation and uptake are so far speculative.

¹⁵⁹⁷ Ajzen Supplemental Report, (Exhibit DOM/HND/IDN-4), para. 59. (emphasis original)

¹⁵⁹⁸ Peer Review Report, (Exhibit DOM/HND-3).

¹⁵⁹⁹ Kleijnen Systematic Review, (Exhibit DOM/HND-4).

¹⁶⁰⁰ Klick TPP Literature Report, (Exhibit UKR-6).

¹⁶⁰¹ See Dominican Republic's first written submission, paras. 569-573; and Peer Review Report, (Exhibit DOM/HND-3), paras. 12-14 and 26-27, and Appendix A.

¹⁶⁰² See Dominican Republic's first written submission, para. 575; and Peer Review Report, (Exhibit DOM/HND-3), para. 17.

research journal in their current form. This literature does not provide a reliable research basis for public policy.¹⁶⁰³

7.568. Australia argues that the fact that most of the papers that comprise the TPP literature were published in 20 different peer-reviewed scientific journals¹⁶⁰⁴, across a range of scientific disciplines, compromises the complainants' assertions that it suffers from critical methodological flaws, as most of the studies were subject to "rigorous scholarly review" prior to publication.¹⁶⁰⁵ Australia describes, as an example, the peer review process at the journal *Tobacco Control*, a British Medical Journal (BMJ) publication, as one in which a high proportion of submissions are rejected up-front, with the remaining papers assigned to an editor, who will then send it for external review to one or more reviewers selected from a database of experts. The paper may also be sent to a statistical reviewer. The process is designed to ensure that the paper "meets rigorous academic standards and fairly reflects the outcomes of the work".¹⁶⁰⁶ Two such external reviews of published TPP literature papers have been submitted as exhibits in these proceedings.¹⁶⁰⁷

7.569. We agree with Australia that the very fact that most of the papers at issue have been published in various specialized public health and medical journals, while the conclusion of the Peer Review Project is that *none* of the reviewed studies would meet relevant publication standards, raises serious doubts about the criteria and benchmarks used by Professor Inman et al. in their review. We also note that the journals in which these papers were published include medical publications as well as public health and tobacco control journals, while the aim of Professor Inman et al. was to evaluate the studies according to the criteria of leading consumer research journals.¹⁶⁰⁸

7.570. Without prejudice to the existence, in individual studies reviewed, of potential shortcomings that may have been validly identified in the Peer Review Project, we find it implausible that flaws of such a fundamental and pervasive character as to render each and every reviewed study unworthy of publication would have entirely escaped the attention of researchers and reviewers in the relevant field of study. We concur with Australia that this outcome in itself suggests that the Peer Review Project reflects an excessively strict approach that does not in fact accurately reflect the accepted practices of the relevant scientific community.¹⁶⁰⁹

The Kleijnen Systematic Review

7.571. The second expert review of the TPP literature relied on by the complainants, commissioned from Kleijnen Systematic Reviews, adopts a different approach, based on an analysis of the strength of the TPP literature in terms of study design and outcomes measured, ("traffic light matrix"), followed by an assessment of the methodological rigour of the studies,

¹⁶⁰³ Peer Review Report, (Exhibit DOM/HND-3), para. 69, p. 47.

¹⁶⁰⁴ The journals include: *Addiction*; *American Journal of Preventive Medicine*; *American Journal of Public Health*; *Applied Economic Perspectives and Policy*; *Australasian Marketing Journal*; *BMC Public Health*; *BMJ Open*; *Education and Health*; *European Journal of Public Health*; *Frontiers in Public Health*; *Healthy Policy*; *Healthcare Policy*; *Journal of Adolescent Health*; *Journal of Business Research*; *Journal of Health Psychology*; *Lancet*; *Nicotine & Tobacco Research*; *Public Health*; *Qualitative Health Research*; *Social Science and Medicine*; *The European Journal of Public Health*; and *Tobacco Control*.

¹⁶⁰⁵ Fong Second Supplemental Report, (Exhibit AUS-585), para. 24.

¹⁶⁰⁶ See Australia's response to Panel question No. 134, paras. 5-8.

¹⁶⁰⁷ See Peer review of Pechey et al. 2013, (Exhibit DOM-108); and Peer review of Lund and Scheffels 2013, (Exhibit DOM-164). See also Author's response to peer reviews of Pechey et al. 2013, available at <<http://www.biomedcentral.com/1471-2458/13/18/prepub>>, accessed 7 October 2014, (Exhibit DOM-165), p. 2.

¹⁶⁰⁸ See Peer Review Report, (Exhibit DOM/HND-3), para. 13.

¹⁶⁰⁹ See, e.g. Fong Report, (Exhibit AUS-14), paras. 501-506. As one researcher stated:

Science can be understood as a negotiated order sustained by craft conventions that are formulated, maintained, and altered over time within communities of practice. Methodological choices and compromises need to be made in response to contingencies; surrogate end points ... are used when necessary; boundaries of acceptable limitations are defined; and different epistemologies (e.g., experimental, quantitative, and qualitative methods) are not only tolerated but put to productive use singly and in combination.

using the "Study Design and Implementation Assessment Device" (Study DIAD).¹⁶¹⁰ This review concludes that:

[T]he evidence base regarding the potential causal impact of plain packaging on reducing smoking prevalence or tobacco consumption is unreliable and lacks credibility. Three major concerns arise with the research that was assessed. First, half of the studies employed designs that are unsuitable for establishing causal inferences. Second, instead of focusing on the key outcome of smoking behaviour, virtually all studies measured more remote and less relevant surrogate outcomes, such as appeal, attitudes and intentions. Third, even for those studies that are suitable for establishing causal inferences, all were implemented such that the findings exhibit a considerable or high risk of bias.¹⁶¹¹

7.572. We note that, although the research question underlying the Kleijnen Systematic Review is identified as relating to the reliability of the evidence "about the potential causal impact of plain packaging on tobacco consumption or smoking prevalence, either directly or indirectly through surrogate variables (behavioural intentions and/or 'other' outcome variables, such as appeal of tobacco products, effectiveness of health warnings, or perceived harm of tobacco products)"¹⁶¹², the authors indicate that they "placed an emphasis on whether it is possible to infer that plain packaging has a causal impact on the outcome of interest, i.e. smoking behaviour". Specifically, the authors consider that "[b]ehavioural outcomes are the most relevant, as opposed to surrogate outcomes such as intentions and appeal", and that "[t]he relevance of these surrogate outcomes for ultimate smoking behaviours is unknown and needs to be demonstrated".¹⁶¹³

7.573. This assumption leads the authors to consider, in the first step of their assessment ("traffic light matrix") that the TPP literature is "particularly weak in terms of measuring actual smoking-related behaviour", as "only two studies used an appropriate experimental design and measured actual smoking-related behaviour". This is one of the three "major concerns" identified with the TPP literature in this review.¹⁶¹⁴

7.574. Another "major concern" identified by the Kleijnen Systematic Review is that "half of the studies employed designs that are unsuitable for establishing causal inferences".¹⁶¹⁵ This conclusion is based on the identification, in the second part of the initial "traffic light matrix" assessment, of a "hierarchy" of study designs, based on their suitability for causal inference. In this classification, randomized experiments are ranked highest, followed by quasi-experiments, cohort and case-control studies, case series, cross-sectional studies, case studies, and finally expert reports. Randomized experiments are considered, under this hierarchy, to constitute the best available design because "if performed optimally, it excludes possible confounding by other factors that may influence the outcome".¹⁶¹⁶ Upon classifying each of the studies according to the design hierarchy, the reviewers determined that 27 papers did not merit further assessment in the next review phase, as their cross-sectional study designs "do not provide evidence from which causal inferences can be made about plain packaging".¹⁶¹⁷

7.575. In summarizing the results of the first step of their review, the "traffic light matrix", the authors conclude:

[T]he plain packaging literature does not fare well in terms of this first stage of assessment, because half of the study outcomes are from designs that do not allow causal inferences to be drawn about the impact of plain packaging. For the half that do, all but two fail to measure the key outcome of smoking behaviour. The literature

¹⁶¹⁰ Kleijnen Systematic Review, (Exhibit DOM/HND-4), section 1.3, pp. 7-9.

¹⁶¹¹ Kleijnen Systematic Review, (Exhibit DOM/HND-4), section 1.4, p. 9.

¹⁶¹² Kleijnen Systematic Review, (Exhibit DOM/HND-4), section 1.1, p. 7. (emphasis added)

¹⁶¹³ Kleijnen Systematic Review, (Exhibit DOM/HND-4), section 1.3, p. 8.

¹⁶¹⁴ Kleijnen Systematic Review, (Exhibit DOM/HND-4), sections 1.3 and 1.4, pp. 8-9.

¹⁶¹⁵ Kleijnen Systematic Review, (Exhibit DOM/HND-4), sections 1.3 and 1.4, pp. 8-9.

¹⁶¹⁶ Kleijnen Systematic Review, (Exhibit DOM/HND-4), section 3.4.1.1, pp. 16-19.

¹⁶¹⁷ Kleijnen Systematic Review, (Exhibit DOM/HND-4), sections 3.4.1.3, 4.2.1, and 4.2.2, pp. 20-22

would therefore benefit from being more robust in terms of study design and more relevant in terms of outcomes investigated.¹⁶¹⁸

7.576. The second stage of the Kleijnen Systematic Review assessed the quality of the studies within the remaining 31 papers whose designs were deemed suitable for drawing causal inferences, namely experimental and quasi-experimental designs. The reviewers applied a Study DIAD intended to provide "a fine-grained examination of relevance of outcomes and the risk of bias within each of the studies".¹⁶¹⁹ The Study DIAD assessed the "risk of bias in a study against the four facets of 'validity' that are recognized throughout the social sciences as crucial to the design and implementation of experimental studies: *construct, internal, external and conclusion validity*".¹⁶²⁰ The reviewers concluded that each of the studies have a "considerable" or "high" risk of bias for one or more facets of validity, thereby making their results unreliable.¹⁶²¹

7.577. Australia's expert, Professor Fong, submits that the Kleijnen Systematic Review employed "overly restrictive" and "completely unreasonable" criteria to assess the level of bias in individual studies.¹⁶²² Indeed, the extreme nature of the results of the Kleijnen Systematic Review, which identified fatal flaws in each of the assessed 31 papers (most of which were otherwise published in peer-reviewed journals) causes us again to question the standard by which the studies were judged, and whether the particular context of tobacco control research was taken into account.

The Klick TPP Literature Report

7.578. The third review of the TPP literature, relied upon by Cuba, was authored by Professor Jonathan Klick of the University of Pennsylvania.¹⁶²³ The Klick TPP Literature Report adopted a narrative approach to reviewing the literature relied upon by tobacco plain packaging advocates. It focuses on 48 individual studies, 36 of which Australia has directly relied upon in these proceedings¹⁶²⁴, and five surveys of the literature conducted by public health academics and governmental bodies.¹⁶²⁵ Professor Klick concludes that, "[g]iven [...] reliability and relevance concerns, the studies discussed in this report do not provide a sound basis upon which to base claims about the expected effects of plain packaging regulations in Australia".¹⁶²⁶

7.579. Professor Klick submits that the individual studies suffer from threats to internal validity, defined as whether the conclusions about the contribution to the stated behavioural objective in a study are justified.¹⁶²⁷ The "most obvious threat to internal validity" is that "almost every available study draws a conclusion about smoking when the research design examines subjectively reported attitudes and preferences of the subjects, not actual smoking behaviour".¹⁶²⁸ This "disconnect between the research designs and the conclusions reached makes the entire literature unreliable".¹⁶²⁹

7.580. As we have noted above, we consider that evidence pertaining to the impact of tobacco plain packaging on "non-behavioural", "intermediate", or "proximate" outcomes, on the one hand,

¹⁶¹⁸ Kleijnen Systematic Review, (Exhibit DOM/HND-4), section 4.2.3, p. 33.

¹⁶¹⁹ Kleijnen Systematic Review, (Exhibit DOM/HND-4), section 4.2.4, p. 34. "Bias" refers to the degree to which the research methodology used may have distorted the results by yielding inaccurate estimates of the true effect. Ibid. Section 2.1, p. 10.

¹⁶²⁰ Kleijnen Systematic Review, (Exhibit DOM/HND-4), section 1.3, p. 8 (emphasis original). See fn 1500 above for an explanation of the different types of validity.

¹⁶²¹ Kleijnen Systematic Review, (Exhibit DOM/HND-4), section 1.3, p. 9.

¹⁶²² Fong Report, (Exhibit AUS-14), paras. 537-555.

¹⁶²³ Klick TPP Literature Report, (UKR-6), p. i and *curriculum vitae* attachment.

¹⁶²⁴ Australia has cited directly to, and provided as an exhibit, 37 of the papers considered as part of the Klick TPP Literature Report, (Exhibit UKR-6). See Table A: Papers Included in a Primary TPP Literature Review and/or Exhibit JE-24, at the back of these Reports.

¹⁶²⁵ Klick TPP Literature Report, (Exhibit UKR-6), pp. 16 and 58. The five "surveys of the literature" reviewed by Professor Klick are (1) CCV Review 2011, (Exhibit AUS-86); (2) US Surgeon General's Report 2012, (Exhibit AUS-76); (3) Goldberg et al. 1995, (Exhibits AUS-221, JE-24(26)); (4) Stirling Review, (Exhibits AUS-140, HND-130, CUB-59), Stirling Review 2013 Update, (Exhibits AUS-216, CUB-60); and Stead et al. 2013, (Exhibit CUB-58); and (5) Chantler Report, (Exhibits AUS-81, CUB-61).

¹⁶²⁶ Klick TPP Literature Report, (Exhibit UKR-6), p. 3.

¹⁶²⁷ Klick TPP Literature Report, (Exhibit UKR-6), p. 11.

¹⁶²⁸ Klick TPP Literature Report, (Exhibit UKR-6), p. 11.

¹⁶²⁹ Klick TPP Literature Report, (Exhibit UKR-6), p. 14.

and actual smoking behaviours, on the other, are both potentially pertinent to an assessment of the TPP measures' contribution to the objective of improving public health by reducing the use of, and exposure to, tobacco products through the TPP measures. As described above, the results of such studies may inform whether tobacco plain packaging impacts the "non-behavioural" or "proximate" outcomes that are a component of the causal chain or mediational model underlying the design and operation of the TPP measures.

7.581. Similar to the Kleijnen Systematic Review, Professor Klick offers a list of possible study designs assessing the impact of tobacco plain packaging, starting from those he considers as most methodologically sound to those considered least sound. Field experiments and natural/quasi experiments (where changes in smoking are measured in two comparable jurisdictions after one adopts plain packaging), are ranked highest, while experiments tracking impressions and intentions, and focus groups and interviews are ranked lowest. According to Professor Klick, "all of the available studies of plain packaging fall in the last two categories" and none of the reviewed individual studies meet "minimum thresholds for research design reliability and relevance".¹⁶³⁰

7.582. Professor Klick further identifies methodological problems associated with the designs of the TPP literature studies. Internal validity, he argues, is threatened by researchers who do not attempt to isolate the relevant sample group (i.e. excluding non-smokers who are unlikely to ever smoke from the sample) or ensure that the sample is representative.¹⁶³¹ Professor Klick also considers that the fact that non-Australian samples make up the bulk of the literature raises concerns about the likelihood that the results of those studies will be predictive of what happens in Australia (external validity), particularly considering Australia's regulatory environment.¹⁶³² Further, Professor Klick contends, each of the individual studies discussed in his report involved participants observing the package in a focused sterile environment. This raises concerns, Professor Klick argues, regarding ecological validity, namely whether what is observed in the study environment will correspond to what occurs in reality.¹⁶³³

7.583. Overall, the three reviews submitted by the Dominican Republic, Honduras, and Cuba conclude that the various individual studies that are part of the TPP literature are flawed. From this, the reviewers deduce that the literature in support of tobacco plain packaging is neither reliable nor relevant to predicting the impact of the TPP measures in Australia, and is unsuitable for establishing any causal link between tobacco plain packaging and smoking behaviours.¹⁶³⁴

7.584. We note, however, that the TPP literature has also been the subject of various external reviews conducted outside of these proceedings, which have also been referred to by the parties.¹⁶³⁵ We describe these below.

Other reviews of the TPP literature

The Stirling Review

7.585. A systematic review of the literature relating to tobacco plain packaging¹⁶³⁶ was undertaken by Crawford Moodie, a "prominent researcher in the area"¹⁶³⁷, and colleagues from the University of Stirling, the University of London, the University of Nottingham, and the UK Centre for Tobacco Control Studies. An initial report was issued in 2012¹⁶³⁸ (Stirling Review), followed by

¹⁶³⁰ Klick TPP Literature Report, (Exhibit UKR-6), pp. 9-11.

¹⁶³¹ Klick TPP Literature Report, (Exhibit UKR-6), p. 14.

¹⁶³² Klick TPP Literature Report, (Exhibit UKR-6), p. 15.

¹⁶³³ Klick TPP Literature Report, (Exhibit UKR-6), p. 16.

¹⁶³⁴ See, e.g. Peer Review Report, (Exhibit DOM/HND-3), paras. 61(iv) and 65; and Klick TPP Literature Report, (Exhibit UKR-6), p. 1.

¹⁶³⁵ See, e.g. Chantler Report, (Exhibits AUS-81, CUB-61); Stirling Review, (Exhibits AUS-140, HND-130, CUB-59); Stirling Review 2013 Update, (Exhibits AUS-216, CUB-60).

¹⁶³⁶ The initial Stirling Review considered 37 studies that were reported in 50 papers. Stirling Review, (Exhibits AUS-140, HND-130, CUB-59), pp. 91-96. The subsequent Stirling Review 2013 Update considered an additional 17 papers. Stirling Review 2013 Update, (Exhibits AUS-216, CUB-60), pp. 2 and 15-17.

¹⁶³⁷ Klick TPP Literature Report, (Exhibit UKR-6), p. 60.

¹⁶³⁸ Stirling Review, (Exhibits AUS-140, HND-130, CUB-59). We note that two of the same researchers from the University of Stirling first conducted a review of tobacco plain packaging research at the request of the UK Department of Health in 2009. See Moodie et al. 2009, (Exhibit AUS-141). The 2009 review was,

a 2013 update¹⁶³⁹ (Stirling Review 2013 Update). The Stirling Review was initiated in the context of a consultation conducted by the British Government on the possible introduction of tobacco plain packaging in the UK:

The review was conducted following the publication of the March 2011 White Paper *Healthy Lives: Healthy People* which set out a renewed Tobacco Control Plan for England. One of the key actions identified in the plan was to consult on possible options to reduce the promotional impact of tobacco packaging, including plain packaging. This systematic review was commissioned to provide a comprehensive overview of evidence on the impact of plain packaging in order to inform a public consultation on the issue.

...

A total of 4,518 citations were identified following initial searching, and after screening and quality appraisal 37 studies were included. Data were extracted from each of these to inform a narrative synthesis organised around five main headings: appeal of cigarettes, packs and brands; salience of health warnings; perceptions of harm; smoking-related attitudes and behaviour; and barriers and facilitators to the introduction of plain packaging.¹⁶⁴⁰

7.586. Having considered in detail the study design and outcomes of each of the relevant studies identified through their initial screening and quality appraisal¹⁶⁴¹, the reviewers concluded as follows:

This review found that there is strong evidence to support the propositions set out in the Framework Convention on Tobacco Control relating to the role of plain packaging in helping to reduce smoking rates; that is, that plain packaging would reduce the attractiveness and appeal of tobacco products, it would increase the noticeability and effectiveness of health warnings and messages, and it would reduce the use of design techniques that may mislead consumers about the harmfulness of tobacco products. In addition, the studies in this review show that plain packaging is perceived by both smokers and non-smokers to reduce initiation among non-smokers and cessation-related behaviours among smokers.¹⁶⁴²

7.587. The authors also assess the strengths and limitations of the Stirling Review, observing that:

The main strength of this project is that it is a systematic review of the relevant literature, with the studies it included identified as the result of careful and extensive searches. As such, while we cannot be sure we have found every single possibly relevant study, we can be confident that we have followed best practice with regard to our searching and have taken steps to avoid bias in the sample of studies we have retrieved. We have also checked the studies we have included for relevance and methodological rigour. This being the case, we can be confident that the statements we have made in this review genuinely reflect the current state of research evidence in this area.¹⁶⁴³

7.588. The authors of this review also identify the limitations they see in the literature that their review is based upon. They identify certain limitations in the individual studies reviewed, including

however, "[b]rief", conducted under time constraints, and did not purport to be systematic in nature. Ibid. title and pp. 1 and 18. It is our understanding that the subsequent Stirling Review, (Exhibits AUS-140, HND-130, CUB-59), considered both the research evaluated in Moodie et al. 2009, as well as newly-available evidence.

¹⁶³⁹ Stirling Review 2013 Update, (Exhibits AUS-216, CUB-60).

¹⁶⁴⁰ Stirling Review, (Exhibits AUS-140, HND-130, CUB-59), p. i.

¹⁶⁴¹ Four studies, in addition to the 37 that were ultimately reviewed, met initial relevancy requirements but were excluded following data extraction and a quality assessment. Stirling Review, (Exhibits AUS-140, HND-130, CUB-59), pp. 19-20.

¹⁶⁴² Stirling Review, (Exhibits AUS-140, HND-130, CUB-59), p. v.

¹⁶⁴³ Stirling Review, (Exhibits AUS-140, HND-130, CUB-59), p. 88.

those arising from the fact that tobacco plain packaging was not yet in place in any country at the time that the studies were conducted. They also acknowledge the difficulty of drawing conclusions about expected outcomes, including behavioural outcomes, on the basis of surveys and qualitative studies. In addition, the authors note that all the reviewed studies "have been confined to a small number of high income countries, most of which have strong tobacco control", which "restricts the ability to predict the potential impact of plain packaging in less developed nations".¹⁶⁴⁴ Nonetheless, overall, the authors conclude that:

Despite these limitations it is worth emphasizing the remarkable consistency in study findings regarding the potential impact of plain packaging. Across studies using different designs, conducted in a range of countries, with young and older populations and with smokers and non-smokers the key findings are similar. This consistency of evidence can provide confidence about the observed potential effects of plain packaging. If and when introduced, existing evidence suggests that plain packaging represents an additional tobacco control measure that has the potential to contribute to reductions in the harm caused by tobacco smoking now and in the future.¹⁶⁴⁵

7.589. Following the issuance of the Stirling Review, the authors, with the assistance of two additional colleagues, published an article on its main findings, focusing on the 25 quantitative studies among the 37 studies considered, "in order to facilitate comparisons and synthesis of results between studies".¹⁶⁴⁶ Despite the reduced number of studies and designs reviewed in this paper, the authors again note that "the findings were largely consistent across different designs, countries, populations, smokers and non-smokers suggesting that we can be fairly confident about the potential effects of standardised packaging".¹⁶⁴⁷

7.590. The Stirling Review team updated their report in 2013 by issuing an additional report analysing 17 further studies that had been published following the August 2011 cut-off date for the initial report. The Stirling Review 2013 Update concludes:

As with the studies included in the original systematic review, most were conducted in a few high income countries, with 15 of the 17 studies included here having been conducted in Australia, New Zealand or the UK. Of the 17 studies identified, nine assessed the impact of plain packaging on appeal and eight the impact of plain packaging on warning salience and effectiveness. Seven studies explored perceptions of product harm and eight explored the impact of pack design on smoking-related attitudes, beliefs, intentions and behaviour. Four studies considered potential facilitators or barriers to plain packaging ...

The findings of these 17 studies, discussed below, suggest that plain packaging would: reduce the appeal of cigarettes and smoking; enhance the salience of health warnings on packs; and address the use of packaging elements that mislead smokers about product harm.¹⁶⁴⁸

7.591. In sum, the Stirling Review and Stirling Review 2013 Update teams, following a review spanning 54 tobacco plain packaging studies reported in 67 papers, concluded that "plain packaging represents an additional tobacco control measure that has the potential to contribute to reductions in the harm caused by tobacco smoking" by reducing the appeal of cigarettes and smoking; enhancing the salience of health warnings; and addressing the use of packaging elements that mislead smokers about product harm.¹⁶⁴⁹

¹⁶⁴⁴ Stirling Review, (Exhibits AUS-140, HND-130, CUB-59), p. 89.

¹⁶⁴⁵ Stirling Review, (Exhibits AUS-140, HND-130, CUB-59), p. 90. We note that this conclusion was reached on the basis of an analysis of those studies that were considered by the authors of the review to meet required standards in terms of relevance and quality, based on an initial screening process by the authors of the review. Hence it was not expressed as a *substitute* for quality review.

¹⁶⁴⁶ See Stead et al. 2013, (Exhibit CUB-58), p. 4.

¹⁶⁴⁷ Stead et al. 2013, (Exhibit CUB-58), p. 8.

¹⁶⁴⁸ Stirling Review 2013 Update, (Exhibits AUS-216, CUB-60), p. 2. (emphasis omitted)

¹⁶⁴⁹ Stirling Review, (Exhibits AUS-140, HND-130, CUB-59), p. v; and Stirling Review 2013 Update, (Exhibits AUS-216, CUB-60), p. 2.

7.592. The Stirling Review has been criticized by the complainants' experts.¹⁶⁵⁰ Professor Kleijnen's team thus stated that its review "sought to improve on the quality assessment standard applied in [the Stirling Review] by taking a more comprehensive and rigorous approach that better assesses the risk of bias of the evidence, particularly in the Australian context".¹⁶⁵¹ Likewise, Professor Klick claims that the Stirling Review "does not critically examine the studies or their conclusions, but simply provided a qualitative discussion of why ... certain studies are more flawed than others".¹⁶⁵² In the same vein, the review has been critiqued for being a "narrative synthesis", rather than a "meta-analysis showing overall effect size".¹⁶⁵³

7.593. We note, however, that the original Stirling Review appraised each of the underlying studies for relevance and quality, applying published "quality tools", principles of good practice for conducting social research with the public, and principles of good practice for the critical appraisal of primary research.¹⁶⁵⁴ On this basis, each of the 37 reviewed studies was assigned a relevance and quality score, distributed as shown below in Table 2:

Table 2: Relevance and quality ratings awarded by the Stirling Review

	High	Medium	Low
Relevance of studies	23	14	6
Quality of studies	5	36	2

Source: Stirling Review, (Exhibits AUS-140, HND-130, CUB-59), pp. 25-37.

Note: A total of 43 ratings were supplied for each criterion, because five of the 37 studies implemented multiple designs, each of which received a separate rating.

7.594. These scores indicate that a substantial majority of the studies were found to be of medium to high quality and relevance to the question of the effectiveness of tobacco plain packaging.

7.595. In addition, an independent review of the Stirling Review and the Stirling Review 2013 Update was conducted in the context of a subsequent consultation at the request of the UK Government (the Chantler Report, discussed below). The Chantler Report verified the quality of the primary evidence base in support of plain packaging, as well as the quality of the Stirling Review process itself.

7.596. Sir Cyril Chantler, who commissioned independent appraisals of the Stirling Review, the Stirling Review 2013 Update, and the studies within, summarized the results as follows:

- the Stirling Review was conducted according to recognised best practice;
- whilst not agreeing on all details of quality appraisal of the individual studies in the Stirling Review, all were considered appropriate for inclusion in its narrative synthesis; and
- the [Stirling Review 2013 Update], whilst not itself a systematic review, added useful information, and, generally speaking, included papers of individually higher quality than in the original review.¹⁶⁵⁵

¹⁶⁵⁰ See, e.g. Mitchell Report, (Exhibit UKR-154), para. 35; McKeganey Report, (Exhibits DOM-105, CUB-72), pp. 43-50; Klick TPP Literature Report, (Exhibit UKR-6), pp. 60-61; and Kleijnen Systematic Review, (Exhibit DOM/HND-4), section 2.3, p. 11; and Kleijnen Systematic Review Second Rebuttal Report, (Exhibit DOM/HND-18), paras. 7, 43 and 64-68. Cf. Chantler Report, (Exhibits AUS-81, CUB-61), paras. 4.4-4.5.

¹⁶⁵¹ See Kleijnen Systematic Review, (Exhibit DOM/HND-4), p. 11. See also Kleijnen Systematic Review Second Rebuttal Report, (Exhibit DOM/HND-18), paras. 7, 43, and 64-68.

¹⁶⁵² Klick TPP Literature Report, (Exhibit UKR-6), p. 61.

¹⁶⁵³ See Chantler Report, (Exhibits AUS-81, CUB-61), para. 4.5.

¹⁶⁵⁴ Stirling Review, (Exhibits AUS-140, HND-130, CUB-59), pp. 19-20.

¹⁶⁵⁵ Chantler Report, (Exhibits AUS-81, CUB-61), para. 4.18.

The Chantler Report

7.597. In April 2014, Sir Cyril Chantler presented a report¹⁶⁵⁶ (Chantler Report) commissioned by the UK Secretary of State for Health, to advise, "taking into account existing and any fresh evidence, as to whether or not the introduction of standardised packaging is likely to have an effect on public health (and what any effect might be), in particular in relation to the health of children".¹⁶⁵⁷

7.598. As noted by the complainants' expert Professor Klick, Sir Cyril Chantler did not conduct novel research.¹⁶⁵⁸ Rather, he reviewed the relevant literature, including the studies underlying the Stirling Review, studies regarding the influence of media, promotion, and branding, tobacco industry documents, commissioned the independent reviews of the Stirling Review described above¹⁶⁵⁹, and engaged in discussions with stakeholders in the plain packaging debate, including representatives from the major tobacco companies. He also visited Australia in March 2014 to study the implementation of the TPP measures.¹⁶⁶⁰

7.599. With respect to the nature of the evidence, Sir Cyril Chantler observes that he was asked whether the evidence shows "that it is *likely* that there would be a public health impact" (of tobacco plain packaging) and that "[t]his is clearly not an issue which is capable of scientific proof in the manner one might apply, for example, to the efficacy of a new drug".¹⁶⁶¹ He also observes that no double blind randomized controlled trials of plain packaging exist and "none could conceivably be undertaken".¹⁶⁶²

7.600. While noting that the evidence base is "modest"¹⁶⁶³ and noting study design constraints, the Chantler Report concludes as follows:

Having reviewed the evidence it is in my view highly likely that standardised packaging would serve to reduce the rate of children taking up smoking and implausible that it would increase the consumption of tobacco. I am persuaded that branded packaging plays an important role in encouraging young people to smoke and in consolidating the habit irrespective of the intentions of the industry. Although I have not seen evidence that allows me to quantify the size of the likely impact of standardised packaging, I am satisfied that the body of evidence shows that standardised packaging, in conjunction with the current tobacco control regime, is very likely to lead to a modest but important reduction over time on the uptake and prevalence of smoking and thus have a positive impact on public health.¹⁶⁶⁴

7.601. As part of his review, Sir Cyril Chantler addressed a number of criticisms of the underlying studies considered in the Stirling Review, which essentially overlap with those raised by the complainants in these proceedings in relation to the TPP literature:

- there are no randomised controlled trials of standardized packaging;
- each study had significant methodological flaws which invalidate the results;
- studies looking at hypothetical situations and attitudes are of little predictive value; and
- in particular the studies fail to demonstrate a link with actual behaviour.¹⁶⁶⁵

¹⁶⁵⁶ Chantler Report, (Exhibits AUS-81, CUB-61).

¹⁶⁵⁷ Chantler Report, (Exhibits AUS-81, CUB-61), Annex A, p. 41.

¹⁶⁵⁸ Klick TPP Literature Report, (Exhibit UKR-6), p. 62.

¹⁶⁵⁹ See paras. 7.585 et seq.

¹⁶⁶⁰ Chantler Report, (Exhibits AUS-81, CUB-61), paras. 1.8-1.16; and Annex A, paras. 1-3.

¹⁶⁶¹ Chantler Report, (Exhibits AUS-81, CUB-61), para. 1.19.

¹⁶⁶² Chantler Report, (Exhibits AUS-81, CUB-61), para. 1.19.

¹⁶⁶³ Chantler Report (AUS-81, CUB-61), para. 6.2.

¹⁶⁶⁴ Chantler Report, (Exhibits AUS-81, CUB-61), p. 6, para. 18.

¹⁶⁶⁵ Chantler Report, (Exhibits AUS-81, CUB-61), para. 4.11.

7.602. Given the centrality of the debate on the quality of the evidence at issue, Sir Cyril Chantler commissioned, as described above, independent analyses of the primary evidence reviewed in the Stirling Review.¹⁶⁶⁶ The studies were divided into two groups, quantitative and qualitative. The independent reviewers¹⁶⁶⁷ evaluated them using an alternative appraisal structure to that applied by the Stirling Review team, to facilitate an independent judgment of the quality of the studies.¹⁶⁶⁸

7.603. The assessment of the quantitative studies concluded that they were "conducted to a high standard" and that "the conclusions that were drawn are a reasonable reflection of the evidence available".¹⁶⁶⁹ Nearly half of the studies included in the original review, and seven out of 12 in the update, were assigned ratings indicating high quality and low risk of bias.¹⁶⁷⁰ Similarly, the assessor of the qualitative studies concluded that the Stirling Review is "a high quality systematic review" which was "clearly documented and follows recognised best practice for such reviews".¹⁶⁷¹ She noted that her scores of three of the ten qualitative papers differed from those assigned by the Stirling Review team, but indicated that this was not fatal and was a result of applying a purposefully different assessment tool.¹⁶⁷² She also concluded that the Stirling Review team properly utilized a narrative form of review, given the diversity of designs and types of studies analysed.¹⁶⁷³

7.604. The Chantler Report has been criticized by Cuba and in a number of expert reports submitted by the complainants.¹⁶⁷⁴ For the most part, these criticisms are of the underlying studies and the conclusions drawn from them, and duplicate critiques presented in these proceedings in relation to these studies.¹⁶⁷⁵ Critiques of the Chantler Report also include that it is

¹⁶⁶⁶ We note that the reviewers of the quantitative studies considered by the Stirling Review indicate that their aim was to examine the evidence rather than to repeat the Stirling Review. Accordingly, each paper was appraised by a single independent reviewer rather than two reviewers. Chantler Report, (Exhibits AUS-81, CUB-61), Annex D, p. 49.

¹⁶⁶⁷ Dr Yanzhong Wang and Professor Janet Peacock of King's College London, and Professor Catherine Pope of Southampton University.

¹⁶⁶⁸ Chantler Report, (Exhibits AUS-81, CUB-61), para. 4.17. It appears that the four "mixed method" studies included in the Stirling Review were omitted from the evaluations conducted by Dr Wang, Professor Peacock, and Professor Pope. Compare Stirling Review, (Exhibits AUS-140, HND-130, CUB-59), pp. 35-36 with Chantler Report, (Exhibits AUS-81, CUB-61), Annex D, pp. 50-53 and Annex E, pp. 60-61.

¹⁶⁶⁹ Chantler Report, (Exhibits AUS-81, CUB-61), Annex D, p. 49.

¹⁶⁷⁰ Chantler Report, (Exhibits AUS-81, CUB-61), Annex D, pp. 47-49.

¹⁶⁷¹ Chantler Report, (Exhibits AUS-81, CUB-61), Annex E, p. 56.

¹⁶⁷² Chantler Report, (Exhibits AUS-81, CUB-61), Annex E, p. 56.

¹⁶⁷³ See Chantler Report, (Exhibits AUS-81, CUB-61), para. 4.7, and Annex E, p. 56.

¹⁶⁷⁴ See, e.g. Cuba's first written submission, paras. 173-175 and 182; Cuba's second written submission, paras. 46 and 312; Mitchell Report, (Exhibit UKR-154); Gibson Report, (Exhibit DOM-92), pp. 13-14; McKeganey Report, (Exhibits DOM-105, CUB-72), pp. 8-9; Klick TPP Literature Report, (Exhibit UKR-6), pp. 62-63; and Kleijnen Systematic Review Second Rebuttal Report, (Exhibit DOM/HND-18), paras. 64-65 and 67-68.

¹⁶⁷⁵ See "Tobacco packaging as a form of promotion or advertising" and "Impact of plain packaging on the appeal of tobacco products" within section 7.2.5.3.5.2 below for a discussion of the relationship between branded packaging, tobacco advertising, and appeal (with respect to Cuba's first written submission, para. 196); "Focus of the TPP studies on "non-behavioural" outcomes" above and "Overall assessment" below within section 7.2.5.3.5.1 for a discussion of the designs of the TPP literature studies, their methodological validity, and the feasibility of randomized controlled experiments (with respect to Cuba's first written submission, para. 175 and fn 210; and Mitchell Report, (Exhibit UKR-154), paras. 11 and 56-58); and Klick Report, (Exhibit UKR-6), pp. 62-63); "Focus of the TPP studies on "non-behavioural" outcomes" above for a discussion of the TPP literature's use of "proximal" or "non-behavioural" outcomes and surrogate variables for smoking behavior (with respect to Cuba's first written submission, para. 173; and Mitchell Report, (Exhibit UKR-154), para. 11); "Relationship between attitudes and behaviours" within section 7.2.5.3.5.2 discussing behavioural theories and the relationships among appeal, beliefs, attitudes, intentions, and behavior (with respect to Cuba's first written submission, paras. 182(a), and 204; second written submission, paras. 312-313; Mitchell Report, (Exhibit UKR-154), paras. 17-22; and Ajzen Report, (Exhibit DOM/HND/IDN-3), paras. 46 and 95); See, e.g. paras. 7.550 and 7.641; and Slovic Report, (Exhibit AUS-12), para. 116, for a discussion of the convergence of the results of the TPP literature studies (with respect to Cuba's first written submission, para. 182(c)); Paras. 7.617 et seq. for a discussion of the TPP literature assessing appeal in light of Australia's 75% GHW (with respect to Cuba's first written submission, paras. 189-195, 205(b), 348(c); and second written submission, para. 46(c); and Mitchell Report, (Exhibit UKR-154), paras. 37 and 43-45); paras. 7.1215-7.1218 with regard to the impact of tobacco plain packaging on the price of cigarettes (with respect to Klick Report, (Exhibit UKR-6), p. 63; and Mitchell Report, (Exhibit UKR-154), para. 46); "Smoking initiation" within section 7.2.5.3.5.2 for a discussion of risk factors and drivers of smoking initiation and the role of branded packaging (with respect to Mitchell Report, (Exhibit UKR-154), paras. 36, 41-42 and 51-56; and

flawed due to allegedly inadequate consideration of certain types of evidence, i.e. post-implementation evidence¹⁶⁷⁶, theories of adolescent health behaviour¹⁶⁷⁷, or theories of automatic behaviour.¹⁶⁷⁸ We note that evidence relating to these aspects has been presented in these proceedings, which goes beyond the materials that were relied upon in the Chantler Report.¹⁶⁷⁹ This evidence is addressed in these Reports as part of our own assessment regarding the contribution of the TPP measures to their objective, in light of the totality of the evidence before us.

7.605. To the extent that Sir Cyril Chantler may have "resolve[d] ambiguities in this evidence in favor of a move to standardized packaging"¹⁶⁸⁰, or gave "'the benefit of the doubt' to possible future developments where they favour plain packaging"¹⁶⁸¹, we consider this to have been an exercise of judgment on Sir Cyril Chantler's part, to which he was entitled. We further note that the Report readily acknowledges weaknesses in the evidence and possible countervailing impacts of standardized packaging¹⁶⁸², suggesting that it seeks to present a balanced assessment of the then-available evidence.

Other surveys of the literature

7.606. During the course of these proceedings, the parties referred to other surveys of the evidence which have reached positive conclusions regarding the likely impact of tobacco plain packaging.

7.607. Australia has referenced a "review of the evidence" prepared for the Irish Department of Health¹⁶⁸³, and has also referred to a 2012 US Surgeon General's Report as an "independent

McKeganey Report, (Exhibits DOM-105, CUB-72), pp. 15-23); "Impact of plain packaging on the salience and processing of GHWs" within section 7.2.5.3.5.3 with respect to the impact of tobacco plain packaging on the salience of health warnings (with respect to Mitchell Report, (Exhibit UKR-154), para. 35); "Ability of plain packaging to increase the effectiveness of GHWs by improving risk awareness and risk beliefs" within section 7.2.5.3.5.3, discussing adolescents' awareness of the risks of smoking (with respect to Mitchell Report, (Exhibit UKR-154, para. 34); and paras. 7.738 et seq. discussing the distinction between primary and secondary demand (with respect to Mitchell Report, (Exhibit UKR-154), paras. 27-32).

¹⁶⁷⁶ See Cuba's first written submission, para. 182(b); Gibson Report, (Exhibit DOM-92), p. 13; Klick Report (Exhibit UKR-6); McKeganey Report, (Exhibits DOM-105, CUB-72), pp. 8-9 and 11. Cf. Dominican Republic's response to Panel question No. 197, para. 264; Dominican Republic's comments on Australia's response to Panel question No. 196, paras. 579-581; and Kleijnen Systematic Review Second Rebuttal Report, (Exhibit DOM/HND-18), para. 68. The Panel considers the post-implementation data on the record in section 7.2.5.3.6 below.

¹⁶⁷⁷ See Mitchell Report, (Exhibit UKR-154), paras. 14-26. Theories of adolescent behaviour are discussed at "Smoking initiation" within section 7.2.5.3.5.2 of these Reports.

¹⁶⁷⁸ See Cuba's first written submission, paras. 205-207 and 348(c); Cuba's second written submission, para. 46(c); Klick Report, (Exhibit UKR-6), p. 63; and Mitchell Report, (Exhibit UKR-154), paras. 14-17. The Panel discusses the "affect heuristic" theory and unconscious or automatic responses to branded packaging at paras. 7.725 et seq. See also Slovic Report, (Exhibit AUS-12), paras. 116-117 (responding to criticism of the Chantler Report's application of theories of automatic behaviour).

¹⁶⁷⁹ See section 7.2.5.3.3 for a discussion of the Panel's approach to the evidence regarding contribution presented in these proceedings.

¹⁶⁸⁰ Mitchell Report, (Exhibit UKR-154), para. 58.

¹⁶⁸¹ Gibson Report, (Exhibit DOM-92), p. 13.

¹⁶⁸² See, e.g. Chantler Report, (Exhibits AUS-81, CUB-61), para. 4.5 (acknowledging criticisms of the Stirling Review and the Stirling Review 2013 Update); para. 4.23 (acknowledging the argument that standardized packaging could produce a perverse appeal for children); para. 4.21 (noting that the findings of the Stirling Review regarding smoking behaviour are "essentially indirect and 'speculative'"); paras. 5.1-5.3 (indicating that an economist had been commissioned in order to thoroughly address the argument by opponents of standardized packaging that it could cause large scale price reductions); para. 6.2 (acknowledging that the evidence base regarding standardized packaging is "relatively modest"); and para. 6.11 (concluding that "after a careful review of all the relevant evidence ... there is sufficient evidence derived from independent sources").

¹⁶⁸³ Australia's second written submission, para. 246 (referring to Hammond Review, (Exhibit AUS-555)). This review, completed in March 2014, examined more than 55 articles. It states, with respect to the methodological quality of the studies:

The plain packaging literature includes a heterogeneous mix of research designs, with a wide variety of outcomes from different research domains. Plain packaging has been assessed using consumer perceptions, physiological measures of visual attention and neuroimaging, behavioural

review of the literature".¹⁶⁸⁴ The complainants' expert, Professor Klick, also classifies the 2012 US Surgeon General's Report, as well as reports by CCV and Health Canada, as "surveys of the literature".¹⁶⁸⁵ We distinguish, however, the Stirling Review and Chantler Report described above, which, in addition to synthesizing and summarizing the evidence, applied critical appraisal tools to each study in order to evaluate the overall *quality* of the evidence.¹⁶⁸⁶

7.608. We note that no systematic review of the TPP literature appears to have been undertaken in Australia prior to the adoption and implementation of the TPP measures.¹⁶⁸⁷ A working group of the NPHT in Australia considered the evidence on tobacco plain packaging in a report outlining various recommended tobacco control actions, including the introduction of plain packaging. This report describes the main findings of certain relevant studies relating to tobacco plain packaging.¹⁶⁸⁸ CCV published a "compilation of literature" in 2011, which "summarises the findings

tasks, as well as population-level cessation behaviour. A substantial proportion of these studies use experimental research designs, with high levels of internal validity, strengthening the level of causal inference that can be made. The diversity of the research designs and outcomes is a considerable strength of the evidence base.

Studies on packaging have been conducted with diverse samples, including youth and adults, as well as smokers and non-smokers.

Hammond Review, (Exhibit AUS-555), p. 30.

The review notes the consistency and coherence across different research methods and most outcomes examined, which it describes as "a considerable strength of the evidence base" that increases the likelihood of a causal association with tobacco plain packaging. Hammond Review, (Exhibit AUS-555), p. 31. The volume of the evidence is sufficient, the review concludes, to provide an informed opinion, namely that:

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

Hammond Review, (Exhibit AUS-555), p. i.

¹⁶⁸⁴ Australia's first written submission, para. 612 (referring to US Surgeon General's Report 2012, (Exhibit AUS-76)).

¹⁶⁸⁵ Klick TPP Literature Report, (Exhibit UKR-6), pp. 58-60 (critiquing US Surgeon General's Report 2012, (Exhibit AUS-76); Goldberg et al. 1995, (Exhibits AUS-221, JE-24(26)); and CCV Review 2011, (Exhibit AUS-86)).

¹⁶⁸⁶ See Chantler Report, (Exhibits AUS-81, CUB-61), Annex D, p. 47, and Annex E, p. 56; and Stirling Review, (Exhibits AUS-140, HND-130, CUB-59), pp. 19-20.

¹⁶⁸⁷ Australia explains that its decision to adopt the TPP measures was based on an extensive body of evidence available at the time, as well as the explicit recommendation of the Parties to the FCTC to adopt plain packaging as a means to implement their obligations under the FCTC (Australia's closing statement at the second substantive meeting, para. 5). See also Australia's closing statement at the second substantive meeting, para. 7.

¹⁶⁸⁸ NPHT Technical Report 2, (Exhibits AUS-52, JE-12). It states in relevant part:

Cigarette brand names and package design enable the communication of personal characteristics, social identity and aspirations,[185] and are a crucial aspect of marketing the product.[186, 187] Consumer research indicates that decreasing the number of design elements on the packet reduces its appeal and perceptions about the likely enjoyment and desirability of smoking.[188] Requiring cigarettes to be sold in plain packaging would reinforce the idea that cigarettes are not an ordinary consumer item. It would also reduce the potential for cigarettes to be used to signify status. Plain packaging would increase the salience of health warnings: research subjects show an improved ability to recall health warnings on plain packs.[189-191] Plain packaging would prohibit brand imagery, colours, corporate logos and trademarks, permitting manufacturers only to print the brand name in a mandated size, font and place, in addition to required health warnings and other legally mandated product information such as toxic constituents, tax-paid seals or package contents. A standard cardboard texture would be mandatory, and the size and shape of the package and cellophane wrapper would also be prescribed. A detailed analysis of current marketing practices[187] suggests that plain packaging would also need to encompass pack interiors and the cigarette itself, given the potential for manufacturers to use colours, bandings and markings, and different length and gauges to make cigarettes more "interesting" and appealing. Any use of perfuming, incorporation of audio chips or affixing of "onserts" would also need to be banned.

of more than 25 published studies conducted to assess the likely impact of plain packaging".¹⁶⁸⁹ Neither publication, however, indicates or suggests that it constitutes a systematic review or quality assessment of the evidence regarding tobacco plain packaging. We understand the post-implementation review (PIR) undertaken after the entry into force of the TPP measures to have been intended to provide such an assessment, albeit in a post-implementation context.¹⁶⁹⁰

Overall assessment

7.609. As described above, the complainants consider that the TPP literature as a whole is methodologically flawed, as an evidentiary base in support of tobacco plain packaging. This conclusion is reflected in all three of the expert reviews described above commissioned by the complainants for the purposes of these proceedings, which largely overlap in the substance of their criticism.

7.610. One of the main criticisms addressed by the complainants to the TPP literature is the fact that it focuses on the "proximal outcomes" of plain packaging, including the appeal of tobacco products, and fails to measure smoking-related behaviours. We have already determined, in this respect, that we are not persuaded that this constitutes, in itself, a flaw, provided that such

Industry opposition to restrictions on pack design is a strong indication of its importance to tobacco sales.[192]

"In our opinion, [after taxation] the other two regulatory environment changes that concern the industry the most are homogenous packaging and below-the counter sales. Both would significantly restrict the industry's ability to promote their products." Morgan Stanley Research (2007)[193].

NPHT Technical Report 2, (Exhibits AUS-52, JE-12), p. 20. Another section of the report discusses the elimination of the promotion of tobacco products through packaging:

An experimental study of the effects of packaging on the image of smoking and characteristics of tobacco products found that smokers of plain packs were rated as significantly less trendy/stylish, less sociable/outgoing and less mature than smokers of the original pack. Compared with original packs, smokers inferred that cigarettes from these plain packs would be less rich in tobacco, less satisfying and of lower quality tobacco.[91]

A paper presented at the 2009 meeting of the Society for Research into Nicotine and Tobacco[92] found that substantial proportions of UK adult smokers and children reported false beliefs about health risk based on packaging ...

...
A case study presented at the World Conference on Tobacco or Health in Mumbai in March 2009[98] demonstrated how the Dunhill brand was able to significantly increase sales and market share in the absence of any allowable media advertising following significant changes in packaging of the product and promotion to retailers encouraging more prominent display at point of sale.

NPHT Technical Report 2, (Exhibits AUS-52, JE-12), pp. 99-101. The quoted passages cite the following eleven sources, four of which Australia has offered as exhibits in these proceedings: J. Scheffels J. A difference that makes a difference: young adult smokers' accounts of cigarette brands and package design. *Tob Control*. 2008;17:118-22; Wakefield et al. 2002, (Exhibits AUS-93, CUB-28); Freeman B, Chapman S and Rimmer M. Review: The case for the plain packaging of tobacco products. Sydney: University of Sydney, 2007; Wakefield et al. 2008, (Exhibits AUS-149, JE-24(62)); Beede and Lawson 1992, (Exhibits AUS-202, JE-24(6)); Goldberg et al. 1999, (Exhibits AUS-209, JE-24(27)); Strahan EJ, White K, Fong GT, Fabrigar LR, Zanna MP and Cameron R. Enhancing the effectiveness of tobacco package warning labels: a social psychological perspective. *Tob Control*. 2002;11:183-90; Wakefield M and Letcher T. My pack is cuter than your pack. *Tob Control*. 2002;11:154-6; Morgan Stanley Research Europe. *Tobacco: Late to the Party*. London: Morgan Stanley Research, 2007; Hammond D, Arnott D, Dockrell M, Lee A and McNeill A. Cigarette pack design and perceptions of risk among adults and youth. 2009 Joint Conference of SRNT and SRNT-Europe. Dublin, Ireland, 2009 (sharing the same authors and a similar title to Hammond et al. 2009, (Exhibits AUS-166, JE-24(29)); and Lindorff K. Power of the packet: A case study for plain packaging. 14th World Conference on Tobacco or Health. Mumbai, 2009. See NPHT Technical Report 2, (Exhibits AUS-52, JE-12), pp. 61 and 138.

¹⁶⁸⁹ CCV Review 2011 (Updated), (Exhibit JE-16), p. 5.

¹⁶⁹⁰ See Tobacco Plain Packaging PIR, (Exhibit AUS-624), p. 3.

"proximal outcomes" are understood to form one element of the "causal chain" in the "mediational model" underlying the design and operation of the measures.¹⁶⁹¹

7.611. Other key criticisms of the relevant studies by the complainants include the inability of the chosen study designs to inform causal relationships with respect to the measured outcome, a lack of consideration of confounding factors, in particular GHWs, and the possibility of demand effects and social desirability bias. We consider these aspects in turn.

7.612. With respect to study design, we note that the studies at issue are based on a range of study designs, including non-experimental qualitative studies and focus groups, and quantitative cross-sectional surveys. The complainants¹⁶⁹² and their experts, in particular Professor Kleijnen et al., contend that nearly half of the TPP literature studies employed designs that were inappropriate for research questions addressing the causal impact of tobacco plain packaging. Professor Kleijnen offers a "widely accepted" hierarchy of study design types based upon their suitability for causal inference.¹⁶⁹³ Randomised experiments, quasi-experiments, and cohort and case control studies "may be capable of allowing causal inferences to be drawn", whereas cross-sectional studies, case studies, and expert reports "are not capable of allowing causal inferences to be drawn".¹⁶⁹⁴ Professor Kleijnen et al. accordingly determined that, among the 63 different studies discussed across the 58 papers considered, 32 of the studies employed a cross-sectional (non-experimental) design to measure the impact of plain packaging on intentions and perceptions of smoking and pack design¹⁶⁹⁵, and were thus not further assessed due to their inability to allow causal inferences to be drawn.¹⁶⁹⁶ This approach, they claim, is "similar to other recent systematic reviews outside the plain packaging domain" and reflects "accepted practice".¹⁶⁹⁷

7.613. The evidence before us suggests that it is generally recognized that different study methods and designs may have diverse abilities to demonstrate relevant causal relationships and that in particular, properly executed experimental designs may in principle have predictive superiority. At the same time, as discussed above, it has also been recognized that, in respect of tobacco plain packaging research, practical and ethical constraints would have affected the possibility of conducting the type of randomized experiment that may in principle have been considered to have the highest level of predictive value. There is no indication, in the Kleijnen Systematic Review, that such considerations were taken into account in applying the chosen analytical framework to the TPP literature. We note in this respect that the Stirling Review, while indicating that some systematic reviews only include controlled trials, included in its review of the TPP literature "all feasible study designs"¹⁶⁹⁸, including non-experimental studies, as did the subsequent Stirling Review update and the Chantler Report.¹⁶⁹⁹

7.614. We further note in this respect the observation from a handbook for systematic reviews, cited by Australia, that "evidence from qualitative studies can play an important role in adding value to systematic reviews for policy, practice and consumer decision-making".¹⁷⁰⁰ Kleijnen et al., while considering that non-experimental designs are not a recommended means of measuring the effectiveness of an intervention¹⁷⁰¹, at the same time acknowledge that non-experimental studies are capable of "developing and examining ideas" and "identifying barriers and facilitators for behavioural change". Professor Inman also notes that non-experimental studies can provide

¹⁶⁹¹ See paras. 7.555 and 7.564 above.

¹⁶⁹² See, e.g. Honduras's first written submission, paras. 483 and 485-486; Dominican Republic's first written submission, para. 586; and Cuba's first written submission, paras. 174-175. See also Indonesia's second written submission, para. 186.

¹⁶⁹³ Kleijnen Systematic Review, (Exhibit DOM/HND-4), Section 3.4.1.1; and Kleijnen Systematic Review Second Rebuttal Report, (Exhibit DOM/HND-18), para. 41. See also Peer Review Report, (Exhibit DOM/HND-3), para. 61.iv.a (noting that experiments are the preferred method for addressing questions of causal relationships).

¹⁶⁹⁴ Kleijnen Systematic Review, (Exhibit DOM/HND-4), Section 3.4.1.1, p. 17.

¹⁶⁹⁵ Kleijnen Systematic Review, (Exhibit DOM/HND-4), Figure 5, p. 31.

¹⁶⁹⁶ Kleijnen Systematic Review, (Exhibit DOM/HND-4), Section 4.2.2, p. 33.

¹⁶⁹⁷ Kleijnen Systematic Review Rebuttal Report, (Exhibit DOM/HND-13), paras. 29 and 32.

¹⁶⁹⁸ Stirling Review, (Exhibits AUS-140, HND-130, CUB-59), Section 3.2, pp. 17-18.

¹⁶⁹⁹ Chantler Report, (Exhibits AUS-81, CUB-61), Annex E, p. 56.

¹⁷⁰⁰ Australia's first written submission, Annexure E, para. 6 (quoting Fong Report, (Exhibit AUS-14), para. 463).

¹⁷⁰¹ Kleijnen Systematic Review Rebuttal Report, (Exhibit DOM/HND-13), paras. 29 and 34-35.

evidence of association or correlation.¹⁷⁰² We also note the observation by Professor Pope, whose independent quality assessment of the qualitative studies included in the Stirling Review was incorporated into the Chantler Report, that such studies may reveal factors likely to be relevant or influential in behaviour.¹⁷⁰³ Accordingly, we are not persuaded that the limitations of non-experimental designs are such as to justify, as suggested in the review of the TPP literature by Kleijnen et al., a wholesale exclusion of the relevance of such studies to informing the effects of tobacco plain packaging on relevant outcomes.

7.615. The complainants further identify a number of specific limitations of the TPP studies, which they argue affect the studies' internal, external, conclusion, and construct validity.¹⁷⁰⁴ They observe in particular that most of the plain packs used in the TPP literature studies failed to include a dominant GHW.¹⁷⁰⁵

7.616. The evidence before us suggests that it is recognized, within the research community, that study designs should take account of relevant variables that may affect the external, internal, and construct validity of the study, but also that certain constraints inherent in the construct of experimental studies may affect the extent to which all relevant factors, including potential sources of bias or confounding factors, may be accounted for simultaneously in a given study. Professor Fong thus quotes *The Handbook of Social Psychology* in asserting that "it is next to impossible to design an experiment that is high in both internal and external validity".¹⁷⁰⁶ We also note the observation by Australia's expert Professor Slovic that in the realm of tobacco control, it is particularly difficult to control for confounding factors.¹⁷⁰⁷

7.617. In this respect, the complainants question in particular the validity of those TPP studies that compared branded and plain packs without dominant health warnings. The comparatively smaller amount of remaining space on Australian plain packs *with* a dominant GHW, they claim, would likely have a smaller impact on the measured outcomes of pack appeal, noticeability of GHWs, and beliefs and attitudes about harm.¹⁷⁰⁸ Further, they allege that the dominant negative imagery resulting from the large Australian GHW itself impacts the measured outcomes.¹⁷⁰⁹ At the same time, one of the complainants' experts asserts that the use of differently sized GHWs in a single study across various experimental packs introduces a confounding variable¹⁷¹⁰ that threatens internal validity by preventing results from being attributable to plain packaging alone.¹⁷¹¹

7.618. It seems unsurprising, in our view, that TPP literature studies conducted prior to the implementation of the TPP measures in Australia, and intended to examine the impact of tobacco plain packaging in various possible configurations, would have utilized a variety of different pack conditions, including different types and sizes of health warnings, given the novelty of the intervention and the variety of health warning requirements in place across the globe. As noted by Professor Fong, some of the studies varied the size of the warnings and the degree of branding in order to assess the effectiveness of various combinations.¹⁷¹²

¹⁷⁰² Peer Review Report, (Exhibit DOM/HND-3), para. 61.iv.a.

¹⁷⁰³ See Chantler Report, (Exhibits AUS-81, CUB-61), Annex E, p. 56.

¹⁷⁰⁴ See fn 1500, above.

¹⁷⁰⁵ See, e.g. Honduras's first written submission, para. 495; Dominican Republic's first written submission, paras. 608-611; Cuba's first written submission, paras. 12(b), 176(a), and 189; and Indonesia's second written submission, paras. 186-187.

¹⁷⁰⁶ Fong Report, (Exhibit AUS-14), para. 493.

¹⁷⁰⁷ Slovic Report, (Exhibit AUS-12), para. 120.

¹⁷⁰⁸ Honduras's first written submission, para. 495; Dominican Republic's first written submission, paras. 608-611; Cuba's first written submission, paras. 12(b), 176(a), and 189; and Indonesia's second written submission, paras. 186-187.

¹⁷⁰⁹ Honduras's first written submission, para. 495; Dominican Republic's first written submission, paras. 608-611; Cuba's first written submission, paras. 12(b), 176(a), and 189; and Indonesia's second written submission, paras. 186-187.

¹⁷¹⁰ A confounding variable is a variable that is not a focus of the study, but is highly correlated with a variable that is. Peer Review Report, (Exhibit DOM/HND-3), para. 61.iii.

¹⁷¹¹ See, e.g. Kleijnen Systematic Review, (Exhibit DOM/HND-4), p. 45 (critiquing Hoek et al. 2011, (Exhibits AUS-148, JE-24(34))).

¹⁷¹² Fong Supplemental Report, (Exhibit AUS-531), para. 155 (referring to Hammond et al. 2013a, (Exhibits AUS-177, JE-24(32))); and Wakefield et al. 2012, (Exhibits AUS-557, JE-24(63))).

7.619. Nonetheless, we also note that some of the TPP literature studies did include plain packs with dominant GHWs on the front of the pack.¹⁷¹³ Australia identifies two experimental studies specifically designed to measure whether plain packaging has an impact in the presence of large GHWs.¹⁷¹⁴ We note that the independent reviewers of the Chantler Report assigned both of these studies a quality score of 5 out of 6, or "high".¹⁷¹⁵ We further note a study from New Zealand, which permitted a degree of comparison between plain and branded packs with a dominant GHW. This study found that packs with a 75% GHW were deemed "very unattractive, regardless of the level of branding present".¹⁷¹⁶ Wakefield et al. submit that the results of this study may have been influenced by the use of an arguably more appealing white background on the plain packs rather than a brown background, as well as a novel GHW and a single front-of-pack view rather than a multi-dimensional view which displays branding or "plainness" to a greater degree.¹⁷¹⁷

7.620. We also note that the study commissioned by Australia, Parr et al. 2011b, to test the impact of plain and branded packages of roll-your-own (RYO) tobacco, cigarillos/little cigars, and premium cigars, assessed each of these with a 75% GHW.¹⁷¹⁸ Honduras¹⁷¹⁹, the Dominican Republic¹⁷²⁰, and Cuba¹⁷²¹ argue that Parr et al. 2011b utilised an inadequate sample and suffered from methodological flaws. In particular, they argue that, as regards premium cigars, Parr et al. 2011b relies on responses from eight LHM cigar smokers, none of whom were selected randomly to participate in the research. Further, Parr et al. 2011b adopted a purely qualitative approach to

¹⁷¹³ For example, the following studies included packs where a GHW occupied more than 50% of the front pack face: Hoek et al. 2011, (Exhibits AUS-148, JE-24(34)); Wakefield et al. 2012, (Exhibits AUS-557, JE-24(63)); Hoek et al. 2012, (Exhibits AUS-163, JE-24(35)); Hammond et al. 2013a, (Exhibits AUS-177, JE-24(32)); Parr et al. 2011a, (Exhibits AUS-117, JE-24(49)); Parr et al. 2011b, (Exhibits AUS-219, JE-24(50)); and Germain et al. 2010, (Exhibits AUS-154, JE-24(25)).

¹⁷¹⁴ Thrasher et al. 2011, (Exhibits AUS-229, JE-24(58)); and Wakefield et al. 2012, (Exhibits AUS-557, JE-24(63)). Wakefield et al. 2012 employed a between-subjects experiment, which collected Australian smokers' ratings of positive pack characteristics, positive smoker characteristics, negative smoker characteristics, positive taste characteristics, and negative harm characteristics for each of six different packs, including a plain pack with a 70% GHW and a branded pack with a 70% GHW. The branded pack with a 70% GHW was rated more highly on positive pack characteristics and positive smoker characteristics, while the plain pack with a 70% GHW was rated more highly on the negative smoker characteristic, "boring". The packs rated similarly on measures of positive taste characteristics, while the branded pack received higher ratings on negative harm characteristics. Wakefield et al. 2012, (Exhibits AUS-557, JE-24(63)), p. 1164. Further, analysis of the ratings of these two packs, in conjunction with ratings of four other packs, each of which was either branded or plain and included either a 30% or 100% GHW on the pack face, indicated that plain packaging had more of an effect on brand appeal and purchase intentions than increasing the size of the GHW. Wakefield et al. 2012, (Exhibits AUS-557, JE-24(63)), pp. 1163-1164. Thrasher et al. 2011 assessed demand among smokers in the United States, via an auction, for variously packaged cigarettes, including a branded pack with a 50% GHW and a plainer pack with a 50% GHW. Bids for the more plainly packaged cigarette pack were lower, indicating that plain packaging further reduces demand for cigarettes beyond the impact of a 50% GHW. Thrasher et al. 2011, (Exhibits AUS-229, JE-24(58)), p. 47.

¹⁷¹⁵ See Chantler Report, (Exhibits AUS-81, CUB-61), Annex D, pp. 48, 51, and 54. Thrasher et al. 2011, (Exhibits AUS-229, JE-24(58)), was included in the original Stirling Review, and was assigned a quality score of "Medium". Stirling report, (Exhibits AUS-140, HND-130, CUB-59), p. 31. Wakefield et al. 2012 was published after the cut-off date of the original Stirling Review, and was included in the Stirling Review 2013 Update, which did not assign quality ratings to individual studies. See Stirling update report, (Exhibits CUB-216, CUB-60).

¹⁷¹⁶ Hoek et al. 2011, (Exhibits AUS-148, JE-24(34)), pp. 185-186. Hoek et al. 2011 conducted a within-subjects best-worst experiment in which young adult smokers identified their preferred and least-preferred pack among thirteen different packs which displayed various degrees of branding alongside a 30%, 50%, or 75% GHW on the front face. This study concluded that where graphic health warnings covered at least 50% of the pack face, respondents preferred plain packages.

¹⁷¹⁷ Wakefield et al. 2012, (Exhibits AUS-557, JE-24(63)), p. 1165.

¹⁷¹⁸ Parr et al. 2011b, (Exhibits AUS-219, JE-24(50)), p. 11. This study generally found that the plain packages minimised perceptions of appeal and quality, although the GHWs were perceived as equally noticeable on the branded and plain RYO and cigarillo/little cigar packages. The study also found that darker colours were seen to be more harmful to health than lighter colours. Among 6 packages tested with a 75% GHW, 5 with branding and one plain package, the plain package was perceived to contain the second most harmful RYO cigarettes, and the third most harmful cigarillos/little cigars. Ibid. pp. 25-26 and 34. The study also noted a possible link between appeal, quality, and perceived harm with respect to cigarillos/little cigars. Ibid. p. 34. The impact of plain packaging on the noticeability of health warnings or the ability of a pack to mislead regarding harmfulness to health were not tested in this study for cigars.

¹⁷¹⁹ Honduras's first written submission, paras. 530-537.

¹⁷²⁰ Dominican Republic's first written submission, paras. 66 and 628-639.

¹⁷²¹ Cuba's first written submission, paras. 263-267.

its research on LHM cigars to draw conclusions about the likely effects of a substantial public health intervention for an entire population of interest. Also, Parr et al. 2011b asked respondents to compare images of digitally created, unbranded, plain pack cigar tubes, carrying a full health warning, with images of existing branded cigar tubes with no health warning. As a result, according to Cuba, it is impossible to separate out the potential effect of plain packaging from the potential effect of the brand name and the health warning. The interviewers also presented respondents with a plain pack cigar band that did not display any information at all and asked them to compare it with a fully branded band.¹⁷²²

7.621. As Cuba and the Dominican Republic note, Parr et al. 2011b explains the reasons for some of these shortcomings. According to Parr et al. 2011b, the methodology for premium cigar smokers was qualitative and the number of interviewees was limited to eight due to difficulties recruiting large numbers of premium cigar smokers in Australia.¹⁷²³ Parr et al. 2011b adds that the brand name for the plain packaged brand "Mayfair" was chosen for cigarillos and little cigars as there is currently no other similarly named tobacco product in the Australian market and there would be no latent association with the brand name among the research audiences.¹⁷²⁴ According to Parr et al. 2011b, in the case of cigar tubes it was not possible to produce images of branded products that would show both the health warning in full as well as the brand because of the specification that the health warning take up 60% of the circumference and 95% of the length of the tube. It was determined that images showing only the health warning or branding in part would not be useful for research purposes. In addition, time constraints meant it was not possible to create physical mock ups of cigar tubes.¹⁷²⁵

7.622. We consider that these explanations provide relevant reasons for specific limitations of the methodology of Parr et al. 2011b criticised by Cuba, the Dominican Republic, and Honduras. In light of this, and while we agree with the complainants that a better methodology may have been preferable, we note that, as Cuba and the Dominican Republic point out, Parr et al. 2011b is the only pre-implementation study submitted in these proceedings that sought to investigate the impact of tobacco plain packaging on cigars and cigarillos.¹⁷²⁶ We shall therefore take its conclusions into account in our subsequent analysis – to the extent that these contain relevant observations for assessing specific aspects of how plain packaging, in the design used by Parr et al. 2011b, may contribute to the objective of the TPP measures, in particular to certain mechanisms outlined by the TPP measures.

7.623. The complainants identify other instances where the validity of TPP literature studies may, in their view, have been compromised, such as the use of non-representative samples that include non-smokers or do not reflect the demographics of the population¹⁷²⁷, presenting subjects with a "false choice" between branded and plain packs, when only plain packs will be available following implementation¹⁷²⁸, or the use of an unfamiliar branded pack rather than an existing/familiar branded pack.¹⁷²⁹ However, even assuming that various factors have impacted the validity of certain studies within the TPP literature as the complainants argue, it is not always clear what impact such factors may have had on study results and the conclusions that may be drawn from them, either individually or taken together. We note in this respect Professor Fong's observation that these factors in most cases have an indeterminate impact upon study results.¹⁷³⁰

¹⁷²² Honduras's first written submission, paras. 530-537; Dominican Republic's first written submission, paras. 628-639; and Cuba's first written submission, paras. 263-267.

¹⁷²³ Parr et al. 2011b, (Exhibits AUS-219, JE-24(50)), p. 6.

¹⁷²⁴ Parr et al. 2011b, (Exhibits AUS-219, JE-24(50)), p. 6. See also ibid, p. 19.

¹⁷²⁵ Parr et al. 2011b, (Exhibits AUS-219, JE-24(50)), p. 18.

¹⁷²⁶ We note in this respect that Cuba itself, while questioning the methodological soundness of this study, relies on it in particular in the context of its claim under Article IX:4 of GATT 1994.

¹⁷²⁷ See, e.g. Klick TPP Literature Report, (Exhibit UKR-6), p. 14.

¹⁷²⁸ See, e.g. Dominican Republic's first written submission, para. 614; and Klick TPP Literature Report, (Exhibit UKR-6), p. 12.

¹⁷²⁹ See, e.g. Peer Review Report, (Exhibit DOM/HND-3), para. 61.iii, p. 29; and Kleijnen Systematic Review, (Exhibit DOM/HND-4), p. 40.

¹⁷³⁰ Fong Report, (Exhibit AUS-14), paras. 507-509 and 553-555.

7.624. The complainants and their experts also identify socially desirable responding (SDR) and demand effects as common concerns in the tobacco plain packaging studies.¹⁷³¹ SDR arises when respondents in a study are simply giving the response that they believe is consistent with social norms and expectations – in this particular case about smoking and tobacco control policies – rather than their own true attitudes.¹⁷³² The complainants' expert Professor Ajzen explains how SDR can influence the results of the TPP research, and that it is the researchers' responsibility to make sure that the obtained results cannot be explained by reactive effects.¹⁷³³ The complainants argue that the risk of SDR is particularly present in research contexts that involve issues of strong social norms and expectations, addictive behaviour, or social ostracism, such as tobacco control research, and can be controlled by measuring each participant's tendency to engage in SDR and including the resulting scores in the analysis. None of the papers reviewed as part of the Peer Review Project reported having accounted for the possibility of SDR.¹⁷³⁴ Australia responds that several of the TPP studies employed a "between-subjects" study design, a method endorsed by the complainants' expert Professor Ajzen to reduce the possibility of bias¹⁷³⁵, and claims that the complainants are applying a much more critical standard to the TPP research than the prevailing standard in the field of marketing.¹⁷³⁶

7.625. Demand effects arise in the presence of research design features that may lead participants to anticipate the researchers' hypothesis and as a result to be inclined to respond as they think the researcher wishes them to respond rather than in accordance with their own attitudes and preferences.¹⁷³⁷ The complainants' experts suggest that while the need to investigate such reactive effects is well-recognized in behavioural sciences and, more specifically, in the tobacco control literature, the plain packaging studies do not all report having accounted for those effects. The complainants also explain how the studies could have accounted for them.¹⁷³⁸ Australia responds that the complainants fail to provide any evidence that biases are indeed present, and if so, how they could influence the results of any particular study, and that, in many cases, these supposed biases could not have influenced the findings.¹⁷³⁹ Australia's expert also submits that, in a number of the studies where reactive effects were allegedly a "concern", any potential bias could not explain the results; and provides examples of cases where the standards of review used by the complainants' experts for plain packaging studies is not consistent with the standards of review used in this research field.¹⁷⁴⁰ The complainants' expert Professor Ajzen does not agree that the designs of a number of TPP studies rule out the risk that reactive effects bias the study results¹⁷⁴¹ and argues that whatever impact plain packaging is observed to have, including on the appeal of tobacco products, is conceivably due to no more than such reactive effects.¹⁷⁴² Inman et al. allege that SDR and/or demand effects may be present in more than 70% of the 56 papers reviewed.¹⁷⁴³ SDR and/or demand effects appear to be a systematic concern of

¹⁷³¹ Honduras's first written submission, para. 496; Dominican Republic's first written submission, paras. 598-600; Cuba's first written submission, para. 176; Klick TPP Literature Report, (Exhibit UKR-6), p. 1; Peer Review Report, (Exhibit DOM/HND-3), paras. 18(i) and 61.ii; Kleijnen Systematic Review, (Exhibit DOM/HND-4), Section 4.2.5, p. 36; Viscusi Report, (Exhibit UKR-8), paras. 32 and 34; Ajzen Report, (Exhibit DOM/HND/IDN-3), paras. 179-188; Peer Review Project Rebuttal Report, (Exhibit DOM/HND-12), paras. 41-51; and Ajzen Supplemental Report, (Exhibit DOM/HND/IDN-4), para. 61.h.

¹⁷³² Dominican Republic's first written submission, para. 598; Kleijnen Systematic Review, (Exhibit DOM/HND-4), Table 3, p.36; and Peer Review Report, (Exhibit DOM/HND-3), para. 61.i, p. 26.

¹⁷³³ Ajzen Report, (Exhibit DOM/HND/IDN-3), paras. 179-188; and Ajzen Rebuttal Report, (Exhibit DOM/HND/IDN-5), paras. 150-152.

¹⁷³⁴ Peer Review Report, (Exhibit DOM/HND-3), para. 61.i, pp. 26-27; and Kleijnen Systematic Review, (Exhibit DOM/HND-4), p. 48.

¹⁷³⁵ Australia's second written submission, para. 484.

¹⁷³⁶ Fong Report, (Exhibit AUS-14), para. 479.

¹⁷³⁷ Peer Review Report, (Exhibit DOM/HND-3), para. 61.ii. See also Ajzen Report, (Exhibit DOM/HND/IDN-3), para. 180.

¹⁷³⁸ See, e.g. Peer Review Report, (Exhibit DOM/HND-3), para. 61.ii; Kleijnen Systematic Review, (Exhibit DOM/HND-4), p. 48; and Ajzen Report, (Exhibit DOM/HND/IDN-3), paras. 179-188.

¹⁷³⁹ Australia explains that this is because the study design would have prevented such biases from impacting the results, or the study's findings would be even stronger by finding relationships between measures despite the presence of supposed biases. Australia's first written submission, Annexure E, para. 6; Fong Report, (Exhibit AUS-14), paras. 480-484; and Fong Supplemental Report, (Exhibit AUS-531), paras. 144-151.

¹⁷⁴⁰ Fong Report, (Exhibit AUS-14), paras. 482-483.

¹⁷⁴¹ Ajzen Rebuttal Report, (Exhibit DOM/HND/IDN-5), paras. 153-156.

¹⁷⁴² Ajzen Report, (Exhibit DOM/HND/IDN-3), para. 182.

¹⁷⁴³ See Peer Review Report, (Exhibit DOM/HND-3), Appendix C.

Inman et al. with respect to studies featuring focus groups, telephone interviews, or within-participant designs. It is also noted as a possible source of bias in studies involving children and those where the participants self-report results.¹⁷⁴⁴

7.626. We note that the Chantler Report's independent reviewers acknowledged possible social desirability effects in some of the studies that they reviewed.¹⁷⁴⁵ Among the 37 quantitative studies considered in the Chantler Report, the independent reviewers noted social desirability bias as a comment or "key limitation" in relation to four of the studies.¹⁷⁴⁶ It appears therefore that demand effects and socially desirable responding may have affected a subset of TPP studies, including some of those relating to the impact of plain packaging on the appeal of tobacco products. We note, however, that despite these concerns, the independent experts assigned each of those studies "high" overall quality ratings, indicating that the presence of such risks may have a limited impact upon the overall quality of a study.¹⁷⁴⁷ We further note that several other studies for which the Dominican Republic and Honduras's Peer Review Project identified a risk of bias from SDR or demand effects have nevertheless been assessed favourable overall quality ratings by the Stirling Review and/or the independent reviewers commissioned for the Chantler Report.¹⁷⁴⁸ We have previously determined that the Stirling Review, as confirmed by the Chantler Report's independent experts, is a high-quality review of the literature that was executed in accordance with best practices.¹⁷⁴⁹ Thus, even assuming that certain studies failed to account for such effects, we do not consider that we have a sufficient basis to draw conclusions on the extent to which such bias could, or actually does, affect the results of the studies at issue, and, as a result, call into question the probative value of the TPP literature.

7.627. Overall, we do not consider that we are in a position to draw definitive conclusions on the methodological merits of each individual study referred to in relation to the impact of plain packaging on the various outcomes that they measure, including the three "proximal outcomes" reflected in the TPP Act. Nor, indeed, do we consider that it would be appropriate for us to do so.

¹⁷⁴⁴ See Peer Review Report, (Exhibit DOM/HND-3), Appendix C.

¹⁷⁴⁵ See Chantler Report, (Exhibits AUS-81, CUB-61), Annex D, pp. 50-55.

¹⁷⁴⁶ See Chantler Report, (Exhibits AUS-81, CUB-61), Annex D, pp. 50-55. "Social desirability bias" was noted in entries corresponding to Doxey and Hammond 2011, (Exhibits AUS-156, JE-24(17)); Hammond et al. 2009, (Exhibits AUS-166, JE-24(29)); and Hammond et al. 2011, (Exhibits AUS-157, JE-24(30)). Social desirability was also referred to with respect to a study that was presented at the SRNT 17th Annual Meeting in Toronto in 2011 and under review with a peer-reviewed journal at the time of the Stirling Review. The title and authorship of the subsequently published paper Hammond et al. 2013b, (Exhibits AUS-158, JE-24(31)), is similar to the description of this study, and a note at the bottom of p. 151 indicates that it was presented at the Society for Research on Nicotine and Tobacco Annual Conference in Toronto in 2011.

¹⁷⁴⁷ Chantler Report, (Exhibits AUS-81, CUB-61), Annex D, pp. 48 and 50. Each of the studies identified in fn 1746 above as at-risk of SDR were assigned overall quality/assessment ratings of 5 out of a total possible of 6, which is considered "high".

¹⁷⁴⁸ Compare Chantler Report, (Exhibits AUS-81, CUB-61), Annex D, p. 54 (assigning Borland et al. 2013, (Exhibits AUS-136, JE-24(9)) an overall quality/bias assessment score of 5 out of 6), with Peer Review Report, (Exhibit DOM/HND-3), p. 606 (noting that the within-subjects design utilized in Borland et al. 2013, (Exhibits AUS-136, JE-24(9)), produces "impossible ... to avoid" threats to validity in the form of SDR and demand effects); Chantler Report, (Exhibits AUS-81, CUB-61), Annex D, p. 54 (assigning Ford et al. 2013a, (Exhibits AUS-137, JE-24(20)) an overall quality/bias assessment score of 5.5 out of 6), with Peer Review Report, (Exhibit DOM/HND-3), p. 620 (noting social desirability biases in Ford et al. 2013a, (Exhibits AUS-137, JE-24(20))), may be "systematic and large"); Chantler Report, (Exhibits AUS-81, CUB-61), Annex D, p. 50 (assigning Germain et al. 2010, (Exhibits AUS-154, JE-24(25)) an overall quality/bias assessment score of 5.5 out of 6), and Stirling Review, (Exhibits AUS-140, HND-130, CUB-59), p. 28 (assigning Germain et al. 2010, (Exhibits AUS-154, JE-24(25)), a quality score of "Medium"), with Peer Review Report, (Exhibit DOM/HND-3), p. 293 (noting possible bias in Germain et al. 2010, (Exhibits AUS-154, JE-24(25)) due to parental recruitment of subjects as well as possible demand effects due to the novelty of the packs); Chantler Report, (Exhibits AUS-81, CUB-61), Annex D, p. 50 (assigning Donovan 1993, (Exhibits AUS-151, JE-24(16)) an overall quality/bias assessment score of 5 out of 6), and Stirling Review, (Exhibits AUS-140, HND-130, CUB-59), p. 26 (assigning Donovan 1993, (Exhibits AUS-151, JE-24(16)) a quality score of "Medium"), with Peer Review Report, (Exhibit DOM/HND-3), pp. 176-177 and 180 (noting the possibility of social desirability bias in Donovan 1993, (Exhibits AUS-151, JE-24(16))); and Chantler Report (Exhibits AUS-81, CUB-61), Annex E, p. 61 (assigning Hoek et al. 2012, (Exhibits AUS-163, JE-24(35)), an overall quality/bias assessment score of 6 out of 6), and Stirling Review, (Exhibits AUS-140, HND-130, CUB-59), p. 34 (assigning Hoek et al. 2012, (Exhibits AUS-163, JE-24(35)), a quality score of "Medium"), with Peer Review Report, (Exhibit DOM/HND-3), pp. 463-464 (indicating that it is unknown whether demand effects have influenced the results of Hoek et al. 2012, (Exhibits AUS-163, JE-24(35))).

¹⁷⁴⁹ See paras. 7.595-7.596 above and 7.633 below.

Rather, as described above, what we must consider is the extent to which the body of evidence before us, as a whole, provides a reasonable basis in support of the proposition for which it is being invoked. In this assessment, to the extent that scientific evidence is being relied upon, we must determine whether such evidence has the "necessary scientific and methodological rigor to be considered reputable science" according to the standards of the relevant scientific community¹⁷⁵⁰, as well as the extent to which its use in support of the measures at issue is "objective and coherent".¹⁷⁵¹

7.628. In the present instance, it is clear from the above that a body of research developed, mostly prior to the implementation of the TPP measures in Australia, with the aim of evaluating the potential impact of tobacco plain packaging on a range of outcomes, including the appeal of tobacco products, the salience of GHGs and the ability of tobacco packaging to mislead consumers about the harmful effects of tobacco products. This research gave rise to a number of publications, emanating from a range of recognized institutions conducting research on tobacco control, in support of the proposition that plain packaging of tobacco products would lead, *inter alia*, to a reduction in the appeal of tobacco products to consumers, increased effectiveness of GHGs, and a reduction in the ability of the pack to mislead consumers about the harmful effects of tobacco products.

7.629. It is recognized, including by Australia, that individual studies within this body of literature may have limitations, in terms of their study design or implementation. However, credible evidence has also been presented to us, which suggests that certain ethical and practical constraints exist in the conduct of this type of research. As discussed above, this includes constraints in respect of the ability to conduct the type of experiments that would in principle be considered optimal, such as large-scale randomized experiments¹⁷⁵², as well as limitations on the ability to design and implement a study in such a manner as to account effectively and simultaneously for all potential biases and confounding factors.¹⁷⁵³

7.630. As described above, aside from the three reviews commissioned by Honduras, the Dominican Republic, and Ukraine (relied upon by Cuba) for the purpose of these proceedings, at least two comprehensive reviews of the TPP literature have previously been carried out, including a systematic review and an independent assessment of this review and the underlying studies (the Stirling Review and the Chantler Report). Both were conducted in the context of the UK Government's consultations on the possible introduction of tobacco plain packaging.¹⁷⁵⁴

7.631. While the various reviews before us do not all cover exactly the same group of studies, there is a significant overlap among them: of the 55 papers included in the Peer Review Project, 42 were included in the Stirling Review and its subsequent update¹⁷⁵⁵, and 37 in the Chantler Report. Among the 58 papers that were the focus of the Kleijnen Systematic Review, 45 were included in the Stirling Review and its subsequent update¹⁷⁵⁶, and 40 were evaluated in the Chantler Report.¹⁷⁵⁷ Among the 48 studies reviewed by Professor Klick, 39 were included in the Stirling Review and its subsequent update¹⁷⁵⁸, and 34 were evaluated in the Chantler Report.

¹⁷⁵⁰ Appellate Body Report, *US – Continued Suspension*, paras. 591-592. See also *ibid.* paras. 598 and 601.

¹⁷⁵¹ Appellate Body Report, *US – Continued Suspension*, paras. 592, 598, and 601.

¹⁷⁵² See paras. 7.557-7.562 above, regarding the practical and ethical limitations on the conduct of large-scale randomized experiments, in respect of tobacco plain packaging.

¹⁷⁵³ See paras. 7.615-7.622 above.

¹⁷⁵⁴ See Stirling Review, (Exhibits AUS-140, HND-130, CUB-59); and Chantler Report, (Exhibits AUS-81, CUB-61).

¹⁷⁵⁵ One of the Peer Review Project papers was excluded from the Stirling Review due to poor quality data, and six were published after the mid-September 2013 cut-off date for the Stirling Review 2013 Update. Two of the studies included in the Peer Review Project but not included in the Stirling Review were unpublished studies conducted by GfK Bluemoon at the request of Australia.

¹⁷⁵⁶ Four papers assessed in the Kleijnen Systematic Review were published after the Stirling Review 2013 Update's mid-September 2013 cut-off date.

¹⁷⁵⁷ See Table A: Papers Included in a Primary TPP Literature Review and/or Exhibit JE-24, at the back of these Reports.

¹⁷⁵⁸ Four papers assessed by Professor Klick were published after the Stirling Review 2013 Update's mid-September 2013 cut-off date.

7.632. We also note that the reviews conducted in the context of the UK consultations, like those presented by the complainants in these proceedings, consider individual studies as well as the conclusions that may be drawn from the TPP literature as a whole. These reviews focus on key questions of interest to our own assessment, including the expected impact of tobacco plain packaging on the three "non-behavioural" or "proximal" outcomes that correspond to the three mechanisms reflected in Australia's TPP measures, and, to a lesser extent, on smoking-related behaviours.

7.633. We further note that the main methodological criticisms expressed by the complainants in these proceedings in relation to the TPP studies duplicate critiques that were made to Sir Cyril Chantler during the course of his consultation for the UK Government, and did not lead him to conclude that the evidence base for plain packaging was flawed.¹⁷⁵⁹ As described above, the preparation of the Chantler Report included a process whereby independent reviewers assessed the quality of individual studies comprising the TPP literature, as well as the quality of the systematic review of this literature in the Stirling Review. These independent reviewers concluded both that the methodology followed in the Stirling Review was consistent with best practices, and that the underlying research was "robust".¹⁷⁶⁰

7.634. As described above, the reviewers of the quantitative studies concluded that the Stirling Review was conducted to a high standard and that the conclusions drawn are "a reasonable reflection of the evidence available".¹⁷⁶¹ Specifically, they found that "the three main outcomes, appeal, health warning and harm were mainly addressed in the high quality papers".¹⁷⁶² With respect to the qualitative studies, the reviewer observes that this work "is necessarily small scale and indicative of factors likely to be relevant/influential in behaviour rather than offering the kinds of predictive accuracy associated with Randomized Trials or large scale quantitative analyses".¹⁷⁶³ The reviewer notes that, in the absence of population studies or experiments "this is probably the best evidence available".¹⁷⁶⁴ She concludes as follows:

My conclusions are that, in the absence of strong experimental or quantitative analyses of actual behaviour, the qualitative research reviewed provides a reasonable summary of attitudes and perceptions regarding plain packaging. This work suggests that:

- Plain packaging is perceived as less attractive/appealing by smokers and non-smokers.
- Colour and branding are important: gold and silver convey brand and quality, and 'sludgy' brown/grey may be viewed more negatively by smokers and non-smokers.
- Plain packaging increases the visibility/prominence of health warnings (however there is some evidence that smokers and non-smokers – including young people – are aware of, and/or can recall messages about health risks and harm but this may not alter behaviour).
- Plain packaging may have different impacts on smoker and non-smoker populations (it may not deter current smokers or reduce brand familiarity/loyalty and is unlikely to increase transaction times).¹⁷⁶⁵

7.635. We accord particular weight to these assessments, which constitute an independent judgment, from qualified sources¹⁷⁶⁶, of the quality of the studies underlying the Stirling Review,

¹⁷⁵⁹ See Chantler Report, paras. 4.5-4.10. In particular, the Chantler Report considered criticisms that the Stirling Review and its associated update were: (a) a narrative synthesis rather than a meta-analysis showing overall effect size; (b) tainted by bias; and (c) demonstrated consistent results due to repeated flaws in the underlying studies

¹⁷⁶⁰ Chantler Report, (Exhibits AUS-81, CUB-61), para. 4.18.

¹⁷⁶¹ Chantler Report, (Exhibits AUS-81, CUB-61), Annex D, p. 49.

¹⁷⁶² Chantler Report, (Exhibits AUS-81, CUB-61), Annex D, p. 49.

¹⁷⁶³ Chantler Report, (Exhibits AUS-81, CUB-61), Annex E, p. 56.

¹⁷⁶⁴ Chantler Report, (Exhibits AUS-81, CUB-61), Annex E, p. 56.

¹⁷⁶⁵ Chantler Report, (Exhibits AUS-81, CUB-61), Annex E, p. 57.

as well as the quality of the Stirling Review itself, thereby lending credence to its overall conclusions regarding the anticipated impact of tobacco plain packaging.

7.636. The conclusions of this independent review and the Stirling Review, which together reviewed 49 of the same 69 papers (71%) considered across the complainants' three TPP literature reviews (the Kleijnen Systematic Review, Peer Review Project, and the review conducted by Professor Klick), contrast with those of the complainants' experts. The Peer Review Project concludes that "the Plain Packaging literature as a whole falls short of providing compelling evidence of the effect of plain packaging on the demand for tobacco products".¹⁷⁶⁷ It is not clear to us, however, given the nature and constraints of the research at issue, that such "compelling evidence" could have been reasonably expected, especially prior to the adoption of tobacco plain packaging measures in Australia or elsewhere. Rather, as discussed above, it may be expected that some flaws and limitations will inevitably affect individual studies, which do not necessarily invalidate the entirety of their conclusions.

7.637. The two comprehensive external reviews of the literature described above, the Stirling Review and Chantler Report, acknowledge the existence of such limitations in the TPP literature, including some of the type identified in the expert reviews commissioned by the complainants for the purposes of these proceedings. Nonetheless, they found that these studies, on the whole, constituted the "best available evidence" and supported the conclusions drawn from them. We also note that the complainants have not presented a body of other studies that would suggest conclusions contrary to the converging conclusions reached by the main body of plain packaging-related literature.

7.638. In conclusion, it may well be that the TPP literature would "benefit from being more robust in terms of study design", as expressed in the Kleijnen Systematic Review.¹⁷⁶⁸ However, in light of the elements above, we are not persuaded that the complainants have demonstrated that this body of evidence, taken as a whole, lacks methodological rigour to such an extent that it should be considered not to constitute reputable science according to the standards of the relevant scientific community, or that Australia's reliance on it in these proceedings is not "objective and coherent". To the contrary, a systematic review awarded a substantial majority of the then-available tobacco plain packaging studies medium to high quality and relevance scores¹⁷⁶⁹, assessments which were in turn substantiated by an independent review which confirmed that the studies are "methodologically sound".¹⁷⁷⁰

Overall conclusion on the critique of the TPP literature

7.639. Overall, in light of the above, we find that the studies forming the TPP literature come from respected and qualified sources, focus on relevant outcomes and have not been shown to be, overall, so methodologically flawed that they should be dismissed in their entirety as an unreliable evidentiary base in support of tobacco plain packaging.

7.640. At this stage of our analysis therefore, we note the existence of a body of published studies, predating the implementation by Australia of the TPP measures, and supporting the hypothesis of an effect of tobacco plain packaging on the appeal of tobacco products, the effectiveness of GHWs, and the ability of packs to mislead the consumer about the harmful effects of smoking, as well as on some smoking-related behaviours.

7.641. While some of these studies may suffer from methodological flaws or limitations, some of which are identified in the relevant publications themselves, these were not considered fatal in an independent review. We note in this respect the observations by Australia that "individual studies

¹⁷⁶⁶ We note that this independent review was conducted by academics commissioned by Sir Cyril Chantler who are not themselves authors of the reviewed studies. By contrast, some of the co-authors of the Stirling Review co-authored some of the reviewed publications.

¹⁷⁶⁷ Peer Review Report, (Exhibit DOM/HND-3), para. 68.

¹⁷⁶⁸ Kleijnen Systematic Review, (Exhibit DOM/HND-4), Section 4.2.3, p. 33.

¹⁷⁶⁹ See Stirling Review, (Exhibits AUS-140, HND-130, CUB-59), pp. 25-37.

¹⁷⁷⁰ See Chantler Report, (Exhibits AUS-81, CUB-61), para. 4.24 and p. 5, para. 13.

within any body of literature will vary in their methodological strengths¹⁷⁷¹ and that an assessment of the quality of the TPP literature should take into account the totality of the relevant evidence, rather than seek to disaggregate the analysis in such a manner that each individual study would be judged in isolation for its ability to provide the basis for general conclusions.¹⁷⁷² This view is echoed in the Stirling Review and Chantler Report, which take into consideration, in their assessment, not only the quality of the individual studies under review, but also their combined strength and consistency with the wider literature and, in the case of the Chantler Report, other relevant evidence, including tobacco industry documents.¹⁷⁷³ Sir Cyril Chantler thus observes that:

In my view the criticisms of the primary research have a tendency to take a "binary approach", dismissing studies in their entirety on the basis that each has some (usually identified) limitations. The correct approach should be to take account of the limitation in considering the described results. Few research studies are without limitations, and undoubtedly many could be improved with insights from related fields, but this does not seem a reasonable basis on which completely to discount the findings of over 50 peer-reviewed, published studies. Any scientific study can only, realistically, attempt to minimize risk of bias to contribute towards an overall estimate of a likely effect.¹⁷⁷⁴

7.642. We also note that, to the extent that the TPP literature predates the implementation of the TPP measures, it could inform the design of Australia's measures but does not purport to reflect the actual outcomes of the TPP measures as adopted by Australia. The TPP literature, in particular the body of studies conducted prior to the introduction of the TPP measures and relied upon in these proceedings, is only one component of the relevant evidence before us. Australia, in recognizing the predominant focus of these studies on "proximal" outcomes and the difficulty in measuring outcomes in a situation where the ideal study design is impracticable or unethical, recognizes this inherent limitation, which is similarly recognized in an early review of tobacco plain packaging literature.¹⁷⁷⁵

7.643. Notwithstanding any potential limitations of these studies, taken individually or as a whole, we also have before us, in addition to the TPP literature, qualitative and quantitative research and evidence drawn from a variety of sources and fields, as well as empirical evidence relating to the application of the TPP measures in Australia since their entry into force. This includes empirical studies addressing the actual impact of the TPP measures on the three proximal outcomes that are the object of most of the reviewed TPP literature studies. As the complainants have observed,

¹⁷⁷¹ Hammond Review, (Exhibit AUS-555), p. 33. See also Fong Report, (Exhibit AUS-14), paras. 489, 493, and 527 (noting that it is standard practice to acknowledge a study's limitations, and then to draw appropriate conclusions from the data that can be made despite the limitations).

¹⁷⁷² See Fong Report, (Exhibit AUS-14), paras. 492-493. See also Hammond Review, (Exhibit AUS-555), pp. 33-34 ("[C]ausality is rarely, if ever, established on the basis of a single study; rather, it should be evaluated based upon a body of research.").

¹⁷⁷³ See Stirling Review, (Exhibits AUS-140, HND-130, CUB-59), pp. 20-23 (describing the method by which study results were synthesized); Chantler Report, (Exhibits AUS-81, CUB-61), para. 1.20 (noting that a considerable volume of evidence from interested parties on all sides of the debate was taken into account, as augmented by further tobacco control publications, internal tobacco industry documents, and wider marketing literature and practice). See also Stead et al. 2013, (Exhibit CUB-58), p. 8 (describing the available research "overall" and comparing the findings to the wider marketing literature and other literature on health warnings).

¹⁷⁷⁴ Chantler Report, (Exhibits AUS-81, CUB-61), para. 4.14.

¹⁷⁷⁵ See Goldberg et al. 1995, (Exhibits AUS-221, JE-24(26)), p. 4:

In marketing and social research, no single study or research method by itself can provide definitive answers to the research question, "What will consumers do if?" Without the benefit of field experiments, such research can only determine what consumers would "say" they would do if. In this case, the Panel had to ask consumers what they would do if all cigarettes were only available in the same plain and generic packages. The Panel could not measure what consumers will do – it could only measure what they say they would do, what they say they think about plain packaging, what they say they think about the idea, etc. Thus, this type of research question is much more difficult to answer than the types of research questions physical scientists typically ask. They can measure what molecules do if, but they cannot ask the molecules what they would do if?

evidence relating to actual application of the measures should be given appropriate weight in our assessment.

7.644. We consider this additional evidence in section 7.2.5.3.6 below, and therefore do not seek to draw, at this stage of our analysis, any overall conclusion on the impact of the TPP measures on relevant outcomes addressed in the TPP literature. The evidentiary weight to be given to this body of studies in our assessment will depend not only on its intrinsic quality, but also on its relevance to our overall assessment, in light also of other relevant evidence before us.

7.645. With these initial determinations in mind, we consider further the evidence before us in relation each of the three "mechanisms" identified in the TPP Act, and the associated behavioural outcomes intended to arise from them, that underlie the design, structure and operation of the measures.

7.2.5.3.5.2 First mechanism: impact of plain packaging on the appeal of tobacco products to consumers

7.646. As described earlier, the first "mechanism" through which the TPP measures are designed to contribute to the achievement of their objective is by "reduc[ing] the appeal of tobacco products to consumers", which, in turn, is expected to influence smoking behaviours and thereby contribute to a reduction in the use of, and exposure to, tobacco products.

7.647. A relevant assumption underlying this mechanism is that, where branding features are available on tobacco products or their retail packaging, these may act as advertising and thereby influence perceptions of tobacco products. The complainants disagree that tobacco packaging functions as advertising. As discussed above, the complainants also generally consider that the evidentiary base for the proposition that the *removal* of branding features through the uniform presentation of tobacco products and their retail packaging (plain packaging) will lead to a reduction of the appeal of tobacco products, is flawed. They further argue that plain packaging will not reduce the "coolness" factor of branded packs to adolescents¹⁷⁷⁶ and will, at best, cause attitudes toward some brands to become less positive and attitudes toward other brands to become more positive.¹⁷⁷⁷ The complainants further argue that, even assuming that the appeal of tobacco products could be reduced through plain packaging, this would not have the expected "follow-on" effect on smoking behaviours, because packaging is not a driver of the relevant behaviours, namely smoking initiation, cessation or relapse.

7.648. In light of the parties' arguments, and taking into account the elements constituting the "causal chain" under the first mechanism of the measures, we consider below the following aspects of the design, structure and intended operation of the TPP measures, in relation to this "first mechanism"¹⁷⁷⁸:

- The role of tobacco packaging as a form of advertising or promotion, and its impact on the perception of tobacco products;
- The impact of tobacco *plain* packaging on the appeal of tobacco products; and
- The impact of a reduction in product appeal on smoking *behaviours*.

Tobacco packaging as a form of promotion or advertising

7.649. Australia considers that tobacco packaging is a form of marketing and advertising, which can generate positive perceptions of a product, and that advertising increases demand for tobacco products.¹⁷⁷⁹ Australia explains that "[b]y removing one of the last remaining frontiers for tobacco advertising in Australia through the introduction of tobacco plain packaging, Australia sought to sever the link between tobacco product packaging and tobacco smoking behaviour, particularly for

¹⁷⁷⁶ See Steinberg Report, (Exhibit DOM/HND-6), paras. 54-57.

¹⁷⁷⁷ See Mitchell Report, (Exhibit UKR-154), paras. 27-32.

¹⁷⁷⁸ As described above, we will consider the evidence relating to the application of the TPP measures in the next part of our analysis. See section 7.2.5.3.6 below.

¹⁷⁷⁹ See Australia's first written submission, paras. 66-91 and 615-626.

youth".¹⁷⁸⁰ The complainants consider however that packaging is not a form of advertising and does not have an impact on the decision to smoke.¹⁷⁸¹ In their view, therefore, the adoption of plain packaging does not eliminate "one of the last remaining frontiers for advertising".¹⁷⁸²

Main arguments of the parties

7.650. The complainants argue that there are significant differences between general advertising media, which are very versatile in terms of their ability to create brand imagery, and the limited role that branded packaging can play in communicating messages.¹⁷⁸³ The complainants also argue that packaging needs to serve identification functions that necessarily limit its ability to convey messages in the way that mass advertising media do.¹⁷⁸⁴ Australia responds that packaging can create a "billboard" effect that has the ability to act as "five-second commercials for the product"¹⁷⁸⁵ and that packaging performs similarly to, "and in several cases favourably to", many forms of mass media advertising.¹⁷⁸⁶

7.651. The parties further discuss the extent to which brand packaging acts as a form of advertising in the tobacco sector. The complainants argue that branded packaging on tobacco products is used for the purposes of "brand differentiation", i.e. to influence the consumer's decision to purchase one brand over another, rather than to influence the decision to purchase a tobacco product.¹⁷⁸⁷ Australia responds that tobacco packaging "can communicate descriptive and persuasive information to a consumer in a manner that influences her perceptions about the brand, the brand's image and the product itself".¹⁷⁸⁸ It provides examples from tobacco industry documents to demonstrate that tobacco companies themselves have acknowledged the use of packaging as an advertising medium.¹⁷⁸⁹

7.652. The parties also disagree on the extent to which tobacco packaging can act as advertising in the Australian context, that is, in the presence of, *inter alia*, a total advertising ban, point-of-sale restrictions, and GHWs occupying 75% of the pack surface.¹⁷⁹⁰ The complainants consider that differences between packaging and mass media advertising are particularly pronounced in Australia's "dark market", where "dominant and ugly" GHWs leave very little space for branding; there is no opportunity for the packaging to recall or evoke advertising as part of a communications mix; and there is virtually no opportunity for a potential consumer to see the limited space available for branding.¹⁷⁹¹ For the complainants, in this context, "it is not credible to

¹⁷⁸⁰ Australia's first written submission, para. 61 (footnote omitted). See also Australia's second written submission, paras. 227-236.

¹⁷⁸¹ See, e.g. Honduras's first written submission, paras. 443-454; Honduras's response to Panel question No. 102; Dominican Republic's first written submission, paras. 671-686; Dominican Republic's response to Panel question No. 102; Indonesia's second written submission, paras. 27-28; Indonesia's response to Panel question No. 102; Cuba's first written submission, paras. 197-200; and Cuba's response to Panel question No. 102.

¹⁷⁸² Dominican Republic's first written submission, para. 671.

¹⁷⁸³ See, e.g. Steenkamp Report, (Exhibit DOM/HND-5), paras. 12 and 66-75. We note that both Cuba and Indonesia have relied upon this report, which was submitted by the Dominican Republic and Honduras. See Indonesia's second written submission, paras. 27-28; Indonesia's response to Panel question No. 102; and Cuba's first written submission, para. 198.

¹⁷⁸⁴ See, e.g. Dominican Republic's first written submission, para. 676; Steenkamp Report, (Exhibit DOM/HND-5), para. 69; and Steenkamp Rebuttal Report, (Exhibit DOM/HND-14), para. 25.

¹⁷⁸⁵ Australia's first written submission, para. 72 (referring to Tavassoli Report, (Exhibit AUS-10), para. 16).

¹⁷⁸⁶ Tavassoli Report, (Exhibit AUS-10), para. 17.

¹⁷⁸⁷ See, e.g. Honduras's first written submission, para. 453; Honduras's second written submission, para. 304; Dominican Republic's first written submission, para. 666; Dominican Republic's response to Panel question No. 102, para. 77; and Steenkamp Report, (Exhibit DOM/HND-5), paras. 9, 50-60, 110, and 114.

¹⁷⁸⁸ Dubé Report, (Exhibit AUS-11), para. 13.

¹⁷⁸⁹ See Australia's first written submission, paras. 67-69; Australia's opening statement at the first meeting of the Panel, para. 18; and Australia's opening statement at the second meeting of the Panel, para. 32.

¹⁷⁹⁰ See sections 2.2.1-2.2.2 and 2.2.4.

¹⁷⁹¹ This argument is developed in particular in an expert report by Professor Steenkamp, relied upon by the complainants. See Steenkamp Report, (Exhibit DOM/HND-5), paras. 13, 76-86 and 116.

suggest that the use of non-misleading trademarks on the remainder of the pack would turn this package into an advertising tool" or create positive associations.¹⁷⁹²

7.653. Australia considers that the fact that Australia is a dark market on the contrary "likely enhances" the ability of the pack to serve as an effective advertising vehicle.¹⁷⁹³ This argument is developed in two expert reports submitted by Australia, by Professors Dubé and Tavassoli respectively. Professor Dubé argues that marketing impressions are created by packaging mostly at the point of consumption (rather than the point of sale) and that there is evidence to suggest that advertising media can be substitutes, as opposed to complements.¹⁷⁹⁴ Professor Tavassoli considers that packaging provides "a potent means of advertising" in the Australian context, and discusses various concepts ("selective attention"¹⁷⁹⁵, "size-invariance") in support of the notion that the power of branding imagery on packaging is not dependent on its size.¹⁷⁹⁶ Professor Steenkamp responds that Professor Tavassoli's examples are inapt to explain the impact of TPP on overall demand, as they relate to market conditions that do not reflect the Australian context.¹⁷⁹⁷ Professor Steenkamp also responds to Professor Dubé's critique, contending that the studies Professor Dubé relies on to conclude that tobacco packaging would be more effective in a "dark market" do not support that conclusion.¹⁷⁹⁸

Analysis by the Panel

7.654. We do not consider it necessary, for the purposes of our findings, to determine in the abstract what would be a proper textbook characterization of product packaging in relation to advertising, and, in particular, whether "packaging" can be generally considered as a medium of advertising and promotion¹⁷⁹⁹ or is more properly characterized as relating primarily to the product itself.¹⁸⁰⁰

7.655. Rather, as we understand it, the relevant question before us is, more specifically, the extent to which the aspects of tobacco products and packaging regulated by the TPP measures can be considered to play a role in promotion and communication about tobacco products¹⁸⁰¹, and the extent to which it may, as such, have an impact on perceptions relating to these products. This question is relevant to our determination, to the extent that an understanding of the potential impact of tobacco packaging on perceptions about tobacco products will inform our assessment of the capacity of the TPP measures, which regulate tobacco products through the *removal* of a number of branding features on tobacco products and their retail packaging, to affect their appeal to the consumer (and, as a result, affect smoking behaviours and contribute to reducing the use of, and exposure to, tobacco products in Australia, including by reducing their appeal to the consumer).

7.656. We first note that some of the complainants, while emphasizing the distinction between communication and advertising¹⁸⁰², acknowledge that tobacco packaging "can be a vehicle for

¹⁷⁹² See, e.g. Honduras's comments on Australia's response to Panel question No. 204, para. 196.

¹⁷⁹³ Australia's opening statement at the second meeting of the Panel, para. 39.

¹⁷⁹⁴ Dubé Report, (Exhibit AUS-11), para. 13; and Dubé Rebuttal Report, (Exhibit AUS-583), para. 1.

¹⁷⁹⁵ In Professor Tavassoli's description, "selective attention refers to the process of determining which amongst competing items of information to process". Tavassoli Report, (Exhibit AUS-10), para. 110. See also *ibid.* paras. 111-113.

¹⁷⁹⁶ Tavassoli Rebuttal Report, (Exhibit AUS-588), heading 2 and paras. 21-24. See also Tavassoli Report, (Exhibit AUS-10), paras. 25-34.

¹⁷⁹⁷ Steenkamp Rebuttal Report, (Exhibit DOM/HND-14), paras. 46-47.

¹⁷⁹⁸ Steenkamp Second Rebuttal Report, (Exhibit DOM/HND-19), paras. 26-31.

¹⁷⁹⁹ See Dubé Report, (Exhibit AUS-11), paras. 25-26; and Tavassoli Report, (Exhibit AUS-10), para. 16.

¹⁸⁰⁰ See Dominican Republic's first written submission, para. 673; Steenkamp Report, (Exhibit DOM/HND-5), paras. 26-33 and Figure 3.1; and Steenkamp Rebuttal Report, (Exhibit DOM/HND-14), paras. 50-54.

¹⁸⁰¹ Honduras thus considers the debate about whether packaging is advertising not to be relevant, in that it accepts that packaging can be a vehicle for communication, but not every form of communication is advertising. See Honduras's comments on Australia's response to Panel question No. 204, para. 195. See also Cuba's comments on Australia's responses to Panel question Nos. 166, 170, and 204, para. 30 (indicating that whether use of a trademark or GI is "advertising" is "irrelevant").

¹⁸⁰² See Honduras's comments on Australia's response to Panel question No. 204, para. 195.

communicating quality perceptions to consumers".¹⁸⁰³ Indeed, the complainants generally explain the nature of the economic impact of the TPP measures for manufacturers with reference to their influence on the possibility of communicating to the consumer, through branding on tobacco packaging, about the qualities of tobacco products.¹⁸⁰⁴

7.657. We also note that various documents referred to or presented as evidence in these proceedings identify a number of industry documents suggesting that the tobacco industry has in fact used packaging as an instrument of communication, including in the Australian market:

"In the absence of any other marketing messages, our packaging ... is the sole communicator of our brand essence."¹⁸⁰⁵

"The most effective means Australia has had to get the consumer to notice something new post restrictions was a new/different packaging configuration."¹⁸⁰⁶

"In some key markets legislative restrictions mean that the only medium available to communicate with consumers is via packaging. The pack becomes the primary communication vehicle for conveying the brand essence. In order to ensure the brand remains relevant to target consumers, particularly in these darkening markets, it is essential that the pack itself generates the optimum level of modernity, youthful image and appeal amongst ASU30 [Adult Smokers Under 30] consumers".¹⁸⁰⁷

7.658. We further note that the use of branded packaging as an advertising tool for tobacco products was acknowledged as recently as 2014 in a statement made by British American Tobacco Australia (BATA) in the context of the consultations on plain packaging conducted for the UK Government: "tobacco companies, like other consumer goods companies, see branded packaging as one of the tools of advertising".¹⁸⁰⁸

7.659. These elements sufficiently establish, in our view, that "branded packaging" can act as an advertising or promotion tool in relation to tobacco products, and that this has in fact been considered to be the case by tobacco companies operating in the Australian market, even in the presence of significant restrictions on advertising in the period leading to the entry into force of the TPP measures.¹⁸⁰⁹ Indeed, as observed by Australia and as suggested by the industry statements

¹⁸⁰³ Honduras's comments on Australia's response to Panel question No. 204, para. 195. See also Cuba's comments on Australia's responses to Panel question Nos. 166, 170 and 204, para. 34 (referring to a "trademark communication function" and stating that whether the display of a trademark on a package is described as "promotion" rather than "communication" is unimportant); Indonesia's comments on Australia's response to Panel question No. 204, paras. 60 and 63 (stating, as a "fact", that "branding is an element of marketing and provides a path of communicate with consumers" and that "us[ing] trademarks to distinguish a product inherently includes communicating with consumers"); and Neven Report, (Exhibit UKR-3) (SCI), section 4.1, p. 19 ("From an economic perspective, branding is a form of communication").

¹⁸⁰⁴ See, e.g. para. 7.1092 below.

¹⁸⁰⁵ Australia's first written submission, para. 67 (quoting Philip Morris, Marketing Issues Corporate Affairs Conference, (Exhibit AUS-82), p. 21). See also Slovic Report, (Exhibit AUS-12), para. 70.

¹⁸⁰⁶ RJ Reynolds, Australia Trip: Topline Learning, (Exhibit AUS-83), p. 2 (quoted in Australia's first written submission, para. 68). See also Slovic Report, (Exhibit AUS-12), para. 70.

¹⁸⁰⁷ Australia's first written submission, para. 8 (quoting British American Tobacco, Packaging Brief 2001, (Exhibit AUS-23)). See also Slovic Report, (Exhibit AUS-12), para. 71.

¹⁸⁰⁸ Australia's first written submission, para. 69 (referring to Chantler Report, (Exhibits AUS-81, CUB-61), para. 3.22). See also JTI v. Commonwealth, Transcript, (Exhibit AUS-84), line 735 (wherein counsel for Japan Tobacco International refers to the cigarette pack as "our billboard"); and Chaloupka Public Health Report, (Exhibit AUS-9), para. 58.

¹⁸⁰⁹ As regards cigars and cigarillos, we note that Parr et al. 2011b does not address directly whether tobacco packaging is a form of advertising as regards cigarillos and cigars. Nonetheless, Parr et al. 2011b does show that the importance of packaging in establishing tobacco brand associations and perceptions also applies to cigarillo, little cigar and less frequent premium cigar smokers, and to a lesser extent also to more frequent premium cigar smokers: "As with other plain packaging research, existing associations had a significant impact on how smokers viewed particular brands. In particular, packaging is a significant means of informing these perceptions. This is the case for RYO, cigarillo / little cigar and less frequent premium cigar smokers. For more frequent cigar smokers, rather than the packaging it is the cigar bands which act as markers of legitimacy and carry essential product information, in particular for single sale loose cigars." Parr et al. 2011b (Exhibit AUS-219, JE-24(50)), p. 11. In addition, Parr et al. 2011b notes the brand attachment and loyalty of the cigarillo smokers surveyed: "Cigarillo smokers in this study tended to have established brand relationships,

above, product packaging becomes the only means of brand communication available, in a context where no other form of promotion or advertising is permitted in relation to tobacco products.¹⁸¹⁰ This understanding is supported by a 2012 report by the US Surgeon General entitled *Preventing Tobacco Use Among Youth and Young Adults* which regards tobacco packaging as a "highly visible form of marketing" that assumes greater importance as a promotional tool as exposure to other forms of marketing becomes increasingly restricted.¹⁸¹¹

7.660. The evidence above, in particular the statements emanating from the tobacco industry itself, further indicate that a key purpose of the use of branding on tobacco products, including packaging, is to generate certain positive perceptions in relation to the product in the eyes of the consumer, including, as described above, to "generate the optimal level of modernity, youthful image and appeal" among consumers.¹⁸¹² We are not persuaded that branding on tobacco packaging cannot serve this promotional function or generate certain positive perceptions in the presence of Australia's expanded GHWs, which occupy 75% of the front pack face.¹⁸¹³

7.661. We further note that the use of particular packaging design features such as colours, graphic elements, texture, typography, opening mechanisms, and shapes has been documented as constituting an integral part of the use of branding on tobacco retail packs, for the purposes of creating a brand image and positive associations with the products. Australia points to a "sizable" body of research indicating that brand features, such as pack colour, a key element of brand identity¹⁸¹⁴, affects perceptions of tobacco products and those who smoke them.¹⁸¹⁵ Eye-catching, brightly coloured packs, with prominent and bold designs, have been shown to invoke the strongest positive imagery¹⁸¹⁶, while features such as pack shape can reinforce branding and make products more appealing.¹⁸¹⁷

7.662. For example, reference is made to research conducted by the tobacco industry demonstrated that packs that deviated from a traditional flip-top box by utilizing features such as slide openings or rounded or beveled corners were associated with positive image attributes.¹⁸¹⁸ Small and narrow "perfume packs" oriented towards women have been described as "glamourous", while a pack with an embossed logo was associated with high levels of sophistication.¹⁸¹⁹ Texture or lacquering has been used to create a tactile sensation, enabling an emotional or affective connection with the product or package, while the use of fragrance has been found to connect to emotions, mood and memory.¹⁸²⁰ Packaging features have thus been used to support "identity

only smoking specific brands. That said, while there was some sense that some brands were of higher quality than others, cigarillo smokers did not generally have a large amount of previous knowledge of brands other than their preferred brand." Ibid. p. 8.

¹⁸¹⁰ See section 2.2.2 above.

¹⁸¹¹ US Surgeon General's Report 2012, (Exhibit AUS-76), p. 535.

¹⁸¹² British American Tobacco, Packaging Brief 2001, (Exhibit AUS-23).

¹⁸¹³ Tavassoli Report, (Exhibit AUS-10), para. 25 (noting that advertisers invest in product placements which, when seen by television viewers, can be as small as branding covering 25% of a cigarette pack) and para. 62 (explaining that brand imagery on packaging will have the same power to imbue products with meaning when it covers 25% of the pack, because the recognition of the image's identity or its impact on subsequent conceptual processing are unaffected by the image's size); Dubé Report, (Exhibit AUS-11), para. 56 (comparing the branding on a cigarette package with internet display ads on mobile devices); Slovic Report, (Exhibit AUS-12), para. 79 (stating that "even a small brand logo on the bottom of a pack is likely to produce positive affect that is reinforced thousands of times when a smoker reaches for a cigarette from a branded pack"); and Tavassoli Rebuttal Report, (Exhibit AUS-588), paras. 26 (stating that subtle cues on packaging can have a potent effect).

¹⁸¹⁴ See Cancer Research UK, (Exhibit AUS-90), para. 1.5.1.

¹⁸¹⁵ Biglan Report, (Exhibit AUS-13), para. 145. See also Slovic Report, (Exhibit AUS-12), paras. 74-77; Dubé Report, (Exhibit AUS-11), paras. 28-29 and 32; NCI Tobacco Control Monograph No. 19, (Exhibit AUS-77), pp. 107-108; J.R. Difranza, D.M. Clark and R.W. Pollay, "Cigarette Package Design: Opportunities for Disease Prevention", *Tobacco Induced Diseases*, Vol. 1, No. 2 (2003), (Difranza et al. 2003), (Exhibit AUS-92), p. 101; Hoek et al. 2012, (Exhibits AUS-163, JE-24(35)), pp. 632, 634, and 636.

¹⁸¹⁶ Cancer Research UK, (Exhibit AUS-90), para. 4.3.6. See also Biglan Report, (Exhibit AUS-13), para. 98.

¹⁸¹⁷ Stirling Review, (Exhibits AUS-140, HND-130, CUB-59), p. 13.

¹⁸¹⁸ K. Kotnowski and D. Hammond, "The Impact of Cigarette Pack Shape, Size and Opening: Evidence from Tobacco Company Documents", *Addiction*, Vol. 108, No. 9 (2013), p. 1658, (Kotnowski and Hammond 2013), (Exhibit AUS-139), p. 1660. See also Fong Report, (Exhibit AUS-14), para. 168.

¹⁸¹⁹ Fong Report, (Exhibit AUS-14), paras. 169-170, and 226.

¹⁸²⁰ Stirling Review, (Exhibits AUS-140, HND-130, CUB-59), pp. 14-15.

branding", whereby brands appeal to the "ideal self" or "type" of person that the consumer aspires to be.¹⁸²¹

7.663. In light of the above, we are not persuaded that the complainants have demonstrated that tobacco packaging cannot act as an advertising or promotion tool, including in Australia's "dark market".¹⁸²² On the contrary, the evidence before us suggests that tobacco packaging may be used as an instrument of promotion. More specifically, the evidence before us also suggests that it may be used, and has in fact been used, to generate positive perceptions of tobacco products.

7.664. These findings are consistent with certain statements in the Article 13 FCTC Guidelines.¹⁸²³ Paragraph 3(c) of the "Purpose and Objectives" of these Guidelines provides that "a comprehensive ban on all tobacco advertising, promotion and sponsorship applies to all forms of commercial communication, recommendation or action and all forms of contribution to any event, activity or individual with the aim, effect, or likely effect of promoting a tobacco product or tobacco use either directly or indirectly".¹⁸²⁴ Paragraph 8 of the Article 13 FCTC Guidelines further states that "'Tobacco advertising and promotion' is not restricted to 'communications', but also includes 'recommendations' and 'actions', which should cover at least the following categories: [...] (d) *promotional packaging and product design features*".¹⁸²⁵ Paragraph 9 further elaborates on the ways in which, "[p]romotional effects, both direct and indirect may be brought about", including by the use of:

[W]ords, designs, images, sounds and colours, including brand names, trademarks, logos, names of tobacco manufacturers or importers, and colours or schemes of colours associated with tobacco products, manufacturers or importers, or by the use of a part or parts of words, designs, images and colours. Promotion of tobacco companies themselves (sometimes referred to as corporate promotion) is a form of promotion of tobacco products or tobacco use, even without the presentation of brand names or trademarks. Advertising, including display and sponsorship of smoking accessories such as cigarette papers, filters and equipment for rolling cigarettes, as well as imitations of tobacco products, may also have the effect of promoting tobacco products or tobacco use.¹⁸²⁶

7.665. Paragraph 15 of the Article 13 FCTC Guidelines further states that:

Packaging is an important element of advertising and promotion. Tobacco pack or product features are used in various ways to attract consumers, to promote products and to cultivate and promote brand identity, for example by using logos, colours, fonts, pictures, shapes and materials on or in packs or on individual cigarettes or other tobacco products.¹⁸²⁷

7.666. With these determinations in mind, we consider the arguments of the complainants that tobacco *plain* packaging does not have the capacity to *reduce* the appeal of tobacco products to the consumer and, as a result, influence smoking behaviours. As described above, at this stage of our analysis, we focus on evidence relating to the design, structure and operation of the measures.

¹⁸²¹ See Tavassoli Report, (Exhibit AUS-10), paras. 74-85.

¹⁸²² See fn 1338 above.

¹⁸²³ As described above, these Guidelines were adopted by the FCTC COP in 2008 to assist each Party to implement, "in accordance with its constitution or constitutional principles", a "comprehensive ban of all tobacco advertising, promotion and sponsorship" pursuant to Article 13 of the Convention. FCTC, (Exhibits AUS-44, JE-19), Article 13, para. 2; and Article 13 FCTC Guidelines, FCTC/COP/3(12), (Exhibit JE-21). The Article 13 FCTC Guidelines "give ... guidance" to FCTC Parties for introducing and enforcing such a ban (or, for those Parties that are not in a position to undertake a comprehensive ban, applying restrictions as comprehensive as possible on "advertising, promotion and sponsorship"). Article 13 FCTC Guidelines, FCTC/COP/3(12), (Exhibit JE-21), Annex, para. 1. See also sections 2.4 and 7.2.5.2 above.

¹⁸²⁴ Article 13 FCTC Guidelines, FCTC/COP/3(12), (Exhibit JE-21), Annex, para. 3(c). (emphasis omitted)

¹⁸²⁵ Article 13 FCTC Guidelines, FCTC/COP/3(12), (Exhibit JE-21), Annex, para. 8. (emphasis added)

¹⁸²⁶ Article 13 FCTC Guidelines, FCTC/COP/3(12), (Exhibit JE-21), Annex, para. 9.

¹⁸²⁷ Article 13 FCTC Guidelines, FCTC/COP/3(12), (Exhibit JE-21), Annex, para. 15. Paragraph 15 is under the heading "Packaging and product features", under which, as discussed above, "plain packaging" is described in para. 16 and recommended in the "*Recommendation*" that follows para. 17. Ibid. Annex, paras. 15-17. See also section 2.4 and paras. 7.314-7.315 above.

We will consider further in section 7.2.5.3.6 below the relevant evidence relating to the actual application of the TPP measures.

Impact of plain packaging on the appeal of tobacco products

7.667. As discussed above¹⁸²⁸, the complainants generally consider that the literature in support of tobacco plain packaging (the TPP literature) lacks the methodological rigour to support the proposition that the TPP measures are capable of contributing to their objective. This body of literature includes a number of studies relating in part or in whole to the anticipated impact of tobacco plain packaging on the appeal of tobacco products. Australia disagrees with these criticisms and responds that numerous studies have established that tobacco plain packaging reduces the appeal of tobacco products by reducing the attractiveness of tobacco packaging, reducing positive perceptions of taste, and reducing positive perceptions of smokers.¹⁸²⁹

7.668. Australia refers to a number of empirical studies¹⁸³⁰, as well as the Stirling Review discussed above¹⁸³¹, which it argues have found that plain packaged tobacco products are rated as substantially less attractive overall than the equivalent non-plain packaged products, particularly by young smokers.¹⁸³² Australia further argues that this was also the case for particular segments of the population, such as women targeted with female design elements on packs associated with greater levels of attractiveness¹⁸³³, as well as subjects from a range of cultures and demographics.¹⁸³⁴

7.669. Australia notes that the Stirling Review summarised this evidence and found that:

In terms of attractiveness, plain packs were perceived as less attractive, exciting, fashionable, cool, stylish, appealing, nice and colourful than branded packs, and were less likely to be chosen in preference tests. Studies that tested a range of branded and unbranded packs found that packs became more negatively rated as progressively more brand elements were removed.¹⁸³⁵

7.670. Australia concludes that by altering consumers' positive perceptions of tobacco products, tobacco plain packaging brings about a reduction in the overall appeal of tobacco products and positive perceptions of those who smoke them.¹⁸³⁶

¹⁸²⁸ See "Main arguments of the parties" within section 7.2.5.3.5.1 above.

¹⁸²⁹ See Australia's first written submission, paras. 148-162.

¹⁸³⁰ Australia's first written submission, para. 151 fn 250 (referring to Centre for Health Promotion 1993, (Exhibits AUS-142, JE-24(14)); Bondy et al. 1994, (Exhibits AUS-143, JE-24(7)); d'Avernas et al. 1997, (Exhibit AUS-144)); Rootman and Flay 1995, (Exhibits AUS-145, JE-24(53)); ISR newsletter, (Exhibit AUS-146)); Beede et al. 1990, (Exhibits AUS-147, JE-24(4)); Hoek et al. 2011, (Exhibits AUS-148, JE-24(34)); Wakefield et al. 2008, (Exhibits AUS-149, JE-24(62)); Bansal-Travers et al. 2011, (Exhibits AUS-150, JE-24(3)); Donovan 1993, (Exhibits AUS-151, JE-24(16)); and Gallopel-Morvan et al. 2012, (Exhibits AUS-152, JE-24(23))).

¹⁸³¹ Australia's first written submission, para. 151 fn 249 (referring to Stirling Review, (Exhibits AUS-140, HND-130, CUB-59), and a predecessor to the Stirling Review, C. Moodie, G. Hastings and A. Ford, "A Brief Review of Plain Packaging Research for Tobacco Products", Institute for Social Marketing, University of Stirling (2009), (Moodie et al. 2009), (Exhibit AUS-141)).

¹⁸³² Australia's first written submission, para. 151 fn 251 (referring to Beede et al. 1990, (Exhibits AUS-147, JE-24(4)); Beede and Lawson 1991, (Exhibits AUS-153, JE-24(5)); Centre for Health Promotion 1993, (Exhibits AUS-142, JE-24(14)); Rootman and Flay 1995, (Exhibit AUS-145, JE-24(53)); Wakefield et al. 2008, (Exhibits AUS-149, JE-24(62)); Germain et al. 2010, (Exhibits AUS-154, JE-24(25)); and Moodie et al. 2011, (Exhibits AUS-155, JE-24(44))).

¹⁸³³ Australia's first written submission, para. 151 fn 252 (referring to Doxey and Hammond, (Exhibits AUS-156, JE-24(17)); and Hammond et al. 2011, (Exhibits AUS-157, JE-24(30))).

¹⁸³⁴ Australia's first written submission, para. 151 fn 253 (referring to Hammond et al. 2013b, (Exhibits AUS-158, JE-24(31)); Al-hamdan 2011, (Exhibit AUS-159); White et al. 2012, (Exhibits AUS-160, JE-24(66)); Van Hal et al. 2012, (Exhibits AUS-161, JE-24(60)); Gallopel-Morvan et al. 2013, (Exhibits AUS-162, JE-24(24)); and Hoek et al. 2012, (Exhibits AUS-163, JE-24(35))).

¹⁸³⁵ Australia's first written submission, para. 151 (quoting Stirling Review, (Exhibits AUS-140, HND-130, CUB-59), p. 84).

¹⁸³⁶ Australia's first written submission, para. 152.

7.671. Australia's expert Professor Fong further identifies a number of studies that he submits have shown that tobacco products in plain packaging are substantially less attractive to young smokers as well as smokers of all ages.¹⁸³⁷ Professor Fong refers to the findings of the initial report of the Stirling Review, noting that:

- (1) All 19 studies identified found that plain packages were rated as less attractive than branded equivalent packs, or were rated as unattractive, by both adults and children; (2) The 12 studies that compared perceptions of plain and branded packs consistently found that plain packs were perceived to be poorer quality by both adults and children; (3) Plain packs consistently received lower ratings on projected personality attributes (such as "popular" and "cool") than branded packs; (4) Visual experiments measuring the strength of association between specific brands and person types found the association between particular brands and smoker identity weakened or disappeared with plain packaging; (5) Studies found that plain packs were perceived as being more likely to be smoked by "older" or "less fashionable" people than branded packs; and (6) The ten qualitative studies that examined appeal found that: (a) plain pack colours have negative connotations; (b) plain packs weaken attachment to brands; (c) plain packs project a less desirable smoker identity; and (d) plain packs expose the reality of smoking.¹⁸³⁸

7.672. As discussed above, the complainants dispute the relevance and quality of the TPP literature generally. The complainants' review and critique of the TPP literature overlaps in scope with, but is not identical to, the studies relied upon by Australia in relation to the impact of the TPP measures on the appeal of tobacco products. Overall, among the 51 papers identified by the Stirling Review and/or the Chantler Report as relating to the impact of tobacco plain packaging on the appeal of tobacco products¹⁸³⁹, 40 were also assessed by at least one of the complainants' three reviews of the TPP literature, the Peer Review Project¹⁸⁴⁰, Kleijnen Systematic Review¹⁸⁴¹, and/or the review conducted by Professor Klick.¹⁸⁴² Australia has relied on 29 of these¹⁸⁴³ in the course of these proceedings, as reflected by their provision to the Panel as exhibits.¹⁸⁴⁴ Australia

¹⁸³⁷ See Fong Report, (Exhibit AUS-14), para. 200 (referring to, with reference to young smokers: Beede et al. 1990, (Exhibits AUS-147, JE-24(4)); Bondy et al. 1994, (Exhibits AUS-143, JE-24(7)); Centre for Health Promotion 1993, (Exhibits AUS-142, JE-24(14)); d'Avernas et al. 1997, (Exhibit AUS-144); Northrup and Pollard 1995, (Exhibit JE-24(48)); and Rootman and Flay 1995, (Exhibits AUS-145, JE-24(53)); and with respect to smokers of all ages: Bansal-Travers et al. 2011, (Exhibits AUS-150, JE-24(3)); Donovan 1993, (Exhibits AUS-151, JE-24(19)); Hoek et al. 2011, (Exhibits AUS-148, JE-24(34)); and Wakefield et al. 2008, (Exhibits AUS-149, JE-24(62)), and stating that two of these studies note a greater impact for youth).

¹⁸³⁸ Fong Report, (Exhibit AUS-14), para. 201.

¹⁸³⁹ See Table A: Papers Included in a Primary TPP Literature Review and/or Exhibit JE-24, at the end of these Reports. We note that the Chantler Report's reviewers of the quantitative studies did not identify "appeal" as a "main outcome" with respect to one of the papers, Pechey et al. 2013, (Exhibit JE-24(51)). We have included this paper in our count as the Chantler Report's reviewer of the qualitative studies, who also reviewed this paper, did consider "appeal" to be one of the "main outcomes covered". See Chantler Report, (Exhibits AUS-81, CUB-61), Annex D, p. 55; and Annex E, p. 61. We also note that the Stirling Review did not identify "appeal" as a "type of finding" in Carter S M, Chapman S (2006). Smokers and non-smokers talk about regulatory options in tobacco control. *Tobacco Control*, 15(5): 398-404.

<http://dx.doi.org/10.1136/tc.2006.015818> (not on the record). We have also included this paper in our count as the Chantler Report's reviewer of the qualitative studies did consider "appeal" to be one of the "main outcomes covered". See Stirling Review, (Exhibits AUS-140, HND-130, CUB-59), p. 32; and Chantler Report, (Exhibits AUS-81, CUB-61), Annex E, p. 60.

¹⁸⁴⁰ Peer Review Report, (Exhibit DOM/HND-3).

¹⁸⁴¹ Kleijnen Systematic Review, (Exhibit DOM/HND-4).

¹⁸⁴² Klick TPP Literature Report, (Exhibit UKR-6).

¹⁸⁴³ Additionally, we note that Australia has submitted and relied upon a newsletter article that was authored by the same researchers, and appears to discuss the same study, as another paper that was reviewed by all three of the complainants' TPP literature reviews, and assessed by the Stirling Review and Chantler Report as measuring the impact of tobacco plain packaging upon the appeal of tobacco products. Compare Northrup and Pollard 1995, (Exhibit JE-24(48)), with ISR newsletter, (Exhibit AUS-146).

¹⁸⁴⁴ See Table A: Papers Included in a Primary TPP Literature Review and/or Exhibit JE-24, at the back of these Reports.

also refers to a number of other papers that were not reviewed in one of the three reviews of the TPP literature presented by the complainants.¹⁸⁴⁵

7.673. As described above, we do not consider that we are in a position to draw definitive conclusions on the methodological merits of each individual study referred to in relation to the impact of plain packaging on various relevant measured outcomes, or that it would be appropriate for us to do so. Rather, as described above, what we must consider is the extent to which the body of evidence before us, as a whole, provides a reasonable basis in support of the proposition that it is being invoked for, i.e. in this instance, the proposition that plain packaging of tobacco products will lead to a reduction in the appeal of tobacco products for consumers. In this assessment, as described above, we consider it pertinent to take into account the extent to which the scientific evidence relied upon has the "necessary scientific and methodological rigour to be considered reputable science"¹⁸⁴⁶ as well as the extent to which the use being made of it is "objective and coherent".¹⁸⁴⁷

7.674. With respect to the methodological rigour of the relevant studies, and notwithstanding the potential limitations of individual studies, we consider that the Stirling Review and Chantler Report offer credible evidence with respect to the adequacy of the methodological rigour of the studies that assessed the potential impact of tobacco plain packaging on the appeal of tobacco products, taken as a whole. Among the 40 papers that measured the impact of tobacco plain packaging on the appeal of tobacco products (as determined by the Stirling Review and/or Chantler Report), and were reviewed in one or more of the complainants' three TPP literature reviews¹⁸⁴⁸, 29 were assigned quality ratings during the course of the initial Stirling Review. Of these, two received a "high" rating, and 27 received a "medium rating".¹⁸⁴⁹ Among the papers that received a medium rating, four also received a "low" rating for the focus group aspect of their underlying studies.

7.675. Thirty-five of the 40 papers considered in one or more of the complainants' three TPP literature reviews, and identified by the Stirling Review and/or Chantler Report as relating to the appeal "mechanism", also received ratings from the independent reviewers of the Chantler Report. Of these, 23 were given a rating of between 5 and 6 (denoting high quality/low risk of bias), while the remaining 12 earned a score of between 3 and 4.5 (denoting moderate quality/moderate bias).¹⁸⁵⁰ Thus, the independent reviewer of the qualitative studies concluded that "[o]verall the papers are satisfactory", while the reviewers of the quantitative studies stated that the conclusions drawn in the Stirling Review (which included, *inter alia*, that tobacco plain packaging would reduce the appeal of tobacco products) were a "reasonable reflection of the evidence available".¹⁸⁵¹

7.676. We also note that the packaging features standardized by the TPP measures align with those that were evaluated in the TPP literature and other studies relied upon by Australia. Namely, the studies considered the presence, size, location, and use of, *inter alia*, colour, fonts, designs, shapes, opening mechanisms, descriptors, and warnings on tobacco packaging.¹⁸⁵² To the extent that the TPP Act's depiction of the first "mechanism" underlying the design and structure of the TPP measures is closely aligned to the measured outcome in the relevant studies, we also find that Australia's reliance on this evidence base in support of the capacity of the TPP measures to

¹⁸⁴⁵ See, e.g. Gallopel-Morvan et al. 2010, (Exhibit AUS-176); Wakefield 2011, (Exhibit AUS-172); Hammond and Parkinson 2009, (Exhibit AUS-165); Wakefield et al. 2002, (Exhibits AUS-93, CUB-28); Gendall et al. 2012, (Exhibit AUS-178); Kotnowski 2013, (Exhibit AUS-138); Kotnowski and Hammond 2013, (Exhibit AUS-139); d'Avernas et al. 1997, (Exhibit AUS-144); Difranza et al. 2003, (Exhibit AUS-92); and Hammond 2010, (Exhibits AUS-91, JE-24(28)).

¹⁸⁴⁶ Appellate Body Report, *US – Continued Suspension*, paras. 591-592. See also *ibid.* paras. 598 and 601.

¹⁸⁴⁷ Appellate Body Report, *US – Continued Suspension*, paras. 592, 598, and 601.

¹⁸⁴⁸ See Kleijnen Systematic Review, (Exhibit DOM/HND-4); Peer Review Report, (Exhibit DOM/HND-3); and Klick TPP Literature Report, (Exhibit UKR-6).

¹⁸⁴⁹ See Table A: Papers Included in a Primary TPP Literature Review and/or Exhibit JE-24, at the back of these Reports; and Stirling Review, (Exhibits AUS-140, HND-130, CUB-59), Table 4.1.

¹⁸⁵⁰ See Table A: Papers Included in a Primary TPP Literature Review and/or Exhibit JE-24, at the back of these Reports; and Chantler Report, (Exhibits AUS-81, CUB-61), Annex D, pp. 50-55, and Annex E, pp. 60-62

¹⁸⁵¹ Chantler Report, (Exhibits AUS-81, CUB-61), Annex D, p. 49, and Annex E, p. 56.

¹⁸⁵² See, e.g. Stirling Review, (Exhibits AUS-140, HND-130, CUB-59), Table 4.1, pp. 25-37.

contribute to its objective by reducing the appeal of tobacco products is "coherent and objective".¹⁸⁵³

7.677. We also note that Australia has sought to ensure that the remaining features permitted on tobacco packs under the TPP measures, in particular the background colour and font on the 25% of the pack not covered by the GHW, were selected with a view to minimizing their attractiveness.¹⁸⁵⁴ In this respect also, to the extent that it has adopted TPP requirements that are intended to act upon the type of design and other features that are described in the TPP literature as affecting the appeal of tobacco products, and to minimize their attractiveness, we also find that Australia's reliance on this body of evidence is "coherent and objective".

7.678. We note that only one of the cited studies, Parr et al. 2011b¹⁸⁵⁵, addressed specifically the impact of plain packaging on the appeal of cigars and cigarillos. As regards cigarillo/little cigar smokers, plain packs are reported to be seen as "least appealing"¹⁸⁵⁶ or "least palatable".¹⁸⁵⁷ Further, qualitative discussions reported in that study consistently found the plain pack to be unappealing and unattractive, which was strongly tied to perceptions of low quality. In particular, it was felt the plain packaging has a significant effect in lowering the appeal of cigarillo smoking.¹⁸⁵⁸ With respect to smokers of premium cigars, Parr et al. 2011b found that they "differed considerably in their attitude to cigars compared to smokers of other tobacco products", as "[s]moking cigars is felt to be a choice rather than an addiction or habit", and "is seen as a luxury and occurs most often in conjunction with a specific activity, for a specific occasion, or in a specific location".¹⁸⁵⁹

7.679. Within the group of premium cigar smokers, Parr et al. 2011b distinguished less frequent smokers¹⁸⁶⁰ from more frequent and connoisseur smokers¹⁸⁶¹, identifying them as two "very different types of cigar smokers".¹⁸⁶² For less frequent cigar smokers, Parr et al. 2011b finds that the "presenting" or giving of cigars could play a major role in the perceived appeal, and that the plain packaged tube has a marked effect on the perceived appeal of cigar smoking.¹⁸⁶³ Conversely,

¹⁸⁵³ We note also that the TPP measures address, in addition to the packaging of tobacco products, the appearance of the products themselves, including cigar bands. This is consistent, in our view, with the objective of preventing the design features addressed by the TPP measures from acting as instruments of promotion and advertising and creating the types of associations discussed above on the products themselves, thereby having an effect comparable to that of packaging.

¹⁸⁵⁴ Australia's first written submission, para. 118; and Parr et al. 2011a, (Exhibits AUS-117, JE-24(49), p. 6.

¹⁸⁵⁵ Parr et al. 2011b, (Exhibits AUS-219, JE-24(50)).

¹⁸⁵⁶ Specifically, in quantitative testing, the plain packaged cigarillo tin was generally seen to be the least appealing pack and the pack containing the lowest quality cigarillos. Parr et al. 2011b, (Exhibits AUS-219, JE-24(50)), p. 8.

¹⁸⁵⁷ In qualitative discussions, the participants felt that the plain package pack was least palatable and that they would least want to smoke it themselves. Parr et al. 2011b, (Exhibits AUS-219, JE-24(50)), p. 9.

¹⁸⁵⁸ Parr et al. 2011b, (Exhibits AUS-219, JE-24(50)), p. 9.

¹⁸⁵⁹ Parr et al. 2011b, (Exhibits AUS-219, JE-24(50)), p. 9.

¹⁸⁶⁰ According to Parr et al. 2011b, "[t]he less frequent smokers of premium cigars in the study tended to smoke a premium cigar about twice a month on average (smokers who smoked cigars less frequently than this were excluded from participating in the study). Some of the less frequent cigar smokers were smokers of other tobacco products, including cigarettes. While they felt driven by habit to smoke cigarettes, cigar smoking was seen an occasional pleasure. Their cigar smoking was generally associated with a specific activity, such as a card game, or a specific occasion such as a success at work. These cigar smokers were less knowledgeable about premium cigars and how to determine quality so were more influenced by brand names. They were more likely to assume quality based on origin, rather than have more detailed understanding of difference that the more frequent cigar smokers had." Parr et al. 2011b, (Exhibits AUS-219, JE-24(50)), p. 9.

¹⁸⁶¹ According to Parr et al. 2011b, "[m]ore frequent cigar smokers, were often extremely knowledgeable about the different types of cigars, and regularly smoked different brands of cigars for enjoyment and as a learning activity. Preference for a specific brand was driven by a combination of factors such as best value for money, the amount of time available to enjoy the cigar, the company and the perceived quality of the tobacco used in the cigar. The brand name and variant of the cigar provides an indication of this type of product information. The more frequent cigar smokers interviewed did not smoke any other tobacco product." Parr et al. 2011b, (Exhibits AUS-219, JE-24(50)), p. 9.

¹⁸⁶² Parr et al. 2011b, (Exhibits AUS-219, JE-24(50)), p. 9.

¹⁸⁶³ Parr et al. 2011b, (Exhibits AUS-219, JE-24(50)), p. 10:

The less frequent smokers take particular interest in the branding and packaging of cigar tubes. Their smoking is largely driven by social occasions within which the "presenting" or giving of

Parr et al. 2011b concludes that plain cigar tubes did not have the same impact in terms of lowering appeal or attractiveness of cigar smoking for more frequent or connoisseur cigar smokers.¹⁸⁶⁴

7.680. In general, Parr et al. 2011b concludes that "[t]here are ... differences in the strength of th[e] impact [of plain packaging, including GHWs,] depending on the types of cigar smokers involved":

In general the connoisseurs and more frequent cigar smokers reported feeling that the plain packaging would be more of an inconvenience but ultimately not affect their smoking behaviour. In contrast the less frequent and more occasion based cigar smokers reported a much stronger feeling that plain packaging may have a significant effect on their smoking behaviour due to lowering the appeal of cigars.¹⁸⁶⁵

7.681. Overall, therefore, the only pre-implementation study addressing specifically the impact of plain packaging on cigars and cigarillos suggests that smokers of cigarillos or little cigars and less frequent smokers of premium cigars found plain packaged products less appealing, although plain cigar tubes did not have the same impact on frequent or connoisseur premium cigar smokers.

7.682. In light of the above, we take note of the existence of a body of studies, emanating from qualified sources, supporting the proposition that plain packaging of tobacco products would reduce their appeal to the consumer. We also note that the evidence in this respect is more limited in relation to cigars than in relation to cigarettes.

7.683. Notwithstanding any potential limitations of the above studies, taken individually or as a whole, we recall that we also have before us evidence relating to the actual application of the TPP measures in Australia since their entry into force, including empirical studies in relation to their impact on the appeal of tobacco products. We consider this evidence in section 7.2.5.3.6 below, and therefore do not seek to draw, at this stage of our analysis, an overall conclusion on the impact of the TPP measures on the appeal of tobacco products to the consumer.

cigars can play a major role in the perceived appeal. The branding also has a strong effect on their perceptions of quality in regards to their purchases and as such the plain packaged tube has a marked effect on the perceived appeal of cigar smoking. It significantly deglamourises the event and reduces their appeal as gifts or when presenting them to friends. The lack of brand association for the plain packaged products, in contrast with existing products, leaves them nothing "to go on" bar the colour of the tube. This was described as "muddy", "tar like" and highly unappealing. This lack of appeal is strongly tied to a perception of low quality.

¹⁸⁶⁴ Parr et al. 2011b, (Exhibits AUS-219, JE-24(50)), p. 10:

For more frequent and connoisseur cigar smokers the [cigar] tubes did not have the same impact in terms of lowering appeal or attractiveness of cigar smoking. This is because they judge the quality of a cigar on criteria other than the branding, which can include the type of tobacco, the roll, the age and particular country and region of origin. The brand name is taken as a sign of authenticity or legitimacy of the product.

The Report also considers the specific impact, for frequent and connoisseur cigar smokers, of plain package bands not containing brand name information:

This information is most often contained on the cigar band. As such a plain pack band (which did not display any information) obscuring the branded band has a more significant impact as it deprives them of the product information which they use to inform their purchases. This lowers the desirability of any given particular cigar as they are unable to verify the product they are receiving as opposed to lowering the overall appeal of cigar smoking which remains high.

Ibid. We note however that the TPP measures allow the brand name to be shown on cigar bands (see TPP Regulations, (Exhibits AUS-3, JE-2), Section 3.2.1(3)(a)), so that these specific findings are not directly pertinent to an assessment of the impact of the TPP measures on cigars.

¹⁸⁶⁵ Parr et al. 2011b, (Exhibits AUS-219, JE-24(50)), p. 40.

Impact of reduced product appeal on smoking behaviours

7.684. As described above, the "causal chain" along which the TPP measures are designed to contribute to Australia's objective posits that the mechanisms of the TPP measures (including reduced product appeal) have a consequential effect on smoking *behaviours*. Specifically, the "proximal outcomes" of the measures, including a reduction in the appeal of tobacco products, are expected to cause Australian consumers to be discouraged from taking up smoking (*initiation*), or resuming smoking (*relapse*), and to be encouraged to stop smoking (*cessation*).¹⁸⁶⁶

7.685. Australia submits that the effect of tobacco control policies on these behaviours is best measured by their influence on "downstream psychosocial variables such as knowledge, beliefs, attitudes and intentions, and on subsequent tobacco use behaviours".¹⁸⁶⁷ In Australia's view, the evidence, which includes theoretical models of behaviour, confirms that behavioural intentions are immediate precursors to behaviour and are one of the strongest predictors of future behaviour.¹⁸⁶⁸ For Australia, "intentions are strongly related to measuring future behaviour", such that "the attitudes, perceptions and beliefs of consumers – most particularly young consumers – provide strong evidence of the effect of the tobacco plain packaging measure".¹⁸⁶⁹

7.686. Honduras argues that an accurate assessment of the contribution of the TPP measures to Australia's objective can only be made by evaluating how they affect *actual smoking behaviour* and, in particular, that "[v]arious surrogate factors, such as changes in consumer attitudes and beliefs about smoking, cannot in themselves prove that a tobacco-control measure is effective".¹⁸⁷⁰ The Dominican Republic contends that behavioural theory does not establish that the TPP measures will reduce smoking behaviour¹⁸⁷¹, and that Australia has not adequately tested the assumptions it made concerning the ability of product appeal and perception of health risks to affect smoking behaviour.¹⁸⁷² Cuba argues that Australia has not provided probative evidence of the "sole parameter that is important for the evaluation of the impact of [the TPP measures], namely, its effect on actual smoking behaviour and tobacco consumption".¹⁸⁷³ Indonesia similarly submits that "Australia simply assumed behavioral theory 'proved' that attitudes toward the appeal of tobacco products and health risks affect actual smoking behavior, which resulted in a number of flaws in the subsequent plain packaging research".¹⁸⁷⁴

7.687. The question before us at this stage is whether the reduction in the appeal of tobacco products hypothesized to occur as a result of the plain packaging of tobacco products could have an impact on subsequent smoking-related behaviours, as posited under the mediational model underlying the design and structure of the TPP measures. The complainants consider that Australia has not demonstrated that a reduction in appeal would in fact lead to changes in actual behaviours. In support of this argument, the complainants consider that the behavioural theories relied on by Australia do not support its assumptions on the ability of product perceptions (and health risks) in relation to tobacco products to effect changes in behaviours, and that tobacco packaging is not a driver of the relevant smoking behaviours.

7.688. For the purposes of this part of the analysis, there is no disagreement between the experts for the complainants and Australia that the appeal of tobacco products to consumers can be considered an "attitude" towards tobacco products.¹⁸⁷⁵ However, the parties disagree on the impact that a change in such attitudes can have on smoking behaviours. The complainants dispute

¹⁸⁶⁶ We note that Section 3(1)(a)(iv) of the TPP Act also posits that an object of the TPP Act is to reduce people's exposure to smoke from tobacco products. See TPP Act, (Exhibits AUS-1, JE-1).

¹⁸⁶⁷ Australia's first written submission, para. 146 (quoting Fong et al. 2006, (Exhibit AUS-132), p. iii10).

¹⁸⁶⁸ Australia's first written submission, para. 145.

¹⁸⁶⁹ Australia's first written submission, para. 164.

¹⁸⁷⁰ Honduras's response to Panel question No. 2, p. 2.

¹⁸⁷¹ Dominican Republic's responses to Panel question No. 2, para. 19, and No. 41, paras. 176-178. See also Indonesia's response to Panel question No. 2 ("incorporate[ing] by reference the Dominican Republic's response to this question").

¹⁸⁷² Dominican Republic's response to Panel question No. 123.

¹⁸⁷³ Cuba's second written submission, para. 261.

¹⁸⁷⁴ Indonesia's second written submission, para. 190.

¹⁸⁷⁵ See Fong Report, (Exhibit AUS-14), para. 250; and Ajzen Report, (Exhibit DOM/HND/IDN-3), para. 45.

Australia's assertions regarding the expected correlation between attitudes and future behaviours in general. They also argue that a change in the appeal of tobacco products cannot have an effect on the behaviours of interest in respect of those products (i.e. smoking behaviours), given that packaging is not a driver of such behaviours. We consider these two aspects in turn.

Relationship between attitudes and behaviours

7.689. Australia's expert Professor Fong considers that "[n]on-behavioural, psychological variables are critically important variables in predicting and understanding consumer behaviour, both in conceptual models of consumer behaviour and research in consumer behaviour".¹⁸⁷⁶ Professor Fong states that "the starting point for research on attitude-behaviour relationship is that such a relationship does indeed exist".¹⁸⁷⁷ Moreover, "[m]odels of consumer behaviour are dominated by mediational models that posit that marketing efforts influence psychological variables within the person, and these psychological variables, in turn, cause changes in future behaviour".¹⁸⁷⁸ Professor Fong states that:

Social psychological theories, notably the "Theory of Reasoned Action" [TRA] (Fishbein & Ajzen 1975), and research arising from such theories, have demonstrated clearly that attitudes are indeed related to behaviour. A considerable proportion of these attitude-behaviour studies have been devoted to examining the conditions under which attitudes may be more or less strongly related to behaviour.¹⁸⁷⁹

7.690. The complainants consider that Australia's reliance on behavioural theory to establish a correlation between the operation of the mechanisms in the TPP Act and smoking behaviours is inappropriate. The Dominican Republic, Honduras and Indonesia rely in this respect on an expert report by Professor Ajzen.¹⁸⁸⁰ In respect of the proposition that "the starting point for research on attitude-behaviour relationship is that such a relationship does indeed exist", Professor Ajzen contends that the "exact opposite is true".¹⁸⁸¹ He argues that:

The starting point in the 1970s for developing my [TRA] was precisely to account for, and offer a solution to, the fact that there is a **weak** relation between attitudes and behavior, such that attitudes do not reliably predict behavior. ... [M]y research revealed that *general attitudes toward non-behavioral targets* (e.g. tobacco products) are poor predictors of actual behavior with respect to those targets. In contrast, attitudes toward a specific behavior (e.g. smoking initiation) are more likely to predict this behavior.¹⁸⁸²

7.691. Professor Ajzen also notes that the TRA was limited by its assumption that the behaviour in question "is a direct function of the intention to perform the behaviour". The Theory of Planned Behaviour (TPB) was thus developed "recognizing that ... people often find it difficult or impossible to act on their avowed intentions".¹⁸⁸³ Thus, the TPB posits that a decision to engage in behaviour is guided by "behavioural", "normative" and "control" beliefs, which then have flow-on effects for, respectively, a subject's attitude towards the behaviour in question, their subjective norms, and their perception of their own behavioural control.¹⁸⁸⁴ Professor Ajzen illustrates this relationship in the following manner:

¹⁸⁷⁶ Fong Report, (Exhibit AUS-14), para. 94.

¹⁸⁷⁷ Fong Report, (Exhibit AUS-14), para. 252.

¹⁸⁷⁸ Fong Report, (Exhibit AUS-14), para. 95.

¹⁸⁷⁹ Fong Report, (Exhibit AUS-14), para. 252.

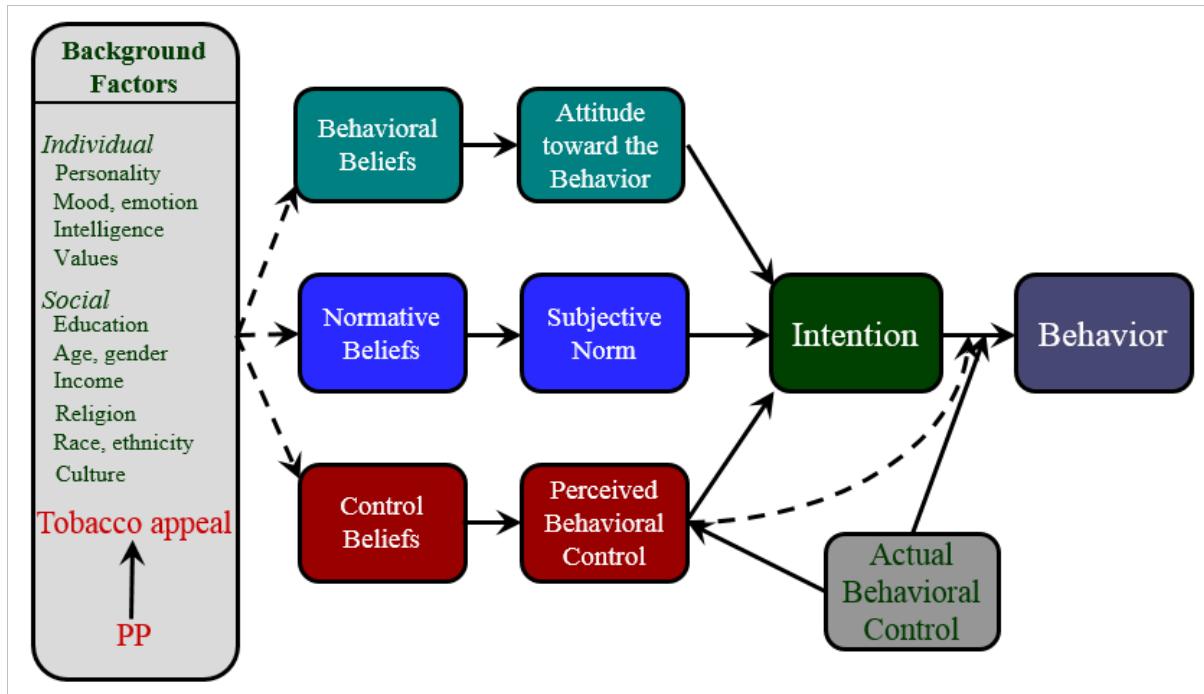
¹⁸⁸⁰ Ajzen Report, (Exhibit DOM/HND/IDN-3). We note that Cuba has not relied upon this report in its submissions. Cuba has, however, questioned the value of the behavioural theories put forward by Australia. Cuba's response to Panel question No. 146, p. 2. Cuba argues that Australia is attempting to "hide behind abstract and convoluted theories", which "can be developed to justify any conclusions", while the "best approach for measuring the effectiveness of [the TPP measures] is through an analysis of the facts as reflected in the actual consumption data ...". Cuba's second written submission, para. 289; and opening statement at the second meeting of the Panel, para. 11.

¹⁸⁸¹ Ajzen Report, (Exhibit DOM/HND/IDN-3), para. 50.

¹⁸⁸² Ajzen Report, (Exhibit DOM/HND/IDN-3), para. 50. (emphasis original)

¹⁸⁸³ Ajzen Report, (Exhibit DOM/HND/IDN-3), para. 59.

¹⁸⁸⁴ Ajzen Report, (Exhibit DOM/HND/IDN-3), para. 61.

Figure 13: Diagram of the TPB¹⁸⁸⁵

Source: Ajzen Report, (Exhibit DOM/HND/IDN-3), Figure 3, p. 19.

7.692. For Professor Ajzen, "the relations between successive links in the chain, though often quite substantial, are far from perfect", such that "the impact of changes in background factors or in beliefs – which are not direct determinants of intentions, much less behavior – may have to be quite large to carry all the way across to actual behavior".¹⁸⁸⁶ In addition, "even if there are changes in a direct determinant of behavioral intentions (e.g. attitude toward the behavior), these may not change intentions if, for example, attitudes don't carry much weight in the prediction of intentions; and, even if behavioral intentions are changed to some extent, that may not influence actual behavior, for example, because of a weak correlation between intentions and behavior or because of the influence of actual behavioral control (or both)".¹⁸⁸⁷

7.693. We first note that we do not understand Australia's reliance on "social psychological theories", including the TRA and related research, as suggesting or implying that a change in attitude in respect of a particular object will lead *in every case* to a change in behaviour in respect of that object. We also do not understand Australia to disagree with the general proposition, reflected in Professor Ajzen's description above, that the correlation between beliefs, attitudes, behavioural intentions and actual behaviours depends on successive "links in the chain", and that the relations between such links in a given context is a product of a combination of factors that will affect the strength of the correlation. This point appears clearly in Professor Fong's observation that a "considerable proportion of these attitude-behaviour studies have been devoted to examining the conditions under which attitudes may be *more or less* strongly related to behaviour". Professor Fong thus articulates that downstream psychosocial mediators are affected by multiple means.¹⁸⁸⁸

7.694. We also note Professor Ajzen's own description, in a recent publication, of how the TPB informs the way in which attitudes and perceptions influence intentions and behaviours:

¹⁸⁸⁵ We will elaborate on these steps in our analysis, below.

¹⁸⁸⁶ Ajzen Report, (Exhibit DOM/HND/IDN-3), para. 82.

¹⁸⁸⁷ Ajzen Report, (Exhibit DOM/HND/IDN-3), para. 83.

¹⁸⁸⁸ Fong Report, (Exhibit AUS-14), para. 252. See also Fong et al. 2006, pp. ii4-ii5.

All the theory stipulates is that people's attitudes, subjective norms and perceptions of control follow reasonably and consistently from their beliefs, no matter how the beliefs were formed, and that in this way they influence intentions and behaviour.¹⁸⁸⁹

7.695. Overall, the above suggests that a significant body of research is devoted to the study of the correlation between attitudes, intentions and behaviours, and that the parties all acknowledge, with reference to this research, that the strength of the correlation between attitudes and behaviours is affected by the interaction of multiple factors.¹⁸⁹⁰ As Professor Fong expresses it, quoting separate work by Professor Ajzen, "low attitude-behaviour relations are neither unexpected, nor do they imply that attitudes are irrelevant for the prediction of behaviour".¹⁸⁹¹

7.696. Professor Fong further explains that his use of theory does "not put forward a line of argument that 'dispensed' with the need for empirical evidence or claimed that theories 'prove' the importance of appeal and perceived health risks to smoking behaviour", but rather "used behavioural theories as a way of providing context and meaning for the available empirical evidence that examined the impact of plain packaging on beliefs, perceptions, and behaviour".¹⁸⁹² Professor Ajzen similarly states that "[t]heories do not demonstrate or prove a link between non-behavioral constructs (e.g. beliefs, attitudes, intentions) and behavior" but do "generate useful hypotheses about the possible presence, or absence, of a causal link" that "must be confirmed or rejected through properly conducted research".¹⁸⁹³ We further note in this respect Professor Ajzen's acknowledgement that, while the "TPB is ... not a theory of behaviour change" and is instead "meant to help explain and predict people's intentions and behaviour", it can nonetheless "serve as a useful framework for designing effective behaviour change interventions".¹⁸⁹⁴

7.697. We understand Australia's reliance on "social psychological theories", including the TRA and related research, in the context of its intervention on tobacco plain packaging as intending to support its argument that it is reasonable to expect a correlation to exist between a reduction in the appeal of tobacco products and subsequent smoking behaviours, such that reduced appeal will influence *at least some* consumers in their smoking behaviours. This is reflected in Professor Fong's description of the expected impact of Australia's TPP measures:

One can make reasonable and confident predictions that if the plain packaging measure is shown to decrease appeal and/or increase the effectiveness of health warnings and/or decrease the ability of the package to mislead consumers about the harmfulness of tobacco products, the Objects of the Act will likely be achieved.¹⁸⁹⁵

7.698. Professor Azjen, however, argues that under the TPB, "the three constructs of attitude towards a behaviour, subjective norm, and perceived behavioural control together predict *intentions* to take up smoking and to quit smoking quite well", as such constructs "accounted for 26% to 48% of the variance in *intentions to start smoking* ..."¹⁸⁹⁶ but that "prediction of *actual behavior* from intentions and perceived behavioral control was much less successful".¹⁸⁹⁷

¹⁸⁸⁹ I. Ajzen, "The Theory of Planned Behaviour is Alive and Well, and Not Ready to Retire: A Commentary on Sniehotta, Presseau, and Araújo-Soares", *Health Psychology Review* (2014), (Ajzen, *Health Psychology Review* 2014), (Exhibit HND-134), p. 3.

¹⁸⁹⁰ See Ajzen, *Health Psychology Review* 2014, (Exhibit HND-134), pp. 3-4.

¹⁸⁹¹ Fong Supplemental Report, (Exhibit AUS-531), para. 60 (referring to M. Fishbein and I. Ajzen, *Predicting and Changing Behavior: The Reasoned Action Approach* (Psychology Press, 2010), not on the record of these proceedings).

¹⁸⁹² Fong Supplemental Report, (Exhibit AUS-531), para. 39.

¹⁸⁹³ Ajzen Report, (Exhibit DOM/HND/IDN-3), para. 13 (emphasis original) (cited by Honduras in para. 147 of its second written submission).

¹⁸⁹⁴ Ajzen, *Health Psychology Review* 2014, (Exhibit HND-134), p. 3. The extent to which behavioural changes may be induced by such interventions will, Professor Ajzen explains, depend on the circumstances: "For an intervention to have an appreciable effect on intentions, ... it has to produce large changes in beliefs; and for the intention to lead to the desired behaviour, people must have the requisite resources and potential barriers to behavioural performance must be removed." Ibid. pp. 3-4.

¹⁸⁹⁵ Fong Report, (Exhibit AUS-14), para. 90. See also ibid. para. 306.

¹⁸⁹⁶ Ajzen Report, (Exhibit DOM/HND/IDN-3), para. 100. (emphasis original)

¹⁸⁹⁷ Ajzen Report, (Exhibit DOM/HND/IDN-3), para. 102. (emphasis original)

7.699. As we understand it, therefore, the disagreement among the parties relates primarily to the extent to which attitudes and perceptions, and changes in such attitudes and perceptions, may be expected or assumed to have an influence on intentions and subsequent behaviours, in the specific context of the TPP measures. Specifically, the question at issue at this stage of our analysis is the extent to which a reduction in the appeal of tobacco products may be expected to have an impact on smoking behaviours.

7.700. With this understanding in mind, we consider the evidence before us relating to the impact on smoking behaviours of a reduction in the appeal of tobacco products through the TPP measures.

Impact of a reduction in the appeal of tobacco products on smoking behaviours

7.701. Section 3(1) of the TPP Act identifies specific behaviours that Australia seeks to influence through the TPP measures – that is, "discouraging people from taking up smoking, or using tobacco products" (which we refer to as initiation); "encouraging people to give up smoking, and to stop using tobacco products" (which we refer to as cessation); and discouraging people who have given up smoking, or who have stopped using tobacco products, from relapsing (which we refer to as relapse).¹⁸⁹⁸

7.702. The complainants consider that the TPP measures cannot influence these behaviours, because they are driven by factors other than packaging, unlikely to be overpowered by a change in the packaging of tobacco products. Specifically, the complainants argue that research on the drivers of smoking initiation does not identify packaging as a factor influencing the decision to start smoking. They also argue that plain packaging cannot have an impact on cessation or relapse behaviours. We consider these different behaviours in turn.

Smoking initiation

Drivers of smoking initiation

7.703. The complainants argue that smoking initiation is driven by factors other than packaging, with the effect that packaging cannot have an influence on the decision to smoke.¹⁸⁹⁹ Honduras refers to research identifying the drivers of smoking initiation as psychosocial characteristics, interpersonal influences, and community context (including price and availability of tobacco products).¹⁹⁰⁰ The Dominican Republic argues that both the propensity for risk-taking, combined with societal factors such as the influence of peer pressure, increase the chances that young people will engage in risky behaviours, including smoking.¹⁹⁰¹ Cuba argues that smoking is a specific manifestation of the more general category of risk taking.¹⁹⁰² Indonesia argues that the main risk factors for adolescent smoking include psychological characteristics that incline people to smoke (sensation-seeking, tendencies toward negative emotions, impulsivity, and inattentiveness); peers and family members who smoke; and access to cigarettes.¹⁹⁰³

7.704. The evidence before us regarding the factors affecting the initiation¹⁹⁰⁴ of tobacco use focuses on adolescents and young adults. As expressed by Australia's expert, Dr Biglan, this is

¹⁸⁹⁸ TPP Act, (Exhibits JE-1, AUS-1), Section 3(1)(a).

¹⁸⁹⁹ Honduras's first written submission, paras. 418-425. See also Dominican Republic's first written submission, paras. 689-700; Cuba's first written submission, paras. 208-213; and Indonesia's first written submission, para. 412.

¹⁹⁰⁰ Honduras's first written submission, paras. 412-416.

¹⁹⁰¹ Dominican Republic's first written submission, para. 691.

¹⁹⁰² Cuba's first written submission, para. 213.

¹⁹⁰³ Indonesia's first written submission, para. 412.

¹⁹⁰⁴ The US Surgeon General defines "initiation" as having ever tried tobacco. This is distinct from experimental use (i.e. occasional use), and regular use (i.e. an increase in the frequency and quantity of use). In adolescence, regular use "is often marked by a pattern of monthly or weekly use and may include psychological and physical dependence on tobacco". US Surgeon General's Report 2012, (Exhibit AUS-76), p. 429. This definition is also used by the USIOM. See R. Bonnie, K. Stratton, and L. Kwan (eds.), *Public Health Implications of Raising the Minimum Age of Legal Access to Tobacco Products*, United States Institute of Medicine (The National Academies Press, 2015), (2015 USIOM Report), (Exhibit DOM-232), p. 2-11.

because "[v]irtually all smoking begins during adolescence or young adulthood".¹⁹⁰⁵ Dr Biglan premises this point on findings of the US Surgeon General, which state that:

Among adults who had ever tried a cigarette, 81.5% reported trying their first cigarette by the time they were 18 years of age, while an additional 16.5% did so by 26 years of age. Among adults who had ever smoked cigarettes daily, 88.2% reported trying their first cigarette by the time they were 18 years of age, while an additional 10.8% did so by 26 years of age. About two-thirds (65.1%) of adults who had ever smoked daily began smoking daily by 18 years of age, and almost one-third of these adults (31.1%) began smoking daily between 18 and 26 years of age. Therefore, virtually no initiation of cigarette smoking (<1-2%) and few transitions to daily smoking (<4%) actually occur in adulthood after 26 years of age.¹⁹⁰⁶

7.705. This observation accords with findings by the USIOM:

Tobacco use by young adults (those between 18 and 24 years of age) also poses serious concerns. While nearly 90 percent of people who have ever smoked daily first tried a cigarette before 19 years of age, the fact that another 9.4 percent tried their first cigarette before the age of 26 should not be overlooked ... Additionally, only 54 percent of daily smokers are smoking daily before age 18, but 85 percent are doing so by age 21, and 94 percent before age 25 ... These data strongly suggest that if someone is not a regular tobacco user by 25 years of age, it is highly unlikely they will become one.¹⁹⁰⁷

7.706. In the Australian context, Professor Samet refers to data from the 2013 National Drug Strategy Household Survey (NDSHS) which "show[s] that the average age of initiation of smoking over the age range 14 to 24 years has steadily risen since 1995 from 14.2 to 15.9 in 2013" and that "the age window of 14 to 24 is now the period of greatest risk for starting to smoke and adolescence remains a period during which initiation occurs".¹⁹⁰⁸

7.707. The US Surgeon General summarizes¹⁹⁰⁹ the risk factors associated with the initiation and use of tobacco products as: relatively low socio-economic status; the relatively high accessibility

¹⁹⁰⁵ Biglan Report, (Exhibit AUS-13), para. 14.

¹⁹⁰⁶ US Surgeon General's Report 2012, (Exhibit AUS-76), p. 134. This report also refers to "[o]ne of the most important—and widely cited—findings from the 1994 Surgeon General's report on smoking and health" which "was that virtually all cigarette smoking begins before adulthood". Ibid. Referring to survey data, the 1994 Surgeon General's report found that:

Of all persons who had ever tried a cigarette, 88 percent had tried their first cigarette by age 18. The mean age of first trying a cigarette was 14.5 years. Thirty-five percent of the respondents had become daily smokers by age 18. Of those who had ever smoked daily, 71 percent had smoked daily by age 18. The mean age of becoming a daily smoker was 17.7 years.

US Surgeon General's Report 1994, (Exhibit CUB-66), p. 51. See also US Surgeon General's Report 1994, Executive Summary, (Exhibit AUS-73), p. 9.

¹⁹⁰⁷ 2013 USIOM Report, (Exhibit DOM-232), p. 1-2.

¹⁹⁰⁸ Samet Report, (Exhibit AUS-7), para. 45. See also Biglan Report, (Exhibit AUS-13), para. 14. We note that a 2014 survey by Vision One, commissioned by Cuba and assessing a considerably smaller sample, assessed that the mean age of cigarette initiation in Australia is 17.7. Vision One Report, Exhibit CUB-79, para. 14, chart 2-3. Cuba notes, however, that this report acknowledges that its data concerning cigarette initiation is not necessarily representative of the cigarette smoking population in Australia, as it was looking at a subset of the cigarette smoking population, i.e. current LHM Cigar smokers who have ever smoked cigarettes on a regular basis. Cuba's first written submission, para. 249, referring to Vision One Report, Exhibit CUB-79, para. 18.

¹⁹⁰⁹ This summary is provided in the Surgeon General's 2012 report, relying on conclusions drawn in its 1994 report. We note that the entirety of the 1994 report, including the chapter concerning the drivers of initiation of tobacco use, has not been provided to us as evidence by the parties. Cuba has provided excerpts of that report and Australia has provided excerpts of its executive summary. See US Surgeon General's Report 1994, (Exhibit CUB-66); and US Surgeon General's Report 1994, Executive Summary, (Exhibit AUS-73). A summary of findings on the epidemiology of tobacco use among young people states:

Sociodemographic, environmental, behavioral, and personal factors can encourage the onset of tobacco use among adolescents.

and availability of tobacco products; perceptions by adolescents that tobacco use is normative (i.e. usual or acceptable behaviour); use of tobacco by significant others and approval of tobacco use among those persons; a lack of parental support; low levels of academic achievement and school involvement; a lack of the skills required to resist influences to use tobacco; relatively low self-efficacy for refusal¹⁹¹⁰; previous tobacco use and intention to use tobacco in the future; relatively low self-image; and the belief that tobacco use is functional or serves a purpose.¹⁹¹¹

7.708. A number of other expert reports submitted by the parties discuss the drivers of smoking initiation, and display similarity with the broad range of factors identified by the US Surgeon General as influencing youth smoking initiation.¹⁹¹² Professor Viscusi summarizes the key factors that contribute to smoking initiation by youth as involving one's parents, siblings, friends, peers, access to cigarettes, personal characteristics, and cost.¹⁹¹³ Professor Mitchell refers to studies of underage smoking focussing on factors at the individual (genetic, cognitive, affective, and demographic characteristics), proximal (familial, interpersonal, social networks) and environmental (neighborhood, community, state, national) levels, and notes that within each level of analysis, a wide range of variables has been found to predict underage smoking initiation and continuation.¹⁹¹⁴ Professor McKeganey states that tobacco use "begins through a complex

... Behavioral factors figure heavily during adolescence, a period of multiple transitions to physical maturation, to a coherent sense of self, and to emotional independence. Adolescents are thus particularly vulnerable to a range of hazardous behaviors and activities, including tobacco use, that may seem to assist in these transitions. Young people who report that smoking serves positive functions or is potentially useful are at increased risk for smoking. These functions are associated with bonding with peers, being independent and mature, and having a positive social image. Since reports from adolescents who begin to smoke indicate that they have lower self-esteem and lower self-images than their non-smoking peers, smoking can become a self-enhancement mechanism. Similarly, not having the confidence to be able to resist peer offers of tobacco seems to be an important risk factor for initiation. Intentions to use tobacco and actual experimentation also strongly predict subsequent regular use.

US Surgeon General's Report 1994, Executive Summary (Exhibit AUS-73), pp. 7-8. See also McKeganey Report, (Exhibits DOM-105, CUB-72), pp. 17-20.

¹⁹¹⁰ Self-efficacy is described as being "related to an individual's confidence in achieving goals through personal efforts, such as the ability to resist smoking or to remain smoke-free after quitting". US Surgeon General's Report 2012, (Exhibit AUS-76), p. 447.

¹⁹¹¹ US Surgeon General's Report 2012, (Exhibit AUS-76), p. 427.

¹⁹¹² We note that Professor Heckman, in a report submitted by Ukraine, focuses on cognitive abilities (as a predictor of educational attainment, wages, and many other forms of economic and social success, including physical and mental health, and healthy behaviors and outcomes, including avoiding smoking, obesity, and eating fried foods) and non-cognitive skills (which affect school performance and wages later in life, as well as on smoking, physical health, mental health, teen pregnancy, and participation in crime), while also noting the relevance of price and parental and peer smoking. He concludes that causal factors affecting youth smoking behaviour include prices, peers (social networks), parents, early family environments and investments in children. Heckman Report, (Exhibit UKR-144), paras. 21-42.

¹⁹¹³ Viscusi Report, (Exhibit UKR-8), para. 111. See also ibid. paras. 112-119.

¹⁹¹⁴ Mitchell Report, (Exhibit UKR-154), para. 52. Professor Mitchell elaborates that:

A number of factors observable at the individual level are associated with increased risk of underage smoking. For instance, lower socioeconomic status males with lower academic achievement are at greater risk of smoking than females in general or other males who are from a different class or who are performing better in school. Adolescents exhibiting certain behavioral and psychiatric disorders are at greater risk, as are victims of sexual abuse. Genetic markers indicating heritability for tobacco use have been found, and neurological correlates of tobacco use (in brain regions associated with decision-making and impulse control) have been found.

A number of factors in an adolescent's proximal environment can increase the risk of smoking. For instance, the presence of a smoker in the household increases the risk of underage smoking, as does the presence of a smoker within a peer group. Females appear to be more susceptible to peer influences, but the influence of peers for all persons will depend on the status of those peers within the potential smoker's social network, family views on smoking, and individual beliefs about the costs and benefits of smoking, as well as other individual, proximal, and environmental factors.

interaction of psychosocial risk factors, which broadly involve sociodemographic, environmental, behavioural, personal and interpersonal factors".¹⁹¹⁵ In this connection, Professor McKeganey refers to the US Surgeon General's 2012 report.¹⁹¹⁶

7.709. We note the shared views before us concerning the age-related factors that contribute to smoking behaviour among youth and young adults. The US Surgeon General, for example, notes that "adolescence is a sensitive developmental period, characterized by brain changes and high levels of emotionality, impulsivity, and risk-taking", and that "the plasticity of the adolescent brain, together with the relatively immature neurobehavioral systems necessary for self-control and affect regulation, confer a heightened vulnerability for the development of smoking behavior".¹⁹¹⁷ It adds that the period following early and middle adolescence (18-25 years) has particular developmental significance with regard to smoking behaviour, as many risk behaviours peak during this period of life, including rates of substance use, smoking, risky driving, and unsafe sex.¹⁹¹⁸

7.710. The US Surgeon General, in making these observations, refers (*inter alia*) to previous work by Professor Steinberg.¹⁹¹⁹ In its 2015 report, the USIOM, in reaching similar conclusions to the US Surgeon General with respect to the drivers of smoking initiation, also refers to research by Professor Steinberg.¹⁹²⁰ In his expert report for Honduras and the Dominican Republic in these proceedings, Professor Steinberg sets out the "dominant model" of adolescent risk-taking, the "maturational imbalance" or "dual systems" model. According to this model:

[H]eighthened risk taking in adolescence is a *natural* byproduct of the asynchronous maturation of two different brain systems: a "reward system" (sometimes referred to as an "incentive processing system" or a "socioemotional system"), which is responsive to emotion, reward, and novelty, and a "cognitive control system," which is critical for impulse control, emotion regulation, and planned decision making. Briefly, the "dual systems" model posits that the incentive processing system becomes especially aroused early in adolescence, shortly after puberty, and that this arousal pushes the adolescent to engage in sensation-seeking in the pursuit of immediate rewards, but that this arousal takes place before the cognitive control system has matured enough to provide much-needed self-control. The combination of a highly responsive incentive processing system and a still immature cognitive control system sets the stage of risk taking.¹⁹²¹

7.711. Professor Steinberg identifies three sets of risk factors for smoking during adolescence: psychological characteristics that incline individuals to smoke¹⁹²², interpersonal influences that encourage and support smoking¹⁹²³, and a community context in which smoking is seen as normal, and where cigarettes are readily available and affordable.¹⁹²⁴ This leads Professor Steinberg to the view that adolescents' behaviour is strongly influenced by their relationships with peers and their intense desire for peer approval, which manifests through behaviours they associate with being an adult, such as smoking. Professor Steinberg argues that, "[g]iven the way that the adolescent brain works, there is an inherent appeal of behaviors that are exciting, that are perceived as

Examples of correlates at the environmental level include price and purchasing regulations: increasing the price of cigarettes through government regulation has been found to be an effective means of reducing demand among underage smokers, and education of merchants about restrictions on sales to minors and increased enforcement of laws prohibiting sales to minors is associated with reduced underage smoking.

Ibid. paras. 53-55. (footnotes omitted)

¹⁹¹⁵ McKeganey Report, (Exhibits DOM-105, CUB-72), p. 15.

¹⁹¹⁶ McKeganey Report, (Exhibits DOM-105, CUB-72), pp. 20-22.

¹⁹¹⁷ US Surgeon General's Report 2012, (Exhibit AUS-76), p. 428. (references omitted)

¹⁹¹⁸ US Surgeon General's Report 2012, (Exhibit AUS-76), p. 428.

¹⁹¹⁹ US Surgeon General's Report 2012, (Exhibit AUS-76), p. 428.

¹⁹²⁰ 2015 USIOM Report, (Exhibit DOM-232), pp. 3-2 to 3-8.

¹⁹²¹ Steinberg Report, (Exhibit DOM/HND-6), para. 19. (emphasis original)

¹⁹²² Steinberg Report, (Exhibit DOM/HND-6), para. 36.

¹⁹²³ Steinberg Report, (Exhibit DOM/HND-6), paras. 37-38.

¹⁹²⁴ Steinberg Report, (Exhibit DOM/HND-6), para. 39.

rewarding, and that are expected to elicit the approval of one's peers".¹⁹²⁵ Professor Steinberg concludes that adolescents' interest in smoking comes primarily from the act of smoking itself, and its influence on peer approval and social status, and not from other factors such as the package. He adds that changing tobacco packaging is not likely to overpower the basic motive of seeking approval from peers.¹⁹²⁶

7.712. Australia's expert, Professor Slovic, agrees with Professor Steinberg that the high rate of risk-taking in adolescence is the natural result of the asynchronous maturation of two brain systems: a reward system responsive to emotion and immediate pleasures and a cognitive control system essential for impulse control, emotion regulation, and planned decision making.¹⁹²⁷ Professor Slovic elaborates that "[t]he reward system becomes prominent shortly after puberty, but the control system is not fully developed until adulthood", and that this "asynchrony leads youth to be especially sensitive to rewards, immediate consequences of a decision, and the influence of peers".¹⁹²⁸ Moreover, the "immaturity of the regions in the brain associated with cognitive control leads adolescents to act without thinking and to fail to make and carry out plans". Professor Slovic argues that "[e]xperimentation with smoking is likely a manifestation of the general tendency to seek new experiences and to engage in impulsive risk taking in the service of sensation seeking and having fun with friends".¹⁹²⁹

7.713. Another of Australia's experts, Dr Biglan, also refers to previous work by Professor Steinberg in the context of his arguments that adolescents are motivated to use tobacco by concerns about fitting in with peers, as well as increased levels of sensation-seeking, risk-taking, rebelliousness, and anxiety and depression in motivating tobacco.¹⁹³⁰ Dr Biglan also notes that during emerging adulthood the tendency toward high levels of risk taking may diminish, but not yet to the levels they will be later on¹⁹³¹, and that young adults are still concerned by social acceptance, and that such concerns may affect levels of loneliness, depression and shame.¹⁹³²

7.714. On the basis of the above descriptions, we observe a certain consistency in the evidence before us in respect of the drivers of smoking initiation, including the developmental factors which have a bearing on the extent to which these drivers may lead to smoking initiation in adolescents and young adults.

7.715. Notwithstanding this convergence, we also note the observation by the US Surgeon General that "[c]igarette smoking among adolescents and young adults is a multi-determined behavior, influenced by the unique and overlapping combinations of biological, psychosocial, and environmental factors".¹⁹³³ The USIOM also reports that "[t]obacco use is the result of a complex and dynamic interplay of multiple converging developmental, social, and environmental factors" and that "[m]any of these factors are developmentally related, with adolescence and young adulthood as a key period of vulnerability to tobacco use and the progression to nicotine dependence".¹⁹³⁴

¹⁹²⁵ Steinberg Report, (Exhibit DOM/HND-6), para. 52.

¹⁹²⁶ Steinberg Report, (Exhibit DOM/HND-6), para. 53.

¹⁹²⁷ Slovic Report, (Exhibit AUS-12), para. 21. See also paras. 107-111. Professor Slovic also refers to the reports by Professors Viscusi, Mitchell and McKeganey in his own discussion of the "[e]xperiential affective factors linked to young people's need for excitement, peer approval, and other social influences". See *ibid.* paras. 50, 88-104, and 115-120.

¹⁹²⁸ Slovic Report, (Exhibit AUS-12), para. 21. See also paras. 107-111.

¹⁹²⁹ Slovic Report, (Exhibit AUS-12), para. 21. See also paras. 107-111.

¹⁹³⁰ Biglan Report, (Exhibit AUS-13), paras. 15-19.

¹⁹³¹ Biglan Report, (Exhibit AUS-13), para. 20.

¹⁹³² Biglan Report, (Exhibit AUS-13), paras. 21-24.

¹⁹³³ US Surgeon General's Report 2012, (Exhibit AUS-76), p. 428.

¹⁹³⁴ 2015 USIOM Report, (Exhibit DOM-232), p. 3-1. This view is echoed by Professor Heckman, who states:

Over the past decades, scholars in many disciplines, including neuroscience, psychology, sociology, health policy, and economics have extensively studied youth and adult participation in a variety of risky behaviors, including smoking. The numerous studies of youth smoking and initiation that have resulted from this research have not been able to identify any single factor that fully explains youth smoking behavior. There is a consensus view that there are many complex and interactive influences on youth smoking.

7.716. Professor Steinberg notes that, although adolescents are more likely than children or adults to engage in risky behaviour, only a minority of adolescents smoke because of individual differences in personality and availability¹⁹³⁵ – "[g]enerally, the more risk factors that are present for an individual, the more likely she or he is to smoke".¹⁹³⁶

7.717. Thus, while the evidence indicates shared views among various experts and institutions concerning the factors that can, individually or in combination, have an effect on the initiation of the use of tobacco products by youth, the view is equally shared that no single factor is determinative of such behaviour.

7.718. Neither the reports by the various public health bodies referred to above, nor the expert reports before us, identify tobacco packaging as a driver of smoking initiation in the same way as they list the other factors of initiation identified above.¹⁹³⁷ However, we do not understand Australia to argue that tobacco packaging is an independent factor that drives initiation of tobacco use. Rather, it argues that packaging plays a role in influencing some of the factors that are drivers of smoking initiation.¹⁹³⁸ Specifically, Australia argues that tobacco packaging is a form of marketing that influences smoking behaviour by generating positive perceptions of tobacco products, including by communicating to young people that smoking the brand will help fulfil particular psychological needs.¹⁹³⁹

7.719. Accordingly, what is at issue is not whether tobacco packaging causes adolescents and young adults to initiate smoking or is, in itself, an independent driver of smoking initiation. Rather our inquiry should focus on whether the evidence before us suggests that tobacco packaging has a bearing on the complex interaction of factors that are understood to drive smoking initiation, including among youth, such that it would be capable of having an influence on the decision to smoke. This is expressed most clearly by the USIOM, in respect of advertising and promotion generally:

The question is not, "Are advertising and promotion *the* causes of youth initiation?" but rather, "Does the preponderance of evidence suggest that features of advertising and promotion tend to encourage youths to smoke?"¹⁹⁴⁰

7.720. Similarly, the question before us here is whether the evidence before us suggests that features of tobacco packaging can have an impact on the factors that drive smoking initiation, including among youth. We consider this question next.

Influence of packaging on the drivers of smoking initiation

7.721. As described above, in essence, the complainants' experts argue that tobacco use by adolescents (including, most relevantly, initiation) is best viewed in the context of the high-risk behaviours in which adolescents often engage as a result of their neurological development, such as drug use and alcohol consumption. Professor Viscusi argues that the determinants of such behaviours are very similar as they involve peer influences, family background including parental and sibling influences, the school environment, and socioeconomic status.¹⁹⁴¹ Professor Mitchell argues that an explanation for risky behaviour is found in developmental approaches to adolescent

Heckman Report, (Exhibit UKR-144), para. 18. See also Mitchell Report, (Exhibit UKR-154), para. 52.

¹⁹³⁵ Steinberg Report, (Exhibit DOM/HND-6), para. 42.

¹⁹³⁶ Steinberg Report, (Exhibit DOM/HND-6), para. 35. (references omitted) See also Fong Report, (Exhibit AUS-14), paras. 275-276.

¹⁹³⁷ See McKeganey Report, (Exhibits DOM-105, CUB-72), pp. 16 and 41.

¹⁹³⁸ Australia's first written submission, para. 60.

¹⁹³⁹ Australia's first written submission, paras. 60-102.

¹⁹⁴⁰ 1994 USIOM Report, Chap. 4, (Exhibit AUS-78), p. 131. The report concludes, "The answer is yes, and this is a sufficient basis for action, even in the absence of a precise and definitive causal chain." Ibid. In this connection, we note that Professor Ajzen seems to agree that a complex set of factors drive smoking initiation. See Ajzen Report, (Exhibit DOM/HND/IDN-3), para. 92; Ajzen Rebuttal Report, (Exhibit DOM/HND/IDN-5), para. 205. We are surprised, therefore, that they both nonetheless consider that Australia must demonstrate a direct causative link between tobacco packaging and smoking initiation.

¹⁹⁴¹ Viscusi Report, (Exhibit UKR-8), para. 113. See also Heckman Report, (Exhibit UKR-144), paras. 19-29.

decision-making, which find that while adolescents possess the ability to reason logically about outcomes, they are more likely to attend to the immediate rewards rather than future costs that can come from engaging in risky behaviour, just at the time when their desire for new sensations and experiences increases.¹⁹⁴²

7.722. Professor Steinberg elaborates that young people smoke because the act of smoking itself confers the approval of peers and the feeling of being adult because it is an activity reserved for adults, and the brand they select is immaterial.¹⁹⁴³ Put differently, according to Professor Steinberg, the desired reward of smoking is inherent in the act of smoking itself, and so "[i]t is highly improbable that an adolescent who is interested in trying smoking will decline a cigarette from a friend because of the packaging from which the cigarette is offered".¹⁹⁴⁴ Professor Steinberg elaborates that risky behaviour by adolescents, including smoking, derives from the desire to seek approval of peers, and changing packaging is unlikely to overpower these motives.¹⁹⁴⁵

7.723. Professor Steinberg also argues that branding of tobacco products is less important to adolescents because of the way young people obtain cigarettes – that is, from friends, "often without necessarily seeing the package in which they were sold".¹⁹⁴⁶ Professor Steinberg argues that the effect of branding can only be relevant "in a world where branded packs are available", as it is "highly improbable on the face of it" that "the additional cool value added by packaging is so great that people will not smoke if the packages of cigarettes they buy carry more minimal branding than at present".¹⁹⁴⁷ He adds that it would be easy for underage smokers who are concerned about projecting a particular image to personalize the packaging of the cigarettes they smoke.¹⁹⁴⁸

7.724. As we have noted, Australia's expert Professor Slovic agrees with Professor Steinberg in a number of important respects concerning adolescents' neurological development, risk-taking, experimentation with tobacco, and sensitivity to rewards and the influence of peers.¹⁹⁴⁹ Where they diverge is that Professor Slovic argues that Professor Steinberg's "characterization of youth risk taking is actually a strong argument in favor of plain packaging".¹⁹⁵⁰

7.725. Professor Slovic refers to "the importance of affect in guiding judgments, decisions and all forms of motivated behaviour". He uses "affect" to mean the specific quality of "goodness" or "badness" that may be "(a) experienced as a feeling state (with or without conscious awareness) and (b) demarcating a positive or negative quality of a stimulus". Professor Slovic notes that "[a]ffective responses occur rapidly and automatically".¹⁹⁵¹ Reliance on such feelings can be characterized as the "affect heuristic" and, in Professor Slovic's view, the majority of risk-taking behaviors are motivated by affect rather than by deliberative analysis of quantitative probabilities or statistics.¹⁹⁵² Professor Slovic elaborates in the following terms:

Although analysis is certainly important in many circumstances, reliance on affect and emotion is a quicker, easier, and more efficient way to navigate in a complex, uncertain, and sometimes dangerous world ... Many theorists have given affect a direct and primary role in motivating behavior. Epstein's view on this is as follows:

The experiential system is assumed to be intimately associated with the experience of affect ... which refer[s] to subtle feelings of which people are often unaware. When a person responds to an emotionally significant event ... the experiential system automatically searches its memory banks for related events, including their emotional accompaniments. ... If the

¹⁹⁴² Mitchell Report, (Exhibit UKR-154), para. 25.

¹⁹⁴³ Steinberg Report, (Exhibit DOM/HND-6), p. 4 and paras. 31 and 52-53.

¹⁹⁴⁴ Steinberg Report, (Exhibit DOM/HND-6), paras. 31 and 53.

¹⁹⁴⁵ Steinberg Report, (Exhibit DOM/HND-6), para. 53.

¹⁹⁴⁶ Steinberg Report, (Exhibit DOM/HND-6), paras. 55-56 and 59.

¹⁹⁴⁷ Steinberg Report, (Exhibit DOM/HND-6), para. 57.

¹⁹⁴⁸ Steinberg Report, (Exhibit DOM/HND-6), para. 58.

¹⁹⁴⁹ Slovic Report, (Exhibit AUS-12), para. 107.

¹⁹⁵⁰ Slovic Report, (Exhibit AUS-12), para. 21. See also ibid. paras. 107-111.

¹⁹⁵¹ Slovic Report, (Exhibit AUS-12), para. 27.

¹⁹⁵² Slovic Report, (Exhibit AUS-12), para. 27.

activated feelings are pleasant, they motivate actions and thoughts anticipated to reproduce the feelings. If the feelings are unpleasant, they motivate actions and thoughts anticipated to avoid the feelings.¹⁹⁵³

7.726. In respect of smoking initiation, Professor Slovic refers to evidence from survey data and the tobacco industry which, in his view, indicate that "experiential and affective forces, rather than analytic decision making, are leading many young people to begin smoking, a behavior that they later regard as a mistake".¹⁹⁵⁴ In respect of tobacco advertising and promotion, Professor Slovic submits that a considerable variety of tobacco advertising and other promotions have been designed to associate positive imagery and positive affect with the act of smoking. Additionally, he continues, the affective cues emanating from the social environment are powerful influences on smoking behaviour (for example, having a good time with friends and avoiding the risk of peer disapproval are examples of social factors in which affect or experiential thinking dominates any tendency for analytic or deliberative thinking).¹⁹⁵⁵ Thus, Professor Slovic argues that tobacco companies invest considerable resources in the development of packages to ensure they appeal to young people, and that the feeling produced by brand images and associations can exert powerful influences on behaviours that are not consciously recognized.¹⁹⁵⁶ Professor Slovic thus critiques Professor Steinberg's submission for not "examining the role of billions of dollars of sophisticated marketing that creates the cachet that leads the young person, driven by the brain's early maturing reward system, to consider smoking and leads that person's friend to offer a cigarette in settings where smoking is socially attractive".¹⁹⁵⁷ He also argues that Professor Steinberg "neglects to consider restricting the availability of brands and other marketing imagery that have been designed to exploit the vulnerability of immature brains by enhancing the emotional appeal of tobacco products".¹⁹⁵⁸

7.727. Another of Australia's experts, Dr Biglan also agrees with Professor Steinberg that the act of smoking is important to newly initiating youth because of "what it says to peers and to the adolescent him or herself"¹⁹⁵⁹ and that "until they become addicted, their primary motivations involve the fulfillment of psychosocial needs such as acceptance by their peers and a sense of popularity, fun, and excitement".¹⁹⁶⁰ He also explains that emerging adulthood is also affected by concerns over social acceptance and social attachment.¹⁹⁶¹ On this basis, Dr Biglan states that "when young people have or aspire to a self-image that is consistent with their image of a smoker they are more likely to intend to smoke or to become a smoker", and that the young people on the margins of social in-groups are more likely to be rebellious and risk-taking.¹⁹⁶²

7.728. Dr Biglan refers to studies that he explains "show that the image that young people have of smokers is an important influence on their smoking and that those who have or aspire to such an image or who find that image attractive become more likely to smoke" and that in this context, smoking can be a ticket to social acceptance.¹⁹⁶³ Specifically, beginning to smoke a particular brand "may seem to be a useful move, to the extent that the brand is effectively associated in their minds with social acceptance and with social attributes, such as autonomy, maturity, and ruggedness".¹⁹⁶⁴ Psychological needs that induce young people to smoke "include having a positive masculine or feminine image, reducing psychological distress, being rebellious, and sensation seeking"; adolescents high in these needs are more likely to smoke, tobacco companies seek to

¹⁹⁵³ Slovic Report, (Exhibit AUS-12), para. 31 (referring to Epstein, S. (1994). Integration of the cognitive and the psychodynamic unconscious. *American Psychologist*, 49, p. 716, not on the record in these proceedings).

¹⁹⁵⁴ Slovic Report, (Exhibit AUS-12), para. 46.

¹⁹⁵⁵ Slovic Report, (Exhibit AUS-12), para. 60. See also ibid. para. 90.

¹⁹⁵⁶ Slovic Report, (Exhibit AUS-12), paras. 101-102.

¹⁹⁵⁷ Slovic Report, (Exhibit AUS-12), para. 111.

¹⁹⁵⁸ Slovic Report, (Exhibit AUS-12), para. 114.

¹⁹⁵⁹ Biglan Report, (Exhibit AUS-13), para. 157 (quoting Steinberg Report, (Exhibit DOM/HND-6, p. 4)).

¹⁹⁶⁰ Biglan Report, (Exhibit AUS-13), para. 157.

¹⁹⁶¹ Biglan Report, (Exhibit AUS-13), para. 21.

¹⁹⁶² Biglan Report, (Exhibit AUS-13), paras. 29-30.

¹⁹⁶³ Biglan Report, (Exhibit AUS-13), paras. 26-32.

¹⁹⁶⁴ Biglan Report, (Exhibit AUS-13), para. 32. (reference omitted)

associate their brands with the fulfilment of one or more of these needs, and youth-popular brands associate their brands with the achievement of one or more of these needs.¹⁹⁶⁵

7.729. For Dr Biglan, whether branded packs in Australia's dark market will influence young people to initiate and continue smoking hinges on whether features of branded packs have the kind of influence that other features of marketing have:

[D]o they communicate to young people that the brand and smokers of a brand have social characteristics that young people aspire to, such as stylishness, popularity, excitement, and sex appeal? Do they influence the young person to believe that popular people smoke the brand? Do young people find the branded pack attractive? Do the packs communicate that the branded cigarette will be easy to smoke? Good tasting? Easy to stop smoking? To the extent that branded packs have these effects on young people, then branded packs are simply another facet of marketing and we can expect them to influence young people to try smoking or to continue smoking.¹⁹⁶⁶

7.730. We note the disagreement between the experts concerning whether these elements would cause an adolescent or young adult to initiate smoking because of the act of smoking itself, or whether branding adds something additional *independent* of the act of smoking. As noted above, for Professor Slovic, branding does add something additional, namely "the cachet that leads the young person, driven by the brain's early maturing reward system, to consider smoking and leads that person's friend to offer a cigarette in settings where smoking is socially attractive".¹⁹⁶⁷

7.731. We recall our findings above that branded packaging can act as an advertising or promotion tool in relation to tobacco products and the evidence before us, in particular the statements emanating from the tobacco industry itself, indicating that branding on tobacco products, including packaging, can generate certain positive perceptions in relation to the product in the eyes of the consumer. We also noted that the use of particular packaging design features such as colours, graphic elements, texture, typography, opening mechanisms, and shapes has been documented as constituting an integral part of the use of branding on tobacco retail packs, for the purposes of creating a brand image and positive associations with the products.¹⁹⁶⁸

7.732. In addition, it is apparent from a number of industry documents referred to in these proceedings that such branding efforts, including as applied to packaging, are intended to create images that would be expected to act *inter alia* on perceptions of the function of tobacco use, described above, to which adolescents and youth have been identified as being particularly sensitive.

7.733. A "research and planning memorandum" from RJ Reynolds thus describes, *inter alia*, the psychological effects of smoking, which it identifies as "group identification", "stress and boredom relief", "self-image enhancement", and "experimentation".¹⁹⁶⁹ The memorandum goes on to

¹⁹⁶⁵ Biglan Report, (Exhibit AUS-13), para. 33 (referring to NCI Tobacco Control Monograph No. 19, (Exhibit AUS-77); and US Surgeon General's Report 2012, (Exhibit AUS-76).

¹⁹⁶⁶ Biglan Report, (Exhibit AUS-13), para. 77.

¹⁹⁶⁷ Slovic Report, (Exhibit AUS-12), para. 111.

¹⁹⁶⁸ See paras. 7.660-7.663 above.

¹⁹⁶⁹ RJ Reynolds Memo 1973, (Exhibit AUS-69), pp. 6-8. The memorandum noted that cigarette marketing "should not in any way influence non-smokers to start smoking" but recognized that "many or most of the '21 and under' group will inevitably become smokers, and offer them an opportunity to use our brands". Ibid. p. 1. The memorandum goes on to state that, "[f]or the pre-smoker and 'learner' the physical effects of smoking are largely unknown, unneeded, or actually quite unpleasant or awkward". It continues that "[t]he expected or derived psychological effects are largely responsible for influencing the pre-smoker to try smoking, and provide sufficient motivation during the 'learning' period to keep the 'learner' going, despite the physical unpleasantness and awkwardness of the period". Ibid. p. 2. The memorandum sets out that:

Brands tailored for the beginning smoker should emphasize the desirable psychological effects of smoking, also suggesting the desirable physical effects to be expected later. Happily, then, it should be possible to aim a cigarette promotion at the beginning smoker, at the same time making it attractive to the confirmed smoker. The information and outline in Table I then may be used as a basis for arriving at some specifications for new "youth" brands and for determining how they should be promoted.

consider the "image a new brand aimed at the youth market should have" and elaborates that "product image factors" should "emphasize participation, togetherness, and membership in a group, one of the group's primary values being individuality", "be strongly perceived as a mechanism for relieving stress, tension, awkwardness, boredom, and the like", "be associated with doing one's own thing to be adventurous, different, adult, or whatever else is individually valued", "be perceived as some sort of new experience, something arousing some curiosity, and some challenge", "be different from established brands used by the over-thirty and perhaps even over-twenty-five groups" and "[m]ust become the proprietary 'in' thing of the 'young' group"; and "not be perceived as a 'health' brand".¹⁹⁷⁰

7.734. Further evidence relating to the marketing of specific brands presented or referred to in these proceedings illustrates the role of brand marketing, including through packaging, in conveying the type of images and perceptions that youth are known to be sensitive to and that have been identified above as contributing to smoking initiation. For example:

- In a document entitled "Packaging Brief" for the Benson & Hedges brand, it was noted that "it is essential that the pack itself generates the optimum level of modernity, youthful image and appeal amongst ASU30 [Adult Smokers Under 30] consumers".¹⁹⁷¹ Among the "Key Consumer Benefit[s]" identified is "[p]ositively radiates the personal, emotional values of an 'impassioned spirit' inside & outside".¹⁹⁷² It continues that "Benson & Hedges embodies a true impassioned spirit by: Understanding that it takes strength to achieve what you want out of life[;] Supporting the true emotions of the human spirit[;] Actively encourages person to person contact among impassioned people all over the world[;] Possessing a reputation for quality that is the foundation for its confident, progressive attitude".¹⁹⁷³
- In a 1990 Philip Morris document entitled "Marketing New Products in a Restrictive Environment", the proposition is for "an innovative packaging concept which projects a distinctive young masculine appearance".¹⁹⁷⁴ In addition, "non[-]traditional trademarks" are noted as a "new product idea" with the "target market" being "young adult urban European and the trademarks that appeal to them / reflect their lifestyle today".¹⁹⁷⁵ In respect of a "refill" product idea, the presentation notes that the idea of refill "changes the smoking ritual" by using "the ultimate container: a newly designed exclusive case that is an expression of personal identity" and would "make[] the product more socially acceptable".¹⁹⁷⁶ With respect to a "made to measure" product idea, it is noted that "consumers today look for self[-]fulfillment and are consciously choosing those products which fit their individual lifestyles".¹⁹⁷⁷

Ibid. p. 4. These "psychological effects" were defined in the paper as "group identification" (i.e. "participating, sharing, conforming, etc."), "stress and boredom relief" (i.e. "buys time, valid interruption, bridges awkward times and situations, something to do, etc."), "self-image enhancement" (i.e. "identification with valued persons, daring, sophisticated, free to choose, adult, etc.") and "experimentation" (i.e. "try something new, experiment, etc"). Ibid. pp. 6-8.

¹⁹⁷⁰ RJ Reynolds Memo 1973, (Exhibit AUS-69), p. 9. It further notes that the "name and appearance of the product will here become crucial in establishing the desired image". Ibid. p. 10. It exemplifies this by noting that "the name chosen should have a double meaning" or be "one which evokes different but desirable responses from different age groups". It exemplifies this with reference to the Marlboro "western theme", which "suggests independence, clean air, open spaces and freedom to the youth group, while at the same time suggesting the 'good old days', hard work, white hats over black hats, and the like to the older generation". Ibid. p. 10.

¹⁹⁷¹ British American Tobacco, Packaging Brief 2001, (Exhibit AUS-23), p. 1.

¹⁹⁷² British American Tobacco, Packaging Brief 2001, (Exhibit AUS-23), p. 2.

¹⁹⁷³ British American Tobacco, Packaging Brief 2001, (Exhibit AUS-23, p. 2. The advertising brief further identifies the "brand character" as "Inner Substance & Outward Style[;] Inner Confidence & Outward Success[;] Inner Imagination & Outward Expressiveness[;] Inner Determination & Outward Achievement[;] Inner Warmth & Outward Generosity[;] Inner Motivation & Outward Optimism[;] Inner Passion & Outward Energy[;] Inner Pride & Outward Joy[;] Inner Quality & Outward Reputation". Ibid. p. 2.

¹⁹⁷⁴ Philip Morris, "Marketing New Products in a Restrictive Environment", Marketing Meeting, Naples, Florida (June 1990), Bates No. 2044762173/2364, (Philip Morris Marketing Meeting 1990), (Exhibit AUS-96), p. 12.

¹⁹⁷⁵ Philip Morris Marketing Meeting 1990, (Exhibit AUS-96), p. 24.

¹⁹⁷⁶ Philip Morris Marketing Meeting 1990, (Exhibit AUS-96), pp. 29 and 31.

¹⁹⁷⁷ Philip Morris Marketing Meeting 1990, (Exhibit AUS-96), p. 33.

- In a 1992 Philip Morris document entitled "Opportunities in packaging innovation" the "value of new" is identified as "looks different", "I'd have something different", "looks more contemporary; now; 90'[s]", "makes me feel special, makes me feel my brand is paying attention to me", "creates eye-appeal", "draws attention (jealousy) from others", "renews my attention to what I have in my hand", "rekindles attachment, excitement about my brand", and "if I'm paying full price, I should be getting something creative, exciting, different".¹⁹⁷⁸
- In a document in respect of Alpine cigarettes by Philip Morris in 2000, the author noted that "smokers of this product are seen" as "[s]ophisticated", "[f]ashion conscious", "[y]ounger adult", "[c]onfident", "[o]utgoing/sociable", "[m]ore like me", "[m]ost popular", and "[f]airly innovative".¹⁹⁷⁹
- In another document prepared for Philip Morris in 1994 , in discussing the Alpine smoker and "[w]hat ... she want[s]", reference is made to: a "[f]eminine, upmarket social image" (elaborated in the following terms: "[s]ophistication", "[b]alanced success as woman", and it is noted that "[t]he white filter & pack give this"), "emotional gratification" (elaborated in the following terms: "[w]ind down, regain control & confidence"; "[l]ook and feel attractive").¹⁹⁸⁰ Under the heading "Repositioning Alpine for the 90's", a "[m]ove toward the Princess Image" is noted and equated with "[s]oft, less driven (balance), less masculine, a bit more dreamy".¹⁹⁸¹ In respect of packaging and type styles, it is noted that "[i]deally want a cross between [][r]elaxed, trendy modernity of Squiggles" and "[r]efined quality image of Double Line".¹⁹⁸²
- In a Camel advertising development "White Paper", it is noted that: CAMEL's "current existing market image (i.e., brand perceptions, not advertising perceptions) includes aspects that are highly consistent with the wants of younger adult males, and have a strong fit with what CAMEL has always stood for".¹⁹⁸³ These aspects were said to include "independence", "doesn't follow crowd", "lives by its own beliefs", "stands up for beliefs", "not afraid to express individuality", "enjoys being different", and "won't settle for ordinary".¹⁹⁸⁴
- Australia also submits a Philip Morris document entitled "Virginia Slims Rounded Corners Name/Pack Test", which sets out the results of a quantitative research study in respect of a proposal to change the packaging of Virginia Slims.¹⁹⁸⁵ It notes that, in interviews conducted in fifteen malls in which different pack designs were tested, the "full flavour Modified Rounded Corners pack and lights Rounded Corners pack were more likely to be associated with positive image attributes such as 'innovative', 'pack my friends would carry', 'sophisticated' and 'good value'".¹⁹⁸⁶
- In a pack test for Merit for Philip Morris, in "an effort to revitalize the Merit brand", research was conducted to obtain reactions to alternative packages for different brand variants. The study states that the objective of the research "was to determine the relative appeal of each pack among Merit and competitive smokers, as well as to learn about the imagery and product attributes communicated by each pack".¹⁹⁸⁷ Across all three variants, three packaging alternatives were ranked against a range of perceptions,

¹⁹⁷⁸ Philip Morris, Opportunities in Packaging Innovation, (Exhibit AUS-95), p. 3.

¹⁹⁷⁹ Philip Morris, Alpine Cigarettes, (Exhibit AUS-107), p. 12.

¹⁹⁸⁰ Colmar Brunton, Alpine Creative Presentation, (Exhibit AUS-108), pp. 9-10. (emphasis omitted)

¹⁹⁸¹ Colmar Brunton, Alpine Creative Presentation, (Exhibit AUS-108), p. 11.

¹⁹⁸² Colmar Brunton, Alpine Creative Presentation, (Exhibit AUS-108), p. 19.

¹⁹⁸³ Camel Advertising Development White Paper, (Exhibit AUS-197), p. 3.

¹⁹⁸⁴ Camel Advertising Development White Paper, (Exhibit AUS-197), p. 3.

¹⁹⁸⁵ Philip Morris, Virginia Slims Rounded Corners Name/Pack Test, (Exhibit AUS-168), p. i.

¹⁹⁸⁶ Philip Morris, Virginia Slims Rounded Corners Name/Pack Test, (Exhibit AUS-168), pp. i and iv. Full flavour cigarettes in "the Modified Rounded Corners pack were significantly more likely to be described as 'light' versus the Direct Translation Rounded Corners and Standard Box packs". Of the names under consideration for the rounded corners pack, "Sleek Box and Contour Box were considered most appealing and appropriate in general", and "were aligned with more favourable imagery attributes including 'stylish', 'innovative', 'contemporary', 'unique', 'classy sounding' and 'sophisticated'". Ibid. p. v.

¹⁹⁸⁷ Philip Morris, Merit Pack Test, (Exhibit AUS-170), p. i.

including whether the pack is "[f]or smokers my age", "[h]as a fresh, revitalized look", "[c]lassy looking", "[e]ye-catching", "[a]ttractive", "[h]igh quality", "[c]ould become popular among [Young Adult Smokers]", "[f]or someone like me", "[m]odern/contemporary", "[a] pack I'd like to carry", "[t]rendy", "[c]ool/hip", "[b]oring/dull", "[g]eneric", "[u]nattractive" and "[c]heap looking".¹⁹⁸⁸

- In a study for RJ Reynolds concerning the Salem brand family, participants were asked to indicate how well they thought various statements described particular brands, including whether the brand is: "bold and dynamic"; "changing for the better"; "intriguing"; "up and coming"; "progressive"; and "for young adult urban smokers". Participants were also asked whether the brand "[r]eflects an attitude you like", "[h]as a mystical feel", and whether they "[w]ould recommend to adult friend who smokes".¹⁹⁸⁹
- In a 1990 Philip Morris marketing presentation, in respect of the Longbeach brand, it is noted that "[s]ome of the reasons for the brand's success have been identified in qualitative research" and that "[i]t's [sic] packaging and advertising have been found to project a personality that many super value smokers aspire to, [p]articularly its attitude of freedom, escape, mildness and its genuine mainstream brand value".¹⁹⁹⁰

7.735. This evidence indicates to us that the tobacco industry and its marketing agencies consider that tobacco packaging (including word, design, shape, and other features) can communicate a wide range of imagery relating not only to the characteristics of the product but also projecting images about its consumer, such as modernity¹⁹⁹¹, a youthful image¹⁹⁹², "Inner Substance & Outward Style", "Inner Confidence & Outward Success"¹⁹⁹³, "an expression of personal identity"¹⁹⁹⁴, "[c]onfident", "[o]utgoing/sociable", "[m]ost popular"¹⁹⁹⁵, can "emphasize participation, togetherness, and membership in a group"¹⁹⁹⁶; "individuality"¹⁹⁹⁷; a way of "relieving stress, tension, awkwardness, boredom, and the like"¹⁹⁹⁸; "be associated with doing one's own thing to be adventurous, different, adult, or whatever else is individually valued"¹⁹⁹⁹; "be perceived as some sort of new experience, something arousing some curiosity, and some challenge"²⁰⁰⁰; make the user "feel special"²⁰⁰¹; can "draw[] attention (jealousy) from others"²⁰⁰²; "emotional gratification"²⁰⁰³; a way to "[l]ook and feel attractive"²⁰⁰⁴; "[p]layful[ness], social adventure & exertion"²⁰⁰⁵; a sense of being "stylish"²⁰⁰⁶, "[u]nique"²⁰⁰⁷, "[c]ool" or "hip"²⁰⁰⁸; "[t]raditional"²⁰⁰⁹, "[o]ld-fashioned"²⁰¹⁰; "tough/rugged"²⁰¹¹, "trendy"²⁰¹², "expensive looking"²⁰¹³, "cheap looking"²⁰¹⁴,

¹⁹⁸⁸ Philip Morris, Merit Pack Test: Final Report, (Exhibit AUS-170), p. 16.

¹⁹⁸⁹ RJ Reynolds, Salem A&A Study, (Exhibit AUS-171), p. 95.

¹⁹⁹⁰ Philip Morris, 1990 Marketing Presentation, (Exhibit AUS-544), p. 18.

¹⁹⁹¹ British American Tobacco, Packaging Brief 2001, (Exhibit AUS-23), pp. 1-2; Philip Morris, Opportunities in Packaging Innovation, (Exhibit AUS-95), p. 12; and Philip Morris, Merit Pack Test, (Exhibit AUS-170), p. 16.

¹⁹⁹² British American Tobacco, Packaging Brief 2001, (Exhibit AUS-23), p. 1.

¹⁹⁹³ British American Tobacco, Packaging Brief 2001, (Exhibit AUS-23), p. 2.

¹⁹⁹⁴ Philip Morris Marketing Meeting 1990, (Exhibit AUS-96), p. 29.

¹⁹⁹⁵ Philip Morris, Alpine Cigarettes, (Exhibit AUS-107), p. 12.

¹⁹⁹⁶ RJ Reynolds Memo 1973, (Exhibit AUS-69), p. 9.

¹⁹⁹⁷ RJ Reynolds Memo 1973, (Exhibit AUS-69), p. 9.

¹⁹⁹⁸ RJ Reynolds Memo 1973, (Exhibit AUS-69), p. 9.

¹⁹⁹⁹ RJ Reynolds Memo 1973, (Exhibit AUS-69), p. 9.

²⁰⁰⁰ RJ Reynolds Memo 1973, (Exhibit AUS-69), p. 9.

²⁰⁰¹ Philip Morris, Opportunities in Packaging Innovation, (Exhibit AUS-95), p. 3.

²⁰⁰² Philip Morris, Opportunities in Packaging Innovation, (Exhibit AUS-95), p. 3.

²⁰⁰³ Colmar Brunton, Alpine Creative Presentation, (Exhibit AUS-108), p. 10.

²⁰⁰⁴ Colmar Brunton, Alpine Creative Presentation, (Exhibit AUS-108), p. 10. See also Philip Morris, New Parliament Pack Test, (Exhibit AUS-169), p. 13.

²⁰⁰⁵ Colmar Brunton, Alpine Creative Presentation, (Exhibit AUS-108), p. 10.

²⁰⁰⁶ Philip Morris, Virginia Slims Rounded Corners Name/Pack Test, (Exhibit AUS-168), p. v; Philip Morris, New Parliament Pack Test, (Exhibit AUS-169), p. 13; and Philip Morris, Merit Pack Test, (Exhibit AUS-170), pp. 16-17.

²⁰⁰⁷ Philip Morris, New Parliament Pack Test, (Exhibit AUS-169), p. 13.

²⁰⁰⁸ Philip Morris, New Parliament Pack Test, (Exhibit AUS-169), p. 13; and Philip Morris, Merit Pack Test, (Exhibit AUS-170), pp. 16-17.

²⁰⁰⁹ Philip Morris, New Parliament Pack Test, (Exhibit AUS-169), p. 13; and Philip Morris, Merit Pack Test, (Exhibit AUS-170), pp. 16-17.

²⁰¹⁰ Philip Morris, New Parliament Pack Test, (Exhibit AUS-169), pp. 13 and 41-42.

"prissy"²⁰¹⁵, "bold and dynamic"; "intriguing"; "up and coming"; "progressive"²⁰¹⁶; and a notion of "independence"²⁰¹⁷, "doesn't follow crowd"²⁰¹⁸, "lives by its own beliefs"²⁰¹⁹, "stands up for beliefs"²⁰²⁰, "not afraid to express individuality"²⁰²¹, "enjoys being different"²⁰²², "won't settle for ordinary"²⁰²³; "freedom"²⁰²⁴, "escape".²⁰²⁵

7.736. This evidence indicates to us that designers of packaging innovations in the tobacco industry are conscious of the power of branding, including design and other elements of packaging, to elicit certain responses in the minds of consumers and imbue those products with images with which the prospective consumer would want to be associated. Specifically, the evidence above suggests that tobacco packaging seeks to capture images and associations that are appealing to the consumer in respect of *what that package says about them* as well as the *image of the owner that those packages conveys or elicits*. In this respect, we agree with Professor Fong that:

Product differentiation is key to tobacco packaging in that it increases appeal through package design (graphical and structural) aimed at making tobacco products attractive and aesthetically pleasing to the eye and engendering perceptions of positive product *quality characteristics, identity and personality characteristics*, and positive taste perceptions.²⁰²⁶

7.737. The experts' views and tobacco industry documents summarized above provide evidence that the images and messages conveyed by tobacco packaging are of such a nature as to be capable of conveying a belief that tobacco use can fulfil certain needs, or create certain associations with the user. Moreover, as identified above, it is recognized that youth and young adults are particularly vulnerable to the initiation of tobacco use in the event that they believe those needs can be fulfilled through tobacco use. Taken together, therefore, the evidence before us supports the view that the imagery and associations, with which tobacco products may be imbued by virtue of their packaging, are of such a nature as to engender a belief that their use will attribute certain qualities to the user, and that adolescents are particularly vulnerable to acting on the basis of such beliefs by virtue of the nature of adolescent decision-making processes, as summarized above.²⁰²⁷

7.738. Notwithstanding this observation, we note the complainants' arguments that the impact of such branding, and the positive associations that it may generate, is limited to secondary demand (as opposed to primary demand).²⁰²⁸ Honduras describes this distinction as follows:

²⁰¹¹ Philip Morris, New Parliament Pack Test, (Exhibit AUS-169), p. 41.

²⁰¹² Philip Morris, New Parliament Pack Test, (Exhibit AUS-169), p. 41; and Philip Morris, Merit Pack Test, (Exhibit AUS-170), pp. 16-17.

²⁰¹³ Philip Morris, New Parliament Pack Test, (Exhibit AUS-169), pp. 41-42.

²⁰¹⁴ Philip Morris, New Parliament Pack Test, (Exhibit AUS-169), p. 41.

²⁰¹⁵ Philip Morris, New Parliament Pack Test, (Exhibit AUS-169), pp. 41-42.

²⁰¹⁶ RJ Reynolds, Salem A&A Study, (Exhibit AUS-171), p. 95.

²⁰¹⁷ Camel Advertising Development White Paper, (Exhibit AUS-197), p. 3.

²⁰¹⁸ Camel Advertising Development White Paper, (Exhibit AUS-197), p. 3.

²⁰¹⁹ Camel Advertising Development White Paper, (Exhibit AUS-197), p. 3.

²⁰²⁰ Camel Advertising Development White Paper, (Exhibit AUS-197), p. 3.

²⁰²¹ Camel Advertising Development White Paper, (Exhibit AUS-197), p. 3.

²⁰²² Camel Advertising Development White Paper, (Exhibit AUS-197), p. 3.

²⁰²³ Camel Advertising Development White Paper, (Exhibit AUS-197), p. 3.

²⁰²⁴ Philip Morris, 1990 Marketing Presentation, (Exhibit AUS-544), p. 18.

²⁰²⁵ Philip Morris, 1990 Marketing Presentation, (Exhibit AUS-544), p. 18.

²⁰²⁶ Fong Report, (Exhibit AUS-14), para. 165. (emphasis added)

²⁰²⁷ We also note that the evidence referred to in paragraphs 7.732-7.736 indicates that such influence can be created by the trademark, but also a variety of other design elements, including, for example, colours and shapes. Furthermore, such colours and shapes were still permissible prior to the introduction of the TPP measures and were therefore, in our view, still capable of communicating these same messages. See also Biglan Report (Exhibit AUS-13), Figure 6; United States v. Philip Morris, (Exhibit AUS-71), para. 2653 (quoting the US Surgeon General's 1994 report); and Chantler Report (Exhibits AUS-81, CUB-61), paras. 3.1-3.6.

²⁰²⁸ Honduras's first written submission, paras. 448-454; and Honduras's second written submission, para. 646. See also Honduras's second written submission, paras. 208-209; and Dominican Republic's first written submission, para. 683.

As observed by Professor Winer, when assessing the effects of brands on demand for a product, it is essential to consider the distinction between primary and secondary demand. Primary demand refers to the total demand for products within an industry or product category. In the cigarette market, primary demand is the volume of cigarettes that consumers buy across all brands. Secondary demand is [a] measure of demand for a particular brand within a market. In the cigarette market, secondary demand refers to the volumes of consumption of a specific brand, e.g. Dunhill, Marlboro, etc.²⁰²⁹

7.739. The complainants refer, in respect of this distinction and the role of marketing in respect of primary and secondary demand, to expert reports by Professors Winer and Steenkamp. Professor Winer argues that in a mature market, like that for cigarettes, "branding does not affect the primary demand or market size but affects secondary demand, consumer choices within the market".²⁰³⁰ For Professor Winer, a key reason that branding is most effective as a means of generating secondary demand in a mature market is that consumers already know about the product, its perceived benefits and disadvantages, and may be experienced repeat customers.²⁰³¹ In such a market, brand communications aid competitors in gaining share from other participants in the industry, rather than informing consumers of the existence of the product.²⁰³² Professor Winer adds that the majority of consumers may not be willing to switch brands, but the fact that some consumers will do so is a powerful incentive for brands to fight to maintain or increase their share, such that "[s]witching or the threat of switching is the essence of a competitive marketplace because brands must strive to improve their product, service and/or value proposition to grow or, at least, protect their share and continue to be profitable and provide value to their shareholders".²⁰³³ Professor Winer refers to a number of studies and notes that "given advertising campaigns do not increase aggregate, primary demand in mature industries, the trademarked package features certainly cannot increase aggregate demand, particularly in the context of the known health risks and strong anti-smoking environment", especially given the lack of support from any of the other "usual promotional contexts".²⁰³⁴

7.740. Professor Steenkamp, though rejecting the notion that brand packaging is a dedicated advertising instrument, argues that if packaging has some advertising function, the effect of advertising on primary demand²⁰³⁵ is overstated.²⁰³⁶ He reviews a number of econometric studies of advertising elasticities to examine the extent to which increases in expenditures on tobacco advertising affect demand for tobacco products. Concluding that advertising has at best a negligible effect on primary demand, he continues that firms nonetheless advertise in order to increase inter-brand sales, to contribute to brand differentiation, to charge a premium price for their brands, and to create barriers to entry for new entrants.²⁰³⁷

²⁰²⁹ Honduras's first written submission, para. 450 (referring to Winer Report, (Exhibit UKR-9), para. 28). See also Dominican Republic's first written submission, para. 683 (referring to Steenkamp Report, (Exhibit DOM/HND-5), para. 115; and Winer Report, (Exhibit UKR-9), p. 32). Honduras and the Dominican Republic both rely upon the Winer Report, (Exhibit UKR-9). See Honduras's communication to the Panel of 8 July 2015; and Dominican Republic's responses to Panel questions following the first substantive meeting, para. 1.

²⁰³⁰ Winer Report, (Exhibit UKR-9), para. 29.

²⁰³¹ Winer Report, (Exhibit UKR-9), para. 29.

²⁰³² Winer Report, (Exhibit UKR-9), para. 30.

²⁰³³ Winer Report, (Exhibit UKR-9), para. 31.

²⁰³⁴ Winer Report, (Exhibit UKR-9), paras. 32-34.

²⁰³⁵ Professor Steenkamp also uses the expression "category demand".

²⁰³⁶ Steenkamp Report, (Exhibit DOM/HND-5), para. 90.

²⁰³⁷ Steenkamp Report, (Exhibit DOM/HND-5), paras. 90-112. We also note Professor Neven's argument that, from an economic perspective, branding as a specific type of marketing strategy can, first, increase the willingness to pay of consumers for a particular type of product; and, second, may increase the inclination of consumers to purchase a particular *brand* inside that product group. Professor Neven argues that, generally speaking, marketing measures are more likely to lead to market expansion effects when a product is new and when consumers are still relatively uninformed about its characteristics, and that over the lifecycle of a product, market expansion elements of branding (primary demand) tend to become less important, and are replaced by business stealing effects (secondary demand). When products "are mature, branding may in fact have hardly any market expansion value anymore at all". Neven Report, (Exhibit UKR-3) (SCI), pp. 20-25. See also Steenkamp Rebuttal Report, (Exhibit DOM/HND-14), paras. 73-80.

7.741. Australia relies on expert reports by Professors Chaloupka and Tavassoli to contest these assertions. Specifically, Professor Chaloupka surveys various reports by, *inter alia*, the US Surgeon General, USIOM, and the US National Cancer Institute concerning the role of advertising and promotion on tobacco use (and specifically initiation), and critiques the complainants' experts for their failure to take into account such information. He also critiques the bases upon which they reach their conclusions on the effects of advertising.²⁰³⁸ Professor Tavassoli argues that advertising can be effective in stimulating primary demand in mature categories, and that brand-level effects can affect perceptions of product categories as a whole and therefore can affect primary demand.²⁰³⁹

7.742. Australia refers to internal tobacco industry documents, findings by the United States District Court for the District of Columbia in United States v. Philip Morris, as well as reports by the US Surgeon General, the US National Cancer Institute, the USIOM and the WHO, in support of a causal link having been established between tobacco marketing and tobacco use, including the initiation of tobacco use.²⁰⁴⁰

7.743. We take note of the econometric studies referred to by Professor Steenkamp suggesting an "at best negligible impact" of advertising on primary demand for tobacco products.²⁰⁴¹ However, we also note the limited ability of econometric evidence based on aggregate data to detect increases in consumption resulting from increased advertising, as suggested in an analysis by the World Bank, as cited and co-authored by Professor Chaloupka.²⁰⁴² Accordingly, we consider it appropriate to take due account also of other relevant evidence before us that may inform the potential impact of branding features on tobacco packaging on demand for, and consumption of, tobacco products.

7.744. In this respect, the evidence before us makes clear that new smokers must continuously be recruited to maintain the primary demand for tobacco products at a level that will sustain the industry and "replace" those who cease to use the product because they have quit or died. As the US Surgeon General has observed:

²⁰³⁸ Chaloupka Public Health Report, (Exhibit AUS-9), paras. 57-88.

²⁰³⁹ Tavassoli Report, (Exhibit AUS-10), paras. 42-53.

²⁰⁴⁰ Australia's first written submission, paras. 62-65.

²⁰⁴¹ We also note in this respect that the complainants have presented these arguments as an alternative to their main contention that packaging cannot be considered to act as advertising.

²⁰⁴² See Chaloupka Public Health Report, (Exhibit AUS-9), para. 79 (quoting Jha and Chaloupka 1999, (Exhibit AUS-51), pp. 49-50):

These studies may be misleading for the following reasons. First, economic theory suggests that advertising will have a diminishing marginal impact on demand; that is, when advertising for a product increases, consumers will gradually respond less and less to additional advertising, and ultimately, advertising will stop making any impact on them at all. Advertising in the tobacco industry is at a relatively high level, around 6 per cent of sales revenue, about 50 per cent higher than the average industry. Thus any increased consumption that may result from increased advertising is likely to be very small and difficult to detect. This does not mean that, in the absence of advertising, consumption would necessarily be as high as it is in the presence of advertising - only that the marginal impact of an increase in advertising is negligible. Second, data that record the impact of advertising on sales are usually highly aggregated for relatively long time periods, for all advertisers, in all media, and often over large populations. Any subtle changes that might be apparent at a more disaggregated level of analysis are therefore obscured. In studies that use less aggregated data, researchers find more evidence of a positive effect of advertising on consumption, but such studies are expensive and time-consuming and, therefore, rare.

We also note the "tropicana" example provided by Professor Steenkamp in support of his argument that the effects of a packaging change are limited to secondary demand. Professor Steenkamp explains that a change in pack appearance in respect of the brand "Tropicana" led some consumers to shift to other brands, which Professor Steenkamp suggests indicates that the impact of such change is on secondary rather than primary demand for the product (in that case, orange juice). (see Steenkamp Report, (Exhibit DOM/HND-5), paras. 58-59). We note however the very different circumstances of that situation, as compared to the application of uniform packaging across all brands: in that example, competing products continued to be available to the consumer in their familiar packaging, and some consumers switched to those other brands. As Professor Steenkamp acknowledges, this is a very different situation from that of tobacco plain packaging, where *all* brands are plain and there is no opportunity to switch to another product that has not been affected by the same change in packaging.

Young people are a strategically important market for the tobacco industry. Since most smokers try their first cigarette before age 18, young people are the chief source of new consumers for the tobacco industry, which each year must replace the many consumers who quit smoking and the many who die from smoking-related diseases.²⁰⁴³

7.745. The evidence further indicates that young adult smokers are a key target of brand marketing in light of their high degree of brand loyalty to their first brand choice. That this age group has a high degree of brand loyalty to their first brand choice has been recognized by the tobacco industry.²⁰⁴⁴ Indeed, the industry has noted that "the aging of younger adult smokers combined with their brand loyalty guarantee the growth of a brand for decades", such that "[t]he future success of any cigarette brand is driven by its ability to attract younger adult smokers, between the age of 18 and 24 years old", and that "smokers aged 18-24 determine the future trends of the tobacco industry".²⁰⁴⁵ Indeed, as noted by the US National Cancer Institute:

A successful tobacco brand must attract young smokers who will ideally (from the manufacturer's perspective) go through a series of stages leading from experimentation, to loyalty to a particular brand, to increased consumption as they age and become mature smokers. Because every day approximately 4,000 adolescents between the ages of 12 and 17 initiate cigarette smoking, the early years are critically important in helping young adult smokers settle on a brand for life, thus helping tobacco companies gain total brand share.²⁰⁴⁶

7.746. Taking these elements into account, we agree with Professor Tavassoli's assessment that "[t]he critical question, from the perspective of product adoption, is not whether a category is mature or not, but whether a consumer is new to the category".²⁰⁴⁷ The evidence mentioned above indicates that it is essential that new users be recruited to smoke in order to sustain the industry, and that youth are strategically important in this regard given that adolescence represents the age at which initiation generally occurs²⁰⁴⁸, and because of the high degree of brand loyalty that young people exhibit over the course of their tobacco use.

7.747. In light of the above, we are not persuaded that the impact of branding of tobacco products, and the positive associations that it may generate, is limited, as the complainants argue, to secondary demand. We are therefore also not persuaded that the evidence before us, taken as a whole, demonstrates, as the complainants argue, that tobacco packaging could not play a role in influencing the decision to smoke, and specifically on smoking initiation, in particular among adolescents and young adults, by virtue of the positive perceptions and associated product appeal created by such packaging.

7.748. We further note that some of the evidence before us suggests that the age of initiation of LHM cigar smokers is significantly higher than that of cigarette smokers.²⁰⁴⁹ Cuba refers to an online survey of the Australian cigar market (the "Vision One Report")²⁰⁵⁰ which found that the majority of LHM cigar smokers initiate when they are adults. According to this report, of those sampled, the mean age of initiation in Australia for smoking LHM cigars was found to be 31.1 years, as compared to 17.7 years for cigarette initiation, and the modal age of LHM cigar initiation

²⁰⁴³ US Surgeon General's Report 1994, Executive Summary, (Exhibit AUS-73), p. 8. See also Tavassoli Report, (Exhibit AUS-10), para. 50 (stating that "[p]rimary demand also depends on the ability to attract new consumers without whom it will shrink in the long term"); and US Surgeon General's Report 2012, (Exhibit AUS-76), p. 541.

²⁰⁴⁴ See Camel Advertising Development White Paper, (Exhibit AUS-197), p. 1.

²⁰⁴⁵ Camel Advertising Development White Paper, (Exhibit AUS-197), p. 1. (emphasis omitted)

²⁰⁴⁶ NCI Tobacco Control Monograph No. 19, (Exhibit AUS-77), p. 159.

²⁰⁴⁷ Tavassoli Report, (Exhibit AUS-10), para. 52.

²⁰⁴⁸ US Surgeon General's Report 2012, (Exhibit AUS-76), p. 134; US Surgeon General's Report 1994, (Exhibit CUB-66), p. 51. See also US Surgeon General's Report 1994, Executive Summary, (Exhibit AUS-73), p. 9.

²⁰⁴⁹ Cuba's first written submission, para. 244.

²⁰⁵⁰ Vision One Report, (Exhibit CUB-79), para. 11 (referenced in Cuba's first written submission, para. 245 et seq.).

in Australia was recorded as 30 years, as compared to 18 years for cigarette initiation.²⁰⁵¹ Cuba adds that a statistical analysis of the results of the Vision One Report shows that only 2% of LHM cigar smokers started to regularly smoke LHM cigars under 18, and only 30% by the age of 24.²⁰⁵² Data and analysis by the USSG in its 2014 report indicate that cigar use among youth and adolescents continued to follow a similar pattern.²⁰⁵³

7.749. Cuba notes that the Vision One Report acknowledges that the data it collected on cigarette initiation is not necessarily representative of the cigarette smoking population in Australia as it was looking at a subset of the cigarette smoking population, i.e. current LHM cigar smokers who have ever smoked cigarettes on a regular basis.²⁰⁵⁴ Therefore, Cuba also relies on statistics on initiation presented by the 1994 US Surgeon General's Report to show the same patterns of behaviour with regard to cigarette smokers.²⁰⁵⁵ According to the 1994 US Surgeon General's Report, as regards the age of initiation, the data shows that whilst 53% of persons who had ever smoked a cigarette daily began smoking cigarettes daily before they reached 18, only 2% of persons who currently smoke LHM cigars had started regularly smoking LHM cigars by the same age. By age 29, almost all (98.1%) of persons who had ever smoked cigarettes daily had begun smoking while less than half (49%) of persons who currently smoke LHM cigars had started regularly smoking those products.²⁰⁵⁶

7.750. Cuba adds that smokers of LHM cigars are significantly older than smokers of cigarettes.²⁰⁵⁷ Of the respondents to the Vision One survey (all of whom answered that they currently smoke LHM cigars on a regular basis), only 5% were aged between 18 and 25, whilst the majority (47.1%) were between 35 and 54 years of age (with 66.9% aged 35 or above).²⁰⁵⁸ By contrast, of the respondents to the 2013 Victorian Smoking and Health Survey (VSHS), of whom 86.7% smoked factory made cigarettes and only 2.6% did not smoke cigarettes, 26.1% were aged between 18 and 29, 42.2% were aged between 30 and 49, and 31.7% were aged 50 or above.²⁰⁵⁹

7.751. According to Cuba, the later initiation age range for consumers of LHM cigars is significant because of what is known about tobacco initiation.²⁰⁶⁰ The US Surgeon General's 2012 Report concluded that tobacco prevention efforts should be focused on youth because nearly all tobacco use begins in childhood and adolescence (88% of adult smokers who smoke daily report that they

²⁰⁵¹ Cuba's first written submission, para. 246 (referring to Vision One Report, (Exhibit CUB-79), paras. 14-15, charts 2-3). Further, Cuba argues that the Vision One Report shows that there is a sharp and steep incline in cigarette initiation as age progresses and a more moderate curve in initiation for LHM Cigar smoking, which is indicative of the finding that, of the survey respondents who had ever smoked cigarettes regularly, 80% started smoking cigarettes when they were under 19 years of age, whereas a similar percentage of LHM Cigar smokers (69%) did not start smoking LHM Cigars regularly until the ages of 20 to 39. See also Cuba's first written submission, para. 247 (referring to Vision One Report, (Exhibit CUB-79), para. 16, chart 4).

²⁰⁵² Cuba's first written submission, para. 248 (referring to Vision One Report, (Exhibit CUB-79), para. 17). This compared to just over half (52%) of those who have ever smoked cigarettes started smoking them regularly when they were under 18, whilst almost all (92%) had started smoking them regularly by the age of 24.

²⁰⁵³ See US Surgeon General 2014 report, (Exhibit AUS-37), page 735.

²⁰⁵⁴ Cuba's first written submission, para. 249 (referring to Vision One Report, (Exhibit CUB-79), para. 18).

²⁰⁵⁵ Cuba's first written submission, para. 249 (referring to US Surgeon General's Report 1994, (Exhibit CUB-66)).

²⁰⁵⁶ Cuba's first written submission, para. 250 (referring to US Surgeon General's Report 1994, (Exhibit CUB-66)), paras. 19-22, Chart 6).

²⁰⁵⁷ Cuba's first written submission, para. 251.

²⁰⁵⁸ Cuba's first written submission, para. 251 (referring to Vision One Report, (Exhibit CUB-79), para. 9(a)(ii) and Appendix I).

²⁰⁵⁹ Cuba's first written submission, para. 251 (referring to Tobacco in Australia 2012, CUB Excerpts, (Exhibit CUB-13), Chap. 1, p. 3 (Methods), p. 5 (Table 1), and p. 6 (Discussion)). This was a telephone survey undertaken with adults aged over 18 residing in the Australian state of Victoria, where just under one-quarter of the Australian population reside.

²⁰⁶⁰ Cuba's first written submission, para. 252.

started smoking by the age of 18 years)²⁰⁶¹ and the Chantler Report also concluded that "most smokers become addicted when they are children or young adults".²⁰⁶²

7.752. Accordingly, Cuba concludes that, as LHM cigars are hardly smoked by youth, and since older smokers are significantly less likely to be susceptible to plain packaging, regulating the appearance of 25% of the front surface of LHM cigar packaging is unlikely to make any incremental contribution to reducing initiation levels in Australia for LHM cigars.²⁰⁶³ Cuba notes that legislative proposals in the European Union and the United Kingdom reflect these demographic realities.²⁰⁶⁴ Cuba argues that this must have been based on data collated by the UK Office for National Statistics, which showed that in 2011 whilst 18% of people aged 16 to 19 smoked cigarettes, only 0.2% of this age group smoked cigars, and that in June 2014 "almost all cigar smokers [we]re ... over 25 years of age".²⁰⁶⁵

7.753. In response, Australia points out that Cuba's own evidence indicates that 30% of smokers of large handmade (LHM) cigars started to smoke before the age of 24²⁰⁶⁶, and that nearly half of all LHM cigar smokers surveyed for the Vision One Report commissioned by Cuba had started smoking these products in their 20s.²⁰⁶⁷ Australia adds that when coupled with initiation rates of other cigar products such as small cigars and cigarillos, cigars are no longer the domain of "traditional male smokers". Rather, cigar products are increasingly associated with an upscale status, luxury, affluence, sophistication and style, and the image of cigar smokers has adapted in recent years to reflect the changing consumer market.²⁰⁶⁸ This includes innovations such as the release of exclusive cigar tubes, brightly coloured "foil fresh" packaging and presentation in brightly coloured boxes.²⁰⁶⁹ Australia adds that consumers often keep these specialised cigar boxes, displaying them long after purchase²⁰⁷⁰, and that the tobacco industry is well aware of the importance of product packaging for cigar products.²⁰⁷¹

7.754. The evidence before us thus suggests that certain age and demographical differences exist, which might reduce the relevance of youth initiation for cigars, in particular LHM cigars

²⁰⁶¹ Cuba's first written submission, para. 252 (referring to US Surgeon General's Report 2012, CUB excerpts, (Exhibit CUB-26), pp. 3 and 8.

²⁰⁶² Cuba's first written submission, para. 252 (referring to Chantler Report, (Exhibits AUS-81, CUB-61), para. 6.11.

²⁰⁶³ Cuba's first written submission, para. 254.

²⁰⁶⁴ Cuba's first written submission, para. 255. The European Commission's proposal for a Revised Tobacco Products Directive currently permits European Union Member States to exempt various non-cigarette tobacco products, including cigars of all types, from requirements imposing increased graphic health warnings and restricting the use of certain flavourings as these products "are mainly consumed by older consumers, while the focus of this proposal is to regulate tobacco products in such a way as they do not encourage young people to start using tobacco". Cuba's first written submission, para. 255 (referring to European Commission, "Questions & Answers: New Rules for Tobacco Products", Memo/14/134 (26 February 2014), (Exhibit CUB-38)). Likewise, the public consultation document concerning the UK proposal to introduce regulations requiring standardized packaging of tobacco products explains that the proposed regulations are not intended to cover cigars, which are classed as a "specialist tobacco product" "given their low rates of use, particularly by young people". Cuba's first written submission, para. 255 (referring to UK Department of Health, "Consultation on the Introduction of Regulations for Standardised Packaging of Tobacco Products", June 2014 (Exhibit CUB-67), para. 5.12)

²⁰⁶⁵ Cuba's first written submission, para. 255 (referring to UK Department of Health, "Consultation on the Introduction of Regulations for Standardised Packaging of Tobacco Products", June 2014, (Exhibit CUB-67), para. 5.10, in turn referring to the Office for National Statistics website (2013), Opinions and Lifestyle Survey, Smoking Habits Amongst Adults, 2012).

²⁰⁶⁶ Australia's first written submission, para. 160 (referring to Cuba's first written submission, para. 248).

²⁰⁶⁷ Australia's first written submission, para. 160 (referring to Cuba's first written submission, para. 250).

²⁰⁶⁸ Australia's first written submission, para. 160 (referring to Wenger et al. 2001, (Exhibit AUS-182), p. 279; and Jamner 1999, (Exhibit AUS-183), p. 188).

²⁰⁶⁹ Australia's first written submission, para. 82 (referring to Swedish Match, New Launch on Game, (Exhibit AUS-99), p. 5; Swedish Match, New Products, (Exhibit AUS-100), p. 23; and Swedish Match, Cigars for a Trend-Conscious Generation, (Exhibit AUS-101), p. 10).

²⁰⁷⁰ Australia's first written submission, para. 82 (referring to Miller et al. 2015, (Exhibits AUS-102, DOM-315), p. 4).

²⁰⁷¹ Australia's first written submission, para. 82 (referring to Swedish Match, 2013 Annual Report, (Exhibit AUS-103), p. 9).

relative to youth initiation of cigarette smoking.²⁰⁷² However, as Australia points out, the data submitted by Cuba does not suggest LHM cigar use by youth and adolescents would be non-existent or that youth initiation would be totally irrelevant in the context of cigars, including LHM cigars. This is underscored by evidence before us on the importance accorded to cigar packaging by certain consumers, as well as the corresponding cigar marketing policies of tobacco companies referenced by Australia. In particular, Australia has submitted evidence indicating that cigar marketing also features the use of imagery. In one published study relied on by Australia, the authors argue that increases in cigar smoking observed in the late 1990s are attributable to the "positive and improving image of cigar smoking" which has resulted from cigar publications like *Cigar Aficionado* and increased visibility and use by celebrities, and that cigar use is portrayed as "young, independent, vibrant, rebellious, and frequently female".²⁰⁷³ This assertion is supported by another published study presented by Australia, which describes the promotion of cigars by American rapper Snoop Dogg and likens this to other cigarette advertising campaigns which targeted "young African-American men, and exploited the popular hip-hop musical genre to sell cigarettes".²⁰⁷⁴

7.755. These elements suggest that imagery relating to the branding of cigars is capable of being used to appeal to adolescent behaviour in a similar manner as has been observed in the context of cigarettes. We are therefore not persuaded that cigar packaging could not play a role in influencing the decision to initiate the use of cigars, in particular among adolescents and young adults, by virtue of the positive perceptions and associated product appeal created by such packaging. More generally, given the acknowledged importance of branding in respect of cigars,²⁰⁷⁵ we see no basis to assume that packaging of cigars would not have the ability to contribute to the appeal of the products, in a similar manner to that observed in respect of cigarettes, such that a reduced opportunity to use brand imagery as a result of plain packaging of cigars would also have the ability to reduce their attractiveness.

7.756. Notwithstanding these conclusions, we acknowledge the observation, made in particular by Professor Ajzen, that the "carry-through" effect from perceptions of the product, in this case tobacco products, to attitudes towards it and ultimately, purchase decisions, is not automatic. Specifically, in relation to tobacco plain packaging, we see no basis to assume that an impact on proximal outcomes, including a reduction in the appeal of tobacco products, would *in all cases* lead to a change in smoking behaviours. Indeed, we do not understand this to be the assumption underlying the design and structure of the TPP measures. Rather, as discussed above, we understand the assumption underlying the operation of the TPP measures to be that at least some consumers will be influenced in their smoking behaviours, and be discouraged from taking up smoking, if the appeal of tobacco products is reduced through tobacco plain packaging, in combination with other tobacco control measures in place in Australia. The fact that this measure is, by design, one element of a broader range of tobacco control measures designed to act on various aspects of the complex and multifaceted decision-making involved in the decision to initiate smoking – including restrictions on the advertisement and promotion of tobacco products²⁰⁷⁶ and social marketing campaigns²⁰⁷⁷ – is consistent with this understanding.

Smoking cessation and relapse

7.757. The complainants also argue that the TPP measures are not capable of having an influence on the other smoking behaviours targeted by the measures, namely smoking cessation and relapse. Honduras argues that the TPP measures "are fundamentally ill-suited to have any effect on the behaviour of existing or former smokers".²⁰⁷⁸ The Dominican Republic argues that "there is no credible evidence supporting Australia's position that the plain packaging measures could

²⁰⁷² We note that the US Surgeon General referenced US cigar initiation data showing an overall decrease among adolescents, but an increase among Hispanic young adults between 2006 and 2010. See US Surgeon General's Report 2012, (Exhibit AUS-76), p. 149.

²⁰⁷³ Jamner 1999, (Exhibit AUS-183), p. 188.

²⁰⁷⁴ A. Richardson, O. Ganz and D. Vallone, "The Cigar Ambassador: How Snoop Dogg uses Instagram to Promote Tobacco Use", *Tobacco Control*, Vol. 23 (2014), (Exhibit AUS-180), p. 80.

²⁰⁷⁵ See Cuba's response to Panel question No. 29 (annexed to its response to Panel question No. 138).

²⁰⁷⁶ See section 2.2.2 above.

²⁰⁷⁷ See para. 2.71 above and section 7.2.5.6.4 below.

²⁰⁷⁸ Dominican Republic's first written submission, para. 705.

contribute to smoking cessation".²⁰⁷⁹ Cuba submits that "tobacco packaging is not a material factor in encouraging cessation or preventing relapse".²⁰⁸⁰ Indonesia asserts that "it is highly unlikely that [the TPP measures] will have a significant effect on the number of people who stop smoking"²⁰⁸¹ and that the "potential for [plain packaging] to ever generate a significant effect on smoking prevalence is purely speculative".²⁰⁸² Australia responds that, in the context of cessation and relapse, tobacco packaging "plays an important role" in "presenting a visual cue and reminder to those smokers who have, or are attempting to, quit smoking".²⁰⁸³

7.758. We therefore consider next the evidence before us on the drivers of smoking cessation and relapse and whether, as the complainants argue, these could not be affected by plain packaging of tobacco products.

7.759. Honduras and Cuba rely on an expert report by Dr Satel, who submits that people who smoke (like users of drugs in general) have a bias towards satisfying short-term gains over protecting one's long-term interests (which she refers to as "discounting")²⁰⁸⁴, and that plain packaging would not affect the discounting phenomenon.²⁰⁸⁵ She states that "[i]n the absence of discrete concerns about negative consequences, motivation to quit and confidence in one's capacity to quit, there is no evidence to suggest that plain packaging will genuinely contribute to tipping the scales in favor of quitting".²⁰⁸⁶ Dr Satel discusses "conditioned cues" for smoking²⁰⁸⁷, which refer to "stimulus – such as the substance itself (the cigarette, its smell) or its container (the pack) – that provokes desire to smoke because the link between stimulus and the positive effects of smoking has been tightly established through prior experience".²⁰⁸⁸ In Dr Satel's view, "[t]his form of learning represents classic Pavlovian conditioning" such that the pack, ashtray, or lighter itself can produce an urge to smoke. Dr Stael adds that "[u]nder a regime of plain packaging, a plain brown package – as opposed to a branded package – will simply become the normal visual cue to a smoker".²⁰⁸⁹ Dr Satel thus contends that even if it is correct that smokers and former smokers may respond to the sight of a cigarette pack or display with an urge to purchase, "it is unlikely that plain packaging will alleviate that urge", as "conditioned cue-substitution would presumably occur, and the plain pack would simply take on the significance of the formerly branded pack".²⁰⁹⁰ Concerning relapse, Dr Satel posits that such behaviour is driven by "[e]pisodic events" such as divorce, the initiation of smoking by a partner, and conflicts with others as risk factors, and that economic strain, insecure employment, socializing with people who smoke, and limited opportunities for respite and recreation, make quitters vulnerable to relapse.²⁰⁹¹ She adds that predictors of relapse also include weight concerns and lack of a feeling of self-efficacy. Thus, according to Dr Satel, when ex-smokers relapse, "they may desire the missed pleasures and benefits of smoking".²⁰⁹² Dr Satel states that there is no compelling evidence that pack design plays an important role in stimulating resumption of smoking²⁰⁹³, and that the appearance of the pack itself "plays no role in the web of factors that motivate patients to remain smoke-free and to undertake cessation".²⁰⁹⁴ To the extent that a pack of cigarettes serves as a cue to pick up a cigarette, the plain pack would serve as a reminder as well, as it would acquire the status of a conditioned cue.²⁰⁹⁵

7.760. In an expert report submitted by Honduras and the Dominican Republic, Professor Fischer argues that tobacco addiction results in repeated, elevated dopamine release that occurs in the

²⁰⁷⁹ Honduras's first written submission, para. 442.

²⁰⁸⁰ Cuba's first written submission, para. 214.

²⁰⁸¹ Indonesia's first written submission, para. 413.

²⁰⁸² Indonesia's first written submission, para. 420.

²⁰⁸³ Australia's first written submission, para. 87.

²⁰⁸⁴ Satel Report, (Exhibit UKR-7), paras. 22-23. Dr Satel refers to a tendency to "discount" and "a cognitive bias toward gratifying one's self in the present".

²⁰⁸⁵ Satel Report, (Exhibit UKR-7), para. 25.

²⁰⁸⁶ Satel Report, (Exhibit UKR-7), para. 33.

²⁰⁸⁷ Satel Report, (Exhibit UKR-7), para. 37.

²⁰⁸⁸ Satel Report, (Exhibit UKR-7), para. 38.

²⁰⁸⁹ Satel Report, (Exhibit UKR-7), para. 39.

²⁰⁹⁰ Satel Report, (Exhibit UKR-7), para. 42.

²⁰⁹¹ Satel Report, (Exhibit UKR-7), para. 34.

²⁰⁹² Satel Report, (Exhibit UKR-7), para. 34.

²⁰⁹³ Satel Report, (Exhibit UKR-7), paras. 34-36.

²⁰⁹⁴ Satel Report, (Exhibit UKR-7), para. 44.

²⁰⁹⁵ Satel Report, (Exhibit UKR-7), paras. 39.

presence of related cues (or "environmental stimuli that have previously been associated with smoking").²⁰⁹⁶ In Professor Fischer's view, this association, via Pavlovian or classical conditioning, grows "to the point where exposure to environmental stimuli that are associated with the behavior can induce a strong desire to take the drug (*i.e.*, craving)".²⁰⁹⁷ She notes that this can be affected by, *inter alia*, cue-induced craving.²⁰⁹⁸ In respect of packaging as a smoking cue, Professor Fischer makes three contentions. First, she asserts that the link between cues, craving and smoking behaviour is "much weaker than one might expect"²⁰⁹⁹, as "just because cues may induce craving, it does not necessarily follow that craving prompts actual smoking behaviour".²¹⁰⁰ Second, Professor Fischer alleges that there is a wide degree of variation in the extent to which different cues demonstrate a capacity to induce craving, and that there is clear evidence for a hierarchy among cues in this regard²¹⁰¹, and that "there is evidence that the cigarette pack was the weakest of a series of established proximal cues".²¹⁰² Third, she maintains that under tobacco plain packaging, "smokers will simply see one form of smoking cue replaced by another".²¹⁰³ She elaborates that plain packs will very quickly acquire the cue status of the old package through the same process of classical conditioning, with the effect that "while certain features of the appearance of the cue may have changed, its essential ability to act as a cue – arising through its association with cigarettes and smoking behavior – will remain the same".²¹⁰⁴ Professor Fischer submits that if "essentially generic" cigarettes can exhibit salience, then "there is no reason plain packs cannot also be strongly salient absent brand imagery"²¹⁰⁵, and that plain packs would not function differently from other generic cues with a strong contingency (such as cigarettes, ashtrays, matches and environmental tobacco smoke). In her view, because "all packs look the same", plain packs could have stronger contingency than branded packs because a plain pack would be the only one associated with smoking among all smokers at all times.²¹⁰⁶ Professor Fischer also discusses relapse, and identifies the factors commonly associated with relapse as including negative affect (mood), higher nicotine dependence, and withdrawal symptoms.²¹⁰⁷ Professor Fischer points out that clinical samples report that relapse can be predicted by the presence of withdrawal symptoms and higher levels of nicotine dependence; negative affect (mood); younger age at time of quit attempt; a history of comorbid psychiatric disorders, including past or current anxiety disorders, depression, and schizophrenia; and absence of tobacco-related disease.²¹⁰⁸ She also notes that at the population level, relapse has been associated with the presence of withdrawal symptoms and recently failed quit attempts; negative affect; a higher level of baseline nicotine dependence; gender; lower socioeconomic status; lower subjective social status; and high stress situations following a period of low stress.²¹⁰⁹ She further states that the inability of current research to consistently identify treatable factors associated with smoking relapse "highlights the complex, individual nature of the smoking-cessation process".²¹¹⁰

7.761. Australia submits an expert report by Dr Brandon, who asserts that, in respect of "conditioned cue reactivity", stimuli vary in their ability to become effective conditioned stimuli on the basis of whether they are presented close to the unconditioned stimulus in both space and time ("spatiotemporal proximity"), will be apparent and garner the attention of the subject ("salience"), and will be reliably paired, with relatively few unpaired occurrences of the conditioned stimulus or unconditioned stimulus without the other ("strong contingency").²¹¹¹ In applying these criteria, Professor Brandon states that cigarette packs are nearly always present immediately

²⁰⁹⁶ Fischer Report, (Exhibit DOM/HND-7), para. 34.

²⁰⁹⁷ Fischer Report, (Exhibit DOM/HND-7), para. 34.

²⁰⁹⁸ Fischer Report, (Exhibit DOM/HND-7), para. 35.

²⁰⁹⁹ Fischer Report, (Exhibit DOM/HND-7), para. 64.

²¹⁰⁰ Fischer Report, (Exhibit DOM/HND-7), paras. 68-69.

²¹⁰¹ Fischer Report, (Exhibit DOM/HND-7), para. 71.

²¹⁰² Fischer Report, (Exhibit DOM/HND-7), para. 73.

²¹⁰³ Fischer Report, (Exhibit DOM/HND-7), para. 76.

²¹⁰⁴ Fischer Report, (Exhibit DOM/HND-7), para. 77.

²¹⁰⁵ Fischer Rebuttal Report, (Exhibit DOM/HND-11), paras. 23-25.

²¹⁰⁶ Fischer Rebuttal Report, (Exhibit DOM/HND-11), paras. 26-28.

²¹⁰⁷ Fischer Report, (Exhibit DOM/HND-7), para. 19.

²¹⁰⁸ Fischer Report, (Exhibit DOM/HND-7), para. 55.

²¹⁰⁹ Fischer Report, (Exhibit DOM/HND-7), para. 56.

²¹¹⁰ Fischer Report, (Exhibit DOM/HND-7), para. 58.

²¹¹¹ Brandon Report, (Exhibit AUS-15), para. 42. Professor Brandon also argues that, in the tobacco context, nicotine deprivation and the opportunity to smoke are conditions which have been shown to improve conditioned responding to smoking-related cues. Brandon Report, (Exhibit AUS-15), para. 44. See also Australia's first written submission, paras. 97-100.

before an individual smokes (proximity); branding is designed to attract the attention of, and be memorable to, the consumer (salience); and there is near-perfect pairing between handling a pack and smoking (contingency).²¹¹² Dr Brandon notes that it "is a reasonable argument" to say that plain packages could acquire conditioned cue status, but adds that there "are reasons to believe that plain packaging would be a less effective conditioned cue than fully branded packaging".²¹¹³ Specifically, "[w]hereas proximity would not change with plain packaging, [salience and contingency] might".²¹¹⁴ Dr Brandon elaborates that "[d]rab dark brown packaging with small, standardised text is designed to be less salient than fully branded tobacco packaging" and, additionally, "the tight contingency between viewing one's own brand and smoking is likely to be reduced".²¹¹⁵ In respect of relapse, Dr Brandon notes that relapse has been "reliably paired" with the presence of other smokers, the use of alcohol, stress and negative mood states, "among other[situations]", and that such observations strengthen the evidence for cue-reactivity in smoking motivation.²¹¹⁶ On the basis of this connection with cue-reactivity, Dr Brandon's discussion of relapse behaviour is made largely in the context of cessation, as summarized above.

7.762. In respect of this evidence, we note, first, that cessation and relapse, though identified as separate behaviours in Section 3(2) of the TPP Act that are expected to be impacted through the operation of the specific mechanisms in Section 3(1), are discussed together by all parties and the experts upon whose reports they rely.

7.763. Second, we note that there are some differences in the depictions of drivers of smoking cessation by Drs Satel and Brandon, and by Professor Fischer. However, we also note that they agree in respect of the brain chemistry underlying classical, or Pavlovian, conditioning, and accept that this is applicable in the context of addiction to tobacco products.²¹¹⁷ They also agree that a cue in this context can be sufficient to instigate a reaction within the brain of the addicted smoker – neither the complainants, nor Australia, nor their respective experts, contest that cue reactivity is one of many factors that may influence a smoker's ability to quit, or a recent quitter's ability to remain so²¹¹⁸, though they do contest the strength of that relationship.²¹¹⁹ Finally, the parties, through their experts, also appear to agree that tobacco packaging can constitute a cue for the use of tobacco products, to the extent that it satisfies many of the elements common to cues.²¹²⁰

7.764. The difference of view between the parties' experts concerns whether the adoption of plain tobacco packages in Australia will have any bearing on the elements that render tobacco packaging a cue, and will thus undermine the ability of the package to "present[] a visual cue and reminder to those smokers who have, or are attempting to, quit smoking".²¹²¹ In this connection, as described above, Dr Brandon sets out that "among the key characteristics of a strong conditioned stimuli" are spatiotemporal proximity, salience, and strong contingency.²¹²² The key divergence between the parties' experts in this respect relates to salience and contingency –

²¹¹² Brandon Report, (Exhibit AUS-15), para. 59. Professor Brandon also notes that the smoker usually chooses to light a cigarette after the onset of early nicotine withdrawal symptoms, which begin within 30 minutes of the last cigarette, and that stronger conditioned responses are found when the smoker knows that there is an opportunity to smoke. He argues that these factors "that magnify conditioned responding in smokers are also consistent with cigarette packs" as smokers "usually smoke after a period of nicotine deprivation, during the early stages of nicotine withdrawal", and "will likely see their pack during such a state". He also submits that "the cigarette pack—unless it's known to be empty—also signals the availability of smoking". Brandon Report, (Exhibit AUS-15), paras. 45 and 59.

²¹¹³ Brandon Report, (Exhibit AUS-15), paras. 76 and 88.

²¹¹⁴ Brandon Report, (Exhibit AUS-15), paras. 76 and 88.

²¹¹⁵ Brandon Report, (Exhibit AUS-15), paras. 76 and 88.

²¹¹⁶ Brandon Report, (Exhibit AUS-15), para. 49.

²¹¹⁷ Satel Report, (Exhibit UKR-7), paras. 38-39; Fischer Report, (Exhibit DOM/HND-7), para. 34 (and generally Part E); and Brandon Report, (Exhibit AUS-15), paras. 39-41.

²¹¹⁸ Satel Report, (Exhibit UKR-7), para. 38; Fischer Report, (Exhibit DOM/HND-7), para. 49; and Brandon Report, (Exhibit AUS-15), paras. 46-52.

²¹¹⁹ Satel Report, (Exhibit UKR-7), paras. 44-46; Fischer Report, (Exhibit DOM/HND-7), Parts F and H; and Brandon Report, (Exhibit AUS-15), para. 83.

²¹²⁰ Satel Report, (Exhibit UKR-7), para. 39; Fischer Report, (Exhibit DOM/HND-7), Part I; and Brandon Report, (Exhibit AUS-15), paras. 60-69.

²¹²¹ Australia's first written submission, para. 87.

²¹²² Brandon Report, (Exhibit AUS-15), para. 42.

specifically, whether plain packs are likely to be less salient and less contingent, and thus less effective as a cue than branded packages.²¹²³

7.765. Concerning salience, Dr Brandon submits that "[d]rab dark brown packaging with small, standardised text is designed to be less salient than fully branded tobacco packaging".²¹²⁴ He adds that:

Indeed, the entire purpose of full branding, and the reason that the tobacco industry (and any other consumer product industry) uses brands and logos is to attract the attention of the consumer and to associate the product with the brand. Thus, an effective brand is, by definition, salient. It is doubtful that the tobacco industry would object to plain packaging if they truly believed that consumers did not attend to their full brand and logo and associate them with immediate nicotine reinforcement effects.²¹²⁵

7.766. This notion is echoed in an expert report by Professor Tavassoli, submitted by Australia, in which he argues that the TPP measures can decrease the salience of tobacco packaging (that is, decrease the attention given to tobacco packaging). He submits that attention is used to select information that is necessary and/or influential in subsequent judgements, such that marketers strive to control consumer attention in shopping environments, using vivid packaging and other attention-drawing techniques to encourage consideration of product offerings. He notes that "[c]olours, in particular, are important to marketers because they are an attention-grabbing device". He adds that, in Australia's dark market for tobacco products (and before the TPP measures were introduced), salience could not be effective at the point of sale, but post-purchase usage could be triggered by product packaging's salience.²¹²⁶

7.767. Professor Fischer, for her part, submits that the comparison between the relative salience of branded and plain tobacco packages overlooks the fact that Australian plain packs are "dominated by a large health warning", such that there is a limited possibility for the salience to differ due to the residual difference in brand imagery.²¹²⁷ Professor Steenkamp similarly argues that the absence of GHWs in the examples used by Professor Tavassoli (*inter alia*) overlooks the negative message conveyed on Australian packages by the GHW.²¹²⁸

7.768. In relation to these arguments, we note that the complainants' experts have not contested Australia's depiction of the notion of salience, which refers to the level of attention given (in this context) to tobacco packaging. Moreover, at least some of the complainants' experts have acknowledged the capacity of features of tobacco packaging such as colours or graphics, as specifically discussed by Professor Tavassoli to have a degree of salience²¹²⁹; they instead contest the effect that such branding elements may have given the concurrent presence and salience of GHWs (which they argue, on balance, convey a "dominant message" which is "highly negative"²¹³⁰) and the role of other factors known to affect cessation and relapse generally.²¹³¹ In this respect, we note that Professor Fischer's argument is that, in light of these GHWs, there is a "limited possibility for the salience to differ due to the residual difference in brand imagery"²¹³², and that Professor Steenkamp focuses on the *relative effect* of the positive and negative messages conveyed by the branded and GHW-dominated portions (respectively) of tobacco packaging in light of the differences in size of those portions of the pack face, rather than on the *existence* of both positive and negative messages.²¹³³

²¹²³ See Fischer Report, (Exhibit DOM/HND-7), para. 66; and Brandon Rebuttal Report, (Exhibit AUS-534), para. 24.

²¹²⁴ Brandon Report, (Exhibit AUS-15), para. 76.

²¹²⁵ Brandon Rebuttal Report, (Exhibit AUS-534), para. 25.

²¹²⁶ Tavassoli Report, (Exhibit AUS-10), para. 101.

²¹²⁷ Fischer Rebuttal Report, (Exhibit DOM/HND-11), para. 21.

²¹²⁸ Steenkamp Rebuttal Report, (Exhibit DOM/HND-14), paras. 42-43.

²¹²⁹ See Steenkamp Rebuttal Report, (Exhibit DOM/HND-14), para. 40, acknowledging the role of "vivid use of colours or graphics" as discussed by Professor Tavassoli as a factor of pack salience.

²¹³⁰ Steenkamp Rebuttal Report, (Exhibit DOM/HND-14), section 2.3.2.

²¹³¹ Fischer Rebuttal Report, (Exhibit DOM/HND-11), para. 21.

²¹³² Fischer Rebuttal Report, (Exhibit DOM/HND-11), para. 21. (emphasis added)

²¹³³ Steenkamp Rebuttal Report, (Exhibit DOM/HND-14), paras. 36-39.

7.769. This evidence suggests to us that the use of visual features such as colours or logos is understood to have in principle the capacity to have an impact on the salience of a pack and that a pack's salience is an element of its strength as a conditioned cue. The question at issue is, rather, to what extent the salience of the pack, and therefore its ability to act as a cue, could be at least reduced by the removal of such features on those parts of tobacco packaging that are not covered by GHW requirements. In this respect, while we agree that the size of GHWs reduces the part of the pack on which brand features may be used to achieve salience, relative to a pack that does not have such large GHWs, we are not persuaded that the complainants have demonstrated that this context would be such as to entirely prevent branded features from contributing to the salience of the pack, and its ability to act as a cue.

7.770. We also note Dr Brandon's assertion that plain tobacco packages would have lower "contingency" and would also, by extension, be a weaker cue than branded tobacco packages. Dr Brandon describes contingency in this context as relating to the extent to which the conditioned stimulus (the pack) and the unconditioned stimulus (the cigarette) are "reliably paired", in that there are relatively few unpaired occurrences of the conditioned or unconditioned stimulus without the other.²¹³⁴ Dr Brandon describes how the cigarette itself is reliably paired with smoking, and notes that there is also near-perfect pairing between handling a pack and smoking.²¹³⁵ Elsewhere in his report, Dr Brandon identifies that the contingency is between "viewing one's own brand and smoking".²¹³⁶ In response, Professor Fischer submits, on the basis of a 1995 paper by Dr Brandon, that he:

[A]ccepts a strong contingency ("high correlation with nicotine delivery") between smoking and generic proximal cues, such as cigarettes, ashtrays, matches, and environmental tobacco smoke. Consider cigarettes and plain packs. A smoker will see cigarettes in at least as many situations as s/he sees plain packs. Although cigarettes are seen everywhere, Prof. Brandon accepts in his report and in his 1995 paper that they are a strong – if not the strongest – conditioned cue.²¹³⁷

7.771. Dr Brandon does not address this contention in his second report. However, he submits, in a different context, that the notion that unbranded or minimally-branded cigarettes can be powerful cues to smoke does not indicate that branding is inconsequential, but instead indicates that cigarettes maximize the contingency factor associated with classical conditioning.

7.772. Overall, this evidence suggests that the presence of branding elements on tobacco packaging may increase the contingency of the package and smoking (i.e. the extent to which they are paired), such that the removal of such branding elements would be apt, in turn, to reduce such contingency and thus reduce the ability of the pack to act as a conditioned cue. At the same time, however, we note that Australia's own expert, Dr Brandon, acknowledges that it is a "reasonable argument" that plain packages would themselves acquire conditioned cue status, and that other generic items are also capable of acting as conditioned cues. This suggests that it is recognized that in a market where only plain packs are available, and where these are the only packs universally associated with smoking among all smokers at all times, the removal of the ability of branding elements to act as cues on the pack would not prevent the pack itself from continuing to act at least to some extent as a conditioned cue, to the extent that it is recognized to be closely paired/associated with the act of smoking.

7.773. We also note the evidence before us that underscores the addictive nature of other tobacco products, such as cigars.²¹³⁸ We note in this respect that Parr et al. 2011b addresses perceptions of "ease of quitting" in relation to cigars and cigarillos. It finds that plain packed cigarillos were perceived as "easiest to quit"²¹³⁹ and that this is "driven by low desirability of the [plain packaged]

²¹³⁴ Brandon Report, (Exhibit AUS-15), para. 42.

²¹³⁵ Brandon Report, (Exhibit AUS-15), para. 59.

²¹³⁶ Brandon Report, (Exhibit AUS-15), para. 76.

²¹³⁷ Fischer Rebuttal Report, (Exhibit DOM/HND-11), para. 27.

²¹³⁸ See Cigars: Facts and Figures, (Exhibit AUS-34) ("Cigars contain the same addictive, toxic and carcinogenic compounds found in cigarettes and are not a safe alternative. In fact, a single large cigar can contain as much tobacco as an entire pack of cigarettes.").

²¹³⁹ According to Parr et al. 2011b, "[o]n the measure of ease of quitting, there was no obvious consistency in how the different packs were ranked on perceived ease of quitting and the [plain] pack was seen

pack".²¹⁴⁰ As regards premium cigars, Parr et al. 2011b concludes that "[f]or both types of cigar smoker there was little perceived need to 'quit' smoking"²¹⁴¹ but finds that there were differences in this respect "across the product and audience range":

For example, whereas less frequent premium cigar smokers felt the plain packaging significantly lowers the appeal and suitability for specific occasions (such as gift giving) and were thus more likely to quit, frequent premium cigar smokers felt largely unaffected by plain packaging and therefore unlikely to quit because of it."²¹⁴²

7.774. On the basis of the foregoing, overall, we are not persuaded that the complainants have demonstrated that plain packaging of tobacco products, including cigars, is not capable of influencing smoking cessation or relapse by acting on the ability of the pack to act as a conditioned cue for smoking and thus affect the ability of smokers to quit smoking, or to remain quit.

7.775. At the same time, as in the context of initiation, we acknowledge the observation that the "carry-through" effect from perceptions of the product, in this case tobacco products, to attitudes towards it and ultimately, purchase decisions, is not automatic. In the context of cessation and relapse, both Professors Ajzen (for the complainants) and Slovic (for Australia) highlight the difficulties of quitting smoking²¹⁴³; Professor Ajzen characterizes this difficulty as a "behavioural control" factor, which in his view is the best predictor of intentions to quit within the construct of the TPB.²¹⁴⁴ From this Professor Ajzen concludes that, "[g]iven the relatively low empirical intention-behavior correlation, one would expect that even if research were to show that plain packaging lowers intentions to smoke or raises intentions to quit, these changes may not produce changes in actual behavior".²¹⁴⁵

7.776. As we noted in the context of initiation, we do not understand the assumption underlying the design and structure of the TPP measures to be that an impact on proximal outcomes, including a reduction in the ability of a pack to act as a conditioned cue following the introduction of tobacco plain packaging, would be expected *in all* cases to lead to a change in smoking behaviours. Rather, as discussed above, we understand the assumption underlying the operation of the TPP measures to be that at least some consumers would be influenced in their smoking behaviours, and be more inclined to quit (or disinclined to relapse, as the case may be) if the ability of the tobacco package to act as a conditioned cue is reduced through tobacco plain packaging. The fact that this measure is, by design, one element in a set of tobacco control measures designed to act on various aspects of the complex and multifaceted decision-making involved in the decision to smoke, including restrictions on the advertisement and promotion of tobacco products²¹⁴⁶ and restrictions on the sale of tobacco products (including point of sale restrictions)²¹⁴⁷ – is consistent with this understanding.

Conclusion

7.777. In light of the above, we are not persuaded that the complainants have shown that the TPP measures would not be capable of reducing the appeal of tobacco products, and thereby contribute to Australia's objective of improving public health by reducing the use of, and exposure to, tobacco products.

to contain cigarillos that were easiest to quit. This result appeared to be influenced by varied interpretation of the question, as seen for RYO smokers." Parr et al. 2011b, (Exhibits AUS-219, JE-24(50)), p. 9.

²¹⁴⁰ Parr et al. 2011b, (Exhibits AUS-219, JE-24(50)), p. 11.

²¹⁴¹ "They did not see themselves as 'addicted' to their habit in the same way they perceived cigarette smokers to be 'addicted'. As there was no perceived 'addiction' there was also no need to quit. Both types of cigar smoker also had low perceptions of any health risks connected with their cigar smoking, which further contributed to the lack of perceived need to quit. As most did not smoke daily but rather weekly or once every two weeks they also did not feel their frequency of smoking warranted concern about health implications or a need to quit." Parr et al. 2011b, (Exhibits AUS-219, JE-24(50)), p. 10.

²¹⁴² Parr et al. 2011b, (Exhibits AUS-219, JE-24(50)), p. 10.

²¹⁴³ Ajzen Report, (Exhibit DOM/HND/IDN-3), paras. 102-104; and Slovic Report, (Exhibit AUS-12), paras. 53-55.

²¹⁴⁴ See generally Ajzen Report, (Exhibit DOM/HND/IDN-3), paras. 96-104.

²¹⁴⁵ Ajzen Report, (Exhibit DOM/HND/IDN-3), para. 105.

²¹⁴⁶ See section 2.2.2 above.

²¹⁴⁷ See section 2.2.4 above.

7.778. Rather, we find that credible evidence has been presented, emanating from recognized sources, that plain packaging of tobacco products may reduce their appeal, by minimizing the ability of various branding features to create positive associations with tobacco products that could have an influence on smoking behaviours, including smoking initiation, cessation and relapse.

7.779. In addition, we recall that we also have before us evidence relating to the actual application of the TPP measures since their entry into force, including empirical studies specifically addressing the impact of plain packaging on the appeal of tobacco products, which will be considered in section 7.2.5.3.6 below, and given appropriate weight. We therefore do not seek to draw, at this stage of our analysis, any overall conclusion on the impact of the TPP measures on the appeal of tobacco products, and the extent to which any reduction in such appeal arising from the TPP measures contributes to Australia's objective of improving public health by reducing the use of, and exposure to, tobacco products.

7.2.5.3.5.3 Second mechanism: impact of the TPP measures on the effectiveness of GHWs

7.780. As described above, the second "mechanism" through which the TPP measures are designed to contribute to the achievement of their objective is by "increas[ing] the effectiveness of health warnings on the retail packaging of tobacco products", which, in turn, is expected to influence smoking behaviours and thereby contribute to a reduction in the use of, and exposure to, tobacco products.

7.781. The complainants contest the ability of the TPP measures to have an effect on this "mechanism". Australia responds that the TPP measures increase the visual attention paid to health warnings, make them more prominent and salient²¹⁴⁸, and increase perceptions about the believability and seriousness and enhances recall of health warnings.²¹⁴⁹ Australia further submits that increases in the effectiveness of health warnings affect consumer intention and behaviour.²¹⁵⁰

Main arguments of the parties

7.782. Honduras argues that there is no basis for Australia to consider that plain packaging "will enhance the visibility of the on-pack graphic health warning"²¹⁵¹ which "are very visible". It adds that "empirical evidence demonstrates that Australian adolescents are well-aware of the health risks associated with smoking, and, in any event, their decision to smoke is driven by other factors, such as peer pressure, whether they are sensation-seeking, and are responsive to reward stimuli".²¹⁵² Honduras argues that most adolescents, when experimenting with smoking, are likely not even to see a tobacco package, as they obtain cigarettes from their friends usually when the cigarette has already been removed from its package.²¹⁵³ Honduras refers to an expert report by Professor Viscusi, in which he argues that increasing the effectiveness of warnings is only of behavioural consequence if consumers have an informational deficit and do not find existing warning to be credible.²¹⁵⁴ Honduras refers to Professor Viscusi's observation that Australians are aware of the risks and personalize them, and that it is highly unlikely that increasing warning size or prominence will have any influence on smoking behaviours or consumer perceptions of health consequences.²¹⁵⁵

7.783. Honduras refers to the expert report by Professor Steinberg, which questions policies seeking to increase adolescent awareness of the health risks of smoking, with reference to recent research demonstrating that Australian adolescents are well aware of and understand the risks of smoking and that "it is difficult to imagine how the introduction of plain packaging could – even conceptually – increase this awareness".²¹⁵⁶ Honduras also submits that "these policies fail to

²¹⁴⁸ Australia's first written submission, paras. 176-179.

²¹⁴⁹ Australia's first written submission, paras. 180-181.

²¹⁵⁰ Australia's first written submission, paras. 182-186.

²¹⁵¹ Honduras's first written submission, para. 419.

²¹⁵² Honduras's first written submission, para. 419.

²¹⁵³ Honduras's first written submission, para. 419.

²¹⁵⁴ Honduras's first written submission, paras. 419 fn 349.

²¹⁵⁵ Honduras's first written submission, para. 419 fn 349.

²¹⁵⁶ Honduras's first written submission, para. 417 (referring to Steinberg Report, (Exhibit DOM/HND-6), para. 44).

consider the fact that an adolescent's decisions to engage in a potentially dangerous activity is based not only on the *perceived risks* of the activity but on its *perceived benefits*, and is largely influenced by his particular psychological characteristics as well as his emotional and social context".²¹⁵⁷

7.784. The Dominican Republic argues that the TPP literature "fail[s] to assess the effect of plain packaging on packs dominated by a 75 percent graphical health warning".²¹⁵⁸ The Dominican Republic submits that with a large GHW, there is a small amount of space available for branding, which is likely to have a small impact, if any, on the outcomes measured in the TPP studies. The Dominican Republic submits that "more fundamentally, the dominant negative imagery resulting from a large GHW will also have an impact on these outcomes".²¹⁵⁹

7.785. The Dominican Republic further submits that adolescents will continue to engage in smoking behaviour, even where it is "abundantly clear that adolescents are aware of and understand the risks of smoking and know that it has harmful long-term health consequences".²¹⁶⁰ Thus, the Dominican Republic submits, with reference to the expert report of Professor Steinberg, that "even if plain packaging were shown to increase the prominence of health warnings (which recent research in fact suggests is not the case), this would ... have no influence on adolescent experimentation with, or use of, tobacco products".²¹⁶¹

7.786. Cuba argues that "[o]ne glance at any current Australian [GHW] should suffice to refute [Australia's] claim" concerning the effectiveness of GHWs.²¹⁶² Noting that the GHW covers 75% of the front face of the pack (in the case of cigarette packaging) and "is designed to make an impact and hold consumer attention", Cuba argues that the "prominence and powerful design" of these GHWs makes it "implausible to suggest that consumers of tobacco products in Australia will fail to notice them or that any Australian consumers who do somehow fail to notice these warnings will have their capricious attention appropriately re-directed because of plain packaging".²¹⁶³ Cuba refers to a 2013 study which "acknowledged that the findings in the literature relating to the [GHW] Effectiveness Claim are 'mixed'"²¹⁶⁴ and to an expert report by Professor Viscusi, which concludes that "[t]he findings from the studies discussed ... provide no basis for concluding that plain packs make warnings more effective". Cuba also refers to a report finding that once the GHW reaches 75% pack coverage, it "stands out" to the same extent on plain and branded packaging.²¹⁶⁵ Cuba also refers to Professor Viscusi's discussion of a 2011 study which "concluded that '[t]aken together with the existing literature, it is plausible that plain packaging will increase the salience and impact of health warnings in those yet to establish a smoking habit'".²¹⁶⁶ Cuba points out that the authors "accept that 'it is unclear whether increased visual attention to health warnings will translate to actual differences in cigarette smoking behaviour'".²¹⁶⁷

7.787. Cuba submits that, in any case, increased attention to health warnings does not necessarily imply that there will be significant changes in smoking rates in Australia.²¹⁶⁸ For Cuba, "[t]here is no basis to conclude that the attention accorded to the health warning on a branded pack is inadequate for the necessary information about risk to be conveyed", and "[n]othing in the literature suggests otherwise".²¹⁶⁹ Cuba argues, with reference to Professor Viscusi's conclusions, that acting by increasing risk awareness can have little, if any, incremental effect on smoking

²¹⁵⁷ Honduras's first written submission, para. 417.

²¹⁵⁸ Dominican Republic's first written submission, para. 608-609.

²¹⁵⁹ Dominican Republic's first written submission, para. 610.

²¹⁶⁰ Dominican Republic's first written submission, para. 695

²¹⁶¹ Dominican Republic's first written submission, para. 695.

²¹⁶² Cuba's first written submission, para. 223.

²¹⁶³ Cuba's first written submission, para. 223. See also Cuba's first written submission, para. 349.

²¹⁶⁴ Cuba's first written submission, para. 224 (referring to Stead et al. 2013, (Exhibit CUB-58)).

²¹⁶⁵ Cuba's first written submission, para. 224 (referring to Parr et al. 2011b, (Exhibits AUS-219, JE-24(50)), as discussed in Viscusi Report, (Exhibit UKR-8), para. 96).

²¹⁶⁶ Cuba's first written submission, para. 225 (referring to Munafò et al. 2011, (Exhibits AUS-199, JE-24(47)), p. 1508).

²¹⁶⁷ Cuba's first written submission, para. 225 (referring to Munafò et al. 2011, (Exhibits AUS-199, JE-24(47)), p. 1509).

²¹⁶⁸ Cuba's first written submission, para. 226 (referring to Munafò et al. 2011, (Exhibits AUS-199, JE-24(47)), p. 1509, Table 1). See also Cuba's first written submission, para. 349.

²¹⁶⁹ Cuba's first written submission, para. 226 (referring to Viscusi Report, (Exhibit UKR-8), para. 71).

behaviour in Australia, given that the overwhelming majority of the population is already aware of the relevant risks.²¹⁷⁰

7.788. Cuba refers to the report by Australia's expert, Professor Tavassoli and considers that its conclusion that packaging can increase primary demand by inhibiting the effectiveness of GHWs is untenable. Cuba elaborates that there is no evidence to show that without plain packaging, GHWs will be less effective or visible. For Cuba, the appearance of a trademark on the remaining 25% of the front part of the pack will not have "any appreciable effect on consumers' appreciation of the health risks of tobacco use".²¹⁷¹

7.789. Indonesia's arguments concerning whether the TPP measures increase the effectiveness of GHWs relate to post-implementation evidence and are addressed in section 7.2.5.3.6.1 below.²¹⁷²

7.790. Australia argues that "[s]tudies into the effectiveness of graphic health warnings indicate that effectiveness of the warnings can be greatly reduced by distraction caused by pack design". Australia contends that "[p]ackaging elements compete with health warning labels, drawing consumer attention away from the mandated health warnings, and also adversely affect consumer perceptions of risk about the severe health consequences of tobacco use".²¹⁷³

7.791. Australia does not agree with the complainants that Australians are fully informed of the health risks of smoking. Referring to the expert report by Professor Slovic, Australia argues that "knowledge of risk is 'a multilayered concept' and studies of Australians found that even though people are sometimes 'aware' that smoking can lead to adverse health consequences, they do not have even a basic understanding of the nature and severity of these consequences".²¹⁷⁴ This is "further compounded by what Professor Slovic terms 'optimism bias', whereby those who exhibit an awareness of health risks caused by smoking often think that it applies to other people more than themselves".²¹⁷⁵ In Australia's view, "informed, rational decision making requires deeper levels of knowledge about the risks of tobacco use than many Australians currently have".²¹⁷⁶

7.792. Australia adds that it has improved the Australian population's knowledge of the risks of smoking through the introduction of GHWs, but that this measure alone is not enough to ensure that Australians are fully informed of the risks of tobacco use. In Australia's view, branding and package design of tobacco products "can exert powerful influences on behaviour which may not be consciously recognised, but which can influence understandings and perceptions of risks of smoking".²¹⁷⁷ Australia contends that misperception of risk is compounded in relation to non-cigarette tobacco products, as cigars are perceived as a "safe alternative" because they are considered more natural and less harmful than cigarettes, despite delivering nicotine in concentrations comparable to cigarettes and smokeless tobacco.²¹⁷⁸ Australia argues that the TPP measures were "designed to standardize pack elements which suppress risk perception and to ensure that the warnings on packs were both noticeable and presented in such a way as to have an influence on consumer perceptions and smoking behaviour. Australia points out that "adolescent experimentation with smoking usually happens without conscious consideration of the risks", and adds that "even for addicted smokers, branding and packaging designs can draw attention away from, or positively undermine, health warnings on packs".²¹⁷⁹

²¹⁷⁰ Cuba's first written submission, para. 227.

²¹⁷¹ Cuba's second written submission, para. 307.

²¹⁷² See Indonesia's response to Panel question No. 46; and Indonesia's comments on Australia's response to Panel question No. 170.

²¹⁷³ Australia's first written submission, para. 169.

²¹⁷⁴ Australia's first written submission, para. 171 (referring to Slovic Report, (Exhibit AUS-12), para. 96).

²¹⁷⁵ Australia's first written submission, para. 171 (referring to Slovic Report, (Exhibit AUS-12), para. 92).

²¹⁷⁶ Australia's first written submission, para. 171. (footnote omitted)

²¹⁷⁷ Australia's first written submission, para. 172 (referring to Slovic Report, (Exhibit AUS-12), para. 102).

²¹⁷⁸ Australia's first written submission, para. 173 (referring to NCI Tobacco Control Monograph No. 9, (Exhibits AUS-33, DOM-149)).

²¹⁷⁹ Australia's first written submission, para. 174 (referring to Camel Advertising Development White Paper, (Exhibit AUS-197)).

7.793. Australia also adds that it adopted "[o]ptimal combinations" of the size of GHWs with TPP following testing and recommendations from commissioned research and that as a result, the TPP measures increase the effectiveness of health warnings by increasing the visual attention paid to them, making them more prominent and salient, removing the distraction caused by branding, increasing perceptions about the believability and seriousness of health warnings; and increasing consumer recall of health warnings to foster a deeper understanding of the health effects of tobacco use.²¹⁸⁰

7.794. Australia submits that the overall weight of the evidence "strongly indicates that tobacco plain packaging leads to a greater noticeability of health warnings, particularly when operating together with the increased size of the graphic health warnings".²¹⁸¹ This is largely because the visual interference and competition of brand images are greatly reduced.²¹⁸² For Australia, "[b]y reducing the positive imagery of tobacco product branding and innovative packaging, there is strong evidence to suggest that both users and non-users of tobacco products will be much more likely to think about the information conveyed by health warnings, thereby deepening consumer understanding about the severe consequences of tobacco addiction and use".²¹⁸³

7.795. Australia further submits that, by removing competition and interference between health warnings and positive images conveyed on and by tobacco packaging, tobacco plain packaging is likely to increase the believability and seriousness of the messages contained in the health warnings.²¹⁸⁴ Likewise, the TPP measures "have also been found to increase consumer recall of health warnings on plain packs, compared with recall of health warnings on non-plain packaged packs".²¹⁸⁵ Australia submits that *any* increase in recall, believability and/or seriousness of health warnings will contribute to negating the positive associations conveyed by pack design, including brand imagery.²¹⁸⁶

7.796. Australia also argues that this evidence demonstrates that increased effectiveness of health warnings influences potential consumers to resist the uptake of tobacco products and influences current consumers to quit smoking.²¹⁸⁷

Analysis by the Panel

7.797. At the outset, we note that the question before us is not whether GHWs are an effective tobacco control measure, either in principle or in the enlarged form that is required in Australia by the *Competition and Consumer (Tobacco) Information Standard 2011* (Cth)²¹⁸⁸ (Information Standard), implemented contemporaneously with the TPP measures.²¹⁸⁹

7.798. We note in this respect that GHWs are recognized as a legitimate tobacco control measure under the FCTC. Article 11(1)(b) of the FCTC provides that each Party shall adopt and implement effective measures to ensure that "each unit packet and package of tobacco products and any outside packaging and labelling of such products also carry health warnings describing the harmful effects of tobacco use, and may include other appropriate messages". This provision further states

²¹⁸⁰ Australia's first written submission, para. 175.

²¹⁸¹ Australia's first written submission, para. 176.

²¹⁸² Australia's first written submission, para. 176.

²¹⁸³ Australia's first written submission, para. 178.

²¹⁸⁴ Australia's first written submission, para. 180 (referring to Fong Report, (Exhibit AUS-14), para. 336).

²¹⁸⁵ Australia's first written submission, para. 180 (referring to Beede and Lawson, (Exhibits AUS-202, JE-24(6)); and Al-hamdani 2013, (Exhibits AUS-203, JE-24(1))).

²¹⁸⁶ Australia's first written submission, para. 181.

²¹⁸⁷ Australia's first written submission, para. 182. Australia elaborates on this argument with respect to evidence post-dating the implementation of the TPP measures concerning consumers' responses to GHWs. Australia's first written submission, paras. 183-184 (referring to Wakefield et al. 2015, (Exhibits AUS-206, DOM-306); Dunlop et al. 2014, (Exhibits AUS-207, HND-132, DOM-199); Fong Report, (Exhibit AUS-14), para. 432; and Miller et al. 2015, (Exhibits AUS-102, DOM-315)). This evidence will be considered in section 7.2.5.3.6 below.

²¹⁸⁸ Information Standard, (Exhibits AUS-128, JE-8).

²¹⁸⁹ See section 2.2.1 above.

that these warnings "may be in the form of or include pictures or pictograms".²¹⁹⁰ The Article 11 FCTC Guidelines stipulate that:

Globally, many people are not fully aware of, misunderstand or underestimate the risks for morbidity and premature mortality due to tobacco use and exposure to tobacco smoke. Well-designed health warnings and messages on tobacco product packages have been shown to be a cost-effective means to increase public awareness of the health effects of tobacco use and to be effective in reducing tobacco consumption. Effective health warnings and messages and other tobacco product packaging and labelling measures are key components of a comprehensive, integrated approach to tobacco control.²¹⁹¹

7.799. Indeed, Honduras and Indonesia note their own domestic requirements in respect of health warnings and their use on tobacco products within their respective territories.²¹⁹²

7.800. We also note that paragraph 46 of the Article 11 FCTC Guidelines states that the adoption of plain packaging measures²¹⁹³ "may increase the noticeability and effectiveness of health warnings and messages, prevent the package from detracting attention from them, and address industry package design techniques that may suggest that some products are less harmful than others".²¹⁹⁴

7.801. The point of contention is whether the TPP measures can increase the effectiveness of GHWs in Australia, as envisaged by section 3(2) of the TPP Act, and thereby have an impact on smoking behaviours and contribute to Australia's objective of improving public health by reducing the use of, and exposure to, tobacco products.

7.802. The TPP Act, in identifying an "increase [in] the effectiveness of [GHWs] on the retail packaging of tobacco products" as one of the "mechanisms" through which the TPP measures will contribute to their objective, does not elaborate upon how "effectiveness" is to be understood in that context.

7.803. We note, in this respect, that the Article 11 FCTC Guidelines state, under the heading "Developing Effective Packaging and Labelling Requirements", that:

Well-designed health warnings and messages are part of a range of effective measures to communicate health risks and to reduce tobacco use. Evidence demonstrates that the effectiveness of health warnings and messages *increases with their prominence*. In comparison with small, text-only health warnings, *larger warnings with pictures are more likely to be noticed, better communicate health risks, provoke a greater emotional response and increase the motivation of tobacco users to quit and to decrease their tobacco consumption*. Larger picture warnings are also more likely to retain their effectiveness over time and are particularly effective in communicating health effects to low-literacy populations, children and young people. *Other elements that enhance effectiveness include locating health warnings and messages on principal display areas, and at the top of these principal display areas; the use of colour rather than just black and white; requiring that multiple health*

²¹⁹⁰ FCTC, (Exhibits AUS-44, JE-19), Article 11(1)(b) and Article 11(1)(b)(v), respectively.

²¹⁹¹ Article 11 FCTC Guidelines, FCTC/COP/3(10), (Exhibit JE-20), Annex, para. 3. These Guidelines address health warnings *inter alia* in paras. 7-31.

²¹⁹² Honduras's first written submission, para. 115 (referring to Republica de Honduras, Ley Especial para el Control del Tabaco, Decreto 92-2010, Diario Oficial Num. 32, 296 (21 August 2010), (Exhibit HND-24)); and Indonesia's first written submission, para. 6 (referring to Australian Broadcasting Corporation News, "Indonesia Pushes for Graphic Health Warnings on Cigarette Packs", (25 June 2014), available at: <http://www.abc.net.au/news>, accessed 27 September 2015, (Exhibit IDN-1)).

²¹⁹³ We recall that such measures are elaborated as being those that "restrict or prohibit the use of logos, colours, brand images or promotional information on packaging other than brand names and product names displayed in a standard colour and font style". See Article 11 FCTC Guidelines, FCTC/COP/3(10), (Exhibit JE-20), Annex, para. 46.

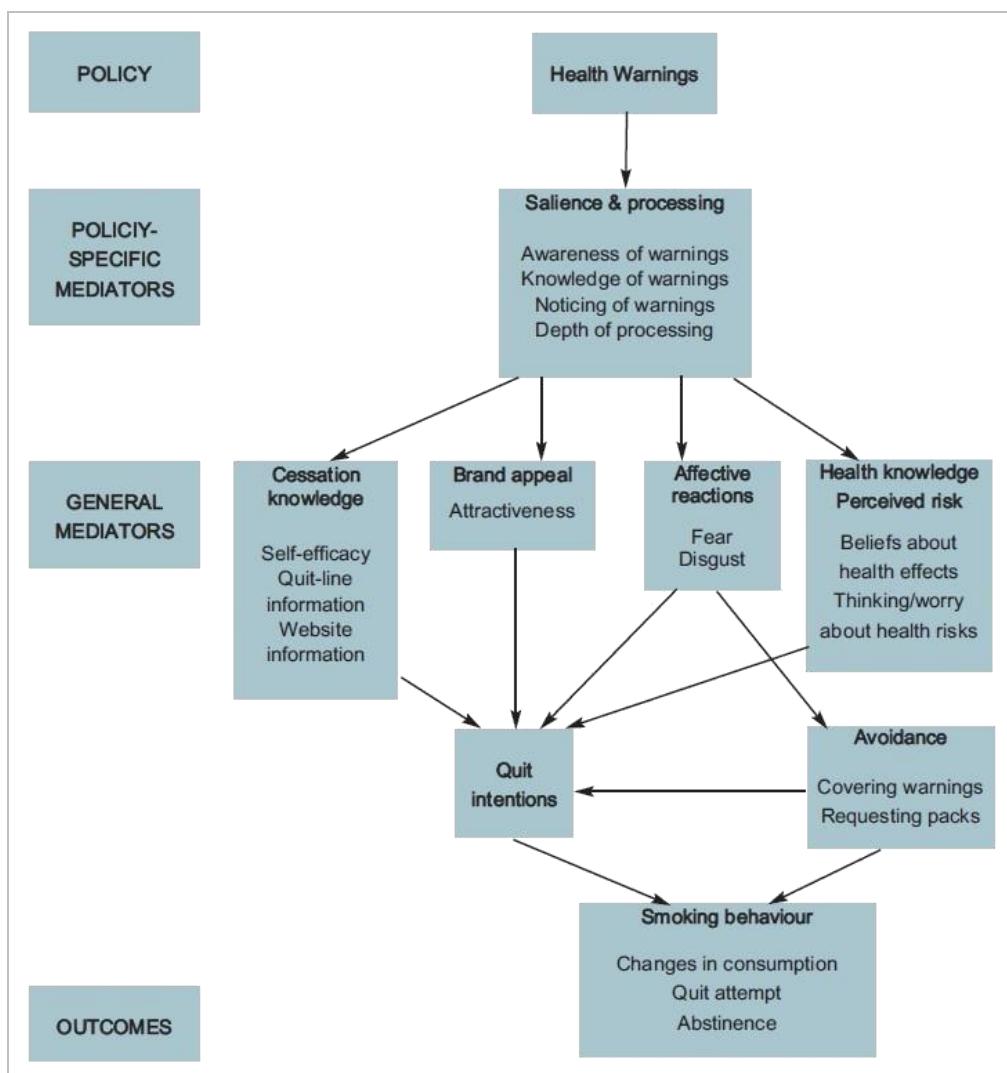
²¹⁹⁴ See Article 11 FCTC Guidelines, FCTC/COP/3(10), (Exhibit JE-20), Annex, para. 46.

*warnings and messages appear concurrently; and periodic revision of health warnings and messages.*²¹⁹⁵

7.804. We understand this passage to indicate that the effectiveness of GHWs may be determined with reference to their prominence, which affects their noticeability, their ability to communicate health risks and provoke an emotional response, and the motivation of smokers to quit or decrease consumption. The location, appearance and content of GHWs are also acknowledged as relevant to their effectiveness.

7.805. Australia's expert Professor Chaloupka depicts a conceptual model of the pathways through which GHWs would ultimately lead to reductions in smoking prevalence, which "emphasizes the importance of the salience and processing of health warnings, which affects their impact on perceived risk and other health knowledge, brand appeal, and emotional responses, all of which contribute to quit intentions and other changes in smoking behavior, which will eventually lead to increased quit attempts, reductions in consumption, and successful cessation".²¹⁹⁶ Professor Chaloupka depicts this as follows:

Figure 14: Professor Chaloupka's conceptual framework for the evaluation of health warning policies



Source: Chaloupka Public Health Report, (Exhibit AUS-9), p. 71.

²¹⁹⁵ Article 11 FCTC Guidelines, FCTC/COP/3(10), (Exhibit JE-20), Annex, para. 7. (emphasis added)

²¹⁹⁶ Chaloupka Public Health Report, (Exhibit AUS-9), para. 89, Figure 5.

7.806. This model identifies cessation knowledge, brand appeal, affective reactions, and health knowledge/risk perception, as relevant factors in an assessment of the effectiveness of GHWs. Such factors are expected to have a bearing on quit intentions (or, in respect of affective reactions, avoidance) and, ultimately, smoking behaviours. There appears to be a high degree of consistency between this model and the elements set out in the Article 11 FCTC Guidelines which have a bearing on the effectiveness of GHWs. In addition, we note that this conceptual framework has been endorsed by the International Agency for Research on Cancer (IARC), which was established by the WHO, in a handbook on tobacco control entitled *Methods for Evaluating Tobacco Control Policies*²¹⁹⁷ (2008 IARC Handbook).

7.807. We note that in a 2008 evaluation of the effectiveness of GHWs in Australia, commissioned by Australia's DHA, participants were asked questions that sought to ascertain the salience and processing of health warnings, their cessation knowledge, affective reactions to GHWs, and their knowledge of the health effects and their perception of the risk associated with tobacco use.²¹⁹⁸ The measurement of such elements through these questions is consistent with the elements identified as relevant in the FCTC and by Professor Chaloupka.²¹⁹⁹

7.808. We further note that the complainants have not directly addressed the relevance of these elements to an assessment of the effectiveness of GHWs. The complainants' expert Professor Viscusi argues that "[i]ncreasing the effectiveness of warnings as measured by 'recall, attention, seriousness and believability' is only of behavioral consequence if consumers currently have an informational deficit and do not find existing warnings credible" which, he argues, is not established by the studies he critiques in his report.²²⁰⁰ He argues that "whether plain packs will enhance the effectiveness of warnings on risk beliefs depends on how much people know about the risks of smoking and how much having warnings on plain packs rather than regular packs will alter these risk beliefs".²²⁰¹ Professor Viscusi's statements in this respect suggest that, while he considers that they are not always of behavioural consequence, he does not suggest that the "recall ... seriousness and believability" of, and "attention" to, GHWs, are not relevant for the purpose of understanding the effectiveness of GHWs.

7.809. Furthermore, we note that neither the complainants, nor their experts, seem to contest the notion that the effect of GHWs on health knowledge and/or risk perception is also relevant – indeed, the fact that the complainants direct much of their argumentation towards the notion that health awareness and risk perception is already high in Australia (and that this cannot be further improved by increasing the effectiveness GHWs, as we discuss in the next section) suggests that the complainants do not dispute the relevance of these elements.

7.810. As we understand it, what the complainants in essence contest is the ability of the TPP measures to have an impact on those factors that affect the effectiveness of GHWs, including their visibility and noticeability (in light in particular of the size of GHWs in Australia), their ability to increase risk awareness (which the complainants argue is already very high in Australia) and, as a consequence, the ability of the TPP measures to have an impact on smoking behaviours by increasing the effectiveness of GHWs. We consider each of these points in turn.

Impact of plain packaging on the salience and processing of GHWs

7.811. Honduras argues that there is no basis for Australia to consider that plain packaging will enhance the visibility of on-pack GHWs.²²⁰² The Dominican Republic argues in particular that the TPP literature fails to assess the effect of tobacco plain packaging on packs dominated by a 75%

²¹⁹⁷ 2008 IARC Handbook, (Exhibits AUS-602, DOM-368), p. 296. We note that this report contains "the views and opinions of an IARC Working Group on Methods for Evaluating Tobacco Control Policies", among whom were Professor Chaloupka and Professor Fong. This report also notes that "[o]ther psychosocial variables, such as social norms and beliefs about the tobacco industry, could also be added to this model".
Ibid. p. 298.

²¹⁹⁸ Shanahan and Elliott 2008, (Exhibit CUB-15), pp. 196-224.

²¹⁹⁹ See paras. 7.798-7.804 and 7.806 above.

²²⁰⁰ Viscusi Report, (Exhibit UKR-8), para. 21.

²²⁰¹ Viscusi Report, (Exhibit UKR-8), para. 22. Professor Steinberg also makes reference to Australian adolescents' pre-existing knowledge of the risks of tobacco use. See Steinberg Report, (Exhibit DOM/HND-6), para. 44.

²²⁰² Honduras's first written submission, para. 419.

GHW.²²⁰³ Cuba submits that the 75% GHWs are "designed to make an impact and hold consumer attention" and, "[g]iven the prominence and powerful design of these [GHWs], it is implausible to suggest that consumers of tobacco products in Australia will fail to notice them or that any Australian consumers who do somehow fail to notice these warnings will have their capricious attention appropriately re-directed because of plain packaging".²²⁰⁴

7.812. Australia responds that a number of studies support the contrary view that plain packaged tobacco products will increase the visual attention paid to health warnings, thereby making them more prominent and salient.²²⁰⁵ Australia further argues that the TPP measures increase perceptions about the believability and seriousness of health warnings, and enhance their recall.²²⁰⁶ Australia also argues that these effects are present across both adults and youth.²²⁰⁷

7.813. The evidence before us in respect of the impact of tobacco plain packaging on the effectiveness of GHWs includes certain studies that are part of the body of literature discussed above as the TPP literature as well as evidence relating to the application of the TPP measures since their entry into force. In this section, we focus on evidence relating to the design and structure of the TPP measures, with respect to their aptitude to contribute to Australia's objective of reducing the use of, and exposure to, tobacco products by increasing the effectiveness of GHWs. We consider relevant evidence relating to the *application* of the TPP measures, including evidence in respect of their effect on increasing the effectiveness of GHWs, in section 7.2.5.3.6.1 below.²²⁰⁸

7.814. Australia's expert Professor Fong identifies a number of studies relating both to the impact of branding features as a potential source of distraction from GHWs, and to the expected impact of tobacco plain packaging on the salience, visibility and noticeability of GHWs, including the visual attention paid to them, their cognitive processing and their recall. On the basis of these studies, he submits that "it is reasonable to consider that the tobacco plain packaging measure will increase the effectiveness of health warnings on the retail packaging of tobacco products, including cigarettes and cigar products".²²⁰⁹ In another expert report submitted by Australia, Dr Biglan, referencing many of the same studies as well as certain others submitted in these proceedings, concludes that "across a wide variety of measures, subject populations (country, smoker/non-smoker, or adolescent/adult), investigators, and pack variations, the impact of health warnings strengthens when packs have no brand features".²²¹⁰ Expert reports by Professors

²²⁰³ Dominican Republic's first written submission, para. 608.

²²⁰⁴ Cuba's first written submission, para. 223. See also Indonesia's first written submission, para. 13; and second written submission, paras. 186-187.

²²⁰⁵ Australia's first written submission, paras. 176-179.

²²⁰⁶ Australia's first written submission, paras. 180-181.

²²⁰⁷ Australia's first written submission, paras. 177 and 179 (referring to Galloppel-Morvan et al. 2010, (Exhibit AUS-176); Environics 2008a, (Exhibits AUS-179, JE-24(19)); Moodie and Mackintosh 2013, (Exhibits AUS-185, JE-24(43)); and Mays et al. 2015, (Exhibit AUS-201)).

²²⁰⁸ Indonesia focuses its arguments in respect of the effectiveness of GHWs on post-implementation evidence. See Indonesia's response to Panel question No. 146; and Indonesia's comments on Australia's response to Panel question No. 170, para. 47.

²²⁰⁹ Fong Report, (Exhibit AUS-14), paras. 355-356. Professor Fong's conclusion follows his description of the results of a number of studies that are on the record of these proceedings, including those discussed in the following papers: Moodie et al. 2011, (Exhibits AUS-155, JE-24(44)); Moodie and Mackintosh 2013, (Exhibits AUS-185, JE-24(43)); CBRC 1992, (Exhibits AUS-198, JE-24(13)); d'Avernas et al. 1997, (Exhibit AUS-144); McCool et al. 2012, (Exhibit JE-24(41)); Van Hal et al. 2012, (Exhibits AUS-161, JE-24(60)); Munafò et al. 2011, (Exhibits AUS-199, JE-24(47)); Maynard et al. 2013, (Exhibits AUS-200, JE-24(40)); Northrup and Pollard 1995, (Exhibit JE-24(48)); Galloppel-Morvan et al. 2010, (Exhibit AUS-176); Parr et al. 2011b, (Exhibits AUS-219, JE-24(50)); Beede and Lawson 1992, (Exhibits AUS-202, JE-24(6)); Al-hamdan 2013, (Exhibits AUS-203, JE-24(1)); Germain et al. 2010, (Exhibits AUS-154, JE-24(25)); Goldberg et al. 1999, (Exhibits AUS-209, JE-24(27)); Environics 2008a, (Exhibits AUS-179, JE-24(19)); Environics 2008b, (Exhibit JE-24(18)); Borland et al. 2009a, (Exhibit AUS-210); Borland et al. 2009b, (Exhibit AUS-211); Hammond et al. 2007, (Exhibit AUS-212); Borland 1997, (Exhibit AUS-213); Partos et al. 2013, (Exhibit AUS-204); Borland and Hill 1997, (Exhibit AUS-208); Hammond et al. 2006, (Exhibit AUS-190); and McCaul et al. 2006, (Exhibit AUS-205). Fong Report, (Exhibit AUS-14), paras. 314-354.

²²¹⁰ Biglan Report, (Exhibit AUS-13), para. 175. Dr Biglan's conclusion follows his consideration of the results of studies documented in the following papers, among others: Beede and Lawson 1992, (Exhibits AUS-202, JE-24(6)); Borland et al. 2013, (Exhibits AUS-136, JE-24(9)); Environics 2008a, (Exhibits AUS-179, JE-24(19)); Galloppel-Morvan et al. 2010, (Exhibit AUS-176); Germain et al. 2010, (Exhibits AUS-154, JE-24(25)); Goldberg et al. 1999, (Exhibits AUS-209, JE-24(27)); Hammond et al. 2013b, (Exhibits AUS-158, JE-24(31)); Hammond et al. 2009, (Exhibits AUS-166, JE-24(29)); Hammond and Parkinson, (Exhibit

Samet, Tavassoli, and Slovic, submitted by Australia, also refer to a number of studies in the context of their assertions that tobacco plain packaging increases the noticeability and salience of GHWs, and changes the attention paid to the risks of tobacco use; a number of these studies are on the record of these proceedings.²²¹¹

7.815. We note that in this context²²¹², Australia and its experts have provided, and refer to, a number of studies which indicate that the *visual attention* paid to GHWs increases in the presence of plain packaging.²²¹³

7.816. Of these papers, five²²¹⁴ are critiqued in each of the reviews by Kleijnen Systematic Reviews²²¹⁵, Professor Inman et al.²²¹⁶, and Professor Klick²²¹⁷; one is critiqued only by Professor Inman et al. and Professor Klick.²²¹⁸ Two are not considered in any of the complainants' three literature reviews.²²¹⁹ The critiques of the complainants' experts regarding these particular studies largely follow the criticisms that they make of the TPP literature in general, which we have highlighted above; namely, the (in)ability of the designs of these studies to inform causal relationships with respect to the measured outcome (in this case, the visual attention paid to GHWs); the presence of threats to the internal, external, and construct validity of the studies, including possible demand effects and/or SDR; and the fact that the studies do not measure smoking behaviour.

AUS-165); Hoek et al. 2011, (Exhibits AUS-148, JE-24(34)); Moodie et al. 2011, (Exhibits AUS-155, JE-24(44)); Rousu and Thrasher 2013, (Exhibits AUS-228, JE-24(54)); Thrasher et al. 2011, (Exhibits AUS-229, JE-24(58)); Wakefield et al. 2008, (Exhibits AUS-149, JE-24(62)). See Biglan Report, (Exhibit AUS-13), para. 174.

²²¹¹ Samet Report, (Exhibit AUS-7), para. 125 (referring to a number of pre-implementation papers, including Hammond et al. 2013a, (AUS-177, JE-24(32)); and Arora et al. 2013, (Exhibit JE-24(2))); Tavassoli Report, (Exhibit AUS-10), paras. 109-119 (referring to a number of pre-implementation papers, including Maynard et al. 2013, (Exhibits AUS-200, JE-24(40)); Beede and Lawson 1992, (Exhibits AUS-202, JE-24(6)); and Goldberg et al. 1999, (Exhibits AUS-209, JE-24(27))); Slovic Report, (Exhibit AUS-12), paras. 84-99 (referring to a number of pre-implementation papers, including Hammond et al. 2006, (Exhibit AUS-190); Hammond et al. 2009, (Exhibits AUS-166, JE-24(29)); Wakefield et al. 2002, (Exhibits AUS-93, CUB-28); and Kennedy et al. 2012, (Exhibit AUS-192)).

²²¹² Australia's first written submission, paras. 176-179.

²²¹³ See, e.g. Rootman and Flay 1995, (Exhibits AUS-145, JE-24(53)), p. 6 (finding that 51% of students surveyed reported that it was easier to see the health warning on the plain package, whereas 29% considered that it was easier on the regular package, and 20% reported no difference); d'Avernas et al. 1997, (Exhibit AUS-144), p. 13 (reporting that, when participants were presented with different packs featuring different combinations of GHWs, colours, and branding, "significantly more daily smokers mentioned the health warning on the plain package (82%) than on the regular package (62%)"); Galloppel-Morvan et al. 2010, (Exhibit AUS-176), Table 1, p. 8 (finding that French youth who compared four cigarette package designs were more likely to notice the (written) health warning first on non-branded designs, whereas branding was more likely to be noticed first for branded designs); Munafò et al. 2011, (Exhibits AUS-199, JE-24(47)), p. 1508 (finding that, when tracking eye movement in the presence of plain and branded packages, "among non-smokers and weekly (i.e. light, non-established) cigarette smokers, plain packaging increases visual attention towards health warning information and away from brand information", but that "[t]his effect is not observed among daily (i.e. established) cigarette smokers"); Maynard et al. 2013, (Exhibits AUS-200, JE-24(40)), p. 417 ("largely replicat[ing] and extend[ing]" the results of Munafò et al. 2011, (Exhibits AUS-199, JE-24(47))); McCool et al. 2012, (Exhibit JE-24(41)), p. 1272 (reporting that "[a]n overwhelming majority of participants" in semi-structured focus group interviews "regarded warning labels on plain packages as more potent, since 'there's nothing to distract you from the warnings'"); Arora et al. 2013, (Exhibit JE-24(2)), p. 4 (reporting that 90% of participants in an opinion poll in India indicated that plain packaging would increase the noticeability and effectiveness of health warnings on tobacco products); and Borland et al. 2013, (Exhibits AUS-136, JE-24(9)). See also Australia's first written submission, paras. 176-179; Samet Report, (Exhibit AUS-7), para. 125; Tavassoli Report, (Exhibit AUS-10), para. 112; Biglan Report, (Exhibit AUS-13), para. 174; Fong Report, (Exhibit AUS-14), paras. 314-322.

²²¹⁴ Rootman and Flay 1995, (Exhibits AUS-145, JE-24(53)); Munafò et al. 2011, (Exhibits AUS-199, JE-24(47)); Maynard et al. 2013, (Exhibits AUS-200, JE-24(40)); McCool et al. 2012, (Exhibit JE-24(41)); and Arora et al. 2013, (Exhibit JE-24(2)).

²²¹⁵ Kleijnen Systematic Review, (Exhibit DOM/HND-4).

²²¹⁶ Peer Review Report, (Exhibit DOM/HND-3).

²²¹⁷ Klick TPP Literature Report, (Exhibit UKR-6).

²²¹⁸ Borland et al. 2013, (Exhibits AUS-136, JE-24(9)).

²²¹⁹ d'Avernas et al. 1997, (Exhibit AUS-144); and Galloppel-Morvan et al. 2010, (Exhibit AUS-176).

7.817. We note that six of these eight studies were considered in the original Stirling Review report or the subsequent Stirling Review 2013 Update²²²⁰; the three studies considered by the original Stirling Review report were given a quality score of "medium" (though the focus group component of Rootman and Flay 1995 was considered of "low" quality).²²²¹ Considering the relevant studies as a whole, the Stirling Review concluded (*inter alia*) that "the studies suggest that plain packaging tends to increase ... the attention paid to [health warnings]."²²²² Moreover, five of these studies were considered in the Chantler Report; one was given a score of 5 out of 6 (denoting high quality/low risk of bias)²²²³, and the other four were given a score of either 4²²²⁴ or 4.5²²²⁵ out of 6 (denoting moderate quality/moderate bias).²²²⁶ In respect of the qualitative studies, the reviewer concluded that, *inter alia*, "[p]lain packaging increases the visibility/prominence of health warnings".²²²⁷

7.818. Overall, therefore, this group of studies in respect of visual attention paid to GHWs in the presence of plain packaging was favourably rated in the Stirling and Chantler reviews. Indeed, we note in this respect Cuba's observation, quoting an expert report by Professor Viscusi, that "[i]t is 'almost tautological' that the eye would be more drawn to a graphic health warning on a plain pack, which will inevitably have less to read than a branded pack".²²²⁸

7.819. In addition, Australia's expert Professor Fong discusses the impact of *not* regulating the appearance of tobacco packaging on GHW effectiveness, referring, *inter alia*, to a study by Borland et al. 2013²²²⁹ which "showed that bevelled pack shape distracts more from warnings than a standard pack, and other non-standard pack designs which are banned under the [TPP measures] were also found to distract from warnings".²²³⁰ Australia concludes in this respect by quoting

²²²⁰ The original Stirling Review considered Rootman and Flay 1995, (Exhibit JE-24(53)); Munafò et al. 2011, (Exhibits AUS-199, JE-24(47)); and Gallopel-Morvan et al. 2010, (Exhibit AUS-176). Stirling Review, (Exhibits AUS-140, HND-130, CUB-59), pp. 27, 30, and 36. The Stirling Review 2013 Update considered Maynard et al. 2013, (Exhibits AUS-200, JE-24(40)); Borland et al. 2013, (Exhibits AUS-136, JE-24(9)); and McCool et al. 2012, (Exhibit JE-24(41)). Stirling Review 2013 Update, (Exhibits AUS-216, CUB-60), pp. 15-16.

²²²¹ Stirling Review, (Exhibits AUS-140, HND-130, CUB-59), pp. 27, 30, and 36.

²²²² Stirling Review, (Exhibits AUS-140, HND-130, CUB-59), p. 52. See also Stirling Review 2013 Update, (Exhibits AUS-216, CUB-60), pp. 5 and 7. "The findings of these ... studies ... suggest that plain packaging would: ... enhance the salience of health warnings on packs ...". *Ibid.* p. 2.

²²²³ See Chantler Report, (Exhibits AUS-81, CUB-61), Annex D, p. 54 (with respect to Borland et al. 2013, (Exhibits AUS-136, JE-24(9))). We note that the Chantler Report did not identify GHWs as one of the main outcomes of this study. *Ibid.*

²²²⁴ See Chantler Report, (Exhibits AUS-81, CUB-61), Annex D, p. 51 (with respect to Gallopel-Morvan et al. 2010, (Exhibit AUS-176)).

²²²⁵ See Chantler Report, (Exhibits AUS-81, CUB-61), Annex D, pp. 51 and 54; and Annex E, p. 61 (with respect to Munafò et al. 2011, (Exhibits AUS-199, JE-24(47)); Maynard et al. 2013, (Exhibits AUS-200, JE-24(40)); and McCool et al. 2012, (Exhibit JE-24(41))).

²²²⁶ Chantler Report, (Exhibits AUS-81, CUB-61), Annex D, p. 49.

²²²⁷ See also Chantler Report, (Exhibits AUS-81, CUB-61), Annex E, p. 57.

²²²⁸ Cuba's first written submission, para. 225 (emphasis original; footnotes omitted) (quoting Viscusi Report, (Exhibit UKR-8), para. 74). Referencing Munafò et al. 2011, the Viscusi Report states that "[a] major finding of the study is that for daily smokers there was no effect whatsoever of viewing plain packs rather than regular packs." Viscusi Report, (Exhibit UKR-8), para. 75. The relevant study found that "[a]nalysis of variance indicated more eye movements (i.e. greater visual attention) towards health warnings compared to brand information on plain packs versus branded packs", as "observed among non-smokers and weekly smokers, but not daily smokers", and concluded that "[a]mong non-smokers and non-daily cigarette smokers, plain packaging appears to increase visual attention towards health warning information and away from brand information." Munafò et al. 2011 (Exhibits AUS-199, JE-24(47)), p. 1505. See also Stirling Review, (Exhibits AUS-140, HND-130, CUB-59), p. 55; and Maynard et al. 2013, (Exhibits AUS-200, JE-24(40)).

²²²⁹ Borland et al. 2013, (Exhibits AUS-136, JE-24(9)). We note that this study was first published online in 2011, prior to the implementation of the TPP measures. The study identified a relationship between pack shapes and distraction from health warnings. Study participants rated the standard pack shape least distracting from health warnings compared with bevelled and rounded packs. *Ibid.* p. 99. We note that this study used GHWs covering 30% and 70% of the pack surface.

²²³⁰ Fong Report, (Exhibit AUS-14), para. 309 (referring to Borland et al. 2013, (Exhibits AUS-136, JE-24(9))). We note that, in this context, Professor Fong also refers to a study by Moodie and Ford (2011), and the statement therein that "packaging not only allows tobacco companies to enhance the promotional offering by showcasing design and innovation, which often sets a new standard among consumer products, but in doing so they distract from health warnings". See *ibid.* para. 312 (quoting Moodie and Ford 2011, (Exhibits AUS-189, JE-24(42)), p. 175). We note that Moodie and Ford 2011, (Exhibits AUS-189, JE-24(42)), did not test for this effect.

Professor Fong's statement that by "reducing the positive imagery that branded packages of cigarettes create, there is good evidence that smokers and non-smokers will be more focused on the negative imagery of the health warnings, and be more likely to think about the risk information that they convey".²²³¹

7.820. Australia, and in particular its expert Professor Fong, further identifies and submits a number of studies in support of the proposition that tobacco plain packaging increases *the cognitive processing of warnings*²²³² and *recall of GHWs*²²³³, and enhances *the seriousness and believability of GHWs*.²²³⁴ Professor Fong concludes that (in addition to his conclusions concerning the visual attention paid to GHWs, discussed above), "[o]n the basis of the available evidence ... it is reasonable to consider that the tobacco plain packaging measure will increase the effectiveness of health warnings on the retail packaging of tobacco products, including cigarettes and cigar products."²²³⁵

²²³¹ Australia's first written submission, para. 179 (quoting Fong Report, (Exhibit AUS-14), para. 341).

²²³² See, e.g. Moodie and Mackintosh 2013, (Exhibits AUS-185, JE-24(43)), p. 6 (reporting that, when participants from Scotland smoked cigarettes from a fictitious plain pack for one week, and then from their own pack for one week, overall ratings of the warnings did not differ between the plain and participants' normal packs, but the warnings were rated as being read more closely on the plain pack than on the participants' own packs, and thought about more on the plain pack relative to participants' own packs). See also Parr et al. 2011b (Exhibits AUS-219, JE-24(50)), which, as Professor Fong notes, states that "[w]hen the graphic health warning has 75% pack coverage, plain packaging had limited additional impact on the noticeability of health warnings for RYO and cigarillo / little cigars". Parr et al. 2011b (Exhibits AUS-219, JE-24(50)), pp. 11 and 47; and Fong Report, (Exhibit AUS-14), para. 320.

²²³³ Australia's first written submission, para. 180 and fn 345 (referring to Beede and Lawson 1992, (Exhibits AUS-202, JE-24(6)); and Al-hamdani 2013, (Exhibits AUS-203, JE-24(1))). Beede and Lawson 1992 found that recall of the presence of health warnings was greater among students for US plain packs than for US branded packs, but observed no significant difference for the more familiar New Zealand packs. Beede and Lawson 1992, (Exhibits AUS-202, JE-24(6)), p. 317. Al-Hamdani 2013 found that, of the four packages shown to participants, the two with the least branding information elicited the highest percentages of correct recall of GHWs, and that non-smokers (82%) were more likely to correctly recall the correct health warning than smokers (60.4%). Al-hamdani 2013, (Exhibits AUS-203, JE-24(1)), p. 73.

Australia's expert, Professor Fong, refers to studies which "reported mixed results regarding differences in recall on plain versus branded packages of cigarettes, depending on the specific message of the warning". Fong Report, (Exhibit AUS-14), para. 333 (referring to Goldberg et al. 1995, (Exhibits AUS-221, JE-24(26)) and Goldberg et al. 1999, (Exhibits AUS-209, JE-24(27))). Goldberg et al. 1995 reported that in unaided recall, one warning ("Smoking can kill you") was recalled by 44% of teenagers on the branded packages, and 50% of teenagers on the plain package. This was the only warning recalled by a "meaningful number" of subjects. In aided recall, two out of the three warnings used were more successfully matched with the brand on which they appeared by those who viewed the branded pack, whereas for the third warning, 50% of those exposed to branded packs, and 50% of those exposed to plain packs, were able to successfully match the warning with the brand on which they appeared. Goldberg et al. 1995, (Exhibits AUS-221, JE-24(26)), p. 107. In a later study, Goldberg et al. 1999, the authors reported that recall of health warnings on two of the three subject packages was higher when subjects were exposed to the plain cigarette packages. Recall of one warning was lower on plain packages. The authors attributed this difference to the content of the health warning. Goldberg et al. 1999, (Exhibits AUS-209, JE-24(27)), p. 1434. Professor Fong also refers to Northrup and Pollard 1995 and Germain et al. 2010. Fong Report, (Exhibit AUS-14), para. 332. In Northrup and Pollard 1995, the authors found that recall of health warnings did not vary by the type of plain package used (white compared to off-white), and that recall of the health warning was not enhanced by using plain packaging. However, recall of health warnings on the plain package was higher for light smokers and for daily smokers. Northrup and Pollard 1995, (Exhibit JE-24(48)), pp. 28-30. Germain et al. 2010 found no difference in the ability of participants to recall the correct GHW between individuals who saw a plain pack with a 30% GHW and a plain pack with a 80% GHW. Germain et al. 2010, (Exhibits AUS-154, JE-24(25)), p. 390.

²²³⁴ See Northrup and Pollard 1995, (Exhibit JE-24(48)), Table 8, p. 18 (finding that students surveyed were more likely to say that plain packages make the health warning look more serious); Moodie et al. 2011, (Exhibits AUS-155, JE-24(44)), p. 369 (finding that smokers, who carried their cigarettes in their normal, and in plain mock-up, packs for the study period, did not, overall, vary their ratings of the noticeability, seriousness and believability of the warnings); Moodie and Mackintosh 2013, (Exhibits AUS-185, JE-24(43)), p. 370 (finding, in a study similar to Moodie et al. 2011, (Exhibits AUS-155, JE-24(44)), no noticeable difference in term of the perceived seriousness or believability of health warnings in a comparison between plain and branded packs). We also note that in the context of the seriousness and believability of GHWs, Australia refers to Beede and Lawson 1992, (Exhibits AUS-202, JE-24(6)), and Al-hamdani 2013, (Exhibits AUS-203, JE-24(1)), in respect of consumer recall of warnings on plain packages. Australia's first written submission, para. 180 and fn 345. We have discussed these studies in footnote 2233 above.

²²³⁵ Fong Report, (Exhibit AUS-14), para. 355.

7.821. The complainants' review and critique of the TPP literature overlaps in scope with, but is not identical to, the studies relied upon by Australia in relation to the impact of the TPP measures on the effectiveness of GHWs. Among the 67 papers reviewed between the original Stirling Review and the Stirling Review 2013 Update, 26 measured impacts on GHWs (including recall, cognitive processing, seriousness and believability, as well as visual attention paid to GHWs on plain packs, discussed above) after "impact on GHWs" as a "type[]" of finding[] or "main outcome[]", as determined by the original Stirling Review²²³⁶ or the Chantler Report.²²³⁷ Overall, 20 of these papers were also considered in one or more of the complainants' three literature reviews, the Peer Review Project, the Kleijnen Systematic Review, and/or the review conducted by Professor Klick. Of these, Australia has directly relied upon 15 in the course of these proceedings, as reflected by their provision to the Panel as exhibits.²²³⁸ Australia also refers in this context to a number of other papers that were not reviewed in one of the three reviews of the TPP literature presented by the complainants.²²³⁹

7.822. We also note that, among the 20 papers that measured the impact of tobacco plain packaging on GHWs which were considered in both the Stirling Review or the Stirling Review 2013 Update, and one or more of the complainants' three reviews of the TPP literature, 12 were included in the original Stirling Review, and received quality ratings. Eight were rated as being of "medium" quality, while four received a "medium" rating for the survey aspect of the underlying study and a "low" rating for the focus group aspect of the underlying study.²²⁴⁰ 16 of the 20 papers also received quality scores from the independent Chantler Report. Of these, four were given a rating of between 5 and 6 (denoting high quality/low risk of bias), while ten earned a score of between 3 and 4.5 (denoting moderate quality/moderate bias), and two earned a score of 2 (denoting low quality/high risk of bias).²²⁴¹

7.823. In respect of the salience of health warnings, the Stirling Review concluded, on the basis of the evidence it considered, that:

- Overall, the studies suggest that plain packaging tends to increase the recall of health warnings, the attention paid to them and their perceived seriousness and believability.
- Findings appear to be moderated by the type, size and position of health warning used.
- Only one study examined sub-group differences, and reported that non-smokers and weekly smokers may pay more attention to warnings on plain packs than daily smokers.²²⁴²

7.824. In respect of cigars, we note some of the observations in Parr et al. 2011b addressing the salience of GHWs on cigar tubes, in the presence of plain packaging. While among frequent and

²²³⁶ Stirling Review, (Exhibits AUS-140, HND-130, CUB-59), Table 4.1.

²²³⁷ Chantler Report, (Exhibits AUS-81, CUB-61), Annex D, pp. 50-55, and Annex E, pp. 60-62.

²²³⁸ See Table A: Papers Included in a Primary TPP Literature Review and/or Exhibit JE-24, at the back of these Reports. See also Stirling Review, (Exhibits AUS-140, HND-130, CUB-59), Table 4.1; and Chantler Report, (Exhibits AUS-81, CUB-61), Annex D, pp. 50-55, and Annex E, pp. 60-62. We note that Australia has also submitted and relied upon a newsletter article that was authored by the same researchers, and appears to discuss the same study, as a paper that assesses the impact of tobacco plain packaging on GHWs and was considered by the Stirling Review and each of the complainants' three TPP literature reviews. Compare Northrup and Pollard 1995, (Exhibit JE-24(48)), with ISR newsletter, (Exhibit AUS-146).

²²³⁹ See, e.g. Gallopel-Morvan et al. 2010, (Exhibit AUS-176); d'Avernas et al. 1997, (Exhibit AUS-144); Hammond et al. 2007, (Exhibit AUS-212); Hammond et al. 2006, (Exhibit AUS-190); and Borland et al. 2009b, (Exhibit AUS-211).

²²⁴⁰ See Table A: Papers Included in a Primary TPP Literature Review and/or Exhibit JE-24, at the back of these Reports. See also Stirling Review, (Exhibits AUS-140, HND-130, CUB-59), Table 4.1.

²²⁴¹ See Table A: Papers Included in a Primary TPP Literature Review and/or Exhibit JE-24, at the back of these Reports. See also Chantler Report, (Exhibits AUS-81, CUB-61), Annex D, pp. 50-55, and Annex E, pp. 60-62. We also note that Gallopel-Morvan et al. 2010, (Exhibit AUS-176), which was not reviewed in the complainants' literature reviews, was assigned a "medium" rating by the Stirling Review, and a score of 4 by the Chantler Report. See Stirling Review, (Exhibits AUS-140, HND-130, CUB-59), p. 27; and Chantler Report, (Exhibits AUS-81, CUB-61), Annex D, p. 51.

²²⁴² Stirling Review, (Exhibits AUS-140, HND-130, CUB-59), p. 52.

connoisseur smokers of premium cigars "the [plain cigar] tubes were disregarded"²²⁴³, the less frequent smokers of premium cigars²²⁴⁴ "had a stronger reaction to the plain pack tube", in particular the GHW²²⁴⁵:

When presented with the plain pack tube they reported feeling the appeal and attractiveness of the tubes had been severely decreased. They reported feeling that part of the "fun" had been removed. Standing out most was the size of the health warning which was unavoidable.²²⁴⁶

7.825. Overall, therefore, the evidence before us suggests that a number of studies, emanating from qualified sources and favourably reviewed in external reviews, support the proposition that plain packaging of tobacco products would increase the effectiveness of GHWs. Specifically, it suggests that in the presence of plain packaging, GHWs on tobacco products are considered easier to see, more noticeable, perceived as being more credible and more serious, attract greater visual attention²²⁴⁷, are less subject to distractions caused by other packaging elements, and are read more closely and thought about more. We also note the existence of mixed evidence in respect of whether tobacco plain packaging improves GHW recall, or affects whether GHWs are perceived as being more serious and believable. In this respect, we note the description by Australia's expert, Professor Samet, that the studies he reviews "are consistent in showing that plain packaging reduces the appeal of the cigarettes in the pack and enhances awareness of pictorial warnings on the pack"²²⁴⁸, though "[t]he evidence is not as abundant on the effect of plain packaging on the salience of pack warnings".²²⁴⁹

7.826. Notwithstanding the potential limitations of these studies, taken individually or as a whole, we also have before us evidence relating to the actual application of the TPP measures since their entry into force, including empirical studies specifically addressing the impact of tobacco plain packaging on the effectiveness of GHWs. This evidence should be given appropriate weight in our assessment. We consider this evidence in section 7.2.5.3.6.1 below, and therefore do not seek to draw, at this stage of our analysis, any overall conclusion on the impact of the TPP measures on the effectiveness of GHWs.

7.827. With this conclusion in mind, we turn now to consider whether an increase in the effectiveness of GHWs may be expected to affect risk beliefs and risk awareness in Australia, as contested by the complainants.

Ability of plain packaging to increase the effectiveness of GHWs by improving risk awareness and risk beliefs

7.828. As described above²²⁵⁰, it appears to be undisputed that an assessment of the effectiveness of GHWs is, as a general matter, informed by their ability to communicate information about health risks and thereby increase levels of risk awareness. The complainants' submissions in this respect focus on the potential for such awareness to *increase* in the presence

²²⁴³ Parr et al. 2011b, (Exhibits AUS-219, JE-24(50)), p. 40. Although "frequent cigar smokers did feel that the plain pack tube would have an impact on their purchasing enjoyment and the appeal of cigar smoking in general. They felt it would render the tobacconists and cigar sellers less appealing and inviting as places to stop and shop. Some reported that it might push their purchases online." Ibid. p. 41.

²²⁴⁴ "Less frequent smokers reported that currently the purchasing of cigars was part of the ritual and enjoyment involved in cigar smoking. They reported that the 'revealing' of the cigars on a social occasion was one of the highlights of the process. A number of respondents reported paying particular attention to the tubes and packaging, and often spending more than they would normally, in order to impress guests, friends, or to give as gifts. The plain packaged tube was felt to take away this aspect of cigar smoking which was often cited as a main driver in their smoking behaviours." Parr et al. 2011b, (Exhibits AUS-219, JE-24(50)), p. 41.

²²⁴⁵ Parr et al. 2011b, (Exhibits AUS-219, JE-24(50)), p. 41.

²²⁴⁶ Parr et al. 2011b, (Exhibits AUS-219, JE-24(50)), p. 41.

²²⁴⁷ In this respect, we note Cuba's observation that it is "*almost tautological*" that the eye would be more drawn to a graphic warning on a plain pack, "which will inevitably have less to read than a branded pack". Cuba's first written submission, para. 225 (emphasis original) (quoting Viscusi Report, (Exhibit UKR-8), para. 74).

²²⁴⁸ Samet Report, (Exhibit AUS-7), para. 128.

²²⁴⁹ Samet Report, (Exhibit AUS-7), para. 129.

²²⁵⁰ See paragraphs 7.803-7.806 above.

of plain packaging, in light in particular of existing levels of knowledge about the health risks arising from the use of tobacco products in Australia.

7.829. Honduras and Cuba argue that Australians, and in particular Australian adolescents, already have a high understanding and awareness of the risks associated with smoking and that their smoking behaviour is not driven by that understanding and awareness.²²⁵¹ The complainants rely in this respect on an expert report by Professor Viscusi²²⁵², who argues that increasing the effectiveness of warnings as measured by "recall, attention, seriousness and believability"²²⁵³ is "only of behavioral consequence if consumers currently have an informational deficit and do not find existing warnings credible", which, he argues, is not established in any the studies underpinning the tobacco plain packaging.²²⁵⁴ He argues that "whether plain packs will enhance the effectiveness of warnings on risk beliefs depends on how much people know about the risks of smoking and how much having warnings on plain packs rather than regular packs will alter these risk beliefs".²²⁵⁵

7.830. Australia responds that "knowledge of risk is 'a multilayered concept' and studies of Australians found that although people are sometimes 'aware' that smoking can lead to adverse health consequences, they do not have even a basic understanding of the nature and severity of these consequences".²²⁵⁶

7.831. Professor Viscusi reviews a number of studies in support of the conclusion that tobacco plain packaging increases the effectiveness of health warnings in Australia and sets out a series of methodological concerns in respect of these studies. In particular, he identifies the need to "carefully assess baseline knowledge among respondents" of risk beliefs, the purpose of which is to make possible meaningful comparisons with risk beliefs elicited after providing the warnings in a plain pack environment.²²⁵⁷ Professor Viscusi notes that "[n]one of the existing plain packaging studies starts from a determination of the existing risk beliefs to compare with the risk beliefs resulting from plain packaging".²²⁵⁸ If there is no increase in risk beliefs, then one cannot, in Professor Viscusi's view, conclude that plain packs foster a greater understanding of smoking risks.²²⁵⁹ Professor Viscusi argues that plain packaging does not provide any new warning information and that there is no evidence that new warnings were not noticed before tobacco plain packaging. In his view, the plain pack studies "fail to assess the alleged informational deficit that plain packaging would fill and do not examine whether people's risk belief changes as a result of plain packaging".²²⁶⁰

7.832. Professor Viscusi further submits that over time, "the progress that can be made through additional warnings efforts will taper off as people become better informed of the risks of smoking"²²⁶¹, and "[o]nce people become generally aware of the major risks posed by cigarettes, such as the mortality risk and lung cancer risk, there will be fewer gains in risk awareness that can be achieved, if any".²²⁶² Professor Viscusi addresses risk beliefs in Australia, noting that "[t]here is substantial evidence in Australia that people are not only aware of the risks but also personalize the risks to themselves"²²⁶³; that "[e]ven before the current warnings were enacted, in an earlier warnings era, Australians indicated substantial risk awareness"²²⁶⁴; and that "[e]ven subgroups of

²²⁵¹ See Honduras's first written submission, para. 417; Cuba's first written submission, para. 227.

²²⁵² Viscusi Report, (Exhibit UKR-8) (relied upon by Honduras and Cuba).

²²⁵³ Viscusi Report, (Exhibit UKR-8), para. 21 (referring to Stirling Review, (Exhibits AUS-140, HND-130, CUB-59), p. ii).

²²⁵⁴ Viscusi Report, (Exhibit UKR-8), para. 21.

²²⁵⁵ Viscusi Report, (Exhibit UKR-8), para. 22.

²²⁵⁶ Australia's first written submission, para. 171.

²²⁵⁷ Viscusi Report, (Exhibit UKR-8), paras. 36-38.

²²⁵⁸ Viscusi Report, (Exhibit UKR-8), para. 38.

²²⁵⁹ Viscusi Report, (Exhibit UKR-8), para. 43.

²²⁶⁰ Viscusi Report, (Exhibit UKR-8), para. 44.

²²⁶¹ Viscusi Report, (Exhibit UKR-8), para. 99.

²²⁶² Viscusi Report, (Exhibit UKR-8), para. 99. See also ibid. paras. 101-104.

²²⁶³ Viscusi Report, (Exhibit UKR-8), para. 104.

²²⁶⁴ Viscusi Report, (Exhibit UKR-8), para. 105.

the Australian population that one might think are difficult to reach with a broadly based warnings policy have received the risk information".²²⁶⁵

7.833. Honduras also refers to an expert report by Professor Steinberg, summarized above²²⁶⁶, and in particular his argument that "it is abundantly clear that Australian adolescents are aware of and understand the risks of smoking and know that it has harmful long-term health consequences".²²⁶⁷ He argues that "adolescents' awareness of the health risks of smoking is nearly universal (and was achieved without plain packaging)", and that it is therefore "difficult to imagine how the introduction of plain packaging could – even conceptually – increase this awareness".²²⁶⁸

7.834. Australia's expert Professor Slovic submits that, contrary to the opinion of Professor Viscusi, many people do not adequately understand and appreciate the risks that smoking entails.²²⁶⁹ He argues that beginning smokers "give little conscious thought to risk", "are lured into the behavior by the prospects of fun, excitement, and adventure" and "begin to think of risk only after they have started to smoke regularly, become addicted, and gained what to them is new information and appreciation of smoking's health risks".²²⁷⁰ Professor Slovic adds that "[t]here is no evidence to show that adolescents, or others who start smoking, have adequate knowledge of the many diseases caused by smoking", nor the experience of lung cancer, chronic obstructive pulmonary disease, or congestive heart failure.²²⁷¹

7.835. Professor Slovic further argues that tobacco advertising and promotion, "of which the pack is a part", have been "designed to play a key role in this process by exposing young people to massive amounts of positive imagery associated with smoking". Professor Slovic observes that these imagery and affective feelings are never mentioned by Professor Viscusi as motivators of smoking.²²⁷² Professor Slovic suggests that "[t]hrough the workings of the affect heuristic, positive feelings suppress feelings of risk", such that scientific or statistical warnings are ignored or undervalued.²²⁷³ Professor Slovic considers that Professor Viscusi "also fails to appreciate [] that research has shown that knowledge of risk from smoking is a multilayered concept", at the "tip" of which is "superficial awareness that smoking is dangerous to health", and progresses through "level 2" (i.e. "knowing a bit about how and why smoking is dangerous"). Professor Slovic argues that rational decision making requires deeper knowledge and, he argues, "few smokers have this deeper, experiential knowledge" (some of which has been shown to be provided by GHWs).²²⁷⁴

7.836. In an expert report submitted by Australia, Dr Biglan also argues that adolescents are not fully informed about the risks of smoking²²⁷⁵ and points out that both smoking and non-smoking adolescents underestimated the death rate due to these diseases.²²⁷⁶ Dr Biglan further argues that in contesting the notion that plain packaging affects risk perceptions, the complainants' experts reviewed only a portion of the empirical literature on the impact of plain packaging²²⁷⁷ and, in the case of Professor Viscusi, provided a critique which contains "inaccuracies and misrepresentations" and overlooked "how clearly [the relevant studies] show the impact of plain packaging on health risk perceptions".²²⁷⁸ Reviewing a number of studies, Dr Biglan concludes that "across a wide variety of measures, subject populations (country, smoker/nonsmoker, or adolescent/adult), investigators, and pack variations, the impact of health warnings strengthens when packs have no brand features".²²⁷⁹

²²⁶⁵ Viscusi Report, (Exhibit UKR-8), para. 106.

²²⁶⁶ See paras. 7.710-7.711 and 7.722-7.723 above.

²²⁶⁷ Steinberg Report, (Exhibit DOM/HND-6), para. 44. See also Steinberg Rebuttal Report, (Exhibit DOM/HND-10), para. 12.

²²⁶⁸ Steinberg Report, (Exhibit DOM/HND-6), para. 44.

²²⁶⁹ Slovic Report, (Exhibit AUS-12), para. 90.

²²⁷⁰ Slovic Report, (Exhibit AUS-12), paras. 90 and 92.

²²⁷¹ Slovic Report, (Exhibit AUS-12), para. 91.

²²⁷² Slovic Report, (Exhibit AUS-12), para. 90.

²²⁷³ Slovic Report, (Exhibit AUS-12), para. 93.

²²⁷⁴ Slovic Report, (Exhibit AUS-12), para. 97.

²²⁷⁵ Biglan Report, (Exhibit AUS-13), para. 166

²²⁷⁶ Biglan Report, (Exhibit AUS-13), para. 166

²²⁷⁷ Biglan Report, (Exhibit AUS-13), paras. 167-169.

²²⁷⁸ Biglan Report, (Exhibit AUS-13), para. 173.

²²⁷⁹ Biglan Report, (Exhibit AUS-13), para. 175.

7.837. We understand the complainants to argue, in essence, that risks awareness levels in Australia are such that there is no meaningful scope for an increase in health knowledge and/or risk perception in Australia through more effective GHWs. Professor Viscusi thus suggests that "[o]nce people become generally aware of the major risks posed by cigarettes, such as the mortality risk and lung cancer risk, there will be fewer gains in risk awareness that can be achieved, if any."²²⁸⁰

7.838. We note that a number of studies submitted as evidence in these proceedings address the existing level of awareness among Australians concerning the risks associated with tobacco use, and the extent to which GHWs increase such awareness. For example, a study by Borland and Hill (1997)²²⁸¹ found that the health warnings introduced in 1995 (which required written health warnings covering no less than 25% of the face of the pack) achieved "high levels of awareness ... at least among smokers"²²⁸², as acknowledged by Professor Viscusi²²⁸³, while also noting that smokers who lacked awareness of the warnings may simply "have never noticed them".²²⁸⁴ The same study also states that "[m]any smokers still lack even a basic understanding of the major constituents of tobacco smoke or of their potential health effects, even though there was a small increase in knowledge at follow up", and that "[o]ne striking finding was that smokers were far more likely to agree that smoking is addictive than to agree that it is harmful, and far more thought it was addictive than thought it was enjoyable".²²⁸⁵ The same paper notes that "[i]t is true that in Australia almost everybody has heard about dangers of smoking (as can be inferred from the data in this paper) but it does not mean that they know and believe all the information that is central to making rational decisions about whether or not to smoke".²²⁸⁶

7.839. Australia's expert Professor Slovic refers²²⁸⁷ to a study based on data gathered in 2002 from the International Tobacco Control Policy Evaluation Project's (ITC Project) 4-country survey, which indicates a high level of awareness in Australia of various conditions in smokers, following phone-based surveys involving prompted recall of those conditions.²²⁸⁸ A 2009 report²²⁸⁹ commissioned by Australia's DHA to evaluate the effectiveness of GHWs on tobacco products also reports, as Professor Viscusi notes²²⁹⁰, a high level of awareness that certain health risks are associated with smoking²²⁹¹, although levels of recall of the content of warnings, unaided²²⁹² and

²²⁸⁰ Viscusi Report, (Exhibit UKR-8), para. 99.

²²⁸¹ Borland and Hill 1997, (Exhibit AUS-208).

²²⁸² Borland and Hill 1997, (Exhibit AUS-208), p. 324.

²²⁸³ Viscusi Report, (Exhibit UKR-8), para. 105.

²²⁸⁴ Borland and Hill 1997, (Exhibit AUS-208), p. 324.

²²⁸⁵ Borland and Hill 1997, (Exhibit AUS-208), p. 324.

²²⁸⁶ Borland and Hill 1997, (Exhibit AUS-208), p. 324.

²²⁸⁷ Slovic Report, (Exhibit AUS-12), para. 91.

²²⁸⁸ The surveys considered in particular knowledge of lung cancer in smokers (94.3%), heart disease (88.7%), stroke (80.8%), lung cancer in non-smokers (69.0%), and impotence (35.8%). Hammond et al. 2006, (Exhibit AUS-190), p. iii21. We note that Professor Slovic also refers in this context to a study by Hammond et al. 2009, (Exhibits AUS-166, JE-24(29)), in which participants from the United Kingdom were asked to compare five packs on the basis of their perception of the packs' taste, tar delivery, health risk, attractiveness and either ease of quitting (for adult smokers) or the brand they would choose if trying smoking (for youth). See Slovic Report, (Exhibit AUS-12), para. 91. As this study is based in the UK, we are of the view that this study is not directly relevant to the question of existing levels of risk awareness in Australia.

²²⁸⁹ Shanahan and Elliott 2008, (Exhibit CUB-15).

²²⁹⁰ Viscusi Report, (Exhibit UKR-8), para. 105.

²²⁹¹ Specifically, the study reports that in Australia 91% of all smokers disagree with the statement: "I don't think smoking has any real negative effect on your health at all"; that 88% of smokers agree with the statement: "I think that smoking probably does increase the risk of a health problem occurring for me"; and that 96% "disagree with statements that smoking does not have any real health effect". Shanahan and Elliott 2008, (Exhibit CUB-15), p. 181).

²²⁹² Shanahan and Elliott 2008, (Exhibit CUB-15), p. 66. Respondents identified the content of warnings to different degrees; specifically, respondents recalled "smoking causes mouth and throat cancer" (18%); "smoking – a lead cause of death"(18%); "smoking causes peripheral vascular disease/gangrene" (17%); "smoking causes emphysema" (9%); "smoking clogs your arteries" (5%); "don't let children breathe your smoke" (4%); "quitting will improve your health" (3%); "smoking causes lung cancer" (34%); "smoking harms unborn babies" (29%); "smoking causes heart disease" (10%); "smoking causes blindness" (4%); "smoking doubles your risk of stroke" (3%); "smoking is addictive" (2%); and "tobacco smoke is toxic" (1%). Ibid. p. 66, Table 15. Results were further disaggregated on the basis of respondents' status as a smoker, recent quitter, non-smoker and ex-smoker. Ibid.

aided²²⁹³, varied. We note also a market research study referred to by Professor Viscusi in support of the point that the health warnings required in 2011 (that is, before their enlargement pursuant to the Information Standard) "are effective, so that smokers and the public at large have been informed of the risks".²²⁹⁴ That report also notes that "with very few exceptions, all respondents could easily identify a specific health warning from the current suite that stood out to them", which "was often the one they avoided buying if they could".²²⁹⁵ Professor Steinberg, in his expert report, also refers to a Victorian Government study based on 2011 Australian Secondary Students Alcohol Smoking and Drug (ASSAD) Survey data²²⁹⁶ reporting high levels of awareness of various specific diseases associated with smoking.²²⁹⁷

7.840. This evidence suggests, overall, that Australians have a high level of awareness that smoking increases the risks of health problems in general. It also suggests a high, and in the case of some conditions, extremely high level of awareness of some specific health risks associated with tobacco use, but a notably lower level of risk awareness in respect of certain conditions discussed in the evidence.

7.841. This evidence further indicates that GHWS have been effective in Australia at, *inter alia*, communicating certain specific effects of tobacco use to the Australian public and, in particular, bringing about gains in risk awareness that go beyond the "major" risks of "mortality ... and lung cancer ...".²²⁹⁸ For example, we note a 2012 study which found that Australian smokers, who were exposed to a GHW with the message that smoking causes blindness, were more likely to report when prompted that smoking causes blindness than smokers from Canada, the United States and the United Kingdom, who were not exposed to this same warning.²²⁹⁹ In this connection, we also note that the timing of many of the studies described above indicates that they refer to periods

²²⁹³ Shanahan and Elliott 2008, (Exhibit CUB-15), p. 71. Respondents identified the content of warnings to different degrees; specifically, respondents recalled "smoking clogs your arteries" (83%); "smoking causes peripheral vascular disease/gangrene" (83%); "smoking causes mouth and throat cancer" (82%); "smoking causes emphysema" (81%); "smoking – a lead cause of death"(73%); "don't let children breathe your smoke" (69%); "quitting will improve your health" (63%); "smoking causes lung cancer" (94%); "smoking harms unborn babies" (90%); "smoking is addictive" (89%); "smoking causes heart disease" (89%); "tobacco smoke is toxic" (76%); "smoking doubles your risk of stroke" (64%); "smoking causes blindness" (61%); "smoking exposes you to more than 40 harmful chemicals" (65%); "quit now to reduce your risk of chronic illness or premature death" (62%); and "these chemicals damage blood vessels, body cells and the immune system" (49%). See *ibid.* p. 71, Table 18.

²²⁹⁴ Viscusi Report, (Exhibit UKR-8), para. 105. Parr et al. 2011c bears this out, insofar as it states that:

The reported behaviour of smokers demonstrated that current health warnings on packs are still effective. Although few smokers claimed to take notice or think about the current health warnings, many admitted to particular behaviours which indicated that the warnings have some impact. Many claimed to [] put the pack into something else (a cover or container); [] empty cigarettes into another container to carry; and/or [] ask retailers for packs with images less personally relevant or graphic".

Parr et al. 2011c, (Exhibits AUS-119, CUB-75), p. 5.

²²⁹⁵ Parr et al. 2011c, (Exhibits AUS-119, CUB-75), p. 25. The authors otherwise report mixed responses to the warnings, however, noting that "[s]mokers claimed that they viewed the health warnings as extreme and rare cases and responded in a rational manner, claiming to dismiss the health consequences as unlikely to occur to them", but that "even if they perceive them as extreme examples they impact on smokers at an emotional level as they highlight areas of potential health concern of which they remain conscious".

²²⁹⁶ ASSAD 2011 Report, (Exhibit DOM-360).

²²⁹⁷ Steinberg Report, (Exhibit DOM/HND-6), para. 44. Professor Steinberg refers to this study in support of an argument that "greater than 90 percent of 12-17 year-olds agreed or strongly agreed with statements that smoking causes lung cancer (97 percent), smoking increases the risk of having a heart attack (91 percent), smoking can harm unborn babies (93 percent), and causes mouth cancer (95 percent), with high percentages for a range of other diseases". The study also notes agreement or strong agreement in prompted recall with the notion that smoking is addictive (86%), is a leading cause of death (75%), causes diseases in toes and fingers (87%), causes emphysema (84%), clogs arteries (83%), causes blindness (52%), doubles risk of stroke (85%), and is toxic (80%). ASSAD 2011 Report, (Exhibit DOM-360), pp. 110-111.

²²⁹⁸ See, e.g. Shanahan and Elliott 2008, (Exhibit CUB-15).

²²⁹⁹ Kennedy et al. 2012, (Exhibit AUS-192).

during which GHWs in Australia have been of different sizes, and have contained different messages.²³⁰⁰

7.842. We further note that the 2008 IARC Handbook suggests that "smokers in different parts of the world have different levels of existing health knowledge", which "has implications for the type of messages to be included in warnings".²³⁰¹ It cites as an example in this respect that "Australian smokers may have a relatively higher level of health literacy than smokers in other regions, which may account for the decision to include a warning for 'peripheral vascular disease' on packages".²³⁰²

7.843. This evidence suggests to us that, in the context of their role in improving health knowledge and perception of risks, the content of GHWs is legitimately informed by gaps in knowledge within the relevant country, with the aim of addressing those gaps in knowledge. We are not persuaded, however, that the existence of a relatively high level of knowledge or risk awareness in Australia implies that GHWs could not be made *more* effective in achieving their objective of increasing such knowledge or risk awareness. It appears to us that such a view would be tenable only if assessed at the highest level of generality (namely that Australians consider smoking to be harmful and to carry risks, which the evidence before us suggests is almost universally known), and if we were to assume that the need to inform individuals about the health risks associated with tobacco use is contingent *only* on the extent of general knowledge already existing in the relevant territory.²³⁰³ Professor Viscusi's own analysis appears to acknowledge that this is not the case, when he notes that "[t]hat the public is well informed does not imply that warning efforts should be abandoned", as "[n]ew generations of potential smokers would still benefit from the information, and removing the warnings would imply that cigarettes have become safer".²³⁰⁴ The complainants' argument on the inability of plain packaging to improve the effectiveness of GHWs due to current levels of risks awareness in Australia would seem to imply that the effectiveness of GHWs would not be capable of being improved in *any* meaningful way, or even that they would no longer be necessary in Australia, which we do not understand the complainants to be suggesting.

7.844. We also note that the evidence before us suggests a lower level of risk awareness in relation to cigars. Parr et al. 2011b conclude that "[s]mokers of premium cigars differed considerably in their attitude to cigars compared to smokers of other tobacco products."²³⁰⁵ Both types of cigar smoker also had "low perceptions of any health risks connected with their cigar smoking", and "[a]s most did not smoke daily but rather weekly or once every two weeks they

²³⁰⁰ As we noted in section 2.2.1, tobacco health warning requirements were enacted by all Australian states and territories in 1973 and set out textual health warnings for cigarettes only. Subsequent measures at the federal level expanded the scope of the warnings with respect to their form (i.e. to include textual and graphic/pictorial warnings), size (i.e. as a percentage of the surface of the pack), position (i.e. on the front and/or back of packs), modalities (i.e. the variation and rotation of text and images) and scope (i.e. application of the requirements to other categories of tobacco products). As of 1 March 2006, GHWs were required for almost all tobacco products – regular packages were required to feature a warning message that covered 25% of the area of the face of the pack on which it was printed, and explanatory messages were required to cover one third of the area of the face of the pack on which it was printed. *Trade Practices (Consumer Product Information Standards) (Tobacco) Regulations 1994* (Cth), (Exhibit AUS-322), Regulation 11. The *Competition and Consumer (Tobacco) Information Standard 2011* (Cth), which sets out the current 75%/90% requirements for GHWs and explanatory statements, entered into force on 1 January 2012. See Information Standard, (Exhibits AUS-128, JE-8).

²³⁰¹ 2008 IARC Handbook, (Exhibits AUS-602, DOM-368), p. 294.

²³⁰² 2008 IARC Handbook, (Exhibits AUS-602, DOM-368), p. 294.

²³⁰³ Shanahan and Elliott 2008, (Exhibit CUB-15), p. 181. In this connection, we are similarly not persuaded by Professor Viscusi's critique of a number of studies concerning the effect of plain packaging of tobacco products on the effectiveness of GHWs, on the basis that "[n]one of the existing plain packaging studies starts from a determination of the existing risk beliefs to compare with the risk beliefs resulting from plain packaging". See Viscusi Report, (Exhibit UKR-8), paras. 36-38 and 43-44. Relatedly, and as discussed in "Focus of the TPP studies on "non-behavioural" outcomes" within section 7.2.5.3.5.1 above, we are not persuaded that the focus on "proximal" outcomes in the TPP literature constitutes, in itself, a flaw, provided that such "proximal outcomes", including the impact of plain packaging on increasing the effectiveness of GHWs, are understood to form only one element of the "causal chain" in the "mediational model" underlying the adoption of the measures. See paras. 7.555 and 7.564 above. We are therefore similarly not persuaded by Professor Viscusi's critique in this respect. See Viscusi Report, (Exhibit UKR-8), paras. 45-49.

²³⁰⁴ Viscusi Report, (Exhibit UKR-8), para. 101.

²³⁰⁵ Parr et al. 2011b, (Exhibits AUS-219, JE-24(50)), p. 9.

also did not feel their frequency of smoking warranted concern about health implications".²³⁰⁶ We also note the observations by Australia, uncontested by the complainants, as to the higher harmfulness of a single cigar compared with a single cigarette²³⁰⁷ and misperceptions of actual cigar risks.²³⁰⁸ Further, we note the finding in Parr et al. 2011b in respect of plain packaged cigar bags: "no one wanted to be seen carrying a bag with a large graphic health warning on it, or to have to look at the bag themselves. It did serve as a reminder of the negative effects of their cigar smoking".²³⁰⁹

7.845. In light of the above, we are not persuaded that the complainants have shown that existing levels of health knowledge and risk awareness in Australia are such that they could not be increased if GHWs achieved greater salience and thereby have a greater ability to increase levels of risk awareness in respect to the health risks posed by tobacco products, in the presence of plain packaging.

7.846. Finally, we will consider the extent to which the complainants have demonstrated that, even if GHWs on tobacco products are considered easier to see, more noticeable, perceived as being more credible and more serious, attract greater visual attention, and increase levels of risk awareness, this could, in any event, have no influence on quit intentions and smoking behaviours.

Effect of an increase in the effectiveness of GHWs through plain packaging on quit intentions and smoking behaviours

7.847. Cuba argues that increased attention to health warnings does not necessarily imply that there will be significant changes in smoking rates in Australia, given that even in the case of branded packs, "observers pay attention to both the health warning and package design elements".²³¹⁰ Cuba further argues that "even if th[e] claim [that plain packaging will increase the effectiveness of GHWs] were true, because it operates by increasing risk awareness, it can have little, if any, incremental effect on smoking behaviour in Australia (given that the overwhelming majority of the population is already aware of the relevant risks)".²³¹¹ Honduras similarly refers to Professor Viscusi's observation that Australians are aware of the risks and personalize them, and that it is highly unlikely that increasing warning size or prominence will have any influence on smoking behaviours or consumer perceptions of health consequences.²³¹² The Dominican Republic also submits, with reference to the expert report of Professor Steinberg, that "even if plain packaging were shown to increase the prominence of health warnings (which recent research in

²³⁰⁶ Parr et al. 2011b, (Exhibits AUS-219, JE-24(50)), p. 10. Parr and Ell 2011 further finds that:

Premium cigar smokers do perceive that there are likely to be health effects from premium cigar smoking. However, these are largely perceived as negligible compared to the smoking of other tobacco products. This is for a number of reasons:

- less tobacco is perceived to be consumed as it is not habitual;
- it is not perceived as physically addictive; and
- it is not perceived to impact on the lungs as much as cigarette smoke does as the smoke is not directly inhaled.

Parr and Ell 2011, (Exhibit CUB-41), p. 27.

²³⁰⁷ Australia's response to Panel question No. 13 (referring to American Lung Association, "Cigars: Facts and Figures", <<http://www.lung.org/stop-smoking/about-smoking/facts-figures/cigars.html>> accessed 30 January 2015, (Cigars: Facts and Figures), (Exhibit AUS-34)). See also Australia's first written submission, para. 30, (referring to US National Cancer Institute, "Fact Sheet: Cigar Smoking and Cancer", 27 October 2010, <<http://www.cancer.gov/cancertopics/factsheet/Tobacco/cigars/>>, accessed 25 February 2015, (NCI Cigar Fact Sheet), (Exhibit AUS-40); Samet Report, (Exhibit AUS-7), paras. 75-77; and WHO/FCTC amici curiae brief, (Exhibit AUS-42 (revised))).

²³⁰⁸ See Australia's first written submission, paras. 173 and 197, and fn 2306 above. Likewise, Miller et al. 2015 notes that "[c]igars and cigarillos were consistently viewed as less harmful and distinct from cigarettes, all of which is consistent with the way cigars have been positioned." Miller et al. 2015, (Exhibits AUS-102, DOM-315), p. 7. See also Australia's first written submission, para. 173.

²³⁰⁹ Parr et al. 2011b, (Exhibits AUS-219, JE-24(50)), p. 43.

²³¹⁰ Cuba's first written submission, para. 226 (referring to Munafò et al. 2011, (Exhibits AUS-199, JE-24(47)), p. 1509, Table 1). See also Cuba's first written submission, para. 349.

²³¹¹ Cuba's first written submission, para. 227.

²³¹² Honduras's first written submission, para. 419 fn 349.

fact suggests is not the case), this would ... have no influence on adolescent experimentation with, or use of, tobacco products".²³¹³

7.848. Australia submits that increases in the effectiveness of GHWs affect consumer intentions and behaviour. It submits that the personal health risks of tobacco use are an important motivator for consumers to cease using tobacco products, and that the combination of plain packs with health warnings decreases positive perceptions of tobacco use and increases the understanding that tobacco use presents a health risk.²³¹⁴ Australia also submits that reducing design elements on tobacco packaging to "detract from health warnings (and the serious and severe consequences of tobacco use), has already started to have its desired effect of changing attitudes, which is likely to encourage quitting behaviour".²³¹⁵

7.849. We understand the design and structure underlying the operation of the second mechanism under the TPP Act to be that at least some consumers will be influenced in their smoking behaviours if GHWs are made more effective as a result of plain packaging of tobacco products, in combination with other tobacco control measures in place in Australia. This is described as follows by Professor Fong:

Given my conclusion that the tobacco plain packaging measure would increase the effectiveness of health warnings on the retail packaging of tobacco products, *I also consider it reasonable to conclude that this increase in effectiveness could lead to important behavioural effects such as discouraging people from taking up smoking, or using tobacco products; encouraging people to give up smoking, and to stop using tobacco products; and discouraging people who have given up smoking, or who have stopped using tobacco products, from relapsing.*²³¹⁶

7.850. Based on the evidence before us, we see no basis to assume that, to the extent that tobacco plain packaging would make GHWs more effective through greater salience and processing of the risk-related information that they convey, as described above, such increased effectiveness of GHWs could not, in combination with the other tobacco control measures applied by Australia, affect smoking behaviours.

7.851. We recall that the complainants have not challenged the conceptual model described above for the assessment of effectiveness of GHWs, as set out by Professor Chaloupka and reflected in the 2008 IARC Handbook. This model associates changes in cessation knowledge, brand appeal, affective reactions, and health knowledge/risk perception with changes in quit intentions, avoidance and subsequent smoking behaviour.²³¹⁷ We also do not understand the complainants to have contested the ability of GHWs, in principle, to be effective.²³¹⁸ Moreover, Australia and its experts, Professor Fong and Dr Biglan, refer to several studies which report an effect of GHWs on smoking behaviour.²³¹⁹

²³¹³ Dominican Republic's first written submission, para. 695.

²³¹⁴ Australia's first written submission, para. 182.

²³¹⁵ Australia's first written submission, para. 185. Evidence relating to the actual application of the TPP measures is considered in section 7.2.5.3.6 below.

²³¹⁶ Fong Report, (Exhibit AUS-14), para. 356. (emphasis added)

²³¹⁷ See Figure 14 above.

²³¹⁸ We note that the Dominican Republic argues, on the basis of post-implementation data, which was also discussed in White et al. 2015a, (Exhibits AUS-186, DOM-235), that the antecedents that feature in Professor Chaloupka's model are absent in Australia, as are certain tobacco-related behaviours (such as making a quit attempt), and that as such the pathway cannot be inferred. See Dominican Republic's second written submission, paras. 526-529. As noted, evidence from Australia concerning the post-implementation period is the subject of section 7.2.5.3.6 below. We also note that the Dominican Republic submits a number of criticisms of a study by Professor Chaloupka (and others) concerning the effect of GHWs in Canada in 2005 on smoking behaviour. See Dominican Republic's second written submission, paras. 530-535. See also Chaloupka Public Health Report, (Exhibit AUS-9); Chaloupka Rebuttal Report, (Exhibit AUS-582); IPE Updated Report, (Exhibit DOM-303), ch 6; and RJ Reynolds v. FDA, (Exhibit DOM-317). Notwithstanding these criticisms of the study by Professor Chaloupka, we do not understand the Dominican Republic's submission as challenging or questioning whether a connection exists between GHWs and smoking behaviour *per se*.

²³¹⁹ Among these studies are Borland 1997, (Exhibit AUS-213) (finding that warnings that were noticed more often were associated with an increase in cigarettes foregone, and that cigarettes foregone was predictive of increases in cessation); and Shanahan and Elliott 2008, (Exhibit CUB-15) (a report for the

7.852. Turning first to quit *intentions*, we note that, as described in Figure 14, these are identified as one of the relevant parameters for an assessment of the effectiveness of GHWs, as a precursor to smoking behaviours. Australia has submitted a number of studies in respect of the relationship between changes in noticeability of, salience of, and cognitive responses to, GHWs, and changes in behavioural intentions. It cites three studies suggesting a positive correlation between pack warnings and quit intentions or attempts.²³²⁰ Australia also refers to a 2009 study that specifically examined the effect of the different health warnings in Australia (at the time of the study, a GHW covering 30% of the front and 90% of the back of the pack), Canada (a GHW covering 50% of the front and back of the pack), and the United Kingdom (a textual warning covering 30% of the front and 40% of the back of the pack) on variables including "two behavioural responses": forgoing cigarettes and avoiding the warnings. The study reported that Australians reported more avoidance of the warnings than Canadians and British respondents, but there was no significant difference between Canadians and Australians, or Australians and British respondents, in respect of foregoing cigarettes.²³²¹ The authors also reported that the "strongest predictors of subsequent quitting" – which they identify as cognitive responses and foregoing cigarettes – indicated that Australian warnings produced stronger cognitive responses and trend towards greater foregoing

Australian Government's DHA). Shanahan and Elliott 2008 reported on a study in which telephone survey respondents were asked a prompted question in regard to the behavioural effects of health warnings. Among smokers, health warnings were reported as helping smokers smoke less (36%), try to quit (43%), and think about quitting (57%). Forty-nine percent of smokers reported no effect on behaviour. Recent quitters reported that health warnings helped them smoke less (62%), try to quit (64%), think about quitting (75%), give up smoking (62%); and stay quit (55%). In prompted questioning, recent quitters (53%) and ex-smokers (11%) identified "Health warnings on cigarette packets – Pictures" as a factor that helped them decide to quit smoking, whereas recent quitters (44%) and ex-smokers (14%) also identified "Health warnings on cigarette packets – Text" as a factor that helped them decide to quit smoking. 2% of recent quitters mentioned the text and 1% the pictures in respect of the main reason to quit). See *ibid.* pp. 118-122. Australia's expert, Dr Biglan, also refers to a 2011 study, in which an experimental auction was used to estimate the differences in demand associated with different health warning label formats and different packaging formats (including plain packaging). Biglan Report, (Exhibit AUS-13), paras. 102-103 and 174 (referring to Thrasher et al. 2011, (Exhibits AUS-229, JE-24(58)); and Rousu and Thrasher 2013, (Exhibits AUS-228, JE-24(54))). Thrasher et al. 2011 found that packages with the pictorial warning attracted a lower mean bid than the mean bid on the control pack (which featured a 50% text-only warning on one side of the pack), and that the mean bid for the package featuring a pictorial health warning was lower still on the plain unbranded package. Thrasher et al. 2011, (Exhibits AUS-229, JE-24(58)). A separate paper discussing the same study sought to estimate the percentage of US smokers that would decrease their demand for cigarette packs with GHWs and with plain packaging. The authors reported that 45% of participants bid less for a package with a pictorial health warning than a package with a front text warning label, and 64% bid less for a plain package with a pictorial label than a package with a front text warning label. Rousu and Thrasher 2013, (Exhibits AUS-228, JE-24(54)). The authors of these two studies argue that the use of an auction-based methodology of this kind "may be preferable to hypothetical valuation techniques such as hypothetical choice experiments or hypothetical auctions" because of the immediate monetary consequences, and the reduction of bias that can exist when consumers are asked for hypothetical valuations. Thrasher et al. 2011, (Exhibits AUS-229, JE-24(58)), p. 42. See also Rousu and Thrasher 2013, (Exhibits AUS-228, JE-24(54)), p. 171.

²³²⁰ A 2007 study considered smoking behaviour with reference to variables including quit attempts in the past year, and intention to quit and found that those warnings that were more likely to be noticed and read (the warnings considered in this study were UK warnings) were also more likely to lead smokers to think about quitting, to think about the health risks of smoking, and had deterred them from having a cigarette in comparison with smokers from other countries. Hammond et al. 2007, (Exhibit AUS-212), p. 207. In a telephone survey covering four countries, the object was to examine variations in smokers' knowledge about tobacco risks and the impact of package warnings. The authors found that, *inter alia*, a higher level of health knowledge was positively correlated with planning to quit, and that the odds of planning to quit were greater among smokers who agreed that smoking causes the health effects identified in prompted recall, and increased in a linear fashion with the total number of health effects reported. Hammond et al. 2006, (Exhibit AUS-190). Another study using data from the same four countries examined prospectively the impact of health warnings on quitting activity. Specifically, in a total of five waves, the authors used reactions to health warnings collected at one wave to predict cessation activity at the next wave. The authors examined warning salience and cognitive responses (i.e. thoughts about harm and of quitting, forgoing of cigarettes, and avoidance of warnings) as predictors of quit attempts, and of quitting success among those who tried (measured as one month of sustained abstinence, replicated across four wave-to-wave transitions). The authors determined that each of these indicia were significantly positively correlated with making a quit attempt by the next survey wave, though there were no consistent patterns of success. The authors also identified that cognitive responses and foregoing cigarettes were consistent predictors of making a quit attempt across all wave-to-wave transitions where they were measured (though the size of the effect was reduced when controlling for quit intentions). Borland et al. 2009b, (Exhibit AUS-211), pp. 669-672.

²³²¹ Borland et al. 2009a, (Exhibit AUS-210), p. 360.

than the United Kingdom's text-only warnings.²³²² We note that these studies are not critiqued in the reports by Professors Kleijnen et al, Professors Inman et al, or Professor Klick. We also note that these studies are not critiqued by Professor Viscusi in his more general assessment of studies concerning the effect of plain packaging on GHWs.

7.853. Turning to *actual smoking behaviours*, in our earlier analysis of the relationship between attitudes and behaviour²³²³, we noted that a body of research is devoted to the study of the correlation between attitudes, intentions and behaviours, and that the parties all acknowledge, with reference to this research, that the strength of the correlation between attitudes and behaviours in a given context is affected by the interaction of multiple factors.²³²⁴ We also found, in that context, that smoking behaviours are recognized to be influenced by a broad range of factors.

7.854. In the context of our analysis of the effect of changes in the appeal of tobacco products on smoking behaviours, we noted that we do not understand the assumption underlying the design and structure of the TPP measures to be that a reduction in the appeal of tobacco products would be expected *in all cases* to lead to a change in smoking behaviours.²³²⁵ Similarly, we see no basis to assume that GHWs made more effective through changes in cessation knowledge, brand appeal, affective reactions, and health knowledge/risk perception need to be assumed to systematically affect quit intentions and subsequently change smoking behaviour, to establish that increased effectiveness of GHWs through the introduction of tobacco plain packaging would have the ability to contribute to reducing the use of, and exposure to, tobacco products. As discussed above, we understand the reasoning underlying the structure and operation of the TPP measures to be that at least some consumers will be influenced in their smoking behaviours, if GHWs are made more effective as a result of TPP, in combination with other tobacco control measures in place in Australia. We will therefore consider the effect of more effective GHWs on the relevant smoking behaviours, which are initiation, cessation and relapse, as elaborated in Section 3(2) of the TPP Act.

7.855. With respect to initiation, we note Honduras's argument that adolescents, who are "well-aware of the health risks associated with smoking", are driven in their decision to smoke by peer pressure, whether they are sensation-seeking, and whether they are responsive to reward stimuli.²³²⁶ This argument accords more generally with the arguments made by all complainants in connection with the factors that drive adolescent smoking behaviour.²³²⁷

7.856. In our consideration of adolescent smoking behaviour, above, we noted a number of consistencies in the evidence before us in respect of the drivers of smoking initiation, including the developmental factors which have a bearing on the extent to which these drivers may lead to smoking initiation in adolescents and young adults (and with particular reference to adolescent risk-taking, short term rewards, failure to take adequate account of risks, and the need to achieve peer approval).²³²⁸ We also concluded that the evidence indicates that the images and messages conveyed by tobacco packaging are of such a nature as to be capable of conveying a belief on adolescents and young adults that initiating tobacco use can fulfil certain needs, and that it is recognized that youth and young adults are particularly vulnerable to acting on compulsions that are caused by those needs. Taken together, therefore, the evidence before us supports the view that the imagery and associations, with which tobacco products are imbued by virtue of their packaging, are of such a nature as to tap into the vulnerabilities faced in particular by adolescents, by virtue of the nature of adolescent decision-making processes as summarized above.²³²⁹

7.857. Consistently with these conclusions, in the context of the question at issue – whether GHWs, made more effective by plain packaging, could be expected to affect smoking behaviours – we recall in particular the agreement between the complainants' expert, Professor Steinberg, and Australia's expert, Professor Slovic, that "young people do not pay attention to risk

²³²² Borland et al. 2009a, (Exhibit AUS-210), p. 361.

²³²³ See "Relationship between attitudes and behaviours" within section 7.2.5.3.5.2 above.

²³²⁴ See Ajzen, Health Psychology Review 2014, (Exhibit HND-134), pp. 3-4.

²³²⁵ See para. 7.756 above.

²³²⁶ Honduras's first written submission, para. 419.

²³²⁷ See "Smoking initiation" within section 7.2.5.3.5.2 above.

²³²⁸ See paras. 7.709-7.714 above.

²³²⁹ See para. 7.737 above.

information".²³³⁰ In this sense, the prospect that plain tobacco packaging may enhance the visual attention paid to, or increase the noticeability of, GHWs, may not in and of itself be sufficient to overcome the reward-seeking behavioural impulses of those adolescents for whom this impulse is a dominant factor in their decision-making.

7.858. We note, however, Professor Tavassoli's discussion of the notion of "selective attention", and in particular that human brains are not capable of attending to numerous elements that may at once compete for attention.²³³¹ Professor Tavassoli discusses, in that context, studies by Maynard et al. 2012 and Beede and Lawson 1992, which are discussed above, in respect of eye-tracking indicating greater attention to GHWs on plain packs than on branded packs, and that recall of warnings was also enhanced when it did not compete with brand imagery.²³³² Professor Tavassoli also discusses the concept of "goal competition", in which he argues that "the perceived value of a product is based on its perceived ability to satisfy consumption goals".²³³³ He argues that the "accessibility of a goal can also be influenced by the activation or accessibility of other goals", as "making one goal accessible will not only increase the impact of that goal on behaviour, but it will decrease the impact of unrelated or oppositional goals", because it is "difficult for people to entertain multiple goals in their minds, and if one gains prominence, others are inhibited".²³³⁴ Professor Tavassoli states that goal-competition research highlights "that there is a difference between whether people know something and how much influence that knowledge has on what people do in a given situation".²³³⁵ In this respect, he argues that goal-competition "does not require GHWs to change consumer beliefs about the health benefits of not smoking"; instead, "TPP can increase GHWs effectiveness by allowing GHWs to activate more effectively already held beliefs at critical moments, i.e. by limiting the activation of competing goals that momentarily inhibit the goal of staying healthy".²³³⁶

7.859. In response to this argument, Cuba argues that the appearance of a trademark on the remaining 25% of the front of the pack will not have any appreciable effect on the consumers' appreciation of the health risks of tobacco use.²³³⁷

7.860. In our view, Professor Tavassoli's arguments, seen against the broader context of the factors recognized to influence smoking behaviours that we considered in earlier parts of our analysis, including smoking initiation among adolescents, suggest that the removal of the branding elements that may constitute a cause for adolescents to associate tobacco products with positive imagery and rewards (on the basis of which they would be inclined to act, as discussed above), would remove, or at least significantly reduce, the competition (both in terms of attention, and between different goals) between the negative message conveyed by the GHW, and branding elements of the package. Such a conclusion appears consistent with Professor Chaloupka's model for understanding the functioning of GHWs, and in particular the bearing that GHWs can have on the overall appeal of the product²³³⁸, in that in the presence of tobacco plain packaging the *only* message communicated by the packaging is the GHW, and that no association with rewards is communicated. In this respect, though we accept that knowledge of risk will not always be a sufficient motivator of adolescent behaviour, we are nonetheless not persuaded that the removal of branding elements, which we have found to communicate messages that appeal to adolescent reward-seeking behaviour, could not increase the effectiveness of GHWs by removing those appealing elements that may compete with, and detract from appreciation of, the GHWs.

7.861. In respect of cessation and relapse, we recall the discussion by the parties, including through their experts' reports (which are most relevantly, in this context, those submitted by Drs Satel and Brandon, and by Professor Fischer), in respect of the drivers of cessation and relapse. As we have discussed, much of these experts' discussion of cessation and relapse relates to the extent to which the absence of branding on tobacco products influences whether tobacco

²³³⁰ Slovic Report, (Exhibit AUS-12), para. 110 (referring to Steinberg Report, (Exhibit DOM/HND-6)).

²³³¹ Tavassoli Report, (Exhibit AUS-10), paras. 110-113.

²³³² Tavassoli Report, (Exhibit AUS-10), para. 112 (referring to Maynard et al. 2013, (Exhibits AUS-200, JE-24(40)); and Beede and Lawson 1992, (Exhibits AUS-202, JE-24(6)), respectively).

²³³³ Tavassoli Report, (Exhibit AUS-10), paras. 114-115.

²³³⁴ Tavassoli Report, (Exhibit AUS-10), para. 116.

²³³⁵ Tavassoli Report, (Exhibit AUS-10), para. 117.

²³³⁶ Tavassoli Report, (Exhibit AUS-10), para. 117.

²³³⁷ Cuba's second written submission, para. 307.

²³³⁸ See paras. 7.805-7.806 above.

packaging can act as a conditioned cue and thus inhibit cessation or encourage relapse. These experts have not addressed specifically the effect of more effective GHWs on cessation and relapse. We note however that all three of these experts²³³⁹ agree that concern regarding the health effects of tobacco use is a factor associated with successful quit attempts and/or cessation.²³⁴⁰ This is consistent with the observation by Professor Slovic that "[w]ith experience, the health risks and other adverse consequences of smoking became evident and stood as a major motivation to quit using cigarettes".²³⁴¹ We also note that an expert report by Professor McKeganey, relied on by the Dominican Republic, identifies a number of studies that set out factors associated with cessation, among which are concerns over health and awareness of health consequences of smoking.²³⁴² Professor Fong also refers to Professor McKeganey's report and observes that "factors such as concerns about the health harms of smoking, lower consumption, and stronger motivation to quit are significant predictors of cessation".²³⁴³

7.862. This evidence suggests a convergence among these experts on the role of concerns regarding the health effects of tobacco products as a factor associated with motivation to quit and cessation. This is consistent with the conceptual model set out by Professor Chaloupka and endorsed by the IARC in respect of the effectiveness of GHWs, which identifies health knowledge and perceived risk as a mediator on which GHWs are intended to have an impact, and thereby affect quit intentions and, ultimately, smoking behaviours. This is also consistent with studies on the record of these proceedings²³⁴⁴, to one of which Professor Slovic also refers.²³⁴⁵ Moreover, the studies summarized above indicate that there is published evidence in support of a connection, for at least *some smokers*, between the noticeability of GHWs and thoughts about quitting²³⁴⁶; about the health risks of smoking, and deterrence from having a cigarette²³⁴⁷; that levels of health knowledge are correlated with plans to quit²³⁴⁸; and that warning salience and cognitive responses are correlated with foregoing cigarettes and with quit attempts.²³⁴⁹ This evidence, taken together, therefore suggests that the type of impact that plain packaging is anticipated to have on the effectiveness of GHWs, i.e. an improved awareness of health concerns associated with smoking, is among those factors that are recognized as influencing the motivation to quit and cessation of the use of tobacco products. Moreover, as observed above, we do not understand the complainants to challenge the ability of GHWs in general to have an impact on the level of awareness of the health risks associated with the use of tobacco products, or the relevance of such awareness to the motivation to quit and cessation.

7.863. In light of the above, we are not persuaded that the complainants have demonstrated that there could be no correlation between increases in the effectiveness of GHW (as measured by changes in cessation knowledge, brand appeal, affective reactions, and health knowledge/risk

²³³⁹ See Satel Report, (Exhibit UKR-7), paras. 26 and 33; Fischer Report, (Exhibit DOM/HND-7), para. 50; and Brandon Report, (Exhibit AUS-15), para. 79.

²³⁴⁰ Dr Satel identifies the following "general predictors of cessation": motivation to quit (which is influenced by the immediacy of health concerns); a supportive, encouraging network of friends and family; and the smoker's sense of self-efficacy (i.e. degree of confidence that once they have stopped smoking they can remain abstinent). Satel Report, (Exhibit UKR-7), paras. 21-33. Professor Fischer argues that successful quit attempts are associated with variables such as motivation, self-efficacy, lower nicotine dependence, and prior quit attempts, younger age, lower cigarette consumption, and smoking-related health concerns. She associates smoking cessation with factors including motivation, self-efficacy, lower nicotine dependence, and prior quit attempts, older age, male gender, higher income, low alcohol consumption, lower expected health benefit, level of education, and having a higher age of smoking initiation. Professor Fischer notes in her description that this list is not exhaustive. Fischer Report, (Exhibit DOM/HND-7), paras. 18-19 and 50-51. The paper relied upon by Professor Fischer in this context also identifies health concerns as being a common motivator of quit attempts. See Hyland et al. 2006, (Exhibit AUS-226), p. iii83. Dr Brandon states that he considers that the variables identified by Professor Fischer are "all reasonable", though they "include only distal, stable characteristics, excluding proximal, environmental, and phasic variables". Brandon Report, (Exhibit AUS-15), para. 79.

²³⁴¹ Slovic Report, (Exhibit AUS-12), para. 52.

²³⁴² McKeganey Report, (Exhibits DOM-105, CUB-72), pp. 24-27.

²³⁴³ Fong Report, (Exhibit AUS-14), para. 588.

²³⁴⁴ See, e.g. Partos et al. 2013, (Exhibit AUS-204) and McCaul 2006, (Exhibit AUS-205). Neither of these studies features in the complainants' literature reviews.

²³⁴⁵ Slovic Report, (Exhibit AUS-12), para. 52.

²³⁴⁶ Hammond et al. 2007, (Exhibit AUS-212).

²³⁴⁷ Borland et al. 2009b, (Exhibit AUS-211).

²³⁴⁸ Hammond et al. 2006, (Exhibit AUS-190).

²³⁴⁹ Borland et al. 2009a, (Exhibit AUS-210); and Borland 1997, (Exhibit AUS-213).

perception) and changes in quitting intentions or smoking behaviours, including initiation and cessation.

7.864. In respect of relapse, Dr Satel submits that this may be precipitated by stress and negative feelings that are typically evident in the hours leading up to relapse²³⁵⁰, and that "[e]pisodic events" (such as divorce, the initiation of smoking by a partner, and conflicts with others) and economic strain, insecure employment, socializing with people who smoke, and limited opportunities for respite and recreation, make quitters vulnerable to relapse.²³⁵¹ Professor Fischer submits that clinical samples report that several predictors of relapse to smoking are the presence of withdrawal symptoms and higher levels of nicotine dependence; negative affect (mood); being younger at the time of the quit attempt; a history of comorbid psychiatric disorders, including past or current anxiety disorders, depression, and schizophrenia; and absence of tobacco-related disease.²³⁵² At the population level, she notes that relapse has been associated with the presence of withdrawal symptoms and recently failed quit attempts; negative affect; a higher level of baseline nicotine dependence; gender; lower socioeconomic status; lower subjective social status; and high stress situations following a period of low stress.²³⁵³ Australia's expert Dr Brandon appears to agree with Professor Fischer, noting that these factors are "all reasonable", although he adds that they "include only distal, stable characteristics, excluding proximal, environmental, and phasic variables".²³⁵⁴

7.865. It seems to be agreed, therefore, that such "episodic" events can drive relapse, and suggest that whether a smoker relapses depends at least in part on whether the effect of the episodic event is sufficient in its influence to overcome the impetus created by whichever factor caused a given smoker to quit in the first place. This is supported by studies on the record of these proceedings. For example, a literature review by McCaul et al. 2006 identified health concerns as a primary motivator for quitting in almost all studies reviewed, and suggested that motivation or cessation strategies include having smokers construct systems to remind themselves about the health consequences of smoking in order to, *inter alia*, assist in the maintenance of a successful quit attempt and rejuvenate quit attempts among those who have relapsed.²³⁵⁵ In addition, survey data collected between 2002 and 2009 of smokers in Australia, Canada, the United Kingdom, and the United States analysed by Partos et al. 2013 found that frequent noticing of health warnings among ex-smokers was associated with greater relapse one year later, but that this effect disappeared when the authors controlled for urges to smoke and self-efficacy. The authors also reported that participants who reported that health warnings make staying quit "a lot" more likely were less likely to have relapsed one year later.²³⁵⁶

7.866. This evidence suggests to us that by influencing the extent to which GHWs on tobacco products are considered easier to see, more noticeable, perceived as being more credible and more serious, attracting greater visual attention among non-smokers and weekly smokers, less subject to distractions caused by other packaging elements, and read more closely and thought about more, the TPP measures could impact the factors that drive cessation (including, in particular, concerns about the health effects of tobacco use). However, in making this observation, we note that there is significantly less evidence before us concerning the impact of GHWs, including those made more effective because of plain packaging, on preventing relapse.

7.867. In light of the foregoing, we are not persuaded that the complainants have shown that improvements in the effectiveness of GHWs brought about by the TPP measures could not be also associated with changes in smoking behaviours, and in particular with smoking initiation and cessation.

²³⁵⁰ Satel Report, (Exhibit UKR-7), para. 34.

²³⁵¹ Satel Report, (Exhibit UKR-7), para. 34.

²³⁵² Fischer Report, (Exhibit DOM/HND-7), para. 55.

²³⁵³ Fischer Report, (Exhibit DOM/HND-7), para. 56.

²³⁵⁴ Brandon Report, (Exhibit AUS-15), para. 79.

²³⁵⁵ See McCaul 2006, (Exhibit AUS-205), p. 53.

²³⁵⁶ See Partos et al. 2013, (Exhibit AUS-204).

Conclusion

7.868. In light of the above, we are not persuaded that the complainants have demonstrated that the TPP measures would not be capable of increasing the effectiveness of GHWs, and thereby contribute to Australia's objective of improving public health by reducing the use of, and exposure to, tobacco products.

7.869. Rather, we find that credible evidence has been presented, emanating from recognized sources, that plain packaging of tobacco products may increase the salience of GHWs, by making them easier to see, more noticeable, and perceived as more credible and more serious. We are not persuaded that the complainants have demonstrated that these effects could not arise in Australia by reason of the large size of the GHWs applied simultaneously with the TPP measures, or that existing levels of risk awareness in Australia would render inutile any additional effort to increase such awareness and thereby affect risk beliefs. We are also not persuaded, in light of the evidence before us, that GHWs that would be more visible and noticeable, and perceived as being more credible and more serious, could not be expected to have an impact on smoking behaviours, including initiation, cessation and relapse.

7.870. In addition, we recall that we also have before us evidence relating to the actual application of the TPP measures since their entry into force, including empirical studies specifically addressing the impact of plain packaging on the effectiveness of GHWs, which will be considered in section 7.2.5.3.6.1 below, and given appropriate weight. We therefore do not seek to draw, at this stage of our analysis, any overall conclusion on the impact of the TPP measures on the effectiveness of GHWs, and the extent to which any change in that effectiveness has contributed to Australia's objective of improving public health by reducing the use of, and exposure to, tobacco products.

7.2.5.3.5.4 Third mechanism: reducing the ability of the pack to mislead consumers about the harmful effects of smoking

7.871. As described above, the third "mechanism" through which the TPP measures are designed to contribute to the achievement of their objective is by "reducing the ability of the pack to mislead consumers about the harmful effects of smoking", which, in turn, is expected to influence smoking behaviours and thereby contribute to a reduction in the use of, and exposure to, tobacco products.

7.872. The complainants contest the TPP measures' ability to contribute to Australia's objective through this "mechanism". Their challenge derives in part from their critique of the TPP literature, discussed in section 7.2.5.3.5.1 above, wherein the complainants dispute the relevance and reliability of the evidentiary base underlying the design and structure of the measures, which includes studies that attempted to measure the impact of plain packaging on the ability of tobacco packaging to mislead consumers about the harmful effects of smoking. In addition, the complainants argue that the TPP measures make no contribution to reducing prevalence by preventing misleading packaging because Australia's current regulatory framework is capable of preventing, and does prevent, packaging from misleading consumers.

7.873. Australia responds that the TPP measures, by reducing the ability of tobacco products to mislead consumers about the relative harmfulness of brands, or product types, will contribute to discouraging initiation and encouraging cessation of tobacco use. Where consumers are fully informed of the real risks and serious consequences of tobacco use, Australia argues, they are more likely to engage in quitting behaviour.

7.874. Australia refers to a number of studies predating the implementation of the TPP measures (including evidence drawn from the body of studies discussed above as the TPP literature) and evidence relating to the application of the TPP measures since their entry into force. In this section, we focus on the design and structure of the measures, in respect of their aptitude to reduce the ability of the pack to mislead consumers about the harmful effects of smoking, and thereby contribute to Australia's objective of improving public health by reducing the use of, and exposure to, tobacco products.

7.875. We consider the *application* of the TPP measures, and specifically the evidence in respect of their effect on the "proximal" outcomes (of which reducing the ability of the pack to mislead consumers about the harmful effects of smoking is one) in section 7.2.5.3.6.1 below.

Main arguments of the parties

7.876. Honduras asserts that the TPP measures seem to be based on the assumption that portion of the pack that is not occupied by large GHWs could mislead consumers about the harmful effects of smoking or using tobacco products.²³⁵⁷ It recalls its argument that "there is no real and practical connection between smoking behaviours (namely smoking initiation, cessation or relapse) and tobacco packaging", and that "smoking is a highly complex behaviour, which is not influenced by tobacco packaging".²³⁵⁸ Honduras also argues that, nevertheless, the report by Honduras's and the Dominican Republic's expert, Mr Shavin, "demonstrates that the use of any design elements of packaging (including tobacco packaging) that are likely to mislead or deceive consumers could, if proper evidence is presented, be effectively dealt with under the existing legal and administrative structures in Australia".²³⁵⁹ Honduras argues that Sections 29 and 33 of the Australian Consumer Law (ACL) are adequate and broad enough to address the concern that tobacco packaging can "mislead consumers about the harmful effects of smoking or using tobacco products". Honduras refers to Mr. Shavin's statement that a representation that tobacco products are not as harmful as they actually are "could qualify as a false or misleading representation as to: (i) a 'standard' or 'quality' of a product", the "performance characteristics" of a product both within the meaning of Section 29, "and/or ... the 'nature' and 'characteristics' of goods in the sense of Section 33".²³⁶⁰ Honduras further explains that there must be a *causal link* between the conduct and the outcome.²³⁶¹ Honduras adds that this possibility must be assessed in relation to a particular class of persons to whom the representation is directed and who are allegedly being affected by the impugned conduct, and that judges must consider the totality of all representations constituting the message, rather than focusing on one specific element thereof.²³⁶² For Honduras, in the context of tobacco packaging, this means that "it is wrong to assess whether the packaging might cause consumers to be misled as to the health effects or otherwise the desirability of the tobacco products by considering only the trademarks in isolation, without considering the effects of all of the design elements in their context, including the graphic health warnings".²³⁶³

7.877. Honduras submits that the Australian Competition and Consumer Commission (ACCC) is entrusted with, *inter alia*, investigating possible breaches of the competition and consumer protection provisions of the Australian law and has strongly enforced Australia's law against misleading or deceptive conduct. Honduras refers to Mr. Shavin's description of "specific examples of the ACCC's successful enforcement proceedings against tobacco companies, distributors and retailers", including its successful action against the promotion by some tobacco companies of brands as "light", "ultra-light", "mild", "ultra-mild" or "low-tar", which, in the ACCC's view, resulted in misleading consumers about the dangers of smoking.²³⁶⁴

²³⁵⁷ Honduras's first written submission, para. 518.

²³⁵⁸ Honduras's first written submission, para. 519.

²³⁵⁹ Honduras's first written submission, para. 520. Honduras elaborates that, as set out by Mr Shavin, four sections of the Australian Consumer Law (ACL) regulate misleading or deceptive conduct – Section 18 ("a general provision that establishes a broad prohibition on engaging, in trade or commerce 'in conduct that is misleading or deceptive or is likely to mislead or deceive'"); Section 29 (which contains specific prohibitions on kinds of false or misleading representation); and Sections 33 and 34, ("which address goods and services, respectively, and provide that a person must not, in trade or commerce, engage in conduct "that is liable to mislead the public as to the nature,... the characteristics ... of any goods"). Honduras's first written submission, para. 521 (referring to D. Shavin, "Prohibitions Against Misleading and Deceptive Conduct Pursuant to the Australian Consumer Law and the Australian Competition & Consumer Commission's History of Effective Enforcement Thereof", 4 October 2014, (Shavin Report) (Exhibit DOM/HND-1), paras. 18-22; and *Competition and Consumer Act 2010* (Cth), Excerpts, (Exhibit HND-66), Sections 29(1)(a) and 29(1)(g)).

²³⁶⁰ Honduras's first written submission, para. 523.

²³⁶¹ Honduras's first written submission, para. 524.

²³⁶² Honduras's first written submission, para. 524.

²³⁶³ Honduras's first written submission, para. 524 (referring to Shavin Report, (Exhibit DOM/HND-1), paras. 49-53).

²³⁶⁴ Honduras's first written submission, para. 529. Honduras explains that as a result of the ACCC's action, the companies gave an undertaking, amongst other things, to cease these activities and to provide funding for a consumer education campaign.

7.878. In Honduras's view, this "demonstrates that there is a comprehensive and robust legal and administrative framework in Australia to address any misleading or deceptive conduct, including in the context of tobacco retail packaging"; and that "the Australian authorities responsible for enforcing ACL against such conduct (namely the ACCC), have acted successfully and diligently against tobacco companies, distributors and retailers, when there was credible evidence that the investigated companies did in fact engage in misleading or deceptive acts".²³⁶⁵ This "shows that the plain packaging measures are superfluous" and that "[t]hey will not contribute to Australia's objective to reduce smoking prevalence by eliminating the alleged misleading or deceptive elements of tobacco packaging".²³⁶⁶

7.879. The Dominican Republic argues that the TPP measures have not contributed to reducing any tobacco consumption that would result from misleading packaging as the ACCC can and does already intervene to prohibit deceptive packaging. Specifically, the Dominican Republic submits that "Australia has had in place for many years a highly effective regulatory regime to tackle misleading packaging, and the [TPP] measures have contributed nothing to this pre-existing capability to reduce any tobacco consumption that would result from such misleading packaging".²³⁶⁷

7.880. The Dominican Republic relies on an expert report by David Shavin QC, who "explains how the Australian Competition & Consumer Commission ('ACCC') has made use of the pre-existing and longstanding consumer protection regime to prevent misleading of consumers, through packaging or otherwise, including for tobacco products".²³⁶⁸ Mr. Shavin concludes that the TPP measures will not contribute anything beyond the regime and mechanisms that already existed in Australia (and continue to exist) toward reducing the risk that tobacco packaging misleads consumers about the harmful effects of smoking,²³⁶⁹ as the use of any design element on tobacco packaging likely to mislead or deceive consumers could, if proper evidence is presented, be dealt with as misleading or deceptive conduct under Australian law.²³⁷⁰ The Dominican Republic argues that the provisions of the ACL are "broad enough to address one of the key concerns of the [TPP] Act – that tobacco packaging can 'mislead consumers about the harmful effects of smoking or using tobacco products'".²³⁷¹ The Dominican Republic refers in addition to Mr. Shavin's submission that the ACL's prohibition on misleading or deceptive acts has been interpreted broadly, and "creates powerful incentives for steps to be taken against packaging and other acts likely to mislead consumers, through the ability of the ACCC or private parties to bring actions resulting in the imposition of civil penalties or criminal sanctions for violations".²³⁷² The Dominican Republic submits that Australia already has at its disposal the power to prevent any ability of tobacco packaging "to mislead consumers about the harmful effects of smoking or using tobacco products", and "makes good use of such power through the ACCC's investigations and enforcement actions".²³⁷³ Thus, in the Dominican Republic's view, "the [TPP] Act fails to contribute

²³⁶⁵ Honduras's first written submission, para. 529.

²³⁶⁶ Honduras's first written submission, para. 529. See also Honduras's closing statement at the first meeting of the Panel, para. 10.

²³⁶⁷ Dominican Republic's first written submission, para. 725.

²³⁶⁸ Dominican Republic's first written submission, para. 726 (referring to Shavin Report, (Exhibit DOM/HND-1), p. 9).

²³⁶⁹ Dominican Republic's first written submission, para. 726 (referring to Shavin Report, (Exhibit DOM/HND-1), para. 15).

²³⁷⁰ Dominican Republic's first written submission, para. 727 (referring to Shavin Report, (Exhibit DOM/HND-1), para. 13). The Dominican Republic refers to Section 29 of the ACL, as well as Section 18, the latter of which "is a related, although more generalized, obligation, providing that a person 'must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive'".

Dominican Republic's first written submission, para. 728 (referring to ACL, (Exhibit DOM-110)).

²³⁷¹ Dominican Republic's first written submission, para. 729 (quoting Shavin Report, (Exhibit DOM/HND-1), para. 23). For example, "an explicit or implicit representation that tobacco products are not as harmful as they actually are would qualify as a false/misleading representation as to a 'standard' or 'quality' or 'nature' of a product within the meaning of sub-section 29(1)(a) of the ACL", and, furthermore, such a representation would qualify as a false/misleading representation as to the "performance characteristics" of a product, within the meaning of sub-section 29(1)(g) of the ACL. Ibid.

²³⁷² Dominican Republic's first written submission, paras. 730-731.

²³⁷³ Dominican Republic's first written submission, para. 735. Dominican Republic's first written submission, para. 732 (referring to Shavin Report, (Exhibit DOM/HND-1), and Shavin Pre-Vetting Report, (Exhibit DOM/HND-9), paras. 73-74). Reference is also made to the ACCC's investigations of "allegations that the use of such descriptors constituted misleading or deceptive actions in violation of Australian consumer protection law, resulting in three major tobacco companies entering into legally enforceable undertakings to,

to the objective of reducing tobacco consumption through the prevention of misleading information on tobacco packaging, as there was no need in Australia to supplement the existing regime".²³⁷⁴

7.881. Cuba argues that the claim that plain packaging reduces the ability of packaging to mislead consumers about the harmful effects of smoking cannot justify the TPP measures.²³⁷⁵ Cuba elaborates that it "does not dispute that it is possible for design elements and information placed on the retail packaging of tobacco products to convey misleading information about the harm or the relative harm associated with the consumption of tobacco products".²³⁷⁶ However, Cuba submits that Australia's claim in this respect "only works as a justification for the [TPP] Measures if one adopts the far-reaching assumption that all of the design elements included on tobacco product packaging are deceptive".²³⁷⁷ Cuba adds that if, as Cuba contends, only a subset of design elements can be classified as deceptive then the appropriate regulatory response is to require that the relevant manufacturers remove any such deceptive material from product packaging. Cuba argues that there are existing mechanisms under Australian law that achieve this outcome.²³⁷⁸ Cuba submits that, in contrast, "by banning all design elements and outlawing the inclusion of a broad range of information (including innocuous elements such as the Habanos GI and the Cuban Government Warranty Seal)", Australia has "imposed an overbroad restriction that goes further than necessary to attain any possible public health benefit".²³⁷⁹ For Cuba, this "indiscriminate approach is disproportionate in light of the alternatives available to Australia".²³⁸⁰ Cuba summarizes that the appropriate regulatory response is not plain packaging but a requirement that the relevant manufacturers remove any such deceptive material from product packaging, and Australian law already contains such a requirement.²³⁸¹ Moreover, Cuba argues that "[n]one of the studies assessing this matter address the effect of any misperceptions as to risk on actual smoking behaviour".²³⁸²

7.882. Indonesia argues that, "as a factual matter", if Australia considers that any specific typeface currently used in a registered trademark is misleading to consumers, the ACCC has existing authority to de-register such trademarks, but has taken no such action to date.²³⁸³

7.883. Australia responds that, when coupled with packaging innovations to detract from health warnings, the packaging of a tobacco product contributes to misleading consumers about the serious health consequences of using such products.²³⁸⁴ Australia adds that "[s]uch misperceptions have been compounded by the tobacco industry's deliberate attempts to market some types of brands of tobacco products as 'safer' than others, by creating 'light' or 'low tar' cigarettes, which were previously marketed as having less distinct flavour and lower delivery of harmful chemicals compared with regular cigarettes".²³⁸⁵ Australia submits that "[t]here is a large body of evidence that the [TPP measures], by limiting the ability to use packaging design, colour and structural innovations through standardization of the packaging, reduces the ability of the retail packaging of tobacco products to mislead consumers (particularly young consumers) about the harmfulness of tobacco products".²³⁸⁶

7.884. Australia refers to various studies on the use of certain colours²³⁸⁷ and argues that in using colours to convey certain meanings, the design of tobacco product packages continues to reinforce

inter alia, cease the use of such descriptors and contribute AUD 9 million to fund a consumer education campaign". Dominican Republic's first written submission, para. 733.

²³⁷⁴ Dominican Republic's first written submission, para. 735.

²³⁷⁵ Cuba's first written submission, para. 350.

²³⁷⁶ Cuba's first written submission, para. 229.

²³⁷⁷ Cuba's first written submission, para. 229.

²³⁷⁸ Cuba's first written submission, para. 229 (referring to Heydon Report, (Exhibit UKR-11)).

²³⁷⁹ Cuba's first written submission, para. 230.

²³⁸⁰ Cuba's first written submission, para. 230.

²³⁸¹ Cuba's first written submission, paras. 350-351; and Cuba's second written submission, para. 48.

²³⁸² Cuba's first written submission, paras. 350-351; and Cuba's second written submission, para. 48.

²³⁸³ Indonesia's second written submission, para. 183.

²³⁸⁴ Australia's first written submission, para. 187.

²³⁸⁵ Australia's first written submission, para. 188.

²³⁸⁶ Australia's first written submission, para. 188.

²³⁸⁷ Australia's first written submission, para. 189. Australia refers to a study that "found that smokers of gold, silver, blue or purple brands were more likely to believe their own brand might be 'a little less harmful' compared to smokers of red or black brands", and "studies [which] have found that the use of blue, gold, and white is often used to convey mildness, while darker and richer colours were seen as conveying strong

misperceptions about the notion that some tobacco brands or types are less harmful than others.²³⁸⁸

7.885. Australia submits that, while an undertaking entered into between the ACCC and the tobacco industry in Australia in 2006 resulted in the withdrawal of descriptors such as "mild", "extra mild" and "light", the tobacco industry "continued to use a variety of colours to help convey certain associations such as taste, harshness and product strength".²³⁸⁹ Australia's expert, Professor Tavassoli, notes that similar tactics were used in other jurisdictions, where *Pall Mall Filter* and *Pall Mall Lights* became *Pall Mall Red* and *Pall Mall Blue* respectively. The ban on misleading descriptors may thus "have been only partially effective, based on the learned associative meaning of colour".²³⁹⁰ In this way, "the package design and colouring used for 'light' or 'low-tar' products has been an important component of the overall strategy to mislead consumers into believing certain brands or product types are less harmful".²³⁹¹

7.886. Australia submits that tobacco industry documents "clearly describe use of colours and shading to create perceptions of reduced strength by the tobacco industry"²³⁹² and that its own commissioned research "confirmed earlier findings, concluding that darker colours [on packs] were seen to contain cigarettes which were more 'harmful to health' and 'harder to quit'" and that lighter colours were seen to be less "harmful to health", and "easier to quit".²³⁹³ Australia adds that drab dark brown packaging, which was chosen for the implementation of the TPP measures, was rated as containing tobacco products that are harder to quit, and were most harmful to health.²³⁹⁴ Australia submits that "[u]nique and creative package designs, in addition to special shapes, opening styles, and filters, have been used to differentiate brands and product types based on their harmfulness in the minds of consumers".²³⁹⁵ This is exemplified by narrow "perfume" type packs which, Australia argues, are portrayed as a fashion accessory rather than a health risk; small packs with "super slims" which, Australia contends, are portrayed to offer lower levels of addiction; and more masculine packs, which Australia argues are suggestive of being heavier or stronger.²³⁹⁶

7.887. Australia argues that plain packaging removes the design and structural features of tobacco product packaging which mislead consumers and reduces false beliefs about the harmfulness of product types or brands or variants by standardizing the package structure.²³⁹⁷ Australia adds that other product characteristics, such as the colour of the tipping paper, also convey the sense in the minds of consumers that particular products are less harmful.²³⁹⁸ Australia also argues that the misleading effect of packaging is also evident across tobacco product types, and that a study in Australia on the effect of tobacco plain packaging on cigar products linked the standardization of package structure and colour design to the perception that those products in plain packaging were more harmful.²³⁹⁹

7.888. Australia further argues that in reducing brand and product category appeal and regulating pack design and structure, plain packaging contributes to reducing false beliefs held by consumers about the "relative harmfulness" of tobacco product types and brands and variants.²⁴⁰⁰ Australia argues that the TPP measures reduce the ability of the tobacco package to mislead consumers and potential consumers (and particularly youth) by requiring that drab dark brown be utilised for all tobacco product packaging which, in Australia's submission, removes the effect of colour and

flavour". Ibid. (referring to Mutti et al. 2011, (Exhibit AUS-217); Difranza et al. 2003, (Exhibit AUS-92); Wakefield et al. 2002, (Exhibits AUS-93, CUB-28); NCI Tobacco Control Monograph No. 19, (Exhibit AUS-77); and Parr et al. 2011a, (Exhibits AUS-117, JE-24(49))).

²³⁸⁸ Australia's first written submission, para. 189.

²³⁸⁹ Australia's first written submission, para. 190.

²³⁹⁰ Australia's first written submission, para. 190.

²³⁹¹ Australia's first written submission, para. 191.

²³⁹² Australia's first written submission, para. 191.

²³⁹³ Australia's first written submission, para. 192.

²³⁹⁴ Australia's first written submission, para. 192.

²³⁹⁵ Australia's first written submission, para. 194.

²³⁹⁶ Australia's first written submission, para. 194.

²³⁹⁷ Australia's first written submission, para. 193.

²³⁹⁸ Australia's first written submission, para. 194.

²³⁹⁹ Australia's first written submission, para. 195 (referring to Parr et al. 2011b (Exhibits AUS-219, JE-24(50)).

²⁴⁰⁰ Australia's first written submission, para. 196.

design elements on perceptions of harm for smoking and non-smoking adults, youth, and young women, and by standardizing package designs.²⁴⁰¹

7.889. Australia also argues that tobacco plain packaging reduces the opportunities to mislead consumers about the health risks of individual products, which "is of particular relevance in the case of non-cigarette tobacco products, which are still consistently viewed as less harmful and distinct from cigarettes".²⁴⁰²

7.890. Australia concludes that, "by reducing the ability of the tobacco pack to mislead, the tobacco plain packaging measure works together with other tobacco control policies such as public education efforts and health warnings to continue to inform consumers as to the harmfulness of all tobacco product types as well as to encourage cessation behaviour", which "directly contributes to the public health objectives of the tobacco plain packaging measure, as set out under subsection 3(1) of the TPP Act".²⁴⁰³

7.891. Australia does not dispute that "the ACL could be used to address" this mechanism, though it "is not nearly as effective in achieving this objective as the tobacco plain packaging measure".²⁴⁰⁴ Australia elaborates that "[t]obacco plain packaging has prevented any misleading package from being released onto the Australian market since its full implementation in December 2012", whereas "using litigation under the ACL to restrain the use of misleading packaging would involve: a case-by-case approach and significant cost and uncertainty of outcome, even in circumstances where Australia has extensive evidence to demonstrate that particular packaging techniques are misleading".²⁴⁰⁵

Analysis by the Panel

7.892. The complainants consider that the ACL already provides a legal mechanism sufficient to address any concern Australia may have in respect of whether tobacco packaging can mislead consumers and through which any packaging having this effect can be removed from the market, such that the TPP measures would not be capable of making a contribution to this mechanism in excess of what is already achieved by the ACL. Australia responds that the TPP measures reduce the ability of the pack to mislead consumers about the harmful effects of smoking and, in doing so, are more effective in preventing Australians from being misled than the ACL.

7.893. At this stage of our analysis, the question before us is whether the structure, design and operation of the TPP measures is such that they would have the capacity to reduce the ability of tobacco packaging to mislead consumers about the harmful effects of smoking, and thereby contribute to Australia's objective of improving public health by reducing the use of, and exposure to, tobacco products.

7.894. We first consider the evidence in relation to the capacity of plain packaging to reduce the ability of tobacco packaging to mislead consumers about the harmful effects of tobacco products, notwithstanding the existence of a regulatory framework in Australia to address such effects. In light of the complainants' arguments that no *additional* reduction could be expected from the TPP measures in light of the pre-existing legal framework in Australia for the prevention of misleading practices, we also consider whether the presence of this legal framework implies that no additional benefit could be gained in this respect from the introduction of the TPP measures.

²⁴⁰¹ Australia's first written submission, para. 196.

²⁴⁰² Australia's first written submission, para. 197.

²⁴⁰³ Australia's first written submission, para. 200. Australia argues, with reference to Fong Report, (Exhibit AUS-14), para. 52, that the TPP measures will "likely" cause (i) "current smokers of regular (non-light) brands who are health-concerned may be more likely to understand and believe that light cigarettes are not less harmful and therefore may be more likely to quit smoking rather than switching from regular to light cigarettes"; (ii) "current smokers already smoking light cigarettes may be more likely to understand and believe that their own brand is not less harmful and therefore may be encouraged to quit"; and (iii) "non-smokers may be less likely to start to smoke and experimental smokers may be less likely to progress to increase their frequency and quantity of smoking because they are more likely to understand and believe that certain brands are not less harmful than others, and that there is no health benefit to smoking a light brand compared to a regular brand". Australia's first written submission, para. 199.

²⁴⁰⁴ Australia's first written submission, para. 731.

²⁴⁰⁵ Australia's first written submission, para. 731.

7.895. We note that some of the complainants' arguments, and in particular some of Cuba's arguments, are formulated in terms of whether plain packaging is an "appropriate" or "disproportionate" regulatory response, to address the ability of tobacco packs to mislead consumers about the harmful effects of smoking. At this stage of our analysis, however, we limit ourselves to a consideration of the capacity of the TPP measures to reduce the ability of the pack to mislead consumers about the harmful effects of smoking, and thereby contribute to Australia's objective of reducing the use of, and exposure to, tobacco products. This question is distinct, in our view, from whether an equivalent contribution could be achieved through other means that may be less trade-restrictive. We note in this respect that the complainants have, elsewhere in their submissions, proposed, as a reasonably available alternative to the TPP measures, that Australia adopt a "pre-vetting mechanism" for tobacco packaging to be administered by the ACCC, to assess individual tobacco packaging features, before a pack is placed on the Australian market. We will consider this proposed alternative in section 7.2.5.6.5 below, in the context of our "comparative analysis" under Article 2.2.

Whether the TPP measures can, by design, reduce the ability of tobacco packaging to mislead consumers about the harmful effects of smoking

7.896. The complainants do not present detailed arguments in addition to those addressed in section 7.2.5.3.5.1 above, in respect of whether the design of the TPP measures is such that they can reduce the ability of retail packaging of tobacco products to mislead consumers about the harmful effects of smoking,²⁴⁰⁶ including in the specific Australian context where a 75% GHW covers the front pack face.

7.897. Australia refers to reports by the US Surgeon General and the US National Cancer Institute, tobacco industry documents, published papers, and a number of empirical studies in support of its argument that the elimination of colour contributes to reducing the ability of the pack to mislead consumers²⁴⁰⁷, that plain packaging removes design and structural features of tobacco product packaging which mislead consumers²⁴⁰⁸, and that the reduction of the ability of the pack to mislead affects consumer intentions and behaviour.²⁴⁰⁹ Australia's expert Professor Fong further identifies a number of studies published prior to the adoption of the TPP measures, that he argues indicate that "there is strong evidence to suggest that the plain packaging measure will have the effect of reducing the ability of the retail packaging of tobacco products to mislead consumers about the harmful effects of smoking or using tobacco products".²⁴¹⁰ Another of Australia's experts, Dr Samet, referencing several of these same studies, as well as certain other studies on the record of these proceedings, concludes that "it is reasonable to propose that reduction of exposure to brand imagery would reduce consumption of cigarettes to the benefit of public health", and that the anticipated benefits would come from the consequences of plain packaging for "product appeal, salience of warnings, and preventing misleading use of the package by the tobacco industry".²⁴¹¹

7.898. The complainants address some of these empirical studies in the context of their critique of the TPP literature. As discussed above the complainants have submitted individual critiques of specific studies and also argue that the TPP literature as a whole suffers from serious methodological flaws and lacks the scientific rigour and objectivity required to form a reliable evidentiary base for a policy intervention of this kind.²⁴¹² Australia relies upon a number of papers that were not part of either the Peer Review Project, the Kleijnen Systematic Review, and/or the

²⁴⁰⁶ We note that Cuba acknowledges that tobacco packaging can, in principle, convey misleading information to consumers about the harm, or relative harm, associated with the consumption of tobacco products. Cuba's first written submission, para. 229.

²⁴⁰⁷ Australia's first written submission, paras. 189-192.

²⁴⁰⁸ Australia's first written submission, paras. 193-195.

²⁴⁰⁹ Australia's first written submission, paras. 196-200.

²⁴¹⁰ Fong Report, (Exhibit AUS-14), para. 413.

²⁴¹¹ Samet Report, (Exhibit AUS-7), para. 132. (emphasis added)

²⁴¹² See Honduras's first written submission, paras. 455-517; Dominican Republic's first written submission, paras. 551-659; and Cuba's first written submission, paras. 169-185.

Klick TPP Literature Report to support its assertion that the measures will prevent the ability of tobacco packaging to mislead consumers about the harmful effects of smoking.²⁴¹³

7.899. Australia specifically references the conclusions of the Stirling Review and the Stirling Review 2013 Update to support its arguments. Overall, 26 of the papers included in the Stirling Review or the Stirling Review 2013 Update and either the Peer Review Project, the Kleijnen Systematic Review, and/or the Klick TPP Literature Report relate to tobacco plain packaging and the ability of branded packages to mislead consumers regarding the harmful effects of smoking, as identified by the Stirling Review and/or the independent Chantler Report reviewers. Of these, Australia has directly relied upon 19 in the course of these proceedings, as reflected by their provision to the Panel as exhibits.²⁴¹⁴

7.900. We also note that 23 of the 26 papers included in the Stirling Review or the Stirling Review 2013 Update and either the Peer Review Project, the Kleijnen Systematic Review, and/or the Klick TPP Literature Report, relate to plain packaging and the ability of branded packages to mislead consumers regarding the harmful effects of smoking, as identified by the Stirling Review and/or Chantler Report, and are on the record of these proceedings.²⁴¹⁵ Of these 23 papers, 16 were included in the original Stirling Review report and assigned quality ratings. One²⁴¹⁶ was determined to be of "high" quality, and 15²⁴¹⁷ of "medium" quality.²⁴¹⁸ Moreover, all 23 papers were assessed in the Chantler Report; 14²⁴¹⁹ were given a score of between 5 and 6 (denoting high quality/low risk of bias), and the remaining nine²⁴²⁰ were given a score of between 3 and 4.5 (denoting moderate quality/moderate bias).²⁴²¹

7.901. On the basis of its assessment, including its identification of all of the reviewed studies being of either high or medium quality, the Stirling Review concluded that:

²⁴¹³ See, *inter alia*, Mutti et al. 2011, (Exhibit AUS-217); Difranza et al. 2003, (Exhibit AUS-92); Wakefield et al. 2002, (Exhibits AUS-93, CUB-28); Labrecque et al. 2013, (Exhibit AUS-218); Hammond and Parkinson 2009, (Exhibit AUS-165); Miller et al. 2015, (Exhibits AUS-102, DOM-315); DeSantis and Morgan 2003, (Exhibit AUS-220); Borland et al. 2009a (Exhibit AUS-210); Borland et al. 2009b, (Exhibit AUS-211); Hammond et al. 2007, (Exhibit AUS-212); Borland 1997, (Exhibit AUS-213); and Brose et al. 2014, (Exhibits AUS-263, JE-24(11)).

²⁴¹⁴ See Table A: Papers Included in a Primary TPP Literature Review and/or Exhibit JE-24, at the end of these Reports. We have used the column heading assigned by both the Chantler Report and the Stirling Review, namely "Perceptions of Harm and Strength", to identify papers that measure the impact of plain packaging on the ability of a pack to mislead consumers regarding the harmful effects of smoking. We further note that the Stirling Review did not identify "perceptions of harm and strength" as a "type of finding" with respect to one of the 26 studies, namely Van Hal et al. 2012, (Exhibits AUS-161, JE-24(60)). We have included this study in our count as the reviewers of the Chantler Report did consider "perceptions of harm and strength" to be one of the "main outcomes covered" by this study.

²⁴¹⁵ See fn 2414 above.

²⁴¹⁶ Moodie and Ford 2011, (Exhibits AUS-189, JE-24(42)).

²⁴¹⁷ Hammond et al. 2009, (AUS-166, JE-24(29)); Hammond et al. 2011, (Exhibits AUS-155, JE-24(44)); Hammond et al. 2013b, (Exhibits AUS-158, JE-24(31)); Wakefield et al. 2008, (Exhibits AUS-149, JE-24(62)); Doxey and Hammond 2011, (Exhibits AUS-156, JE-24(17)); Hammond et al. 2011, (Exhibits AUS-157, JE-24(30)); Germain et al. 2010, (Exhibits AUS-154, JE-24(25)); Moodie et al. 2012, (Exhibits AUS-174, JE-24(45)); Gallopel-Morvan et al. 2012, (Exhibits AUS-152, JE-24(23)); Gallopel-Morvan et al. 2013, (Exhibits AUS-162, JE-24(24)); Bansal-Travers et al. 2011, (Exhibits AUS-150, JE-24(3)), White 2011, (Exhibit AUS-173); Environics 2008a, (Exhibits AUS-179, JE-24(19)); Environics 2008b, (Exhibit JE-24(18)); and Van Hal et al. 2012, (Exhibits AUS-161, JE-24(60)).

²⁴¹⁸ See Stirling Review, (Exhibit AUS-140, HND-130, CUB-59), Table 4.1, pp. 25-37.

²⁴¹⁹ Hammond et al. 2009, (AUS-166, JE-24(29)); Hammond et al. 2013b, (Exhibits AUS-158, JE-24(31)); Wakefield et al. 2008, (Exhibits AUS-149, JE-24(62)); Doxey and Hammond 2011, (Exhibits AUS-156, JE-24(17)); Hammond et al. 2011, (Exhibits AUS-157, JE-24(30)); Germain et al. 2010, (Exhibits AUS-154, JE-24(25)); Gallopel-Morvan et al. 2012, (Exhibits AUS-152, JE-24(23)); Moodie and Ford 2011, (Exhibits AUS-189, JE-24(42)); Bansal-Travers et al. 2011, (Exhibits AUS-150, JE-24(3)); White 2011, (Exhibit AUS-173); Wakefield et al. 2012, (Exhibits AUS-557, JE-24(63)); Ford et al. 2013a, (Exhibits AUS-137, JE-24(20)); Wakefield et al. 2013, (Exhibits AUS-184, JE-24(64)); and Borland and Savvas 2013b (Exhibits AUS-175, JE-24(10)).

²⁴²⁰ Moodie et al. 2011, (Exhibits AUS-155, JE-24(44)); Moodie et al. 2012, (Exhibits AUS-174, JE-24(45)); Gallopel-Morvan et al. 2013, (Exhibits AUS-162, JE-24(24)); Environics 2008a, (Exhibits AUS-179, JE-24(19)); Environics 2008b, (Exhibit JE-24(18)); Ford et al. 2013b, (Exhibit JE-24(21)); McCool et al. 2012, (Exhibit JE-24(41)); Van Hal et al. 2012, (Exhibits AUS-161, JE-24(60)); and Scheffels and Saebo 2013, (Exhibit JE-24(56)).

²⁴²¹ Chantler Report, (Exhibits AUS-81, CUB-61), Annex D, pp. 50-55, and Annex E, pp. 60-62.

- Plain packaging can reduce misperceptions about the relative harmfulness of different brands.
- Colours of packs affect perceptions of product harm and strength and, in general, plain packs are perceived as more harmful than branded packs if in a darker colour such as brown and, conversely, less harmful than branded packs if in lighter colours such as white.
- Use of descriptors such as 'gold' or 'smooth' on plain packs have the potential to mislead consumers, as they do on branded packs.
- In general, smokers are more likely to have misperceptions about the harmfulness of packs, both branded and plain, than non-smokers.²⁴²²

7.902. Furthermore, the Chantler Report concluded, *inter alia*, that tobacco plain packaging will cause consumers to "be less deceived into thinking that some brands are healthier than others and that therefore health warnings apply less to them".²⁴²³ We are not persuaded that these conclusions are voided in their entirety by the presence of enlarged GHWs enacted simultaneously with the TPP measures.²⁴²⁴ We note in this respect that Australia has presented evidence that even small amounts of branding are capable of communicating information to consumers, including in the presence of large GHWs.²⁴²⁵

7.903. We further note Australia's observation that preventing the pack from misleading consumers about the harmful effects of smoking "is of particular relevance in the case of non-cigarette tobacco products, which are still consistently viewed as less harmful and distinct from cigarettes".²⁴²⁶ This assertion concerning these products is consistent with the observations contained in Parr et al. 2011b in respect of cigars and cigarillos²⁴²⁷; data from Australia, Canada, the United Kingdom, and the United States considered by O'Connor et al.²⁴²⁸; and the historical practice adopted by the industry, as documented in Kostygina et al. 2014, of "imply[ing that] cigars are better for your health than are cigarettes and that you'll enjoy them more".²⁴²⁹

7.904. In light of the above, we are not persuaded that the complainants have demonstrated that the TPP measures, by their design, would not be capable of reducing the ability of tobacco packaging to mislead consumers about the harmful effects of smoking.

Whether the TPP measures have the capacity to reduce the ability of tobacco packaging to mislead consumers about the harmful effects of smoking, in light of the pre-existing capacity to do so under the ACL

7.905. As noted above, the complainants argue that Australia's existing ACL is sufficient to address any misleading aspects of tobacco packaging, and that the TPP measures will therefore not add to this capacity. Honduras thus argues that "the use of any design elements of packaging (including tobacco packaging) that are likely to mislead or deceive consumers could, if proper evidence is presented, be effectively dealt with under" the ACL.²⁴³⁰ The Dominican Republic similarly argues that the TPP measures "have contributed nothing to [the] pre-existing capability to reduce any tobacco consumption that would result from ... misleading packaging".²⁴³¹ Cuba argues that the "appropriate regulatory response" is "a requirement that the relevant manufacturers remove any ... deceptive material from product packaging", and that "Australian law already contains such a requirement".²⁴³² Indonesia argues that "if Australia considers that any specific typeface currently used in a registered trademark is 'misleading' to consumers, the [ACCC]

²⁴²² Stirling Review, (Exhibit AUS-140, HND-130, CUB-59), p. 58.

²⁴²³ Chantler Report, (Exhibits AUS-81, CUB-61), p. 31.

²⁴²⁴ See paras. 7.617-7.620 and 7.660 above.

²⁴²⁵ See para. 7.660 fn 1813 above.

²⁴²⁶ Australia's first written submission, para. 198.

²⁴²⁷ See footnote 2306.

²⁴²⁸ See O'Connor et al. 2007, (Exhibit AUS-196).

²⁴²⁹ Kostygina et al. 2014, (Exhibit AUS-181), p. 2.

²⁴³⁰ Honduras's first written submission, para. 520.

²⁴³¹ Dominican Republic's first written submission, para. 725.

²⁴³² Cuba's first written submission, para. 350.

has existing authority to de-register such trademarks, but has taken no such action to date".²⁴³³ The complainants rely on separate expert reports by Messrs Heydon and Shavin in this connection.

7.906. Australia submits that certain colours can convey impressions regarding the *relative* harmfulness of certain tobacco products, and in particular perpetuate an association between certain colours and descriptors such as "light" or "mild", which are no longer used in Australia by virtue of an undertaking between the tobacco industry and the ACCC in 2006.²⁴³⁴ Australia makes a similar observation in respect of pack shapes, with reference to "narrow 'perfume' type packs [that] are portrayed as a fashion accessory rather than a health risk; small packs with 'super slims' [that] are portrayed to offer lower levels of addiction; and more masculine packs [that] are suggestive of being heavier or stronger".²⁴³⁵

7.907. We have concluded in earlier parts of our analysis that such elements of package design, among others, have the capacity to convey a range of perceptions about tobacco products, including in the presence of Australia's mandatory GHWs, and influence the appeal of tobacco products and the effectiveness of GHWs (as measured by the attention paid to, cognitive processing of, perceptions of the seriousness and believability of, or recall of those warnings), such that their removal could be expected to reduce the use of, and exposure to, tobacco products. The question before us in the present context is whether, to the extent that the TPP measures can be expected to reduce the ability of tobacco packaging to mislead consumers about the harmful effects of smoking (which, as we have concluded, the complainants have not demonstrated cannot occur), they can be expected to do so to a greater extent than was already possible under the ACL.

7.908. We take note of the discussion, through the expert reports of Mr Heydon for the complainants²⁴³⁶, and Messrs Finkelstein and Sims for Australia²⁴³⁷, of the extent to which the ACL may be used to address concerns relating either to the impact of tobacco packaging on the appeal of tobacco products or to the effectiveness of GHWs. The specific question before us however, is whether, through the TPP measures, Australia can expect to reduce further (i.e. beyond that which may be possible under the ACL) the extent to which tobacco packaging has the ability to address the concern reflected in the *third mechanism* of the TPP Act, namely mislead consumers about the harmful effects of tobacco products.

7.909. In this connection, Mr Heydon, in his expert report, submits that Australia's *Competition and Consumer Act 2010* (Cth) (CCA), and in particular the ACL, "has many provisions regulating the misleading and deceptive packaging of goods, including tobacco products", and that there "is no element of the allegedly misleading conduct precluded by the challenged regime which is incapable of remedy under the Act".²⁴³⁸ Honduras's and the Dominican Republic's expert, Mr Shavin, also concludes that "given the broad consumer protections provided by the ACL and the ACCC's enforcement of the relevant provisions", the Australian Government "already has at its disposal the power to prevent any ability of tobacco packaging 'to mislead consumers about the harmful effects of smoking or using tobacco products'".²⁴³⁹ Australia's expert, Mr Sims, considers that "at best, the misleading or deceptive conduct provisions in the ACL might be capable of being used only in relation to the third objective of the [TPP Act], that is to reduce the ability of the retail packaging of tobacco products to mislead consumers about the harmful effects of smoking or using tobacco products".²⁴⁴⁰

7.910. Mr Sims' statement indicates that, to the extent that tobacco packaging would feature some element which amounts to conduct that misleads consumers about the harmful effects of

²⁴³³ Indonesia's second written submission, para. 183.

²⁴³⁴ Australia's first written submission, paras. 190-192 (referring to, *inter alia*, Sims Report, (Exhibit AUS-22) (SCI), paras. 4.4-4.15).

²⁴³⁵ Australia's first written submission, para. 194. (footnotes omitted)

²⁴³⁶ See Heydon Report, (Exhibit UKR-11), p. 2 (relied upon by Cuba and Indonesia: see Cuba's communication to the Panel of 13 July 2015; and Indonesia's communication to the Panel of 8 July 2015).

²⁴³⁷ See Finkelstein Report, (Exhibit AUS-21), paras. 67-72; Sims Report, (Exhibit AUS-22) (SCI), paras. 5.3-5.8.

²⁴³⁸ Heydon Report, (Exhibit UKR-11), p. 3.

²⁴³⁹ Shavin Report, (Exhibit DOM/HND-1), para. 103.

²⁴⁴⁰ Sims Report, (Exhibit AUS-22) (SCI), para. 5.8.

smoking, Australia's ACCC²⁴⁴¹ takes the view that the ACL could be enforced in respect of those elements to through the ACCC's enforcement powers, or through the various provisions of the ACL concerning penalties and remedies. This is consistent with Australia's own acknowledgement that the ACL could be used to address this mechanism, though, in its view, it "is not nearly as effective in achieving this objective as the tobacco plain packaging measure".²⁴⁴² The ability of the ACCC to address concerns relating to the misleading character of certain features of branding on tobacco products is also confirmed by the examples referred both by the complainants and by Australia relating to the use of terms such as "mild" or "light".²⁴⁴³

7.911. However, we also note the powers of the ACCC to enforce the ACL, as described in the ACL²⁴⁴⁴ and as elaborated by Messrs Shavin, Heydon, and Sims.²⁴⁴⁵ As Mr Sims explains, the ACCC has discretion in respect of which allegations of inconsistency with the ACL it pursues. Mr Sims explains that the ACCC cannot pursue all the complaints it receives about the conduct of traders or businesses, and that it "exercises its discretion to direct resources to the investigation and resolution of matters that provide the greatest overall benefit for competition and consumers".²⁴⁴⁶ In outlining the factors that influence the ACCC's discretion in this regard, Mr Sims notes (*inter alia*) that the ACCC "will always prioritise the assessment of product safety issues which have the potential to cause serious harm to consumers".²⁴⁴⁷ In his discussion of the settlement reached between the ACCC and certain tobacco companies in relation to the "mild" and "light" descriptors, Mr Sims states that the "fact that settlement was reached without any admission of liability from the tobacco companies in question is unusual and indicative of the challenges facing the ACCC in this investigation".²⁴⁴⁸ Mr Sims notes the investment of "considerable resources" in this matter between 2001 and 2005²⁴⁴⁹, and highlights the cost and uncertainty that would have been associated with the pursuit of the matter through litigation.²⁴⁵⁰

7.912. We do not wish to speculate about the costs or uncertainty that may or may not be associated with domestic litigation of this nature. However, we do observe that actions taken by the ACCC as enforcer of the ACL is a matter that is at its discretion, and that notwithstanding the priority it may give to the product safety issues that have the potential to cause serious harm to consumers²⁴⁵¹, we note that the object of the CCA, to which the ACL is a schedule, is stated, according to Mr Shavin in Section 2 of the CCA as "to enhance the welfare of Australians through

²⁴⁴¹ In his report, Mr Sims, who is the Chairman of the ACCC, points out that the report was "prepared by the ACCC at the request of the Australian Government in relation to [these proceedings]". Sims Report, (Exhibit AUS-22) (SCI), para. 1.1.

²⁴⁴² Australia's first written submission, para. 731.

²⁴⁴³ Messrs Shavin, Heydon, Finkelstein and Sims, and all parties to these proceedings, refer to the ACCC's investigation of allegations that tobacco companies had engaged in contraventions of the *Trade Practices Act 1974* (Cth) (the precursor to the ACL), including, in particular, misleading or deceptive conduct and false representations through the promotion of cigarette brands as "light", "ultra-light", "mild", "ultra-mild", or "low tar", and on the basis of test results that were allegedly artificial and did not provide an accurate reflection of a smoker's actual exposure to tar when smoking these cigarettes. This investigation began in 2001, and was settled in 2005 when the ACCC accepted court enforceable undertakings from each of the three tobacco companies involved pursuant to Section 87B of the *Trade Practices Act 1974* (Cth) (the precursor to Section 218 of the ACL). Sims Report, (Exhibit AUS-22) (SCI), paras. 4.4, 4.13-4.15. See also Heydon Report, (Exhibit UKR-11), pp. 7-9; Finkelstein Report, (Exhibit AUS-21), paras. 117-118; Shavin Report, (Exhibit DOM/HND-1), para. 96; Honduras's first written submission, para. 527; Dominican Republic's first written submission, para. 733; Cuba's first written submission, para. 82; Indonesia's first written submission, paras. 70-72; and Australia's first written submission, para. 190.

²⁴⁴⁴ ACL, (Exhibit DOM-110), Chap. 5.

²⁴⁴⁵ See, respectively, Shavin Report, (Exhibit DOM/HND-1), Part IV; Heydon Report, (Exhibit UKR-11), pp. 11-15; and Sims Report, (Exhibit AUS-22) (SCI), Part 3.

²⁴⁴⁶ Sims Report, (Exhibit AUS-22) (SCI), para. 3.5.

²⁴⁴⁷ Sims Report, (Exhibit AUS-22) (SCI), para. 3.9

²⁴⁴⁸ Sims Report, (Exhibit AUS-22) (SCI), para. 4.13.

²⁴⁴⁹ Sims Report, (Exhibit AUS-22) (SCI), para. 4.14.

²⁴⁵⁰ Sims Report, (Exhibit AUS-22) (SCI), para. 4.15. In this respect, Mr Sims quotes the then Chairman of the ACCC, who stated:

If we were to instate proceedings of this nature, it would require a substantial vote of our litigation budget towards these particular proceedings. That would then impact significantly on the ability of the ACCC to deal with other enforcement activities that are within the scope of its jurisdiction.

²⁴⁵¹ Sims Report, (Exhibit AUS-22) (SCI), para. 3.9.

the promotion of competition and fair trading and provision for consumer protection".²⁴⁵² We note that Section 2 of the CCA itself has not been provided to us; however, there is no disagreement between the parties in this respect – indeed, Australia's expert, Mr Sims, submits that "the ACCC's main goals are to maintain and promote competition and remedy market failure, and protect the interests and safety of consumers and support fair trading in markets".²⁴⁵³ While Mr Sims' description suggests that the protection of the interests and safety of consumers are among the goals of the ACCC, it is not clear to us that tobacco packaging that misleads consumers in respect of the harmful effects of smoking would *in all cases* be the subject of enforcement by the ACCC. Indeed, it seems inevitable that the ACCC, with such a broad mandate, would face competing priorities and as such cannot, in our view, be assumed to be practically capable of intervening in the market to systematically prevent tobacco packaging from misleading consumers regarding the harmful effects of tobacco products.

7.913. Relatedly, we also note that Section 232(2) of the ACL allows the ACCC, or any other person, to apply for an injunction in respect of conduct, or proposed conduct, that may contravene (*inter alia*) the provisions of the ACL concerning misleading or deceptive conduct.²⁴⁵⁴ Messrs Shavin and Heydon each argue that it is not necessary for a person to show a special connection with the subject matter of the proceeding or otherwise to satisfy rules as to "standing" before being entitled to apply for an injunction.²⁴⁵⁵ To this, Mr Heydon adds:

It is quite common for the Australian Consumer Law to be enforced, not by public officials and not by persons directly injured by the impugned conduct, but by persons whom it does not directly affect. Any lobby group, for example, can apply for an injunction against any tobacco packaging which it considers contravenes the Australian Consumer Law. So can any concerned citizen. The Australian Consumer Law is thus in considerable measure self-enforcing: its enforcement does not depend only on the decisions of government officials.²⁴⁵⁶

7.914. Notwithstanding the breadth of the ability to apply for an injunction, the fact that the granting of such an injunction remains contingent on the exercise of discretion (in this context, of a lobby group or "concerned citizen") to seek one against an entity responsible for marketing allegedly misleading tobacco products, the exercise of such discretion cannot be assured, especially given that the applicant must undertake to pay any damages caused by the grant of the injunction in the event that no final injunction is granted.²⁴⁵⁷ It therefore cannot be assumed, in our view, that individuals or interest groups would, as Mr Heydon suggests, intervene in the market to systematically prevent tobacco packaging from misleading consumers regarding the harmful effects of tobacco products.

7.915. Furthermore, the implication of the complainants' arguments in this respect is that tobacco product packaging that is alleged to give rise to misleading representations regarding the harmful effects of smoking would remain on the market and continue to represent such information to consumers, at least until such time as the ACCC (or any other applicant, in respect of an injunction²⁴⁵⁸) did actually seek and obtain an order or undertaking to have that product removed from the market, or that the misleading conduct brought into conformity with the ACL.

7.916. Finally, we note Australia's explanation that the standardization of pack features through plain packaging, including the adoption of a single background colour for the 25% of the pack surface not covered by a GHW, prevents the possibility of differences in such pack features from having any impact on perceptions of *relative* harmfulness of different tobacco products.²⁴⁵⁹

7.917. In light of the above, we are not persuaded that the removal of the elements of tobacco packaging that are prohibited by the TPP measures could not reduce the ability of tobacco

²⁴⁵² Shavin Report, (Exhibit DOM/HND-1), para. 17.

²⁴⁵³ Sims Report, (Exhibit AUS-22) (SCI), para. 3.3.

²⁴⁵⁴ ACL, (Exhibit DOM-110), Section 232.

²⁴⁵⁵ Shavin Report, (Exhibit DOM/HND-1), para. 78.

²⁴⁵⁶ Heydon Report, (Exhibit UKR-11), p. 12.

²⁴⁵⁷ Heydon Report, (Exhibit UKR-11), p. 13; and Finkelstein Report, (Exhibit AUS-21), para. 91.

²⁴⁵⁸ It is noted that injunctions against misleading and deceptive conduct may be granted by a court on the basis of an application by the ACCC "or any other person". See ACL, (Exhibit DOM-110), Section 232(2).

²⁴⁵⁹ Australia's first written submission, para. 187.

packaging to mislead consumers to a greater extent than what was already possible under the ACL and its enforcement through the ACCC or, as the Dominican Republic puts it, that the TPP measures "have contributed nothing to [the] pre-existing capability to reduce any tobacco consumption that would result from ... misleading packaging".²⁴⁶⁰ Rather, in our view, the TPP measures address, in this respect, regulatory gaps that may arise by virtue of the practical limitations faced by the ACCC in enforcing the ACL.

Whether the TPP measures, by reducing the ability of tobacco packaging to mislead consumers about the harmful effects of smoking, would affect smoking behaviours

7.918. The complainants have argued, as discussed in section 7.2.5.3.5.1 above, that the evidence underlying the design and operation of the TPP measures, which includes preventing tobacco packaging from misleading consumers about the harmful effects of smoking, fails to assess the impact of plain packaging on smoking behaviours. Honduras argues, in the context of this mechanism, that there is "no *real and practical* connection between smoking behaviours and tobacco packaging".²⁴⁶¹ Cuba specifically contends that none of the studies on the impact of plain packaging on the ability of the pack to mislead consumers "address the effect of any misperceptions as to risk on actual smoking behaviour".²⁴⁶² Australia argues that "reducing of the ability of tobacco products to mislead consumers about the relative harmfulness of brands, or product types, means that tobacco plain packaging will contribute to discouraging initiation and encouraging cessation of tobacco use", and that, "[w]here consumers are fully informed of the real risks and serious consequences of tobacco use, they are more likely to engage in quitting behaviour".²⁴⁶³

7.919. We also note that there is far less discussion among the parties' experts concerning the connection between the ability of the pack to mislead consumers regarding the harmful effects of smoking, and smoking behaviours. We note in particular the observation by Professor Fong that "[t]he direct evidence linking plain packaging to behaviour change through the mechanism of reducing misperceptions about tobacco products is not strong", a factor that he attributes to "the challenges of studying this linkage before the plain packaging measure had been implemented".²⁴⁶⁴

7.920. In respect of initiation, we recall our discussion in earlier parts of our analysis, and in particular the agreement between the complainants' expert, Professor Steinberg, and Australia's expert, Professor Slovic, that "young people do not pay attention to risk information".²⁴⁶⁵ However, the evidence also suggests that there is a difference between adolescents not paying attention to risk information, and adolescents being positively led to believe that the use of one tobacco product over another changes the nature of the risk. Professor Fong describes this in the following terms:

[T]he messages about lightness can also be used to target susceptible nonsmokers or experimental smokers that may have health concerns about starting smoking. Some studies suggest that youth may initiate smoking light cigarettes or continue to smoke light cigarettes because they believe that light cigarettes are less harmful. In addition, youth believe that smoking light cigarettes would make it easier for them to quit compared to regular cigarettes. Moreover, many youth believe that they would be less susceptible to the adverse health consequences of smoking by smoking lighter cigarettes. It is reasonable to conclude that these effects would have the potential to increase the likelihood that youth would take up smoking, and that smoking youth would be more likely to continue to smoke.²⁴⁶⁶

²⁴⁶⁰ Dominican Republic's first written submission, para. 725.

²⁴⁶¹ Honduras's first written submission, para. 518. (emphasis original)

²⁴⁶² Cuba's first written submission, para. 350(b).

²⁴⁶³ Australia's first written submission, para. 198.

²⁴⁶⁴ Fong Report, (Exhibit AUS-14), para. 421.

²⁴⁶⁵ Slovic Report, (Exhibit AUS-12), para. 110 (referring to Steinberg Report, (Exhibit DOM/HND-6)).

²⁴⁶⁶ Fong Report, (Exhibit AUS-14), para. 379.

7.921. The US Surgeon General, the US National Cancer Institute, and Professor Fong refer to tobacco industry documentation which indicates that this effect is known to and utilized by the tobacco industry.²⁴⁶⁷

7.922. In this respect, we note the argument by Professor Steinberg, that "despite knowing the risks of smoking ... adolescents engage in [it] anyway because ... they privilege the short term reward over long term risk".²⁴⁶⁸ We see a difference between the privileging of such short-term rewards over long-term risks and being led to perceive that in respect of some tobacco products the long-term risk is diminished or non-existent. Indeed, though Professor Steinberg (as well as, *inter alia*, Professor Viscusi) contend that young people have a high awareness of the risks of smoking, and notwithstanding our observation that there is a high, and in the case of some conditions, extremely high level of awareness of some specific health risks associated with tobacco use in Australia²⁴⁶⁹, the prospect that packaging elements can create a perception that certain risks are reduced when certain tobacco products are used would seem to catalyse the scenario described by Professor Slovic:

Research shows that young smokers, as cumulative risk takers, believe they can get away with some amount of smoking before the risk takes hold. In short, many young smokers tend to believe that smoking the "very next cigarette" poses little or no risk to their health or that smoking for only a few years poses negligible risk. These young people expect to smoke occasionally for a short while and then quit before any real harm occurs to them. The problem is nicotine addiction – another factor not adequately appreciated by the experiential mode of thinking. As noted above, the powerful visceral cravings characteristic of addiction are difficult, if not impossible, to appreciate unless you are in their grip. The "experience" of these cravings is impossible to predict or even to remember accurately. As a result, young smokers end up smoking more, over a longer time period, than they ever anticipated.²⁴⁷⁰

7.923. Indeed, the evidence before us suggests that young people's pre-disposition to not paying attention to risk information²⁴⁷¹ is in fact more likely to drive behaviour in instances where the perception of the long-term risk is diminished.

7.924. In respect of cessation, we noted in the context of the effectiveness of GHWs that the evidence before us indicates that tobacco cessation can be predicted by concerns regarding the health effects of tobacco products.²⁴⁷² We have noted, above, evidence before us that indicates that tobacco plain packaging can reduce misperceptions among consumers about the relative harmfulness of different brands, the different perceptions of harm created by the use of different design elements (including colours), and also perceptions of the relative harmfulness of different tobacco products (including cigars). Furthermore, there is evidence before us that smokers often use tobacco products that they perceive as being less harmful (including because of the perception created by the use of descriptors as well as packaging elements such as colours²⁴⁷³) as an alternative to, or substitute for, cessation²⁴⁷⁴, including as a result of the belief that they are easier to quit.²⁴⁷⁵ We are therefore not persuaded that the complainants have demonstrated that the TPP measures, by changing the ability of tobacco packaging to mislead consumers about the harmful effects of smoking, would not have an effect on smoking cessation.

7.925. In respect of relapse, we note that there is no detailed discussion before us concerning whether a reduction in the ability of tobacco packaging to mislead consumers about the harmful effects of tobacco use would prevent relapse behaviour. We recall, however, the study by McCaul et al. 2006, which suggested, in light of the role of health concerns as a primary motivator for

²⁴⁶⁷ US Surgeon General's Report 2012, (Exhibit AUS-76), pp. 531-532; NCI Tobacco Control Monograph No. 19, (Exhibit AUS-77), p. 78; and Fong Report, (Exhibit AUS-14), para. 369.

²⁴⁶⁸ Steinberg Second Rebuttal Report, (Exhibit DOM/HND-15), para. 35.

²⁴⁶⁹ See para. 7.840 above.

²⁴⁷⁰ Slovic Report, (Exhibit AUS-12), para. 92 (in-text citations omitted).

²⁴⁷¹ Slovic Report, (Exhibit AUS-12), para. 110 (referring to Steinberg Report, (Exhibit DOM/HND-6)).

²⁴⁷² See para. 7.866 above.

²⁴⁷³ US Surgeon General's Report 2012, (Exhibit AUS-76), p. 531.

²⁴⁷⁴ NCI Tobacco Control Monograph No. 19, (Exhibit AUS-77), p. 78. See also Fong Report, (Exhibit AUS-14), paras. 367-382.

²⁴⁷⁵ Fong Report, (Exhibit AUS-14), para. 377.

quitting, that motivation or cessation strategies include having smokers construct systems to remind themselves about the health consequences of smoking in order to, *inter alia*, assist in the maintenance of a successful quit attempt and rejuvenate quit attempts among those who have relapsed.²⁴⁷⁶ Moreover, as we have noted, there is evidence before us that smokers often use tobacco products that they perceive as being less harmful (including because of the perception created by the use of descriptors as well as packaging elements such as colours²⁴⁷⁷) as an alternative to, or substitute for, cessation.²⁴⁷⁸

7.926. Indeed, to the extent that the removal of branding elements can prevent tobacco packages from conveying the notion that some tobacco products are less harmful than others, we do not exclude that the TPP measures could ensure that quitters were not misled into thinking that there is a less harmful use of tobacco products that would not compromise their health-related motivation to quit.

Conclusion

7.927. On the basis of the above, we are not persuaded that the complainants have demonstrated that the TPP measures, by their design, would not be capable of reducing the ability of tobacco packaging to mislead consumers about the harmful effects of smoking. Furthermore, we are not persuaded that any such contribution to reducing the ability of tobacco packaging to mislead consumers about the harmful effects of smoking could add nothing to what can be achieved under Australia's ACL.

7.928. In addition, we recall that we also have before us evidence relating to the actual application of the TPP measures since their entry into force, including empirical evidence specifically addressing the impact of plain packaging on the ability of the pack to mislead consumers about the harmful effects of smoking, which will be considered in section 7.2.5.3.6 below, and given appropriate weight. We therefore do not seek to draw, at this stage of our analysis, an overall conclusion on the impact of the TPP measures on the ability of tobacco packaging to mislead consumers about the health risks of smoking, and the extent to which this contributes to Australia's objective of improving public health by reducing the use of, and exposure to, tobacco products.

7.2.5.3.5.5 Overall conclusion on evidence relating to the design, structure and operation of the TPP measures

7.929. Overall, our review of the evidence before us in relation to the design, structure and intended operation of the TPP measures does not persuade us that, as the complainants argue, they would not be capable of contributing to Australia's objective of improving public health by reducing the use of, and exposure to, tobacco products, through the operation of the mechanisms identified in the TPP Act, in combination with other relevant tobacco control measures applied by Australia.

7.930. Rather, our review of the relevant evidence suggests that it is recognized that various branding features are capable of being used on tobacco packaging in order to convey certain positive associations with the products, and that a body of research exists, that sought to investigate the impact of *removing* this type of features through plain packaging of tobacco products, on the types of "proximal outcomes" now reflected in the TPP Act. While individual studies within this body of research may suffer from certain limitations, we are not persuaded that the complainants have demonstrated that these are such that it could not be considered reputable science and relied upon as relevant in relation to the anticipated impact of tobacco plain packaging on the measured outcomes, including a reduction in the appeal of tobacco products, an increased effectiveness of GHWs and reducing the ability of packaging to mislead consumers about the harmful effects of smoking.

²⁴⁷⁶ See McCaul et al. 2006, (Exhibit AUS-205), p. 53.

²⁴⁷⁷ US Surgeon General's Report 2012, (Exhibit AUS-76), p. 531.

²⁴⁷⁸ NCI Tobacco Control Monograph No. 19, (Exhibit AUS-77), p. 78. See also Fong Report, (Exhibit AUS-14), paras. 367-382.

7.931. We also take note of the body of research devoted to the study of the relationship between product perceptions, intentions and behaviours discussed by the parties, including the recognition that this relationship is complex and may be influenced by a range of factors in a given context. We further note the evidence presented to us in relation to the drivers of the smoking behaviours that the TPP measures seek to influence, namely initiation, cessation and relapse. Overall, this evidence, while it makes clear the complexity and multiplicity of factors driving smoking behaviours, is consistent, in our view, with the proposition underlying the design and structure of TPP measures that relevant behaviours may be influenced by a reduction in the appeal of tobacco products or an improved awareness and understanding of health risks of smoking, or both.

7.2.5.3.6 Evidence relating to the application of the TPP measures

7.932. As described above, the evidence before us on the contribution of the TPP measures to their objective includes empirical evidence relating to their application since their full entry into force in December 2012, which we consider in this section.

7.933. Overall, this evidence relates to the period between the entry into force of the measures in December 2012 and September 2015, with some variations in the exact period covered, depending on the data used. The empirical evidence available to us in relation to the actual operation of the TPP measures therefore reflects between a few months and a maximum of three years of application of the measures.

7.934. While all parties recognize that this evidence should play a role in our assessment of the contribution of the measures to their objective, they have different views on the weight to be given to it, and on the relative weight to be given, within the relevant post-implementation evidence, to evidence relating to "proximal" and more "distal" outcomes of the measures.

7.935. The Dominican Republic argues that, after two years of application, the time elapsed since the implementation of Australia's plain packaging regime is sufficient to observe the effectiveness of that regime in affecting smoking behaviours in Australia. It is reasonable to expect, the Dominican Republic argues, that, were the TPP measures going to reduce smoking prevalence and tobacco consumption, those effects would be discernible by now.²⁴⁷⁹ In considering these results, the Dominican Republic observes, it is worth highlighting that proponents of plain packaging predicted that the policy would reduce tobacco use within two years.²⁴⁸⁰ Honduras similarly argues that reliable and probative empirical evidence of the lack of actual impact of the measure more than two and a half years after its introduction is available and must be given primacy in the analysis.²⁴⁸¹

7.936. Australia considers however that because the measures have been in operation for a limited period of time, the utility of short-term quantitative data is "limited".²⁴⁸² It argues that the impact of tobacco plain packaging on smoking rates will be most pronounced in the long term, as a result of the addictive power of nicotine, and the consequential need for multiple quit attempts before success. This also follows, Australia explains, from the likely impact of the measure on youth initiation, as any reductions in youth initiation are not likely to be picked up in national prevalence and consumption data for some time given that youth initiation makes up a small fraction of total smoking.²⁴⁸³ Second, Australia argues, with reference to Dr Biglan, that the important role that tobacco marketing plays in influencing youth initiation is partly a function of its ability to create positive social and peer attitudes to smoking. Accordingly, it will take time before the impact of the TPP measures on the behaviour of a generation of children who have never been exposed to promotion through tobacco packaging is reflected in national surveys.²⁴⁸⁴

7.937. Australia thus considers that "the most appropriate approach to discerning the effects of the [TPP measures] in the early stages of [their] introduction was to rely upon experiments and

²⁴⁷⁹ See, e.g. Dominican Republic's first written submission, para. 428.

²⁴⁸⁰ See, e.g. Dominican Republic's first written submission, para. 50. See Pechey et al. 2013, (Exhibit JE-24(51)), p. 5.

²⁴⁸¹ Honduras's second written submission, para. 50.

²⁴⁸² Australia's response to Panel question No. 71, para. 194.

²⁴⁸³ See, e.g. Australia's first written submission, Annexure E, para. 12.

²⁴⁸⁴ Australia's first written submission, Annexure E, para. 12.

surveys which consider drivers of choice, attitudes and, ultimately, the elicitation of behavioural intentions"²⁴⁸⁵ and it is unreasonable for the complainants to draw definitive conclusions on the success of tobacco plain packaging solely on the basis of rates of smoking prevalence so soon after the measure's implementation.²⁴⁸⁶

7.938. We are mindful that, while our task is to assess the actual contribution of the measures to their objective in light of the available evidence before us, we must take due account of the possibility that the effects of certain measures may manifest themselves over a longer period of time and into the future. We note in this respect the observation of the Appellate Body in *US – Gasoline*, in the context of Article XX(g) of the GATT 1994, that "in the field of conservation of exhaustible natural resources, a substantial period of time, perhaps years, may have to elapse before the effects attributable to implementation of a given measure may be observable".²⁴⁸⁷ Similarly, certain measures to protect public health, including, as is the case here, certain measures based on behavioural responses to expected changes in beliefs and attitudes, may take some time to materialize fully or be perceptible in the relevant data.

7.939. We note in particular in this respect Australia's argument that the impact of the measures on smoking initiation can only manifest itself fully over a longer period of application, as it gradually affects future generations not exposed to any form of tobacco branding, on packaging or otherwise. We also note Australia's argument that smoking cessation is known to require multiple attempts and that is made more difficult by addiction to nicotine, such that, even where plain packaging would be effective in achieving the intended proximal outcomes and thereby have an influence on quitting intentions, carrying out the decision to quit may take up to several years and require repeated attempts.²⁴⁸⁸

7.940. We find these considerations persuasive and agree with Australia that, to the extent that the TPP measures rely on evolutions in smoking behaviours that may not be immediately perceptible or measurable, or may take time to materialize in actual behaviours, data and evidence relating to actual smoking behaviours in the early period of application of the measures may not provide a complete picture of the extent to which the measures contribute, and can be expected to contribute into the future, to their objective. We also consider that, in this context, and in light of the nature of the design of the measures, as discussed in preceding sections, available empirical evidence relating to the impact of the measures on "proximal" outcomes, as well as evidence relating to "distal outcomes" that may be precursors of actual smoking behaviours, may usefully inform our assessment of the actual contribution of the TPP measures to their objective, together with evidence before us relating to actual smoking behaviours since the entry into force of the measures.

7.941. We further note the submission of the complainants that, even if the TPP measures produced short-term effects, these effects would rapidly "wear-out". The complainants refer in this context to the "wear-out" effect of advertising messages. We note however that, as observed by Australia, the TPP measures do not, in themselves, seek to transmit a specific message, the effect of which would "wear-out" over time, but rather seek to *limit* the ability of tobacco packaging to convey specific positive associations through branding features.²⁴⁸⁹ We are not persuaded, therefore, that the examples cited by the complainants in this respect should be assumed to be fully transposable to the effects of plain packaging on relevant behavioural outcomes. Where relevant, however, specific wear-out effects are discussed in the context of the analysis of the empirical evidence before us on the application of the TPP measures.²⁴⁹⁰

²⁴⁸⁵ Australia's first written submission, para. 147.

²⁴⁸⁶ See, e.g. Australia's first written submission, Annexure E, para. 13.

²⁴⁸⁷ Appellate Body Report, *US – Gasoline*, p. 21, DSR 1996:I, 3, p. 20. See also Appellate Body Report, *Brazil – Retreaded Tyres*, para. 153 fn 243.

²⁴⁸⁸ See Australia's first written submission, para. 670; second written submission, para. 496; and response to Panel question No. 200, paras. 323-326.

²⁴⁸⁹ We note however that to the extent that specific messages are intended to be communicated through the pack, these are contained in the GHWS that apply in conjunction with plain packaging. We understand the rationale for "rotating" such messages to be precisely to avoid the type of "wear out" effect identified by the complainants.

²⁴⁹⁰ See Appendices A and B.

7.942. We take note also of the parties' detailed exchanges concerning the precedential value of the Canadian experience with the introduction of GHWs and the assessment of its effectiveness over time.²⁴⁹¹ We are not persuaded, however, that a detailed review of the evidence in respect of that measure would provide a conclusive response to the question before us here, which is limited to determining the extent to which the effects of the TPP measures can be expected to be perceptible at the time of our assessment on the basis of the empirical evidence before us, and the implications of this consideration on the conclusions that we may reach on the contribution of the TPP measures to their objective. Specifically, given the complexity of intervening factors, we are not persuaded that the experience with GHWs in the Canadian context would necessarily be directly transposable to the Australian current context relating to the introduction of the TPP measures.²⁴⁹² Nonetheless, bearing in mind this discussion, we are mindful of the challenges inherent in identifying data and methodologies apt to reveal the effects of measures intended to affect population-wide behaviours in a complex setting, and the need to exercise caution in seeking to draw conclusions on the effectiveness of this type of measures on the basis of relatively limited information.

7.943. In light of the above, we consider the evidence before us in relation to the application of the TPP measures with awareness that the time-period for which evidence of application of the measures is available may have an impact on the nature and extent of the conclusions that may be drawn from this evidence. In addition, we are mindful that the probative value of this evidence may also be affected by other factors, such as the quality and nature of the available data itself.

7.944. In light of the above, we consider in turn below:

- a. the evidence before us relating to "proximal outcomes", that is, the effect of the TPP measures on the three parameters underlying the three "mechanisms" reflected in the TPP Act (appeal of tobacco products, effectiveness of GHWs, and ability of the pack to mislead consumers about the harmful effects of tobacco products);
- b. the evidence before us in relation to quitting-related and other "distal" outcomes; and
- c. the evidence before us relating to smoking behaviours, based on consumption and sales volumes of tobacco products and smoking prevalence, since the entry into force of the TPP measures.

7.2.5.3.6.1 Impact of the TPP measures on "proximal" outcomes (appeal of tobacco products, effectiveness of GHWs and ability of the pack to mislead)

7.945. The parties submitted as exhibits a number of peer-reviewed studies investigating the post-implementation impact of the TPP measures and enlarged GHWs on non-behavioural proximal outcomes, namely: (i) reduction in the appeal of tobacco products; (ii) increased effectiveness of GHWs; and (iii) reduction in the ability of the pack to mislead consumers about smoking harms.²⁴⁹³ Appendix A reviews and discusses this evidence, in light of the relevant expert reports submitted by the parties.

7.946. Australia submits that the available post-implementation empirical studies on non-behavioural outcomes confirm that TPP and enlarged GHWs have achieved the objectives of

²⁴⁹¹ See, e.g. Australia's first written submission, para. 16; Australia's response to Panel question No. 200, paras. 334-335; Chaloupka Public Health Report, paras. 89-96; IPE Updated Report, (Exhibit DOM-303), Section 6; and J. List, "A Further Consideration of the Empirical Evidence on the Effects of Australia's Tobacco Plain Packaging Legislation", 16 September 2015, (List Rebuttal Report), (Exhibit DOM/IDN-3), paras. 76-83.

²⁴⁹² Cf. Australia's first written submission, Annexure E, paras. 53-58; Australia's response to Panel question No. 11; and List Rebuttal Report, (Exhibit DOM/IDN-3), para. 80 (highlighting the challenges associated with cross-jurisdictional comparisons).

²⁴⁹³ Some of these papers also analyse more distant variables, such as beliefs, attitudes and intentions towards smoking and quitting, as well as quitting attempts. These papers are also discussed in Appendix B to these Reports.

(i) reducing appeal, (ii) increasing the effectiveness of GHWs, and (iii) reducing the ability of packaging to mislead consumers about the harmful effects of tobacco products.²⁴⁹⁴

7.947. Based on the review of these peer-reviewed papers, and in some cases the re-analysis of the data used in these papers, the complainants argue that the TPP measures have not had the expected effects on the antecedents of behaviour posited in Australia's conceptual framework of the TPP measures.²⁴⁹⁵ In particular, they contend that beyond the obvious findings that the pack is less visually appealing and people more often notice the larger GHGs first, empirical evidence shows little or no effects of the policies on the antecedents of behaviour. They further claim that the variables relating to beliefs, attitudes and intentions towards smoking were almost entirely unaffected by the TPP measures.²⁴⁹⁶ Cuba relies in full on a report submitted by the Dominican Republic as well as on a report submitted by Ukraine, as regards the post-implementation data, analysis, and the conclusions to be drawn from it.²⁴⁹⁷ Cuba also relies upon reports submitted by Honduras, and a report prepared in connection with the UK Consultation on the Introduction of Regulations for Standardised Packaging of Tobacco Products.²⁴⁹⁸

7.948. In addition, the complainants' experts submit that some of the published empirical studies on Australia's TPP measures provide an inaccurate picture of the empirical evidence. They state that some of these papers failed to report the results for more than half of all the variables available in the survey dataset, which were overwhelmingly not statistically significant, suggesting no impact by plain packaging on these variables. The complainants contend that the authors of some of these published studies also failed to explain that a number of the reported statistically significant effects had vanished by the end of the first year of Australia's implementation of the TPP measures as a result of wear-out effects. The Dominican Republic and Indonesia further criticize these papers for failing to report the effects size of the statistically significant effects. According to their experts, most of the reported statistically significant effects are small, suggesting that the TPP measures have little importance in shifting behaviour.²⁴⁹⁹

7.949. Four peer-reviewed papers analysed empirically the impact of Australia's TPP measures on the appeal of tobacco products.²⁵⁰⁰ Different survey data were used by several of these published papers. Most survey data cover adult smokers, with the exception of a survey of students attending secondary schools.²⁵⁰¹ Most of these peer-reviewed papers analyse only cigarette smokers, although some of these survey datasets also include information on cigar smokers. Only one peer-reviewed study analyses appeal-related outcomes in relation to cigar and cigarillo smokers.²⁵⁰²

7.950. Based on different datasets, five peer-reviewed papers have also empirically investigated the impact of Australia's TPP measures on the effectiveness of GHGs.²⁵⁰³ An expert report

²⁴⁹⁴ See Australia's first written submission, paras. 201-205; and comment on complainants' responses to Panel question No. 146, para. 7.

²⁴⁹⁵ See Ajzen et al. Data Report, (Exhibit DOM/IDN-2); Ajzen et al. Second Data Report, (Exhibit DOM/IDN-4); Ajzen et al. Data Rebuttal Report, (Exhibit DOM/IDN-6); Ajzen et al. Second Data Rebuttal Report, (Exhibit DOM/IDN-8); Klick Supplemental Rebuttal Report, (Exhibit HND-122); and Klick Second Supplemental Rebuttal Report, (Exhibit HND-165).

²⁴⁹⁶ See Ajzen et al. Data Report, (Exhibit DOM/IDN-2), paras. 10-22.

²⁴⁹⁷ Cuba's first written submission, para. 100.

²⁴⁹⁸ See, e.g. Cuba's response to Panel question No. 146 (referring to Klick Supplemental Rebuttal Report, (Exhibit HND-122); Klick Second Supplemental Rebuttal Report, (Exhibit HND-165); and Gibson Report, (Exhibit DOM-92)).

²⁴⁹⁹ See Ajzen et al. Data Report, (Exhibit DOM/IDN-2), paras. 23-27.

²⁵⁰⁰ See Wakefield et al. 2015, (Exhibits AUS-206, DOM-306); Dunlop et al. 2014, (Exhibits AUS-207, HND-132, DOM-199); White et al. 2015a, (Exhibits AUS-186, DOM-235); and Miller et al. 2015, (Exhibits AUS-102, DOM-315).

²⁵⁰¹ See White et al. 2015a, (Exhibits AUS-186, DOM-235); and White et al. 2015b, (Exhibits HND-135, DOM-236, DOM-288).

²⁵⁰² See Miller et al. 2015, (Exhibits AUS-102, DOM-315).

²⁵⁰³ See Wakefield et al. 2015, (Exhibits AUS-206, DOM-306); Yong et al. 2015, (Exhibit DOM-382); Dunlop et al. 2014, (Exhibits AUS-207, HND-132, DOM-199); White et al. 2015b, (Exhibits HND-135, DOM-236, DOM-288); and Miller et al. 2015, (Exhibits AUS-102, DOM-315).

prepared by Professor Klick and submitted by Ukraine also contains an analysis of the impact of the TPP measures on the effectiveness of GHWs.²⁵⁰⁴

7.951. Two peer-reviewed papers analyse empirically the impact of Australia's TPP measures on the ability of the pack of tobacco products to mislead consumers among adult cigarette smokers and adolescents respectively.²⁵⁰⁵

7.952. This evidence is reviewed and discussed in detail in Appendix A. Notably, the parties discuss various results based on data from the National Tobacco Plain Packaging Tracking Survey (NTPPTS), a nationwide tracking survey funded by Australia and conducted by CCV, to track the effects of plain packaging.²⁵⁰⁶ In the context of these proceedings, the Dominican Republic sought, and obtained access to, data from this survey.²⁵⁰⁷ The Dominican Republic and Indonesia jointly submitted an expert report by Professors Ajzen, Hortaçsu, List, and Shaikh (Ajzen et al.) re-estimating the NTPPTS dataset covering questions related to the plain packaging mechanisms, and reviewing the accuracy and completeness of various findings reported in the studies relied upon by Australia.²⁵⁰⁸

7.953. On the basis of their re-analysis of the NTPPS data, Ajzen et al. observe the following with respect to the impact of the TPP measures on the appeal of tobacco packs and products:

As we would expect, results regarding the first two measures relating to appeal of the pack showed that respondents rated plain packs with larger GHWs as significantly less appealing than previously marketed branded packs with smaller GHWs. The size of these effects was, according to Cohen's (1988) rule of thumb, moderate to large ($r = .35$ and $.54$).²⁵⁰⁹ These findings are little more than a "manipulation check," i.e., a *check to make sure that plain packs were, as intended, perceived to be less visually attractive than branded packs. After all, plain packaging was explicitly designed and pre-tested to make sure that the package was unattractive;* and the plain packaging was combined with enlarged, dominant, and visually repulsive GHWs. Interestingly,

²⁵⁰⁴ See Klick Report, (Exhibit UKR-5). See also section 1.6.6 above for a description of Ukraine's participation in these proceedings.

²⁵⁰⁵ See Wakefield et al. 2015, (Exhibits AUS-206, DOM-306); and White et al. 2015a, (Exhibits AUS-186, DOM-235).

²⁵⁰⁶ To track the effect of the plain packaging measure, Australia funded the National Tobacco Plain Packaging Tracking Survey (NTPPTS), a nationwide tracking survey conducted by CCV. The NTPPTS is a continuous cross-sectional baseline survey of about 100 interviews per week of current smokers and recent quitters aged 18 to 69 years, conducted from 9 April 2012 to 30 March 2014. A follow-up survey of baseline participants then took place approximately four weeks after the initial survey, with the follow-up surveys conducted from 7 May 2012 to 4 May 2014. NTPPTS Technical Report, (Exhibits AUS-570, HND-124, DOM-307), pp. 7-8. According to Australia, the short time period between interviews limits the ability of the survey data to be used to examine the longer-term impacts expected of the measure. Australia's response to Panel question No. 196, paras. 230, 236; and response to Panel question No. 198, paras. 280-293. It considers that the survey data are most suited to assessing changes in the specific mechanisms of the measure. Results from the NTPPTS were used in six papers published in a supplement to the journal *Tobacco Control* in 2015. Ajzen et al. Data Report, (Exhibit DOM/IDN-2), four of which are relied on by Australia in these proceedings. See, e.g. Australia's response to Panel question No. 198, para. 294 fn 407 (referring to Wakefield et al. 2015, (Exhibits AUS-206, DOM-306); Brennan et al. 2015, (Exhibits AUS-224, DOM-304); and Durkin et al. 2015, (Exhibits AUS-215 (revised), DOM-305)), and paras. 305-308 (referring to Scollon et al. 2015a, (Exhibits HND-133, DOM-237, DOM-311)).

²⁵⁰⁷ See section 1.6.7.3.2 above.

²⁵⁰⁸ See Ajzen et al. Data Report, (Exhibit DOM/IDN-2); and Ajzen et al. Data Rebuttal Report, (Exhibit DOM/IDN-6).

²⁵⁰⁹ (footnote original) Whereas the first of the two pack appeal questions constitutes a direct measure of disliking for the pack, the second question asked respondents to rate the appeal of the current packaging "compared with a year ago." This question must have appeared odd to the participants prior to the introduction of plain packaging as there had been no significant change in the appearance of their cigarette packs. Further, asking respondents to draw comparisons with a year ago is likely to produce demand effects, leading them to believe that the investigators expected them to see a difference. For these reasons, the first direct question is likely to provide a better indication of pack appeal, and it revealed a much smaller impact of plain packaging than did the second comparative question. See Paulhus, D. L. (1991). Measurement and control of response bias. In J.P. Robinson, P. R. Shaver & L. S. Wrightsman (Eds.), *Measures of personality and social psychological attitudes* (pp. 17-59). San Diego, CA: Academic Press.

the results also showed that, even before plain packaging and enlarged GHGs, the majority of smokers disliked the look of their pack.

Turning to the appeal of tobacco products, the lowered visual appeal of the pack appears to have some bearing on the respondents' evaluations of the quality, satisfaction, and value of their cigarettes "compared with a year ago".²⁵¹⁰ These indicators of appeal of tobacco products showed statistically significant effects of the introduction of plain packaging and larger GHGs in the hypothesized direction. However, the magnitude of the effects was markedly lower (all small effects; r's ≤ .30) for product appeal than pack appeal.²⁵¹¹

7.954. These conclusions suggest that Ajzen et al., having reviewed the data obtained from the NTPPTS for the Dominican Republic and Indonesia, accept that plain packs have been, "as intended", perceived to be less attractive, and that "the lowered visual appeal of the pack appears to have some bearing on the respondents' evaluation of the quality, satisfaction and value of their cigarettes" compared to the previous year. We note that these experts also conclude that "these indicators of appeal of tobacco products showed statistically significant effects of the introduction of plain packaging and larger GHGs in the hypothesized direction".²⁵¹² The available empirical evidence relating to the application of the TPP measures since their entry into force thus confirms, rather than discredits, the "hypothesized direction", i.e. the hypothesis reflected in the TPP literature that plain packaging would reduce the appeal of tobacco products.

7.955. Ajzen et al. also discuss the results of the NTPPTS and other data in respect of the impact of the TPP measures on GHW effectiveness and conclude that they are mixed and overall weak²⁵¹³: they note *inter alia* that although the evidence presented suggests that plain packaging and enlarged GHGs do not impact recall of specific smoking risks, the results also suggest that the TPP measures, in conjunction with enlarged GHGs, had a small but statistically significant positive impact on the ability to recall a disease featured on a current GHW.²⁵¹⁴ Ajzen et al. also confirm the results reported in a study based on ITC Project data, providing insight on the magnitude of the impacts, which they describe as "intermediate" for attentional orientation and avoidance of GHGs and "small" for noticing GHGs and cognitive behaviours.²⁵¹⁵ Ajzen et al. mention the possibility of wear-out effects but do not test this assumption.²⁵¹⁶

7.956. As discussed in Appendix A²⁵¹⁷, empirical evidence on the impact of the TPP measures on appeal of cigars and cigarillos is found in a single peer-reviewed paper, in which a descriptive statistics analysis reports that occasional premium cigar and cigarillo smokers with higher TPP exposure, non-premium cigarillo smokers, and online survey participants reported reduced perceived appeal since the implementation of the TPP measures and enlarged GHGs.²⁵¹⁸ We find these findings to be consistent with the findings published in the peer-reviewed studies on adult cigarette smokers and adolescents reviewed in Appendix A. We further see no basis to reject this evidence in its entirety.²⁵¹⁹

7.957. As regards the noticeability of GHGs, the same peer-reviewed study finds that 15 months after the introduction of the TPP measures cigar and cigarillo smokers exposed to plain packaging reported greater noticeability of the GHGs and in a few cases greater concerns about the health

²⁵¹⁰ (footnote original) It is worth noting again that questions comparing attributes of current packs, brands, or products with those of a year ago are problematic. Asking respondents to make such comparisons requires them to look for differences they may not have mentioned spontaneously. It would have been better to simply ask participants to rate pack and product attributes on different occasions (before and after introduction of plain packaging) and examine any changes directly instead of asking participants to report changes.

²⁵¹¹ Ajzen et al. Data Report, (Exhibit DOM/IDN-2), paras. 90-91. (original emphasis omitted; emphasis added)

²⁵¹² Ajzen et al. Data Report, (Exhibit DOM/IDN-2), paras. 90-91. (emphasis added)

²⁵¹³ See Appendix A, para. 68.

²⁵¹⁴ Appendix A, para. 37.

²⁵¹⁵ Appendix A, para. 46.

²⁵¹⁶ Appendix A, para. 45.

²⁵¹⁷ Appendix A, para. 24.

²⁵¹⁸ Appendix A, para. 32.

²⁵¹⁹ Appendix A, para. 32.

warnings and avoidance and concealment.²⁵²⁰ As explained in Appendix A, we see no ground to reject the study in its entirety on the basis of relevant criticism.²⁵²¹ Further, the overall findings on cigar and cigarillo smokers are to some extent in line with the results reported in the other peer-reviewed papers analysing the impact of GHW effectiveness on adult cigarette smokers.²⁵²²

7.958. Overall, our review of the empirical evidence available to us regarding the impact of the TPP measures since their entry into force on the proximal outcomes of interest, as detailed in Appendix A²⁵²³, suggests that:

- a. The TPP measures and enlarged GHWs have statistically significantly reduced the appeal of cigarettes among adult smokers.
- b. The TPP measures and enlarged GHWs have statistically significantly increased GHWs' effectiveness on the noticeability of health warnings, avoidance of graphic health labels and pack concealment among adult cigarette smokers, albeit modestly for some outcomes, while the impact of the TPP measures and enlarged GHWs on adult cigarette smokers' health beliefs is relatively more limited and nuanced.
- c. The TPP measures and enlarged GHWs have had a more mixed and limited impact on the ability of the pack to mislead adult cigarette smokers about the harmful effects of smoking.
- d. While the TPP measures (together with enlarged GHWs) have contributed statistically significantly in reducing the appeal of cigarettes among adolescents, the impact of the TPP measures (with enlarged GHWs) on adolescents' health beliefs and cognitive processing of warning information on cigarettes packs is much more limited. Similarly, the impact of the TPP measures (and enlarged GHWs) on the ability of the pack to mislead adolescents about the harmful effects of smoking is more mixed and limited.
- e. There has been a decrease in perceived packaging appeal when cigar and cigarillo smokers were exposed to the TPP measures (and enlarged GHWs). In addition, there has been an increase in the noticeability of health warnings and packs concealment among cigar and cigarillo smokers, but the evidence is mixed regarding health beliefs.

7.2.5.3.6.2 Impact of the TPP measures on quitting-related outcomes and other distal outcomes

7.959. The parties have submitted as exhibits and discussed several peer-reviewed studies investigating the post-implementation impact of the TPP measures and enlarged GHWs on quitting-related cognitions, pack concealment and quit attempts.²⁵²⁴

7.960. Australia submits that these studies confirm that the TPP measures have resulted in increased calls to Quitline and the number of quit attempts.²⁵²⁵ Australia further submits that the features of certain survey data are most suited to detecting changes in proximal outcomes (i.e. the appeal of tobacco products, GHW effectiveness, and ability of tobacco packaging to mislead consumers about the harmful effects of smoking) than in more distal variables, such as intentions and quitting-related behaviours.²⁵²⁶

7.961. The complainants submit that the TPP measures have not had the expected effects on the antecedents of behaviour posited by Australia's conceptual framework of the TPP measures.²⁵²⁷ In

²⁵²⁰ Appendix A, para. 71.

²⁵²¹ Appendix A, para. 71.

²⁵²² Appendix A, para. 71.

²⁵²³ Appendix A, overall conclusions, para. 86.

²⁵²⁴ Some of these papers also analyse more proximal outcomes variables related to appeal, GHW effectiveness, and the ability of packs to mislead, which are reviewed in Appendix A to these Reports.

²⁵²⁵ Australia's second written submission, para. 464.

²⁵²⁶ Australia's comments on complainants responses to Panel question No. 197, paras. 371-375.

²⁵²⁷ See Ajzen et al. Data Report, (Exhibit DOM/IDN-2); Ajzen et al. Second Data Report, (Exhibit DOM/IDN-4); Ajzen et al. Data Rebuttal Report, (Exhibit DOM/IDN-6); Ajzen et al. Second Data Rebuttal

particular, the Dominican Republic and Indonesia's experts contend that beyond the obvious findings that the pack is less visually appealing and people more often notice the larger GHW first, empirical evidence shows little or no effects of the policies on the antecedents of behaviour. The complainants further argue that empirical evidence shows that the TPP measures have had no impact on variables relating to quitting and relapse.²⁵²⁸ The Dominican Republic and Indonesia submitted expert reports dedicated to reviewing a series of peer-reviewed papers assessing the impact of the TPP measures on quitting-related outcomes. In some cases, the complainants' experts also re-analysed the data used in the studies.²⁵²⁹

7.962. In addition, the experts of the Dominican Republic and Indonesia contend that some of the published empirical studies relied upon by Australia provide an inaccurate picture of the empirical evidence. According to them, some of these papers failed to report the results for more than half of all variables available in the survey dataset, which were overwhelmingly not statistically significant, suggesting no impact of plain packaging on these variables. The complainants contend that the authors of some of these studies failed also to explain that a number of the reported statistically significant effects had "vanished" by the end of the first year of the TPP measures' implementation as a result of wear-out effects. The Dominican Republic and Indonesia further criticize these papers for failing to report the effects size of the statistically significant effects. According to their experts, most of the reported statistically significant effects are small, suggesting that they have little importance in shifting behaviour. The complainants also criticize the authors of one of the studies for having removed the effects of a non-existent daily trend in survey responses, which has distorted the analysis by finding wrongly statistically significant effects.²⁵³⁰

7.963. This evidence is reviewed in detail in Appendix B. Overall, our review of the empirical evidence available to us regarding quitting-related outcomes and other distal outcomes, suggests that:

- a. The impact of the TPP measures and enlarged GHWs on adult cigarette smokers' quitting intentions and quitting-related cognition reactions is limited and mixed.
- b. The TPP measures and enlarged GHWs have had a statistically significant positive impact on avoidant behaviours, such as pack concealment, among adult cigarette smokers, while their impact on stubbing out and stopping smoking is much more limited and mixed.
- c. Although the TPP measures and enlarged GHWs have statistically significantly increased calls to Quitline, the observed impact on quit attempts is very limited and mixed.
- d. The empirical evidence of the impact of the TPP measures and enlarged GHWs on adolescents' quitting-related outcomes is limited. This evidence suggests that the impact of the TPP measures and enlarged GHWs on adolescents' refraining from smoking cigarettes and thoughts about quitting is statistically not significant. No empirical evidence has been submitted on pack concealment among adolescent smokers.
- e. The empirical evidence of the impact of the TPP measures and enlarged GHWs on cigar and cigarillo smokers' quitting-related outcomes is limited. This evidence suggests that the shares of premium cigar and cigarillo smokers and of non-premium cigarillo smokers reporting having decanted the cigars and cigarillos from their boxes to a humidor or an unbranded tin or concealed their pack have increased and there has been an increase in the share of non-premium cigarillo smokers contemplating quitting.

Report, (Exhibit DOM/IDN-8); Klick Supplemental Rebuttal Report, (Exhibit HND-122); and Klick Second Supplemental Rebuttal Report, (Exhibit HND-165).

²⁵²⁸ See Ajzen et al. Data Report, (Exhibit DOM/IDN-2), paras. 10-22; and Klick Supplemental Rebuttal Report, (Exhibit HND-122), para. 100.

²⁵²⁹ See Ajzen et al. Data Report, (Exhibit DOM/IDN-2); Ajzen et al. Second Data Report, (Exhibit DOM/IDN-4); Ajzen et al. Data Rebuttal Report, (Exhibit DOM/IDN-6); Ajzen et al. Second Data Rebuttal Report, (Exhibit DOM/IDN-8); and Klick Report, (Exhibit UKR-5).

²⁵³⁰ See Ajzen et al. Data Report, (Exhibit DOM/IDN-2), paras. 23-27.

7.2.5.3.6.3 Impact of the TPP measures on smoking behaviours

7.964. The complainants generally consider that prevalence and tobacco sales data enable an objective assessment of the actual behavioural effects of changing the appearance of tobacco products and their packaging.²⁵³¹

7.965. The Dominican Republic and Indonesia argue that empirical evidence on the application of the TPP measures since their entry into force suggests that people like plain packages less than branded packages, but that this does not carry through all the variables assessing the appeal of tobacco products, as plain packaging fails to influence the appeal of smoking and has almost no effect on the appeal of the pack and of tobacco products among non-smoking adolescent.²⁵³² Ajzen et al., in an expert report submitted by Honduras and the Dominican Republic, further argue that the TPP measures have had no positive downstream impact on smokers' quit intentions and quit attempts, and led to no changes in smokers' actual smoking behaviour.²⁵³³

7.966. Australia considers that in the early stages of introduction of the measures, its outcomes are best measured on the basis of experiments and studies which consider drivers of choice, attitudes and the elicitation of behavioural intentions. Nonetheless, it engaged in an econometric analysis of data relating to smoking prevalence and consumption since the entry into force of the TPP measures.

7.967. We consider below the evidence before us on the evolution of smoking prevalence and consumption of tobacco products in Australia since the entry into force of the TPP measures.

Impact of the TPP measures on smoking prevalence

7.968. A number of expert reports submitted by the parties are dedicated in part or in whole to an assessment of the contribution of the TPP measures to reducing smoking prevalence.²⁵³⁴ These expert reports rely on different databases, statistical analysis and econometric methods to determine whether TPP and enlarged GHWs have contributed to a reduction in smoking prevalence.

7.969. The complainants argue that the overall empirical statistical and econometric studies carried out by their experts conclude that the TPP measures have failed to reduce cigarette and cigar smoking prevalence.²⁵³⁵ The complainants also initially suggested that the TPP measures "backfired" by increasing youth smoking prevalence²⁵³⁶, although they did not pursue this argument in later stages of the proceedings.

7.970. Notwithstanding its position that in the early stages of introduction of the measures, the most appropriate way to discern their effects is to rely on experiments and surveys which consider

²⁵³¹ See, e.g. Dominican Republic's first written submission, paras. 48-50; Honduras's second written submission, para. 31; Cuba's second written submission, para. 40; and Indonesia's first written submission, paras. 112-117.

²⁵³² See Ajzen et al. Data Rebuttal Report, (Exhibit DOM/IDN-6), paras. 44-51.

²⁵³³ See Ajzen et al. Data Report, (Exhibit DOM/IDN-2), paras. 167-173 and 221-224.

²⁵³⁴ See Chipy Report, (Exhibit AUS-17); Chipy Supplementary Report, (Exhibit AUS-511); Chipy Rebuttal Report, (Exhibit AUS-535) (SCI); Chipy Surrebuttal Report, (Exhibit AUS-586); Chipy Second Rebuttal Report, (Exhibit AUS-591); Chipy Third Rebuttal Report, (Exhibit AUS-605); Chaloupka Rebuttal Report, (Exhibit AUS-582); Chaloupka Third Rebuttal Report, (Exhibit AUS-604); List Report, (Exhibit DOM/IDN-1); List Rebuttal Report; (Exhibit DOM/IDN-3); List Second Supplemental Report, (Exhibit DOM/IDN-5); List Third Supplemental Report, (Exhibit DOM/IDN-7); List Summary Report, (Exhibit DOM/IDN-9); IPE Report, (Exhibit DOM-100); IPE Updated Report, (Exhibit DOM-303); IPE Second Updated Report, (Exhibit DOM-361); IPE Third Updated Report, (Exhibit DOM-375); IPE Summary Report, (Exhibit DOM-379); Klick Report, (Exhibit UKR-5); Klick Rebuttal Report, (Exhibit HND-118); Klick Supplemental Rebuttal Report, (Exhibit HND-122); Klick Second Supplemental Rebuttal Report, (Exhibit HND-165); Klick Third Supplemental Rebuttal Report, (Exhibit HND-166); Klick Fourth Supplemental Rebuttal Report, (Exhibit HND-169).

²⁵³⁵ See Honduras's second written submission, paras. 56-60; Dominican Republic's comments on responses to Panel questions following the second substantive meeting, paras. 681-682; Cuba's second written submission, paras. 276-277; and Indonesia's second written submission, para. 192.

²⁵³⁶ See Honduras's first written submission, para. 395; Dominican Republic's first written submission, para. 523; Cuba's first written submission, para. 163; and Indonesia's first written submission, para. 412.

drivers of choice, attitudes, and ultimately, the elicitation of behavioural intentions, Australia engaged in estimating econometrically the impact of the TPP measures on smoking prevalence, in response to the complainants' submissions.²⁵³⁷ Australia argues that using the most appropriate dataset available and correcting for flaws in the econometric models put forward by the complainants' experts, the results show that the TPP measures have already contributed to reducing cigarette and cigar smoking prevalence.²⁵³⁸

7.971. The approaches proposed by the parties to analyse the trends in smoking prevalence evolved over the course of the proceedings. Overall, they address the following three main aspects, which are reviewed in detail in Appendix C:

- a. First, the parties have submitted economic figures and descriptive statistics analyses aimed at determining whether smoking prevalence has decreased following the implementation of the TPP measures;
- b. Second, Australia, the Dominican Republic, Honduras and Indonesia have submitted statistical analyses to determine whether there was a break in the trend in smoking prevalence following the implementation of the TPP measures, and in particular, whether the reduction of smoking prevalence has accelerated following the implementation of the TPP measures;
- c. Finally, Australia, the Dominican Republic, Honduras and Indonesia have submitted econometric analyses to determine whether the TPP measures have contributed to a reduction in smoking prevalence by isolating and quantifying the different factors that can explain the evolution of smoking prevalence.

7.972. Based on a review of the most recent data available and econometric evidence submitted by the parties, as detailed in Appendix C, we find that:

- a. There is evidence that overall smoking prevalence in Australia continued to decrease following the introduction of the TPP measures.
- b. The downward trend in overall smoking prevalence in Australia appears to have accelerated in the post-TPP period.
- c. Although it is not possible to distinguish between the impact of TPP and the impact of enlarged GHWs on the basis of the empirical evidence submitted, there is some econometric evidence suggesting that the TPP measures, together with the enlarged GHWs implemented at the same time, contributed to the reduction in overall smoking prevalence, including cigar smoking prevalence, since their entry into force.

Impact of the TPP measures on consumption and sales volumes of tobacco products

7.973. A number of expert reports are dedicated in part or in whole to a discussion of evidence relating to the evolution of consumption of tobacco products since the entry into force of the TPP measures.²⁵³⁹ Different databases, statistical analyses and econometric methods have been

²⁵³⁷ See Australia's first written submission, para. 670. Instead Australia claimed that the impact of plain packaging had to be investigated through its mechanism by looking at its impact on non-behavioural outcomes: (1) reduction in the appeal of tobacco products, (2) increased effectiveness of health warnings, and (3) reduction of the ability of the pack to mislead. Australia referred to the series of peer-reviewed studies published in the *Tobacco Control* journal.

²⁵³⁸ See Australia's comments on complainants' response to Panel question No. 197, para. 214.

²⁵³⁹ See Chipy Report, (Exhibit AUS-17); Chipy Supplementary Report, (Exhibit AUS-511); Chipy Rebuttal Report, (Exhibit AUS-535) (SCI); Chipy surrebuttal report, (Exhibit AUS-586); Chipy Second Rebuttal Report, (Exhibit AUS-591); Chipy Third Rebuttal Report, (Exhibit AUS-605); List Report, (Exhibit DOM/IDN-1); List Rebuttal Report, (Exhibit DOM/IDN-3); List Second Supplemental Report, (Exhibit DOM/IDN-5); List Third Supplemental Report, (Exhibit DOM/IDN-7); List summary report, (Exhibit DOM/IDN-9); IPE Report, (Exhibit DOM-100); IPE Updated Report, (Exhibit DOM-303); IPE Second Updated Report, (Exhibit DOM-361); IPE Third Updated Report, (Exhibit DOM-375); IPE Summary Report, (Exhibit DOM-379); Klick Report, (Exhibit UKR-5); Klick Rebuttal Report, (Exhibit HND-118); Klick Supplemental

proposed to determine whether TPP and enlarged GHW have contributed to the reduction in cigarette consumption.

7.974. As in respect of the analysis of smoking prevalence, one of the only points of agreement among the parties is that the empirical econometric evidence on cigarette consumption submitted does not distinguish between the impact of TPP and the impact of enlarged GHWS on cigarette sales or consumption, because both measures were implemented at the exact same time.²⁵⁴⁰

7.975. The complainants argue that all their experts' empirical statistical and econometric studies show that the TPP measures failed to reduce cigarette sales volumes or consumption.²⁵⁴¹ The complainants even suggested initially that TPP measures "backfired" by increasing tobacco sales.²⁵⁴² This argument was however not developed later in the proceedings.

7.976. Notwithstanding its contention that it was too early to investigate the impact of TPP on tobacco consumption, Australia submitted expert reports estimating the TPP measures' impact on cigarette sales, in response to the complainants' submissions.²⁵⁴³ Australia contends that once the most appropriate dataset available (i.e. In-Market-Sales data) are used and the flaws of the econometric models put forward by the complainants' experts are corrected, the econometric results show that TPP measures have already contributed to their objectives by reducing cigarette sales volumes.²⁵⁴⁴

7.977. Similar to the discussion on smoking prevalence, the approaches presented by the parties to analyse cigarette sales volumes and consumption evolved over the course of the proceedings. Overall, these address three main aspects, which are reviewed in detail in Appendix D:

- a. First, the parties have submitted economic figures and descriptive statistics analyses aimed at determining whether cigarette sales or consumption have decreased following the implementation of the TPP measures²⁵⁴⁵;
- b. Second, Australia, the Dominican Republic, and Indonesia have submitted statistical analyses to determine whether there was a break in the trend in cigarette sales following the implementation of the TPP measures, and in particular, whether the reduction of cigarette sales volumes has accelerated in the post-TPP period;
- c. Finally, Australia, the Dominican Republic, Honduras, and Indonesia have submitted econometric analyses to determine whether the TPP measures have contributed to a

Rebuttal Report, (Exhibit HND-122); Klick Second Supplemental Rebuttal Report, (Exhibit HND-165); Klick Third Supplemental Rebuttal Report, (Exhibit HND-166); Klick Fourth Supplemental Rebuttal Report, (Exhibit HND-169); Ajzen et al. Data Report, (Exhibit DOM/IDN-2); Ajzen et al. Second Data Report, (Exhibit DOM/IDN-4).

²⁵⁴⁰ See Australia's first written submission, para. 518; Dominican Republic's response to Panel question No. 8, para. 61; Honduras's responses to Panel question No. 8; Indonesia's response to Panel question No. 8, para. 8.

²⁵⁴¹ See Dominican Republic's comments on responses to questions from the Panel following the second substantive meeting, paras. 681-682; Honduras's second written submission, paras. 56-60; Indonesia's second written submission, para. 192; Cuba's second written submission, paras. 276-277.

²⁵⁴² See Indonesia's first written submission, para. 412; Cuba's first written submission, para. 163; Dominican Republic's first written submission, para. 523; Honduras's first written submission, para. 395.

²⁵⁴³ See Australia's first written submission, para. 670. Instead Australia claimed that the impact of TPP had to be investigated through its mechanism by looking at its impact on non-behavioural outcomes: (1) reduction in the appeal of tobacco products, (2) increased effectiveness of health warnings, and (3) reduction of the ability of the pack to mislead. Australia referred to the series of peer-reviewed studies published in the *Tobacco Control* journal.

²⁵⁴⁴ See Australia's comments on responses to questions from the Panel following the second substantive meeting, para. 214.

²⁵⁴⁵ We note that the parties also submitted data on the value and volume of Australian imports of tobacco, including cigar and cigarillo. See HoustonKemp Report, (Exhibit AUS-19) (SCI); Dominican Republic's response to Panel question No. 5; Honduras's response to Panel question No. 5; Cuba's response to Panel question No. 5 (annexed to its response to Panel question No. 138); and Indonesia's response to Panel question No. 5. These data are not reviewed here because they were not used in any of the econometric reports submitted by the parties.

reduction of cigarette sales or consumption by isolating and quantifying the different factors that can explain the evolution of cigarette sales or consumption.

7.978. The parties also presented and discussed a graphical and descriptive analysis of cigar trade data.

7.979. Overall, based on a review of the most recent data available and evidence submitted by the parties²⁵⁴⁶, as detailed in Appendix D, we find that:

- a. There is some evidence that cigarette sales in Australia continued to decrease following the introduction of the TPP measures;
- b. The downward trend in cigarette sales in Australia appears to have accelerated in the post-TPP period;
- c. Although it is impossible to distinguish between the impact of TPP and enlarged GHWs, there is some econometric evidence suggesting that the TPP measures, in combination with the enlarged GHWs implemented at the same time, contributed to the reduction in wholesale cigarette sales, and therefore cigarette consumption, after their entry into force;
- d. The evidence before us on the evolution of consumption of cigars in the post-TPP period is more limited and does not allow us to draw clear conclusions on the effect of the TPP measures on cigar consumption in Australia.

²⁵⁴⁶ We take note of the theoretical analyses and simulations based on pre-implementation data in the expert reports submitted by Professor Neven and Professor Katz regarding the effect of the TPP measures on consumption, among other outcome variables. See Neven Report, (Exhibit UKR-3) (SCI); Neven Rebuttal Report, (Exhibit HND-123); Katz Report, (Exhibit AUS-18); and Katz Surrebuttal Report, (Exhibit AUS-584). With regard to the theoretical analysis, we note that Professor Neven and Professor Katz come to different conclusions with regard to the effects of plain packaging on the price of cigarettes and on consumption. Professor Katz's view is that the prices will increase as manufacturers will respond to plain packaging by "harvesting" captive smokers and consumption will fall. Professor Neven, on the contrary, argues that (1) the harvesting strategy is a very particular case and does not correspond to the reaction that is normally expected from producers; (2) in the Australian tobacco market with strong and weak brands, a harvesting strategy would reinforce downtrading by raising the price of premium cigarettes relative to that of value brands; (3) the increase in price associated with a harvesting strategy is likely to be transitory and in the long-term prices are likely to fall. His prediction is that plain packaging will lower the price of cigarettes and raise consumption.

With regard to the simulations, Professor Neven assumes that plain packaging has, on the one hand, a moderate effect on consumers' willingness to pay but, on the other hand, significantly reduces differentiation, generating a decrease in price which is sufficient to induce an overall increase in consumption. In his rebuttal report, Professor Katz observes that prices have increased and consumption fallen in the year following the implementation of plain packaging. He further shows that under a different set of assumptions, Professor Neven's model can generate the observed effects. Professor Neven responds that insufficient time has passed for the long-term effects of plain packaging to have materialized and that the simulation methodology should be seen as an alternative methodology which focuses on long-term effects and thereby provides evidence which complements ex-post empirical analysis. Neven Rebuttal Report, (Exhibit HND-123), para. 6.

We observe that depending on the assumptions selected, Professor Neven's model can either predict that plain packaging will increase the consumption of cigarettes, or decrease it. Professor Neven and Professor Katz disagree on how plain packaging affects consumers' willingness to pay, that is on the relative importance of the "market expansion" effect compared to the "business stealing" effect. They also disagree on how producers adjust their prices in response to plain packaging, which explains why they come to different predictions regarding the effects of plain packaging on consumption. They further disagree on how long-run effects should be weighed against short-run effects in the event that the two differ. In our view, neither the theoretical analysis nor the simulations provide conclusive evidence that contradicts the panel's findings based on the rest of the evidence submitted. We note that with regard to the weighing of short- and long-term results, Professor Neven does not explain why his model predicts the long term rather than the short term, where the long term is defined as what might happen after "at least a number of years". Neven Report, (Exhibit UKR-3), fn 41. On this particular point, his view diverges from that of the complainants who typically argue that the effects of plain packaging should have become evident soon after implementation. Moreover, he does not explain how, to the extent plain packaging generates positive effects in the short term, these positive effects should be weighed against his long-term effects. See, e.g. paras. 7.1181 and 7.1215.

7.2.5.3.6.4 Overall conclusion on evidence relating to the application of the TPP measures since their entry into force

7.980. All parties recognize the inherent difficulty, in assessing the impact of the TPP measures since their entry into force, of isolating their effect from that of other factors contributing to the outcomes of interest, both proximal and more distal. In particular, the simultaneous application of enlarged GHGs, which came into effect at the same time as the TPP measures, complicates an assessment of the actual effect of the TPP measures.

7.981. In this respect, the observations of the Appellate Body on the challenges of isolating the contribution of a measure taken in the context of a comprehensive policy are especially pertinent:

We recognize that certain complex public health or environmental problems may be tackled only with a comprehensive policy comprising a multiplicity of interacting measures. In the short-term, it may prove difficult to isolate the contribution to public health or environmental objectives of one specific measure from those attributable to the other measures that are part of the same comprehensive policy. Moreover, the results obtained from certain actions—for instance, measures adopted in order to attenuate global warming and climate change, or certain preventive actions to reduce the incidence of diseases that may manifest themselves only after a certain period of time—can only be evaluated with the benefit of time.²⁵⁴⁷

7.982. We also note the observations of the Appellate Body concerning the type of the evidence that may be pertinent, in such situations, to establish that the measure at issue contributes to the protection of public health or environmental objectives pursued, including "evidence or data, pertaining to the past or the present", as well as "quantitative projections in the future, or qualitative reasoning based on a set of hypotheses that are tested and supported by sufficient evidence".²⁵⁴⁸

7.983. As discussed above, the TPP measures are intended, by design, to operate in conjunction with a range of other tobacco control measures, including effective GHGs. In this context, it appears to be inevitable that an assessment of actual outcomes would be made in the presence of such other measures, including GHGs, which could be expected to affect at least to some degree the capacity to isolate the effect of plain packaging, as applied in the presence of such GHGs.

7.984. Notwithstanding this constraint, we consider that the evidence before us usefully informs the contribution, as of the time of our assessment, of the TPP measures to Australia's objective of improving public health by reducing the use of, and exposure to, tobacco products. As described above, a range of evidence has been presented in these proceedings, and discussed, that seeks to identify the effects of the TPP measures since their entry into force. As analyzed in detail in Appendices A to D, this evidence relates to each of the proximal outcomes of interest (appeal of tobacco products, effectiveness of GHGs and ability of the pack to mislead consumers about the harmful effects of tobacco products), to certain smoking-related behavioural outcomes, and to actual smoking behaviours (sales and consumption of tobacco products and smoking prevalence).

7.985. We note that some of the reported results on proximal, or "non-behavioural", outcomes are mixed. Nonetheless, the evidence before us, including a review by the complainants' own experts of data collected in a national tracking survey conducted specifically to assess the impact of the TPP measures, is consistent with the view that, together with the enlarged GHGs, these measures have led in particular to a reduction in the appeal of tobacco products, as hypothesized in the TPP literature, and to a greater noticeability of GHGs.

7.986. The fact that pre-existing downward trends in smoking prevalence and overall sales and consumption of tobacco products have not only continued but accelerated since the implementation of the TPP measures, and that the TPP measures and enlarged GHGs had a negative and statistically significant impact on smoking prevalence and cigarette wholesale sales, is also consistent with the hypothesis that the measures have had an impact on actual smoking behaviours, notwithstanding the fact that some of the targeted behavioural outcomes could be

²⁵⁴⁷ Appellate Body Report, *Brazil – Tyres*, para. 151. (footnote omitted)

²⁵⁴⁸ Appellate Body Report, *Brazil – Tyres*, para. 151.

expected to manifest themselves over a longer period of time. We note in this respect the limited evidence before us addressing the relationship between observed proximal outcomes and actual smoking behaviours, which suggests that further analysis will be required in this respect.

7.2.5.3.7 Impact of the TPP measures on illicit trade

7.2.5.3.7.1 Main arguments of the parties

7.987. Honduras argues that "an increase in the consumption of illicit tobacco products also means an increase in Australia's general tobacco prevalence"²⁵⁴⁹, which directly undermines "Australia's objective pursued through the plain packaging measures, that is, the reduction of smoking prevalence".²⁵⁵⁰ Honduras submits that the TPP measures have encouraged illicit operators to continue selling illicit branded packs and to introduce illicit plain packs imitating compliant packs²⁵⁵¹ and create opportunities for illegal operators to supply products "in the same fully-branded format that was used before the adoption of Australia's measures".²⁵⁵² Relying on the CMZ Report, Honduras adds that "[t]he need for familiar brands may also translate into a higher demand for counterfeit branded packs".²⁵⁵³ In Honduras's view, deceiving smokers "can become increasingly easier in a plain packaging environment as smokers start to become less familiar with the appearance of fully branded products over time".²⁵⁵⁴ Further, Honduras argues that the TPP measures have encouraged the supply of a category of products known as "illicit whites" both in a fully branded format and in plain packs.²⁵⁵⁵ Honduras also argues that the TPP measures encourage not only the supply of illicit products, but also consumer demand for such products due to price sensitivity and loss of brand loyalty.²⁵⁵⁶

7.988. The Dominican Republic argues that the TPP measures have likely increased illicit trade levels in Australia.²⁵⁵⁷ In support of this contention, the Dominican Republic relies on a report prepared by KPMG titled "Illicit Tobacco in Australia" (KPMG Report)²⁵⁵⁸ indicating relative increases for certain categories of illicit tobacco products, as well as seizure data from the Australian Customs and Border Protection Services (ACBPS) indicating increased detection of illicit trade between the 2011/2012 period and the 2012/2013 period.²⁵⁵⁹

7.989. The Dominican Republic further argues that the TPP measures "promote the competitive opportunities of *illegal* producers at the expense of *legal* producers"²⁵⁶⁰ because "only the illicit market is able to provide branded product offerings in a plain packaging environment".²⁵⁶¹ With reference to an expert report by Professors Chaudhry, Murray, and Zimmerman (CMZ Report)²⁵⁶², jointly submitted with Honduras, it argues that counterfeit illicit products have become easier to produce and harder to detect²⁵⁶³ and that the cheaper price of illicit tobacco becomes more attractive to consumers under the TPP measures.²⁵⁶⁴

²⁵⁴⁹ Honduras's first written submission, para. 564.

²⁵⁵⁰ Honduras's first written submission, para. 564.

²⁵⁵¹ Honduras's first written submission, para. 551.

²⁵⁵² Honduras's first written submission, para. 552. Honduras argues that consumers seeking to purchase preferred brands in the same format as before the implementation of the TPP measures "may now decide to buy a contraband product even if that means entering the illicit market for the first time". Honduras's first written submission, para. 554.

²⁵⁵³ Honduras's first written submission, para. 555.

²⁵⁵⁴ Honduras's first written submission, para. 555. See also *ibid.* paras. 557-558.

²⁵⁵⁵ Honduras's first written submission, paras. 556 and 559-560.

²⁵⁵⁶ Honduras's first written submission, para. 561.

²⁵⁵⁷ Dominican Republic's first written submission, para. 534.

²⁵⁵⁸ KPMG, "Illicit Tobacco in Australia: 2013 Full Year Report", (3 April 2014), (KPMG Report 2013), (Exhibits HND-67, DOM-98, IDN-41), p. 6.

²⁵⁵⁹ Dominican Republic's first written submission, para. 541.

²⁵⁶⁰ Dominican Republic's first written submission, para. 549. (emphasis original)

²⁵⁶¹ Dominican Republic's first written submission, para. 544.

²⁵⁶² P. Chaudhry, A. Murray, and A. Zimmerman, "The Impact of Plain Packaging on the Illicit Trade in Tobacco Products in Australia", 22 September 2014, (CMZ Report), (Exhibit DOM/HND-2).

²⁵⁶³ Dominican Republic's first written submission, paras. 546-549.

²⁵⁶⁴ Dominican Republic's first written submission, para. 545.

7.990. Cuba submits that the TPP measures have not reduced smoking prevalence, and that illicit trade has substantially increased in Australia since the introduction of the TPP measures.²⁵⁶⁵

7.991. Indonesia argues that the TPP measures are contributing to "a shift in consumption from branded, more expensive tobacco products" to, *inter alia*, illicit products.²⁵⁶⁶ Referring to the KPMG report, it argues that the level of illegal tobacco consumption in Australia "reached record levels, growing from 11.8 percent in 2012 to 13.9 percent in 2013". It submits that the "key driver of this growth has been a 151 percent increase in the consumption of *illegal, branded* tobacco", which "equates to loss of AUD 1.1 billion annually to the Australian treasury".²⁵⁶⁷

7.992. Australia responds that, contrary to the complainants' assertions, "the evidence suggests that illicit tobacco is not a significant part of the Australian market, and that the tobacco plain packaging measure has not had and it is not likely to have any discernible effect on illicit tobacco consumption in Australia".²⁵⁶⁸ Australia relies on the expert report of Professor Chaloupka²⁵⁶⁹, pointing to the "serious methodological flaws" and significant overstatement of "the size of the illicit tobacco market in Australia" as presented in the KPMG Report.²⁵⁷⁰ Australia further submits that the cost of supplying illicit tobacco in Australia is high, given its "tight control over the tobacco distribution chain, active enforcement of policies targeting the illicit tobacco trade, strong governance and low levels of corruption, and low demand for illicit tobacco among Australian smokers".²⁵⁷¹ Australia contests the allegation that "the tobacco plain packaging measure makes it more difficult to detect illicit tobacco products" as "entirely speculative" and "directly contradicted by evidence suggesting an upward trend in the number of detections" by the ACBPS after the introduction of the TPP measures.²⁵⁷²

7.2.5.3.7.2 Analysis by the Panel

7.993. In support of their contention that increased illicit trade in tobacco products undermines any contribution made by the TPP measures to their objective, the complainants submit expert reports and evidence that include empirical estimates of the size of the illicit tobacco market in Australia, as well as expert opinions as to whether the TPP measures exacerbate certain contributing factors to illicit trade in tobacco products.

7.994. With regard to empirical estimates of the size of the illicit tobacco market in Australia, the complainants primarily rely upon a report prepared by KPMG (the KPMG Report) commissioned by BATA, Imperial Tobacco Australia Limited (ITA), and Philip Morris Limited (PML).²⁵⁷³ The specific purpose of the KPMG Report was "to provide an overview of the nature and dynamics of the legal and illicit tobacco markets in Australia", and "to provide an independent estimate of the size of the illicit tobacco market in Australia".²⁵⁷⁴

²⁵⁶⁵ Cuba's second written submission, para. 153.

²⁵⁶⁶ Indonesia's first written submission, para. 117.

²⁵⁶⁷ Indonesia's first written submission, para. 120.

²⁵⁶⁸ Australia's first written submission, para. 653.

²⁵⁶⁹ F. Chaloupka, "Expert Report on Australia's Tobacco Plain Packaging Legislation", 6 March 2015, (Chaloupka Illicit Market Report), (Exhibit AUS-8).

²⁵⁷⁰ Australia's first written submission, para. 654. See also Chaloupka Illicit Market Report, (Exhibit AUS-8), paras. 10(d) and 78-79.

²⁵⁷¹ Australia's first written submission, para. 655. See also Chaloupka Illicit Market Report, (Exhibit AUS-8), paras. 35-66.

²⁵⁷² Australia's first written submission, para. 657.

²⁵⁷³ Honduras, the Dominican Republic, and Indonesia each submitted the 2013 full year report prepared by KPMG regarding the size of the illicit tobacco market in Australia, which forms part of a series of reports following the introduction of the TPP measures prepared by KPMG. The estimates in this report were calculated based on the approach adopted in the 2013 half-year report, using all the available data captured in 2013. KPMG Report 2013, (Exhibits HND-67, DOM-98, IDN-41), p. 6. Honduras additionally submitted the 2014 full year report in which the same methodology is used as in previous reports. KPMG, "Illicit Tobacco in Australia: 2014 Full Year Report", (27 March 2015), (Exhibit HND-148), p. 6. The Panel relies in its analysis on the 2013 full year version of the report, which was the primary basis of the complainants' arguments concerning empirical estimates of the size of the illicit tobacco market in Australia.

²⁵⁷⁴ KPMG Report 2013, (Exhibits HND-67, DOM-98, IDN-41), p. 7.

7.995. The KPMG Report considers two main types of *legal* tobacco products in total tobacco consumption: (i) *manufactured cigarettes* sold in packets, and (ii) *loose tobacco* sold in pouches and consumed using rolling papers or tubes.²⁵⁷⁵

7.996. With regard to *illicit* tobacco consumption, the KPMG Report refers to three distinct categories of tobacco products²⁵⁷⁶:

- a. "Unbranded tobacco", which is sold as finely cut loose leaf tobacco that is most commonly smuggled from overseas countries, including what is referred to as "chop chop" (unbranded loose tobacco sold in bags) as well as unbranded tobacco sold in pre-filled tubes.
- b. "Counterfeit" tobacco products, which are manufactured cigarettes that are smuggled into Australia and that carry branding without the consent of the trademark owner.
- c. "Contraband" tobacco products, which are mainly genuine cigarettes that are manufactured legally outside of Australia and smuggled into the Australian market. This category includes cigarettes that are purchased legally abroad but are imported in excess of the personal import allowance without paying duties.²⁵⁷⁷ This category also includes what are known as "illicit whites", which is a term for brands of manufactured cigarettes that are not legally available in the local market, although they may be legal at the point of manufacture, and that are often made exclusively for smuggling.

7.997. To estimate the size of the illicit tobacco market, the KPMG Report used different data sources and methodologies for these different categories of illicit tobacco consumption. For unbranded tobacco, the KPMG used a "consumption model approach" based on results from a consumer survey.²⁵⁷⁸ The survey results were based on reports of purchases of illicit unbranded tobacco, the average frequency of purchases per year, and the average volume purchased per occasion.²⁵⁷⁹

7.998. For illicit manufactured cigarettes (counterfeit and contraband), an empty pack survey (EPS) analysis was used based on the collection of discarded cigarette packs across Australia in 2013.²⁵⁸⁰ The EPS approach involved the collection of 12,000 cigarette packs in 2013 across 16 different towns and cities in Australia.²⁵⁸¹ Each collected pack was assessed to determine whether it was a domestic or non-domestic product, and whether it was a genuine or a counterfeit product.²⁵⁸² As explained in the KPMG Report, the EPS "is used to extrapolate overall consumption in the market by projecting legal domestic sales", and "[t]he percentages of non-domestic and counterfeit packs are added to this total in order to establish the total consumption of

²⁵⁷⁵ KPMG Report 2013, (Exhibits HND-67, DOM-98, IDN-41), p. 9.

²⁵⁷⁶ See KPMG Report 2013, (Exhibits HND-67, DOM-98, IDN-41), p. 9.

²⁵⁷⁷ In this regard, the KPMG Report notes that a "small amount of tobacco is imported into Australia by consumers for their own personal consumption". Based on the "low allowance" of 50 cigarettes or 50 grams of loose tobacco that can be brought into Australia without paying excise duty, the KPMG Report states that "the non-domestic legal volume is likely to be a small proportion of consumption". KPMG Report 2013, (Exhibits HND-67, DOM-98, IDN-41), p. 12. See also *ibid.* Appendix A2.4.

²⁵⁷⁸ KPMG Report 2013, (Exhibits HND-67, DOM-98, IDN-41), p. 27. The consumer survey was carried out by Roy Morgan Research, an Australian Research Company, through Computer Assisted Web-based Interviewing with a sample of 2,116 adult respondents collected from 10,286 who responded to an initial contact sent to Roy Morgan Research's pool of respondents. This sample of respondents was limited to those above 18 years of age who are "regular smokers", which was defined as a person who smokes tobacco products at least five days a week. See *Ibid.* p. 32.

²⁵⁷⁹ KPMG Report 2013, (Exhibits HND-67, DOM-98, IDN-41), p. 33. See also *Ibid.* Appendix A1.1.

²⁵⁸⁰ See KPMG Report 2013, (Exhibits HND-67, DOM-98, IDN-41), pp. 25 and 27.

²⁵⁸¹ KPMG Report 2013, (Exhibits HND-67, DOM-98, IDN-41), p. 25. In particular, empty packs were collected "on a proportionate basis from several neighbourhoods ... from streets and easy access public bins in areas on the sampling plan". These neighbourhoods were "selected to be representative of the city being sampled". Packs were "collected irrespective of their brand and country of origin", and "[r]esidences, offices and other locations such as stadiums have been excluded from the sampling plan". *Ibid.* p. 34.

²⁵⁸² KPMG Report 2013, (Exhibits HND-67, DOM-98, IDN-41), p. 25. As explained in the KPMG Report, packs collected in the EPS are examined by the participating companies, which are able to identify packs which are counterfeit versions of their products. *Ibid.* Appendix A1.2.1.

manufactured cigarettes in Australia".²⁵⁸³ The KPMG Report further explains that the "small proportion" of "non-domestic legal cigarettes", namely those brought into Australia legally by tourists or Australians travelling overseas, is estimated based on travel statistics from the Australian Bureau of Statistics (ABS).²⁵⁸⁴ These "non-domestic legal cigarettes" are removed from the total "non-domestic" volume to leave the total illicit manufactured cigarette market, comprised of contraband and counterfeit cigarettes.²⁵⁸⁵

7.999. Based on these analyses, the KPMG Report concludes that illicit tobacco consumption in Australia grew to 13.9% as a proportion of total consumption in 2013.²⁵⁸⁶ According to its estimates based on a number of sources, the KPMG Report presents this as an increase in the proportion of illicit tobacco consumption from 11.8% in 2012, with estimates for preceding years as 12.4% in 2011; 12.8% in 2010; 9.1% in 2009; and 8.3% in 2007.²⁵⁸⁷

7.1000. Within the illicit tobacco market, the KPMG Report finds that in 2013 contraband manufactured cigarettes constituted 52% of total illicit consumption, while counterfeit manufactured cigarettes and unbranded loose tobacco comprised 6% and 42%, respectively, of the total share.²⁵⁸⁸ Based on its primary methodologies for each category, the KPMG Report further estimates that the illicit manufactured cigarettes market increased by 151% from 2012 to 2013 (comprised of a 148% increase in contraband²⁵⁸⁹ and a 187% increase in counterfeit cigarettes²⁵⁹⁰), while the volume of unbranded tobacco consumed declined by 31% during the same period.²⁵⁹¹ The KPMG Report thus characterizes contraband products as "the predominant driver of the increase in illicit manufactured cigarette volumes between 2012 and 2013".²⁵⁹²

²⁵⁸³ KPMG Report 2013, (Exhibits HND-67, DOM-98, IDN-41), p. 25. More specifically, "[t]he 9.8% non-domestic incidence is combined with estimates for legal domestic sales volumes from Euromonitor to create a volume estimate for illicit manufactured cigarettes", which "can then be broken down into volume estimates for non-domestic legal, counterfeit and contraband". Ibid. Appendix A1.2.2.

²⁵⁸⁴ KPMG Report 2013, (Exhibits HND-67, DOM-98, IDN-41), p. 25. In the calculation of non-domestic legal cigarettes, KPMG uses travel trend data of outbound trips made by Australians and the propensity to purchase tobacco abroad, as well as inbound travel trends of overseas visitors (both short-term visitors and settlers). The calculation also takes into account the change to inbound traveller allowances in September 2012 that reduced the permissible amount. See KPMG, Appendix A2.4.

²⁵⁸⁵ KPMG Report 2013, (Exhibits HND-67, DOM-98, IDN-41), p. 25. The KPMG Report also provides alternative estimates based on other approaches to validate its estimates based on the approaches above. For unbranded tobacco, the KPMG Report inferred, based on a number of assumptions, the volume of loose tobacco smoked from the quantum of rolling papers sold. This was compared with the legal sales of loose tobacco to estimate a consumption gap between legal and illicit. Ibid. pp. 25 and 27. The KPMG Report also used data on seizures by the Australian Customs and Border Protection Authorities on the volume and type of tobacco intercepted at ports and airports, as well as a "consumption gap analysis" based on the difference between legal domestic sales and estimates of total tobacco consumption based on the number of smokers known to exist in Australia and historic consumption patterns. Ibid. pp. 26-27.

²⁵⁸⁶ KPMG Report 2013, (Exhibits HND-67, DOM-98, IDN-41), p. 6.

²⁵⁸⁷ KPMG Report 2013, (Exhibits HND-67, DOM-98, IDN-41), p. 6, Figure 1.1.

²⁵⁸⁸ KPMG Report 2013, (Exhibits HND-67, DOM-98, IDN-41), p. 28. The KPMG Report further notes that this is part of a larger structural shift in recent years towards illicit manufactured cigarettes and away from illicit unbranded tobacco. In particular, the KPMG Report finds that volumes of illicit unbranded tobacco have declined by 31% while volumes of illicit manufactured cigarettes have increased by 151% between 2012 and 2013. Ibid.

²⁵⁸⁹ Contraband manufactured cigarettes are calculated as the remainder of all "non-domestic manufactured cigarettes" that are not counterfeit or legally brought into Australia as part of travellers' inbound allowance. See KPMG Report 2013, (Exhibits HND-67, DOM-98, IDN-41), Appendix A1.2.1. The KPMG Report notes that "illicit whites" (brands of manufactured cigarettes that are not legally available in the local market) have significantly increased in incidence between EPS results from 2012 to 2013, and the most recent EPS results for the KPMG Report showed that illicit whites made up approximately 30% of non-domestic manufactured cigarette consumption. See ibid. p. 40.

²⁵⁹⁰ Specifically regarding counterfeit cigarettes, the KPMG Report states that "[a]lthough the share of counterfeit of total consumption remains relatively small, it is worth noting that this is the highest level of counterfeit incidence recorded in an empty pack survey in Australia". Further, the report states that "[a]nalysis of counterfeit packs has also highlighted that no plain packaged counterfeit packs were reported in the Q4 2013 empty pack survey". KPMG Report 2013, (Exhibits HND-67, DOM-98, IDN-41), p. 38.

²⁵⁹¹ KPMG Report 2013, (Exhibits HND-67, DOM-98, IDN-41), p. 29.

²⁵⁹² See KPMG Report 2013, (Exhibits HND-67, DOM-98, IDN-41), Appendix A1.2.1. See also ibid. pp. 6 and 28. With respect to the alternative approaches used for validation, the KPMG Report finds that seizures data indicate that the proportion of manufactured cigarettes smuggled into Australia "appears to be growing as

7.1001. Australia's expert Professor Chaloupka provides several criticisms of the conclusions reached and the methodologies used in KPMG's studies of the illicit tobacco market in Australia.²⁵⁹³ In particular, Professor Chaloupka submits that "[i]llicit trade in tobacco products in Australia is relatively limited, likely to account for three to five per cent of the overall market for tobacco products in recent years".²⁵⁹⁴ Professor Chaloupka further submits that the methodology used in the KPMG Report "is flawed and almost certainly produces overestimates of the share of Australian tobacco consumption accounted for by illicit tobacco and distorts the trend in illicit tobacco consumption over time".²⁵⁹⁵

7.1002. Professor Chaloupka notes the inconsistency of the estimates in the KPMG Report with multiple other estimates from various sources regarding the size of the illicit tobacco market in Australia. Professor Chaloupka states that none of the estimates reviewed "provides a definitive estimate, but taken together, they do provide a good sense of the scope of the problem".²⁵⁹⁶ On the basis of his review, Professor Chaloupka concludes that most recent estimates of the size of the illicit tobacco market in Australia indicate that illicit tobacco accounts for a relatively small share of overall tobacco consumption, with the exception of "tobacco industry supported reports ... that produce estimates that are two or more times higher than the others".²⁵⁹⁷

7.1003. For example, Professor Chaloupka cites annual estimates by Euromonitor International as to the volume of licit and illicit cigarettes consumed in Australia "based on 'expert' opinions on the extent of the illicit trade problem".²⁵⁹⁸ Professor Chaloupka observes based on estimates from 2000 to 2013 that illicit cigarette trade in Australia accounted "for between three and five per cent of consumption over time", without any clear trend over this period.²⁵⁹⁹

7.1004. Professor Chaloupka also refers to a number of surveys as evidence on the use of illicit tobacco products in Australia. For example, Professor Chaloupka cites Australian NDSHS surveys²⁶⁰⁰ indicating a reduction in the awareness of unbranded tobacco and counterfeit cigarettes, with "relatively infrequent" purchasing of potentially counterfeit cigarettes and purchasing "relatively small quantities" of products in 2013 without plain packaging and GHWs.²⁶⁰¹ Professor Chaloupka further cites the 2013 VSHS results of the 18 and older population in Victoria,

a percentage of total illicit tobacco, validating the growth of illicit manufactured cigarettes indicated by the primary approaches". As regards its consumption gap analysis, the KPMG Report further states that "the smoking population has declined at a slower pace than legal domestic sales, indicating that there may be room for an increase in illicit tobacco consumption". The KPMG Report additionally states that "[t]he consumption gap validates the overall estimate of the volume of illicit tobacco, indicating shifts in the mix of illicit tobacco between manufactured cigarettes and unbranded tobacco". Ibid. p. 30.

²⁵⁹³ Professor Chaloupka addresses his comments to the methodology and conclusions reached in a series of KPMG Reports that include the 2013 full year report relied upon by the complainants. See Chaloupka Illicit Market Report, (Exhibit AUS-8), para. 79 fn 61.

²⁵⁹⁴ Chaloupka Illicit Market Report, (Exhibit AUS-8), para. 10(a).

²⁵⁹⁵ Chaloupka Illicit Market Report, (Exhibit AUS-8), para. 10(d).

²⁵⁹⁶ Chaloupka Illicit Market Report, (Exhibit AUS-8), para. 17.

²⁵⁹⁷ Chaloupka Illicit Market Report, (Exhibit AUS-8), para. 27.

²⁵⁹⁸ Chaloupka Illicit Market Report, (Exhibit AUS-8), para. 18.

²⁵⁹⁹ Chaloupka Illicit Market Report, (Exhibit AUS-8), para. 18. Specifically, the Euromonitor "Estimates of Illicit Trade Penetration in Australia" show estimates ranging from 2.8% in 2000 to 4.6% in 2013, falling slightly from 2007 through 2009, then rising by 1.5 percentage points by 2013, "in contrast to the 4.4 percentage point increase in KPMG's estimates for the period from 2009 through 2013". Ibid. Table A and para. 88.

²⁶⁰⁰ Australia and the Dominican Republic each submitted the entirety of the 2010 NDSHS Report as an exhibit in these proceedings. See 2010 NDSHS Report, (Exhibits AUS-45, DOM-280). Australia also submitted extracts from the 2013 NDSHS Detailed Report. See 2013 NDSHS Report, (Exhibit AUS-48).

²⁶⁰¹ Chaloupka Illicit Market Report, (Exhibit AUS-8), para. 20. In particular, Professor Chaloupka notes a sharp reduction in smokers' awareness and use of unbranded tobacco (including unbranded loose tobacco known as "chop chop") between 2007 and 2013. With respect to counterfeit cigarettes, Professor Chaloupka cites 2010 survey results indicating awareness of counterfeit cigarettes was lower than awareness of unbranded tobacco, and states that purchasing of potentially counterfeit cigarettes was "relatively infrequent", with only 4.6% of smokers reporting purchasing at least once a month. Further, Professor Chaloupka cites 2013 survey results as to tobacco products that did not have plain packaging with GHWs, indicating that about one in eight respondents (12.5%) and fewer than one in five smokers (18.5%) reported seeing non-compliant tobacco products. Fewer than one in ten smokers (9.6%) reported purchasing non-compliant products, most of whom reported purchasing "relatively small quantities": among the 9.6% of smokers reporting purchases of non-compliant products, 4.2% reported purchasing 5 or fewer packets, 1.2% reported purchasing 6-14 packets, and 4.4% reported purchasing 15 or more packets. Ibid.

which indicate that very low percentages of smokers reported using or purchasing illicit tobacco or products in non-compliant packaging.²⁶⁰² Similarly, a national cross-sectional survey of 8,679 Australian smokers conducted from April 2012 through March 2014 found "limited illicit tobacco use" based on certain reported behaviours.²⁶⁰³ Finally, Professor Chaloupka discusses survey results from the ITC Project on Australian smokers' purchase behaviours since 2002, showing very few reports of cross-border shopping, purchasing from online or other direct vendors, or purchases from other sources that are most likely to reflect tax evasion.²⁶⁰⁴

7.1005. In addition, Professor Chaloupka cites a study based on purchases of tobacco products in stores suggesting that the availability of illicit tobacco in retail outlets is very low²⁶⁰⁵, and develops his own estimate based on Roy Morgan survey data indicating much lower measures of illicit tobacco use and prevalence.²⁶⁰⁶

7.1006. Professor Chaloupka also refers to much lower estimates by Quit Victoria of the size of the illicit tobacco market in Australia (between two and three per cent of the market) using data from the NDSHS combined with information from Australian Customs authorities.²⁶⁰⁷ In an analysis of the estimates of the KPMG Report²⁶⁰⁸, Quit Victoria cites "fundamental concerns ... about the representativeness of the two surveys which provide the foundation data for the study"²⁶⁰⁹, and raises the possibility that the EPS for manufactured cigarettes "over-represents the packs used by tourists and other overseas visitors and students".²⁶¹⁰ Quit Victoria also states that "the very low estimate of legal consumption of foreign packs which is fundamental to the estimate of prevalence of contraband cigarettes is highly problematic".²⁶¹¹

7.1007. Professor Chaloupka raises similar criticisms of the methodology and findings of the KPMG Report with respect to representativeness and possible over-estimation of contraband non-domestic cigarettes. In particular, Professor Chaloupka criticizes the screening of survey participants in a way that excludes less regular smokers who are less likely to use illicit tobacco products²⁶¹²; the apparently low survey response rate and insufficiency of information regarding

²⁶⁰² Chaloupka Illicit Market Report, (Exhibit AUS-8), para. 21 (referring to Scollon et al. 2014, (Exhibits AUS-507, JE-24(57)). Specifically, these results indicated that 4% of smokers reported using any unbranded illicit tobacco in the past year, with 1.9% reporting current use; 2.6% of smokers reported buying cigarettes in non-compliant packaging, two-thirds of whom purchased fewer than five packs in the three months prior to the survey and one in five purchasing more than 10 non-compliant packs. Further, 1.7% of smokers reported purchasing from an informal vendor in the year prior to the survey, "with very few of these reporting purchasing more than five packs from these sources in the past year". Ibid.

²⁶⁰³ Chaloupka Illicit Market Report, (Exhibit AUS-8), para. 22 (referring to Scollon et al. 2015, (Exhibit CUB-60), and identifying behaviours such as purchasing international brands at 20% or more below the recommended retail price, purchasing from an informal seller, or using unbranded tobacco).

²⁶⁰⁴ Chaloupka Illicit Market Report, (Exhibit AUS-8), para. 23 (referring to Guindon et al. 2014, (Exhibit HND-156)).

²⁶⁰⁵ Chaloupka Illicit Market Report, (Exhibit AUS-8), para. 26.

²⁶⁰⁶ Chaloupka Illicit Market Report, (Exhibit AUS-8), paras. 28-33 and Annex D. In particular, using the most recent twelve months of available survey data, Professor Chaloupka estimates that 5.7% of current tobacco users have used an illicit tobacco product in the past three months and that approximately 3.2% of the tobacco smoked in Australia consists of illicit tobacco. Ibid. para. 33.

²⁶⁰⁷ Chaloupka Illicit Market Report, (Exhibit AUS-8), para. 25. According to Professor Chaloupka, this approach aims to correct the flaws in methods used to produce tobacco industry sponsored estimates, resulting in considerably lower estimates of the size of the illicit market. Ibid.

²⁶⁰⁸ We note that Quit Victoria analysed the KPMG 2013 half-year report, which was supplemented by the full year report relied upon by the complainants. See CCV KPMG Report Analysis, (Exhibit DOM-99), p. 2.

²⁶⁰⁹ CCV KPMG Report Analysis, (Exhibit DOM-99), p. 2. For example, Quit Victoria states that the sample for the internet survey on use of unbranded tobacco was "likely to be biased towards people more likely to use unbranded tobacco" because it included people in the researcher's database who have responded to previous surveys. Quit Victoria further notes that the KPMG Report does not describe characteristics of the sample that may be relevant to the likelihood to use unbranded tobacco, and calculated averages in a manner to produce an inflated estimate "if those smokers of unbranded tobacco who purchase most frequently tend to be the same people who purchase substantially lower amounts". Ibid. pp. 5-7.

²⁶¹⁰ CCV KPMG Report Analysis, (Exhibit DOM-99), p. 7.

²⁶¹¹ CCV KPMG Report Analysis, (Exhibit DOM-99), p. 2. For example, Quit Victoria cites a number of factors including: the possibly greater prevalence of smokers among travellers than the Australian population as a whole; the large number of visitors coming from countries from which foreign packs identified in the EPS most frequently came; and the increased number of overseas trips by Australians to, and increased number of visitor arrivals from, non-domestic source countries between 2012 and 2013. See ibid. pp. 9-12.

²⁶¹² Chaloupka Illicit Market Report, (Exhibit AUS-8), para. 80.

the characteristics of the resulting sample²⁶¹³; and failure to adequately distinguish in surveys between alternative illicit tobacco products with a potential for inflated estimates due to double counting (e.g. between contraband and counterfeit cigarettes).²⁶¹⁴ Professor Chaloupka states that the EPS used by KPMG "will almost certainly overstate the presence of illicit cigarettes given that it excludes smaller jurisdictions where illicit tobacco distribution networks are less likely to operate", noting that smaller jurisdictions excluded from the EPS account for roughly 25% of the Australian population.²⁶¹⁵ Professor Chaloupka also criticizes the EPS' focus on the largest cities on the grounds that it "will capture a disproportionate share of cigarettes consumed by tourists, other visitors, and foreign students who are more likely to visit these cities and who are more likely to discard their packs in public places".²⁶¹⁶

7.1008. In a study of early evidence about the "predicted unintended consequences" of standardized tobacco packaging in Australia, the authors note that the EPS discussed in the KPMG Report presumed that almost all non-domestic packs found were contraband cigarettes.²⁶¹⁷ The authors contend that the EPS methodology is problematic in tending to over-represent cigarette packs that end up in litter in public places, and that such studies "cannot distinguish between foreign packs that are illegally smuggled into Australia and those brought in by residents and visitors who have purchased them overseas and brought them in either under personal import limits or with the required duty having been paid".²⁶¹⁸

7.1009. In the PIR and cost-benefit analysis associated with the TPP measures, the Australian government took note of criticisms of estimates on illicit trade commissioned by tobacco companies. The Australian government also referred to peer-reviewed studies that found no change in smokers' reported use of unbranded illicit tobacco, no evidence of increases in use of contraband cigarettes, low levels of use of cigarettes likely to be contraband, and no increase in purchases of tobacco from informal sellers.²⁶¹⁹ Consequently, the cost-benefit analysis associated with the TPP measures' PIR "considered that it was most likely that the impact of the [TPP measures] on changes in the illicit tobacco market in Australia has not been substantive, if there has been any impact at all".²⁶²⁰

7.1010. We accept that illicit trade could in principle, and is known to in certain instances, undermine tobacco control efforts.²⁶²¹ We also note, as illustrated by the above, the inherent difficulty and limits of measuring illicit trade, given the quasi-legal or illegal nature of the activities involved.²⁶²² As described above, the size of the illicit tobacco market in Australia is disputed, with estimates in the KPMG Report significantly greater than other estimates from various sources.

²⁶¹³ Chaloupka Illicit Market Report, (Exhibit AUS-8), para. 81.

²⁶¹⁴ Chaloupka Illicit Market Report, (Exhibit AUS-8), para. 82.

²⁶¹⁵ Chaloupka Illicit Market Report, (Exhibit AUS-8), para. 85.

²⁶¹⁶ Chaloupka Illicit Market Report, (Exhibit AUS-8), para. 85. In Professor Chaloupka's view, the likelihood that the EPS will over-represent packs from visitors while under-representing packs from Australian smokers is increased by the fact that residences, offices, and other locations such as stadiums were excluded from the sampling plan. Professor Chaloupka also contrasts KPMG's findings as to the most prevalent brands of "illicit whites" with "the nationally representative ITC-Australia survey [in which] no smoker reports smoking any of these brands". Professor Chaloupka submits that the prevalence of such packs in the EPS, which are not similarly reported in a representative sample of Australian smokers, "suggests that the overseas visitors are likely to account for many of the discarded packs KPMG attributes to illicit trade". *Ibid.* paras. 85-86.

²⁶¹⁷ Scollo et al. 2014, (Exhibits AUS-507, JE-24(57)), p. 2.

²⁶¹⁸ Scollo et al. 2014, (Exhibits AUS-507, JE-24(57)), p. 2.

²⁶¹⁹ See Tobacco Plain Packaging PIR, (Exhibit AUS-624), paras. 162-163.

²⁶²⁰ Tobacco Plain Packaging PIR, (Exhibit AUS-624), para. 163.

²⁶²¹ See, e.g. FCTC, (Exhibits AUS-44, JE-19), Article 15; and FCTC Illicit Trade Protocol, (Exhibit DOM-97), Foreword, p. 1 ("Illicit trade increases the accessibility and affordability of tobacco products, thus fuelling the tobacco epidemic and undermining tobacco control policies.").

²⁶²² See, e.g. Chaloupka Illicit Market Report, (Exhibit AUS-8), Annex C, para. C1 (stating that "[n]o approach will entirely and accurately capture the extent of illicit trade and every approach has its limitations"); CMZ Report, (Exhibit DOM/HND-2), paras. 16 (noting with respect to illicit trade that "measuring its precise quantity is extremely difficult and ... experts agree that there are no definitive statistics on the size of the global illicit tobacco trade problem"), 29 ("there is currently no universally accepted estimate on the scale of the global illicit tobacco trade"), and 30 ("there are no generally-accepted figures on the level and composition of illicit tobacco trade in Australia"); 2011 IARC Handbook, (Exhibit DOM-117), p. 299; and "WHO Technical Manual on Tobacco Tax Administration" (2011), (WHO Tobacco Tax Manual, Full Text), (Exhibit CUB-62), p. 82.

7.1011. We note that the results of the EPS analysis used in the KPMG Report for illicit manufactured cigarettes show a "large increase in non-domestic volumes in 2013" with a very small portion of this identified as counterfeit, and an even smaller share estimated to be non-domestic *legal* cigarettes.²⁶²³ With respect to the empirical basis for the complainants' contention, critiques of the KPMG Report underline the possible underestimation of the legal share of "non-domestic incidence" identified in the EPS that may have been brought by visitors to Australia or Australians returning from abroad within the duty-free allowance.²⁶²⁴ This element of the KPMG Report's analysis and conclusions is particularly significant given the large share of total illicit trade in 2013 ascribed to "contraband cigarettes" as that category is defined in the KPMG Report.

7.1012. For the purposes of our analysis, we do not understand the KPMG Report to purport to establish a definitive conclusion as to the size of the Australian illicit tobacco market. On the contrary, we note KPMG's warning at the beginning of its report that its work "was performed to meet specific terms of reference" agreed with the tobacco companies commissioning the Report, and that its Report "should not therefore be regarded as suitable to be used or relied on by any other person or for any other purpose" and "is issued to all parties on the basis that it is for information only". KPMG further explains that "there were particular features determined for the purposes of the engagement".²⁶²⁵ These features or the "terms of reference" agreed to with the companies commissioning the work are however not expressly identified in the report.

7.1013. The criticisms raised as to its methodologies, and the inconsistency of its estimates with those of other sources, raise some doubt as to the accuracy of the estimate in the KPMG Report of the size of Australia's illicit tobacco market. On the basis of the empirical estimates and arguments before us, we are therefore not persuaded that the potential scale of illicit trade, and thus the extent to which illicit trade may undermine the contribution of the TPP measures, is of the magnitude estimated in the KPMG Report.

7.1014. The specific question before us here, however, is the extent to which the TPP measures have, as the complainants argue, led to an *increase* in the illicit trade of tobacco products, such as to undermine its contribution to Australia's objective of improving public health by reducing the use of, and exposure to, tobacco products. The complainants' contentions in this respect largely rest on qualitative arguments on the causal drivers of illicit tobacco trade in light of the requirements imposed under the TPP measures, as set out in a report prepared by experts in international business and customs matters (the CMZ Report).

7.1015. The CMZ Report considers whether the TPP measures risk exacerbating the illicit trade in tobacco products, particularly with regard to: (i) any potential opportunities developed for illicit traders; (ii) any challenges created for existing adult smokers, retailers, and enforcement bodies; and (iii) the ways in which the TPP measures could worsen the existing negative impacts of the illicit trade in tobacco.²⁶²⁶ The authors of the CMZ Report consider that "plain packaging in Australia gives illicit traders a unique 'competitive advantage' over legitimate tobacco manufacturers", given that illicit traders can use branding that brand owners are prevented from using.²⁶²⁷ Consequently, the authors explain that illicit traders will be able to sell contraband and counterfeit products in branded packs with which smokers are familiar, and that plain packages

²⁶²³ See KPMG Report 2013, (Exhibits HND-67, DOM-98, IDN-41), Appendix A1.2.2 and Figure A1.2.2.

²⁶²⁴ The difficulty of relying on observational data in this regard has been highlighted, as "[w]ithout tax stamps or other forms of overt markings, contraband or other contraband cigarette packs will be indistinguishable unless they fail to display Australian health warnings. Even discarded packs without Australian health warnings could be packs purchased overseas by tourists travelling in Australia." Tobacco in Australia 2012, AUS excerpts, (Exhibit AUS-343), p. 79.

²⁶²⁵ KPMG Report 2013, (Exhibits HND-67, DOM-98, IDN-41), p. 1.

²⁶²⁶ CMZ Report, (Exhibit DOM/HND-2), para. 14. As background, the CMZ Report describes various factors that contribute to the global illicit tobacco trade, including the aptitude of tobacco as a smuggled product, the profit incentives for illicit traders, complicit consumer behaviour towards purchasing illicit tobacco products, and globalization and lower trade barriers. Ibid. paras. 35-49.

²⁶²⁷ CMZ Report, (Exhibit DOM/HND-2), p. 1.

will be easier to counterfeit with static and publicly known specifications as well as economies of scale in production.²⁶²⁸

7.1016. The authors of the CMZ Report express the view "that plain packaging of tobacco products will worsen the illicit trade in those products".²⁶²⁹ In support of this view, and noting the limitations to empirical estimations of illicit trade, the CMZ Report cites the increase of detections and seizures of illicit tobacco products by the ACBPS in the period immediately before and after the introduction of the TPP measures.²⁶³⁰

7.1017. Australia's expert Professor Chaloupka takes issue with the CMZ Report's reliance on estimates by KPMG, which he characterizes as "misleading and biased estimates" that should not be used to draw conclusions about trends²⁶³¹, and notes that the authors "do not appear to consider other data that are inconsistent with their allegation that illicit tobacco use in Australia has increased following the implementation of tobacco plain packaging".²⁶³² Professor Chaloupka notes that consumption of *counterfeit* cigarettes in Australia is very limited, and questions whether plain packaging would have any significant impact on the costs of producing or supplying counterfeit products.²⁶³³

7.1018. In addition to criticizing specific aspects of the CMZ Report, Professor Chaloupka outlines a number of other "determinants or drivers" of illicit trade unrelated to plain packaging. Professor Chaloupka cites as "key factors" the level of tobacco taxes and prices (and differences between nearby jurisdictions)²⁶³⁴, and the costs of supplying illicit tobacco products to the market (including production and distribution costs).²⁶³⁵ Further, Professor Chaloupka cites a number of other factors including access to untaxed cigarettes (e.g. due to poor control of the distribution chain) and the presence of informal distribution networks.²⁶³⁶ Another "key driver" is the expected cost of engaging in illegal behaviours, which can be affected by enforcement efforts and higher penalties, with increasing costs of supplying illicit tobacco due to strong governance, effective tax administration, and the absence of corruption.²⁶³⁷

7.1019. Examining the various factors that can affect the incentives to engage in illicit trade, we note that there are a multiplicity of potential drivers and that Australia is relatively well-situated in several respects to mitigate the incidence of illicit trade in tobacco. Despite its relatively high price level compared to neighbouring countries, Professor Chaloupka notes Australia's regulation and control of the tobacco distribution chain, its geographical character as an island and the effect of

²⁶²⁸ CMZ Report, (Exhibit DOM/HND-2), pp. 1-2. With regard to illicit branded products, including contraband of genuine products and "illicit whites", the CMZ Report describes potentially increased opportunities under the TPP measures due to consumers seeking familiar branded packs, lower prices of illicit products, and easier deception of consumers through counterfeiting. The CMZ Report also cites concurrence with findings by KPMG on the increase of contraband products and "illicit whites". Ibid. paras. 66-78. With regard to illicit products in plain packaging, the CMZ Report describes the reduced complexity and cost of counterfeiting packs in plain packaging. Ibid. paras. 79-87. Additionally, the CMZ Report sets out various ways in which the authentication of products and enforcement will be made more challenging for illicit tobacco products in plain packaging. Ibid. paras. 88-92.

²⁶²⁹ CMZ Report, (Exhibit DOM/HND-2), para. 94.

²⁶³⁰ CMZ Report, (Exhibit DOM/HND-2), para. 60 (noting that between 2012 and 2013 there were 76 detections of 183 tonnes of tobacco and 200 million cigarettes, whereas between 2011 and 2012 there were 45 detections of 177 tonnes of tobacco and 141 million cigarettes).

²⁶³¹ Chaloupka Illicit Market Report, (Exhibit AUS-8), para. 91.

²⁶³² Chaloupka Illicit Market Report, (Exhibit AUS-8), para. 94. Professor Chaloupka specifically references the Euromonitor data, NSDHS data, and ITC Project data discussed above in the context of Professor Chaloupka's criticisms of the KPMG estimates of illicit trade in Australia. Ibid.

²⁶³³ Chaloupka Illicit Market Report, (Exhibit AUS-8), para. 96. Professor Chaloupka cites the opinions of various enforcement authorities and an officer of a tobacco company casting doubt on the impact of tobacco plain packaging on increased consumption of counterfeit products. Ibid. paras. 99-100.

²⁶³⁴ Chaloupka Illicit Market Report, (Exhibit AUS-8), para. 36. See also 2011 IARC Handbook, (Exhibit DOM-117), pp. 301-303.

²⁶³⁵ Chaloupka Illicit Market Report, (Exhibit AUS-8), para. 40. See also 2011 IARC Handbook, (Exhibit DOM-117), pp. 303-304.

²⁶³⁶ Chaloupka Illicit Market Report, (Exhibit AUS-8), paras. 41-42. See also 2011 IARC Handbook, (Exhibit DOM-117), pp. 305-306.

²⁶³⁷ Chaloupka Illicit Market Report, (Exhibit AUS-8), paras. 43-44. See also 2011 IARC Handbook, (Exhibit DOM-117), pp. 306-307.

this on the control of imports, and the lack of free trade and tax-free zones that are a source of illicit tobacco products in many countries.²⁶³⁸

7.1020. As part of Australia's broader tobacco control efforts, Australian authorities have recognized the importance of having a strong legislative and regulatory framework to control the illicit trade in tobacco products.²⁶³⁹ Professor Chaloupka outlines Australia's legislative framework related to illicit tobacco trade and enforcement activities under this framework, which includes licensing and conditions for trade and movement of tobacco products, recordkeeping and reporting requirements imposed by Australian customs authorities, strong controls on tobacco growing, and regulations on the retail sale of tobacco products.²⁶⁴⁰ Moreover, Australia has in place enforcement mechanisms that include inspections by Australian customs authorities (prioritizing illicit tobacco enforcement efforts in 2014) as well as interagency coordination and information sharing at multiple levels of government.²⁶⁴¹ Australia also imposes penalties on illicit tobacco growing, distribution, or sale, which were strengthened in 2012 by making tobacco smuggling a specific criminal offense under the Australian Customs Act.²⁶⁴²

7.1021. As described above, the overall size of the illicit market is disputed. With respect to evidence of increased detections and seizures of illicit tobacco following the introduction of plain packaging²⁶⁴³, we consider such evidence to be of limited probative value to the question at hand given that "the increase in detection of illicit tobacco may be, at least in part, due to an increase in enforcement efforts".²⁶⁴⁴ Moreover, seizures may not be representative of the illicit market as a whole, and even making comparisons across countries on the basis of seizures may not be meaningful due to differing customs investigative techniques, reporting procedures, and law enforcement.²⁶⁴⁵

7.1022. As described above, various factors may affect the drivers of illicit trade that are unrelated to the packaging and branding of products. We also take note of Australia's active regulatory efforts and oversight of tobacco distribution networks to address illicit trade. We also note that certain characteristics of Australia's regime to combat illicit trade are in line with the FCTC Protocol to Eliminate Illicit Trade in Tobacco Products²⁶⁴⁶, namely maintaining supply chain control through licensing and control of distribution channels, imposing penalties for unlawful conduct, and enabling cooperation among relevant authorities and law enforcement agencies.²⁶⁴⁷ Taken together, the evidence before us does not clearly establish, either through empirical evidence or descriptive argument based on the drivers of illicit trade, that the TPP measures have given rise to an increase in Australia's illicit tobacco trade, or that such increase would be of such magnitude as to undermine the contribution of the TPP measures to Australia's public health objective.

7.1023. In light of the above, we are not persuaded that the complainants have demonstrated that the TPP measures have led to increased trade or consumption of illicit tobacco in Australia,

²⁶³⁸ Chaloupka Illicit Market Report, (Exhibit AUS-8), paras. 48-51.

²⁶³⁹ See, e.g. Minister for Health and Ageing, "Taking Preventative Action – A Response to Australia: The Healthiest Country by 2020 – The Report of the National Preventative Health Taskforce" (11 May 2010), (Exhibit JE-15), p. 63; and National Tobacco Strategy 2012-2018, (Exhibits AUS-129, DOM-131), pp. 19-20.

²⁶⁴⁰ Chaloupka Illicit Market Report, (Exhibit AUS-8), paras. 52-56.

²⁶⁴¹ Chaloupka Illicit Market Report, (Exhibit AUS-8), paras. 57-60.

²⁶⁴² Chaloupka Illicit Market Report, (Exhibit AUS-8), para. 61; and National Tobacco Strategy 2012-2018, (Exhibits AUS-129, DOM-131), p. 20. With respect to drivers of illicit trade, Professor Chaloupka notes Australia's high ranking in various international assessments of the absence of corruption and other indicators of strong governance, as well as data suggesting that there is not a large informal distribution network for tobacco products in Australia. Chaloupka Illicit Market Report, (Exhibit AUS-8), paras. 63-64.

²⁶⁴³ See CMZ Report, (Exhibit DOM/HND-2), paras. 32 and 60.

²⁶⁴⁴ CMZ Report, (Exhibit DOM/HND-2), para. 61. See also Chaloupka Illicit Market Report, (Exhibit AUS-8), para. 93 ("CMZ's use of ACBPS data fails to account for the increased attention Customs and other authorities have given to tobacco following sizeable tobacco tax increases and implementation of tobacco plain packaging").

²⁶⁴⁵ See WHO Tobacco Tax Manual, Full Text, (Exhibit CUB-62), p. 83.

²⁶⁴⁶ See para. 2.99 above. The FCTC Protocol to Eliminate Illicit Trade in Tobacco Products was adopted by consensus at the fifth session of the FCTC COP on 12 November 2012. It "shall enter into force on the 90th day following the deposit of the 40th instrument of ratification, acceptance, approval, formal confirmation or accession". FCTC Illicit Trade Protocol, (Exhibit DOM-97), Foreward, pp. 1-2.

²⁶⁴⁷ See FCTC Illicit Trade Protocol, (Exhibit DOM-97), Article 4 and Parts III-V.

such as to undermine the TPP measures' contribution to the objective of improving public health by reducing the use of, and exposure to, tobacco products.

7.2.5.3.8 Overall conclusion on the degree of contribution of the TPP measures to Australia's objective

7.1024. We have considered above the evidence before us in relation to the contribution of the TPP measures to their objective of improving public health by reducing the use of, and exposure to, tobacco products. We have considered the relevant evidence relating both to the design, structure and intended operation of the TPP measures, and the available evidence relating to their application since their entry into force in December 2012.

7.1025. Overall, we find that the complainants have not demonstrated that the TPP measures are not apt to make a contribution to Australia's objective of improving public health by reducing the use of, and exposure to, tobacco products. Rather, we find that the evidence before us, taken in its totality, supports the view that the TPP measures, in combination with other tobacco-control measures maintained by Australia (including the enlarged GHGs introduced simultaneously with TPP), are apt to, and do in fact, contribute to Australia's objective of reducing the use of, and exposure to, tobacco products.

7.1026. As discussed in detail above, a number of studies, including studies published in a range of relevant journals, considered the potential impact of tobacco plain packaging, prior to the implementation of the TPP measures in Australia. In particular, many of these studies address the anticipated impact of plain packaging on the three "mechanisms" identified in the TPP Act as those through which the TPP measures are intended to have an impact on smoking behaviours, namely reducing the appeal of tobacco products, increasing the effectiveness of GHGs, and limiting the ability of the pack to mislead consumers about the harmful effects of smoking. This literature has been found largely to converge towards a conclusion that plain packaging of tobacco products has the capacity to reduce the appeal of tobacco products, increase the effectiveness of GHGs, and reduce the ability of the pack to mislead consumers about the harmful effects of smoking.

7.1027. The complainants identified a number of limitations in this literature. The evidence before us in this respect suggests that it is possible, and acknowledged in reviews of this literature, that some of these studies have various limitations, some of which are inherent in the nature of the research at issue. However, we are not persuaded that the complainants have established that the largely convergent conclusions reflected in the body of studies at issue, and the overall conclusions drawn from them, should be considered to be so fundamentally flawed as to provide no support for the proposition that the TPP measures are capable of contributing to their objective through these mechanisms.

7.1028. We are comforted in this conclusion by the fact that this body of literature has been subject to various reviews conducted outside the context of these proceedings, which have concluded that the body of studies at issue supports the proposition that tobacco plain packaging would be apt to reduce the appeal of tobacco products, enhance the effectiveness of GHGs and reduce the ability of tobacco packaging to mislead consumers about the risks of smoking. We note in particular the conclusions of the independent review conducted on behalf of the UK Government²⁶⁴⁸, which considered both the quality of a previous systematic review of the evidence base relating to tobacco plain packaging and the quality of the underlying evidence itself, and concluded that the quantitative studies reviewed were "conducted to a high standard", that "the conclusions that were drawn are a reasonable reflection of the evidence available"²⁶⁴⁹ and that the review of the qualitative studies at issue was "a high quality systematic review", which was "clearly documented and follows recognised best practice for such reviews".²⁶⁵⁰

²⁶⁴⁸ We attach particular weight to this assessment conducted by independent reviewers who are not among the frequently cited "plain packaging" authors and were commissioned for the purposes of making an independent assessment of the relevant literature.

²⁶⁴⁹ Chantler Report, (Exhibits AUS-81, CUB-61), Annex D, p. 49 (referring to the Stirling Review (Exhibits AUS-140, HND-130, CUB-59).

²⁶⁵⁰ Chantler Report, (Exhibits AUS-81, CUB-61), Annex E, p. 56 (referring to the Stirling Review (Exhibits AUS-140, HND-130, CUB-59).

7.1029. We also note that, to the extent that the disputed studies predate the implementation of tobacco plain packaging in Australia or elsewhere, and that the adoption of the TPP measures was based on certain assumptions about behavioural responses to a policy intervention that had not yet been applied in any territory, the evidence at issue represents an anticipation of the potential effects, rather than a demonstration of the actual effects, of such an intervention. This circumstance has an impact on the nature and extent of the evidence that could have been expected to be developed, at the time that such studies were being conducted, and how conclusive such evidence could be expected to be.²⁶⁵¹

7.1030. As detailed above, to the extent that the contribution of the TPP measures is expected to arise from the operation of a "causal chain" or "mediational model" underlying the design of the TPP Act, it is appropriate to consider not only the operation of the above mechanisms (leading to "proximal outcomes") but also their correlation to smoking behaviours. The complainants have argued that Australia's assumptions in this respect are unfounded, and that, even assuming that the above mechanisms would lead to the proximal outcomes identified by Australia in the TPP Act, these would not be capable of having an influence on subsequent smoking behaviours. We have therefore also considered the evidence before us on the extent to which a reduction in the appeal of tobacco products, an increase in the effectiveness of GHWs, and a reduction in the ability of tobacco packaging to mislead consumers regarding the harmful effects of smoking, may be expected to have an impact on subsequent smoking behaviours, including smoking initiation, cessation and relapse.

7.1031. Overall, this evidence suggests that it is recognized that the relationship between perceptions, attitudes and behaviours is complex. In particular, the evidence before us suggests that while there is a correlation between attitudes and behaviours, a number of intervening factors can influence the extent to which attitudes affect intentions and ultimately actual behaviours in a given context. The context in which the intervention takes place, including the specific factors that may influence behaviours in that context, must be taken into account. However, we do not understand Australia to argue that behaviours would systematically be altered as a result of tobacco plain packaging, such that each and every individual would be similarly affected and modify their smoking behaviours. Rather, we understand Australia to rely on relevant research relating to the relationship between perceptions, attitudes and behaviours, as well as evidence of the factors that are understood to influence smoking behaviours, to argue in essence that in the specific context of this intervention, it is reasonable to expect that reducing the appeal of tobacco products and enhancing clarity about their harmful effects will influence *at least some* consumers in their smoking behaviours.

7.1032. In this respect, it is undisputed that the drivers of smoking behaviours are complex and that smoking initiation, cessation or relapse are influenced by a broad range of factors, other than product packaging. We are not persuaded, however, that this implies, as the complainants argue, that tobacco packaging can have *no* influence on smoking behaviours, especially in a regulatory context where the retail package would be the only avenue for product promotion and for conveying to the consumer any positive associations with the product. The evidence before us demonstrates, in this respect, the role played by branded packaging of tobacco products in conveying the image of tobacco products and making them appealing, especially in a "dark" market such as Australia. We are not persuaded that the effects of such branding are limited, as the complainants argue, to secondary demand for tobacco products, i.e. the choice to smoke one brand over another, to the exclusion of primary demand for such products, i.e. the decision to smoke or not smoke. In particular, we note the recognized importance, for the industry, of attracting new consumers, and therefore making their products appealing to those most likely to initiate tobacco use (i.e. youth), including through branded packaging.

7.1033. We are also not persuaded that the complainants have demonstrated that tobacco plain packaging would not also be capable of having some impact on smoking cessation and relapse, by reducing the ability of branding design features to act as a cue for smoking and by making more prominent the messages conveyed by GHWs.

²⁶⁵¹ As expressed in an early review of tobacco plain packaging literature, in which subjects were asked to theorize "What if" with respect to various packaging scenarios. Goldberg et al. 1995, (Exhibits AUS-221, JE-24(26)), Appendix C, Summary of Male Focus Groups in Toronto, III Grade 8 (Have not Smoked in Last Month).

7.1034. Overall, on the basis of our examination of the evidence relating to the design, structure and intended operation of the TPP measures, we are not persuaded that the complainants have demonstrated that a reduction in the appeal of tobacco products, or an improved awareness of risks through tobacco plain packaging, or a reduction in the ability to mislead consumers on the harmful effects of tobacco products, through plain packaging of tobacco products as applied by Australia, would not be capable of influencing any of the relevant smoking behaviours. To the contrary, in a regulatory context where tobacco packaging would otherwise be the *only* opportunity to convey a positive perception of the product through branding, as is the case in Australia, it appears to us reasonable to hypothesize some correlation between the removal of such design features and the appeal of the product, and between such reduced product appeal and consumer behaviours. It also does not appear unreasonable, in such a context, in light of the evidence before us, to anticipate that the removal of these features would also prevent them from creating a conflicting signal that would undermine other messages that seek to raise the awareness of consumers about the harmfulness of smoking that are part of Australia's tobacco control strategy, including those arising from GHWs.

7.1035. This evidence must be considered also in the light of available empirical evidence on the application of the measures. In this respect, it is not disputed that notwithstanding any "intuitive appeal", tobacco control policies "must be evaluated to provide concrete evidence of their effects"²⁶⁵² and that "the optimal test of plain packaging would be its implementation and evaluation in a population-based setting".²⁶⁵³

7.1036. The evidence before us on the application of the TPP measures includes empirical evidence relating to their impact on the proximal outcomes reflecting the three mechanisms identified and anticipated in the TPP Act, since their entry into force. This evidence suggests that the introduction of tobacco plain packaging, in combination with enlarged GHWs, has in fact reduced the appeal of tobacco products, as anticipated in a number of the pre-implementation studies criticized by the complainants. As discussed above, this is recognized by some of the complainants' own experts on the basis of a direct examination of data collected for the specific purpose of evaluating the effects of the TPP measures and which was provided to the complainants for use in these proceedings. Empirical evidence relating to the proximal outcomes of the TPP measures also suggests that plain packaging and enlarged GHWs have had some impact on the effectiveness of the GHWs.

7.1037. Finally, we also considered the evidence before us on actual smoking behaviours in Australia since the entry into force of the measures, as reflected in data relating to the evolution of smoking prevalence and consumption. As discussed, the extent to which the data available at the time of our assessment can inform an overall assessment of the actual and expected contribution of the measures to their objective is disputed. The data before us in these proceedings relates to a period of up to three years following the entry into force of the TPP measures. Overall, we find that this evidence is consistent with a finding that the TPP measures contribute to a reduction in the use of tobacco products, to the extent that it suggests that, together with the enlarged GHWs introduced at the same time, plain packaging has resulted in a reduction in smoking prevalence and in consumption of tobacco products.

7.1038. The evidence before us relating specifically to cigars is more limited. While we are mindful of the limitations of this body of evidence, it does not persuade us that our conclusion should be different in respect of cigars. The evidence before us suggests that the importance of packaging in establishing brand associations and perceptions also applies to cigar smokers, albeit with nuances. We also note the evidence before us suggesting a lower level of risk awareness in respect of cigar smoking than in respect of other tobacco products. The limited available pre-implementation evidence before us also suggests that plain packaging would have the capacity to act on at least some of the mechanisms through which the TPP measures are designed to operate also in respect of cigars. Specifically, it suggests that plain packages would have the ability to minimise appeal and perceptions of quality with regard to cigarillos, little cigars, and to a lesser extent premium cigars, and could also affect perceptions of ease of quitting as regards cigarillos and – to a lesser extent – premium cigars.

²⁶⁵² Fong et al. 2006, (Exhibit AUS-132), p. 1.

²⁶⁵³ Wakefield et al. 2012, (Exhibits AUS-557, JE-24(63)), p. 1166.

7.1039. These conclusions are consistent with the limited empirical evidence before us regarding observed outcomes of the TPP measures, which suggests a decrease in perceived packaging appeal when cigar smokers were exposed to the TPP measures and enlarged GHWs²⁶⁵⁴, and an increase in the noticeability of health warnings and pack concealment among cigar and cigarillo smokers, although the evidence is mixed regarding health beliefs.²⁶⁵⁵ The econometric evidence before us suggesting that the TPP measures and enlarged GHWs contributed to a reduction in cigar smoking prevalence²⁶⁵⁶ is also consistent with a conclusion that the measures have an impact on relevant smoking behaviours in respect of cigars.

7.1040. The overall impact of the TPP measures is difficult to quantify in terms of the magnitude of changes in smoking behaviours attributable to the measures, on the basis of the evidence available to us. In particular, this impact, as described above, is difficult to isolate empirically, on the basis of the evidence before us, from other factors that also affect the evolution of smoking behaviours, including other tobacco control measures applied simultaneously with the TPP measures.

7.1041. We note that this regulatory context has a direct bearing on the ability of the TPP measures to contribute to their objective through the mechanisms identified in the TPP Act. Specifically, the existence of a general ban on promotion and advertising ensures that the type of design features, the use of which is restricted on tobacco products and their retail packaging as a result of the TPP measures, is not able to be used in other contexts in a manner that might undermine the functioning of the first mechanism under the TPP Act, namely reducing the appeal of tobacco products through branding. The operation of the second mechanism under the TPP Act also assumes the existence of GHWs applied simultaneously, which Australia also does require.

7.1042. We also consider that the significance of the contribution that the TPP measures make to the objective of reducing the use of, and exposure to, tobacco products, must be viewed against the fact that they also operate to support and complement the effectiveness of these other measures, by avoiding regulatory gaps (in respect of advertising and promotion) and ensuring that other tobacco control efforts aimed at raising awareness of the harmful effects of smoking (including GHWs and social media campaigns) are not undermined.

7.1043. Taken as a whole, therefore, we consider that the evidence before us supports the view that, as applied in combination with the comprehensive range of other tobacco control measures maintained by Australia and not challenged in these proceedings, including a prohibition on the use of other means through which branding could otherwise contribute to the appeal of tobacco products and to misleading consumers about the harmful effects of smoking, the TPP measures are apt to, and do, make a meaningful contribution to Australia's objective of reducing the use of, and exposure to, tobacco products.

7.1044. In making this determination, we are also mindful that the impact of the TPP measures may evolve over time. Our determination is based on the evidence available to us at the time of our assessment and is not intended to prejudge the future evolution of the contribution of the TPP measures to the reduction of the use of, and exposure to, tobacco products. We note,

²⁶⁵⁴ Appendix A, para. 25.

²⁶⁵⁵ Appendix A, paras. 59 and 71. There is also evidence before us showing an increase in the share of non-premium cigarillo smokers contemplating quitting following the implementation of the TPP measures and enlarged GHWs. See Appendix B, para. 31.

²⁶⁵⁶ We note in this regard, that according to Cuba, private consumers of LHM cigars may make occasional, high-value purchases of LHM cigars over the internet from foreign suppliers, thereby receiving them in fully branded packs and with fully branded cigar bands. Cuba argues that the TPP measures are a "purely symbolic gesture" that will not reduce LHM cigar prevalence and consumption because they do not apply to products which are sold or purchased, including over the internet, for the purpose of personal use in Australia. Cuba's first written submission, paras. 272 and 274. While online purchases of non-plain packaged tobacco products appears to be a possibility under the TPP measures (see Section 32(2) of the TPP Act, (Exhibits AUS-1, JE-1)), which exempt an individual who purchase the tobacco product "for his or her personal use"), we are not persuaded that this exception would render the TPP measures a "purely symbolic gesture" that will not have the capacity to reduce LHM cigar prevalence and consumption. Indeed, there is some econometric evidence suggesting that the TPP measures, together with the enlarged GHWs implemented at the same time, contributed to a reduction in cigar smoking prevalence observed after their entry into force. See Appendix C, para. 123.

however, that we find reasonable Australia's suggestion that the measures may be expected to have an impact in particular on future generations of young people whose exposure to tobacco advertising or promotion in Australia will have been generally limited, and that impacts on smoking cessation for existing smokers will also take some time to produce their full effects.

7.1045. Finally, we understand the objective of reducing "exposure" to tobacco products (which is expressed in Section 3(1)(a)(iv) of the TPP Act as "reducing people's exposure to smoke from tobacco products")²⁶⁵⁷ through the TPP measures to be directly linked to, and consequential to the achievement of, the objective of reducing "use" of tobacco products, in that a reduced use of tobacco products by those who consume them will lead to a reduction in the exposure to these products for non-users. Therefore, we conclude that to the extent that the TPP measures contribute to a reduction in the use of tobacco products, they will also have some impact on the reduction of exposure to such products.

7.2.5.4 The trade-restrictiveness of the TPP measures

7.1046. As described above²⁶⁵⁸, one of the factors to be considered in the "relational analysis" under Article 2.2 is the "trade-restrictiveness" of the challenged measures.²⁶⁵⁹ This will inform the assessment of whether the challenged measures are "more trade-restrictive than necessary" (emphasis added) within the meaning of Article 2.2:

Article 2.2 does not prohibit measures that have any trade-restrictive effect. It refers to "unnecessary obstacles" to trade and thus allows for some trade-restrictiveness; more specifically, Article 2.2 stipulates that technical regulations shall not be "more trade-restrictive than necessary to fulfil a legitimate objective". Article 2.2 is thus concerned with restrictions on international trade that exceed what is necessary to achieve the degree of contribution that a technical regulation makes to the achievement of a legitimate objective.²⁶⁶⁰

7.1047. The parties have exchanged considerable argumentation concerning the standard that the Panel should apply in assessing the "trade-restrictiveness" of the TPP measures within the meaning of Article 2.2. We therefore first consider this question, before turning to an assessment of the trade-restrictiveness of the TPP measures.

7.2.5.4.1 Meaning of the term "trade-restrictive" in Article 2.2

7.2.5.4.1.1 Main arguments of the parties

7.1048. Honduras argues that the word "restriction", as used in Article 2.2 in conjunction with the word "trade", means something having a limiting effect on trade.²⁶⁶¹ Honduras states that the panel in *US – COOL* found that the challenged technical regulation was trade-restrictive because it affected negatively the competitive conditions of imported products.²⁶⁶² Honduras argues that past GATT and WTO jurisprudence on Article XI of the GATT 1994 further indicates that trade restrictions are measures that place a limiting condition on importation, or have a limiting effect on importation by negatively affecting the competitive opportunities available to imported products; measures that create uncertainties and affect investment plans; measures that have identifiable negative consequences on the importation of a product; and measures that make importation

²⁶⁵⁷ TPP Act, (Exhibits JE-1, AUS-1), Section 3(1)(a)(iv).

²⁶⁵⁸ See para. 7.31 above.

²⁶⁵⁹ See, e.g. Appellate Body Reports, *US – Tuna II (Mexico)*, para. 319; and *US – COOL*, para. 375. The other two factors to be addressed in the "relational analysis" are the degree of contribution of the measure to its objective and the risks that non-fulfilment would create, which are addressed respectively in section 7.2.5.3 above, and section 7.2.5.5 below, respectively.

²⁶⁶⁰ Appellate Body Report, *US – Tuna II (Mexico)*, para. 319.

²⁶⁶¹ Honduras's first written submission, para. 809 (referring to Appellate Body Report, *US – Tuna II (Mexico)*, para. 319).

²⁶⁶² Honduras's first written submission, para. 809 (referring to Panel Reports, *US – COOL*, paras. 7.574-7.575).

more onerous than if the condition did not exist and thus generate a disincentive to import.²⁶⁶³ In Honduras's view, an assessment of trade-restrictiveness does not require the demonstration of any actual trade effects, as the focus is whether the measure has a detrimental effect on the competitive opportunities available to imported products.²⁶⁶⁴ Honduras submits that trade-restrictiveness should be determined on a case-by-case basis, in light of the specific circumstances of each measure. Whether a demonstration of actual trade effects is useful or necessary is something to be determined in light of each measure's characteristics and the available evidence. In this respect, Honduras adds that in certain cases, the evidence on trade flows may be unreliable, for the simple reason that the observed changes in trade flows may result from actions taken by private parties for reasons unrelated to the measure at issue.²⁶⁶⁵ Honduras refers to the TBT Committee's recommendation on the concept of "significant effect on trade of other Members" in Article 2.9 of the TBT Agreement²⁶⁶⁶ (TBT Committee Recommendation), which "is pertinent" for understanding the term "trade-restrictive" in Article 2.2. Honduras argues on this basis that the "value or other importance of imports" is a factor that may demonstrate the trade-restrictiveness of a technical regulation. In the present case, according to Honduras, "the ability to achieve product differentiation is an element of great 'value' and 'importance' to tobacco producers".²⁶⁶⁷ Furthermore, the reference in the TBT Committee Recommendation to difficulties for producers in other Members to comply with the proposed technical regulations "lends further support to Honduras's argument that compliance costs ... is a factor that demonstrates the trade-restrictiveness of the plain packaging measures".²⁶⁶⁸

7.1049. The Dominican Republic argues that the word "restriction", as used in Article 2.2 means something having a limiting effect on trade²⁶⁶⁹, and that the legal standard of trade-restrictive involves a comparison with a benchmark situation; namely, a comparison between the treatment of imported goods under the contested measure with the treatment of the same imports in the absence of the contested measure.²⁶⁷⁰ Concerning the evidentiary standard for trade-restrictiveness, the Dominican Republic argues that trade-restrictiveness does not require the demonstration of any actual trade effects, as the focus is whether the measure has a detrimental effect on the competitive opportunities available to imported products²⁶⁷¹, which is to be determined by reference to its design, architecture, revealing structure and operation.²⁶⁷² According to the Dominican Republic, such evidence suffices to prove a limitation on competitive opportunities without having to prove actual trade effects. Evidence of actual trade effects may be required in situations in which a limitation on competitive opportunities cannot be reliably discerned from other evidence concerning design, structure and expected operation. The need for evidence of actual trade effects turns on what can be gleaned from the other evidence²⁶⁷³, and may also be used by a complainant to confirm that the challenged measure limits competitive opportunities.²⁶⁷⁴ The Dominican Republic adds that (i) a limitation on competitive opportunities may stem from a market-wide regulation that adversely affects the situation of all goods, whether imported or domestic; (ii) a limitation on competitive opportunities may stem from a technical

²⁶⁶³ Honduras's first written submission, para. 810 (referring to Panel Reports, *India – Autos*, para. 7.270; *Colombia – Ports of Entry*, paras. 7.240, 7.243, 7.256, 7.257, 7.274, and 7.275; *India – Quantitative Restrictions*, para. 7.269; and GATT Panel Report, *Japan – Leather (US II)*, para. 55).

²⁶⁶⁴ Honduras's response to Panel question No. 117; and Honduras's second written submission, para. 532.

²⁶⁶⁵ Honduras's response to Panel question No. 117.

²⁶⁶⁶ Committee on Technical Barriers to Trade, Secretariat Note, "Decisions and Recommendations Adopted by the WTO Committee on Technical Barriers to Trade Since 1 January 1995", WTO Document G/TBT/1/Rev.12 (21 January 2015), Section 4.3.1.1, p. 20 (entitled "Significant effect on trade of other Members").

²⁶⁶⁷ Honduras's response to Panel question No. 118.

²⁶⁶⁸ Honduras's response to Panel question No. 118.

²⁶⁶⁹ Dominican Republic's first written submission, para. 963 (referring to Appellate Body Report, *US – Tuna II (Mexico)*, para. 319).

²⁶⁷⁰ Dominican Republic's response to Panel question No. 117 (referring to Appellate Body Reports, *US – COOL*, para. 477); Dominican Republic's second written submission, para. 929.

²⁶⁷¹ Dominican Republic's second written submission, para. 928 (referring to Appellate Body Reports, *US – COOL*, para. 477).

²⁶⁷² Dominican Republic's second written submission, para. 931 (referring to Appellate Body Reports, *EC – Seal Products*, para. 5.228; *Thailand – Cigarettes (Philippines)*, para. 130; and *Japan – Alcoholic Beverages II*, paras. 10.37-10.40).

²⁶⁷³ Dominican Republic's second written submission, para. 931.

²⁶⁷⁴ Dominican Republic's second written submission, para. 929 (referring to Appellate Body Reports, *US – COOL*, para. 477).

regulation that reduces the opportunities of imported *products* in a particular market segment; (iii) limitation on competitive opportunities may be assessed in terms of the volume and/or the value of imports; (iv) a limitation on competitive opportunities should be assessed, taking account of how the measure affects imports from *countries* "individually or collectively"; (v) an assessment of trade-restrictiveness should take into account how the measure affects imports from countries "individually or collectively"; and (vi) trade-restrictiveness should be assessed in terms of its impact on the "potential" growth of such imports, and not on the actual impact of the measure.²⁶⁷⁵ With respect to points (ii)-(vi), above, the Dominican Republic relies on the TBT Committee Recommendation²⁶⁷⁶ which it describes as providing "useful context" for interpreting the term "trade-restrictive" in Article 2.2.²⁶⁷⁷

7.1050. Cuba argues that trade-restrictiveness is to be assessed by examining whether a measure has "a limiting effect on trade".²⁶⁷⁸ Cuba argues that it is sufficient for this standard for prejudicial effects on the position of exporters to be identified, such as restricted market access, uncertainties affecting investment and increased costs.²⁶⁷⁹ In Cuba's view, measures can be trade-restrictive even where they do not cause a reduction in import volumes, as it suffices that harmful effects on the position of exporters are identified²⁶⁸⁰, or the measure's impact on commercial opportunities for imported products²⁶⁸¹, is demonstrated. Cuba argues that the TBT Committee Recommendation²⁶⁸² "provide[s] the Panel with guidance for the analysis of trade-restrictiveness under Article 2.2". Cuba points out that the Recommendation refers not only to the volume of imports but also to their value and growth potential which, in Cuba's view, is particularly relevant in connection with its down-trading argument (discussed further below). Cuba adds that these "criteria" for the evaluation of a trade restriction go beyond an analysis of the "actual effects on trade", and support Cuba's arguments concerning the relevance of competitive opportunities for determining whether a technical regulation is trade-restrictive.²⁶⁸³

7.1051. Indonesia argues that trade-restrictiveness within the meaning of Article 2.2 means "something having a limiting effect on trade", and that trade-restrictive measures include those that deny competitive opportunities to imports.²⁶⁸⁴ Indonesia argues that the scope of the term "trade-restrictive" is broad and does not require the demonstration of any actual trade effects, as the focus is on the competitive opportunities available to imported products²⁶⁸⁵ or competitors in the market.²⁶⁸⁶ In this respect, Indonesia states that "for over 60 years the GATT and WTO have relied on the understanding that complainants do not need to show trade effects of a quantitative nature in order to show that a measure is inconsistent with the GATT or a WTO agreement", and that "the design, the structure and the architecture of a measure can be sufficient to indicate whether a measure is trade-restrictive". Indonesia notes that there may be cases where a panel's examination of the design, structure and expected operation of a measure leaves questions about whether there is a limiting effect on competitive opportunities and, where this is the case, a complainant might have to go further and demonstrate something more, such as trade effects of a quantitative value.²⁶⁸⁷ Indonesia argues that the TBT Committee Recommendation²⁶⁸⁸ provides important context for the Panel's interpretation of Article 2.2. In Indonesia's view, it indicates that

²⁶⁷⁵ Dominican Republic's response to Panel question No. 117 (referring to Appellate Body Reports, *US – COOL*, para. 477; and Committee on Technical Barriers to Trade, Note by the Secretariat, "Updating the Decisions and Recommendations Taken by the Tokyo Round Committee on Technical Barriers to Trade Regarding Procedures for Notification and Information Exchange", G/TBT/W/2/Rev.1, 21 June 1995); and Dominican Republic's second written submission, para. 930.

²⁶⁷⁶ See fn 2666 above.

²⁶⁷⁷ Dominican Republic's response to Panel question Nos. 117 and 118.

²⁶⁷⁸ Cuba's first written submission, para. 398.

²⁶⁷⁹ Cuba's first written submission, para. 400 (referring to Panel Report, *Colombia – Ports of Entry*, para. 7.240; GATT Panel Reports, *EEC – Oilseeds I*, para. 150; and *US – Superfund*, para. 5.2.2).

²⁶⁸⁰ Cuba's response to Panel question No. 117.

²⁶⁸¹ Cuba's second written submission, para. 225.

²⁶⁸² See fn 2666 above.

²⁶⁸³ Cuba's response to Panel question No. 118.

²⁶⁸⁴ Indonesia's first written submission, para. 393 (referring to Appellate Body Report, *US – Tuna II (Mexico)*, para. 319; and Panel Report, *US – Tuna II (Mexico)*, para. 7.455).

²⁶⁸⁵ Indonesia's first written submission, para. 393 (referring to Appellate Body Reports, *US – COOL*, para. 477).

²⁶⁸⁶ Indonesia's response to Panel question No. 117.

²⁶⁸⁷ Indonesia's response to Panel question No. 117.

²⁶⁸⁸ See fn 2666 above.

(i) a significant effect on trade can arise from an impact on a specific product, group of products or products in general; (ii) a measure that has a significant effect on trade includes measures that affect the value of imports, (including the effect of downtrading on premium brands), but that "measures may also affect 'other importance of imports'", in respect of which Indonesia notes the importance of the tobacco sector highlighted by certain least-developed third parties; (iii) a "significant effect on trade" could be "from other Members individually or collectively"; and (iv) "difficulties for producers in other Members to comply with the proposed technical regulations" "could" support the argument that compliance costs could be included in an assessment of trade-restrictiveness (notwithstanding the fact that Indonesia did not allege that compliance costs result in trade-restrictiveness).²⁶⁸⁹

7.1052. Australia argues that the ordinary meaning of the term "restriction" is "something that restricts someone or something, a limitation on action, a limiting condition or regulation", and that, when used in conjunction with the term "trade", the term "restriction" means something "having a limiting effect on trade".²⁶⁹⁰ In Australia's view, a technical regulation will have a "limiting effect on trade" when it creates an "obstacle" (which it equates with a "hindrance" or "impediment") to international trade.²⁶⁹¹

7.1053. In Australia's view, a demonstration that a technical regulation creates an obstacle to international trade does not require evidence of "actual trade effects", but rather can be discerned from the design, structure and operation of the measure.²⁶⁹² Australia notes that "one possible way" of demonstrating trade-restrictiveness is to demonstrate that the technical regulation at issue modifies the conditions of competition in the marketplace to the detriment of imported products relative to domestic products.²⁶⁹³ However, in the absence of such a claim, Australia posits that it is insufficient for the complainants to refer to changes in market conditions in the abstract without also demonstrating how such changes have a limiting effect on international trade.²⁶⁹⁴ Thus, Australia acknowledges "that raised barriers to entry, or increased compliance costs, are potentially relevant in determining whether a measure is trade-restrictive under Article 2.2", but "only if they resulted in a limiting effect on overall trade in tobacco products".²⁶⁹⁵ For Australia, unless "the design, structure and operation of the technical regulation demonstrate that it will result in a limiting effect on international trade, evidence of actual trade effects will be required to establish that the measure is, in fact, trade-restrictive".²⁶⁹⁶ Australia argues that the complainants "have merely asserted that the tobacco plain packaging measure has changed the conditions of competition in the Australian tobacco market", but have not demonstrated that such effects have arisen as a result of the TPP measures, or such changes have resulted in a limiting effect on overall trade in tobacco products.²⁶⁹⁷ Australia asserts that the complainants' claims of trade-restrictiveness are such that they are required to provide supporting evidence and argumentation of actual trade effects, which they have failed to adduce.²⁶⁹⁸

7.1054. In this context, Australia understands "effect on trade" to refer to "the effect on trade of all WTO Members in the products subject to the measure – in this case, tobacco products".²⁶⁹⁹ Furthermore, Australia asserts that "the scope of the analysis must necessarily encompass international trade more generally, rather than trade solely with respect to a single Member", because "a measure that restricts or limits trade for one Member ... but that increases trade for all other Members, such that there is a net increase in trade, would not, without more, be trade-restrictive within the meaning of Article 2.2 of the TBT Agreement", (even though such a

²⁶⁸⁹ Indonesia's response to Panel question No. 118.

²⁶⁹⁰ Australia's first written submission, para. 524.

²⁶⁹¹ Australia's first written submission, para. 525.

²⁶⁹² Australia's first written submission, para. 525; and Australia's response to Panel question No. 117.

²⁶⁹³ Australia's first written submission, para. 526; and Australia's second written submission, para. 374.

²⁶⁹⁴ Australia's first written submission, para. 527.

²⁶⁹⁵ Australia's response to Panel question Nos. 68 and 117. See also Australia's first written submission, para. 547.

²⁶⁹⁶ Australia's response to Panel question No. 117.

²⁶⁹⁷ Australia's response to Panel question No. 117.

²⁶⁹⁸ Australia's response to Panel question No. 117.

²⁶⁹⁹ Australia's response to Panel question Nos. 68, 117, and 151; and Australia's second written submission, para. 366.

measure could constitute a breach of the most-favoured-nation (MFN) obligation in Article 2.1).²⁷⁰⁰ In this respect, Australia argues that the TBT Committee Recommendation²⁷⁰¹ does not assist the Panel in determining whether a measure is "trade-restrictive" within the meaning of Article 2.2 of the TBT Agreement²⁷⁰², as it is of no interpretative significance.²⁷⁰³

7.2.5.4.1.2 Main arguments of the third parties

7.1055. Brazil argues that Article 2 of the TBT Agreement establishes different and cumulative conditions that should inform the adoption and application of technical regulations by WTO Members. Brazil quotes the Appellate Body statement that "ultimately, the task of a panel under Article 2.2 is to determine whether the technical regulation at issue restricts international trade beyond what is necessary for that technical regulation to achieve the degree of contribution that it makes to the achievement of a legitimate objective".²⁷⁰⁴ Supporting evidence and argumentation of actual trade effects may be used to demonstrate trade-restrictiveness in the sense of "unnecessary obstacles to trade". However, the evidence need not necessarily quantify the trade-restriction, but may be qualitatively assessed for its contributions to the legitimate goal.²⁷⁰⁵

7.1056. Canada argues that a measure may be "trade-restrictive" where it has a limiting effect on trade, and that such an effect may be created by the modification of the conditions of competition for imported products, a reduction in individual Member or overall global trade volumes, an import prohibition, or increased compliance costs incurred by manufacturers. Ascertaining trade-restrictiveness exclusively and in all circumstances on a rigid quantitative basis is not consistent with the broad interpretation of the term given to it by previous panels and the Appellate Body.²⁷⁰⁶ While an analysis of the *actual* trade effects may be used to *confirm* that a measure has a certain degree of trade-restrictiveness, that analysis is not required in all cases as a matter of evidentiary burden. Whether a measure is "trade-restrictive" should not be determined solely by conducting an empirical exercise; rather, the ordinary meaning of the words in their context suggests that the term captures a broad set of circumstances.²⁷⁰⁷

7.1057. China argues that the trade-restrictiveness of the measure at issue is a threshold issue and that measures which are not trade-restrictive cannot be inconsistent with Article 2.2. China argues, with reference to the Appellate Body in *US – Tuna II (Mexico)* "trade-restrictive" would mean "having a limiting effect on international trade".²⁷⁰⁸ China states that the Panel may wish to consider whether a demonstration that a technical regulation at issue modifies the conditions of competition in the marketplace to the detriment of imported products relative to domestic products is the sole way of establishing a trade-restrictive effect. Such a view might, in China's view, imply that the analysis under Article 2.2 is to a large extent dependent on the outcome of the analysis under Article 2.1. China recalls that the panel in *US – Clove Cigarettes* distinguished the nature of the analysis to be conducted under Article 2.2 from that to be conducted under Article 2.1.²⁷⁰⁹

7.1058. China also argues that the meaning of "restrictions" in Article XI of the GATT 1994 could inform the interpretation of "trade-restrictiveness" in Article 2.2 of the TBT Agreement. The Appellate Body found that the limiting effect of restrictions "need not be demonstrated by quantifying the effects of the measure at issue", but "can be demonstrated through the design, architecture, and revealing structure of the measure at issue considered in its relevant context".

²⁷⁰⁰ Australia's response to Panel question Nos. 68 and 117; and Australia's second written submission, para. 366.

²⁷⁰¹ See fn 2666 above.

²⁷⁰² Australia's response to Panel question No. 118.

²⁷⁰³ Australia's second written submission, para. 397 fn 380.

²⁷⁰⁴ Brazil's third-party response to Panel question No. 4 (quoting Appellate Body Reports, *US – Tuna II (Mexico)*, para. 322; and *US – COOL*, para. 471).

²⁷⁰⁵ Brazil's third-party response to Panel question No. 4.

²⁷⁰⁶ Canada's third-party response to Panel question No. 4. (referring to Appellate Body Reports, *US – Tuna II (Mexico)*, para. 319; *US – COOL*, para. 375; and Panel Reports, *EC – Seal Products*, para. 7.426; and *US – COOL*, para. 7.569).

²⁷⁰⁷ Canada's third-party response to Panel question No. 4.

²⁷⁰⁸ China's third-party submission, para. 73; and China's third-party response to Panel question No. 4.

²⁷⁰⁹ China's third-party submission, paras. 73-74.

Thus, supporting evidence and argumentation of actual trade effects might help to assess "trade-restrictiveness", but would not necessarily be required.²⁷¹⁰

7.1059. The European Union argues that the phrase "obstacles to international trade" in the first sentence of Article 2.2 and the phrase "trade-restrictive" in the second sentence of Article 2.2, inform each other. The European Union notes that the trade-restrictiveness referred to in the second sentence is international, notwithstanding the absence of that term in that sentence, and Article 2.2 does not refer to restrictions of commerce occurring exclusively within a WTO Member. There might "potentially appear to be a slightly different shade of meaning between the term 'obstacle', which might also imply something that could be overcome, and the term 'restriction', which might also imply a limiting effect".²⁷¹¹ However, one may also argue that something would only be an obstacle if overcoming it entailed a cost and that an additional regulatory cost could amount to a trade-restriction even if it could or would be absorbed or mitigated by firms. An examination of all the instances in which the terms obstacle and restriction appear in the TBT Agreement does not suggest that they are used other than interchangeably. The TBT Agreement also refers to an effect on trade of other Members,²⁷¹² The European Union points to instances in which the Appellate Body has found that different terms have meanings that are the same or very similar.²⁷¹³

7.1060. For the European Union, the trade restriction may be something that may be "observed" by comparing a difference between historical data (unaffected by the measure) and current data, and determining that the measure causes the trade restriction. The trade restriction may also be determined on the basis of a counterfactual or be in the future, but determined on the basis of the design and architecture of the measure, and all the surrounding facts. Thus, it is possible that, after the adoption of the measure, international trade increases for other reasons, but that the measure is nevertheless trade-restrictive, because it is preventing a further increase that would otherwise occur. Furthermore, the possibility that firms might take action in order to absorb or mitigate or overcome the obstacle does not necessarily mean that there is no trade restriction. Thus, whether or not there is an obstacle to international trade or a trade restriction or an effect on trade needs to be assessed on the basis of all the relevant facts. Reliance on hypotheticals or counterfactuals, supported by sufficient evidence may be necessary, particularly in cases involving complex interactions between different measures, which deploy their effects over time. However, an adjudicator needs to proceed with caution and prudence in dealing with a hypothetical or a counterfactual.²⁷¹⁴ The European Union considers that it would not be possible to sustain a claim of violation of Article 2.2 based on an alleged obstacle to international trade or trade restriction or effect on trade that would be excessively hypothetical or remote.²⁷¹⁵

7.1061. The European Union adds that, although volume and price are closely related, and the benefit of a trade flow would be measured in terms of both volume and price (or value), the parties in these proceedings appear to conceptualize the concept of trade-restriction particularly in terms of volume. The complainants appear to argue that a measure that increases prices (or costs) will, all other things being equal, reduce volumes. In this respect, the European Union considers that, if a measure imposes increased costs on trade, whether in the short or long term, including increased barriers to entry, then, all other things being equal, it is susceptible to giving rise to a trade-restriction.²⁷¹⁶

7.1062. The European Union notes that some parties equate the concept "of a detrimental impact on competitive conditions or opportunities used in the context of *de facto* discrimination claims", with that of trade restriction for the purposes of Article 2.2 of the TBT Agreement. However, for the European Union, Articles 2.1 and 2.2 are concerned with different issues – Article 2.1 is concerned with the question of discrimination, whilst Article 2.2 is concerned with the question of necessity. A measure might not be discriminatory but be highly trade-restrictive and unnecessary. Conversely, a measure might have a severely detrimental impact or be highly discriminatory, but

²⁷¹⁰ China's third-party response to Panel question No. 4.

²⁷¹¹ European Union's third-party submission, para. 54.

²⁷¹² European Union's third-party submission, para. 54.

²⁷¹³ European Union's third-party submission, para. 55.

²⁷¹⁴ European Union's third-party submission, para. 56.

²⁷¹⁵ European Union's third-party submission, para. 57.

²⁷¹⁶ European Union's third-party submission, para. 58.

not be trade-restrictive and be entirely necessary. Consequently, the European Union does not agree that whether there is trade-restrictiveness must be assessed relative to domestic products. A measure could impact equally on domestic and imported products, but still be highly trade-restrictive.²⁷¹⁷

7.1063. The European Union does not consider that the affected trade must necessarily be between the complaining Member and the defending Member. As Article 2.2 merely refers to an obstacle to international trade or a trade restriction, and does not, unlike Article 2.1, require a comparison between domestic and imported goods, or between goods originating in two or more third countries, the trade restriction in question could be with respect to the trade of any WTO Member.²⁷¹⁸ A measure that restricts or limits trade for one Member but increases trade for all other Members, would not, without more, be trade-restrictive within the meaning of Article 2.2 of the TBT Agreement. The European Union sees the relative effect of a measure among different exporting Members, or between the exporting Member and the importing Member (issues such as the brand differentiation and down-trading alleged by the complainants in this case) as generally "more apt for treatment under Article 2.1 rather than Article 2.2".²⁷¹⁹ With respect to origin neutral measures that do not involve any *de facto* discrimination, the European Union does not think it sufficient to measure trade-restrictiveness by reference to one complainant, or several complainants. The complainants do not appear to be arguing that the measure at issue affects them in any special way, different from the way that it affects other Members. The European Union therefore does not think that it would be enough for one complainant to demonstrate that its volume has decreased (the volume of some other complainant or complainants having increased).²⁷²⁰

7.1064. Finally, the European Union states that Article 20 of the TRIPS Agreement is context for the interpretation and application of Article 2.2 of the TBT Agreement. It states that it is possible that there could be a measure that encumbers the use of a trademark in the course of trade, within the meaning of Article 20, and that causes a trade restriction within the meaning of Article 2.2; however, this is not automatically the case, and would have to be demonstrated by the complaining Members.²⁷²¹

7.1065. Japan argues that the examination of "trade-restrictiveness" under the second sentence of Article 2.2 shall be based on an examination of the measure's design, architecture, structure and operation. This may involve an inquiry as to whether a modification of competitive opportunities which is detrimental to imports as a whole or in part could not have occurred absent the measures at issue. Evidence of actual trade effects may be referenced to confirm this examination, but the actual trade effect itself may not necessarily reveal trade-restrictiveness since various factors other than the measures at issue may be the cause for the actual trade effect. Japan argues that this is consistent with the Appellate Body's finding that "the demonstration of a limiting effect on competitive opportunities in qualitative terms might suffice in the particular circumstances of a given case".²⁷²²

7.1066. New Zealand argues that the complainants' submissions seek to expand the concept of "trade-restrictiveness" under Article 2.2 beyond its ordinary meaning, without any WTO jurisprudence to support their proposition. Trade-restrictiveness can be assessed by looking at the competitive opportunities available to imported products, but, as Australia has argued, the focus should be on "whether the technical regulation at issue modifies the conditions of competition in the marketplace in a manner that has a limiting effect on trade for imported products subject to that regulation".²⁷²³

7.1067. Referring to the Appellate Body's comments in *US – COOL (Article 21.5 – Canada and Mexico)*, New Zealand submits that these are useful for informing the Panel's assessment of whether the TPP measures are "trade-restrictive". Specifically, given "that Australia's measures are

²⁷¹⁷ European Union's third-party submission, para. 59.

²⁷¹⁸ European Union's third-party submission, para. 60.

²⁷¹⁹ European Union's third-party submission, para. 62.

²⁷²⁰ European Union's third-party response to Panel question No. 4.

²⁷²¹ European Union's third-party submission, para. 63.

²⁷²² Japan's third-party response to Panel question No. 4.

²⁷²³ New Zealand's third-party submission, para. 87 (quoting Australia's first written submission, para. 525).

non-discriminatory internal measures that address a legitimate objective, the complainants should be required to adduce supporting evidence and argumentation of actual trade effects and demonstrate the existence and extent of trade-restrictiveness in respect of Australia's measures".

7.1068. Nicaragua notes that Article 2.2 of the TBT Agreement in no way references discrimination and that it is not relevant to consider any discriminatory impact to find that a technical regulation constitutes an "unnecessary obstacle to international trade". For Nicaragua, it is not inappropriate to consider evidence of actual trade effects, but demonstrating actual trade effects is not a requirement as the WTO obligation protects competitive opportunities. Nicaragua refers to the Appellate Body's agreement in *US – COOL* with the panel's findings that there was no need to demonstrate actual trade effects in an examination of Article 2.2. The analysis of trade-restrictiveness is about the potential of a technical regulation to adversely affect conditions of competition and competitive opportunities and is thus focused on the "structure, architecture and design of the measure" rather than any actual trade effects. Footnote 643 of the Appellate Body's reports in *US – COOL (Article 21.5 – Canada and Mexico)*, supports the proposition that it is sufficient to demonstrate "a limiting effect on competitive opportunities in qualitative terms" to demonstrate a technical regulation's trade-restrictiveness.²⁷²⁴

7.1069. Norway submits that an assessment of whether a technical regulation is "trade-restrictive" requires establishing whether the measure imposes restrictive conditions that limit international trade. Article 2.2 is thus concerned with a different issue than Article 2.1. For Norway, findings of inconsistency under Article 2.1 would however not be irrelevant for the assessment of Article 2.2. For example, if a measure discriminates against imported products as a whole, as compared to like domestic products, this could imply that the measure is also trade-restrictive under Article 2.2. On the other hand, a measure may be trade-restrictive even though it impacts equally on domestic and imported goods. This is presupposed in the Appellate Body's reference in *US – COOL (Article 21.5 – Canada and Mexico)*, to "the existence and extent of trade-restrictiveness in respect of non-discriminatory internal measures". However, the Appellate Body underlined that demonstrating the existence and extent of trade-restrictiveness in respect of non-discriminatory internal measures may require "supporting evidence and argumentation of actual trade effects", as opposed to *de jure* discriminatory measures where a detrimental modification of competitive opportunities "may be self-evident". This seems to imply that the burden of the complainant to substantiate an allegation of trade-restrictiveness may be raised in such cases.²⁷²⁵ Norway shares the views of the European Union and Australia that when assessing whether, and to what extent, a measure limits international trade, the focal point should be trade more generally and not trade solely with respect to a single member. Norway also agrees with the European Union that "issues about the relative effect of a measure among different exporting Members, or between the exporting Member and the importing Members (issues such as the brand differentiation and down-trading alleged by the complainants in this case) [are] generally more apt for treatment under Article 2.1 rather than Article 2.2".²⁷²⁶ Finally, Norway considers that the impact of a measure on access to the market or costs of compliance could be relevant in determining whether it is trade-restrictive, insofar as it has had a limiting effect on international trade in tobacco products.²⁷²⁷

7.1070. Singapore refers to the Appellate Body's statement in footnote 643 of *US – COOL (Article 21.5 – Canada and Mexico)* suggesting that it may be difficult for complainants to prove detrimental modification of competitive opportunities in respect of non-discriminatory internal measures. Trade-restrictiveness "should be seen as an absolute, rather than as a relative standard (in the sense of comparison with another 'like product')". For Singapore, the test of "modification of competitive opportunities" has its roots in the discrimination-based disciplines in Article 2.1 of the TBT Agreement and Articles I and III of GATT 1994. It invites the Panel to consider if importing such a relative standard is appropriate. Singapore submits that evidence of actual trade effects is not a requirement to demonstrate the existence and extent of trade-restrictiveness in respect of non-discriminatory internal measures that address a legitimate objective and trade-restrictiveness

²⁷²⁴ Nicaragua's third-party response to Panel question No. 4 (referring to Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.208).

²⁷²⁵ Norway's third-party response to Panel question No. 4 (referring to Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.208 fn 643).

²⁷²⁶ Norway's third-party response to Panel question No. 4.

²⁷²⁷ Norway's third-party response to Panel question No. 4.

can be discerned through "the characteristics of the technical regulation at issue as revealed by its design and structure".²⁷²⁸

7.2.5.4.1.3 Analysis by the Panel

7.1071. As described above, at this stage of our analysis, what we seek to establish is the "trade-restrictiveness" of the TPP measures, as an element of the broader analysis of whether they are *more* trade-restrictive than necessary within the meaning of Article 2.2.

7.1072. The Appellate Body has understood the word "restriction" as referring to "something that restricts someone or something, a limitation on action, a limiting condition or regulation". Accordingly, it found, in the context of Article XI:2(a) of the GATT 1994, that the word "restriction" refers generally to something that has a limiting effect. It further determined that as used in Article 2.2 in conjunction with the word "trade", the term means "something having a limiting effect on trade".²⁷²⁹ Specifically, what is at stake in this context is the limiting effect of the measure on *international* trade, as is made clear by the reference to "international trade" in the first sentence of Article 2.2. We therefore understand that a technical regulation is "trade-restrictive" within the meaning of Article 2.2 when it has a limiting effect on international trade.²⁷³⁰

7.1073. We note that past panels²⁷³¹, and the Appellate Body²⁷³², have assessed the trade-restrictiveness of specific technical regulations with reference to their limiting effect on the "competitive opportunities" available to imported products.²⁷³³ In those disputes, the trade-restrictiveness of the technical regulations in question was determined in the presence also of a separate assessment of whether the technical regulation accorded less favourable treatment to imported products under Article 2.1 of the TBT Agreement.²⁷³⁴

7.1074. The manner in which an assertion of trade-restrictiveness is substantiated may vary from case to case. The Appellate Body has thus found that an assertion that a technical regulation is trade-restrictive might be substantiated on the basis of whether the technical regulation has a limiting effect on competitive opportunities "in qualitative terms ... in the particular circumstances

²⁷²⁸ Singapore's third-party response to Panel question No. 4 (referring to Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.208).

²⁷²⁹ Appellate Body Report, *US – Tuna II (Mexico)*, para. 319 (footnotes omitted). See also Appellate Body Reports, *US – COOL*, para. 375.

²⁷³⁰ As expressed by the Appellate Body in *US – Tuna II (Mexico)*, para. 319, also quoted above, "Article 2.2 is thus concerned with restrictions on international trade". This is consistent with the first sentence of Article 2.2, which uses the phrase "unnecessary obstacles to international trade", not just "unnecessary obstacles to trade". The term "trade" is qualified by "international" in other key provisions of the TBT Agreement, including "conduct of international trade" (preamble, 3rd recital), "restriction to international trade" (preamble, 6th recital), "obstacles to international trade" (preamble, 5th recital; Article 2.5; Article 5.1.2; and Annex 3.E).

²⁷³¹ Panel Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, paras. 7.367-7.370; and *US – COOL*, para. 7.572.

²⁷³² Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.208 and fn 643 (referring to Appellate Body Reports, *US – COOL*, para. 477).

²⁷³³ See Appellate Body Reports, *US – COOL*, para. 477. As expressed by the Appellate Body, the panel in that case "considered the measure to have a considerable degree of trade-restrictiveness insofar as it has a limiting effect on the competitive opportunities for imported livestock *as compared to the situation prior to the enactment of the COOL measure*". *Ibid.* (emphasis added). In *EC – Seal Products*, the Appellate Body noted the panel's finding under Article 2.2 of the TBT Agreement that the EU Seal Regime "considered in its entirety, is trade restrictive because it does 'hav[e] a limiting effect on trade' by prohibiting certain seal products, including those imported from Canada and Norway, from accessing the EU market". *Ibid.* para. 5.205. The Appellate Body also observed in that report that in referring to the prohibition on the import of seal products "including those imported from Canada and Norway", the panel may have been referring not only to the restrictive impact of the ban, but also to any restrictive discriminatory impact caused by trade diversion between imports of seal products originating in different countries. *Ibid.* para. 5.205 fn 1269.

²⁷³⁴ In the present proceedings, the parties have not pursued claims under Article 2.1 of the TBT Agreement. We note that the complainants each identified Article 2.1 of the TBT Agreement as a legal basis for their respective complaints, but did not present arguments in respect of these claims or request findings in respect of that provision.

of a given case".²⁷³⁵ The Appellate Body has also clarified that, in certain cases, "a detrimental modification of competitive opportunities may be self-evident in respect of certain *de jure* discriminatory measures, whereas supporting evidence and argumentation of actual trade effects might be required to demonstrate the existence and extent of trade-restrictiveness in respect of non-discriminatory internal measures that address a legitimate objective."²⁷³⁶ This finding confirms that "non-discriminatory internal measures" may be found to be "trade-restrictive" within the meaning of Article 2.2 of the TBT Agreement. This is consistent, in our view, with the fact that Article 2.1 and 2.2 establish distinct obligations in respect of technical regulations, concerning respectively the treatment of imported products relative to each other and relative to domestic products, and trade-restrictiveness. While the existence of discrimination may contribute to the establishment of "trade-restrictiveness" within the meaning of Article 2.2, a determination of "trade-restrictiveness" is not dependent on the existence of discriminatory treatment of imported products.

7.1075. How the existence and extent of trade-restrictiveness is to be demonstrated in respect of technical regulations that are not alleged to be discriminatory will depend, as is the case for other technical regulations, on the circumstances of a given case.²⁷³⁷ However, as highlighted by the Appellate Body, in the absence of any allegation of *de jure* restriction on the opportunity for imports to compete on the market or of any alleged discrimination in this respect (between imports or between imported and domestic products), a sufficient demonstration will be required to establish the existence and extent of any "limiting effect" on international trade, resulting from the challenged technical regulation.

7.1076. As observed by the Appellate Body, it will not always be possible to quantify a particular factor analysed under Article 2.2, or to do so with precision, because of, *inter alia*, the nature of the objective pursued and the level of protection sought, or the nature, quantity, and quality of evidence existing at the time of our analysis, or the characteristics of the technical regulation at issue as revealed by its design and structure.²⁷³⁸ Where different methodologies for the assessment of trade-restrictiveness are available based on the facts and arguments submitted by the parties, it is incumbent upon a panel to "adopt or develop a methodology that is suited to yielding a correct assessment" in respect of the technical regulation at hand.²⁷³⁹ Depending on the circumstances of the case, such demonstration could be based on qualitative or quantitative arguments and evidence, or both, including evidence relating to the characteristics of the challenged measure as revealed by its design and operation.

7.1077. In these proceedings, the parties have expressed different views on the manner in which the Panel should assess the extent to which the challenged measures are trade-restrictive. In this respect, Australia submits that the effect of the TPP measures on international trade should be assessed on the basis of their effect on trade with *all WTO Members* taken as a whole, in the products that are the subject of the measures (i.e. "tobacco products" as defined in the TPP Act).²⁷⁴⁰ As described above, the complainants consider that the TBT Committee Recommendation²⁷⁴¹ on the meaning of the term "significant effect on the trade of other Members" in Article 2.9 of the TBT Agreement provides guidance for the analysis of trade-restrictiveness

²⁷³⁵ Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.208. (footnote omitted)

²⁷³⁶ Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.208 fn 643.

²⁷³⁷ See Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.208. We also note that, in the context of its interpretation of the term "restriction" in Article XI:1 of the GATT 1994 (which it has relied upon in the context of interpreting "trade-restrictiveness" in Article 2.2 of the TBT Agreement), the Appellate Body pointed out that limiting effects "need not be demonstrated by quantifying the effects of the measure at issue; rather such limiting effects can be demonstrated through the design, architecture and revealing structure of the measure at issue in its relevant context". See, e.g. Appellate Body Reports, *Argentina – Import Measures*, para. 5.217.

²⁷³⁸ Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.208.

²⁷³⁹ Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.210.

²⁷⁴⁰ See Australia's response to Panel question Nos. 68, 117, and 151; and Australia's second written submission, para. 366.

²⁷⁴¹ See fn 2666 above.

under Article 2.2, and makes clear that Australia's interpretation is incorrect. Australia considers the TBT Committee Recommendation to be of no interpretative significance.²⁷⁴²

7.1078. We see no basis in the terms of Article 2.2 to assume, as Australia proposes, that the effects of a technical regulation on international trade, and specifically the existence and extent of a "trade-restrictive" effect, should be assessed only on the basis of the effect of the measure on trade of all WTO Members, in all products that are the subject of the technical regulation. Indeed, we consider that the adoption of that interpretation would have the effect that a WTO Member could have no recourse to Article 2.2 of the TBT Agreement in respect of a particular product in which its trade were being restricted, in the event that the trade of (an)other Member(s) increased. Further, following Australia's logic, in order to succeed in a claim under Article 2.2, a Member would in all cases need to establish the existence of a limiting effect not only in respect of its own exports, but in respect of the entirety of exports from all Members. This interpretation would, in our view, diminish the rights of Members under Article 2.2.

7.1079. We find useful guidance in this respect from the context of Article 2.2, in particular Article 2.9 of the TBT Agreement. The *chapeau* of Article 2.9 provides:

Whenever a relevant international standard does not exist or the technical content of a proposed technical regulation is not in accordance with the technical content of relevant international standards, and if the technical regulation may have a *significant effect on trade of other Members*, Members shall ... (emphasis added)

7.1080. The subparagraphs immediately following this *chapeau* set out requirements for WTO Members with respect to, *inter alia*, the publication of the proposed introduction of the technical regulation, and the notification to other Members of the products to be covered by the technical regulation, together with a brief indication of its objective and rationale.

7.1081. We note that, as observed by the complainants, the TBT Committee adopted a recommendation with a view to "ensuring a consistent approach to the selection of proposed technical regulations ... to be notified" under Article 2.9 of the TBT Agreement. The TBT Committee Recommendation provides that:

- i. for the purposes of Articles 2.9 and 5.6, the concept of "significant effect on trade of other Members" may refer to the effect on trade:
 - of one technical regulation or procedure for assessment of conformity only, or of various technical regulations or procedures for assessment of conformity in combination;
 - in a specific product, group of products or products in general; and
 - between two or more Members.
- ii. when assessing the significance of the effect on trade of technical regulations, the Member concerned should take into consideration such elements as:
 - the value or other importance of imports in respect of the importing and/or exporting Members concerned, whether from other Members individually or collectively,
 - the potential growth of such imports, and
 - difficulties for producers in other Members to comply with the proposed technical regulations.

²⁷⁴² Australia's response to Panel question No. 127; and Australia's second written submission, para. 397 fn 380.

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- iii. the concept of a significant effect on trade of other Members should include both import-enhancing and import-reducing effects on the trade of other Members, as long as such effects are significant.²⁷⁴³

7.1082. Pursuant to Article 3.2 of the DSU, panels and the Appellate Body are to clarify the provisions of the covered agreements "in accordance with customary rules of interpretation of public international law". In accordance with Article 31(3)(a) of the Vienna Convention on the Law of Treaties²⁷⁴⁴ (Vienna Convention)²⁷⁴⁵, this includes taking into account, together with the context, any "subsequent agreement" between the parties. We therefore consider the extent to which the TBT Committee Recommendation²⁷⁴⁶ may be considered to constitute a "subsequent agreement", for the purposes of interpreting the term "trade-restrictive" in Article 2.2 of the TBT Agreement.

7.1083. The TBT Committee Recommendation was adopted in 1995, subsequent to the conclusion of the TBT Agreement, by all WTO Members acting jointly through the TBT Committee, by consensus.²⁷⁴⁷ However, as the Appellate Body has noted, the extent to which a decision by Members will inform the interpretation and application of a term or provision in a specific case will depend on "the degree to which it 'bears specifically' on the interpretation and application of the respective term or provision".²⁷⁴⁸

7.1084. We first note that by its own terms, the TBT Committee Recommendation²⁷⁴⁹ does not purport to interpret Article 2.2 of the TBT Agreement, or the notion of "trade-restrictiveness" in that provision. Rather, it identifies situations to which the concept of "significant effect on trade of other Members" in Articles 2.9 and 5.6 may refer, and considerations that Members should take into account in assessing "the significance of the effect on trade of technical regulations" in the context of applying these provisions.

7.1085. Taking this into account, it is not clear to us that these aspects of the Recommendation have a function *other than* to shed light on "the concept of 'significant effect on trade of other Members'"²⁷⁵⁰ for the purposes of applying Articles 2.9 and 5.6.²⁷⁵¹ We do not consider, therefore, that the TBT Committee Recommendation²⁷⁵² "bears specifically" upon the interpretation of the term "trade-restrictiveness" in Article 2.2 of the TBT Agreement. We do consider, however that it "bears specifically" upon the interpretation of the term "significant effect on trade of other Members" in Article 2.9 of the TBT Agreement. To the extent that Article 2.9 itself provides relevant context for the interpretation of Article 2.2, the guidance provided by the Recommendation, should therefore inform, as relevant, our understanding of the relevant context provided by Article 2.9.

7.1086. The concept of "significant effect on trade of other Members", while not identical to the term "trade-restrictive" as used in Article 2.2, provides relevant context insofar as it sheds light on

²⁷⁴³ Committee on Technical Barriers to Trade, Secretariat Note, "Decisions and Recommendations Adopted by the WTO Committee on Technical Barriers to Trade Since 1 January 1995", WTO Document G/TBT/1/Rev.12 (21 January 2015), Section 4.3.1.1, p. 20 (entitled "Significant effect on trade of other Members").

²⁷⁴⁴ Vienna Convention on the Law of Treaties, done at Vienna, 23 May 1969, UN Treaty Series, Vol. 1155, p. 331.

²⁷⁴⁵ See Appellate Body Report, *US – Clove Cigarettes*, para. 258 ("Pursuant to Article 3.2 of the DSU, panels and the Appellate Body are required to apply the customary rules of interpretation of public international law – including the rule embodied in Article 31(3)(a) of the Vienna Convention").

²⁷⁴⁶ See fn 2666 above.

²⁷⁴⁷ See Appellate Body Report, *US – Tuna II (Mexico)*, para. 371.

²⁷⁴⁸ See Appellate Body Report, *US – Tuna II (Mexico)*, para. 372 (referring to Appellate Body Report, *US – Clove Cigarettes*, para. 265, in turn quoting Appellate Body Reports, *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)*, para. 390).

²⁷⁴⁹ See fn 2666 above.

²⁷⁵⁰ Committee on Technical Barriers to Trade, Secretariat Note, "Decisions and Recommendations Adopted by the WTO Committee on Technical Barriers to Trade Since 1 January 1995", WTO Document G/TBT/1/Rev.12 (21 January 2015), Section 4.3.1.1, p. 20 (entitled "Significant effect on trade of other Members").

²⁷⁵¹ See Appellate Body Report, *US – Clove Cigarettes*, para. 266. See also fn 1436 above.

²⁷⁵² See fn 2666 above.

how the word "trade" is to be understood in the term "trade-restrictiveness" under Article 2.2.²⁷⁵³ Specifically, as noted in the TBT Committee Recommendation²⁷⁵⁴, a technical regulation might have different "effects" on trade, including "import-enhancing and import-reducing" effects. One such effect may be to "restrict" trade.

7.1087. We also note the first sentence of Article 2.5 of the TBT Agreement, which requires a Member who prepares, adopts or applies a technical regulation that has a "significant effect on trade of other Members", to explain, upon the request of another Member, "the justification for that technical regulation in terms of the provisions of paragraphs 2 to 4".²⁷⁵⁵ That a technical regulation that has a "significant effect on trade of other Members", and a technical regulation that is "trade-restrictive", might both need to be "justified" on the basis of whether they create a restriction on international trade that exceeds what is necessary to achieve the degree of contribution that they make to the achievement of a legitimate objective²⁷⁵⁶, indicates to us that there is at least a significant overlap between the content of "significant effect on trade of other Members" and "trade-restrictiveness". For all these reasons, we do not accept Australia's contention that the TBT Committee Recommendation²⁷⁵⁷ is of no interpretative significance.

7.1088. The TBT Committee Recommendation²⁷⁵⁸ suggests that the concept of "significant effect on trade of other Members", under Article 2.9, may be understood to refer to *inter alia*, the effect on trade in a specific product, group of products or products in general and *the effect on trade between two or more Members*. Furthermore, when assessing the significance of these effects on trade, Members are invited to consider the value or other importance of imports in respect of the importing and/or exporting Members concerned, *whether from other Members individually or collectively*. We consider that this interpretation confirms our observation in paragraph 7.1078 above, that the "trade-restrictiveness" of a technical regulation need not be assessed only on the basis of the effect of the measure on trade between *all* WTO Members, in *all products* that are the subject of the technical regulation. We also consider that the TBT Committee Recommendation suggests that when considering the effects of a technical regulation (including whether the technical regulation has a *limiting* effect on trade), consideration might be given to "the value or other importance of imports in respect of the importing and/or exporting Members concerned", as well as "both import-enhancing and import-reducing effects on the trade of other Members".²⁷⁵⁹

7.1089. Having clarified the meaning of "trade-restrictiveness" under Article 2.2 of the TBT Agreement and how it should be assessed, we consider the extent to which the TPP measures are trade-restrictive.²⁷⁶⁰

7.2.5.4.2 Application to the TPP measures

7.2.5.4.2.1 Main arguments of the parties

7.1090. Honduras argues that "[t]he trademark restrictions are trade-restrictive for two reasons: they affect the competitive opportunities of imported tobacco products in the Australian market,

²⁷⁵³ We also note that Article 2.2, first sentence, requires that technical regulations not be prepared or applied "with the effect of creating unnecessary obstacles to international trade". (emphasis added)

²⁷⁵⁴ See fn 2666 above.

²⁷⁵⁵ We understand "paragraphs 2 to 4" in this context to refer to paragraphs 2 to 4 of Article 2 of the TBT Agreement. See also Panel Report, *US – Clove Cigarettes*, para. 7.457.

²⁷⁵⁶ Appellate Body Report, *US – Tuna II (Mexico)*, para. 319.

²⁷⁵⁷ See fn 2666 above.

²⁷⁵⁸ See fn 2666 above.

²⁷⁵⁹ We find further support for this conclusion in the notion that the nullification or impairment caused by a WTO-inconsistent measure, in the context of arbitrations under Article 22.6 of the DSU, has been assessed on the basis of the total value of trade in the products affected by the measure. See, e.g. Decisions of the Arbitrators, *EC – Hormones (Canada) (Article 22.6 – EC)*, para. 42; and *EC – Hormones (US) (Article 22.6 – EC)*, para. 43. However, we note that in making this observation, we are not conflating our task of assessing the consistency of the TPP measures with Australia's WTO obligations with that of an estimation of the level of any nullification or impairment that the TPP measures may cause. See Decision of the Arbitrator, *EC – Hormones (Canada) (Article 22.6 – EC)*, para. 41.

²⁷⁶⁰ We note also the comparable language of the SPS Committee recommendation on how to assess "significant effect on trade" for the purposes of the notification obligation in Annex B(5) of the SPS Agreement. Committee on Sanitary and Phytosanitary Measures, Recommended Procedures for Implementing the Transparency Obligations of the SPS Agreement (Article 7), G/SPS/7/Rev.3 (20 June 2008), paras. 9-10.

and they entail compliance costs for producers".²⁷⁶¹ Honduras further argues that the TPP measures are trade-restrictive because they affect competitive opportunities of imported tobacco products in various ways, "namely by removing product differentiation which acts as a competitive advantage, due to the impact on market access that results from increased barriers to entry, and due to the compliance costs"²⁷⁶² resulting from the measures.

7.1091. In Honduras's view, by restricting the form in which trademarks may appear on the packaging of tobacco products and on the actual tobacco products, the trademark restrictions harm the competitive opportunities of imported tobacco products and, thus, are trade-restrictive. Honduras elaborates that, to understand the nature of this trade restriction it is necessary to first appreciate the crucial role that trademarks play in the market. Honduras argues that trademarks fulfil a number of important functions, namely identification of the source of product, signalling product quality, reducing transactions costs and purchasing risks, and stimulating fair competition. Honduras focuses on this final element in respect of its trade-restrictiveness arguments. Honduras argues that a trademark's value is directly related to the concept of brand differentiation – in "order to compete effectively, a producer must have the ability to differentiate its product from those offered by his competitors". Referring to Professor Steenkamp, Honduras states that "differentiation is at the heart of modern marketing; it gives companies the ability to create distinctions between competing offerings in a given product market ... so that consumers can establish those differences and act upon them". Consequently, companies go to great lengths to show consumers that their products are different from those of their competitors.²⁷⁶³

7.1092. Honduras adds that one way to underscore differentiation is through the use of trademarks or "brands". Referring to Professor Winer, Honduras argues that brands can be defined as "the unique property of a specific owner [that] has been developed over time so as to embrace a set of values and attributes (both tangible and intangible) which meaningfully and appropriately differentiate products which are otherwise very similar".²⁷⁶⁴ Trademarks also serve as a means for companies to signal product quality to consumers²⁷⁶⁵; in this connection Honduras refers to Professor Winer, who describes brands "as the embodiment of a promise from the manufacturer to the consumer, a communication of quality, product origin, integrity and consistency that a consumer can count on when purchasing a product that is sold under the banner of the brand as signaled by the trademarked symbols".²⁷⁶⁶ Honduras submits that this is particularly important for "experience goods", such as tobacco products, "whose attributes and quality can only be discerned after purchase, once the consumer has actually used them and experienced them".²⁷⁶⁷

7.1093. Honduras argues that "[t]he ability to differentiate a product through branding is a source of competitive advantage", and that "[c]onsumers who prefer a certain brand become loyal to that brand and are willing to pay a price premium for it".²⁷⁶⁸ Honduras refers in this regard to Professor Winer's remarks that "[i]t is not unusual for a loyal buyer to pay 20 to 30 per cent more for a preferred brand" and that "loyal consumers are less likely to be swayed by the marketing activities of competitors".²⁷⁶⁹ A trademark's value can relate not only to the product's quality, but also to features like the origin and/or special nature of certain ingredients.²⁷⁷⁰

7.1094. Honduras argues that companies rely on packaging as a channel to deliver the brand message to consumers, and that this requires that packaging "display the totality of the components that form a trademark". Honduras adds that trademarks consist not only of the brand name itself, but also colours, graphics, logos, typeface, size and shapes.²⁷⁷¹ The benefits of

²⁷⁶¹ Honduras's first written submission, para. 857.

²⁷⁶² Honduras's second written submission, para. 539.

²⁷⁶³ Honduras's first written submission, paras. 862-863.

²⁷⁶⁴ Honduras's first written submission, para. 864 (referring to Winer Report, (Exhibit UKR-9), para. 14).

²⁷⁶⁵ Honduras's first written submission, para. 865 (referring to Steenkamp Report, (Exhibit DOM/HND-5), para. 43).

²⁷⁶⁶ Honduras's first written submission, para. 865 (quoting Winer Report, (Exhibit UKR-9), para. 13).

²⁷⁶⁷ Honduras's first written submission, para. 865.

²⁷⁶⁸ Honduras's first written submission, para. 866 (referring to Steenkamp Report, (Exhibit DOM/HND-5), para. 43); and Honduras's second written submission, para. 544.

²⁷⁶⁹ Honduras's first written submission, para. 866 (quoting Winer Report, (Exhibit UKR-9), para. 24).

²⁷⁷⁰ Honduras's first written submission, para. 866.

²⁷⁷¹ Honduras's first written submission, para. 867.

trademarks are lost when companies can no longer achieve product differentiation as, in such a market, there is "perceived quality convergence" whereby consumers, in the absence of the normal quality signals transmitted through brand packaging, perceive all products to be of the same quality.²⁷⁷² Honduras argues that this "reduces consumers' loyalty towards a particular brand and their refusal to pay a price premium for a high-end brand when brand differentiation is affected"; the ultimate consequence of which is "realignment in the marketplace, with value brands gaining market share at the expense of premium brands and pressure on pricing".²⁷⁷³ Honduras argues that post-implementation data confirms that the TPP measures "have resulted in an increased downtrading effect".²⁷⁷⁴

7.1095. Honduras adds that the reduction of product differentiation can lead to increased sales for the entire product category (i.e. for all brands as a whole), given that companies will start to compete on the basis of price to regain their market shares.²⁷⁷⁵

7.1096. Honduras argues that "the trademark restrictions are trade restrictive because they severely affect the competitive opportunities of imported products in the Australian market". This is because, "[b]efore the enactment of the trademark restrictions, foreign tobacco producers were able to compete in the Australian market by relying on the strength of their brands, whose value and reputation was developed throughout the years", but the "trademark restrictions distort the way in which trademarks appear on the packaging of tobacco products and on the tobacco products themselves", such that companies are now prevented from obtaining the benefits of the brands' value. More specifically, the reduced brand differentiation caused by the trademark restrictions cause consumers to shift away from premium brands in favour of low-end brands. This decline in product differentiation, in Honduras's view, leads consumers to down-trade, and "[a]s consumers begin to down trade, demand for imported tobacco products is bound to decline". For Honduras, this amounts to a "limiting effect on trade" and a disincentive to export tobacco products to Australia.²⁷⁷⁶

7.1097. In response to questioning by the Panel, Honduras further submits that "[b]oth [the trademark and format] restrictions affect the conditions of competition for tobacco products", as they "(i) ... affect the competitive opportunities of imported tobacco products by reducing brand differentiation and causing consumers to shift away from premium brands in favour of low-end brands; and (ii) because they entail compliance costs for producers given the need to modify tobacco products and their packaging so that trademarks appear in the form prescribed by Australia's legislation".²⁷⁷⁷ In relation to whether both sets of requirements are trade-restrictive, Honduras argues that "[a]n analysis of the design and structure of the plain packaging measures shows that the trademark restrictions and format restrictions operate in conjunction", in that both "types of restriction operate together so as to standardize the presentation of tobacco products and their packaging". Thus, the trade-restrictiveness of the challenged measure (in terms of reduced brand differentiation and compliance costs) is a result of both the trademark restrictions and the format restrictions.²⁷⁷⁸

7.1098. Honduras further argues that "the plain packaging measures are also trade-restrictive because they restrict access to the Australian market and distort conditions of competition". By imposing these barriers on market access, Honduras submits that the TPP measures affect competitive opportunities of tobacco products, have a limiting effect on trade, create a disincentive to import into Australia, and have identifiable negative consequences on the importation of tobacco products.

7.1099. Honduras elaborates, with reference to the expert report by Professor Neven, that the TPP measures produce certain communication and price effects that make access to the Australian

²⁷⁷² Honduras's first written submission, para. 870 (referring to Steenkamp Report, (Exhibit DOM/HND-5), para. 64).

²⁷⁷³ Honduras's first written submission, para. 870 (quoting Steenkamp Report, (Exhibit DOM/HND-5), para. 64).

²⁷⁷⁴ Honduras's first written submission, para. 870; and second written submission, para. 546.

²⁷⁷⁵ Honduras's first written submission, para. 871.

²⁷⁷⁶ Honduras's first written submission, paras. 875-876; and response to Panel question No. 117.

²⁷⁷⁷ Honduras's response to Panel question No. 63.

²⁷⁷⁸ Honduras's response to Panel question No. 63. See also Honduras's response to Panel question No. 151.

tobacco market almost impossible. Professor Neven states that "the profits that a manufacturer can expect to earn in a given market determine its willingness to engage in trade, enter new markets and compete with established brands".²⁷⁷⁹ Professor Neven explains that plain packaging produces three different effects on competition and trade in the Australian market: (i) a contestability effect; (ii) a communication effect; and (iii) a competitive effect. Honduras argues that, when one considers the net result from the combined operation of all three effects, "it becomes clear that plain packaging yields overall negative effects for tobacco brands regardless of whether they are already in the Australian market, or may seek to enter the Australian market".²⁷⁸⁰

7.1100. Honduras explains that the contestability effect is based on the premise that existing strong brands benefit from established brand loyalty, which is a factor that can constitute a barrier to potential entrants, such that plain packaging would, in principle, enhance prospects of entry to the Australian market. Honduras argues, however, that this initial positive effect on entry is offset by the two negative effects produced by plain packaging.²⁷⁸¹ Specifically, concerning the communication effect (which relates to the ability of potential entrants to create brand awareness for their own new products), Honduras submits that, "without the possibility to create brand awareness, successful entry for potential entrants becomes significantly more difficult".²⁷⁸² Regarding the competitive effect, Honduras explains that this looks "at the concrete commercial impact of plain packaging", according to which reduced brand differentiation created by plain packaging affects consumers' willingness to pay and thus producers' pricing power. As producers need to reduce prices to address consumers' reduced willingness to pay, their profit margins also decline, such that, for Honduras, "operators have lower willingness to engage in trade", which "also leads to a lower likelihood of entry".²⁷⁸³

7.1101. Honduras therefore submits that, taken together, the final balance of all three effects is that plain packaging significantly undermines the scope for entry into the Australian tobacco market. On this basis and with reference to Professor Neven, Honduras submits that plain packaging distorts competition and hinders international trade for potential entrants and incumbent brands in the following ways:

- a. Competition in the market is distorted by differentially harming producers of premium brands and brands that cater to specific customer preferences relative to producers of low quality cigarettes that mainly compete on price. This undermines diversity, depletes producers' brand capital and generally restricts its non-price competition. This circumstance harms incumbent brands in the Australian market.
- b. Competition for the market is significantly restricted by imposing potentially severe barriers to entry for firms intending to introduce their products into the Australian market with new brands, which is the case of a large number of internationally successful brands that have not yet penetrated the Australian market. Introducing and communicating the characteristics of such foreign brands in Australia will become all but impossible absent the ability to create brand awareness.²⁷⁸⁴

7.1102. Professor Neven thus concludes that "[p]lain packaging reduces product differentiation and thus lowers the prospect for profitable continued market presence and entry", and "also considerably hampers entry of new products on the market given that new products need trademarks and product differentiation opportunities to communicate their presence on the market to potential customers".²⁷⁸⁵

²⁷⁷⁹ Honduras's second written submission, para. 556 (quoting Neven Report, (Exhibit UKR-3) (SCI), para. 6.1).

²⁷⁸⁰ Honduras's second written submission, para. 557.

²⁷⁸¹ Honduras's second written submission, para. 558.

²⁷⁸² Honduras's second written submission, para. 559.

²⁷⁸³ Honduras's second written submission, para. 560.

²⁷⁸⁴ Honduras's second written submission, para. 562 (referring to Neven Report, (Exhibit UKR-3) (SCI), para. 6.2).

²⁷⁸⁵ Honduras's second written submission, para. 563; and response to Panel question No. 151.

7.1103. Honduras adds that "the economic effects identified by Professor Neven not only affect potential new entrants (by reducing their willingness to export to the Australian market), but also affect incumbent brands (by gradually eroding the brand awareness previously created)".²⁷⁸⁶

7.1104. The Dominican Republic argues that the trademark and format requirements under the TPP measures are highly trade-restrictive. The Dominican Republic refers to its arguments concerning "how each and every special [plain packaging] requirement severely encumbers the use of trademarks", and argues that "[f]or similar reasons, each and every one of the trademark requirements ... imposes a condition on the sale of tobacco products in Australia". In addition, "each and every one of the form requirements imposes conditions on the sale of tobacco products in Australia". Thus, cumulatively, "these requirements impose restrictions on trade in tobacco products because, if a retailer or manufacturer fails to comply with them, it is prevented from selling them on the Australian market". Specifically, the requirements prohibit the sale of tobacco products that do not comply with the strict government-mandated conditions or restrictions regarding the retail packaging and appearance of tobacco products. In the Dominican Republic's view, this has the effect that premium products can no longer be sold as premium products, but "must be sold as something entirely different – undifferentiated commodity products that appear to be virtually identical to any other tobacco product on the Australian market", which is "precisely the purpose of the [TPP] measures" – i.e. they are "designed to make all tobacco products look like the 'lowest quality' products on the market".²⁷⁸⁷

7.1105. The Dominican Republic also states that, apart from the limiting effect arising from the requirement to comply with conditions on the sale of tobacco products, "the [TPP] requirements are 'trade-restrictive' for another reason", namely that "trademarks and brands, in general, are the lifeblood of a competitive and dynamic marketplace".²⁷⁸⁸ For the Dominican Republic, it is "therefore inevitable that the trademark requirements in the [TPP] measures affect the ability of all tobacco manufacturers to differentiate their offerings in the market". This interference with all trademarks constrains "their very ability to compete on the basis of brands, eliminating competitive opportunities". In addition, the TPP measures "are likely to have a disproportionate (discriminatory) effect on the trade in premium tobacco products (such as cigars and higher end cigarettes) in Australia". The Dominican Republic, referring to Professor Steenkamp, submits that branding is particularly important for premium products, "since it allows manufacturers to develop and maintain loyal customers for their products, who are willing to pay higher prices for their preferred product". The Dominican Republic elaborates that, according to Professor Steenkamp, consumers' perceptions of the quality of competing brands are based on a combination of (i) functional benefits (e.g. taste, smell) and (ii) intangible benefits, that consumers derive from each brand. Consumers perceive both greater functional and intangible benefits for premium brands than for value brands, although the differences in intangible benefits between premium and value brands are significantly greater than the differences in functional benefits. Packaging plays an important part in establishing and maintaining the high intangible benefits attributed to premium products, such that when packaging differences are eliminated, the intangible benefits for premium products drop significantly more than the intangible benefits for value products. In turn, this disproportionate impact on the perceived intangible benefits of premium products translates into reduced loyalty and a reduced willingness to pay for the premium products. The result is downtrading away from premium brands.²⁷⁸⁹

7.1106. Given that the TPP measures "are designed and structured to limit the competitive opportunities for all tobacco products, and operate to do so", the Dominican Republic states that "it is not clear on what basis Australia considers it necessary, even on its reading of the Appellate Body Reports in US – COOL (Article 21.5 – Canada and Mexico), for the Dominican Republic to demonstrate actual trade effects". In any case, the Dominican Republic also notes that "the

²⁷⁸⁶ Honduras's second written submission, para. 565.

²⁷⁸⁷ Dominican Republic's first written submission, para. 976.

²⁷⁸⁸ Dominican Republic's first written submission, para. 977.

²⁷⁸⁹ Dominican Republic's second written submission, para. 936 (referring to Steenkamp Rebuttal Report, (Exhibit DOM/HND-14), para. 93).

empirical evidence from the marketplace shows this distortion of trade, with significant 'down-trading' from more expensive to cheaper tobacco products due to the [TPP] measures".²⁷⁹⁰

7.1107. The Dominican Republic argues that Australia promotes plain packaging as a measure designed and structured to standardize tobacco packaging and products by eliminating the ability to effectively differentiate tobacco products through trademarks and other distinguishing features of the packaging and products, and to compete for price premiums based on that differentiation. The plain packaging requirements, comprising both trademark and form requirements, result in the standardization of the appearance of all tobacco products. In other words, by design and structure, the TPP measures restrict or limit the competitive opportunities enabled by product differentiation. The Dominican Republic refers to the Appellate Body's reports in *US – COOL (Article 21.5 – Canada and Mexico)* and argues that a panel can rely on qualitative evidence where the limiting effect of the technical regulation relates to the restriction on competitive opportunities. Though "there is no need to prove actual trade effects", the Dominican Republic argues that the measure has led to down-trading from higher-priced to lower-priced products. For these reasons, the Dominican Republic asserts that both the form and trademark requirements lead to the loss of differentiation that eliminates competitive opportunities.²⁷⁹¹ Indeed, the "ability to differentiate one product from another is critical to an exporting producer's opportunity to compete in an international market"; such competition in the marketplace "requires perceptible differences between competing products, which provide a basis for consumers to choose one product over another".²⁷⁹² By curtailing the ability to differentiate products, including imported products, the TPP measures restrict competitive opportunities and impair the conditions of competition for imported tobacco products.²⁷⁹³

7.1108. The Dominican Republic argues that in these proceedings, a limitation on competitive opportunities is already evident in the design, structure, and expected operation of the measure, without any need to establish the consequences of that limitation in terms of actual trade effects. The Dominican Republic repeats that the TPP measures are designed, structured, and implemented to eliminate the opportunity for producers to differentiate their products using design features, such as trademarks and the pack shape, size, opening mechanism, and compositional material.²⁷⁹⁴ These limitations apply to retail packaging for all tobacco products, and to all individual cigar and cigarette sticks. The "now-eliminated opportunity to differentiate a product from competing offerings in the market is the very essence of competition in the marketplace".²⁷⁹⁵ For the Dominican Republic, the differentiating features affected by the TPP measures create competitive opportunities by conveying to the consumer differences in quality, reputation and other characteristics of products. Consumers link particular differentiating features with the characteristics of particular products and producers. This differentiation engenders consumer loyalty and, in turn, increases consumers' willingness to pay.²⁷⁹⁶ The loss of differentiation resulting from the design, structure and operation of the TPP measures "necessarily entails a significant limitation on competitive opportunities for all tobacco products, including imports".²⁷⁹⁷ The Dominican Republic therefore submits that "the measures impose a large dose of commoditization on the entire market, stripping away the opportunity for brands to differentiate themselves", or to "employ the usual means of differentiating itself from competing brands". For the Dominican Republic, one of the predicted impacts of greater commoditization of the market, through a loss of differentiation, is less consumer loyalty and lower willingness to pay, resulting in brand switching from higher- to lower-priced brands".²⁷⁹⁸ The Dominican Republic adds that "Australia does not contest that the [T]PP measures limit competitive opportunities for all tobacco

²⁷⁹⁰ Dominican Republic's first written submission, para. 978; second written submission, para. 938; and comments on Australia's response to Panel question No. 151.

²⁷⁹¹ Dominican Republic's response to Panel question No. 63.

²⁷⁹² Dominican Republic's response to Panel question No. 151.

²⁷⁹³ Dominican Republic's response to Panel question No. 151.

²⁷⁹⁴ Dominican Republic's response to Panel question No. 117; and second written submission, para. 933.

²⁷⁹⁵ Dominican Republic's response to Panel question No. 117; and second written submission, para. 934.

²⁷⁹⁶ Dominican Republic's response to Panel question No. 117; and second written submission, para. 934.

²⁷⁹⁷ Dominican Republic's response to Panel question No. 117; second written submission, para. 937; and response to Panel question No. 151.

²⁷⁹⁸ Dominican Republic's response to Panel question No. 117; and second written submission, para. 935.

products", and "freely admits that the measure is designed, structured and implemented for the very purpose of eliminating the competitive opportunities that arise from the differentiation of tobacco products, including imported tobacco products". Australia "seeks to prevent tobacco producers from using design features to enhance competitive opportunities", and "not contested that product differentiation allows consumers to make associations between particular differentiating features and the characteristics of particular products, thereby enhancing consumer loyalty and willingness to pay". In the Dominican Republic's view, there is no basis for Australia to deny that the TPP measures have a limiting effect on competitive opportunities – "given the intentions behind the design and structure of the [TPP] measures, and the way the measures have been implemented, the Dominican Republic is surprised at Australia's denial of what is self-evident from the very design and structure of the measures: that they are intended to be highly trade-restrictive by significantly impairing competitive opportunities for all tobacco products, including imports from all WTO Members".²⁷⁹⁹ The Dominican Republic also notes that "Australia's own expert, Professor Dubé, accepts, 'the decrease in desirability of tobacco brands, including those in the discount segment, would likely reduce willingness to pay for tobacco brands'".²⁸⁰⁰

7.1109. As regards the consequences of the limitation on competitive opportunities, the Dominican Republic states that the "complainants argue that, by reducing brand differentiation, the [TPP] measures have already led to switching from higher- to lower-priced cigarettes and, hence, to a reduction in the value of the trade, without reducing smoking prevalence or consumption". The Dominican Republic adds that the disagreement between the complainants and Australia concerning the actual trade effects resulting from the TPP measures is not material to the Panel's finding of trade-restrictiveness under Article 2.2, because it is evident from the design, structure, and expected operation of the measures that they severely limit competitive opportunities to differentiate tobacco products. Notwithstanding this, the Dominican Republic has "provided evidence of one form of actual trade effects engendered by the [TPP] measures, as a means of confirming that the measures limit competitive opportunities". The Dominican Republic's evidence of trade effects "shows that the predicted effect of reduced loyalty and willingness to pay, resulting in switching from higher- to lower-priced brands, actually materialized very quickly after implementation of the [TPP] measures", which the Dominican Republic argues it has demonstrated through its econometric analysis of "these 'downward substitution' or 'downdrading' effects".²⁸⁰¹ Downward substitution from higher- to low-priced brands means that some consumers buy a cheaper brand than the brand that they bought before the TPP measures were introduced. This evidence demonstrates that the elimination of differentiating features has – as predicted – led to consumers being less loyal to their former brands and has lowered their willingness to pay for their former brand. Instead, these consumers have switched to a cheaper brand.²⁸⁰²

7.1110. In relation to Australia's arguments concerning the assessment of trade-restrictiveness, the Dominican Republic submits that Australia has a "misguided preoccupation" with actual trade effects.²⁸⁰³ In respect of Australia's argument that the TPP measures are not trade-restrictive because imports of tobacco products into Australia have increased in volume since the introduction of the TPP measures, the increase in imports of tobacco products into Australia is attributable, not to the TPP measures, but to the movement of domestic production offshore as a response to fire-risk requirements in Australia applied to exports.²⁸⁰⁴ Moreover, Australia cannot simply rely on an absolute increase in the volume of imports to rebut the Dominican Republic's showing that the TPP measures are trade-restrictive; to maintain such an argument, Australia must demonstrate what trade volumes would have been absent the challenged measure.²⁸⁰⁵ Furthermore, Australia's "focus on one way in which a measure can have a limiting effect on trade – an impact on trade volumes – is unduly simplistic". In the Dominican Republic's view, Members are not concerned solely with competitive opportunities as reflected in the *number of units* of an exported product

²⁷⁹⁹ Dominican Republic's response to Panel question No. 117; and second written submission, para. 945.

²⁸⁰⁰ Dominican Republic's second written submission, para. 935 (quoting Dubé Report, (Exhibit AUS-11), para. 41).

²⁸⁰¹ Dominican Republic's response to Panel question No. 117. See also Dominican Republic's response to Panel question Nos. 125, 126 and 151.

²⁸⁰² Dominican Republic's response to Panel question Nos. 117, 125-126 and 151.

²⁸⁰³ Dominican Republic's second written submission, para. 947.

²⁸⁰⁴ Dominican Republic's second written submission, para. 948 (referring to Dominican Republic's response to Panel question No. 5 and Australia's response to Panel question No. 117).

²⁸⁰⁵ Dominican Republic's second written submission, para. 949.

sold, but also with the competitive opportunities as reflected in the *value of each unit sold*.²⁸⁰⁶ The value of trade affects the wide range of direct and indirect economic gains that a country derives from its export trade; this is also borne out by the decision of the TBT Committee referenced above, which asks Members to consider the potential trade effects of a measure in terms of the "value" of the affected trade.²⁸⁰⁷ In response to Australia's reference to data that it considers to demonstrate that the total value of the retail market increased, despite a reduction in total demand in the Australian market, the Dominican Republic argues that the correct analysis is what the situation – in value terms – would have been *absent the measure*, and not whether, in the abstract, the aggregate value of trade in tobacco products has increased in an absolute sense.²⁸⁰⁸

7.1111. In response to Australia's arguments that an assertion of trade-restrictiveness requires a demonstration of a limiting effect on "overall trade" (that is, "imports in the regulated category as a whole"), the Dominican Republic submits that this argument derives from Australia's misconception of the proper standard for demonstrating trade-restrictiveness, as Article 2.2 of the TBT Agreement does not require a demonstration of actual trade effects, but instead requires demonstration that the challenged measure limits competitive opportunities, for which evidence of the design, structure and expected operation of the measures is sufficient. The Dominican Republic reiterates that, even if the Panel were to interpret Article 2.2 as requiring a showing that "overall trade" is limited by the challenged measure, the Dominican Republic has demonstrated this, as the TPP measures are designed, structured, and implemented to affect the competitive opportunities of *all* tobacco products (that is, *all* brands, of *any* provenance, are denied the competitive opportunity to differentiate themselves using the features prohibited under the TPP measures). Therefore, the TPP measures do affect "overall trade" in all products.²⁸⁰⁹ Additionally, the Dominican Republic argues that, even if the Panel were to find that the TPP measures limit competitive opportunities solely for premium tobacco products, this limitation would still constitute a trade restriction within the meaning of Article 2.2, as a measure is trade-restrictive even if it has a limiting effect with respect only to a subset of imports, such as one segment. The Dominican Republic argues that in this respect it has demonstrated that the TPP measures have a limiting effect in the form of downward substitution of higher-priced cigarettes with low-priced cigarettes.²⁸¹⁰

7.1112. The Dominican Republic argues that Australia errs in arguing that a trade-restrictive effect of a challenged measure can be "offset" by a trade-promoting effect of that measure. Australia offers no interpretive rationale whatsoever for its argument. Moreover, where the concept of "offsetting" to which Australia alludes has been considered in the case law, it has been rejected as a basis for determining a measure's overall WTO-consistency.²⁸¹¹

7.1113. In the context of its arguments concerning alternative measures, the Dominican Republic submits that to the extent that the Panel finds that the TPP measures contribute to the objective of reducing smoking behaviour (which the Dominican Republic contests), then, to the extent of that contribution, the TPP measures will restrict trade in tobacco products by reducing the total volume of sales. In this event, the Dominican Republic posits that the Panel would have found that the TPP measures entail a volume-based restriction.²⁸¹² In this context, the Dominican Republic also repeats that, by restricting the use of trademarks on tobacco packaging and products, and standardizing all aspects of tobacco packaging and products, the TPP measures also restrict trade by eliminating the competitive opportunities flowing from differentiation, and have a limiting effect on competition for all tobacco products. Thus, the TPP measures involve a trade restriction

²⁸⁰⁶ Dominican Republic's second written submission, para. 950.

²⁸⁰⁷ Dominican Republic's second written submission, para. 950 (referring to G/TBT/W/2/Rev.1, 21 June 1995, p. 7).

²⁸⁰⁸ Dominican Republic's second written submission, paras. 950-951.

²⁸⁰⁹ Dominican Republic's second written submission, para. 955.

²⁸¹⁰ Dominican Republic's second written submission, para. 956.

²⁸¹¹ Dominican Republic's second written submission, paras. 957-959.

²⁸¹² Dominican Republic's second written submission, para. 970; response to Panel question No. 151; and comments on Australia's response to Panel question No. 151. It is noted that, "for the purposes of the analysis of alternatives, the Dominican Republic proceeds on that assumption".

resulting from the elimination of differentiation, which distorts competitive opportunities to the particular detriment of premium brands.²⁸¹³

7.1114. Cuba argues that measures should be treated as trade-restrictive under Article 2.2 of the TBT Agreement even where they do not cause a reduction in import volumes: it is sufficient if prejudicial effects on the position of exporters are identified. Accordingly, the fact that, in Cuba's case, the TPP measures "will not result in a reduction in the overall volume of imports of tobacco products, does not prevent a finding that they are trade restrictive".²⁸¹⁴ Cuba argues that the TPP measures impose "limiting conditions"; namely, that Australia imposes numerous conditions relating to the appearance of the retail packaging of tobacco products and the appearance of tobacco products themselves. All of these conditions must be met before international trade in tobacco products can flow between Australia and third countries. For Cuba, these conditions limit the commercial choices available to exporters, impose costs and make the process of distribution in Australia more burdensome than it would otherwise be.²⁸¹⁵ Referring back to these comments, Cuba submits that the TPP measures "substantially affect market entry for imported tobacco products by imposing 'limiting conditions'".²⁸¹⁶ Cuba submits that the existence of these various conditions suffices, in and of itself, to establish that Australia's measures are trade-restrictive.²⁸¹⁷

7.1115. Cuba argues that, in any event, the TPP measures give rise to two further types of commercial burdens which also establish that the TPP measures are trade-restrictive. First, the TPP measures constrain the ability of exporters to distinguish clearly their products from the products of their competitors. This is a significant source of commercial prejudice for exporters, which is especially severe for producers of higher quality products because they will suffer a significant reduction of their market share and significant downward pressure on the prices that they can charge.²⁸¹⁸ In this connection, Cuba submits that the TPP measures "will fundamentally erode the ability of Cuban producers to position their LHM cigars as luxury premium products with a long tradition", and that "even if this does not occur immediately, over time it will inevitably occur if the plain packaging measures continue to be applied".²⁸¹⁹ In Cuba's view, Australia has not responded to the main argument of Cuba about the downtrading effect of plain packaging measures, i.e. that the measures "will have a negative impact on the overall volume of Cuba's trade, because they will lead to downtrading from Cuba's premium LHM cigars to cheaper products, not originating in Cuba". Premium quality products cannot survive in a market environment in which product differentiation is impossible, and Australia has explicitly stated that the TPP measures are intended to make impossible the differentiation of quality and its importance.²⁸²⁰

7.1116. Second, Cuba submits that exporters have to tailor their products to comply with the unique requirements imposed by the Australian government, which gives rise to compliance and adaptation costs (as no other jurisdiction currently imposes comparable requirements). The existence of these costs also establishes that Australia's measures are trade-restrictive.²⁸²¹ Cuba adds that this includes "the risk of severe economic and criminal penalties".²⁸²² For these reasons Cuba submits that the TPP measures are trade-restrictive within the meaning of Article 2.2 of the TBT Agreement.²⁸²³

7.1117. Cuba considers that the TPP measures is a trade restriction inasmuch as it limits competition and reduces trade opportunities, by eliminating the value of trademarks, which are the essence of competition. The TPP measures give rise to serious prejudice to manufacturers, who are

²⁸¹³ Dominican Republic's second written submission, para. 971; response to Panel question No. 151; and comments on Australia's response to Panel question No. 151.

²⁸¹⁴ Cuba's first written submission, paras. 400-401; and response to Panel question No. 117.

²⁸¹⁵ Cuba's first written submission, para. 401.

²⁸¹⁶ Cuba's second written submission, para. 226.

²⁸¹⁷ Cuba's first written submission, para. 401.

²⁸¹⁸ Cuba's first written submission, para. 403; response to Panel question No. 117; and second written submission, para. 226.

²⁸¹⁹ Cuba's response to Panel question No. 151.

²⁸²⁰ Cuba's comments on Australia's response to Panel question No. 165.

²⁸²¹ Cuba's first written submission, para. 404; response to Panel question No. 117; and second written submission, para. 226.

²⁸²² Cuba's second written submission, para. 226.

²⁸²³ Cuba's first written submission, para. 405.

thus unable to distinguish their products from those of their competitors, by wiping out the prestige and reputation they have achieved through the quality of their products.²⁸²⁴ The trade-restrictiveness may also be seen in the costs that the measure imposes on producers in order to have access to the Australian market, by obliging them to modify the manner in which they manufacture their product (paper costs, packaging costs, manufacturing process modifications) or otherwise withdraw from the market.²⁸²⁵

7.1118. Cuba considers that while the Appellate Body in *US – COOL (Article 21.5 – Canada and Mexico)* recognizes that in some cases evidence of actual trade effects "might be necessary" to demonstrate the trade-restrictiveness of a measure, this approach is not necessary in the present dispute.²⁸²⁶

7.1119. In respect of its arguments concerning product differentiation and import value, Cuba repeats that the plain packaging measure will lead to a reduction in product differentiation and, therefore, an increase in price competition, which will lead to a fall in prices and reduce the value of imported tobacco products. This commodification of tobacco products will distort competition and generate an additional disincentive to export to Australia. Cuba submits, in response to Australia's argument that there is no limiting effect on trade because imports are increasing, that this argument is irrelevant because GATT/WTO case law establishes comprehensively that an actual impact on trade is not necessary and that a measure may restrict trade even when imports increase. Moreover, if, as Australia asserts, imports are increasing because former local producers have transferred their factories abroad, these producers will attempt to retain their market share, at least in the initial term. It is "therefore wrong to argue that "imports" are increasing when the products and producers in question are the same market leaders who have simply moved their production abroad owing to decisions that do not depend on the plain packaging measure".²⁸²⁷ Furthermore, in relation to Australia's assertion that the complainants' arguments are "an attempt to use the TBT Agreement to protect profits in the premium segment of the market rather than as a guarantee that technical regulations do not act as unnecessary barriers to trade", Cuba submits that this claim misrepresents the argument concerning trade reduction and market segment profits. Cuba refers to Professor Neven's argument that it is not prices alone that determine profitability, but rather prices and sales volumes, such that "if regulation reduces profits, then this can either be because regulation diminishes output (as claimed by the proponents of regulation) or because regulation diminishes the margin firms earn for each sale".²⁸²⁸ Thus, Professor Neven concludes, in accordance with his models of branding, that profits will decline, either as a result of diminished output, or because of diminished margins firms earn if they increase output.²⁸²⁹ Furthermore, in relation to Australia's arguments that down-trading is occurring elsewhere in the absence of plain packaging, Cuba submits that this argument misses the point. Cuba does not, it submits, argue that down-trading can only exist because of plain packaging, but instead that the complainants have "shown that down-trading is caused in Australia by the withdrawal of trademarks and other characteristics that increase producers' confidence in price competition, regardless of other measures or policies that may also influence down-trading, such as the price impact of tax increases". Cuba adds that a review of the design, structure and operation of the measure acting to reduce non-price competition and increase price competition indicates that the down-trading observed in the market is a consequence, at least in part, of plain packaging.²⁸³⁰

7.1120. In respect of its arguments concerning compliance and adaptation costs associated with the TPP measures, Cuba elaborates that such costs include one-off costs of adaptation as well as continuous supervision costs owing to changes in production process. Cuba also states that, "[m]ore importantly, they also include the costs arising from the need to ensure strict compliance in view of the high fines and penalties for any failure to comply with the requirements under the measure". Cuba argues that *Brazil – Retreaded Tyres* is "highly relevant" in this context, because it "upholds the position that a penalty itself may operate as a restriction on international trade".

²⁸²⁴ Cuba's response to Panel question No. 117.

²⁸²⁵ Cuba's response to Panel question No. 117.

²⁸²⁶ Cuba's response to Panel question No. 117.

²⁸²⁷ Cuba's second written submission, paras. 246-247.

²⁸²⁸ Cuba's second written submission, para. 249 (referring to Neven Report, (Exhibit UKR-3) (SCI), p. 37).

²⁸²⁹ Cuba's second written submission, para. 249 (referring to Neven Report, (Exhibit UKR-3) (SCI), p. 37).

²⁸³⁰ Cuba's second written submission, para. 250.

The penalties in the present case, "which are again very high and aim to impose punitive measures to ensure compliance with the prohibition on trade in packs of non-complying tobacco products", constitute "an independent and important basis for arguing that the measure is very trade-restrictive".²⁸³¹

7.1121. Indonesia argues that the primary effect of the TPP measures is to prevent tobacco companies from using trademarks to distinguish their tobacco products from those of competitors and in many cases demand premium pricing. By stripping away the most identifiable elements of branding (such as colors, shapes, typefaces, etc.), plain packaging "commoditizes" tobacco products and price becomes the primary form of competition.²⁸³² By eliminating trademarks the TPP measures "fundamentally restructured the competitive conditions of the Australian cigarette market".²⁸³³ Indonesia submits that the Australian cigarette market has always been one in which branded products compete for market share within different price segments. The use of identifiable trademarks associated with brands allowed producers to respond to consumer preferences and enabled significant product differentiation. By requiring that all packages convey the same message that the products are the "lowest quality"²⁸³⁴, Indonesia submits that Australia sought to ensure that "manufacturers *cannot* compete on the basis of quality".²⁸³⁵ In this respect, Indonesia argues that "a stated goal of [plain packaging] was 'shattering the image of cigarettes as an ordinary consumer item'".²⁸³⁶ Indonesia argues that "[w]hat is essential is the fact that the cumulative effect on trade from Australia's plain packaging regime is to deny competitive opportunities for premium branded products by causing downtrading and eliminating the premium brands' ability to compete based on any factor other than prices".²⁸³⁷

7.1122. Indonesia submits that plain packaging strips design features and other distinguishing features from packaging, including trademarks. It is not contested amongst the parties that trademarks and other distinguishing features are the very essence of competitive opportunities in the sense that they make consumers more loyal and they make consumers more willing to pay for a particular product or brand, such that "[b]y removing trademarks and establishing stringent requirements for the elements of the packaging and tobacco products themselves, Australia has created a market where consumers are more willing to switch to other brands and less willing to pay a premium for the branded product". For Indonesia, this is the very essence of limiting competitive opportunities, "which Australia limited intentionally" as it "wants to diminish competitive opportunities that they believe arise from the distinguishing features of packaging and elements of the tobacco products themselves, and prevent producers of tobacco products from benefitting from those competitive opportunities".²⁸³⁸

7.1123. Indonesia argues that restrictions on trademarks, such as those imposed by plain packaging, impose a disproportionate burden on premium brands. Referring to its arguments under Article 20 of the TRIPS Agreement, Indonesia argues that downtrading occurs as consumers who were once loyal to premium brands migrate to cheaper brands.²⁸³⁹ Indonesia elaborates that the complainants also have demonstrated evidence of trade effects in the form of downtrading. When plain packaging interferes with competitive opportunities in a qualitative way with respect to market access (elaborated below), "consumers are more likely to switch brands and less willing to pay". As consumers shift from the more expensive brands to the less expensive brands because they have a higher willingness to switch brands and a lower willingness to pay, downtrading occurs, and "reflects the distortion in the market of the conditions of competition and competitive opportunities available to mid-tier and premium products".²⁸⁴⁰ Indonesia argues that evidence of increased downtrading in the Australian market from premium brands to low-price brands shows

²⁸³¹ Cuba's second written submission, para. 251.

²⁸³² Indonesia's first written submission, para. 395; and second written submission, para. 265.

²⁸³³ Indonesia's first written submission, para. 395; and second written submission, para. 266.

²⁸³⁴ Indonesia's first written submission, para. 396 (referring to Parr et al. 2011a, (Exhibits AUS-117, JE-24(49)), pp. 9-10).

²⁸³⁵ Indonesia's first written submission, para. 396 (emphasis original); and second written submission, para. 266.

²⁸³⁶ Indonesia's first written submission, para. 396 (referring to NPHT Technical Report 2, (Exhibits AUS-52, JE-12), p. vi).

²⁸³⁷ Indonesia's response to Panel question No. 63.

²⁸³⁸ Indonesia's response to Panel question No. 117.

²⁸³⁹ Indonesia's first written submission, paras. 397-399.

²⁸⁴⁰ Indonesia's response to Panel question No. 117.

that plain packaging is limiting competitive opportunities for producers of premium products. Indonesia adds that downtrading harms competitors in the mid-priced and premium segment of the market that have invested in developing higher quality products. For Indonesia, evidence of downtrading already exists in the Australian market post-plain packaging.²⁸⁴¹

7.1124. Indonesia argues that a second mechanism through which plain packaging limits trade relates to the need for imported products to establish an identity with consumers who are already familiar with domestic brands. Indonesia refers to a consumer research survey conducted for the Australian government in conjunction with the implementation of plain packaging which found that whether a brand was considered "foreign" or "local" affected consumer's attitudes towards cigarette brands, and specifically that:

In contrast, a number of brands were seen as distinctly "Australian", which overall was viewed as making the brand more appealing. Distinctly "Australian" cigarettes were primarily those which were seen to be *in the market-place the longest* or were perceived to be smoked by particular types of individuals who "represented" clearly defined Australian stereotypes (for example tradies, football or cricket fans.).²⁸⁴²

7.1125. Indonesia argues that the impact of the requirements in the TPP measures "also falls disproportionately on premium foreign brands, such as Indonesia's Djarum Super, who have invested extensively in their brand identity in their domestic market but are limited in their ability to capitalize on the investment by leveraging it to introduce their product to the Australian market".²⁸⁴³ Indonesia draws a comparison with wine, where there are major variations in terms of quality and brands that are essential for consumers to identify premium products: "[a] Spanish Rioja or California Cabernet sold in Australia might be of extremely low or extremely high quality", and "[a]bsent branding, geographical indications, and other registered marks on the label, a consumer in Australia would have a difficult time distinguishing which was the premium product". However, for Australian Shiraz, it is much more likely that the names of top producers will be familiar to Australians who would be likely to choose the known premium Australian wine over an imported product of unknown quality. For Indonesia, plain packaging prevents precisely the types of trademarks, symbols, and descriptors that would facilitate an Australian consumer's understanding of imported premium tobacco products. Indonesia argues that the inability of foreign tobacco product manufacturers to establish their brand identity in Australia in order to compete against domestic competitors makes it difficult to overcome the existing domestic brand bias. The TPP measures "are thus trade restrictive because they limit trade by imposing restrictions on the right to use trademarks and other aspects of brand identity that are necessary to compete against domestic brands".²⁸⁴⁴

7.1126. Indonesia elaborates its trade-restrictiveness assertions by noting that the fact that there is no domestic like product in the current case on which to base a discrimination claim is not to say, however, that the TPP measures treat foreign and local *brands* equally. While all tobacco products that are sold in Australia now are imported, not all brands sold in Australia are viewed as "foreign". For Indonesia, because "the domestic tobacco industry has moved offshore, cigarette brands that were previously identified as 'local' brands, such as *Landshark*, are now imported, but they still enjoy a large consumer following in Australia". In Indonesia's view, this measure is trade-restrictive because it affects the competitive opportunities in the market.²⁸⁴⁵

7.1127. Indonesia also argues that "[i]t is without question that there is a profound difference in the quality of tobacco products, and this is especially true in the case of cigars". The notion that plain packaging "could have no effect on premium brands cannot be reconciled with the fact that producers are unable to leverage their branding, intellectual property, or packaging to convey quality to consumers to convince them to leave a familiar brand and try an unknown imported

²⁸⁴¹ Indonesia's first written submission, paras. 397-399; response to Panel question Nos. 117 and 165; and second written submission, para. 270.

²⁸⁴² Indonesia's first written submission, para. 400 (quoting Parr et al. 2011a, (Exhibits AUS-117, JE-24(49)), p. 56 (emphasis added by Indonesia)).

²⁸⁴³ Indonesia's first written submission, para. 401. See also Indonesia's second written submission, para. 270.

²⁸⁴⁴ Indonesia's first written submission, paras. 402-403; response to Panel question No. 117; and second written submission, para. 271.

²⁸⁴⁵ Indonesia's response to Panel question No. 117.

brand". For Indonesia, changes to the conditions under which tobacco products can be sold in Australia as unprecedented and significant as those imposed by the TPP measures would logically have some effect on competition in the marketplace. Indonesia adds that "[c]ertainly no one would argue that plain packaging is intended to increase trade, thus the reasonable conclusion is that the design, structure, and architecture of the plain packaging measures are intended to restrict trade".²⁸⁴⁶ Indonesia elaborates that, "[in] Australia's own words, technical regulations that protect public health 'are unlikely to be trade-facilitating'", which, for Indonesia, indicates that "Australia admits what is intuitive about the [TPP] measures: that such a radical change in the marketplace is likely to have some effect on competitive opportunities" and that "[i]f ... it is unlikely that the [TPP] measures are trade-facilitating, then the logical conclusion is that they are trade-restrictive".²⁸⁴⁷

7.1128. Indonesia notes that, while it has not specifically addressed compliance costs, it supports arguments made on this point by Honduras in its first written submission and at the first meeting with the Panel.²⁸⁴⁸

7.1129. Australia argues that "none of the complainants have discharged [their] burden in relation to their four overarching claims of trade-restrictiveness", which Australia characterizes as being that the TPP measures are trade-restrictive because of their alleged effects on brand differentiation and downtrading; that the TPP measures are trade-restrictive because they raise barriers to entry for the Australian tobacco market; that the TPP measures are trade-restrictive because they result in increased compliance costs; and that the TPP measures are trade-restrictive because the mandatory requirements they impose operate as a condition for the importation of tobacco products into Australia; or that technical regulations, by their very nature, impose limits on trade.²⁸⁴⁹

7.1130. With respect to brand differentiation, Australia submits that "the complainants' qualitative argument is insufficient, as a matter of law, to establish that the tobacco plain packaging is trade-restrictive, because it does not demonstrate a limiting effect on international trade in tobacco products". Australia argues that the complainants incorrectly equate the legal standard of trade-restrictiveness with one of "competitive freedom" of market participants, such that a limitation on any "competitive opportunity" in the marketplace would suffice to establish that a technical regulation is trade-restrictive, regardless of whether it results in any limiting effect on international trade in imported products.²⁸⁵⁰ This would, in Australia's view, convert "trade-restrictiveness" into a *per se* standard as "[v]irtually every technical regulation will impose, with respect to at least one market participant, a limiting condition that did not exist prior to its adoption". Australia submits that, even assuming that the TPP measures limit a producer's ability to distinguish its tobacco products from those of other producers (which, Australia says, they do not), this is insufficient to demonstrate, without more, that it has a limiting effect on international trade in tobacco products.²⁸⁵¹ Australia adds that, in the absence of additional evidence and arguments demonstrating, for example, that the design, structure and operation of the TPP measures will result in a decrease in overall demand for tobacco products in Australia, "it is not evident from a purely qualitative assessment that it is trade-restrictive in the sense that the Appellate Body found in *US – COOL*".²⁸⁵²

7.1131. Australia submits that the complainants have failed to articulate any viable basis for their argument that any purported limitations on a tobacco producer's ability to distinguish its products from those of other producers would necessarily result in a limiting effect on international trade in tobacco products. Australia notes the complainants' arguments that tobacco producers in the "premium" segment are "disproportionately" affected by the TPP measures, and submits that this is insufficient by itself to establish trade-restrictiveness under a correct reading of Article 2.2. Australia adds that the complainants have not presented any argument or evidence explaining why the design, structure and operation of the TPP measures and its alleged effects on brand

²⁸⁴⁶ Indonesia's response to Panel question No. 117.

²⁸⁴⁷ Indonesia's second written submission, para. 267.

²⁸⁴⁸ Indonesia's response to Panel question No. 117.

²⁸⁴⁹ Australia's first written submission, para. 531.

²⁸⁵⁰ Australia's second written submission, para. 403.

²⁸⁵¹ Australia's second written submission, paras. 404-405.

²⁸⁵² Australia's second written submission, para. 406.

differentiation are likely to result in a reduction in overall imports of tobacco products from all Members ("bearing in mind the complainants' refusal to admit that the tobacco plain packaging measure will result in a decline in overall demand for tobacco products").²⁸⁵³ Australia refers to the Appellate Body's statements in *US – COOL* (Article 21.5 – Canada and Mexico) that in respect of non-discriminatory internal measures that address a legitimate objective, a complainant may be required to provide "supporting evidence and argumentation of actual trade effects" to establish that such a measure nevertheless results in a limiting effect on overall trade for the purposes of Article 2.2. Australia submits that the complainants' arguments fit this description of a claim that requires supporting evidence and argumentation of actual trade effects but that they have failed to adduce evidence and arguments demonstrating that the TPP measures result in such a limiting effect on overall trade in tobacco products.²⁸⁵⁴

7.1132. With respect to brand differentiation and downtrading effects, Australia submits that the complainants' claim is insufficient to establish that a measure is trade-restrictive within the meaning of Article 2.2 of the TBT Agreement because the complainants have failed to demonstrate that any such downtrading effects result in a limiting effect on international trade; and (i) that downtrading is likely to occur in the Australian market as a result of the design, structure and operation of the TPP measures; or (ii) that any downtrading effects that have occurred in the Australian market are attributable to the TPP measures.²⁸⁵⁵

7.1133. Australia submits that the "first and most fundamental problem with these allegations is that it simply does not follow that any such downtrading effects will result (or have resulted) in a limiting effect on trade in imported tobacco products in Australia". Australia asserts that the complainants have failed to adduce any evidence or argument demonstrating why the design, structure and operation of the TPP measures, and their theoretical effects on the ability to differentiate tobacco products on the basis of brands, or any resulting downtrading effects on imported tobacco products, will have a limiting effect on trade in the tobacco products that are subject to the measure.²⁸⁵⁶ Further, Australia submits that the empirical evidence suggests that the TPP measures have had no "limiting effect" on imports of tobacco products, as the proportion of imported products in the Australian market has continued to rise since the introduction of the TPP measures, even as demand for tobacco products in Australia declines.²⁸⁵⁷

7.1134. Australia submits that even if downtrading effects were sufficient to establish that the TPP measures are trade-restrictive within the meaning of Article 2.2 of the TBT Agreement, the complainants have failed to establish that downtrading is likely to occur in the Australian market as a result of the design, structure and operation of the TPP measures.²⁸⁵⁸ Relying on its expert, Professor Dubé, Australia argues that "[Professor] Steenkamp does not provide any evidence, theoretical or empirical, to support the conclusion that these measures will disproportionately affect premium brands"; Australia submits that such demonstration is a condition precedent for their downtrading claims. Further, Australia argues that the complainants' own evidence suggests that the TPP measures have not put any downward pricing pressure on the premium segment of the market.²⁸⁵⁹

7.1135. Australia also contends that the complainants have failed to demonstrate that any downtrading effects that have occurred in the Australian market are attributable to the TPP measures and not to other factors.²⁸⁶⁰ In this connection, the report by the complainants' experts from the Institute for Policy Evaluation (IPE) "does not separate out the effects of the tobacco plain packaging measure from the other elements of Australia's comprehensive tobacco control policy", and in particular, the fact that the measures' implementation coincided with the introduction of updated and enlarged GHWs.²⁸⁶¹ Australia further argues that the complainants' assertion that any downtrading effects in Australia are attributable to the TPP measures is contrary

²⁸⁵³ Australia's second written submission, para. 407.

²⁸⁵⁴ Australia's response to Panel question No. 117, paras. 117-119. See also Australia's second written submission, para. 408.

²⁸⁵⁵ Australia's first written submission, paras. 533 and 546.

²⁸⁵⁶ Australia's first written submission, paras. 534-535.

²⁸⁵⁷ Australia's first written submission, para. 537 and Figure 17.

²⁸⁵⁸ Australia's first written submission, para. 540.

²⁸⁵⁹ Australia's first written submission, para. 541.

²⁸⁶⁰ Australia's first written submission, para. 542; and second written submission, para. 414.

²⁸⁶¹ Australia's first written submission, para. 543; and second written submission, para. 414.

to the views of tobacco manufacturers operating in Australia, who have instead attributed downtrading effects to increases in excise taxes.²⁸⁶² The complainants "also ignore[] the reality that downtrading is occurring in a number of markets globally, and is not unique to Australia". Thus, given that Australia is the only country to have implemented tobacco plain packaging, downtrading effects in other markets cannot be attributed in any way to a "plain packaging effect".²⁸⁶³

7.1136. Australia adds that it "is undisputed that the 'downtrading' phenomenon to which the complainants refer predates the adoption of tobacco plain packaging, not only in Australia, but in numerous other markets around the world", such that, "[e]ven if the complainants had established that these effects are attributable to the tobacco plain packaging measure ... this would be legally insufficient to establish trade-restrictiveness in quantitative terms, because it does not demonstrate a reduction in either the volume or the value of imported tobacco products".²⁸⁶⁴ In this connection, Australia submits that as the data submitted by the parties²⁸⁶⁵ "unequivocally establish, imports of tobacco products in Australia have increased in both volume and value terms since the introduction of the tobacco plain packaging measure, despite consistent decline in demand for and consumption of tobacco products", and that "there has been no decrease in the volume or value of their own imports of tobacco products, which were a negligible share of total imports in the Australian market prior to the introduction of the tobacco plain packaging measure and have remained so thereafter". Given "the enormous increase in the volume of tobacco imports in the Australian market since the introduction of the tobacco plain packaging measure, and the critical importance to the complainants' case that the measure has not led to a decline in the rates of tobacco use in Australia, their claim of trade-restrictiveness can only be based on a decline in value", for which, Australia submits, the complainants have offered no evidence.²⁸⁶⁶

7.1137. In the context of its arguments concerning the connection between downtrading and the TPP measures, Australia also points out that Professor List "expressly admitted that it was not possible to separate and distinguish the effects of tobacco plain packaging from the effects of the enlarged GHWs". Thus, Australia argues that the complainants "try artificially to address this issue by using much smaller GHWs introduced by Australia in 2006 as a proxy for the enlarged and updated GHWs adopted in 2012", and "essentially argue that, because the smaller GHWs introduced in 2006 did not have any downtrading effects, this Panel should presume that the enlarged and updated GHWs adopted in 2012 did not have any downtrading effects either". Australia submits that this is not an adequate response because of the deficiency of the evidence relied on, and because, in Australia's submission, the smaller GHWs introduced in 2006 are not an appropriate counterfactual, and cannot be presumed to have had the same effects as the enlarged and updated GHWs adopted in 2012.²⁸⁶⁷

7.1138. Australia also reiterates that downtrading is an industry trend that is occurring in a number of markets globally, and is attributable to factors such as excise taxes or the industry's own marketing and pricing strategies" Australia refers to statements by tobacco industry executives and submits that they "confirm[] the link between increases in excise taxes and 'widening gaps' in market prices, but also expressly concede[] that the alleged 'downtrading' effect occurring in the Australian market was 'caused by the industry ... by launches in the low price segment'".²⁸⁶⁸ Australia argues that these are "unequivocal statements by tobacco industry executives recognising the link between excise taxes and the tobacco industry's pricing strategies on the one hand, and downtrading in Australia on the other".²⁸⁶⁹

7.1139. Australia further argues that, "[i]n theory, allegations of downtrading, impact on access to the market, or costs of compliance could, if accompanied by proper evidence of a consequential limiting effect on trade, form the basis of a finding of trade-restrictiveness within the meaning of

²⁸⁶² Australia's first written submission, para. 544.

²⁸⁶³ Australia's first written submission, para. 545.

²⁸⁶⁴ Australia's second written submission, paras. 409-410 and 418. (emphasis original)

²⁸⁶⁵ Australia's second written submission, para. 411 (referring to the parties' responses to Panel question No. 5).

²⁸⁶⁶ Australia's second written submission, para. 411.

²⁸⁶⁷ Australia's second written submission, para. 417.

²⁸⁶⁸ Australia's second written submission, paras. 418-419.

²⁸⁶⁹ Australia's second written submission, para. 419.

Article 2.2 of the TBT Agreement".²⁸⁷⁰ Australia submits that the complainants have failed either to demonstrate that such effects have arisen as a result of the TPP measures, or that such effects have resulted in a limiting effect on trade.

7.1140. Australia submits that the complainants' focus "on alleged impacts of the tobacco plain packaging measure on sales by certain companies, in certain market segments, and ... in respect of certain WTO Members" is "plainly insufficient to establish that the tobacco plain packaging measure has a limiting effect on overall trade in tobacco products – i.e. that the measure has resulted in a limiting effect on imports of tobacco products, assessed collectively".²⁸⁷¹ Australia states that it is "inherent in the complainants' arguments of downtrading ... that sales of lower priced brands of tobacco products have *increased* as a result of Australia's tobacco plain packaging measure (to the detriment of 'premium' brands)", such that "even if the complainants had demonstrated ... that their own tobacco product imports have been negatively affected by the measure, this would not, without more, establish a limiting effect on *overall* trade in tobacco products because any such impact may be offset by increased trade by other Members, or by increased sales in other market segments".

7.1141. Furthermore, Australia continues, "[t]o the extent that the complainants *have* attempted to link downtrading to any actual limiting effect on overall trade, it has been by reference to the weighted average price for a cigarette." Australia points out that the Dominican Republic's expert, Professor List, "confirmed that there has been a significant *increase* in the real weighted price of a cigarette since the introduction of the tobacco plain packaging measure".²⁸⁷² Australia also argues that "subsequent to the introduction of the [TPP measures], overall trade in tobacco products has increased in both volume and value", which "can be explained in part by the movement of domestic production offshore"; however, "data provided by the complainants also clearly demonstrates that the total value of the retail market increased in the period following the introduction of the [TPP measures], despite a reduction in total demand for tobacco products in the Australian market".²⁸⁷³

7.1142. With respect to raised barriers to entry to the Australian tobacco market, Australia submits that "there are three distinct problems" with the claims.²⁸⁷⁴ First, the conclusion that the TPP measures increase barriers to entry "is directly contradicted by another of the complainants' experts, Professor Steenkamp", who "claims that brand differentiation 'creates barriers to entry that make it difficult for other firms to enter the market'; and the effect of plain packaging is to destroy such brand differentiation".²⁸⁷⁵ In Australia's view, the logical conclusion of Professor Steenkamp's claims is that the TPP measures would enhance prospects of new entry. Second, Australia contends that "the complainants have not provided any evidence to support Professor Neven's conclusion that plain packaging has, or will result in, reduced profit margins". Australia states that the complainants' evidence demonstrates a continued upward trend in prices following adoption of the tobacco plain packaging measure".²⁸⁷⁶ Finally, Australia submits that "Professor Neven's claim that the tobacco plain packaging measure reduces the ability of new entrants to communicate with potential customers is made in the abstract, entirely divorced from the reality of Australia's dark market".

7.1143. Specifically, Australia submits that Professor Neven makes no attempt to analyse the extent to which the capacity of a new entrant to communicate with potential customers in Australia had already been reduced by measures that are not challenged in these proceedings – such as Australia's existing advertising and promotion restrictions, including point of sale and retail display bans.²⁸⁷⁷ Australia refers to its experts, HoustonKemp, to argue that the Australian market for

²⁸⁷⁰ Australia's response to Panel question No. 117(b), para. 121. (emphasis original)

²⁸⁷¹ Australia's response to Panel question No. 117.

²⁸⁷² Australia's response to Panel question No. 117 (referring to Dominican Republic's opening statement at the first meeting of the Panel, Appendix 2: Powerpoint Presentation by J. List, slide 58). (emphasis original)

²⁸⁷³ Australia's response to Panel question No. 117 (referring to Supplementary Graphs, Import Volumes, Value and Share of the Market, (Exhibit AUS-512), Figure 15); second written submission, para. 412; and responses to Panel question Nos. 151 and 165.

²⁸⁷⁴ Australia's first written submission, para. 550.

²⁸⁷⁵ Australia's first written submission, para. 551 (quoting Steenkamp Report, (Exhibit DOM/HND-5), paras. 9-10 and 43).

²⁸⁷⁶ Australia's first written submission, para. 552.

²⁸⁷⁷ Australia's first written submission, para. 553.

tobacco products has been characterised by exceptionally high barriers to entry for a very long period, and that the oligopolistic nature of the Australian tobacco market, and the advantages that incumbent firms enjoy as a result, has long made market entry virtually impossible, with the effect that there is no significant alteration to barriers to entry as a consequence of the TPP measures.²⁸⁷⁸ Australia thus argues that, "while raised barriers to entry are potentially relevant in determining whether the [TPP measures have] a limiting effect on trade, the complainants have failed to establish that barriers to entry are likely to be raised as a result of the design, structure and operation of the tobacco plain packaging measure; or that any increased barriers to entry in the Australian market are attributable to the tobacco plain packaging measure and not to other factors".²⁸⁷⁹

7.1144. Australia also notes that some of the complainants argue that the TPP measures are trade-restrictive because the mandatory requirements they impose operate as a condition for the importation of tobacco products into Australia²⁸⁸⁰; or, similarly, because "technical regulations, by their very nature, impose limits on trade".²⁸⁸¹ Australia submits that "the fact that the [TPP measures are] a technical regulation, or that compliance with the [TPP measures] operate[] as a condition on the sale of tobacco products in Australia is not sufficient to establish" that they are trade-restrictive within the meaning of Article 2.2 of the TBT Agreement.²⁸⁸² Australia elaborates that, notwithstanding the fact that technical regulations are by their nature mandatory²⁸⁸³, "the Appellate Body in *US – Tuna II (Mexico)* and in *US – COOL* expressly recognized that there may be circumstances in which a technical regulation is *not* trade-restrictive"²⁸⁸⁴, such that there is "no basis for alleging that a technical regulation is trade-restrictive solely because compliance with its requirements is mandatory; or that technical regulations are *per se* trade-restrictive".²⁸⁸⁵

7.1145. Australia also submits that "there is an obvious way in which the complainants could have argued that the measure is trade-restrictive – they could admit that, over time, Australia's measure will reduce demand for tobacco products by reducing initiation and relapse, and increasing quitting. In the context of Australia's market, where domestic production is being phased out, this would necessarily result in a reduction in imports".²⁸⁸⁶ Australia elaborates that the TPP measures will result in a limiting effect on overall trade in tobacco products in the future because "(i) the measure will reduce the use of tobacco products (by discouraging uptake and relapse and encouraging quitting); and (ii) since imports will soon represent the entirety of Australia's tobacco product market, with domestic production being phased out, a reduction in the use of tobacco products will necessarily limit overall trade in tobacco products".²⁸⁸⁷ Because of this latter impact, "the complainants' trade-restrictiveness arguments are put forward in a context where their position on contribution (that the measure is incapable of achieving any degree of contribution to its objective) relies on contesting the proposition that the measure will reduce overall trade in tobacco products".²⁸⁸⁸ In this connection, Australia argues that the TPP measures restrict trade only to the extent necessary to achieve its degree of contribution to its public health objectives.²⁸⁸⁹

²⁸⁷⁸ Australia's first written submission, para. 554; and response to Panel question No. 117.

²⁸⁷⁹ Australia's first written submission, para. 555; and response to Panel question No. 117.

²⁸⁸⁰ Australia's first written submission, para. 562 (referring to Dominican Republic's first written submission, para. 975, in turn referring to Appellate Body Report, *US – COOL*, paras. 375 and 976; and Cuba's first written submission, para. 401). (emphasis original)

²⁸⁸¹ Australia's first written submission, para. 562 (referring to Dominican Republic's first written submission, para. 973, in turn referring to Appellate Body Reports, *US – Tuna II (Mexico)*, para. 322; and *US – COOL*, para. 376). See also Dominican Republic's first written submission, para. 960.

²⁸⁸² Australia's first written submission, para. 562.

²⁸⁸³ Australia's first written submission, para. 563.

²⁸⁸⁴ Australia's first written submission, para. 564 (referring to Appellate Body Reports, *US – Tuna II (Mexico)*, para. 322 fn 647; and *US – COOL*, para. 376 fn 748).

²⁸⁸⁵ Australia's first written submission, para. 564.

²⁸⁸⁶ Australia's opening statement at the first meeting of the Panel, para. 93.

²⁸⁸⁷ Australia's response to Panel question No. 119.

²⁸⁸⁸ Australia's response to Panel question No. 119.

²⁸⁸⁹ Australia's response to Panel question No. 151; and response to Panel question No. 165.

7.2.5.4.2.2 Main arguments by the third parties

7.1146. The European Union is "not persuaded that the issue of downtrading ... in itself, and without more, demonstrates a trade-restriction, at least insofar as it is simply limited to the observation that the market share of one complainant is increasing at the expense of another". Nor is it persuaded that such a phenomenon, which might involve a decrease in the prices of some products, demonstrates, without more, a trade-restriction. The European Union rather thinks that, as part of its overall analysis, the Panel would also have to look into the question of whether volumes and overall value had remained stable or even increased, including the effects that the measure is apt to cause, and taking into account any mitigating steps taken by the interested firms.²⁸⁹⁰

7.1147. The European Union sees "some connection between the discussion about whether or not the measure is trade-restrictive, on the one hand, and the discussion about whether or not the measure makes a contribution to its objective, on the other hand". For the European Union, both of these discussions are about what the measure causes, or is apt to cause: on the one hand, trade-restriction, and on the other hand, a reduction in smoking prevalence. The European Union suggests that the Panel adopt a consistent approach to these issues, particularly as regards its treatment of the evidence – if the Panel is minded to find that the measure has caused or is apt to cause a trade-restriction, it might also be minded to find that the measure has caused or is apt to cause some reduction in smoking prevalence. This would lead the Panel to make a full analysis under Article 2.2 of the TBT Agreement, that is, one including both a relational and a comparative analysis. For the European Union, this offers the most balanced and fruitful way of addressing the dispute.²⁸⁹¹

7.1148. For New Zealand, the complainants have failed to demonstrate that any changes in marketplace conditions in Australia with respect to tobacco products limit the trade in imported products; rather the complainants' allegations appear to be addressed towards protecting the expectations of tobacco companies to certain levels of profit or market share. Thus, the complainants' unsubstantiated allegations do not engage Australia's obligations under Article 2.2 of the TBT Agreement. The complainants have failed to establish that the TPP measures are trade-restrictive because of any alleged brand differentiation and downtrading effects.²⁸⁹²

7.1149. New Zealand does not consider that the types of impacts alleged by the complainants, such as downtrading, impact on access to the market or costs of compliance demonstrate "trade-restrictiveness" within the meaning of Article 2.2 of the TBT Agreement. The complainants seek to expand the concept of "trade-restrictiveness" under Article 2.2 beyond its ordinary meaning and without any WTO jurisprudence to support the proposition. Trade-restrictiveness can be assessed by looking at the competitive opportunities available to imported products. As Australia argued, the focus should be on "whether the technical regulation at issue modifies the conditions of competition in the marketplace in a manner that has a limiting effect on trade for imported products subject to that regulation".

7.1150. Nigeria argues that the economic expert evidence submitted by the complainants "highlights the detrimental effect on access to the Australian market and the distortion of competitive opportunities that result from the mandated lack of opportunity to differentiate products through trademarks and packaging designs". Nigeria submits that the TPP measures thus impose a very significant restriction on competition and trade.²⁸⁹³

7.1151. Norway argues that the complainants must actually establish, and not merely assert, that the measure has a limiting effect on trade in tobacco products and/or is likely to occur in the Australian market as a result of the design, structure and operation of the plain packaging

²⁸⁹⁰ European Union's third-party response to Panel question No. 4.

²⁸⁹¹ European Union's third-party response to Panel question No. 4.

²⁸⁹² New Zealand's third-party submission, paras. 87-89; and third-party response to Panel question

No. 4.

²⁸⁹³ Nigeria's third-party submission, para. 30.

measure. It would not be sufficient, in Norway's view, "to rely on an abstract notion of market conditions".²⁸⁹⁴

7.1152. Singapore urges the Panel to consider, in formulating a test of trade-restrictiveness and applying it to the types of impacts alleged by the complainants (such as downtrading), that at the heart of the Article 2.2 obligation lies the necessity test, and the threshold for "trade-restrictiveness" should not be unduly onerous. Singapore notes that while Australia rejects the proposition that downtrading will result in a limiting effect on trade in imported tobacco products in Australia, it accepts that (1) an increase in compliance costs; and (2) raised barriers to entry in the Australian tobacco market are potentially relevant in determining whether the TPP measures are trade-restrictive.

7.1153. Singapore does not agree with Australia's proposition that in order to show that the TPP measures are trade-restrictive within the meaning of Article 2.2, the complainants must demonstrate that they have a limiting effect on overall trade in tobacco products of all WTO Members. Instead, it is of the view that the affected trade can be between the complaining Member and the defending Member, and the enquiry should not be broadened such that trade restriction in question is with respect to the trade of any WTO Member. The term ""international trade"" in Article 2.2 of the TBT Agreement is also found in Article XX of GATT 1994, but this term has not been applied in such a manner.²⁸⁹⁵

7.1154. Nicaragua submits that, "given the economic importance of trademarks and brands for market access and fair competition", the prohibition on the use of all distinguishing trademarks, design, logo, and color characteristics from the packaging of branded tobacco products, leaving only the brand name in a standard form, necessarily restricts competitive opportunities in the Australian market. Nicaragua adds that the TPP measures provide a strong disincentive to export to Australia and will make it extremely difficult, if not impossible, for any manufacturer of tobacco products not currently present in the Australian market to enter that market. Nicaragua considers that the evidence presented by the complainants in respect of the trade-restrictive and competition-distorting nature of Australia's plain packaging measure confirms this. For example, Professor Neven explains the different functions of a trademark and concludes that "plain packaging will have a significant negative effect on the prospects of entry into and expansion on the Australian tobacco market" with the exception of the possibility of low-cost entry by non-branded, low-quality cigarettes that compete solely on the basis of price rather than product quality. Nicaragua adds that, at the time of notifying the plain packaging measure under Article 2.9.2 of the TBT Agreement, Australia itself acknowledged that plain packaging would have a significant effect on trade.²⁸⁹⁶

7.1155. Nicaragua considers that the arguments by the complainants concerning the trade-restrictiveness of the TPP measures are sufficient to show that the measure is having a "limiting effect on competitive opportunities" in the Australian market. For example, Professor Neven "clearly and convincingly provides theoretical and empirical evidence demonstrating that the plain packaging measures restricts market access, distorts competitive opportunities and provides a disincentive to export to Australia".²⁸⁹⁷ Nicaragua considers that these impacts of the plain packaging measure on conditions of competition, market access, value, price, and profitability clearly demonstrate its trade-restrictiveness within the meaning of Article 2.2 of the TBT Agreement.²⁸⁹⁸

7.1156. South Africa submits that actual evidence of trade-restrictiveness has not been presented and in the absence of such evidence the Panel cannot make any finding in this respect. South Africa argues that Article 2.2 protects the expectations of WTO Members that technical regulations will not limit trade to a greater extent than is necessary to fulfil a legitimate objective. It would be incumbent on the complainants to prove that "downtrading" is directly related to the introduction of plain packing measures. South Africa adds that "potentially such measures may impact on

²⁸⁹⁴ Norway's third-party submission, para. 95.

²⁸⁹⁵ Singapore's third-party response to Panel question No. 4.

²⁸⁹⁶ Nicaragua's third-party submission, paras. 37-38.

²⁸⁹⁷ Nicaragua's third-party response to Panel question No. 4 (referring to Neven Report, (Exhibit UKR-3) (SCI), pp. 38-41).

²⁸⁹⁸ Nicaragua's third-party response to Panel question No. 4.

market access or the cost of compliance; however, none of the complainants have positively established that plain packaging measures may have resulted solely in such impacts". South Africa submits that "[o]ther factors such as excise taxes or even a general trend of 'downdrading' in other markets where no plain packaging measures are present were not considered to establish such an argument".²⁸⁹⁹

7.1157. Uruguay argues that if "a complainant argues or suggests the Australian measure is trade-restrictive this should be substantiated and show concrete and actual trade effects". For Uruguay, it "is not enough simply to allege that downdrading, impact on access to the market or costs of compliance [to] demonstrate trade-restrictiveness", especially "in a situation of non[-]discrimination". Moreover, Uruguay submits that the fact that consumption diminishes and the market is reduced does not imply or prove trade-restrictiveness. Though there might be some adjustments in market share, Uruguay submits that "this is a natural consequence of the policy adopted and no one can expect market shares to remain completely static".

7.1158. Uruguay adds that it can also be alleged that it is harder for imports to adjust to the new requirements "compared with local production" but this "is almost always true in most trade situations (and not only because of new regulations) and does not prove trade-restrictiveness".²⁹⁰⁰

7.1159. Zimbabwe argues that, by prohibiting the use of trademarks on tobacco products and their packaging and imposing a standardized design, the TPP measures fundamentally alter the competitive conditions on the Australian market for imported products. Zimbabwe refers to Professor Neven's expert report, and submits that the plain packaging requirements significantly limit the access of imported products to the Australian market because of the combination of negative communication and price effects.²⁹⁰¹ Referring to the reports by Victoria Parr and Professor Winer, Zimbabwe notes that they also conclude that the plain packaging requirements distort competition by greatly restricting the possibility to differentiate between products on the basis of quality.²⁹⁰² This results in the "commoditization" of these products and a downward pressure on prices. By preventing quality-based distinctions, the TPP measures will undoubtedly negatively impact trade of high-quality Virginia tobacco leaf such as that produced by Zimbabwe. Increased price competition will have a downward effect on prices of tobacco leaf as manufacturers of tobacco products will be attempting to safeguard their profit margins by sourcing cheaper raw materials. Zimbabwe further submits that a decline in prices of tobacco leaf would have devastating consequences for its economy as a whole because of the importance of tobacco as well as for small farmers and their families who are subsisting by growing tobacco. Zimbabwe cannot, it states, afford a decline in prices of tobacco leaf and has no alternatives to continuing to grow tobacco.²⁹⁰³

7.2.5.4.2.3 Analysis by the Panel

7.1160. As described above, the complainants present a number of arguments in support of their view that the TPP measures are "trade-restrictive" within the meaning of Article 2.2.

7.1161. Overall, these arguments can be described as relating to:

- a. the effects of the TPP measures on the competitive environment in the Australian market;
- b. the effects of the TPP measures on the level of trade in tobacco products; and
- c. the costs of complying with the regulatory requirements arising from the TPP measures.

7.1162. We consider these arguments in turn.

²⁸⁹⁹ South Africa's third-party response to Panel question No. 4.

²⁹⁰⁰ Uruguay's third-party response to Panel question No. 4.

²⁹⁰¹ Zimbabwe's third-party submission, para. 26 (referring to Neven Report, (Exhibit UKR-3) (SCI)).

²⁹⁰² Zimbabwe's third-party submission, para. 26 (referring to Parr et al. 2011a, (Exhibits AUS-117, JE-24(49); and Winer Report, (Exhibit UKR-9)).

²⁹⁰³ Zimbabwe's third-party submission, para. 26.

Whether the TPP measures are trade-restrictive because they alter the competitive environment of producers in the Australian market

Whether the TPP measures harm the competitive opportunities of imported tobacco products by restricting producers' ability to differentiate their products

7.1163. As described above, the complainants generally argue that the TPP measures restrict their competitive opportunities by affecting the ability of tobacco manufacturers to distinguish their products, and compete on the Australian market, on the basis of brands²⁹⁰⁴, thereby "eliminating competitive opportunities" and, in Indonesia's words, "fundamentally restructur[ing] the competitive conditions of the Australian cigarette market".²⁹⁰⁵

7.1164. The Dominican Republic considers that the parties' disagreement on the actual trade effects resulting from the TPP measures is not material to the Panel's finding of trade-restrictiveness under Article 2.2, because "it is evident from the design, structure, and expected operation of the measures that it severely limits competitive opportunities to differentiate tobacco products".²⁹⁰⁶

7.1165. Australia submits that the complainants' "qualitative argument" with respect to brand differentiation is insufficient, as a matter of law, to establish that the tobacco plain packaging is trade-restrictive, because it does not demonstrate a limiting effect on international trade in tobacco products. Australia argues that the complainants incorrectly equate the legal standard of trade-restrictiveness with one of "competitive freedom" of market participants, such that a limitation on any "competitive opportunity" in the marketplace would suffice to establish that a technical regulation is trade-restrictive, regardless of whether it results in any limiting effect on international trade in imported products.²⁹⁰⁷ This, in Australia's view, would convert "trade-restrictiveness" into a *per se* standard as "[v]irtually every technical regulation will impose, with respect to at least one market participant, a limiting condition that did not exist prior to its adoption". Australia submits that, even assuming that the TPP measures limit a producer's ability to distinguish its tobacco products from those of other producers (which, Australia says, it does not), this is insufficient to demonstrate, without more, that it has a limiting effect on international trade in tobacco products.²⁹⁰⁸

7.1166. We agree with Australia that a demonstration that the challenged measures may result in some alteration of the overall competitive environment for suppliers on the market would not, in itself, demonstrate their "trade-restrictiveness" within the meaning of Article 2.2. Rather, as described above, what we must determine is the extent to which the challenged measures have a *limiting effect* on international trade.²⁹⁰⁹ We do not consider, therefore, that a demonstration that the TPP measures "restructured the competitive conditions of the Australian cigarette market"²⁹¹⁰, or that they *modify* the conditions under which all manufacturers will compete against each other on the market, would, in itself, be sufficient to demonstrate their trade-restrictiveness. In this respect, we do not understand the reference to the impact of a technical regulation on "competitive opportunities", in past panel and Appellate Body reports, to imply that *any* modification of the terms on which all products compete on the market as a result of a technical regulation would demonstrate the "trade-restrictiveness" of such technical regulation. Rather, as

²⁹⁰⁴ Dominican Republic's first written submission, para. 977.

²⁹⁰⁵ Indonesia's first written submission, para. 395; and second written submission, para. 266. See also, for example, Honduras's first written submission, paras. 870-877; Dominican Republic's first written submission, paras. 977-978; and Cuba's first written submission, paras. 402-403.

²⁹⁰⁶ Dominican Republic's response to Panel question No. 117, para. 233.

²⁹⁰⁷ Australia's second written submission, para. 403.

²⁹⁰⁸ Australia's second written submission, paras. 404-405.

²⁹⁰⁹ See, in relation to Article III:4 of the GATT 1994, Appellate Body Report, *Korea – Various Measures on Beef*, para. 137 ("A formal difference in treatment between imported and like domestic products is thus neither necessary, nor sufficient, to show a violation of Article III:4. Whether or not imported products are treated 'less favourably' than like domestic products should be assessed instead by examining whether a measure modifies the *conditions of competition* in the relevant market to the detriment of imported products." (emphasis original)).

²⁹¹⁰ Indonesia's first written submission, para. 395.

described above, what must be considered is the extent to which the technical regulation at issue has a *limiting effect* on *international trade*.

7.1167. Specifically, we agree with the complainants that, to the extent that they prevent the use of certain design features on tobacco products and their retail packaging, the TPP measures limit the opportunity for producers to differentiate their products. We also agree that differentiation engenders consumer loyalty and increases consumers' willingness to pay, and that, by restricting the opportunity for brands to differentiate themselves, the TPP measures limit the opportunity for tobacco manufacturers to compete on the basis of such brand differentiation.²⁹¹¹ We are not persuaded, however that this modification of the competitive environment for all tobacco products on the entire market (which may in principle *increase* competition on the market²⁹¹²) constitutes, in itself, a restriction on "competitive opportunities" for imported tobacco products that must be assumed to have a "limiting effect" on international trade.

7.1168. Rather, as Australia expressed it, it needs to be shown *how* such effects on the conditions of competition on the market give rise to a limiting effect on international trade in tobacco products.²⁹¹³ As highlighted by the Appellate Body, appropriate evidence of such limiting effect will in particular be required in the case of a non-discriminatory internal measure. We do not consider, however, that this demonstration must be based on actual trade effects. Rather, it could in principle be based on a qualitative assessment, taking into account in particular the design and operation of the measures, or on a quantitative assessment of its actual trade effects, or both.²⁹¹⁴

7.1169. The complainants present a number of specific arguments detailing how, in their view, the reduced opportunity for manufacturers to compete on the basis of brand differentiation will lead to: (i) "downtrading" and a fall in the price of premium brands, and consequently a reduction in the value of imported products, in particular premium products; (ii) an increase in price competition and a fall in prices and, consequently, a decrease in the sales value of tobacco products and the total value of imports. Honduras and Indonesia also argue that, in addition to harming incumbents, the TPP measures create barriers to entry on the Australian market.

7.1170. Australia responds that, "[i]n theory, allegations of downtrading, impact on access to the market, or costs of compliance could, if accompanied by proper evidence of a consequential limiting effect on trade, form the basis of a finding of trade-restrictiveness within the meaning of Article 2.2 of the TBT Agreement". Australia submits however that the complainants have failed either to demonstrate that such effects have arisen as a result of the TPP measures, or that such effects have resulted in a limiting effect on trade.²⁹¹⁵

7.1171. We consider first the specific arguments of the complainants in respect of the impact of the TPP measures on barriers to entry onto the Australian market, before turning to their arguments relating to their impact on levels of trade and, finally, compliance costs.

Whether the TPP measures raise barriers to entry onto the Australian market

7.1172. Honduras argues, with reference to the expert report by Professor Neven, that Australia's TPP measures produce certain communication and price effects that make access to the Australian tobacco market almost impossible.²⁹¹⁶

7.1173. Professor Neven states that "the profits that a manufacturer can expect to earn in a given market determine its willingness to engage in trade, enter new markets and compete with established brands".²⁹¹⁷ Professor Neven explains that plain packaging produces three different

²⁹¹¹ Dominican Republic's response to Panel question No. 117.

²⁹¹² Product differentiation is typically seen as relaxing the pressure on prices and as allowing firms to charge a premium over their marginal cost.

²⁹¹³ Australia's first written submission, para. 516. See also Appellate Body Report, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.208 fn 643 (referring to Appellate Body Report, *EC – Poultry*, paras. 126-127).

²⁹¹⁴ See para. 7.1076 above.

²⁹¹⁵ See para. 7.1139 above.

²⁹¹⁶ Honduras's second written submission, para. 556.

²⁹¹⁷ Honduras's second written submission, para. 556 (quoting Neven Report, (Exhibit UKR-3) (SCI), para. 6.1, p. 36).

effects on competition and trade in the Australian market: (i) a contestability effect; (ii) a communication effect; and (iii) a competitive effect.²⁹¹⁸ He explains that, as a result of the contestability effect, plain packaging would, in principle, lower barriers to entry and enhance prospects of entry onto the Australian market. He argues, however, that this initial positive contestability effect on barriers to entry is offset by the other two effects produced by plain packaging. In his view, the communication effect of plain packaging raises barriers to entry as successful entry for potential entrants becomes significantly more difficult without the possibility to create brand awareness. And the competitive effect also raises barriers to entry because producers need to reduce prices to address consumers' reduced willingness to pay, which reduces their profit margins, such that "operators have lower willingness to engage in trade", which "also leads to a lower likelihood of entry".²⁹¹⁹ Professor Neven thus concludes that "[p]lain packaging reduces product differentiation and lowers the prospect for profitable continued market presence and entry", and "also considerably hampers entry of new products on the market given that new products need trademarks and product differentiation opportunities to communicate their presence on the market to potential customers".²⁹²⁰

7.1174. Honduras argues that, considering the net result from the combined operation of all three effects, "it becomes clear that plain packaging yields overall negative effects for tobacco brands regardless of whether they are already in the Australian market, or may seek to enter the Australian market".²⁹²¹

7.1175. Indonesia similarly argues that plain packaging limits trade because it makes it more difficult for imported products to establish an identity with consumers who are already familiar with domestic brands. Indonesia refers to a consumer research survey conducted for the Australian government in conjunction with the implementation of plain packaging which found that whether a brand was considered "foreign" or "local" affected consumer's attitudes towards cigarette brands, and specifically that, a number of brands were seen as distinctly "Australian", which overall was viewed as making the brand more appealing. Distinctly "Australian" cigarettes were primarily those which were seen to be in the market-place the longest or were perceived to be smoked by particular types of individuals who "represented" clearly defined Australian stereotypes (for example "tradies" (i.e. tradesmen such as plumbers or electricians), football or cricket fans).²⁹²²

7.1176. Australia identifies "three distinct problems" with the complainants' arguments on raised barriers to entry to the Australian tobacco market.²⁹²³ First, the conclusion that the TPP measures increase barriers to entry "is directly contradicted by another of the complainants' experts, Professor Steenkamp", who "claims that brand differentiation 'creates barriers to entry that make it difficult for other firms to enter the market'; and the effect of plain packaging is to destroy such brand differentiation".²⁹²⁴ In Australia's view, the logical conclusion of this analysis is that the TPP measures would enhance prospects of new entry. Second, Australia contends that "the complainants have not provided any evidence to support Professor Neven's conclusion that plain packaging has, or will result in, reduced profit margins". Australia states the complainants' evidence demonstrates a continued upward trend in prices following adoption of the tobacco plain packaging measure".²⁹²⁵ Finally, Australia submits that "Professor Neven's claim that the tobacco plain packaging measure reduces the ability of new entrants to communicate with potential customers is made in the abstract, entirely divorced from the reality of Australia's dark market".

²⁹¹⁸ The "contestability effect" is based on the premise that existing strong brands benefit from established brand loyalty, which is a factor that can constitute a barrier to potential entrants. It relates to the effect of plain packaging on loyalty to incumbent brands. The "communication effect" relates to the effect of plain packaging on the ability of potential entrants to create brand awareness for their own new products. The "competitive effect" looks at the concrete commercial impact of plain packaging and its impact on the likelihood that entry will be profitable. Neven report, (Exhibit UKR-3) (SCI), p. 38.

²⁹¹⁹ Neven Report, (Exhibit UKR-3) (SCI), pp. 39-41.

²⁹²⁰ Honduras's second written submission, para. 563; and response to Panel question No. 151.

²⁹²¹ Honduras's second written submission, para. 557.

²⁹²² Indonesia's first written submission, para. 400 (quoting Parr et al. 2011a, (Exhibits AUS-117, JE-24(49)), p. 56 (emphasis added by Indonesia)).

²⁹²³ Australia's first written submission, paras. 550-553.

²⁹²⁴ Australia's first written submission, para. 551 (quoting Steenkamp Report, (Exhibit DOM/HND-5), paras. 9-10 and 43).

²⁹²⁵ Australia's first written submission, para. 552.

Specifically, Australia submits that Professor Neven makes no attempt to analyse the extent to which the capacity of a new entrant to communicate with potential customers in Australia had already been reduced by measures that are not challenged in these proceedings – such as Australia's existing advertising and promotion restrictions, including point of sale and retail display bans.²⁹²⁶

7.1177. Australia refers to a report commissioned from HoustonKemp²⁹²⁷ to argue that the Australian market for tobacco products has been characterised by exceptionally high barriers to entry for a very long period, and that the oligopolistic nature of the Australian tobacco market and the advantages that incumbent firms enjoy as a result, have long made market entry virtually impossible, with the effect that there is no significant alteration to barriers to entry as a consequence of the TPP measures.²⁹²⁸ Australia thus argues that, "while raised barriers to entry are potentially relevant in determining whether the [TPP measures have] a limiting effect on trade, the complainants have failed to establish that barriers to entry are likely to be raised as a result of the design, structure and operation of the tobacco plain packaging measure; or that any increased barriers to entry in the Australian market are attributable to the tobacco plain packaging measure and not to other factors".²⁹²⁹

7.1178. Based on a consideration of this evidence, we are not persuaded that Honduras and Indonesia have demonstrated that the TPP measures will, overall, make it more difficult for new brands to enter the market. Honduras's conclusions that barriers to entry are raised by the TPP measures is based on Professor Neven's analysis of the effect of plain packaging on entry on the market. This consists of first identifying three "distinct effects plain packaging has on entry", and then "weighing their importance".²⁹³⁰ We consider the analytical framework proposed by Professor Neven to be helpful in understanding the effects of plain packaging on entry into the Australian market. Specifically, we agree that plain packaging can be seen as producing three distinct effects on competition and trade in the Australian market: (i) a contestability effect; (ii) a communication effect; and (iii) a competitive effect.²⁹³¹ We therefore consider further whether the complainants have demonstrated that, through the operation of these three effects taken together, the TPP measures are likely to raise new barriers to entry, as Professor Neven suggests.

7.1179. First, we agree with Professor Neven's analysis that, as a result of the TPP measures, brand loyalty to existing brands would likely be eroded which would operate to *increase* the scope for entry into the Australian market ("contestability effect"). When a potential entrant contemplates selling into a new market, pre-existing brand-loyalty toward incumbent suppliers reduces the likelihood that entry will be commercially successful. To the extent that plain packaging reduces brand loyalty, as the complainants argue is the case, it can therefore be expected to have a *positive* effect on the prospects of entry. Professor Neven expects, however, that the brand capital of current incumbents on the Australian market will not be completely depleted through the regulation, at least not initially, so that this effect will initially be weak and will only gradually decrease the brand capital of current incumbents on the Australian market. Professor Neven does not, however, explain the basis of this assumption or provide evidence to support it.²⁹³² While this argument seems plausible, it says little about the strength of the contestability effect relative to the strength of the other effects.

7.1180. We also agree that the ability to create brand awareness ("communication effect") would tend instead to *reduce* the commercial scope for entry into the Australian market to the extent that plain packaging reduces the ability to create brand awareness for a new product. In support of his assertion that the communication effect will make it virtually impossible to launch a new brand in Australia, Professor Neven submits data regarding the level of brand awareness by brand in 2012. These statistics show that even prior to plain packaging the hurdles to create brand awareness on the Australian market were significant. However, they provide only limited information on the strength of the communication effect of the TPP measures in absolute terms or relative to the strength of the other two effects identified by Professor Neven. We agree with

²⁹²⁶ Australia's first written submission, para. 553.

²⁹²⁷ See HoustonKemp Report, (Exhibit AUS-19) (SCI).

²⁹²⁸ Australia's first written submission, para. 554; and response to Panel question No. 117.

²⁹²⁹ Australia's first written submission, para. 555.

²⁹³⁰ Neven Report, (Exhibit UKR-3) (SCI), p. 38.

²⁹³¹ Neven Report, (Exhibit UKR-3) (SCI), p. 38. See also fn 2918 above.

²⁹³² See Neven Report, (Exhibit UKR-3) (SCI), fn 57.

Australia that Professor Neven has not attempted to analyse the extent to which the capacity of a new entrant to communicate with potential customers in Australia had already been significantly reduced by measures that are not challenged in these proceedings – such as Australia's existing advertising and promotion restrictions, including point of sale and retail display bans.²⁹³³ To the extent that the ability to create brand awareness was already very low prior to their introduction²⁹³⁴, the TPP measures may have only a marginal effect on the ability to create brand awareness. In this respect, we note the observations in the report by HoustonKemp, submitted by Australia that:

[I]t is unlikely that barriers to entry could be raised by "the communication effect". A new entrant must principally create awareness of its packaging at the point of sale because, for so long as it has a low level of sales, it has very few customers that could display the packaging elsewhere. However, irrespective of the TPP measure, Australian consumers have very limited exposure to tobacco packaging in retail stores, because of the separate restrictions on the display of tobacco products that apply at the point of sale. It follows that the TPP measure has virtually no effect on what customers see when they are choosing what to purchase in a retailer or on the extent to which customers may view the packaging of a new entrant's product.²⁹³⁵

7.1181. Finally, we agree with Professor Neven that changes in profit margins ("competitive effect"), could in principle also be expected to lead to a *lower* likelihood of entry, to the extent that reduced product differentiation resulting from plain packaging would imply that the overall margins of all producers would be appreciably reduced over time. In the presence of substantial fixed costs of entry and operation, reduced margins would materially diminish the likelihood that entry could be commercially profitable. Professor Neven assumes that profitability will fall and that margins will get slimmer as a result of the TPP measures, because of reduced product differentiation. This assumption is mostly supported by abstract economic reasoning.²⁹³⁶ As discussed below in more detail, however, the empirical evidence available to us suggests that, since the entry into force of the TPP measures, prices have increased, while quantities sold have decreased. This means that, even if, *arguendo*, the prices have decreased as a result of the TPP measures, this reduction has been offset by the effect of other factors. Without clear information about costs, this does not allow us to conclude that average profit margins have decreased as a result of the TPP measures. In fact, the [[[**]]]²⁹³⁷ [[[**]]] This does not mean that, in the longer run, the measures may not lead to a fall in prices and profit margins, as suggested by Professor Neven.

7.1182. In weighing the impact of the three effects, Professor Neven concludes that the overall impact of plain packaging will be to significantly undermine the scope for entry into the Australian cigarettes market, for two reasons. First, the inability to create any form of brand awareness (taking account of the pre-existing prohibition of advertising) will make it all but impossible to successfully launch a new brand in Australia. Second, while existing brand strength may constitute a barrier to entry that plain packaging may lower, the brand capital of current incumbents on the Australian market will not be completely depleted through the regulation, at least not in the beginning. This effect, in his view, is further amplified by the generally reduced profitability into markets with low product differentiation and correspondingly slim margins. In other words, he argues that the contestability effect will be relatively weak initially while the communication effect, amplified by the competitive effect, will be relatively strong.

7.1183. However, as discussed above, it is not clear to us that the "contestability effect" of the measures would be as weak as Professor Neven assumes in *increasing* the scope for entry, or that the communication and competitive effect of the measures would be as strong as Professor Neven assumes, in *reducing* the opportunity for entry on the market. There is therefore significant uncertainty about the strength and the relative weight of each of the three effects on entry identified in Professor Neven's report, and therefore, regarding the overall effects of the TPP measures on entry into the market on the basis of the combined operation of these three effects. This uncertainty applies both to the short and the long term. While the

²⁹³³ Australia's first written submission, para. 553.

²⁹³⁴ HoustonKemp Report, (Exhibit AUS-19) (SCI), p. 30.

²⁹³⁵ HoustonKemp Report, (Exhibit AUS-19) (SCI), p. 30.

²⁹³⁶ Neven Report, (Exhibit UKR-3) (SCI), pp. 36-37.

²⁹³⁷ [[[**]]] HoustonKemp Report, (Exhibit AUS-19) (SCI), pp. 19-23.

post-implementation evidence suggests that all three effects may have been very weak, it seems plausible that in the longer run both the contestability and the competitiveness effects may reinforce. The analysis presented in Professor Neven's report therefore does not persuade us that the TPP measures have raised or will significantly raise the barriers to entry into the Australian market for tobacco products beyond their pre-existing level.

7.1184. [[***]]²⁹³⁸ [[***]]²⁹³⁹ [[***]]²⁹⁴⁰ [[***]]²⁹⁴¹ [[***]]²⁹⁴² [[***]]²⁹⁴³

7.1185. [[***]]²⁹⁴⁴ [[***]]²⁹⁴⁵ [[***]]²⁹⁴⁶ [[***]]²⁹⁴⁷

7.1186. [[***]]²⁹⁴⁸

7.1187. As a result, while we do not exclude that a technical regulation that would raise additional barriers to entry on the market may have a "limiting effect" on international trade, and thereby be "trade-restrictive" within the meaning of Article 2.2, we do not consider that the complainants have demonstrated that the TPP measures are trade-restrictive, in that their description of the effects of the TPP measures does not demonstrate that they would have an adverse impact on the opportunity for imported products to gain access to and compete on the Australian market for tobacco products, be they imported or of domestic origin.

Whether the TPP measures have a limiting effect on the volume and value of trade in tobacco products

7.1188. In this section, we consider the parties' arguments in relation to the extent to which the TPP measures cause consumers, as the complainants argue, to "downtrade" from premium to non-premium products and the impact of this on the volume and value of trade, as well as other arguments in relation to the measures' impact on the volume and value of trade.

7.1189. Honduras argues that the requirement that tobacco products be presented in a standardized appearance results in a loss of brand differentiation and the benefits attached thereto, including the ability to convey to consumers a product's quality and reputation and charge a price premium related to brand strength.²⁹⁴⁹ Honduras argues that the post-implementation data analysed by the Dominican Republic's experts at the IPE show that the TPP measures have caused a downward substitution effect, whereby "consumers purchase relatively fewer higher-quality and higher-priced products, and instead purchase relatively more lower-quality and lower-priced products".²⁹⁵⁰ Honduras argues that "[a]s consumers begin to down trade, demand for imported tobacco products is bound to decline" which "amounts to a 'limiting effect on trade' and a disincentive to export tobacco products to Australia".²⁹⁵¹

²⁹³⁸ HoustonKemp Report, (Exhibit AUS-19) (SCI), p. 2.

²⁹³⁹ HoustonKemp Report, (Exhibit AUS-19) (SCI), p. 38.

²⁹⁴⁰ HoustonKemp Report, (Exhibit AUS-19) (SCI), p. 38. [[***]] HoustonKemp Report, (Exhibit AUS-19) (SCI), p. 35.

²⁹⁴¹ HoustonKemp Report, (Exhibit AUS-19) (SCI), p. 38. [[***]] HoustonKemp Report, (Exhibit AUS-19) (SCI), p. 36.

²⁹⁴² HoustonKemp Report, (Exhibit AUS-19) (SCI), p. 38. [[***]] HoustonKemp Report, (Exhibit AUS-19) (SCI), p. 38.

²⁹⁴³ HoustonKemp Report, (Exhibit AUS-19) (SCI), p. 38. [[***]] HoustonKemp Report, (Exhibit AUS-19) (SCI), p. 37. [[***]] HoustonKemp Report, (Exhibit AUS-19) (SCI), p. 36.

²⁹⁴⁴ HoustonKemp Report, (Exhibit AUS-19) (SCI), p. 38. [[***]] HoustonKemp Report, (Exhibit AUS-19) (SCI), p. 38.

²⁹⁴⁵ HoustonKemp Report, (Exhibit AUS-19) (SCI), p. 38. [[***]] HoustonKemp Report, (Exhibit AUS-19) (SCI), pp. 38-39.

²⁹⁴⁶ HoustonKemp Report, (Exhibit AUS-19) (SCI), p. 51.

²⁹⁴⁷ HoustonKemp Report, (Exhibit AUS-19) (SCI), p. 52.

²⁹⁴⁸ HoustonKemp Report, (Exhibit AUS-19) (SCI), p. 37.

²⁹⁴⁹ Honduras's first written submission, paras. 862-873; and second written submission, paras. 542-554.

²⁹⁵⁰ Honduras's first written submission, paras. 372-379.

²⁹⁵¹ Honduras's first written submission, paras. 876-877.

7.1190. The Dominican Republic argues that "the empirical evidence from the marketplace shows distortion of trade, with significant 'down-trading' from more expensive to cheaper tobacco products due to the [TPP] measures".²⁹⁵² The Dominican Republic explains that it has "provided evidence of one form of actual trade effects engendered by the [TPP] measures (i.e. downtrading), as a means of confirming that the measures limit competitive opportunities".²⁹⁵³

7.1191. Cuba also submits that the TPP measures "*will have a negative impact on the overall volume of Cuba's trade*, because they will lead to downtrading from Cuba's premium LHM cigars to cheaper products, not originating in Cuba". Premium quality products cannot survive in a market environment in which product differentiation is impossible, and Australia has explicitly stated that the TPP measures "are intended to make impossible the differentiation of quality and its importance".²⁹⁵⁴

7.1192. Indonesia argues that the complainants have demonstrated evidence of trade effects in the form of down-trading. As consumers shift from the more expensive brands to the less expensive brands because they have a higher willingness to switch brands and a lower willingness to pay, down-trading occurs, and "reflects the distortion in the market of the conditions of competition and competitive opportunities available to mid-tier and premium products".²⁹⁵⁵ Indonesia argues that evidence of increased down-trading in the Australian market from premium brands to low-price brands shows that plain packaging is limiting competitive opportunities for producers of premium products, harming competitors in the mid-priced and premium segment of the market that have invested in developing higher quality products. For Indonesia, evidence of down-trading already exists in the Australian market post-plain packaging.²⁹⁵⁶

7.1193. Australia submits that the complainants have failed to demonstrate that "down-trading" is likely to occur in the Australian market as a result of the design, structure and operation of the TPP measures or that any down-trading effects that have occurred in the Australian market are attributable to these measures.²⁹⁵⁷ It observes that the report by the complainants' experts at the IPE "does not separate out the effects of the tobacco plain packaging measure from the other elements of Australia's comprehensive tobacco control policy", and in particular, the fact that the measures' implementation coincided with the introduction of updated and enlarged GHWs.²⁹⁵⁸

7.1194. Australia further argues that the complainants' assertion that any down-trading effects in Australia are attributable to the TPP measures is contrary to the views of tobacco manufacturers operating in Australia, who have instead attributed down-trading effects to increases in excise taxes.²⁹⁵⁹ Australia refers to statements by tobacco industry executives, which it submits recognise the link between excise taxes and the tobacco industry's pricing strategies on the one hand, and down-trading in Australia on the other.²⁹⁶⁰ Australia considers that the complainants also ignore the reality that down-trading is occurring in a number of markets globally, which cannot be attributed in any way to a "plain packaging effect".²⁹⁶¹ Australia adds that it "is undisputed that the 'down-trading' phenomenon to which the complainants refer predates the adoption of tobacco plain packaging, not only in Australia, but in numerous other markets around the world", such that, "[e]ven if the complainants had established that these effects are attributable to the tobacco plain packaging measure ... this would be legally insufficient to establish trade-restrictiveness in quantitative terms, because it does not demonstrate a reduction in either the volume or the value of imported tobacco products".²⁹⁶²

²⁹⁵² Dominican Republic's first written submission, para. 978; second written submission, para. 938; comments on Australia's response to Panel question No. 151.

²⁹⁵³ Dominican Republic's response to Panel question No. 117. See also Dominican Republic's response to Panel question Nos. 125, 126 and 151.

²⁹⁵⁴ Cuba's comments on Australia's response to Panel question No. 165, para. 26. (emphasis original)

²⁹⁵⁵ Indonesia's response to Panel question No. 117, para. 61.

²⁹⁵⁶ Indonesia's first written submission, paras. 397-399; response to Panel question Nos. 117 and 165; and second written submission, para. 270.

²⁹⁵⁷ Australia's first written submission, para. 533.

²⁹⁵⁸ Australia's first written submission, para. 543; and second written submission, para. 414.

²⁹⁵⁹ Australia's first written submission, para. 544.

²⁹⁶⁰ Australia's second written submission, para. 419.

²⁹⁶¹ Australia's first written submission, para. 545.

²⁹⁶² Australia's second written submission, paras. 409-410 and 418.

7.1195. Australia also points out that Professor List "expressly admitted that it was not possible to separate and distinguish the effects of tobacco plain packaging from the effects of the enlarged GHWs". Thus, in connection with Australia's own argument that the complainants' experts at the IPE failed to take into account the fact that the implementation of the TPP measures coincided with the implementation of larger GHWs²⁹⁶³, Australia argues that the complainants "try artificially to address this issue by using much smaller GHWs introduced by Australia in 2006 as a proxy for the enlarged and updated GHWs adopted in 2012". Australia submits that the smaller GHWs introduced in 2006 are not an appropriate counterfactual, and cannot be presumed to have had the same effects as the enlarged and updated GHWs adopted in 2012.²⁹⁶⁴

7.1196. The complainants have, in our view, demonstrated that the TPP measures have contributed to a reduction of the volume of imports of premium tobacco products both in relative and in absolute terms. Specifically, as explained in more detail in Appendix E, a detailed analysis of the econometric results submitted by the complainants has led us to conclude that there is some evidence, albeit limited, that together with the enlarged GHWs introduced on the same date, the TPP measures appear to have had a negative impact on the ratio of higher- to low-priced cigarette wholesale sales.²⁹⁶⁵ To the extent that there are reasons to expect the TPP measures, and in particular the removal of branding features on tobacco products and their retail packaging, to have a stronger impact on the appeal of tobacco products for premium products, it is reasonable to expect that the reduction in the ratio of higher- to low-priced cigarette wholesale sales observed since the entry into force of the TPP measures results at least in part from the intended operation of the TPP measures and their effect on the consumption of tobacco products more generally.²⁹⁶⁶ This could be the case in particular where an important part of the value of premium products relies on the contribution of branding in building and maintaining positive and unique associations as a means to differentiate them from competing products. At the same time, we recall that we have also determined, on the basis of the evidence before us, that overall consumption of tobacco products has diminished since the entry into force of the TPP measures, and that this is at least partly attributable to the operation of the TPP measures as the evidence before us suggests that the TPP measures are apt to, and do in fact, reduce the appeal of tobacco products to the consumer, and that this may in turn have an impact on smoking behaviours. This means that the consumption of premium tobacco products has also decreased in absolute terms, which may be expected to lead, in turn, to a reduction in imports of premium products (because the domestic market is supplied entirely through imported products).

7.1197. We are not persuaded, however, that this decrease in the consumption and imports of premium tobacco products is exclusively the result of "downtrading" as the complainants describe it, i.e. a transfer of consumption/imports from premium to non-premium products. First, given that the overall consumption of tobacco products has decreased, at least some part of the decrease in the consumption of premium tobacco products has not been substituted with the consumption of non-premium products. Second, and more generally, as discussed in Appendix E, it appears that the higher- and lower-priced segments of the market have evolved on the basis of distinct trends, in the higher- and lower-priced segments of the cigarette wholesale sales market even before the implementation of the TPP measures.

7.1198. As regards cigar downtrading, we have no specific information on changes in the proportion of LHM cigar imports or sales in Australia relative to Australia cigar imports or sales overall. However, we have some information on the evolution of LHM cigar sales in Australia. According to Cuba, there does not appear to have been any decrease in monthly sales of LHM cigars after December 2012 when the TPP measures were introduced, not least when the post-implementation sales volumes are compared to monthly sales in the two years immediately prior to the introduction of the TPP measures;²⁹⁶⁷ moreover, sales of Cuban LHM cigars in Australia have marginally increased since December 2012.²⁹⁶⁸ According to the Dominican Republic,

²⁹⁶³ Australia's first written submission, para. 543.

²⁹⁶⁴ Australia's second written submission, para. 417.

²⁹⁶⁵ See Appendix E. This conclusion is based in particular on some specifications of the modified trend analysis conducted by IPE based on the In-Market-Sales/Exchange of Sales (IMS/EOS) data, which controlled for the effect of excise taxes and prices, among others. This analysis is based on data relating to factory-made cigarettes and fine-cut tobacco (converted to cigarette equivalent).

²⁹⁶⁶ See para. 7.1206 below.

²⁹⁶⁷ Cuba's first written submission, para. 160.

²⁹⁶⁸ Cuba's first written submission, para. 160.

data from the Dominican Republic's cigar industry for sales of Dominican Republic cigars in Australia between [[***]] and [[***]] shows that following the implementation of the TPP measures, there has been a decline in sales of Dominican Republic cigars, which are predominantly premium hand-rolled products.²⁹⁶⁹ We also note that overall imports of cigars and cigarillos have experienced a downward trend in recent years.²⁹⁷⁰ In light of this limited data, we conclude that the complainants have not shown cigar downtrading, or the causal link between any cigar downtrading and the TPP measures.

7.1199. Honduras further argues that "[a]s consumers begin to down-trade, demand for imported tobacco products is bound to decline". For Honduras, this amounts to a "limiting effect on trade" and a disincentive to export tobacco products to Australia.²⁹⁷¹

7.1200. We agree that the TPP measures may indeed reduce the demand for tobacco products. In our analysis of the contribution of the TPP measures to their objective we have previously determined, based on a consideration of the entirety of the evidence before us, that the TPP measures can contribute to reducing the demand for tobacco products. In that context, we found that there is credible evidence before us that the TPP measures may affect primary demand for tobacco products.²⁹⁷² This is because we are not persuaded that the impact of branding, and the positive associations that it may generate, is necessarily limited, as the complainants argue, to secondary demand, to the exclusion of primary demand. Branding restrictions may thus reduce primary demand at the same time as they reduce secondary demand for premium brands.

7.1201. In our view, however, a distinction needs to be made between demand for tobacco products and consumption (or sales) of tobacco products, where the former captures the inclination of consumers to purchase a product while the latter results from the interaction between demand and supply. We agree with Professor Neven, the complainants' expert, that when considering the effect of branding or, for that matter, of restrictions on branding on consumption, it is important to consider both supply and demand.²⁹⁷³ As he explains, this is because prohibitions of branding may not lead to a reduction of consumption because such restrictions affect not only the demand for a product but also its supply. Measures that reduce product differentiation between brands tend to force firms to compete more intensely in the market, which may lead to an increase in sales. In our view, in order to demonstrate that TPP measures are trade-restrictive, a demonstration of alleged effects of the TPP measures on demand would not be sufficient. Instead, a demonstration of alleged effects of the TPP measures on consumption would be needed. We discussed the effects of the TPP measures on consumption/sales in section 7.2.5.3.6.3 above.

7.1202. In its arguments concerning the availability of alternative measures, the Dominican Republic submits that, to the extent that the Panel finds that the TPP measures contribute to the objective of reducing smoking behaviour (which the Dominican Republic contests), then, to the extent of that contribution, the TPP measures will restrict trade in tobacco products by reducing the total volume of sales. In this event, the Dominican Republic posits that the Panel would have found that the TPP measures entail a volume-based restriction.²⁹⁷⁴

7.1203. Australia also submits that "there is an obvious way in which the complainants could have argued that the measure is trade-restrictive – they could admit that, over time, Australia's measure will reduce demand for tobacco products by reducing initiation and relapse, and increasing quitting. In the context of Australia's market, where domestic production is being phased out, this would necessarily result in a reduction in imports".²⁹⁷⁵ Australia considers that the

²⁹⁶⁹ Dominican Republic's response to Panel question No. 194 (referring to "Dominican cigar sales" and "Dominican cigar brands variants", (Exhibit DOM-378) (SCI)).

²⁹⁷⁰ See para. 7.1219 below.

²⁹⁷¹ Honduras's first written submission, paras. 875-876; and response to Panel question No. 117.

²⁹⁷² See paras. 7.737 et seq. above. In marketing terminology, primary demand is the demand for a group of products (e.g. running shoes, or cigarettes) while secondary demand is the demand for a particular brand inside that product group (e.g. Nike shoes, or premium brands). See para. 7.738 above.

²⁹⁷³ Neven Report, (Exhibit UKR-3) (SCI), p. 20.

²⁹⁷⁴ Dominican Republic's second written submission, para. 970; response to Panel question No. 151; comments on Australia's response to Panel question No. 151. It is noted that, "for the purposes of the analysis of alternatives, the Dominican Republic proceeds on that assumption". Dominican Republic's second written submission, para. 970.

²⁹⁷⁵ Australia's opening statement at the first meeting of the Panel, para. 93.

TPP measures will result in a limiting effect on overall trade in tobacco products because "(i) the measure will reduce the use of tobacco products (by discouraging uptake and relapse and encouraging quitting); and (ii) since imports will soon represent the entirety of Australia's tobacco product market, with domestic production being phased out, a reduction in the use of tobacco products will necessarily limit overall trade in tobacco products".²⁹⁷⁶

7.1204. As described above²⁹⁷⁷, the very objective of the TPP measures is to reduce the use of, and exposure to, tobacco products. By design, they are intended *inter alia* to reduce the appeal of tobacco products and thereby contribute to a reduction in their use. Therefore, to the extent that Australia's main underlying premise for the adoption of the TPP measures, i.e. that they are apt to reduce the use of tobacco products, is accurate, it follows that, by design, these measures would reduce the consumption of tobacco products to the same extent that they contribute to this objective.

7.1205. The complainants generally consider that the measures are not apt to lead to such outcomes²⁹⁷⁸, and that they have not in fact contributed to a reduction in the use of tobacco products on the Australian market. We note however that, on the basis of the evidence before us, including evidence relating to the actual operation of the measures since their entry into force, we have determined that there is some econometric evidence suggesting that the TPP measures, together with the enlarged GHWs enacted at the same time, contributed to the reduction of cigarette consumption.²⁹⁷⁹

7.1206. We note Australia's argument that, in order to establish the trade-restrictiveness of the TPP measures, the complainants would need to show that any relevant impact is caused by the TPP measures and not by other aspects of Australia's tobacco control regime, including the enhanced GHWs implemented at the same time as the challenged TPP measures. As discussed in Appendix E, all parties acknowledge the inherent difficulty associated with distinguishing the effects of the TPP measures from the effects of the enhanced GHWs.²⁹⁸⁰ In our analysis of the contribution of the TPP measures to their objective, however, we have previously determined, based on a consideration of the entirety of the evidence before us, that the TPP measures can, and do in fact, contribute to their objective of reducing the use of tobacco products. In particular, one of the reasons for which we found that the reduction in the use of tobacco products observed since the entry into force of the TPP measures results at least in part from the operation of the TPP measures is that the evidence before us suggests that the TPP measures are apt to, and do in fact, reduce the appeal of tobacco products to the consumer, and that this may in turn have an impact on smoking behaviours.

7.1207. As described by Australia, such reduction in overall consumption of tobacco products arising from the TPP measures may be expected to lead to a reduction in imports, to the extent that the domestic market is supplied by imports. We note in this respect that it is undisputed that the Australian market is in fact supplied entirely through imported tobacco products.²⁹⁸¹

7.1208. In light of the above, we find that the TPP measures are trade-restrictive, insofar as, by reducing the use of tobacco products, they reduce the volume of imported tobacco products on the Australian market, and thereby have a "limiting effect" on trade.

7.1209. The complainants finally argue that the reduction in brand differentiation possibilities caused by the TPP measures will lead to an increase in price competition and a fall in prices, and consequently to a decrease in the sales value of tobacco products and the total value of imports.

7.1210. Cuba argues that "the TPP measures reduce product differentiation and lower the value of imported products (particularly in the case of high-quality products)".²⁹⁸² The reduction in product

²⁹⁷⁶ Australia's response to Panel question No. 119, para. 132.

²⁹⁷⁷ See para. 7.232 above.

²⁹⁷⁸ But see Honduras's first written submission, paras. 875-876; and response to Panel question No. 117.

²⁹⁷⁹ See Appendix D, paras. 117 and 137.

²⁹⁸⁰ See Appendix E, para. 2. Cf. para. 7.974 above.

²⁹⁸¹ Dominican Republic's response to Panel question No. 5.

²⁹⁸² Cuba's second written submission, para. 226.

differentiation will lead to an increase in price competition, which will lead to a fall in prices and reduce the value of imported tobacco products. This commodification of tobacco products will distort competition and generate an additional disincentive to export to Australia.²⁹⁸³ The Dominican Republic similarly states that the "complainants argue that, by reducing brand differentiation, the [TPP] measures have already led to switching from higher- to lower-priced cigarettes and, hence, to a reduction in the value of the trade, without reducing smoking prevalence or consumption". In the Dominican Republic's view, "Members are not concerned solely with competitive opportunities as reflected in the *number of units* of an exported product sold, but also with the competitive opportunities as reflected in the *value of each unit sold*. The value of trade affects the wide range of direct and indirect economic gains that a country derives from its export trade; this is also borne out by the decision of the TBT Committee referenced above, which asks Members to consider the potential trade effects of a measure in terms of the "value" of the affected trade".²⁹⁸⁴

7.1211. Australia responds that "[t]o the extent that the complainants *have attempted to link* downtrading to any actual limiting effect on overall trade, it has been by reference to the weighted average price for a cigarette." Australia points out that the Dominican Republic's expert, Professor List, "confirmed that there has been a significant *increase* in the real weighted price of a cigarette since the introduction of the tobacco plain packaging measure". Australia also argues that "subsequent to the introduction of the [TPP measures], overall trade in tobacco products has increased in both volume and value", which "can be explained in part by the movement of domestic production offshore"; however, "data provided by the complainants also clearly demonstrates that the total value of the retail market increased in the period following the introduction of the [TPP measures], despite a reduction in total demand for tobacco products in the Australian market".²⁹⁸⁵

7.1212. Australia argues that, as the data submitted by the parties²⁹⁸⁶ "unequivocally establish, imports of tobacco products in Australia have increased in both volume and value terms since the introduction of the tobacco plain packaging measure, despite consistent decline in demand for and consumption of tobacco products", and that "there has been no decrease in the volume or value of their own imports of tobacco products, which were a negligible share of total imports in the Australian market prior to the introduction of the tobacco plain packaging measure and have remained so thereafter". Given "the enormous increase in the volume of tobacco imports in the Australian market since the introduction of the tobacco plain packaging measure, and the critical importance to the complainants' case that the measure has not led to a decline in the rates of tobacco use in Australia, their claim of trade-restrictiveness can only be based on a decline in value", in respect of which, Australia submits, the complainants have offered no evidence.²⁹⁸⁷

7.1213. In response to Australia's reference to data on the total value of the retail market, the Dominican Republic argues that the correct analysis is what the situation – in value terms – would have been absent the TPP measures, and not whether, in the abstract, the aggregate value of trade in tobacco products has increased in an absolute sense.²⁹⁸⁸

7.1214. As described above, we agree that, to the extent that they restrict the use of branding features on tobacco products and their retail packaging, the TPP measures reduce opportunities for producers to differentiate their products on the basis of these features. We therefore consider whether the complainants have demonstrated that such reduced opportunity for brand differentiation has led to an increase in price competition and a fall in prices and consequently to a decrease in the sales value of tobacco products and the total value of imports.

²⁹⁸³ Cuba's second written submission, para. 245.

²⁹⁸⁴ Dominican Republic's response to Panel question No. 117, para. 219. (emphasis original)

²⁹⁸⁵ Australia's response to Panel question No. 117, paras. 124-125 (emphasis original; footnote omitted) (referring to Supplementary Graphs, Import Volumes, Value and Share of the Market, (Exhibit AUS-512), Figure 15). See also Australia's second written submission, para. 412; and Australia's response to Panel question Nos. 151 and 165.

²⁹⁸⁶ Australia's second written submission, para. 411 (referring to parties' responses to Panel question No. 5).

²⁹⁸⁷ Australia's second written submission, para. 411. (footnotes omitted)

²⁹⁸⁸ Dominican Republic's second written submission, paras. 950-951.

7.1215. First, the empirical evidence before us, submitted by both Australia and the complainants, shows that the net of taxes price of tobacco products has increased since the introduction of the TPP measures, over the period for which data is available to us.²⁹⁸⁹ The expert report of Professor Neven includes evidence showing that "even net of tax average prices have followed an upward trend over the period Q1 2009 to Q4 2013, except for the most expensive cigarettes for which the net prices has decreased in the last quarter of 2013".²⁹⁹⁰ Australia also submits a report by Professor Katz containing (a) evidence that the prices of cigarettes rose both gross and net of taxes; (b) evidence that the pace of cigarette price increases did not decelerate following the implementation of plain packaging and, if anything, accelerated²⁹⁹¹; (c) references to Professor Klick's statement that "plain packaging ... appears to have a statistically significant positive effect on price of about 5 percent".²⁹⁹² The Dominican Republic's expert Professor List also confirmed that there has been a significant *increase* in the real weighted price of a cigarette since the introduction of the TPP measures.²⁹⁹³ Moreover, evidence before us also suggests that brands in the higher priced segments generally maintained or increased their pricing premiums over brands in the lower-priced segments in the first year following the implementation of plain packaging, and have not exhibited a marked drop.²⁹⁹⁴

7.1216. Evidence submitted to the Panel, including data provided by the complainants, also clearly demonstrates that the total value of the retail market increased, rather than decreased, over the period Q4 2009 to Q3 2013, despite the overall reduction in consumption of tobacco products in the Australian market over the same period.²⁹⁹⁵ Consistent with the higher prices, the complainants' data suggest that the total retail value of the Australian cigarette market (excluding taxes) increased by approximately 200 million Australian dollars in the 12 months following the introduction of the TPP measures, notwithstanding a decline in the total volume of cigarettes sold over the same period.²⁹⁹⁶

7.1217. The empirical evidence submitted to the Panel also shows that both the volume and the value of cigarette *imports* have increased since the introduction of the TPP measures.²⁹⁹⁷ We agree with Australia and the complainants, however, that the increase in *imports* of tobacco products into Australia is mostly attributable to the movement of production out of Australia as a response to Australian government reduced-fire-risk requirements introduced in 2010 on all locally manufactured cigarettes that do not match consumers' preferences in other markets in the region.²⁹⁹⁸ We also agree with the parties that this factor makes it difficult to use the submitted import data to estimate whether, controlling for the effect of the fire-risk requirements, total trade value has increased or decreased as a result of the TPP measures. As explained by Australia, an additional complication arises from the fact that the import values represented in various figures provided to the Panel are "customs values", which, when the buyer and the seller are not independent of each other, may only be approximations of the prices actually paid or payable to the supplier (transaction value).²⁹⁹⁹

²⁹⁸⁹ The time period covered by each data set provided to the Panel varies by source. The largest data set of relevance to this topic covers the period from January 2000 to September 2015. See Appendix E, para. 12 fn 14 and Figure E.5.

²⁹⁹⁰ Neven Report, (Exhibit UKR-3) (SCI), p. 10.

²⁹⁹¹ Katz Report, (Exhibit AUS-18), paras. 63-72.

²⁹⁹² Klick Supplemental Rebuttal Report, (Exhibit HND-122), fn 71.

²⁹⁹³ Dominican Republic's opening statement at the first meeting of the Panel, Appendix 2: Powerpoint Presentation by J. List, slide 58.

²⁹⁹⁴ Katz Report, (Exhibit AUS-18), para. 66.

²⁹⁹⁵ Australia's response to Panel question No. 117 (referring to Supplementary Graphs, Import Volumes, Value and Share of the Market, (Exhibit AUS-512), Figure 15); second written submission, para. 412; and response to Panel question Nos. 151 and 165.

²⁹⁹⁶ Supplementary Graphs, Import Volumes, Value and Share of the Market, (Exhibit AUS-512), Figure 15 (identifying "Nielsen and excise data as provided in Neven Report backup production" as the data source).

²⁹⁹⁷ Supplementary Graphs, Import Volumes, Value and Share of the Market, (Exhibit AUS-512), Figs. 1-6.

²⁹⁹⁸ Dominican Republic's second written submission, para. 948; Dominican Republic's response to Panel question No. 5, paras. 36-39; Australia's response to Panel question No. 117, para. 125; HoustonKemp Report, (Exhibit AUS-19) (SCI), pp. 27 and 50.

²⁹⁹⁹ Australia's response to Panel question No. 5, paras. 31-32.

7.1218. Overall, therefore, the empirical evidence before us relating to cigarette prices, to the total value of the retail market and to the total value and volume of cigarette imports does not validate the complainants' argument that the TPP measures will lead to an increase in price competition and a fall in prices, and consequently to a decrease in the sales value of tobacco products and the total value of imports. This evidence suggests that the measures have led to an increase in the price of cigarettes which has more than offset the decrease in the quantity of cigarette consumed and has thereby contributed to an increase in the value of the market. We agree with the Dominican Republic that the correct analysis is what the situation – in value terms – would have been absent the TPP measures, and not whether, in the abstract, the aggregate value of trade in tobacco products has increased in an absolute sense. However, we observe that the complainants, including the Dominican Republic, have nowhere suggested that the effect of the measure could be to mitigate an increase in the price of cigarettes caused by other factors. We also observe that, if, *arguendo*, the TPP measures since their entry into force had, by the end of 2013, led to an increase in price competition and a fall in prices, this effect must have been relatively weak as it was offset by an increase in price caused by some other factor(s). The complainants do not rebut this evidence but they argue that it does not contradict their claims.

7.1219. As discussed in Appendix D, empirical evidence before us regarding cigars and cigarillos is somewhat less clear. Despite fluctuations, overall imports of cigars and cigarillos have experienced a downward trend in recent years. However, none of the parties provided econometric evidence assessing the impact of the TPP measures on cigar imports. Likewise, as noted, data on cigar imports per complainant is limited and indirect, in that it does not address the role of the TPP measures. We recall however our conclusion that, as detailed in Appendix C, there is some econometric evidence suggesting that the TPP measures contributed to the reduction in cigar smoking prevalence in Australia, which supports a conclusion that the TPP measures are trade-restrictive also *vis-à-vis* cigars.

7.1220. Cuba argues that the observed increase in the price of cigarettes and in the total value of the market for cigarettes do not contradict their claim that the TPP measures are trade-restrictive because they reduce product differentiation and lower the value of imported products.³⁰⁰⁰ Cuba argues that Professor Neven posits a fall in prices net of tax for certain premium brands and, in accordance with his models of branding, he finds that profits will decline, either as a result of diminished output, or because of diminished margins firms earn if they increase output.³⁰⁰¹

7.1221. In the Dominican Republic's view, the complainants argument is that, by reducing brand differentiation, the TPP measures have already led to switching from higher- to lower-priced cigarettes and, hence, to a reduction in the value of the trade, without reducing smoking prevalence or consumption. However, at the same time the Dominican Republic adds that "[t]his disagreement on the actual trade effects resulting from the [TPP] measures is not material to the Panel's finding of trade-restrictiveness under Article 2.2, because it is evident from the design, structure, and expected operation of the measures that it severely limits competitive opportunities to differentiate tobacco products".³⁰⁰² The Dominican Republic's argument is based on the assumption that the TPP measures would either keep the price of cigarettes constant or reduce it. However, evidence shows that brands in the higher priced segments generally maintained or increased their pricing premiums over brands in the lower-priced segments in the first year following the implementation of plain packaging, and have not exhibited a marked drop, in line with the observation that the average price of cigarettes had increased sufficiently to offset the

Imports in Australian international trade statistics are primarily recorded at the customs value. The starting point for establishing the customs value is the price actually paid or payable to the supplier (transaction value), provided a number of conditions are met. The most important of these is that the buyer and seller must be independent of each other (i.e. it is an arm's length transaction). If the conditions are not met, practical rules are used to determine a substitute price to be used as the customs value. The substitute price is intended to be as close an approximation as possible of the transaction price that would have been struck had the prescribed conditions been met.

Ibid. (quoting Australian Bureau of Statistics, "Balance of Payments and International Investment Position, Australia, Concepts, Sources and Methods, 1998", Cat. No. 5331.0 (1998), (Exhibit AUS-513)).

³⁰⁰⁰ Cuba's second written submission, para. 227.

³⁰⁰¹ Cuba's second written submission, paras. 249-250.

³⁰⁰² Dominican Republic's response to Panel question No. 117, para. 233.

decrease in consumption.³⁰⁰³ In other words, the facts before us do not support the Dominican Republic's argument.

7.1222. Honduras, with reference to the expert reports by Professor Neven, argues that prices will ultimately decline.³⁰⁰⁴ Indeed, the parties' experts have submitted predictions regarding the effect of the TPP measures on competition and prices over time based on economic models. Professor Katz for Australia and Professor Neven for Honduras, have diverging views regarding the strategies that firms will adopt in reaction to the introduction of the TPP measures and the reduction in differentiation. Professor Neven argues that "plain packaging is likely to erode the value of established cigarette brands, thereby reducing brand loyalty among consumers and thus intensifying competition between producers", and that, "[a]s a result, prices are likely to decline over time, since the value of incumbent brands deteriorates, [...]"³⁰⁰⁵ Professor Katz, on the contrary, submits that:

*Economic theory yields ambiguous predictions regarding whether a reduction in the perceived attractiveness of cigarettes induces tobacco companies to raise or lower cigarette prices. In choosing its prices, a supplier compares the profits from pursuing a mass-market strategy (i.e., a low-price strategy that attracts a large number of customers) with those of pursuing a premium, or targeted, strategy (i.e., one appealing to a smaller base of loyal customers who are less price sensitive and willing to pay a higher price). ... However, economic theory clearly identifies situations in which reducing the perceived attractiveness of a product induces a supplier to shift from charging a relatively low price aimed at appealing to a wide range of consumers to charging a relatively high price and selling only to those consumers who are willing to pay the most for its products. It is notable that actual market experience—including experience with Australian cigarettes—demonstrates that downward shifts in demand can lead to higher prices.*³⁰⁰⁶

7.1223. In his rebuttal expert report, Professor Neven responds to Professor Katz's argument that the TPP measures may induce tobacco producers to adopt the so-called "harvesting strategy", which consists in appealing to a smaller base of loyal customers who are less price-sensitive and are willing to pay a higher price. Professor Neven argues that the harvesting strategy does not correspond to the reaction that is normally expected from producers, and that the increase in price associated with a harvesting strategy is likely to be transitory and in the long-term prices are likely to fall.³⁰⁰⁷ In response, with respect to the existence of "harvesting", Professor Katz notes that Professor Neven reviews studies of whether harvesting occurs in other countries in other industries, which are subject to very different marketplace dynamics, rather than recognizing the evidence suggesting that harvesting is, in fact, occurring in the Australian cigarette industry.³⁰⁰⁸ Professor Katz further notes that "there is nothing in the structure of Professor Neven's simulation model that differentiates between the long run and the short run"; that the "model's predictions are driven by the values of the parameters it receives as inputs", and thus that "there is no reason to expect his model should perform better in the long run than it does in the short run".³⁰⁰⁹ Finally, he notes that Professor Neven's position regarding the time path of policy effects is contrary to that of several of the complainants' other experts who assert that, if plain packaging is ever going

³⁰⁰³ Katz Report, (Exhibit AUS-18), para. 66.

³⁰⁰⁴ Honduras's second written submission, paras. 571-572.

³⁰⁰⁵ Neven Report, (Exhibit UKR-3) (SCI), p. 2.

³⁰⁰⁶ Katz Report, (Exhibit AUS-18), p. 4. (emphasis original)

³⁰⁰⁷ Neven Rebuttal Report, (Exhibit HND-123), para. 42. Note that Professor Neven also argues that Professor Katz's harvesting theory also misses important characteristics of the Australian market, in particular the diversity of brands with different strengths. This argument, however, does not contradict Professor Katz's argument that the TPP measures may induce producers to adopt a harvesting strategy, but rather serves to explain that: "The theoretical possibility of a harvesting strategy by strong brands therefore does not undermine our conclusion that plain packaging is unlikely to decrease smoking as more price-sensitive consumers are likely to gravitate towards weaker brands with lower prices." Neven Rebuttal Report, (Exhibit HND-123), para. 5.

³⁰⁰⁸ Katz Surrebuttal Report, (Exhibit AUS-584), para. 12.

³⁰⁰⁹ Katz Surrebuttal Report, (Exhibit AUS-584), para. 31.

to have its intended effects, then those effects should have become clearly evident soon after the implementation of plain packaging.³⁰¹⁰

7.1224. Predicting the evolution of competitive interactions is notoriously difficult. We agree with Professor Katz that economic theory yields ambiguous predictions regarding whether a reduction in the perceived attractiveness of cigarettes will induce tobacco companies to raise or lower cigarette prices. In this context, the empirical evidence before us shows that cigarette prices, excluding taxes, have increased since the introduction of the TPP measures, and brands in the higher priced segments generally maintained or increased their pricing premiums over brands in the lower-priced segments in the first year following the implementation of plain packaging, and have not exhibited a marked drop.³⁰¹¹ This suggests that at least in the period of observation covered, price competition has not increased. These observations are consistent with the predictions of Professor Katz's model, which Professor Neven rejects without offering an alternative explanation that would be consistent with a short-term increase in prices followed by a decrease in the longer run. The evidence, however, does not allow us to exclude the possibility that the TPP measures may have reinforced price competition, which does not seem unreasonable, nor, if this hasn't happened yet, that they may reinforce it in the future. It may well be that, as argued by Professor Neven, prices will eventually start decreasing, even if the evidence presented to us does not, in our view, persuasively demonstrate, that this will be the case.

7.1225. In light of the above, and considering our earlier findings relating to the effect of the TPP measures on consumption, and the possibility that, to the extent that the measures would continue to contribute to their objective, these effects may increase with time, we find that while the complainants have not demonstrated that the TPP measures have reduced the value of imported tobacco products on the Australian market, it cannot be excluded that this may happen in the future, either as a result of the effect of the measures on consumption only or as a result of this effect combined with a fall in prices.

Whether the TPP measures are trade-restrictive because they impose conditions on the sale of tobacco products that entail compliance costs

7.1226. We agree with Australia that, as expressly recognized by the Appellate Body in *US – Tuna II* (Mexico) and in *US – COOL*, there may be circumstances in which a technical regulation is not trade-restrictive, such that there is "no basis for alleging that a technical regulation is trade-restrictive solely because compliance with its requirements is mandatory; or that technical regulations are *per se* trade-restrictive".³⁰¹² As explained above, we consider that a demonstration that a particular technical regulation is trade-restrictive requires a demonstration that it gives rise to a limiting effect on international trade in the relevant products. In the present case, a demonstration that the TPP measures are trade-restrictive requires a demonstration that they give rise to a limiting effect on international trade in tobacco products. We are not persuaded that the complainants have demonstrated that the TPP measures are trade-restrictive simply because they set out mandatory requirements for the packaging of tobacco products.

7.1227. We therefore consider whether, as argued by Honduras, Cuba, and Indonesia, the existence of these requirements give rise to a trade-restrictive effect because of the costs faced by producers associated with compliance with the measures, or by reason of the penalties that they provide for in the event of non-compliance.

7.1228. Honduras, Cuba and Indonesia argue that the TPP measures are trade-restrictive because they entail compliance costs. In particular, these complainants assert that there are compliance costs associated with ensuring that the appearance of trademarks is consistent with the TPP measures³⁰¹³, that the format of packaging³⁰¹⁴ and individual tobacco products³⁰¹⁵ is

³⁰¹⁰ Katz Surrebuttal Report, (Exhibit AUS-584), para. 34.

³⁰¹¹ Katz Report, (Exhibit AUS-18), para. 66.

³⁰¹² Australia's first written submission, para. 564. See para. 7.1144 above.

³⁰¹³ Honduras's first written submission, para. 878; Honduras's response to Panel question No. 117; Cuba's first written submission, para. 404; Cuba's response to Panel question No. 117; Cuba's second written submission, paras. 251-253; and Indonesia's response to Panel question No. 117.

³⁰¹⁴ Honduras's first written submission, para. 879; Honduras's response to Panel question No. 117; Cuba's first written submission, para. 404; Cuba's response to Panel question No. 117; Cuba's second written

consistent with the TPP measures, and because retailers would have been required to replace non-plain packaged stock with plain-packaged stock upon the introduction of the TPP measures.³⁰¹⁶

7.1229. Australia responds that the complainants' arguments are not sufficient to establish the trade-restrictiveness of the TPP measures (though such costs are potentially relevant in determining whether the TPP measures have a limiting effect on trade³⁰¹⁷). Australia notes that producers wishing to participate in the Australian market were already required to meet Australia's bespoke product and packaging requirements, such that this market condition has not changed (though there has been a change to the content of the requirements).³⁰¹⁸ Moreover, Australia argues that the complainants have not identified the incremental cost of compliance or adaptation attributable to the TPP measures³⁰¹⁹, nor why such costs increase for legitimate producers but decrease for counterfeiters (as the complainants have argued in the context of the effect of the TPP measures on the market for illicit tobacco products in Australia).³⁰²⁰ In short, Australia argues that the Panel has no evidence before it that it is less expensive for a company to change its processes to produce a branded cigarette, cigar, or package that complies with Australian law, than it is to produce a plain cigarette, cigar, or package that complies with Australian law.³⁰²¹

7.1230. We recall that an assessment of the trade-restrictiveness of a technical regulation involves an assessment of whether it has a limiting effect on trade. In this respect, we consider that the standard applied when determining whether a measure amounts to a "restriction" on importation within the meaning of Article XI of the GATT 1994³⁰²² may provide useful guidance. We thus note that the panel in *US – COOL* informed its understanding of "trade-restrictiveness" with reference to the interpretation given by previous panels to the term "restriction" in Article XI of the GATT.³⁰²³

7.1231. With this in mind, we note that past panels have found that measures may amount, or have amounted, to "restrictions" under Article XI of GATT 1994 on the basis that they negatively affected importers' investment plans and increased transaction costs.³⁰²⁴ In support of their contention that the TPP measures are trade-restrictive because they impose compliance costs, Honduras, Cuba, and Indonesia have referred to such past panel reports – namely, the GATT panel in *Japan – Leather (US II)* and the panel in *Colombia – Ports of Entry*. Before determining whether we agree with the assertion that such costs may also be "trade-restrictive" within the meaning of Article 2.2 of the TBT Agreement, we find it pertinent to consider in more detail the manner in which increased costs were addressed by these panels in the context of their assessments under Article XI of the GATT 1994. The GATT panel in *Japan – Leather (US II)* stated that:

[T]he existence of a quantitative restriction should be presumed to cause nullification or impairment not only because of any effect it had had on the volume of trade but also for other reasons e.g. it would lead to increased transaction costs and would create uncertainties which could affect investment plans.³⁰²⁵

³⁰¹⁵ submission, paras. 251-253; Indonesia's response to Panel question No. 117; and Indonesia's second written submission, para. 272.

³⁰¹⁶ Honduras's first written submission, para. 881; Honduras's second written submission, para. 579; Honduras's response to Panel question No. 117; Cuba's first written submission, para. 404; Cuba's response to Panel question No. 117; Cuba's second written submission, paras. 251-253; and Indonesia's response to Panel question No. 117.

³⁰¹⁷ Honduras's first written submission, para. 885; Honduras's response to Panel question No. 117; Cuba's first written submission, para. 404; Cuba's response to Panel question No. 117; Cuba's second written submission, paras. 251-253; and Indonesia's response to Panel question No. 117.

³⁰¹⁸ Australia's first written submission, para. 561; and Australia's response to Panel question No. 117.

³⁰¹⁹ Australia's first written submission, para. 557; and Australia's response to Panel question Nos. 117 and 125.

³⁰²⁰ Australia's first written submission, para. 560.

³⁰²¹ Australia's first written submission, para. 559 (referring to Janeczko Report, (Exhibit UKR-10)).

³⁰²² Australia's response to Panel question No. 155.

³⁰²³ Panel Reports, *US – COOL*, paras. 7.569-7.572.

³⁰²⁴ Panel Reports, *US – COOL*, paras. 7.569-7.572.

³⁰²⁵ GATT Panel Report, *Japan – Leather (US II)*, para. 55. See also Panel Reports, *Colombia – Ports of Entry*, para. 7.236; and *Argentina – Import Measures*, paras. 6.261 and 6.473.

³⁰²⁶ GATT Panel Report, *Japan – Leather (US II)*, para. 55.

7.1232. In *Colombia – Ports of Entry*, the panel assessed, *inter alia*, the additional costs associated with restrictions on the ports of entry available to certain textiles, apparel and footwear. In the context of that analysis, the panel endorsed the statements made by the GATT panel in *Japan – Leather (US II)*³⁰²⁶, before considering Panama's argument that the imposition of the challenged measure had limited competitive opportunities by forcing importers to incur higher shipping costs in order for products to reach certain markets in Colombia.³⁰²⁷ The panel proceeded to consider a number of quotes and estimates adduced by the parties associated with the costs of transportation of products to different ports in Colombia. The panel identified a number of deficiencies with this evidence and thus declined to draw conclusions from it.³⁰²⁸

7.1233. We note that additional costs arising from compliance with a measure were also addressed by the panel in *Argentina – Import Measures*. In that dispute, the panel stated that "[e]xtra costs as a general matter will discourage importation and, thus, will have an additional limiting effect on imports".³⁰²⁹ The panel then observed that the measures at issue – which required, *inter alia*, that certain importers and other economic operators offset the value of their imports with at least an equivalent value of exports, and refrain from repatriating profits from Argentina³⁰³⁰ – may "result in costs unrelated to the business activity of the particular operator".³⁰³¹ The panel concluded that these export activities and limitations on repatriation of profits "did not come about as a result of business decisions", but "in response to requirements imposed by Argentina".³⁰³²

7.1234. On the basis of these analyses, we understand that the focus of previous disputes concerning whether costs amount to "restrictions" has mostly been on whether the measure in question would create costs for economic actors with respect to their *ongoing participation* in the relevant market.³⁰³³ We can envisage that, under certain circumstances, the adoption of a

³⁰²⁶ Panel Report, *Colombia – Ports of Entry*, para. 7.241.

³⁰²⁷ Panel Report, *Colombia – Ports of Entry*, para. 7.258.

³⁰²⁸ Panel Report, *Colombia – Ports of Entry*, paras. 7.259-7.270.

³⁰²⁹ Panel Reports, *Argentina – Import Measures*, para. 6.261.

³⁰³⁰ Panel Reports, *Argentina – Import Measures*, para. 6.155. These costs were later described as follows:

Evidence shows that, to comply with the requirement to export, companies have engaged in activities unrelated to their respective business activity. For instance, companies from the automotive sector have exported peanuts, water, wine, soy products and biodiesel; companies from the motorcycle sector exported grape juice and wine; tyre producers exported honey and clothing brands have exported wool. Other companies have engaged in export activities within their sector to even out their trade balance. For example, bible importers exported children books and multinational toy companies exported domestic toys produced by unrelated companies. In addition, at the behest of the Argentine Government, operators have made investments and refrained from repatriating profits, both of which result in additional costs for economic operators.

Panel Reports, *Argentina – Import Measures*, para. 6.262 (footnotes omitted). See also *ibid.* paras. 6.167-6.168.

³⁰³¹ Panel Reports, *Argentina – Import Measures*, para. 6.261. The Panel also noted that:

While the circumstances in the present case are different, the fact that a measure may constitute a restriction on importation within the meaning of Article XI:1 of the GATT 1994 when it acts to discourage importation by penalizing it and making it prohibitively expensive, was analysed by the panel in *Brazil – Retreaded Tyres*. We agree with the panel's analytic approach in that case.

Ibid. (footnote omitted). We note that the panel in *Brazil – Retreaded Tyres* considered this question with respect to whether fines associated with a prohibition on the importation of used and retreaded tyres amounted to restrictions for the purpose of Article XI:1 of the GATT 1994. See Panel Report, *Brazil – Retreaded Tyres*, paras. 7.368-7.374. We note Cuba has argued that the TPP measures are trade-restrictive on the basis of the applicable penalties for non-compliance. We will consider this in "Whether the penalties under the TPP measures are trade-restrictive" within section 7.2.5.4.2.3 below.

³⁰³² Panel Reports, *Argentina – Import Measures*, para. 6.263.

³⁰³³ We also note, for completeness, that the relationship between compliance costs and trade-restrictiveness was before the panel in *US – COOL (Article 21.5 – Canada and Mexico)* in the context of the claims under Article 2.2 of the TBT Agreement. This question arose in the context of the cost for industry of compliance with the third and fourth alternative measures proposed by the complainants, and whether this was probative of the trade-restrictiveness of those alternatives. However, in relation to the third alternative

technical regulation may impose costs that are not, or not exclusively, ongoing in nature. We do not exclude that such costs may be of such a magnitude or nature as to limit the "competitive opportunities" available to imported products and thereby have a limiting effect on trade.³⁰³⁴

7.1235. However, we are not persuaded that the existence of *any* level of costs associated with initial compliance with a technical regulation will be sufficient, in and of itself, to demonstrate that a technical regulation is trade-restrictive. Honduras submits that in relation to "labelling and packaging or other product-related requirements covered by the disciplines of the TBT Agreement, it is clear that every technical regulation will require some adaptation and forms a barrier to trade". We note that, as recognized in the TBT Committee Recommendation discussed above, a technical regulation may have import-enhancing as well as import-reducing effects.³⁰³⁵ With respect specifically to costs, a technical regulation may create costs of such a magnitude or nature as to have a limiting effect on trade. However, it may also create a regulatory environment in which operating costs are *reduced*, thereby *enhancing* competitive opportunities and *facilitating* trade.³⁰³⁶ For these reasons, we are not satisfied that the existence of some initial adaptation costs would in all cases be sufficient, in and of itself, to indicate that a technical regulation has a limiting effect on trade. The extent to which such costs may be trade-restrictive must, in our view, be assessed on a case-by-case basis.

7.1236. We note that the parties do not disagree insofar as they consider that the adoption of the TPP measures (and of the enhanced GHWs implemented at the same time) required the manufacturing of tobacco products and their packaging to be modified. However, Australia argues that the complainants have not discharged their burden of proof because (i) they have not provided evidence to substantiate the increase in costs, and in any case have not isolated the cost of complying with the TPP measures from the costs of modifications to the size of the GHWs; and (ii) if there were any additional costs attributable to the TPP measures, there is no evidence concerning whether those costs were significant enough to have a limiting effect on trade.³⁰³⁷

7.1237. Turning to the evidence adduced by the parties, we first observe that Australia itself seems to have envisaged that, at least in the period immediately before the entry into force of the TPP measures, the industry would face certain costs associated with their introduction. For example, Honduras has presented a "Best Practice Regulation Preliminary Assessment" by the Australian Government, dated 7 April 2010, completed by the DHA with respect to plain packaging of tobacco products. Under the heading "Business compliance costs", the DHA answered "yes" to the following questions: "Will businesses incur extra costs in keeping abreast of regulatory requirements?"; "will businesses need to purchase materials, equipment or external services?"; "will businesses incur costs when cooperating with audits or inspections?"; "will businesses incur costs from other changes in their procedures and practices?"; and "are there other compliance costs?"^{3038, 3039} Honduras has also submitted a Regulation Impact Statement (RIS) by the DHA,

measure, the panel was critical of the complainants' elucidation of the expected operation of that proposal, and therefore concluded that the complainants had not demonstrated that the alternative would be less trade-restrictive than the measure at issue. In relation to the fourth alternative, the Panel concluded that the complainants had not provided an adequate explanation of how it would be implemented. In light of its evidentiary concerns, the panel did not draw conclusions surrounding the relationship between costs and trade-restrictiveness for the purpose of Article 2.2 of the TBT Agreement. See Panel Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, paras. 7.509, 7.558–7.560 and 7.603–7.610.

³⁰³⁴ We note in this respect the comment by the panel in *Argentina – Import Measures*, quoted above, that "[e]xtra costs as a general matter will discourage importation and, thus, will have an additional limiting effect on imports". See Panel Reports, *Argentina – Import Measures*, para. 6.261.

³⁰³⁵ See Committee on Technical Barriers to Trade, Secretariat Note, "Decisions and Recommendations Adopted by the WTO Committee on Technical Barriers to Trade Since 1 January 1995", G/TBT/1/Rev.12, 21 January 2015, Section 4.3.1.1, p. 20 (entitled "Significant effect on trade of other Members"). See also paras. 7.1081, 7.1086, and 7.1088 above.

³⁰³⁶ We also note that the Appellate Body envisages circumstances in which a technical regulation will not be trade-restrictive. As the Appellate Body has observed, a comparison of a challenged measure and possible alternative measures may not be required "when the measure is not trade restrictive at all". Appellate Body Reports, *US – COOL*, para. 376 fn 748. See also Appellate Body Report, *US – Tuna II (Mexico)*, para. 322 fn 647.

³⁰³⁷ Australia's response to Panel question No. 155.

³⁰³⁸ Such costs relate to "indirect costs or impacts on intermediaries" relating to accountants, lawyers, banks or financial advisers.

dated April 2010, in which the DHA states that the requirement to ensure packaging meets specified design characteristics "will involve some upfront costs to adjust manufacturing processes for the Australian market and there may be some ongoing costs to maintain separate packaging requirements for the Australian market if the manufacturer sells into other markets".³⁰⁴⁰ This document also indicates that it would not be possible to quantify the cost to manufacturers until the design of the packages had been determined.³⁰⁴¹

7.1238. Moreover, in the PIR of the TPP measures, the Australian government reported that one of the major manufacturers of tobacco products in Australia submitted an estimate of its costs associated with the transition to plain packaging.³⁰⁴² These costs were estimated at AUD\$73.87 million, of which manufacturers, importers and wholesalers faced AUD\$11.42 million costs associated with plants and machinery, and AUD\$57.73 million associated with "packaging compliance costs".³⁰⁴³ No ongoing costs were reported.³⁰⁴⁴ The PIR also reports that "[t]obacco plain packaging is likely to give rise to an on-going saving to manufacturers as the printing of plain as opposed to branded tobacco packaging could be undertaken at a lower cost".³⁰⁴⁵

7.1239. Honduras argues that the costs identified in the PIR confirm the arguments it has made throughout these proceedings, and are "significant under any metric". Honduras adds that Australia's calculation of the compliance costs does not require complex economic analysis, and the estimates were derived using industry-submitted costs, "with adjustments made where relevant and consistent with the ... [regulatory burden measurement] methodology". According to Honduras, this enhances the credibility of Australia's estimates.³⁰⁴⁶

7.1240. We note however that the PIR identifies a number of limitations associated with these figures. For example, it notes that "it was not possible to determine precisely which costs submitted were actually attributable to compliance with tobacco plain packaging, and which costs were likely to have been incurred by the manufacturers as part of business as usual including due to other compliance activities".³⁰⁴⁷ Furthermore, the PIR asserts that the one submission with respect to costs mentioned above "was at a very high level of generality and difficult to disaggregate, with little information given regarding the underlying activities said to give rise to the costs claimed", and was accompanied by an explanation suggesting "that some of the costs incurred resulted from activities voluntarily engaged in that went outside the scope of the minimum compliance requirements of the measure and that were not incurred by other industry members".³⁰⁴⁸

7.1241. The Panel shares Australia's view that Honduras, Cuba, and Indonesia have done little to elaborate on, or substantiate, their general assertions concerning the costs faced by the tobacco industry in complying with the TPP measures. It could have been expected, in light of the intricate analyses provided by all parties concerning other factual matters in these proceedings, that more precise information would be provided.³⁰⁴⁹ Nonetheless, the evidence described above from the manufacturer of tobacco products in Australia does establish that at least one manufacturer faced costs associated with the transition to the TPP measures.³⁰⁵⁰

7.1242. The question we must consider, therefore, is whether the potential and actual costs identified are sufficient to demonstrate that the TPP measures have a limiting effect on international trade. In addressing this question, we recall our view that the existence of some

³⁰³⁹ Australian Government, Department of Health and Ageing, "Best Practice Regulation Preliminary Assessment", 7 April 2010, (Best Practice Regulation Preliminary Assessment), (Exhibit HND-13).

³⁰⁴⁰ Australian Government, Department of Health and Ageing, "Regulation Impact Statement: Plain Packaging of Tobacco Products", 27 April 2010, (RIS 2010), (Exhibit HND-15), p. 10.

³⁰⁴¹ RIS 2010, (Exhibit HND-15), p. 10.

³⁰⁴² Australia identifies these as BATA, Philip Morris (Australia) and Imperial Tobacco Australia. Tobacco Plain Packaging PIR, (Exhibit AUS-624), paras. 144 and 150.

³⁰⁴³ Tobacco Plain Packaging PIR, (Exhibit AUS-624), para. 153.

³⁰⁴⁴ Tobacco Plain Packaging PIR, (Exhibit AUS-624), para. 154.

³⁰⁴⁵ Tobacco Plain Packaging PIR, (Exhibit AUS-624), para. 156.

³⁰⁴⁶ Honduras's comments on Australia's Post-Implementation Review, paras. 9 and 97-101.

³⁰⁴⁷ Tobacco Plain Packaging PIR, (Exhibit AUS-624), para. 147.

³⁰⁴⁸ Tobacco Plain Packaging PIR, (Exhibit AUS-624), para. 150.

³⁰⁴⁹ Australia's response to Panel question No. 155.

³⁰⁵⁰ See para. 7.1238 above.

initial compliance costs may not be sufficient, in and of itself, to indicate that a technical regulation is trade-restrictive. We also note that the complainants, though having had the opportunity to comment on the PIR, have not addressed the criticisms identified therein in relation to the information provided by one of the major manufacturers of tobacco products in Australia in respect of its costs associated with the transition to plain packaging. These elements lead us to conclude that the complainants have not sufficiently identified how compliance costs associated with the TPP measures would have had, or have, are of such nature or magnitude as to have a limiting effect on trade.³⁰⁵¹

7.1243. We also note the evidence on the record concerning counterfeit tobacco products, that the TPP measures will lower barriers to market entry for counterfeit producers, as the requirements in the TPP measures will simplify³⁰⁵², and possibly even cheapen³⁰⁵³, the production of packaging that satisfies the requirements in the TPP measures. This evidence has been submitted to the Panel in the context of the complainants' arguments concerning the market for illicit tobacco products in Australia, and the impact of the TPP measures on that market. Though we do not conclude that predictions about the behaviour of economic actors in the illicit market are automatically transposable to the licit market, the assertions contained in this evidence in relation to the costs faced by economic operators, and their responses thereto, are indicative of the nature and extent of the costs caused by changes in regulation.

7.1244. In light of the above, we are not persuaded that the complainants have demonstrated that the TPP measures are trade-restrictive on the basis that they have generated costs associated with compliance with their requirements, that would have a limiting effect on international trade. It is also unclear to us that the implementation of the TPP measures has generated additional compliance costs, compared to what would have been required to ensure compliance with the requirements for enhanced GHWs that entered into force at the same time as the TPP measures, which are not challenged in these proceedings and would also inevitably have led to adaptations in the appearance of the packaging of tobacco products for the Australian market.

7.1245. We further note that the complainants have not adduced specific evidence concerning compliance costs in relation to cigars. However, according to the HoustonKemp report presented by Australia, the costs of plain packaging for packets of cigars and cigarillos made in large quantities would be very similar to those for packets of cigarettes, and the on-going costs for producing simpler packaging with less colours will be either low or result in lower costs to produce the packaging.³⁰⁵⁴ HoustonKemp adds that the TPP measures were adapted to reduce the cost of compliance for cigar suppliers selling individual cigars. According to HoustonKemp, the legislation was changed to allow cigars to be imported non-compliant and then repacked in Australia. Further,

³⁰⁵¹ See Appellate Body Report, *EC – Poultry*, paras. 126-127.

³⁰⁵² Specifically, we note that the expert report of Professors Chaudry, Murray and Zimmerman, submitted by the Dominican Republic and Honduras, asserts that manufacturers of illicit tobacco packaging will face a reduced level of complexity and cost in making counterfeit plain packaged packs. They note in particular that the "industry standard" basic flip-top pack imposed in Australia by plain packaging is far simpler to replicate" and therefore "lowers a counterfeiter's cost of production". CMZ Report, (Exhibit DOM/HND-2), paras. 79-80. This view is supported by Amcor, and the Janeczko expert report. See Amcor Submission on TPP Bill, (Exhibit AUS-258), pp. 13-14; and Janeczko Report, (Exhibit UKR-10), paras. 42-48 (relied upon by Indonesia: see Indonesia's communication to the Panel of 8 July 2015).

³⁰⁵³ We note the evidence on the record from Amcor (in its own words, "the global leader in consumer packaging") to the effect that compliant packaging requires less sophisticated machinery to be produced, and that this will lead to lower upfront investment costs and barriers to entry for counterfeiters. Specifically, Amcor points out that the Gravure machine, which produces most tobacco packaging products today, "costs around A[UD]\$9-11 million". The other technology used to print tobacco packaging – offset lithography – does not achieve as high quality finishes as the use of Gravure technology, and cannot achieve specific finishes, such as metallic inks and certain structural varnishes. Amcor states:

Reduced technical requirements would mean that market entry becomes even more attractive, less specialised and less secure, especially if second-hand equipment is purchased, and where the requirements for installation space are much smaller. For instance, a second-hand offset machine would typically cost around A[UD]\$65,000 – A[UD]\$135,000 and could easily be installed in a domestic setting e.g. a garage.[.] In addition, converting equipment is readily available and the lead times for acquisition are relatively short - around nine months on average.

See Amcor Submission on TPP Bill, (Exhibit AUS-258), p. 14.

³⁰⁵⁴ HoustonKemp Report, (Exhibit AUS-19) (SCI), p. 38.

the cigar bands can be covered with a compliant adhesive band as an alternative to removal, so that alphanumeric codes and marks are permitted on cigar bands for anti-counterfeiting purposes. Also, the costs of repacking individual cigars imported from overseas does not appear to be very significant because the TPP measures have not had a substantial impact on the rate at which cigar and cigarillo prices have been rising, and the volume of cigar and cigarillo imports has been falling. Finally, the influence of cigar brands has been reduced because they are no longer shown on packets, which will either reduce barriers to entry or have no significant effect.³⁰⁵⁵ On the basis of this evidence, we therefore also find that the TPP measures have not been demonstrated to be trade-restrictive on the basis of the compliance costs associated with their implementation for cigars.

7.1246. Finally, we note that Honduras has not presented evidence in relation to its assertions relating to the need to replace non-plain packaged stock with plain-packaged stock upon the introduction of the TPP measures³⁰⁵⁶, other than an assertion to this effect by the Australian Retailers' Association in the context of the Chantler Report.³⁰⁵⁷ We consider that the decision on how to manage inventory in preparation for the implementation of a regulatory change is in the first instance a business decision based on an assessment of how compliance could be optimally achieved. We are not persuaded that Honduras's assertion in this respect is sufficient to demonstrate the trade-restrictiveness of the TPP measures.

Whether the penalties under the TPP measures are trade-restrictive

7.1247. Cuba argues that the measures also involve costs arising from the need to ensure strict compliance in view of the high fines and penalties for any failure to comply with the requirements under the measure.³⁰⁵⁸ Cuba argues that a penalty itself may operate as a restriction on international trade, and that the penalties in the present case constitute an independent and important basis for arguing that the measure is very trade-restrictive.³⁰⁵⁹ Cuba considers that the penalties imposed under the TPP measures are, in themselves, trade-restrictive and constitute an independent basis for a finding that the TPP measures are trade-restrictive. In support of its claim, Cuba refers to the analysis under Article XI of GATT 1994 by the panel in *Brazil – Retreaded Tyres*.

7.1248. As we have noted above, we consider that prior rulings in respect of the meaning of the term "restrictions" within the meaning of Article XI of the GATT 1994 may inform our understanding of the term "trade-restrictive" in Article 2.2.³⁰⁶⁰ We do not exclude that a technical regulation imposing costly penalties on importation may, in the circumstances of a given case, have a limiting effect on trade and, as a result, be "trade-restrictive" within the meaning of Article 2.2 of the TBT Agreement.³⁰⁶¹

7.1249. In the dispute referred to by Cuba, *Brazil – Retreaded Tyres*, the European Communities challenged a ban on the importation of retreaded tyres and the imposition of fines on the importation of such tyres, as measures "that complement and reinforce" the import ban, with the effect that both the ban and the fines were found to be inconsistent with Article XI:1 of the GATT 1994.³⁰⁶² The parties in that case did not dispute that the fines were an enforcement measure, applied in addition to and in support of a prohibition on importation.³⁰⁶³ The panel observed that "the fines as a whole ... have the effect of penalizing the act of 'importing' retreaded tyres by subjecting retreaded tyres already imported and existing in the Brazilian internal market to the prohibitively expensive rate of fines".³⁰⁶⁴

³⁰⁵⁵ HoustonKemp Report, (Exhibit AUS-19) (SCI), pp. 38-39.

³⁰⁵⁶ Honduras's first written submission, para. 885.

³⁰⁵⁷ Chantler Notes 14 March 2014, (Exhibit HND-104).

³⁰⁵⁸ Cuba's second written submission, para. 251.

³⁰⁵⁹ Cuba's second written submission, paras. 150, 251 (referring to Panel Report, *Brazil – Retreaded Tyres*, para. 7.372).

³⁰⁶⁰ Panel Reports, *US – COOL*, paras. 7.569-7.572.

³⁰⁶¹ Panel Reports, *US – COOL*, paras. 7.569-7.572. See also Panel Report, *US – Tuna II*, (Mexico), para. 7.455.

³⁰⁶² Panel Report, *Brazil – Retreaded Tyres*, paras. 7.360-7.361.

³⁰⁶³ Panel Report, *Brazil – Retreaded Tyres*, paras. 7.365 and 7.370.

³⁰⁶⁴ Panel Report, *Brazil – Retreaded Tyres*, para. 7.372.

7.1250. There are significant differences, in our view, between the situation addressed by the panel in *Brazil – Retreaded Tyres* and the situation before us in these proceedings. As we understand the panel's analysis in *Brazil – Retreaded Tyres*, it was directed at whether the imposition of a penalty *in support of an import prohibition* was a restriction on importation. That the fines supported and enforced a prohibition on the act of importing retreaded tyres, itself inconsistent with Article XI:1 of the GATT 1994, and thereby acted as a disincentive *on importation*, constituted the basis for the finding that the fines were also restrictions on the importation of retreaded tyres, inconsistent with Article XI:1 of the GATT 1994.³⁰⁶⁵

7.1251. In the case before us, Chapter 3 of the TPP Act, entitled "Offences and civil penalty provisions", identifies various acts that attract either civil or criminal penalties. These are described as follows in Section 30 of the TPP Act (entitled "Simplified outline"):

A person must not:

- (a) supply or purchase tobacco products in retail packaging that does not comply with the requirements of this Act; nor
- (b) be involved in the packaging of tobacco products for retail sale if the packaging does not comply with those requirements; nor
- (c) supply, purchase or manufacture tobacco products that do not comply with those requirements; nor
- (d) supply tobacco products that are not packaged for retail sale without certain contractual prohibitions.

7.1252. Chapter 3 of the TPP Act also sets out the penalties for contraventions to these prohibitions.³⁰⁶⁶ These penalties are also applicable for failure to comply with the TPP Regulations.³⁰⁶⁷

7.1253. The terms of the penalty provisions contained in Chapter 3 of the TPP Act make clear that they are in support of, and enforce compliance with, the requirements of the TPP measures relating to the appearance of retail packaging for tobacco products. By extension, therefore, they would only be trade-restrictive to the extent that they are in support of, and enforce compliance with, any trade-restrictiveness otherwise caused by the TPP measures themselves.

7.1254. We note Cuba's argument that the penalties in the present case are very high and aim to impose punitive measures to ensure compliance with "the prohibition on trade in packs of non-complying tobacco products", with the effect that the penalties are "very trade-restrictive".³⁰⁶⁸ We do not consider, however, that the imposition of penalties to ensure compliance with the requirements of the TPP measures results, in itself, in an "additional" limiting effect on imports beyond what would be induced by full compliance with the TPP requirements themselves, which is what the penalties seek to ensure. We are not persuaded, therefore, that the existence of these penalties, or their level, lead to a greater degree of trade-restrictiveness than that arising from compliance with the relevant requirements of the TPP measures (which we have concluded, above, have not been demonstrated to be trade-restrictive).

Overall conclusion on the trade-restrictiveness of the TPP measures

7.1255. On the basis of the foregoing, we conclude that the TPP measures are trade-restrictive, insofar as, by reducing the use of tobacco products, they reduce the volume of imported tobacco products on the Australian market, and thereby have a "limiting effect" on trade. We also conclude that, while it is plausible that the measures may also, over time, affect the overall value of tobacco imports, the evidence before us does not show this to have been the case to date. We are also not

³⁰⁶⁵ Cuba's second written submission, para. 251.

³⁰⁶⁶ TPP Act, (Exhibits AUS-1, JE-1), Chap. 3.

³⁰⁶⁷ TPP Act, (Exhibits AUS-1, JE-1), Chap. 3 and Section 4 (definition of "tobacco product requirement").

³⁰⁶⁸ Cuba's second written submission, para. 251.

persuaded that the complainants have demonstrated that the TPP measures impose conditions on the sale of tobacco products in Australia or compliance costs of such magnitude that they would amount to a limiting effect on trade.

7.2.5.5 The nature and gravity of the "risks of non-fulfilment"

7.1256. As described above³⁰⁶⁹, "the nature of the risks at issue and the gravity of consequences that would arise from non-fulfilment of the objective(s) pursued by the Member through the measure" constitute a third factor to be assessed in the "relational analysis"³⁰⁷⁰, in the context of our assessment of whether a technical regulation is "more trade-restrictive than necessary" under Article 2.2 of the TBT Agreement. This reflects the fact that Article 2.2 of the TBT Agreement provides that "technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, *taking account of the risks non-fulfilment would create*" (emphasis added).

7.1257. According to the Appellate Body, "[t]his suggests a further element of weighing and balancing in the determination of whether the trade-restrictiveness of a technical regulation is 'necessary' or, alternatively, whether a possible alternative measure, which is less trade restrictive, *would make an equivalent contribution to the relevant legitimate objective, taking account of the risks non-fulfilment would create*, and would be reasonably available".³⁰⁷¹ In this context, there is "a margin of appreciation in assessing the equivalence of the respective degrees of contribution" of a measure and a proposed alternative, which "may be affected by the nature of the risks and the gravity of the consequences arising from the non-fulfilment of the technical regulation's objective".³⁰⁷²

7.1258. In the words of the Appellate Body, "the obligation to consider 'the risks non-fulfilment would create' suggests that the comparison of the challenged measure with a possible alternative measure should be made in the light of the *nature of the risks at issue and the gravity of the consequences* that would arise from non-fulfilment of the legitimate objective".³⁰⁷³

7.1259. As described by the Appellate Body, "in order to engage in this assessment and ensure that this factor is 'tak[en] account of', the nature of the risks and the gravity of the consequences that would arise from non-fulfilment would themselves, *in the first place*, need to be identified".³⁰⁷⁴ As we understand it, therefore, the "*identification*"³⁰⁷⁵ of "the risks non-fulfilment would create" is distinct from the subsequent step of "*taking account of*" such risks in the context of the comparative analysis that is in most cases required to complete the necessity analysis.³⁰⁷⁶

7.1260. At this stage of our analysis, we therefore seek to identify, "in the first place", the nature of the risks at issue and the gravity of the consequences that would arise from "non-fulfilment". The "risks" to be "tak[en] account of" are those that would be created by the "non-fulfilment" of

³⁰⁶⁹ See para. 7.184 above.

³⁰⁷⁰ Appellate Body Report, *US – Tuna II (Mexico)*, paras. 318 and 322.

³⁰⁷¹ Appellate Body Report, *US – Tuna II (Mexico)*, para. 321. (emphasis added; footnote omitted)

³⁰⁷² Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.254. See also ibid. para. 5.269.

³⁰⁷³ Appellate Body Report, *US – Tuna II (Mexico)*, para. 321. (emphasis added)

³⁰⁷⁴ Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.217 (emphasis added). As the Appellate Body held in *US – COOL*, the comparative analysis of the challenged measure and the proposed alternatives is distinct from the establishment of the risk non-fulfilment would create:

[T]he contribution that the challenged measure makes to the achievement of its objective must be determined objectively, and then evaluated along with the other factors mentioned in Article 2.2, that is: (i) the trade restrictiveness of the measure; and (ii) the nature of the risks at issue and the gravity of the consequences that would arise from non-fulfilment of the objective(s) pursued by the Member through the measure. In most cases, a comparison of the challenged measure and possible alternative measures will then also need to be undertaken.

Appellate Body Reports, *US – COOL*, para. 461. (emphasis added; footnote omitted)

³⁰⁷⁵ Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.217. (emphasis added)

³⁰⁷⁶ Appellate Body Report, *US – Tuna II (Mexico)*, para. 322 (emphasis added). See also Appellate Body Reports, *US – COOL*, paras. 471 and 481.

the "legitimate objective" of the technical regulation at issue.³⁰⁷⁷ This determination is therefore directly related to the objective pursued by the challenged measure.³⁰⁷⁸ In assessing such risks, as provided by Article 2.2, relevant elements of consideration are "*inter alia*: available scientific and technical information, related processing technology or intended end-uses of products".³⁰⁷⁹

7.1261. With these general considerations in mind, we consider below the nature of the risks at issue and the gravity of the consequences that would arise from non-fulfilment of the legitimate objective of the TPP measures, in order to identify, in the first place, the "risks that non-fulfilment would create". We will consider separately, at a later stage of our analysis, how these risks should be "taken into account" in determining whether the TPP measures are more trade-restrictive than necessary within the meaning of Article 2.2.

7.2.5.5.1 Main arguments of the parties

7.1262. The parties agree that "the risks non-fulfilment would create" is a key element of the necessity analysis under Article 2.2 of the TBT Agreement.³⁰⁸⁰ All parties recall³⁰⁸¹ that, in the words of the Appellate Body, this element refers to two main factors, namely: "the nature of the risks at issue and the gravity of the consequences that would arise from non-fulfilment of the legitimate objective".³⁰⁸² The complainants and Australia disagree, however, as to whether "taking account of the risk non-fulfilment would create" involves a comparison of the likelihood of the challenged and the proposed alternative measures' contribution to the TPP measures' objective.

7.1263. Specifically, Honduras argues that the nature of the risks at issue relates to "the serious health risks that arise from tobacco smoking":³⁰⁸³ "tobacco smoking gives rise to serious health risks regardless of whether an individual smokes cigarettes, cigars, or other tobacco products".³⁰⁸⁴ Honduras maintains that assessing the nature of the risks at issue requires a consideration of

³⁰⁷⁷ Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, paras. 5.217 and 5.277. Indeed, through the use of the words "fulfil" (as in "necessary to fulfil a legitimate objective")/"réaliser" (as in "nécessaire pour réaliser un objectif légitime")/"ancanzar" (as in "necesario para alcanzar un objetivo legítimo") and "non-fulfilment" (as in "taking account of the risks non-fulfilment would create")/"non-réalisation" (as in "compte tenu des risques que la non-réalisation entraînerait")/"no alcanzarlo" (as in "teniendo en cuenta los riesgos que crearía no alcanzarlo"), respectively, the second sentence of Article 2.2 links risks of non-fulfilment to the objective of the challenged measure in all three authentic language versions of the TBT Agreement. This linkage is made explicit in the Spanish version of the second sentence of Article 2.2, where the suffix "lo" for the word "alcanzarlo" - in the phrase "teniendo en cuenta los riesgos que crearía no alcanzarlo" - is a masculine direct-object pronoun indicating the intention to specifically refer back to the masculine "un objetivo legítimo" in the preceding phrase of the same sentence.

³⁰⁷⁸ We recall in this regard the emphasis placed on "identifying with sufficient clarity and consistency the objective or objectives pursued by a Member through a technical regulation." Appellate Body Reports, *US – COOL*, para. 387.

³⁰⁷⁹ See Appellate Body Report, *US – Tuna II (Mexico)*, para. 321. The exact terms of Article 2.2 of the TBT Agreement are as follows:

Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, *taking account of the risks non-fulfilment would create*. Such legitimate objectives are, *inter alia*: national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment. *In assessing such risks, relevant elements of consideration are, inter alia: available scientific and technical information, related processing technology or intended end-uses of products.* (emphasis added)

³⁰⁸⁰ Honduras's first written submission, para. 890; Dominican Republic's first written submission, para. 1025; Dominican Republic's second written submission, para. 991; Cuba's first written submission, paras. 410-411; Indonesia's second written submission, para. 277; and Australia's first written submission, para. 683.

³⁰⁸¹ Honduras's first written submission, para. 890; Dominican Republic's first written submission, para. 1025; Dominican Republic's response to Panel question Nos. 65 and 157; Dominican Republic's second written submission, para. 992; Cuba's response to Panel question No. 65 (annexed to its response to Panel question No. 138); Indonesia's response to Panel question No. 89; Australia's comments on the complainants' responses to Panel question No. 157.

³⁰⁸² Appellate Body Reports, *US – Tuna II (Mexico)*, para. 321; and *US – COOL*, para. 377.

³⁰⁸³ Honduras's first written submission, para. 892.

³⁰⁸⁴ Honduras's response to Panel question No. 65.

"the general importance and the type of risk that the WTO Member seeks to address through the challenged measure".³⁰⁸⁵

7.1264. Accordingly, Honduras maintains that the factor relating to the gravity of the consequences should focus on "how serious would the consequences be if the measure at issue does not achieve the government's objective".³⁰⁸⁶ Honduras contends that "although the risks at issue are of a serious nature, the consequences of not fulfilling Australia's objective through the plain packaging measures are not grave".³⁰⁸⁷ As smoking rates in Australia have been in decline for years as a result of numerous anti-tobacco measures, Honduras states, Australia was in a position to achieve its desired reduction of tobacco prevalence without the introduction of the TPP measure.³⁰⁸⁸ As a result, according to the Honduras, the failure of the TPP measures to fulfil Australia's objective would not lead to serious consequences, since smoking rates would simply continue to fall as they have done so for decades.³⁰⁸⁹

7.1265. The Dominican Republic argues that the dictionary definition of "risk" incorporates "two inter-linked elements: (1) the 'possibility' or likelihood of (2) a negative event occurring".³⁰⁹⁰ For the Dominican Republic, in the context of this case, the "negative event" is "the failure to achieve, wholly or partly, the desired objective"³⁰⁹¹; in other words, "there will be an additional number of people who smoke (i.e. there will be higher smoking rates)".³⁰⁹² According to the Dominican Republic, Australia mistakenly focuses on the nature of the health risks of smoking:³⁰⁹³ the risk of harm caused by smoking is not the relevant enquiry in these proceedings because neither the TPP measures nor any of the proposed alternatives have as their objective a reduction in the considerable health risks that result from smoking.³⁰⁹⁴ Rather, the Dominican Republic maintains, all of these measures aim to reduce the number of people that engage in smoking behaviour; consequently, the risk of non-fulfilment is "the risk of a larger number of smokers".³⁰⁹⁵

7.1266. In turn, the Dominican Republic contends, the likelihood of this "negative event" occurring is a question that can be only answered with "reliable and credible evidence".³⁰⁹⁶ For the Dominican Republic, this means that a proper consideration of the nature of the risk in this case should involve an assessment of the "relative risk (likelihood)" of a larger number of smokers under the TPP measures as compared with the alternatives: in short, "what is the risk (likelihood) that the alternatives would reduce smoking behaviour by less than the [T]PP measures?"³⁰⁹⁷ According to the Dominican Republic, the evidence shows that whereas the TPP measures involve "at worst, actual non fulfilment and, at best a considerable risk of non-fulfilment of the objective of reducing smoking", the proposed alternatives involve "no risk of non-fulfilment" but a "certainty that they would immediately reduce smoking behaviour in the population in general, and among young people in particular".³⁰⁹⁸ The Dominican Republic further argues that, whereas the TPP measures are supposed to reduce smoking in the future, which is not substantiated by evidence³⁰⁹⁹, the proposed alternatives involve the "certainty" that they would reduce smoking

³⁰⁸⁵ Honduras's first written submission, para. 815.

³⁰⁸⁶ Honduras's first written submission, para. 893.

³⁰⁸⁷ Honduras's first written submission, para. 894.

³⁰⁸⁸ Honduras's first written submission, para. 894. See also ibid. paras. 895-905.

³⁰⁸⁹ Honduras's first written submission, para. 894. See also ibid. para. 906.

³⁰⁹⁰ Dominican Republic's first written submission, para. 1027 (referring to Oxford English Dictionary, online, definition of "risk", <<http://www.oed.com/view/Entry/166306?rskey=fqWvbI&result=1&print>>, accessed 10 May 2014, (Exhibit DOM-160)); response to Panel question No. 65; and second written submission, para. 992.

³⁰⁹¹ Dominican Republic's first written submission, para. 1027.

³⁰⁹² Dominican Republic's response to Panel Question No. 65; and Dominican Republic's second written submission, paras. 995 and 997.

³⁰⁹³ Dominican Republic's second written submission, para. 1009.

³⁰⁹⁴ Dominican Republic's second written submission, para. 1009.

³⁰⁹⁵ Dominican Republic's second written submission, para. 1008.

³⁰⁹⁶ Dominican Republic's first written submission, para. 1027.

³⁰⁹⁷ Dominican Republic's second written submission, para. 996.

³⁰⁹⁸ Dominican Republic's response to Panel question No. 65 (emphasis original). See also Dominican Republic's first written submission, paras. 1030 and 2018; and second written submission, paras. 997-998.

³⁰⁹⁹ Dominican Republic's second written submission, para. 999.

behaviour in the population in general, and among young people in particular, both in the short and the long term.³¹⁰⁰

7.1267. The Dominican Republic contends that in calling on panels to take account of the risks of non-fulfilment in assessing the equivalence of the respective contributions, "the Appellate Body has recognized that the nature of the risks of non-fulfilment may well differ as between the challenged and alternative measures".³¹⁰¹ As one measure may give rise to a much higher risk of non-fulfilment than another, because it is much less likely to contribute to the objective³¹⁰², "the Appellate Body has confirmed that this factor must be addressed in the assessment of the equivalence of contribution, and that a panel enjoys a margin of appreciation in doing so".³¹⁰³

7.1268. The Dominican Republic adds that the *nature of the risks* should be separately considered for cigarettes and cigars as none of the evidence shows "any impact of the [T]PP measures on reducing smoking prevalence or consumption for tobacco products overall, or for cigars".³¹⁰⁴ Accordingly, the Dominican Republic maintains, the likelihood that, without the TPP measures, smoking prevalence and consumption would have been higher for cigars is zero.³¹⁰⁵

7.1269. As regards the *gravity of the consequences*, the Dominican Republic equates this factor to "the seriousness of the consequences that flow from the negative event materializing".³¹⁰⁶ For the Dominican Republic, in these proceedings "the consequence of the failure to fulfill the objective ... would be serious and grave" because, "[i]f tobacco use does not decrease to a greater extent than would otherwise be the case in the absence of [the T]PP [measures], then more Australian citizens would suffer from the adverse health impacts of smoking".³¹⁰⁷ The Dominican Republic adds that the "serious and grave"³¹⁰⁸ consequences "are the same as between the [T]PP measure and the alternative measures".³¹⁰⁹ According to the Dominican Republic, in assessing the equivalence of the contributions, the objective pursued remains constant for the challenged and alternative measures; consequently, the gravity of the consequences that would arise from non-fulfilment of that objective also remains constant.³¹¹⁰ For the Dominican Republic, when the objective is to reduce smoking, "Australia and the Dominican Republic agree that the consequences of non-fulfilment of that objective are that 'more Australian citizens would suffer from the adverse health impacts of smoking'"³¹¹¹, and these "grave consequences of non-fulfilment are identical for the challenged and the alternative measures, as they would be for all tobacco control measures".³¹¹²

7.1270. Cuba maintains that, while there is a "material risk" that the TPP measures will not achieve their goal of reducing smoking prevalence, such a risk is "much lower (or non-existent)" for all of the less trade-restrictive alternatives that Cuba has identified.³¹¹³ According to Cuba, in this case, the risk that non-fulfilment would create concerns, more specifically, the risk that people will, in the absence of the TPP measures: (i) begin to smoke; (ii) continue smoking; or (iii) not quit smoking.³¹¹⁴ According to Cuba, given the TPP measures' lack of contribution, the situation from the standpoint of smoking prevalence would not be different without plain packaging.³¹¹⁵ Cuba

³¹⁰⁰ Dominican Republic's second written submission, para. 1000. See also Dominican Republic's second written submission, paras. 1001-1005.

³¹⁰¹ Dominican Republic's response to Panel question No. 157 (referring to Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, paras. 5.218, 5.284 and 5.295).

³¹⁰² Dominican Republic's response to Panel question No. 157 (referring to Dominican Republic's second written submission, para. 992; and Dominican Republic's first written submission, para. 1027).

³¹⁰³ Dominican Republic's response to Panel question No. 157.

³¹⁰⁴ Dominican Republic's response to Panel question No. 65.

³¹⁰⁵ Dominican Republic's response to Panel question No. 65.

³¹⁰⁶ Dominican Republic's first written submission, para. 1029; and second written submission, para. 992.

³¹⁰⁷ Dominican Republic's first written submission, para. 1029.

³¹⁰⁸ Dominican Republic's second written submission, para. 1010.

³¹⁰⁹ Dominican Republic's second written submission, para. 1006.

³¹¹⁰ Dominican Republic's response to Panel question No. 157.

³¹¹¹ Dominican Republic's response to Panel question No. 157 (referring to Australia's second written submission, para. 543, in turn referring to the Dominican Republic's first written submission, para. 1029).

³¹¹² Dominican Republic's response to Panel question No. 157.

³¹¹³ Cuba's first written submission, para. 416.

³¹¹⁴ Cuba's response to Panel question No. 65 (annexed to its response to Panel question No. 138).

³¹¹⁵ Cuba's response to Panel question No. 65 (annexed to its response to Panel question No. 138).

contends that Australia has at its disposal equally or more effective alternative measures that do not present a greater risk than the risk that non-fulfilment of the health objective would create.³¹¹⁶ On the contrary, Cuba argues, it has been shown that these alternatives are effective and do not raise the risk of undesirable consequences that would impair any possible effects of the TPP measures.³¹¹⁷ Cuba adds that the harmfulness of smoking is not at issue in these proceedings: smoking is harmful for all consumers.³¹¹⁸ Accordingly, Cuba does not consider that there is any need to analyse the nature of the risks involved, in particular with respect to individual products or groups of consumers.³¹¹⁹

7.1271. Indonesia quotes³¹²⁰ the panel in *US – Tuna II (Mexico)*, according to which the consideration of the risks of non-fulfilment requires an assessment of the "likelihood and the gravity of potential risks".³¹²¹ Indonesia considers that the nature of the risks at issue in these proceedings is "the risk to public health from those elements of packaging that Australia has prohibited or regulated through its plain packaging measures".³¹²² According to Indonesia, like the panel in *US – Tuna II (Mexico)*, the Panel should evaluate the "likelihood and the gravity" of potential risks to all consumers, and it would be useful to assess the likelihood of risk to adults and youth separately, in light of Australia's particular emphasis on the expectation that plain packaging will be particularly effective with youth. Indonesia further argues that it may be useful – if data is available – to consider the impact on Australia's Aboriginal and Torres Strait Islander population, since those population groups were expressly targeted by the Council of Australian Governments' smoking prevalence reduction goals.³¹²³

7.1272. Indonesia also finds support for its arguments in Section 15 of the TPP Act³¹²⁴, for which it submits the following interpretation: "if an Australian court were to find that [the TPP measures] resulted in an unjust acquisition of property, the government could simply cancel the PP requirements and would not owe compensation".³¹²⁵ For Indonesia, "[b]ecause Australia is willing to walk away from [TPP measures], rather than pay compensation, it is clear that Australia believes there is little risk to public health from not allowing [the TPP measures] to fulfill [their] public health objective (i.e. the risk of non-fulfillment is negligible)".³¹²⁶ Further, according to Indonesia, prevalence was already falling before the introduction of the TPP measures, and there is no evidence that reductions in prevalence were likely to slow".³¹²⁷ Even if prevalence only continued to fall by the historic trend, Australia would, in any event, reach its 10% prevalence target whether the TPP measures were implemented or not.³¹²⁸ Indonesia further contends that, if Australia accepts that the TPP measures are "likely to make little contribution toward the legitimate objective of reducing smoking prevalence for an extended period of time (if ever), Australia must not perceive a significant near-term risk of [the TPP measures] failing to make a contribution toward its objective".³¹²⁹ Indonesia adds that, if the TPP measures are "generational" measures as Australia argues³¹³⁰, it follows that, for the generation until the TPP measures achieve a reduction in prevalence, "non-fulfilment of the objective" under the TPP measures is "almost certain".³¹³¹

³¹¹⁶ Cuba's response to Panel question No. 65 (annexed to its response to Panel question No. 138).

³¹¹⁷ Cuba's response to Panel question No. 65 (annexed to its response to Panel question No. 138).

³¹¹⁸ Cuba's response to Panel question No. 65 (annexed to its response to Panel question No. 138).

³¹¹⁹ Cuba's response to Panel question No. 65 (annexed to its response to Panel question No. 138).

³¹²⁰ Indonesia's first written submission, para. 422. See also Indonesia's response to Panel question

No. 65.

³¹²¹ Panel Report, *US – Tuna II (Mexico)*, para. 7.467.

³¹²² Indonesia's response to Panel question No. 65.

³¹²³ Indonesia's response to Panel question No. 65.

³¹²⁴ The Simplified Outline of Chapter 1 of the TPP Act summarizes Section 15 of the same Act as follows: "This Act does not apply to the extent that its operation would infringe certain constitutional protections (such as by acquiring property otherwise than on just terms)." TPP Act, (Exhibits AUS-1, JE-1), Section 13.

³¹²⁵ Indonesia's first written submission, para. 425.

³¹²⁶ Indonesia's first written submission, para. 425.

³¹²⁷ Indonesia's first written submission, para. 426.

³¹²⁸ Indonesia's first written submission, para. 426; and second written submission, para. 279.

³¹²⁹ Indonesia's first written submission, para. 427.

³¹³⁰ Indonesia's second written submission, para. 281 (referring to Australia's response to Panel question No. 126).

³¹³¹ Indonesia's second written submission, para. 281.

7.1273. Indonesia also argues that in assessing "the risks non-fulfilment would create" a panel must consider the "risks that *both* the measures and the alternative(s) pose".³¹³² For Indonesia, the relative contribution of the measure and the alternative(s) are part of the analysis of "the risks non-fulfilment would create", and the nature of the risks includes both the "possibility" and "likelihood" of a negative event arising.³¹³³ According to Indonesia, contrary to Australia's overly dramatic description of the risks non-fulfilment would create, it is actually the TPP measures that create the greatest risk of non-fulfilment of the objective of reducing smoking prevalence.³¹³⁴ Indonesia adds that it is proposing alternative measures that have "an immediate and direct impact on smoking prevalence, which means the risk of non-fulfillment is low".³¹³⁵

7.1274. Australia recalls that panels and the Appellate Body have recognised that the interests and values at stake in relation to measures to reduce the harm caused by the use of tobacco products are "both vital and important in the highest degree".³¹³⁶ It then follows, argues Australia, that the nature of the risks at issue in these proceedings is "both vital and important in the highest degree".³¹³⁷ According to Australia, the magnitude of the global tobacco epidemic and the serious harms caused by tobacco use, including in Australia, are well-established:³¹³⁸ all tobacco products are highly addictive, there is no safe level of tobacco use or safe level of exposure to second-hand or environmental tobacco smoke, and tobacco use harms nearly every organ in the body.³¹³⁹

7.1275. As regards the *nature of the risks* at issue, Australia agrees with the Dominican Republic that Article 2.2 suggests an objective enquiry of the relevant risks.³¹⁴⁰ Australia adds that scientific evidence establishes that tobacco use is the world's leading cause of preventable morbidity and mortality, harms nearly every organ in the body, and is responsible for the deaths of nearly 6 million people annually.³¹⁴¹

7.1276. Australia contends that the complainants "conflate 'contribution' and 'risks non-fulfilment would create' as elements of the relational analysis under Article 2.2".³¹⁴² According to Australia, these are "separate analyses" under Article 2.2 of the TBT Agreement.³¹⁴³ Australia adds that the complainants misconstrue this element of the weighing and balancing analysis in an attempt to persuade the Panel of the counterintuitive proposition that notwithstanding the vital importance of Australia's public health objectives and the serious public health risks posed by the use of and exposure to tobacco products, the risks that would arise from the non-fulfilment of the objectives of the TPP measures are insignificant.³¹⁴⁴ According to Australia, the text of Article 2.2 of the TBT Agreement makes it clear that "the risks non-fulfilment would create" are the risks that would arise assuming the technical regulation's objective would not be fulfilled, and that the risks to be assessed are those that would be created by the non-fulfilment of "a legitimate objective", i.e. "those risks that relate to the objective that the technical regulation pursues, rather than the technical regulation itself".³¹⁴⁵ Accordingly, Australia argues, the proper assessment of "the risks non-fulfilment would create" involves the consideration of the nature of the risks at issue and the gravity of the consequences that would arise from the non-fulfilment "of the objectives of

³¹³² Indonesia's second written submission, para. 277. (emphasis added)

³¹³³ Indonesia's second written submission, para. 279.

³¹³⁴ Indonesia's second written submission, para. 279.

³¹³⁵ Indonesia's first written submission, para. 427.

³¹³⁶ Australia's response to Panel question No. 65 (referring to Panel Report, *US – Clove Cigarettes*, para. 7.347; and GATT Panel Report, *Thailand – Cigarettes*, para. 73).

³¹³⁷ Australia's first written submission, para. 684. See also Australia's response to Panel question No. 65; and second written submission, para. 539.

³¹³⁸ Australia's response to Panel question No. 65 (referring to Australia's first written submission, Part II).

³¹³⁹ Australia's response to Panel question No. 65 (referring to Australia's first written submission, Part II).

³¹⁴⁰ Australia's second written submission, para. 537 (referring to Dominican Republic's response to Panel question No. 65).

³¹⁴¹ Australia's second written submission, para. 538.

³¹⁴² Australia's first written submission, para. 688.

³¹⁴³ Australia's second written submission, para. 526.

³¹⁴⁴ Australia's second written submission, para. 527.

³¹⁴⁵ Australia's second written submission, paras. 532-533.

improving public health by discouraging uptake of tobacco products, encouraging cessation, discouraging relapse, and reducing people's exposure to smoke".³¹⁴⁶

7.1277. Australia also rejects the proposition by the Dominican Republic and Indonesia that the *likelihood* of the "negative event" occurring should be taken into account. Australia considers that taking this element into account would lead to a misconstrued assessment of the nature of the risks non-fulfilment would create.³¹⁴⁷ According to Australia, the Dominican Republic and Indonesia attempt to use this misinterpretation "to rerun their arguments relating to the contribution the measure makes to its objectives".³¹⁴⁸ However, Australia contends, this is contrary to the text of Article 2.2 and finds no support in previous Appellate Body reports.³¹⁴⁹

7.1278. According to Australia, the plain text of Article 2.2, as confirmed by the Appellate Body, makes it clear that the "risks" to be assessed under this element of the relational analysis are those that would arise assuming non-fulfilment of the objectives of the challenged measure; not, as the Dominican Republic continues to erroneously contend, the risk or likelihood of non-fulfilment.³¹⁵⁰ According to Australia, "[s]ince the relevant risks to be assessed are those arising *from* non-fulfilment of the *objectives* of the challenged measure; and since 'the objective pursued *remains constant* for the challenged and alternative measures'; 'the nature of the risks' arising from non-fulfilment of the objectives also remains constant under either the relational or comparative analysis".³¹⁵¹

7.1279. Australia agrees with Honduras that assessing the "nature of the risks at issue" requires a consideration of "the general importance and the type of risk that the WTO Member seeks to address through the challenged measure".³¹⁵² According to Australia, the Appellate Body clarified in *US – COOL (Article 21.5 – Canada and Mexico)* that it is "the importance of the objective to the Member implementing the technical regulation (rather than the relative importance of the objective against other potential objectives)" that informs the analysis under Article 2.2.³¹⁵³ For Australia, "[t]he adoption of tobacco plain packaging, as recommended in the FCTC Guidelines, was a logical extension of Australia's existing restrictions on the advertising and promotion of tobacco products, as part of Australia's comprehensive suite of tobacco control measures".³¹⁵⁴ Australia's long history of implementing tobacco control measures, and the importance it places on a comprehensive approach to tobacco control, illustrate the importance of the objective to Australia and the grave consequences that would arise from non-fulfilment of the objective.³¹⁵⁵ The results of not fulfilling the TPP measures' public health objectives would be "more tobacco related premature death and serious disease in Australia than would otherwise be the case".³¹⁵⁶

7.1280. Australia also considers that the nature of the risks should be considered in relation to all tobacco products and all consumers, as indicated by the legitimate objectives of the TPP measures.³¹⁵⁷ According to Australia, it is clear from the public health and marketing evidence, including expert opinion, that the nature of the risks addressed by the TPP measures are similar for all tobacco products and for all consumers of tobacco products, and impact non-smokers through exposure to second-hand smoke from tobacco products.³¹⁵⁸

7.1281. Australia responds that Indonesia "entirely mischaracterizes" the text of Section 15 of the TPP Act.³¹⁵⁹ According to Australia, is a "savings provision"³¹⁶⁰ concerned with "potential invalidity,

³¹⁴⁶ Australia's second written submission, para. 536.

³¹⁴⁷ Australia's second written submission, para. 541.

³¹⁴⁸ Australia's second written submission, para. 541.

³¹⁴⁹ Australia's second written submission, para. 542.

³¹⁵⁰ Australia's comments on the complainants' responses to Panel question No. 157.

³¹⁵¹ Australia's comments on the complainants' responses to Panel question No. 157. (emphasis added; footnotes omitted).

³¹⁵² Australia's response to Panel question No. 65 (referring to Honduras's first written submission, para. 81). See also Australia's second written submission, para. 537.

³¹⁵³ Australia's response to Panel question No. 65 (referring to Appellate Body Reports, *US – COOL (Article 21.5)*, para. 5.279).

³¹⁵⁴ Australia's first written submission, para. 690.

³¹⁵⁵ Australia's response to Panel question No. 65.

³¹⁵⁶ Australia's first written submission, para. 691.

³¹⁵⁷ Australia's response to Panel question No. 65.

³¹⁵⁸ Australia's response to Panel question No. 65.

³¹⁵⁹ Australia's first written submission, para. 693.

not potential liability"³¹⁶¹, introduced out of "an abundance of caution".³¹⁶² Australia explains that Section 15 is a provision "specifically intended to *preserve* the requirements of the TPP Act with respect to the retail packaging of tobacco products and the appearance of tobacco products to the *greatest extent possible*, in the unlikely event that it was found to be inconsistent with the Australian Constitution".³¹⁶³ Australia adds that the High Court of Australia upheld the constitutionality of the TPP measures.³¹⁶⁴

7.1282. As regards the *gravity of the consequences*, Australia agrees with the Dominican Republic that assessing this factor "relates to the seriousness of the consequences that would flow from non-fulfilment"³¹⁶⁵ and that the consequences of non-fulfilment of the TPP measures' objectives "would be serious and grave" because "more Australian citizens would suffer from the adverse health impacts of smoking".³¹⁶⁶ At the same time, Australia considers that Honduras misconstrues the consideration of the gravity of the consequences that would arise from non-fulfilment by arguing that smoking rates have been and would continue to be in decline as a result of anti-tobacco measures other than plain packaging.³¹⁶⁷ Australia contends that Honduras's approach would lead to the absurd result that the risks arising from the non-fulfilment of a technical regulation's objective will never be meaningful where the technical regulation at issue is adopted as part of a comprehensive policy that already contributes to a legitimate objective. According to Australia, in light of the Appellate Body report in *Brazil – Retreaded Tyres*, Members "should not be prevented from adopting technical regulations that complement the effects of other elements of a comprehensive policy, even in situations where those other elements already make a contribution to the same overarching objective".³¹⁶⁸ Australia emphasises that the consequences that would arise from non-fulfilment of the legitimate objectives of the TPP measures are "grave" given the enormous harm caused by tobacco use³¹⁶⁹ in the form of increased tobacco-related deaths and disease in Australia.³¹⁷⁰ Therefore, Australia contends, the risks that non-fulfilment would create are "great".³¹⁷¹

7.2.5.5.2 Analysis by the Panel

7.1283. Article 2.2 does not prescribe a particular methodology for assessing "the risks non-fulfilment would create"³¹⁷², other than indicating that, in assessing such risks, "relevant elements for consideration are '*inter alia*: available scientific and technical information, related processing technology or intended end-uses of products'".³¹⁷³

7.1284. However, as described above, an identification of the "the risks non-fulfilment would create" involves a consideration of both "the nature of the risks" and the "gravity of the consequences that would arise from non-fulfilment". According to the Appellate Body:

[I]n some contexts, it might be possible and appropriate to seek to determine separately the nature of the risks, on the one hand, and to quantify the gravity of the consequences that would arise from non-fulfilment, on the other hand. In other contexts, however, it might be difficult, in practice, to determine or quantify those elements separately with precision. In such contexts, it may be more appropriate to conduct a conjunctive analysis of both the nature of the risks and the gravity of the consequences of non-fulfilment, in which "the risks non-fulfilment would create" are

³¹⁶⁰ Australia's first written submission, para. 693.

³¹⁶¹ Australia's first written submission, para. 693 fn 911.

³¹⁶² Australia's first written submission, para. 693 fn 911.

³¹⁶³ Australia's first written submission, para. 693. (emphasis original)

³¹⁶⁴ Australia's first written submission, para. 693.

³¹⁶⁵ Australia's second written submission, para. 543 (referring to Dominican Republic's first written submission, para. 1029).

³¹⁶⁶ Australia's second written submission, para. 544 (referring to Dominican Republic's first written submission, para. 1029).

³¹⁶⁷ Australia's second written submission, para. 545.

³¹⁶⁸ Australia's second written submission, para. 547 (referring to Appellate Body Report, *Brazil – Retreaded Tyres*, para. 151).

³¹⁶⁹ Australia's first written submission, para. 684; and response to Panel question No. 65.

³¹⁷⁰ Australia's second written submission, para. 526.

³¹⁷¹ Australia's first written submission, para. 684; and second written submission, para. 526.

³¹⁷² Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.218.

³¹⁷³ Appellate Body Report, *US – Tuna II (Mexico)*, para. 321.

assessed in qualitative terms. In any case, difficulties or imprecision that arise in assessing "the risks non-fulfilment would create" – due to the nature of the relevant risks or the gravity of the consequences of non-fulfilment at issue – should not, in and of themselves, relieve a panel from its duty to assess this factor.³¹⁷⁴

7.1285. We shall attempt to determine these two aspects as precisely as possible separately, before drawing conclusions on the identification of the risks non-fulfilment would create. Should a separate and precise quantification of these two factors be difficult, we shall, as suggested by the Appellate Body, conduct a "conjunctive analysis" of both aspects, in which "the risks non-fulfilment would create" are assessed in qualitative terms.³¹⁷⁵

7.2.5.5.2.1 Nature of the risks

7.1286. As explained, the identification of "the risks that non-fulfilment would create" is directly related to "the objective(s) pursued by the Member through the measure" at issue³¹⁷⁶, and "the 'risks' to be 'tak[en] account of' under Article 2.2 are those that would be created by the 'non-fulfilment' of the 'legitimate objective' of the technical regulation at issue".³¹⁷⁷

7.1287. We have found above that the objective of the measures challenged in these proceedings, the TPP measures, is "to improve public health by reducing the use of, and exposure to, tobacco products".³¹⁷⁸ Accordingly, we find that the nature of the risk of not fulfilling the TPP measures' legitimate objective is that public health would not be improved, as the use of, and exposure to, tobacco products would not be reduced.

7.1288. The Dominican Republic quotes the dictionary definition of "risk" to argue that the likelihood of "risk" should be taken into account in determining the risks non-fulfilment would create, in particular the nature of such risks.³¹⁷⁹ Specifically, the Dominican Republic contends that a proper consideration of the nature of the risk in this case involves an assessment of the "relative risk (likelihood)" of there being a larger number of smokers under the TPP measures as compared with the alternatives: in short, "what is the risk (likelihood) that the alternatives would reduce smoking behaviour by less than the [T]PP measures?"³¹⁸⁰

7.1289. Indonesia similarly refers to³¹⁸¹ the panel's ruling in *US – Tuna II (Mexico)* in respect of "the likelihood and the gravity of potential risks (and any associated adverse consequences) that might arise in the event that the legitimate objective being pursued would not be fulfilled".³¹⁸² In that panel's view, this passage "impl[ies] that an alternative means of achieving the objective that would entail greater 'risks of non-fulfilment' would not be a valid alternative, even if it were less trade-restrictive".³¹⁸³

7.1290. We note that both complainants' references to the "likelihood" of risks serve to underpin a comparison between the likelihoods of a contribution by the challenged and alternative measures to the objective in question, taking into account the risks non-fulfilment would entail. We are not persuaded, however, that the *identification* of the nature of the "risks non-fulfilment would create" entails such a comparison of the challenged measures and possible alternative measures, or consideration of their degrees of contribution to the objective.

7.1291. As described above, the questions that we must consider at this stage of our analysis are: the *nature of the risks* that non-fulfilment of the relevant objective would create, and the *gravity*

³¹⁷⁴ Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.218. (footnotes omitted)

³¹⁷⁵ Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.218.

³¹⁷⁶ Appellate Body Report, *US – Tuna II (Mexico)*, para. 322.

³¹⁷⁷ Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.277.

³¹⁷⁸ See para. 7.232 above.

³¹⁷⁹ Dominican Republic's first written submission, para. 1027.

³¹⁸⁰ Dominican Republic's second written submission, para. 996.

³¹⁸¹ Indonesia's first written submission, para. 422. See also Indonesia's response to Panel question No. 65.

³¹⁸² Panel Report, *US – Tuna II (Mexico)*, para. 7.467. (emphasis added)

³¹⁸³ Panel Report, *US – Tuna II (Mexico)*, para. 7.467.

of the consequences of non-fulfilment of this objective. Indonesia refers to³¹⁸⁴ the panel's ruling in *US – Tuna II (Mexico)* in support of its view that this includes "the likelihood and the gravity of potential risks (and any associated adverse consequences) that might arise in the event that the legitimate objective being pursued would not be fulfilled".³¹⁸⁵ However, on appeal the Appellate Body did not reference the "the likelihood and the gravity" of the risk in summarizing the proper legal test under Article 2.2. Instead, as described above, the Appellate Body referred to the "nature" of the risks at issue and the gravity of the consequences of non-fulfilment of the objectives. This choice of terms reflects, in our view, that this part of the analysis should focus, first, on the identification of the specific risks that would arise from the non-fulfilment of the objective being pursued, i.e. the "nature" of such risks.³¹⁸⁶

7.1292. As explained by the Appellate Body, the "risks" that are being assessed are "those that would be created by the 'non-fulfilment' of the 'legitimate objective' of the technical regulation at issue".³¹⁸⁷ This assessment is therefore related to the essential nature and character of the risks at issue and the consequences that would arise, should the objective of the measure *not* be fulfilled. This question is not, as such, dependent on the extent to which the challenged measure (or any proposed alternative measure) fulfils the objective. Rather, as Australia expresses it, to the extent that the objective is a constant, the *nature* of the risks associated with its *non-fulfilment* will also be constant, independently of the choice of instrument to address these risks.

7.1293. Indeed, from an analytical perspective, it would amount to circular logic to assess whether any of the alternatives would make an equivalent contribution to the objective, "taking account of the risks non-fulfilment would create", and to identify those "risks" in the first place with reference to the comparison of their degrees of contribution to the objective. As Australia points out³¹⁸⁸, such an approach would deprive the "taking account of the risks non-fulfilment would create" from being a distinct, "further element"³¹⁸⁹ of the analysis. For the same reasons, identifying the risks non-fulfilment would create also does not, in our view, entail an assessment of the "likelihood" of the challenged measure not fulfilling its objective or how likely it is that the challenged measure will not achieve its objective as compared with the complainants' proposed alternative measures.

7.1294. At this point, we make no determination in respect of the extent of the "likelihood" of the objective pursued not being fulfilled, under either the challenged measures or any proposed alternative measure. That said, we do not exclude the possibility that this may be a relevant consideration in other parts of our analysis under Article 2.2, including in the context of a comparative analysis of the challenged and alternative measures' respective degrees of contribution to the objective and whether the proposed alternative measures "would make an equivalent contribution to the relevant legitimate objective, taking account of the risks non-fulfilment would create".³¹⁹⁰

7.1295. We further note that the nature of the risks at issue is recognized to be in essence the same in relation to different types of tobacco products. As Honduras points out, tobacco smoking gives rise to health risks "regardless of whether an individual smokes cigarettes, cigars, or other

³¹⁸⁴ Indonesia's first written submission, para. 422. See also Indonesia's response to Panel question No. 65.

³¹⁸⁵ Panel Report, *US – Tuna II (Mexico)*, para. 7.467. (emphasis added)

³¹⁸⁶ We also note that no Appellate Body report to date addressing "the risks non-fulfilment would create" under Article 2.2 of the TBT Agreement assessed, in its consideration of the "nature of the risks" at issue, the probability or likelihood of risks, or identified a requirement for panels to do so. See Appellate Body Reports, *US – Tuna II (Mexico)*; *US – COOL*; and *US – COOL (Article 21.5 – Canada and Mexico)*.

³¹⁸⁷ Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.277. Article 2.2 refers to "the risks non-fulfilment would create"/"des risques que la non-réalisation entraînerait"/"los riesgos que crearía no alcanzarlo" – instead of "the risks of non-fulfilment"/"des risques de la non-réalisation"/"los riesgos de no alcanzarlo", respectively.

³¹⁸⁸ Australia's second written submission, para. 542.

³¹⁸⁹ Appellate Body Report, *US – Tuna II (Mexico)*, para. 321.

³¹⁹⁰ Appellate Body Report, *US – Tuna II (Mexico)*, para. 322.

tobacco products".³¹⁹¹ We note that this conclusion is echoed by the US National Cancer Institute, which notes that "[t]here is no safe level of exposure to tobacco smoke".³¹⁹²

7.1296. We note the Dominican Republic's argument that the risk of harm caused by smoking is not the relevant enquiry in these proceedings³¹⁹³ and that, rather, the risk of non-fulfilment should be "the risk of a larger number of smokers"³¹⁹⁴ in light of the objective of reducing the number of smokers. The Dominican Republic links this argument to the objective of the TPP measures, which it defines in terms of reducing smoking prevalence.³¹⁹⁵ As noted, we have determined above that the objective pursued by Australia is not limited to reduced smoking prevalence but extends more broadly to a reduction in "the use of, and exposure to, tobacco products".³¹⁹⁶ In addition, we note that even assuming that the objective were limited to a reduction in smoking prevalence, this would not imply that the nature of the risk of non-fulfilment of this objective would involve only a situation in which there would be "larger number" of smokers – indeed, it would involve also a situation in which there would be no reduction in this number, i.e. a situation where the number of smokers would remain unchanged. Accordingly, we do not agree with the Dominican Republic that the nature of the risks of non-fulfilment is limited to the risk of there being a "larger number of smokers".

7.2.5.5.2.2 The gravity of the consequences of non-fulfilment

7.1297. We have found that the nature of the risks of non-fulfilment of the TPP measures' objective is that public health would not be improved as the use of, and exposure to, tobacco products would not be reduced. The consequences of non-fulfilment of this objective, therefore, entail a public health problem as a result of the lack of reduction in the use of, and exposure to, tobacco products. This public health problem is linked to the consequences of the use of, and exposure to, tobacco products in general, and more specifically within Australia, given that the challenged measures apply and aim to achieve their objective in Australia.

7.1298. As regards the consequences of the use of, and exposure to, tobacco products in general, Australia points out that tobacco is "a unique, highly addictive, and deadly product", and "the only legal consumer product that kills half of its long-term users when used exactly as intended by the manufacturer".³¹⁹⁷

7.1299. Australia refers to various WHO documents and recommendations, as well as US Surgeon General reports, documenting the public health consequences of tobacco use:

Tobacco use is the world's leading cause of preventable morbidity and mortality, and has been classified as a global epidemic under the FCTC. Tobacco use is responsible for the deaths of nearly 6,000,000 people annually, including 600,000 non-smokers exposed to second-hand smoke. There is no safe level of tobacco use or safe level of exposure to second-hand or environmental tobacco smoke. Tobacco use harms nearly every organ in the body.³¹⁹⁸

7.1300. In relation to the specific consequences of tobacco use, Australia notes:

Authoritative scientific opinion has concluded that smoking causes many forms of cancer (lung, larynx, lip, tongue, mouth, pharynx, oesophagus, pancreas, bladder, kidney, cervix, stomach and acute myeloid leukaemia, liver cancer, and urinary tract

³¹⁹¹ Honduras's response to Panel question No. 65.

³¹⁹² National Cancer Institute, "Fact Sheet: Cigar Smoking and Cancer", 27 October 2010,

<<http://www.cancer.gov/cancertopics/factsheet/Tobacco/cigars/>>, accessed 25 February 2015, (Exhibit AUS-40).

³¹⁹³ Dominican Republic's second written submission, para. 1009.

³¹⁹⁴ Dominican Republic's second written submission, para. 1008.

³¹⁹⁵ Dominican Republic's second written submission, para. 1009.

³¹⁹⁶ See section 7.2.5.1.1.2 above with respect to the objective of the measures.

³¹⁹⁷ Australia's first written submission, paras. 1 and 28-30.

³¹⁹⁸ Australia's first written submission, para. 23 (referring to WHO Tobacco Fact Sheet, (Exhibit AUS-28); WHO Second-Hand Smoke Policy Recommendations, (Exhibit AUS-24), p. 2; and US Surgeon General's Report 2004, (Exhibit AUS-25), p. 25). See also Australia's response to Panel question No. 148.

cancer), stroke, peripheral vascular disease, chronic obstructive pulmonary disease, several serious cardiovascular diseases, many kinds of respiratory diseases and impairments and other types of disease.³¹⁹⁹

7.1301. As regards the specific consequences of *exposure* to tobacco, Australia refers in particular to a report by the US Surgeon General, and concludes that "[t]here is ... authoritative scientific opinion that involuntary inhalation of tobacco ('passive smoking') 'causes premature death and disease in children and in adults who do not smoke' including lung cancer, coronary heart disease and Sudden Infant Death Syndrome (SIDS)."³²⁰⁰

7.1302. Australia adds that "[a]ll tobacco products are highly addictive"³²⁰¹:

Nicotine is the chemical in tobacco that causes addiction. Reviews by the WHO and bodies of high international standing such as the Royal College of Physicians of London, have concluded that the pharmacologic and behavioural processes that determine tobacco addiction are similar to those that determine addiction to other drugs, such as heroin and cocaine.³²⁰²

7.1303. Australia points out that "all tobacco products contain substantial amounts of nicotine".³²⁰³ Further, Australia states, "the addictive properties of nicotine are critical in the transition of smokers from experimentation to sustained smoking and to the maintenance of smoking for the majority of smokers who wish to quit".³²⁰⁴ According to Australia, "statistics indicate that 95% of all quit attempts are unsuccessful, such is the grip of nicotine addiction".³²⁰⁵

7.1304. Thus, Australia argues, there is a "'global tobacco epidemic' affect[ing] all WTO Members". Australia points out that "[t]he WHO estimates that if current trends continue, the annual death toll worldwide from tobacco use could rise to more than 8,000,000 by 2030".³²⁰⁶ Australia adds that according to the WHO and the FCTC Secretariat³²⁰⁷ there are "extensive health, social, environmental, and economic consequences of tobacco consumption and exposure".³²⁰⁸ Further, according to the Union for International Cancer Control and Cancer Council Australia, "[t]obacco use is the only common risk factor across all four major non-communicable diseases (cardiovascular diseases, cancers, chronic respiratory diseases and diabetes)".³²⁰⁹

7.1305. As regards tobacco use specifically in Australia, Australia explains that:

Tobacco use remains one of the leading causes of preventable disease and premature death in Australia. Estimates of the annual mortality attributable to smoking in Australia since 2000 have "ranged from about 15,000 deaths to about 20,000 with the

³¹⁹⁹ Australia's first written submission, para. 28 (referring to US Surgeon General's Report 2004, (Exhibit AUS-25), p. 4, Table 1.1; and US Surgeon General's Report 2014, (Exhibits AUS-37, DOM-104, CUB-35), p. 113).

³²⁰⁰ Australia's first written submission, para. 29 (referring to US Surgeon General's Report 2006, (Exhibit AUS-39), p. 7).

³²⁰¹ Australia's first written submission, heading II.A.1 (emphasis omitted). See *ibid.* paras. 24-29.

³²⁰² Australia's first written submission, para. 24 (referring to US Surgeon General's Report 1988, (Exhibit AUS-29), p. 9; Nomenclature and Classification of Drug- and Alcohol-Related Problems: A WHO Memorandum, (Exhibit AUS-30); and Royal College of Physicians Report 2000, (Exhibit AUS-31), p. xiv).

³²⁰³ Australia's first written submission, para. 25 (referring to US Surgeon General's Report 1988, (Exhibit AUS-29), p. 9).

³²⁰⁴ Australia's first written submission, para. 27 (referring to US Surgeon General's Report 2014, (Exhibits AUS-37, DOM-104, CUB-35), p. 113; and Samet Report, (Exhibit AUS-7), para. 48).

³²⁰⁵ Australia's first written submission, para. 27 (referring to Samet Report, (Exhibit AUS-7), para. 50).

³²⁰⁶ Australia's first written submission, para. 31 (referring to FCTC, (Exhibits AUS-44, JE-19), p. 33; and WHO Report on the Global Tobacco Epidemic 2011, (Exhibits AUS-43, HND-142), p. 8).

³²⁰⁷ WHO/FCTC *amici curiae* brief, (Exhibit AUS-42 (revised)), para. 5.

³²⁰⁸ Australia's first written submission, para. 32.

³²⁰⁹ Australia's first written submission, para. 32 (referring to UICC and CCA *amici curiae* brief, (Exhibit AUS-38), para. 4.2).

differences reflecting methodology". As many as two in three Australian smokers will die prematurely from smoking-related diseases.³²¹⁰

7.1306. Australia adds that "the social and economic costs of tobacco consumption in Australia, estimated at AUD 31.5 billion in 2004, are expected to continue to rise, as the disease and health effects caused by tobacco consumption can take many years to manifest".³²¹¹

7.1307. The complainants do not contest the harmful consequences of tobacco in general, or the above specific evidence and arguments advanced by Australia in that regard – whether in general or specifically within Australia. Cuba "fully accepts that tobacco consumption has serious consequences for public health and it acknowledges that scientific evidence has unequivocally established that tobacco consumption, and exposure to tobacco smoke, cause death, disease and disability".³²¹² Honduras was also clear in stating, at the outset of these proceedings, that: "[t]he dispute is not about whether smoking is dangerous or whether it affects the health of many people in Australia and around the world – it is and it does".³²¹³ Likewise, Indonesia noted, at the outset, that "the issue before the Panel is not whether tobacco is harmful"³²¹⁴, adding that:

[n]o one, and certainly not Indonesia, believes tobacco use is healthy. Most countries, including Indonesia, recognize that tobacco use in various forms can lead to disease and in some cases premature death.³²¹⁵

7.1308. Similarly, the Dominican Republic references, without criticism, various statements by Australia as to the harmful consequences of tobacco:

In meetings of the WTO Dispute Settlement Body, Australia has spoken of the scale of the global tobacco epidemic. Citing the WHO's Report on the Global Tobacco Epidemic 2011, Australia points out that:

Tobacco use continues to be the leading global cause of preventable death. It kills approximately six million people and causes hundreds of billions of dollars of economic damage worldwide each year ... if current trends continue, by 2030 tobacco will kill more than eight million people worldwide each year, with 80 percent of these living in low- and middle-income countries.

Australia has also highlighted the specific risks posed by, and the costs incurred from, tobacco smoking in Australia. In the [T]PP Bill Explanatory Memorandum, the Australian Government noted that:

Tobacco smoking remains one of the leading causes of preventable death and disease among Australians, killing over 15,000 Australians every year.³²¹⁶

7.1309. The particular gravity of the consequences of not reducing the use of, and exposure to, tobacco products has also been recognized in the FCTC which states in its preamble that "scientific evidence has unequivocally established that tobacco consumption and exposure to tobacco smoke

³²¹⁰ Australia's first written submission, para. 34 (referring to Samet Report, (Exhibit AUS-7), para. 100; and Banks et al. 2015, (Exhibit AUS-27), p. 38).

³²¹¹ Australia's first written submission, para. 35 (referring to D.J. Collins and H.M. Lapsley, The Costs of Tobacco, Alcohol and Illicit Drug Abuse to Australian Society in 2004/05: A Report for the Commonwealth of Australia, 2008, (Collins and Lapsley 2008), (Exhibit AUS-47), p. xi; and Samet Report, (Exhibit AUS-7), para. 94 (noting that: "The four-stage model of the evolution of the tobacco epidemic and its consequences developed by Lopez and colleagues (Lopez, Collishaw et al. 1994), reflects the experience gained across the last century in witnessing the rise and fall of tobacco use and the parallel but lagged rise and fall of major tobacco-caused diseases.")).

³²¹² Cuba's first written submission, para. 3.

³²¹³ Honduras's first written submission, para. 1.

³²¹⁴ Indonesia's first written submission, para. 8.

³²¹⁵ Indonesia's first written submission, para. 7.

³²¹⁶ Dominican Republic's first written submission, paras. 140-141. (original footnotes omitted)

cause death, disease and disability" and that "the spread of the tobacco epidemic is a global problem with serious consequences for public health".³²¹⁷

7.1310. In light of the above, we find that it is widely recognized, and undisputed in these proceedings, that the public health consequences of the use of, and exposure to, tobacco, including in Australia, are particularly grave.

7.1311. We further note in this respect the determination of the Appellate Body in *EC – Asbestos* that the preservation of human life and health through the elimination, or reduction, of the well-known, and life-threatening, health risks posed by asbestos fibres was a "value ... is both vital and important in the highest degree".³²¹⁸ Similarly, in *Brazil – Retreaded Tyres*, the Appellate Body agreed with the panel that "few interests are more 'vital' and 'important' than protecting human beings from health risks".³²¹⁹ We also note that the "serious risk to human health" from smoking has previously been recognized in GATT and WTO dispute settlement proceedings.³²²⁰

7.1312. As noted, some complainants argue that we should assess the nature of the risks and the gravity of the consequences specifically for different tobacco products, or according to certain age and social groups. In particular, the Dominican Republic argues that risks should be separately considered for cigarettes and cigars, as, it argues, none of the evidence shows "any impact of the [T]PP measures on reducing smoking prevalence or consumption for tobacco products overall, or for cigars".³²²¹

7.1313. As described earlier, the TPP measures apply to a broad range of tobacco products, as defined in the TPP Act, including cigarettes and cigars, and it is not disputed that the *nature* of the risks associated with the use of different tobacco products, including cigarettes and cigars, is essentially the same.³²²² As regards the distinction between cigarettes and cigars, we note Australia's assertions, made with reference to various scientific publications, that cigars can deliver nicotine concentrations comparable to cigarettes:

All tobacco products contain substantial amounts of nicotine; cigarettes are particularly effective in delivering nicotine. Likewise, cigars can deliver nicotine in concentrations comparable to cigarettes and smokeless tobacco - a single large cigar can contain as much tobacco as an entire packet of cigarettes and can take between one to two hours to smoke.³²²³

7.1314. Australia also explains, with reference to relevant sources, including the US National Cancer Institute and CCV, that cigars contain higher quantities of harmful substances than cigarettes. "Smoke from cigars, like the smoke from cigarettes, contains toxic and cancer causing chemicals harmful to both smokers and non-smokers. However, the amounts of these substances found in cigar smoke are much higher. Cigar smoking is causally linked to cancer, cardiovascular disease and chronic lung disease ...".³²²⁴ The WHO and FCTC Secretariat have also stated that

³²¹⁷ See FCTC, (Exhibits AUS-44, JE-19), preamble, fifth and second recitals, respectively. See also *ibid*. Articles 3 and 8(1). See also WHO/FCTC *amici curiae* brief, (Exhibit AUS-42 (revised)), section 1.1.

³²¹⁸ Appellate Body Report, *EC – Asbestos*, para. 172.

³²¹⁹ Appellate Body Report, *Brazil – Retreaded Tyres*, para. 144. See also Panel Report, *US – Clove Cigarettes*, para. 7.347.

³²²⁰ See, e.g. GATT Panel Report, *Thailand – Cigarettes*, para. 73 ("In agreement with the parties to the dispute and the expert from the WHO, the Panel accepted that smoking constituted a serious risk to human health and that consequently measures designed to reduce the consumption of cigarettes fell within the scope of Article XX(b)."); and Panel Report, *US – Clove Cigarettes*, para. 7.1 ("Cigarettes are inherently harmful to human health, as recognized by the WHO, the scientific community and both parties to this dispute.").

³²²¹ Dominican Republic's response to Panel question No. 65.

³²²² See para. 7.1295 above.

³²²³ Australia's first written submission, para. 25 (referring to US Surgeon General's Report 1988, (Exhibit AUS-29), p. 9; Samet Report, (Exhibit AUS-7), para. 40; NCI Tobacco Control Monograph No. 9, (Exhibits AUS-33, DOM-149), p. 11; and Cigars: Facts and Figures, (Exhibit AUS-34)).

³²²⁴ Australia's first written submission, para. 30 (referring to NCI Cigar Fact Sheet, (Exhibit AUS-40); Cancer Council of Victoria, Quit Victoria, Heart Foundation, and VicHealth, Submission on Tobacco Plain Packaging: Proposed Approach to Non-Cigarette Tobacco Products, 28 October 2011, (Exhibit AUS-41), pp. 2-3; and Samet Report, (Exhibit AUS-7), paras. 75-77). See also NCI Tobacco Control Monograph No. 9, (Exhibits AUS-33, DOM-149), p. 19, "Overall conclusions":

"smoke from cigars contains the same toxic constituents as smoke from cigarettes, and cigar smoking causes many of the same diseases caused by cigarette smoking".³²²⁵

7.1315. The complainants do not contest these factual assertions by Australia or the evidence upon which it relies in this respect, suggesting that the gravity of the consequences arising from smoking cigars is comparable to that arising from cigarettes.

7.1316. Turning to specific age groups, we note that the complainants do not contest Australia's arguments on the particular public health impact of youth and adolescents using, and being exposed to, tobacco, or the relevance of these arguments in the Australian context:

As the United States Centers for Disease Control and Prevention underscores in its report, *Best Practices for Comprehensive Tobacco Control Programs 2014*, tobacco control strategies must target all smoking behaviour. The report notes that a comprehensive tobacco control regime should target: initiation among youth and young adults; quitting among youth and adults; exposure to second-hand smoke; and tobacco-related disparities among population groups. In particular, a focus on preventing youth initiation is important, as youth and adolescence is the key period in which the initiation of tobacco products is likely to occur. Moreover, evidence shows that people who begin smoking early are more likely to continue smoking.³²²⁶

7.1317. Therefore, we conclude that from a public health perspective, the consequences of not fulfilling the objective of reducing the use of, and exposure to, tobacco products, are especially grave for youth. We also note that both the Appellate Body and the panel in *US – Clove Cigarettes* recognized the particular importance of reducing youth smoking.³²²⁷

7.1318. We further note that the complainants also do not contest Australia's assertions that Aboriginal and Torres Strait Islander peoples are disproportionately affected by tobacco use than the rest of the Australian population:

The harmful consequences of tobacco use are disproportionately felt by disadvantaged communities, and smokers in Australia are twice as likely as non-smokers to have been diagnosed or treated for a mental illness. Smoking is responsible for 12.1% of the total burden of disease and 20% of deaths among Aboriginal and Torres Strait Islander peoples.

...

Aboriginal and Torres Strait Islander peoples have a much higher rate of tobacco use than non-Indigenous Australians, with 41.6% of Aboriginal and Torres Strait Islander peoples above the age of 15 smoking on a daily basis. In 2012-13 current daily smoking was more prevalent among Aboriginal and Torres Strait Islander peoples than non-Indigenous people in every age group.³²²⁸

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1. Cigar smoking can cause oral, esophageal, laryngeal and lung cancers. Regular cigar smokers who inhale, particularly those who smoke several cigars per day, have an increased risk of coronary heart disease and chronic obstructive pulmonary disease.
 2. Regular cigar smokers have risks of oral and esophageal cancers similar to those of cigarette smokers, but they have lower risks of lung and laryngeal cancer, coronary heart disease and chronic obstructive pulmonary disease.

³²²⁵ WHO/FCTC *amici curiae* brief, (Exhibit AUS-42 (revised)), para. 3.

³²²⁶ Australia's first written submission, para. 43 (referring to USCDC Best Practices for Comprehensive Tobacco Control Programs, (Exhibit AUS-50), p. 19; and 2013 NDSHS Report, (Exhibit AUS-48), p. 22).

³²²⁷ Appellate Body Report, *US – Clove Cigarettes*, para. 236; and Panel Report, *US – Clove Cigarettes*, para. 7.347.

³²²⁸ Australia's first written submission, paras. 34 and 37 (referring to Samet Report, (Exhibit AUS-7), para. 103; 2010 NDSHS Report, (Exhibits AUS-45, DOM-280), p. 22; Vos et al. 2007, (Exhibit AUS-46), p. 55; and Australian Bureau of Statistics, Australian Aboriginal and Torres Strait Islander Health Survey, Updated Results, 2012-2013, Cat. No. 4727.0.55.006 (2014), (Exhibit AUS-49)).

7.1319. Finally, we are mindful of the point made by Australia, undisputed by the complainants, that "there is no safe level of tobacco use or safe level of exposure to second-hand or environmental tobacco smoke".³²²⁹ We read this as underscoring the particular gravity of the consequences of not fulfilling the objective of improving public health by reducing the use of, and exposure to, tobacco products. We also recall in this respect that the gravity of the consequences arising from the non-fulfilment of the technical regulation's legitimate objective would normally be expected "to correlate, at least to some extent, to the importance of the objective to the Member concerned".³²³⁰ Australia has emphasised the importance to it of the public health objective pursued by the TPP Act; in particular, it stated that "the interests at stake are of the utmost importance"³²³¹ and highlighted "the fundamental importance of a comprehensive approach to tobacco control".³²³²

7.1320. Our conclusions are not modified by the existence of Section 15 of the TPP Act, which provides that the TPP Act does not apply to the extent that its operation would infringe certain constitutional protections, such as by acquiring property otherwise than on just terms.³²³³ Indonesia argues that "[b]ecause Australia is willing to walk away from [the TPP measures], rather than pay compensation, it is clear that Australia believes there is little risk to public health from not allowing [the TPP measures] to fulfill [their] public health objective (i.e. the risk of non-fulfillment is negligible)".³²³⁴ We are not persuaded, however, as Indonesia argues, that the existence of this provision in the TPP Act, and the fact that it envisages the possibility of the requirements of the TPP Act not applying, if it were found to result in unjust acquisition of property under Australia's Constitution, provides evidence that the public health objective of the TPP Act, in relation to the reduction of the use of and exposure to tobacco products, or the potential of the TPP measures to contribute to this objective, are not important to Australia.³²³⁵

7.2.5.5.2.3 Conclusion on the nature of the risks that non-fulfilment would create and gravity of their consequences

7.1321. We have determined above that a Panel's assessment of "the risks non-fulfilment would create" entails, in the first place, *identifying* the nature and gravity of the "risks non-fulfilment would create", and that this does not entail a comparison of the challenged measures and possible alternative measures, or a consideration of their respective degrees of contribution to the objective. Rather, such identification involves assessing the following two key aspects: the nature of the risks and the gravity of the consequences of non-fulfilment of the objective of the challenged measures.

7.1322. With the foregoing interpretation in mind, in light of the objective of the TPP measures and taking into account in particular the available scientific and technical evidence, we have found

³²²⁹ Australia's first written submission, para. 23 (referring to WHO Second-Hand Smoke Policy Recommendations (Exhibit AUS-24), p. 2). See also Australia's second written submission, para. 538.

³²³⁰ Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.279. In stating this, the Appellate Body held that "[h]owever, this does not mean that the *relative* importance of an objective, as determined against other potential objectives that a Member might pursue, is a factor directly pertinent to 'taking account of the risks non-fulfilment would create' under Article 2.2". *Ibid.* (emphasis original). For the Appellate Body, the terms of Article 2.2 "do not connote the kinds of judgements that would be necessary to determine whether one objective is, in comparative terms, more or less important than other objectives". *Ibid.* para. 5.278.

³²³¹ Australia's first written submission, para. 697.

³²³² Australia's first written submission, para. 38.

³²³³ TPP Act, Simplified Outline of Chapter 1, Section 15, (Exhibits AUS-1, JE-1), Section 13.

³²³⁴ Indonesia's first written submission, para. 425.

³²³⁵ We also note that Section 15 of the TPP Act serves to ensure that the same Act "does not apply to the extent that its operation would infringe certain constitutional protections (such as by acquiring property otherwise than on just terms)." TPP Act, (Exhibits AUS-1, JE-1), Section 13, Simplified Outline of Chapter 1. As Australia explains, the High Court of Australia upheld the constitutionality of the TPP measures in regard to the specific point addressed by Article 15. Australia's first written submission, para. 693. In fact, the High Court responded "No" to the first and main substantive question before it, which was as follows: "Apart from s 15 of the Tobacco Plain Packaging Act 2011 (Cth), would all or some of the provisions of the Tobacco Plain Packaging Act 2011 (Cth) result in an acquisition of any, and if so what, property of the plaintiffs or any of them otherwise than on just terms, of a kind to which s 51(xxi) of the Constitution applies?" *JTI v. Commonwealth*, (Exhibits AUS-500, CUB-50), p. 2. The Panel notes that Honduras and Indonesia also submitted excerpts of this High Court decision as exhibits. See Exhibits HND-53 and IDN-86.

that the nature of the risks non-fulfilment of the objective would create is that public health would not be improved as the use of, and exposure to, tobacco products would not be reduced. We have also found that the public health consequences of not fulfilling this objective are particularly grave.

7.1323. Having identified the risks of non-fulfilment, as explained we shall take account of these risks in subsequent parts of our overall analysis under Article 2.2 of the TBT Agreement.

7.2.5.6 Whether less trade-restrictive alternative measures are reasonably available to Australia

7.1324. As observed above, whether a technical regulation is "more trade-restrictive than necessary" within the meaning of the second sentence of Article 2.2 of the TBT Agreement, and thereby creates an "unnecessary obstacle[] to international trade" within the meaning of the first sentence, may be established on the basis of a "comparative analysis"³²³⁶ of the challenged measure and possible alternative measures that may be reasonably available *and* less trade-restrictive than the challenged measure, taking account of the risks non-fulfilment would create.³²³⁷

7.1325. Having determined above that the TPP measures contribute to their objective and are also trade-restrictive, we now consider whether, as the complainants argue, certain *less* trade-restrictive alternative measures would be reasonably available to Australia to achieve an equivalent contribution to its objective, taking account of the risks that non-fulfilment of the objective would create.

7.1326. The parties have discussed in detail the manner in which this comparative analysis should be approached. We therefore first clarify our overall approach, before turning to a consideration of each of the alternative measures proposed by the complainants.

7.2.5.6.1 Approach of the Panel

7.2.5.6.1.1 Main arguments of the parties

7.1327. Honduras argues that the comparison under the second part of a "necessity" assessment under Article 2.2 should consider "whether the proposed alternative is less trade restrictive, whether it would make an equivalent contribution to the relevant legitimate objective, taking account of the risks non-fulfilment would create, and whether it is reasonably available".³²³⁸

7.1328. Honduras argues that the Panel should assess the contribution of the TPP measures and the alternative identified by the complainants against Australia's objective of improving public health by reducing smoking prevalence.³²³⁹ Honduras further argues that, for the purposes of comparing the degree of contribution, the panel must have previously determined clearly and precisely the degree of contribution that the challenged measure makes to the achievement of the legitimate objective.³²⁴⁰ Honduras further submits that the proposed alternative measure may achieve an equivalent degree of contribution in ways different from the technical regulation at issue and the panel has a margin of appreciation in this assessment.³²⁴¹ In Honduras's view, this may have an impact on the nature of the evidence available and the qualitative or quantitative

³²³⁶ Appellate Body Reports, *US – Tuna II (Mexico)*, para. 320; *US – COOL*, para. 376; and *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.212.

³²³⁷ Appellate Body Reports, *US – Tuna II (Mexico)*, paras. 320-323; *US – COOL*, para. 379; and *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.213. As observed by the Appellate Body, there may be circumstances where a comparative analysis of this nature may be unnecessary, for example if the challenged measure is not trade-restrictive or makes no contribution to the achievement of the legitimate objective pursued. Appellate Body Reports, *US – Tuna II (Mexico)*, para. 322 fn 647; and *US – COOL*, para. 376 fn 748.

³²³⁸ Honduras's first written submission, para. 807 (referring to Appellate Body Report, *US – Tuna II (Mexico)*, para. 322).

³²³⁹ Honduras's response to Panel question No. 64 (referring to Panel Reports, *US – COOL*, paras. 7.597 – 7.599). See also Honduras's response to Panel question No. 69 (quoting European Union's third-party submission, para. 68).

³²⁴⁰ Honduras's first written submission, paras. 822 and 934.

³²⁴¹ Honduras's response to Panel question No. 157.

assessment that is made of its contribution.³²⁴² Honduras adds that the "quantitative evidence undeniably shows that plain packaging has not led to a reduction in smoking in the first three years of application, and quantitative projections as well as qualitative analysis of the drivers of smoking confirm that it is not capable of doing so, let alone in any meaningful manner". In contrast, Honduras argues that "the quantitative and qualitative support for increased taxes or increasing the [minimum legal purchasing age (MLPA)] is overwhelming", and that "[t]he pre-vetting mechanism focuses on the same mechanisms but is simply more targeted".³²⁴³

7.1329. Honduras notes that the Appellate Body refers simply to an alternative measure that is "less" trade-restrictive.³²⁴⁴ For Honduras, the starting point is the challenged measure and its trade-restrictive nature and degree, which means that in the context of these proceedings, the Panel should analyse whether and to what degree both the TPP measures and the proposed alternatives impact the conditions of competition in the market place in Australia.³²⁴⁵

7.1330. Honduras further argues that the determination under "risks of non-fulfilment" will affect both the relational and comparative analysis, in equal measure. For example, if a measure entails inconsequential risks of non-fulfilment, that determination will affect the conclusions under the relational and comparative analysis, in equal measure, and will also affect the overall conclusion of the "necessity" assessment under Article 2.2 of the TBT Agreement.³²⁴⁶

7.1331. Honduras also submits that the Panel's comparative analysis may consider only alternative measures that would be reasonably available to the importing WTO Member³²⁴⁷ and this includes measures which consist of an increase in magnitude or an improvement of an existing measure.³²⁴⁸ In Honduras's view, the relevant question for the comparison is whether the overall contribution is equivalent and, as such, the starting point is the overall degree of contribution that the technical regulation makes to the smoking reduction objective pursued.³²⁴⁹

7.1332. Honduras submits that Australia's reliance on the rulings in *Brazil – Retreaded Tyres* is misleading and taken out of context, such that its analogy between the facts in *Brazil – Retreaded Tyres* and these proceedings is inaccurate.³²⁵⁰ In any case, Honduras submits that the TPP measures are not a key element of Australia's tobacco control regulatory regime, and that it would be incorrect to assert that Australia's many other tobacco-control measures would risk being undermined if plain packaging were not in force.³²⁵¹

7.1333. The Dominican Republic argues that "in performing the relational analysis of whether a measure is 'more trade restrictive than necessary to fulfil' its objective, a panel generally relies on the 'conceptual tool' of less trade-restrictive alternatives".³²⁵² In assessing each less trade-restrictive alternative put forward by a complainant, a panel must "consider, in particular, whether the proposed alternative is less trade-restrictive than the challenged measure, whether it would make an equivalent contribution to the relevant legitimate objective (taking account of the risks non-fulfilment would create), and whether it is reasonably available".³²⁵³

³²⁴² Appellate Body Reports, *US – COOL* (Article 21.5 – Canada and Mexico), paras. 5.254-5.255.

³²⁴³ Honduras's response to Panel question No. 157.

³²⁴⁴ Honduras's response to Panel question No. 151 (referring to Appellate Body Reports, *US – COOL*, para. 471).

³²⁴⁵ Honduras's response to Panel question No. 151.

³²⁴⁶ Honduras's first written submission, para. 822.

³²⁴⁷ Honduras's first written submission, para. 823 (referring to Appellate Body Report, *US – Tuna II (Mexico)*, paras. 320, 321 and 322).

³²⁴⁸ Honduras's first written submission, para. 823 (referring to Panel Reports, *China – Rare Earths*, para. 7.186).

³²⁴⁹ Honduras's response to Panel question No. 157 (referring to Appellate Body Reports, *US – COOL* (Article 21.5 – Canada and Mexico), para. 5.2).

³²⁵⁰ Honduras's second written submission, paras. 687-688. See also Honduras's second written submission, para. 689 (referring to Appellate Body Report, *Brazil – Retreaded Tyres*, para. 91; Panel Reports, *China – Rare Earths*, paras. 7.186, 7.568-7.590; and Panel Reports, *China – Raw Materials*, para. 7.568); response to Panel question No. 161; and comments on Australia's response to Panel question No. 158.

³²⁵¹ Honduras's response to Panel question No. 161; and comments on Australia's response to Panel question Nos. 157 and 158.

³²⁵² Dominican Republic's first written submission, para. 970.

³²⁵³ Dominican Republic's first written submission, para. 971.

7.1334. The Dominican Republic submits that the stated means for achieving an objective cannot also be objectives themselves, because any alternative would have to contribute by the same means (i.e. Australia's "specific objectives") as plain packaging, "even if the alternative contributed more to the ultimate objective of reducing smoking". Thus, the Panel's assessment of the TPP measures and that of the alternatives must be conducted against the TPP Act's "object of reducing smoking behaviour".³²⁵⁴

7.1335. Moreover, the Dominican Republic argues that a proposed measure is an alternative if it is different in its substantive effects from an existing measure, including in terms of the extent of the contribution to the relevant objective.³²⁵⁵ Thus, "if an existing measure can be modified, expanded, or improved so as to make at least an equivalent contribution to the objective of the challenged measure, that improved measure can constitute an 'alternative'".³²⁵⁶ The Dominican Republic submits that the panel and the Appellate Body in *Brazil – Retreaded Tyres* did not find that strengthening a measure that has already been implemented "in part" cannot be an alternative, or that a more stringent "variation" of an existing measure is not an alternative.³²⁵⁷ Provided that an alternative measure "involves some new regulatory feature that makes a contribution equivalent to any made by a challenged measure, replacing the challenged measure with the alternative measure would not lessen the contribution made to the public health objective – even if the measures work in different ways, at different times, and with different synergies".³²⁵⁸

7.1336. The Dominican Republic submits that a panel need only establish that the alternative measures are less trade-restrictive than the challenged measure, "which does not necessarily require a determination of the absolute levels of restriction of each measure".³²⁵⁹ In making the comparison of trade-restrictiveness, the Dominican Republic submits that a panel must bear in mind that a challenged technical regulation and proposed alternative measures may use different regulatory means that may entail a loss of different competitive opportunities. For the Dominican Republic, the "relative restrictiveness of the measures cannot ... be compared through a simple comparison of the lost competitive opportunities, because this is an apples-to-oranges comparison".³²⁶⁰ The Dominican Republic posits that "one method of engaging in an apples-to-apples" comparison would be to compare the trade effects of the challenged technical regulation and the alternative measures, such that a panel could first identify the number, nature and extent of the different trade effects resulting from the challenged technical regulation, and then assess whether the alternative measures entail lesser adverse trade effects in light of all of the elements.³²⁶¹

7.1337. The Dominican Republic also submits that where a challenged technical regulation and alternative measures "deploy different regulatory means, an important factor to bear in mind is that some types of regulatory means are not disciplined as trade restrictive measures under the covered agreements".³²⁶² Thus, if an alternative measure is not trade-restrictive under the covered agreements, and a challenged technical regulation is, the Dominican Republic considers that this

³²⁵⁴ Dominican Republic's response to Panel question No. 64.

³²⁵⁵ Dominican Republic's second written submission, para. 631; and response to Panel question No. 153.

³²⁵⁶ Dominican Republic's second written submission, para. 689; and response to Panel question No. 153. See also Dominican Republic's second written submission, paras. 631 and 659 (referring to Panel Reports, *China – Rare Earths*, para. 7.186).

³²⁵⁷ Dominican Republic's comments on Australia's response to Panel question No. 148 (referring to Australia's response to Panel Question No. 157, para. 70); and comments on Australia's response to Panel question No. 157. See also Dominican Republic's comments on Australia's response to Panel question Nos. 148 (referring to Panel Report, *Brazil – Retreaded Tyres*, paras. 7.167-169; and Appellate Body Report, *Brazil – Retreaded Tyres*, para. 158), 151, and 158.

³²⁵⁸ Dominican Republic's comments on Australia's response to Panel question No. 158. (emphasis original)

³²⁵⁹ Dominican Republic's response to Panel question No. 151.

³²⁶⁰ Dominican Republic's response to Panel question No. 151.

³²⁶¹ Dominican Republic's response to Panel question No. 151.

³²⁶² Dominican Republic's response to Panel question No. 151; and comments on Australia's response to Panel question No. 151.

"is a strong, even decisive, indication" that the alternative is less trade-restrictive under those agreements.³²⁶³

7.1338. The Dominican Republic argues that the Panel can only address alternative measures if it finds that the TPP measures contribute to the objective of reducing smoking behaviour. The Dominican Republic argues that "[i]n comparing the trade restrictiveness of the [TPP] measures and the alternatives, the Panel must take fully into account both dimensions of the trade restrictiveness of the [TPP] measures".³²⁶⁴ Assuming that the alternatives make an equivalent contribution to the objective of reducing smoking behaviour, in the Dominican Republic's view, (and on the basis of its assumptions concerning the contribution of the TPP measures), in terms of restrictions on the volume of tobacco products, each of the alternatives is similarly trade-restrictive because they each make a similar contribution to reducing smoking; however, "they do not restrict competitive opportunities, as the [TPP] measures do, by curtailing differentiation and distorting competitive opportunities".³²⁶⁵

7.1339. The Dominican Republic sees no basis in the arguments or evidence before the Panel for a separate assessment of the trade-restrictiveness and contribution of the alternative measures as they apply to cigars and cigarettes.³²⁶⁶

7.1340. The Dominican Republic argues that a panel has a duty to assess all of the evidence before it, both quantitative and qualitative, such that if the Panel opts to assess the contribution of the TPP measures qualitatively, it cannot elect not to examine the quantitative evidence. If the Panel reaches a finding that the TPP measures have made, or are apt to make, a contribution to reducing smoking, it must establish the degree or extent of that contribution, expressed in quantitative or qualitative terms, and this will then serve as the basis for the comparison with alternatives, which "is facilitated by a clear and precise statement of the degree of contribution".³²⁶⁷ Different policy mechanisms will inevitably make different degrees of contributions, and the issue is not the number of mechanisms at work but the degree of the contribution that results.³²⁶⁸

7.1341. The Dominican Republic also argues that a panel must assess equivalence based on the overall contribution of the challenged and alternative measures to the objective, and not the contribution made through particular aspects of the measure. For the Dominican Republic this means that, in these proceedings, the comparison must be made by comparing the impact of the respective measures on the objective of reducing smoking³²⁶⁹ and should take into account (1) the degree or extent of the contribution; (2) where the contribution is expected in the future, the likelihood or probability of the contribution materializing; and (3) where the contribution is expected in the future, the timeframe within which the contribution is expected to materialize.³²⁷⁰ The Dominican Republic stresses that such considerations are important in these proceedings, because "it is highly uncertain whether the challenged [TPP] measures will ever contribute to reducing smoking, whereas it is almost certain that the proposed alternatives would do so".³²⁷¹

7.1342. The Dominican Republic adds that a panel enjoys a "margin of appreciation" in assessing equivalence³²⁷² which allows it to weigh the relevant factors, such as the degree, likelihood, and timing of the respective contributions to reach an overall conclusion on equivalence.³²⁷³ This

³²⁶³ Dominican Republic's response to Panel question No. 151; and comments on Australia's response to Panel question No. 151.

³²⁶⁴ Dominican Republic's second written submission, paras. 970-972.

³²⁶⁵ Dominican Republic's second written submission, paras. 973-978; and comments on Australia's response to Panel question No. 151.

³²⁶⁶ Dominican Republic's response to Panel question No. 152.

³²⁶⁷ Dominican Republic's response to Panel question No. 157 (referring to Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, paras. 5.215-5.216); and comments on Australia's response to Panel question No. 148.

³²⁶⁸ Dominican Republic's comments on Australia's response to Panel question No. 148.

³²⁶⁹ Dominican Republic's response to Panel question No. 157.

³²⁷⁰ Dominican Republic's response to Panel question No. 157; and comments on Australia's response to Panel question No. 156.

³²⁷¹ Dominican Republic's response to Panel question No. 157.

³²⁷² Dominican Republic's response to Panel question No. 157 (referring to Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.215).

³²⁷³ Dominican Republic's response to Panel question No. 157.

margin of appreciation may be informed by the risks that non-fulfilment of the objective would create.³²⁷⁴ One measure may give rise to a much higher risk of non-fulfilment than another, because it is much less likely to contribute to the objective.³²⁷⁵

7.1343. Cuba argues, if the Panel finds that the TPP measures do have the effect of reducing levels of tobacco use in Australia, that the TPP measures are "disproportionate". Cuba submits that whatever modest degree of contribution that the TPP measures make to reducing levels of tobacco use in Australia could be replicated by less restrictive alternative measures.³²⁷⁶ Cuba submits that the "assessment of whether Australia's measures are disproportionate must take into account the *actual* positive contribution that the Panel deems to have resulted from the TPP measures and determine whether the alternatives proposed by Cuba are reasonably available and would match that contribution".³²⁷⁷ Moreover, to the extent that there are uncertainties about whether the measure under challenge or alternative measures will be effective, Cuba submits that those uncertainties should also be factored into the analysis.³²⁷⁸

7.1344. Cuba submits that the Panel is not obliged to carry out a quantitative analysis of the relative degrees of trade-restrictiveness of the measures at issue and each of the proposed alternatives, and that doing so would imply speculating to such an extent that it could not be qualified as a "quantitative analysis by the empirical or experimental laboratory methods commonly associated with the physical sciences".³²⁷⁹ Cuba elaborates that the Panel can assess the relative degree of trade-restrictiveness of the TPP measures by considering whether the proposed alternative measures "would have the same devastating impact on Cuban LHM cigars as plain packaging". Cuba submits that the TPP measures "will fundamentally erode the ability of Cuban producers to position their LHM cigars as luxury premium products with a long tradition". Cuba considers that "even if this does not occur immediately, over time it will inevitably occur", and that none of the proposed alternative measures would have this effect.³²⁸⁰

7.1345. Cuba submits that the Panel should assess whether, in the light of all the evidence presented, the less trade-restrictive measures would make a smaller contribution to Australia's health objectives than the TPP measures. It states that there is no need for the Panel to base its assessment exclusively on qualitative evidence, and that the Panel has data that enable it to make a quantitative assessment. It adds that the distinction between a qualitative and a quantitative assessment is not a strict one, and that the Panel should take account of the totality of the evidence and the quality and importance of such evidence.³²⁸¹

7.1346. Cuba submits that Australia's claim that the alternatives proposed by the complainants cannot be considered "alternatives" because they are complementary elements of a "comprehensive suite of measures" is incorrect from a legal and factual point of view.³²⁸² Cuba argues that Australia's argument that the TPP measures are part of a package of measures that "work together synergistically" is "a clear attempt to shield [them] against all kinds of scrutiny". Cuba quotes Australia's Office of Best Practice Regulation's (OBPR) comments that it was "having trouble determining what the problem is and how significant it is"; that "there has been a decline in tobacco consumption over the past 15 years among young people and over the past 30 years for the population as a whole"; and that "it appears than the current programs are achieving their objectives and that there are no clear reasons for extra initiatives".³²⁸³

7.1347. Indonesia argues that, while Australia has argued that it is implementing a "comprehensive tobacco control policy" that relies on both the TPP measures and several of the measures put forward by the complainants as alternatives, it has not put forward arguments and

³²⁷⁴ Dominican Republic's response to Panel question No. 157 (referring to Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*), para. 5.215.

³²⁷⁵ Dominican Republic's response to Panel question No. 157.

³²⁷⁶ Cuba's first written submission, paras. 408-410.

³²⁷⁷ Cuba's first written submission, para. 411. (emphasis original)

³²⁷⁸ Cuba's first written submission, para. 411.

³²⁷⁹ Cuba's response to Panel question No. 151 (referring to Appellate Body Report, *EC – Hormones*, para. 187).

³²⁸⁰ Cuba's response to Panel question No. 151.

³²⁸¹ Cuba's response to Panel question No. 157.

³²⁸² Cuba's comments on Australia's response to Panel question Nos. 157 and 158.

³²⁸³ Cuba's comments on Australia's response to Panel question Nos. 157 and 158.

evidence (and "certainly nothing comparable to the evidence developed by Brazil" in *Brazil – Retreaded Tyres*³²⁸⁴) showing that the complainants' alternatives would be less effective in the absence of the TPP measures.

7.1348. Indonesia also clarifies that the complainants are not arguing that existing tobacco control measures – like taxation, social marketing campaigns, or the MLPA – would serve as alternatives in their present form but have proposed modifications of those policies such that they would become "a new measure not currently in effect in Australia". In Indonesia's view, the Panel should conclude based on the facts of this case that "alternatives" within the meaning of Article 2.2 can include increasing, improving, or updating other tobacco control policies that have been proven to be more effective at reducing smoking than the TPP measures and are less trade-restrictive.³²⁸⁵

7.1349. Indonesia also refers to the European Union's third-party submission that even a measure that might go so far as to eliminate smoking in Australia would not qualify as an alternative under Australia's proposed standard if it did not have an effect on the appeal of the package. Indonesia also refers to the Appellate Body's comment in *US – COOL (Article 21.5 – Canada and Mexico)* that, "[t]he proposed alternative may achieve equivalence in ways that are different from the measure at issue".³²⁸⁶

7.1350. Indonesia submits that the Panel must first determine the contribution to the objective of the measure(s), which Indonesia identifies as to cut Australia's smoking prevalence rate to 10% by 2018 and reduce the number of smokers among the Aboriginal and Torres Straight Islanders population by 50%. A measure that reduces both prevalence and consumption could be viewed more favourably than a measure that reduces prevalence alone, and a measure that reduced only consumption with no impact on prevalence should not be found to have made a contribution to Australia's objective of reducing smoking prevalence. Where a challenged measure's contribution can only be assessed qualitatively, Indonesia argues that a panel must attempt to assess whether the challenged measure makes (or is apt to make) a contribution that is greater than that of the proposed alternatives.³²⁸⁷

7.1351. Indonesia argues that which measure is "less trade restrictive" should be assessed by comparing the challenged measure with proposed alternatives and selecting the measure that interferes the least with "competitive" opportunities available among products in the market place.³²⁸⁸

7.1352. Moreover, Indonesia argues that Australia has not provided any evidence that synergies exist or even explained exactly what the nature of the "synergy" is between plain packaging and other elements of Australia's tobacco control strategy.³²⁸⁹

7.1353. Australia argues that the complainants' approach to the comparison of alternatives in these proceedings represents "a radical departure from the applicable jurisprudence as the 'alternative' measures proposed, with one exception, are already being implemented as part of Australia's comprehensive tobacco control policy". Australia refers to *Brazil – Retreaded Tyres*, in which "both the panel and the Appellate Body concluded that measures which were already elements of a comprehensive strategy to address health problems were not valid 'alternatives'".³²⁹⁰ Australia adds that the Appellate Body "agreed with this analysis" and added that "[s]ubstituting one element of this comprehensive policy for another would weaken the policy by reducing the synergies between its components, as well as its total effect".³²⁹¹

³²⁸⁴ Indonesia's second written submission, paras. 286-287 (referring to Panel Report, *Brazil – Retreaded Tyres*, paras. 7.142, 7.160 and 7.169).

³²⁸⁵ Indonesia's second written submission, para. 290.

³²⁸⁶ Indonesia's second written submission, para. 291.

³²⁸⁷ Indonesia's response to Panel question No. 165.

³²⁸⁸ Indonesia's response to Panel question No. 165.

³²⁸⁹ Indonesia's comments on Australia's response to Panel question No. 157.

³²⁹⁰ Australia's first written submission, para. 704 (referring to Panel Report, *Brazil – Retreaded Tyres*, paras. 7.169, 7.171-7.172); and second written submission, para. 551.

³²⁹¹ Australia's first written submission, para. 704 (quoting Appellate Body Report, *Brazil – Retreaded Tyres*, para. 172); second written submission, para. 551; and response to Panel question No. 165.

7.1354. While noting that it is possible for an alternative measure to achieve an equivalent degree of contribution in ways different from the technical regulation at issue³²⁹², Australia argues that where a proposed alternative measure contributes to the public health objective by means different from the technical regulation at issue, but in the same way as existing elements within the comprehensive strategy, it will not make an equivalent degree of contribution.³²⁹³ Australia further states that the panel's reasoning in *China – Rare Earths* "does not apply to the present dispute because Australia has explained why the complainants' proposed variations to existing elements of Australia's tobacco control strategy could not be effective alternatives to the [TPP measures], given the synergies and complementarities between tobacco plain packaging and these elements".³²⁹⁴

7.1355. Australia considers that apart from the proposed "pre-vetting scheme", the alternatives proposed by the complainants "are either precise replicas of, or in the case of the proposed increase in the [MLPA], slight variations on, measures that Australia has already implemented". Australia submits that a comprehensive and dynamic approach to tobacco control is required, such that each proposed "alternative" cannot substitute for the contribution of the TPP measures to its objectives, because that measure plays a distinct and complementary role within Australia's suite of tobacco control measures.³²⁹⁵ Australia argues that the synergies between measures can amplify the overall effect of tobacco control strategies more than any individual measure alone. For example, tobacco plain packaging, by decreasing the appeal of tobacco products, also increases the effectiveness of GHWs. It is logical therefore that enlarged GHWs, combined with tobacco plain packaging, would lead to a stronger effect than either measure alone.³²⁹⁶

7.1356. Australia argues that the increasing heterogeneity of tobacco use reinforces the need for a comprehensive approach to tobacco control and that tobacco control strategies must target all smoking behaviour³²⁹⁷ and apply to all tobacco products to avoid a regulatory gap which, if left unaddressed, could be exploited by the tobacco industry or allow consumers to avoid measures associated with particular tobacco products.³²⁹⁸ Australia submits that comprehensive approaches to tobacco control are consistent with the FCTC and reflected in Article 5 of the FCTC.³²⁹⁹

7.1357. Australia argues that Honduras's contention that the Appellate Body's reasoning in *Brazil – Retreaded Tyres* does not apply in the circumstances of this case because tobacco plain packaging works in isolation rather than in synergy with the proposed alternative measures represents a "fundamental misunderstanding of the operation of the [TPP measures], Australia's National Tobacco Strategy, and best practice in tobacco control".³³⁰⁰

7.1358. Australia submits that the Panel "must also take into account the specific mechanisms or causal pathway of the measure when assessing whether the alternatives identified by the complainants will make an equivalent contribution to the [TPP measures'] general objectives of reducing the use of and exposure to tobacco products". In this respect, Australia submits that to qualify as alternatives, any measures proposed must "preserve for the responding Member its

³²⁹² Australia's second written submission, para. 553 (referring to Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.269); and response to Panel question No. 165.

³²⁹³ Australia's second written submission, para. 553 (referring to Appellate Body Report, *Brazil – Retreaded Tyres*, para. 172); and response to Panel question No. 165.

³²⁹⁴ Australia's comments on the complainants' responses to Panel question No. 156.

³²⁹⁵ Australia's first written submission, para. 706; and response to Panel question No. 165.

³²⁹⁶ Australia's first written submission, paras. 40-41 (referring to US Surgeon General's Report 2000, (Exhibit AUS-53), p. 6). See also Australia's first written submission, paras. 706 and 38.

³²⁹⁷ Australia's first written submission, paras. 42-43 (referring to USCDC Best Practices for Comprehensive Tobacco Control Programs, (Exhibit AUS-50), p. 19).

³²⁹⁸ Australia's first written submission, paras. 44-45.

³²⁹⁹ Australia's first written submission, para. 47 (referring to Article 5 of the FCTC, which reads: "Each Party shall develop, implement, periodically update and review comprehensive multisectoral national tobacco control strategies, plans and programmes in accordance with this Convention and the protocols to which it is a Party.") See also ibid. para. 46 (referring to WHO and WHO/FCTC *amici curiae* brief, (Exhibit AUS-42 (revised)), para. 72, which reads: "[T]obacco control relies upon implementation of comprehensive multi-sectoral measures that work together as cumulative interventions in a complementary regulatory scheme.")

³³⁰⁰ Australia's comments on the complainants' responses to Panel question No. 163. See also Australia's comments on the complainants' responses to Panel question No. 161.

right to achieve its desired level of protection with respect to the objective pursued".³³⁰¹ Accordingly, in Australia's view, any alternative measures proposed must make an equivalent contribution to Australia's general objective of improving public health, taking into account the fact that these measures are part of Australia's comprehensive range of tobacco control measures. Australia submits that the TPP measures are one element "within a comprehensive suite of measures which together aim to improve public health", and that "the specific mechanisms by which the tobacco plain packaging measure operates are a central feature of the measure's design and structure and inform the extent to which a proposed alternative, which narrows the range of mechanisms deployed in Australia's tobacco control strategy, is able to achieve an equivalent contribution to the objectives in subsection 3(1) of the TPP Act".³³⁰² For Australia, the more limited the set of "specific mechanisms" deployed in Australia's tobacco control strategy, the more difficult it is to influence the behaviour of the broadest range of consumers possible, and the more limited the set of measures in place, the greater potential for regulatory loopholes.³³⁰³

7.1359. In addition, Australia argues that the "expected timing" of a measure's contribution is irrelevant to a panel's assessment of equivalence of contribution.³³⁰⁴ Australia also states that the Appellate Body in *Brazil – Retreaded Tyres* "considered it sufficient to demonstrate that a technical regulation is apt to contribute to its objectives 'at some point in time'" and nothing in the Appellate Body's analysis in that dispute, nor any other, suggests that the "expected timing" of a measure's contribution has any relevant bearing on determining the equivalence of contribution as between a challenged measure and a proposed alternative.³³⁰⁵

7.1360. Australia submits that the TPP measures restrict trade "only to the extent necessary to achieve its degree of contribution to its public health objectives", such that any alternative measure that is less trade-restrictive, "by reducing the volume of imports of tobacco products to a lesser extent, would make a lesser contribution to the public health objectives of the measure". Moreover, Australia submits that "any proposed alternative measure that is more effective than tobacco plain packaging would reduce the volume of imports to a greater extent and would thus be more trade-restrictive"³³⁰⁶ and "any proposed alternative measure that makes an equivalent contribution to the objectives of the tobacco plain packaging measure would need to reduce the volume of imports of tobacco products to the same extent, and would therefore be equally (rather than less) trade-restrictive as the challenged measure".³³⁰⁷

7.1361. For Australia, a comparison of relative reductions in the value of trade caused by the challenged measure and the proposed alternatives is not relevant in the circumstances of these proceedings, because "there is no evidence before the Panel to support the conclusion that the [TPP measures are] trade-restrictive on the basis that [they have] reduced the value of overall trade in tobacco products in the Australian market".³³⁰⁸ Australia notes that "the fact that excise increases are the principal cause of downtrading is accepted by all parties to the dispute, by public health experts, and indeed, by the tobacco industry".³³⁰⁹ Consequently, if "downtrading is in and of itself evidence of trade-restrictiveness, an excise increase would be far more trade-restrictive than tobacco plain packaging".³³¹⁰ Moreover, Australia notes, with reference to the complainants' arguments on the limitation of "competitive opportunities" and "freedoms", that an increase in the MLPA would "by its design, structure and intended operation, completely eliminate[] a 'competitive opportunity' or 'freedom' currently available to the tobacco industry in the Australian market, namely the opportunity to compete legally for sales of tobacco products to consumers between the

³³⁰¹ Australia's response to Panel question No. 64 (quoting Appellate Body Report, *Brazil – Retreaded Tyres*, para. 156).

³³⁰² Australia's response to Panel question Nos. 64 and 69. See also Australia's response to Panel question No. 64 (quoting Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.254).

³³⁰³ Australia's response to Panel question No. 64. See also Australia's response to Panel question No. 69; and comment on the complainants' responses to Panel question No. 157.

³³⁰⁴ Australia's comments on the complainants' responses to Panel question No. 157.

³³⁰⁵ Australia's comments on the complainants' responses to Panel question No. 157.

³³⁰⁶ Australia's response to Panel question No. 151.

³³⁰⁷ Australia's response to Panel question No. 151.

³³⁰⁸ Australia's response to Panel question No. 151.

³³⁰⁹ Australia's response to Panel question No. 151; and comment on the complainants' responses to Panel question Nos. 151 and 165.

³³¹⁰ Australia's response to Panel question No. 151; and comment on the complainants' responses to Panel question Nos. 151 and 165.

ages of 18-21 years".³³¹¹ This is, in Australia's view, a more marked restriction on "freedom" than limitations on the ability to use certain branding elements on packaging.³³¹² With respect to pre-vetting, Australia submits that "the complainants contend that any increase in compliance costs, in and of itself, amounts to trade-restrictiveness", and that "Australia has explained the very significant compliance, regulatory and other costs that would be imposed on the industry and new entrants were a user-pays 'pre-vetting' scheme to be introduced".³³¹³ Australia further considers the Dominican Republic's argument that the trade-restrictiveness of the alternative measures should be viewed under "the prism of the covered agreements to have no legal foundation whatsoever".³³¹⁴

7.2.5.6.1.2 Analysis by the Panel

7.1362. As described above, a complainant may seek to identify a possible alternative measure that "is less trade restrictive, makes an equivalent contribution to the relevant objective, and is reasonably available", as part of its *prima facie* case that a technical regulation is more trade-restrictive than necessary.³³¹⁵ Such alternatives are "conceptual tools" to demonstrate that a technical regulation is more trade-restrictive than necessary.³³¹⁶

7.1363. The burden rests with the complainant to identify a possible alternative measure that is less trade-restrictive, makes an equivalent contribution to the relevant objective, and is reasonably available. If this is done, the burden is then on the responding Member to rebut the complainant's *prima facie* case, by presenting evidence and arguments showing that the challenged measure is not more trade-restrictive than necessary by demonstrating, for example, that the alternative measure identified by the complainant is not, in fact, "reasonably available", is not less trade-restrictive, or does not make an equivalent contribution to the achievement of the relevant legitimate objective.³³¹⁷

7.1364. Overall, therefore, for a proposed alternative measure to form the basis of a determination that the challenged measure is more trade-restrictive than necessary, it would need to cumulatively satisfy all of the elements of the comparative analysis. It would thus need to be demonstrated that a proposed alternative measure would not only be less trade-restrictive than the challenged measures, but also that it would make at least an equivalent contribution to the objective being pursued through the challenged measure, and be "reasonably available" to the Member as an alternative to the challenged measures.³³¹⁸

7.1365. A comparison of the relative trade-restrictiveness³³¹⁹ of a challenged technical regulation and a proposed alternative measure requires first an identification of the trade-restrictiveness caused by the proposed alternative. An assessment of the trade-restrictiveness of a measure requires an assessment of its degree of trade-restrictiveness, rather than merely a determination of whether or not the measure involves some restriction on trade.³³²⁰ This is necessary in particular to allow a comparison to be carried out, as to whether a proposed alternative is "less" trade-restrictive than the challenged technical regulation and to reach a conclusion as to whether the challenged measures are "*more* trade-restrictive than necessary" within the meaning of Article 2.2.³³²¹ This assessment does not differ in nature from that of the degree of trade-restrictiveness of the challenged measures in the "relational analysis" above, in that this

³³¹¹ Australia's response to Panel question No. 151; and comment on the complainants' responses to Panel question Nos. 151 and 165.

³³¹² Australia's response to Panel question No. 151; and comment on the complainants' responses to Panel question Nos. 151 and 165.

³³¹³ Australia's response to Panel question No. 151; and comment on the complainants' responses to Panel question Nos. 151 and 165.

³³¹⁴ Australia's comments on the complainants' responses to Panel question Nos. 151 and 165.

³³¹⁵ Appellate Body Reports, *US – Tuna II (Mexico)*, para. 323; *US – COOL*, para. 379; and *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.213.

³³¹⁶ Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.213.

³³¹⁷ Appellate Body Report, *US – Tuna II (Mexico)*, para. 323.

³³¹⁸ Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.213.

³³¹⁹ Appellate Body Reports, *US – COOL*, para. 471.

³³²⁰ See Appellate Body Report, *Colombia – Textiles*, para. 5.104 (quoting Appellate Body Report, *Argentina – Financial Services*, para. 6.234).

³³²¹ See Appellate Body Report, *Colombia – Textiles*, para. 5.116.

inquiry similarly concerns the extent to which the proposed alternative would have a limiting effect on trade.³³²² For the comparison to be meaningful, the same parameters need to apply to both assessments to the greatest extent feasible. However, the nature and quality of evidence available in respect of a proposed alternative measure may be limited by the fact that it is, by nature, a hypothetical conceptual tool. In addition, there may be inherent limits to, and constraints on, the degree of precision with which this comparison can be carried out, depending on the manner in which the challenged technical regulation and the proposed alternative measure would each operate and thereby affect international trade.

7.1366. Similarly, in respect of the contribution made by the technical regulation at issue and a proposed alternative measure, the respective *degrees* of contribution of those measures to the objective pursued must first be ascertained, as a prerequisite to an assessment of their equivalence.³³²³

7.1367. We note in this respect the complainants' arguments on the nature of the evidence to be taken into account in assessing the degree of contribution of their proposed alternative measures (including whether the assessment should be based on qualitative or quantitative evidence) and how the comparison with the contribution of the TPP measures should be carried out. As described above, it is inherent in the nature of this comparison, which is based in part on a hypothetical situation, that there may be limits to the degree of precision that can be achieved in assessing the degree of contribution of a proposed alternative measure. In addition, the availability and quality of relevant evidence also affects the degree of precision with which the degree of contribution of the challenged measures themselves can be determined. Nonetheless, as described above, this does not relieve the Panel of its duty to assess the relative degrees of contribution of the challenged measures and proposed alternative measures and to then take this assessment into account, in carrying out its overall assessment. Rather, we must strive to establish as precisely as possible, in light of the entirety of the relevant evidence before us, the degree of contribution that the proposed alternatives would make to the objective. In this respect, as was the case with respect to the determination of the degree of contribution of the TPP measures to their objective, we do not consider it appropriate to *a priori* exclude from consideration certain types of evidence (for example evidence of a qualitative or quantitative nature). Rather, we must take account of all relevant evidence before us, to the extent that it may inform our assessment of the degree of contribution that would be expected from a proposed alternative measure.

7.1368. Having determined, to the extent feasible, the degree of contribution of a proposed alternative measure to the objective pursued by the Member, a comparison of the respective contributions of the challenged measures and proposed alternatives should be based on whether these contributions can be said to be "equivalent". What is relevant in an assessment of "equivalence" is "the overall degree of contribution that the technical regulation makes to the objective pursued ... rather than any individual isolated aspect or component of contribution". As described by the Appellate Body, the exact contours of this assessment may vary from case to case and should take into account "the characteristics of the technical regulation at issue as revealed through its design and structure, as well as the nature of the objective pursued and the nature, quantity, and quality of the evidence available".³³²⁴

7.1369. Furthermore, in seeking to demonstrate such equivalence, a complainant need not demonstrate that its proposed alternative measure achieves a degree of contribution identical to that achieved by the challenged technical regulation. Rather, a proposed alternative measure may achieve an equivalent degree of contribution in ways different from the technical regulation at issue³³²⁵ and there is a margin of appreciation in this assessment.³³²⁶ This margin of appreciation may be informed by the nature of the risks and the gravity of the consequences arising from the non-fulfilment of the technical regulation's objective.³³²⁷ We note in this respect the Appellate

³³²² Appellate Body Reports, *US – COOL*, para. 375 (referring to Appellate Body Report, *US – Tuna II (Mexico)*, para. 319).

³³²³ See Appellate Body Report, *Colombia – Textiles*, para. 5.116.

³³²⁴ Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, paras. 5.216 and 5.254-5.255.

³³²⁵ Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, paras. 5.215, 5.254.

³³²⁶ Appellate Body Reports, *US – COOL*, para. 373; and *US – COOL (Article 21.5 – Canada and Mexico)*, paras. 5.215 and 5.254.

³³²⁷ Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.215.

Body's observation that the need for equivalence of the respective degrees of contribution comports with the principle reflected in the sixth recital of the preamble to the TBT Agreement; namely, that a Member shall not be prevented from pursuing a legitimate objective "at the levels it considers appropriate".³³²⁸

7.1370. Given the hypothetical nature of a proposed alternative measure, some imprecision in assessing the equivalence of the respective degrees of contribution of a technical regulation and such alternative is to be expected, and may be inevitable.³³²⁹ By way of example, the Appellate Body notes that "a technical regulation and the proposed alternative measures may deploy various methods or techniques that jointly or separately contribute to achieving the objective pursued, which may not each be quantifiable in an isolated manner".³³³⁰ However, this does not, in and of itself, "relieve a panel from its duty to assess the equivalence of the respective degrees of contribution", and a panel should proceed with the overall weighing and balancing under Article 2.2 in spite of such imprecision.³³³¹ We are guided by these considerations in our assessment.

7.1371. We also recall the requirement to consider "the risks non-fulfilment would create", which suggests that the comparison of the challenged measure with a possible alternative measure should be made in the light of "the nature of the risks at issue and the gravity of the consequences that would arise from non-fulfilment of the legitimate objective"³³³² as an element of weighing and balancing in the determination.³³³³ This factor may affect in particular the Panel's margin of appreciation in assessing the equivalence of the respective degrees of contribution.³³³⁴

7.1372. In the context of these proceedings, as we have established earlier, the nature of the risks that non-fulfilment of Australia's legitimate objective would create is that public health would not be improved as the use of, and exposure to, tobacco products would not be reduced.³³³⁵ We have also found that the public health consequences of not fulfilling this objective are particularly grave. We will therefore take due account of this factor in our comparison of the TPP measures with the alternatives proposed by the complainants.

7.1373. Finally, a proposed alternative measure under Article 2.2 must be "reasonably available" to the responding Member.³³³⁶ A measure may be found not to be reasonably available where it is merely theoretical in nature, for instance, where the responding Member is not capable of taking it, or where the measure imposes an undue burden on that Member, such as prohibitive costs or substantial technical difficulties.³³³⁷

7.1374. The nature and degree of evidence required for a complainant to establish the "reasonable availability" of a proposed alternative measure "will necessarily vary from measure to measure and from case to case".³³³⁸ The fact that the assessment pertains to proposed alternative measures that function as "conceptual tool[s]" informs the nature and degree of evidence required

³³²⁸ Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.214. See also Appellate Body Reports, *US – COOL*, para. 373.

³³²⁹ Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.216.

³³³⁰ Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.216 and fn 660 (referring to Appellate Body Report, *Brazil – Retreaded Tyres*, para. 151).

³³³¹ Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.216.

³³³² Appellate Body Report, *US – Tuna II (Mexico)*, para. 321.

³³³³ Appellate Body Report, *US – Tuna II (Mexico)*, para. 321.

³³³⁴ Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, paras. 5.254 and 5.269.

³³³⁵ See para. 7.1322 above.

³³³⁶ Appellate Body Reports, *US – Tuna II (Mexico)*, para. 323; *US – COOL*, para. 379; and *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.327.

³³³⁷ Appellate Body Report, *Brazil – Retreaded Tyres*, para. 156 (quoting Appellate Body Report, *US – Gambling*, para. 308).

³³³⁸ Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.327 (referring to Appellate Body Report, *Chile – Price Band System (Article 21.5 – Argentina)*, para. 134, which in turn refers to Appellate Body Reports, *US – Wool Shirts and Blouses*, p. 14, DSR 1997:I, p. 335; and *US – Carbon Steel*, para. 157).

to establish the "reasonable availability" of proposed alternative measures in making a *prima facie* case under Article 2.2 of the TBT Agreement.³³³⁹

7.1375. While it is for the complainant to make a *prima facie* case that its proposed alternative measure is reasonably available³³⁴⁰, a complainant is not required under Article 2.2 to provide detailed information on how a proposed alternative would be implemented by the respondent in practice, or precise and comprehensive estimates of the cost that such implementation would entail.³³⁴¹ Rather, "once a complainant has established *prima facie* that the proposed alternative is reasonably available to the respondent, it would be for the respondent to adduce specific evidence showing that associated costs would be prohibitive, or that technical difficulties would be so substantial that implementation of such an alternative would entail an undue burden for the Member in question".³³⁴²

7.1376. Having clarified the general basis for our assessment, we address certain issues raised by the parties concerning the manner in which the comparative analysis should be approached, in a situation where the measure at issue is part of "a more complex suite of measures directed at the same objective".³³⁴³

7.1377. Australia's primary argument with respect to three of the four alternative measures proposed by the complainants is that they are not "true" alternatives for the purpose of the legal assessment under Article 2.2. Australia submits that "[a]part from the proposed 'pre-vetting scheme', the 'alternatives' proposed by the complainants are either precise replicas of, or in the case of the proposed increase in the [MLPA], slight variations on, measures that Australia has already implemented".³³⁴⁴ In this connection, Australia relies on the Appellate Body's determinations in *Brazil – Retreaded Tyres*.³³⁴⁵

7.1378. Australia argues that it has "already explained ... why a comprehensive and dynamic approach to tobacco control is required" and that "[i]n this light, each proposed 'alternative' cannot substitute for the contribution of the tobacco plain packaging measure to its objectives because that measure plays a distinct and complementary role within Australia's suite of tobacco control measures".³³⁴⁶

7.1379. The complainants submit that certain modifications to existing measures can nonetheless qualify as alternative measures. For example, Honduras submits that the "scope of valid alternative measures includes not only measures that are new to the responding Member, but also measures which consist of an increase in magnitude or an improvement of an existing measure".³³⁴⁷ The Dominican Republic argues that a "proposed measure is an alternative if it is different in its substantive effects from an existing measure, including in terms of the extent of the contribution to the relevant objective", and that an "alternative measure may, therefore, include many features of an existing measure but with a *stricter* element of regulation".³³⁴⁸ These

³³³⁹ Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.328 (referring to Appellate Body Report, *US – Tuna II (Mexico)*, para. 320).

³³⁴⁰ This is to be contrasted with Article XX of the GATT 1994, which the Appellate Body distinguishes in the following terms:

[W]e see differences between, on the one hand, the burden on the respondent under Article XX of the GATT 1994 to prove that an alternative measure proposed by the complainant would impose an undue burden – e.g. due to prohibitively high cost or substantial technical difficulties – and that this alternative is therefore *not* reasonably available and, on the other hand, the burden on the complainant under Article 2.2 of the TBT Agreement to make a *prima facie* case that the alternative measure it proposes would be reasonably available.

See Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.337 (emphasis original).

³³⁴¹ Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.334.

³³⁴² Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.338.

³³⁴³ Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.216 fn 660 (referring to Appellate Body Report, *Brazil – Retreaded Tyres*, para. 151).

³³⁴⁴ Australia's first written submission, para. 705.

³³⁴⁵ Appellate Body Report, *Brazil – Retreaded Tyres*, para. 172.

³³⁴⁶ Australia's first written submission, para. 706.

³³⁴⁷ Honduras's first written submission, para. 823.

³³⁴⁸ Dominican Republic's second written submission, para. 631. (emphasis original)

complainants refer to the panel rulings in *China – Rare Earths*, which, in their view, confirm that (in the Dominican Republic's formulation) a reasonably available alternative measure "may be an improved version of an existing measure".³³⁴⁹

7.1380. We shall address, as part of our assessment, whether each of the specific measures proposed by the complainants is indeed an "alternative" for the purpose of our analysis of those proposals. At this stage, we consider the relevant clarifications provided in prior rulings cited by the parties and how they may inform what qualifies as an "alternative" in a context where different measures are maintained towards a common objective.

7.1381. In *Brazil – Retreaded Tyres*, the panel considered a number of alternatives to Brazil's import ban on retreaded tyres put forward by the European Communities, and found them to be already implemented, or in the process of being implemented, by Brazil. The panel thus concluded that "the alternative measures identified by the European Communities to avoid the generation of waste do not constitute alternatives that could apply as a substitute for the import ban on retreaded tyres to achieve its goal of preventing the generation of waste tyres to the maximum extent possible".³³⁵⁰ On appeal, the Appellate Body found that:

In fact, like the Import Ban, these measures already figure as elements of a comprehensive strategy designed by Brazil to deal with waste tyres. Substituting one element of this comprehensive policy for another would weaken the policy by reducing the synergies between its components, as well as its total effect. We are therefore of the view that the Panel did not err in rejecting as alternatives to the Import Ban components of Brazil's policy regarding waste tyres that are complementary to the Import Ban.³³⁵¹

7.1382. In *China – Rare Earths*, China argued that the alternative measures identified by the complainants "are not in fact 'alternatives', since China already imposes such measures". The panel accepted this contention, but observed that:

China has not explained why it could not, as an alternative to the export duties (which the Panel has found are WTO-inconsistent and not apt to make a material contribution to the protection of human, animal, or plant life or health), increase the volume restrictions on mining and production, increase the pollution controls on mining and production, increase the resource tax, and/or increase the pollution tax. In this regard, the fact that China already imposes these types of measures does not explain why increasing the rates (e.g. on the resource tax) is not an "alternative" to export duties.³³⁵²

7.1383. These rulings shed light on aspects of the comparative analysis relevant to our analysis in these proceedings.

7.1384. First, we agree with Australia's contention, reflected in the reasoning of the panel and the Appellate Body in *Brazil – Retreaded Tyres*, that where a responding Member maintains the measure at issue as one "element[] of [a] comprehensive policy", substituting another "element of [that] comprehensive policy" for the measure at issue may "weaken the policy by reducing the synergies between" the components of that package, as well as its total effects.³³⁵³ In light of this, it is appropriate to take due account, in a comparative analysis under Article 2.2, of the context in which the challenged measure is applied, including, where relevant, the fact that it may constitute one component of a comprehensive policy. This is also consistent, in our view, with the need to take into account, as the Appellate Body expressed it, of "the characteristics of the technical regulation at issue as revealed through its design and structure, as well as the nature of the objective pursued and the nature, quantity, and quality of the evidence available" in assessing the

³³⁴⁹ Dominican Republic's first written submission, para. 747. See also Dominican Republic's second written submission, para. 631 (referring to Panel Reports, *China – Rare Earths*, para. 7.186) and Honduras's second written submission, paras. 587-588.

³³⁵⁰ Panel Report, *Brazil – Retreaded Tyres*, para. 7.172. (emphasis original)

³³⁵¹ Appellate Body Report, *Brazil – Retreaded Tyres*, para. 172. (footnote omitted)

³³⁵² Panel Reports, *China – Rare Earths*, para. 7.186. (emphasis original)

³³⁵³ Appellate Body Report, *Brazil – Retreaded Tyres*, para. 172.

relative contributions of the challenged measure and proposed alternative measures to the objective pursued by the responding Member.³³⁵⁴

7.1385. Second, though we accept Australia's argument that the aforementioned statement by the panel in *China – Rare Earths* was made *arguendo*, we agree with the premise that appears to underlie the panel's reasoning in that case – namely, that a proposed measure that is a *variation* of an existing measure may constitute a valid alternative. Indeed, this is consistent with the Appellate Body's observation that alternative measures are "of a hypothetical nature in the context of the analysis under Article 2.2 because they do not yet exist in the Member in question, or at least not in the particular form proposed by the complainant".³³⁵⁵ This confirms that a measure may be a valid alternative where it exists in the responding Member, albeit in a different form from that proposed by the complainant. In such a case, it is the *variation* proposed by the complainants as a substitute for the challenged measure that would be the subject of the comparative analysis under Article 2.2 of the TBT Agreement, including of whether that variation of an existing measure would make an equivalent contribution to the objective pursued by the responding Member.

7.1386. Turning to the implications of these general considerations for our assessment, we recall our conclusion that the objective of the TPP measures is to improve public health by reducing the use of, and exposure to, tobacco products. The TPP measures seek to achieve this by reducing the appeal of tobacco products, increasing the effectiveness of GHWs and reducing the ability of the retail packaging of tobacco products to mislead consumers about the harmful effects of smoking or using tobacco products.³³⁵⁶ We have concluded above that the evidence before us, taken in its totality, supports the conclusion that the TPP measures, in combination with other tobacco-control measures maintained by Australia (including the enlarged GHWs introduced simultaneously with TPP), make a meaningful contribution to Australia's objective of improving public health by reducing the use of, and exposure to, tobacco products.

7.1387. We also recall the regulatory background with respect to tobacco control in Australia, as set out in Section 2.2 of these Reports. As described in detail above, Australia maintains a range of tobacco control measures, including restrictions on the advertisement and promotion of tobacco products, taxation measures and restrictions on the sale of tobacco products.³³⁵⁷ We also recall the immediate context in which Australia adopted the TPP measures, namely, as one of four measures that Australia announced to "deliver on [the] recommendations of the [NPHT]", including a tobacco excise increase of 25%, restrictions on Australian internet advertising of tobacco products and extra expenditure on anti-smoking campaigns.³³⁵⁸ Australia has explained and documented in these proceedings that these measures are part of a long-term comprehensive tobacco control strategy.³³⁵⁹

7.1388. Furthermore, we note that this approach is consistent with that outlined in the FCTC, which Australia has indicated that it seeks to implement *inter alia* through the TPP measures. As described earlier³³⁶⁰, Article 5(1) of the FCTC thus contains a "general obligation" to "develop, implement, periodically update and review comprehensive multisectoral national tobacco control strategies, plans and programmes in accordance with" the FCTC and other applicable protocols.³³⁶¹

7.1389. The FCTC encompasses a comprehensive range of actions to address different aspects of tobacco control.³³⁶² This is reflected in the fact that it is structured on the basis of a distinction between measures relating to the reduction of demand for tobacco (which include price and tax

³³⁵⁴ Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.215.

³³⁵⁵ Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.328. (emphasis added)

³³⁵⁶ TPP Act (Exhibits AUS-1, JE-1), Section 3(2).

³³⁵⁷ See sections 2.2.1 (Mandatory text and graphic health warnings); 2.2.2 (Restrictions on advertisement and promotion of tobacco products); 2.2.3 (Taxation measures); 2.2.4 (Restrictions on the sale of tobacco products); and 2.2.5 (Other measures, including bans on tobacco consumption in particular locations, anti-smoking social marketing campaigns, the provision of nicotine replacement and cessation medicines, Quitlines, and measures with respect to the illicit tobacco trade) above.

³³⁵⁸ See para. 2.8 above.

³³⁵⁹ See, e.g. Australia's first written submission, section II.D.

³³⁶⁰ See para. 2.101.

³³⁶¹ FCTC, (Exhibits AUS-44, JE-19), Article 5(1).

³³⁶² See footnote 1064 and, e.g. the discussion at paras. 7.327-7.328 and 7.388 above.

measures; measures to protect against exposure to tobacco smoke; regulation of the contents of tobacco products; regulation of product disclosure; measures concerning the packaging and labelling of tobacco products; education, communication, training and public awareness; tobacco advertising, promotion and sponsorship; demand reduction measures concerning tobacco dependence and cessation)³³⁶³ and measures relating to the reduction of the supply of tobacco (which include measures relating to illicit trade in tobacco products and sales to and by minors).³³⁶⁴

7.1390. We also note that the proposition that the use of, and exposure to, tobacco products should be addressed through a combination of measures working together is echoed in publications by the WHO³³⁶⁵, the World Bank³³⁶⁶, the US Surgeon General³³⁶⁷, the USIOM³³⁶⁸, and the US Centers for Disease Control and Prevention (USCDC).³³⁶⁹ This multifaceted approach reflects the multiplicity of factors that are recognized to influence tobacco use, as discussed above.³³⁷⁰

7.1391. These elements indicate that the TPP measures operate "as part of a more complex suite of measures directed at the same objective"³³⁷¹ and we will take due account of this broader regulatory context as we conduct our comparative assessment. At the same time, as discussed above, this does not imply that the complainants could not identify as an alternative to the TPP measures, a measure in the form of a variation of one of the other measures applied by Australia as a part of its broader suite of measures directed at tobacco control.

7.2.5.6.2 First proposed alternative measure: Increase in the MLPA

7.1392. All complainants argue that an increase in the MLPA for tobacco products in Australia from 18 to 21 years would be a less trade-restrictive alternative to the TPP measures, that would make an equivalent contribution to Australia's objective.

7.1393. Australia's primary argument in response to this proposed alternative is that an increase in the MLPA is not an alternative measure, but "rather a slight variation to a measure Australia has already implemented".³³⁷² We therefore consider first whether an increase in the MLPA may be considered to be an "alternative" measure.

7.1394. Should we determine that such an increase would constitute an alternative measure, we would need to consider whether it would be, as the complainants suggest, a less trade-restrictive measure that would make an equivalent contribution to Australia's objective of improving public

³³⁶³ FCTC, (Exhibits AUS-44, JE-19), Articles 6-14.

³³⁶⁴ FCTC, (Exhibits AUS-44, JE-19), Articles 15-17.

³³⁶⁵ WHO Policy Package to Reverse the Tobacco Epidemic, (Exhibit AUS-607), p. 11 (recognizing that tobacco control policies "are complementary and synergistic").

³³⁶⁶ Jha and Chaloupka 1999, (Exhibit AUS-51), pp. 82-83 (noting that "[w]here governments decide to take strong action to curb the tobacco epidemic, a multipronged strategy should be adopted ...").

³³⁶⁷ US Surgeon General's Report 2014, (Exhibits AUS-37, DOM-104, CUB-35), p. 7 (noting that "[s]ince the 1964 Surgeon General's report, comprehensive tobacco control programs and policies have been proven effective for controlling tobacco use", and that "[f]urther gains can be made with the full, forceful, and sustained use of these measures"); and US Surgeon General's Report 2000, (Exhibit AUS-53), p. 11 (noting that "a public health success in reducing tobacco use requires activity on all fronts", and that a "comprehensive approach—one that optimizes synergy from a mix of strategies—has emerged as the guiding principle for future efforts to reduce tobacco use"). See also US Surgeon General's Report 2012, (Exhibit AUS-76), Chap. 6.

³³⁶⁸ 2015 USIOM Report, (Exhibit DOM-232), p. 6-20 (noting, in its discussion of youth access restrictions, that "there is some evidence that comprehensive tobacco programs *that include youth access restrictions* are effective at reducing underage tobacco use ...").

³³⁶⁹ USCDC Best Practices for Comprehensive Tobacco Control Programs, (Exhibit AUS-50), pp. 6 and 9 (recognizing the effectiveness of comprehensive tobacco control approaches that combine "educational, clinical, regulatory, economic, and social strategies", and noting that "research has shown greater effectiveness with interventional efforts that integrate the implementation of programmatic and policy initiatives to influence social norms, systems, and networks").

³³⁷⁰ See e.g. the discussion at paras. 7.703-7.720 above.

³³⁷¹ Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.216 fn 660 (referring to Appellate Body Report, *Brazil – Retreaded Tyres*, para. 151).

³³⁷² Australia's first written submission, para. 709.

health by reducing the use of, and exposure to, tobacco products, and be reasonably available to Australia. As a preliminary matter, we first describe the proposed measure.

7.2.5.6.2.1 Description of the proposed measure

7.1395. Honduras argues that a less trade-restrictive alternative measure consists of increasing Australia's MLPA for tobacco products from 18 to 21, which could restrict the availability of tobacco products for adolescents.³³⁷³ The Dominican Republic argues that, "[b]eyond increasing taxation, a[n ...] alternative means of tackling this issue would be to increase the [MLPA] from the current 18 years to 21 years for tobacco products in Australia" as it "would be a more effective, straightforward, readily available option that, unlike the TPP measures, would not encumber the use of trademarks".³³⁷⁴ Cuba "adopts" the arguments put forward by the Dominican Republic in respect of an increase in the MLPA.³³⁷⁵ Indonesia "endorses" the alternatives "proposed by" the Dominican Republic's regarding raising the legal smoking age from 18 to 21.³³⁷⁶

7.1396. We also note the Dominican Republic's argument that, should the Panel consider that a greater reduction in smoking achieved by an increase in the MLPA from 18 to 21 years, on its own, necessarily means greater trade-restrictiveness, the Dominican Republic "offers a calibrated approach to increasing the MLPA", which "would ensure that the contribution to reducing smoking made by increasing the MLPA would remain equivalent to any contribution that the [TPP] measures might make".³³⁷⁷ In particular, "the MLPA could be raised to 19 or 20 [years], were the Panel to find that raising the MLPA to 21 [years] is considerably more effective than the [TPP] measures in reducing volumes of tobacco products sold, and this is a decisive consideration in assessing trade restrictiveness".³³⁷⁸ This is because raising the MLPA to 19 years would have a lower impact on prevalence rates than an increase to 21 years, and the contribution "to reducing smoking [of raising the MLPA to 20 years] would necessarily fall in the middle of the range of effects found for an MLPA of 19 and 21 [years]."³³⁷⁹

7.1397. As the Dominican Republic's suggestion that Australia could raise the MLPA to 19 or 20 years depends on our other findings in respect of the trade-restrictiveness and contribution of an increase in the MLPA to 21 years, we will consider these arguments in the event that we make the findings identified by the Dominican Republic (i.e. that a greater reduction in smoking achieved by an increase in the MLPA from 18 to 21 years, on its own, necessarily results in a greater degree of trade-restrictiveness).

7.2.5.6.2.2 Whether an increase in the MLPA to 21 years is an alternative measure

7.1398. Australia points out that each of Australia's states and territories increased the MLPA from 16 to 18 years over the period 1990 to 1998.³³⁸⁰ Australia adds that there are a broad range of policies in Australia directed at restricting youth access to tobacco products, including prohibitions on selling tobacco products to minors, purchasing on behalf of minors, and using false identification documents to purchase tobacco products.³³⁸¹ In addition, "some states have also implemented laws authorising the seizure of tobacco products being smoked [by] or in the possession of a person under the age of 18 years".³³⁸² For Australia, such measures are complements to, rather than substitutes for, the TPP measures.³³⁸³

7.1399. The complainants' arguments with respect to the extent to which variations on existing measures can be classified as "alternatives" for the purpose of the comparative analysis are

³³⁷³ Honduras's first written submission, paras. 567 and 913.

³³⁷⁴ Dominican Republic's first written submission, para. 763. (footnote omitted)

³³⁷⁵ Cuba's first written submission, para. 287.

³³⁷⁶ Indonesia's first written submission, para. 457. See also Indonesia's second written submission, paras. 283-293.

³³⁷⁷ Dominican Republic's response to Panel question No. 157, para. 133.

³³⁷⁸ Dominican Republic's response to Panel question No. 151, para. 58.

³³⁷⁹ Dominican Republic's response to Panel question No. 157, para. 135.

³³⁸⁰ Australia's first written submission, para. 710.

³³⁸¹ Australia's first written submission, para. 710.

³³⁸² Australia's first written submission, para. 710.

³³⁸³ Australia's first written submission, para. 710.

summarized above.³³⁸⁴ In addition, Indonesia argues that "the fact that Australia raised its [MLPA] from 16 to 18 *almost 20 years ago* has no bearing on the positive effects that a raise from 18 to 21 *now could generate*".³³⁸⁵

7.1400. Australia's existing MLPA is 18 years, and is maintained through measures at the state and territory level.³³⁸⁶ As explained above, a measure may be a valid alternative where it exists in the responding Member, albeit in a different form from that proposed by the complainant.³³⁸⁷ In this instance, though Australia does maintain an MLPA, it is not in the form proposed by the complainants (i.e. it is 18 years, not 21 years, as proposed). Australia has not demonstrated why a variation of this nature (i.e. increasing the MLPA by three years) is not sufficient to render the complainants' proposal an alternative measure for the purpose of our analysis; it merely asserts that the existence of an MLPA of 18 years renders such a measure a complement to, rather than a substitute for, the TPP measures.³³⁸⁸

7.1401. Therefore, we are not persuaded that the complainants' proposal to increase the MLPA to 21 years is not an alternative measure, based solely on the fact that it is a "slight variation" on Australia's existing minimum purchasing age of 18 years.³³⁸⁹

7.1402. We therefore conclude that increasing the MLPA to 21 is an alternative measure, in that it is a measure not currently applied by Australia. We therefore proceed to assess further whether this measure, as an alternative to the TPP measures, would be less trade-restrictive than the TPP measures, make an equivalent contribution to Australia's objective, and be reasonably available for Australia to implement.

7.2.5.6.2.3 Whether an increase in the MLPA to 21 years would be less trade-restrictive than the TPP measures

Arguments of the parties

7.1403. Honduras argues that an increase in the MLPA to 21 years is less trade-restrictive than the trademark and format requirements of the TPP measures, as it does not affect producers' ability to use branded packaging in order to signal quality and reputation to consumers in the Australian market, and would not impose on producers any compliance costs concerning modifications to the appearance of packaging and tobacco products themselves.³³⁹⁰ Honduras adds that an increase in the MLPA to 21 years in no way distorts competitive opportunities by detrimentally affecting producers' protected IP rights and their ability to legitimately distinguish their products from those of competitors in the Australian market, nor does it impose any additional compliance costs on traders and does not create uncertainties in the market.³³⁹¹

7.1404. The Dominican Republic argues that an increase in the MLPA to 21 years would be less trade-restrictive than the TPP measures. According to the Dominican Republic, while the TPP measures prevent trademarks from playing "their vital role as a differentiator", and thus eliminate competitive opportunities for producers of tobacco products, an increase in the MLPA would have none of these trade-restrictive effects.³³⁹²

7.1405. The Dominican Republic also argues that if the Panel were to find that the TPP measures contribute to Australia's objective, the measures will also be trade-restrictive by reducing the volume of sales of tobacco products.³³⁹³ On the basis of this assumption, the Dominican Republic submits that an increase in the MLPA to 21 years is less trade-restrictive than the TPP measures, because it would entail the same volume-based restrictions as the TPP measures, but would not

³³⁸⁴ See para. 7.1379 above.

³³⁸⁵ Indonesia's second written submission, para. 289. (emphasis original)

³³⁸⁶ Reporting Instrument of the WHO FCTC submitted by Australia, (Exhibit HND-26); and Australia's first written submission, Annexure C, fn 1102.

³³⁸⁷ See para. 7.1385 above.

³³⁸⁸ Australia's first written submission, para. 710.

³³⁸⁹ See para. 2.65 and fn 309 above for a discussion of Australia's existing MLPA.

³³⁹⁰ Honduras's first written submission, paras. 580 and 916; and response to Panel question No. 151.

³³⁹¹ Honduras's response to Panel question No. 151.

³³⁹² Dominican Republic's first written submission, paras. 1022-1023.

³³⁹³ Dominican Republic's second written submission, para. 970.

restrict competitive opportunities, as the TPP measures do, by curtailing differentiation and distorting competitive opportunities. Specifically, increasing the MLPA does not affect the use of trademarks or other elements of packaging and products that serve to differentiate tobacco products from each other³³⁹⁴, and does not lead to downtrading because it denies young people the ability to purchase any and all tobacco products, whether high- or low-end.³³⁹⁵ Furthermore, the Dominican Republic submits, an increase in the MLPA can be calibrated to ensure that its effects on the volume of sales of tobacco products are equivalent in size to any such volume effects that the TPP measures are found to have. It could be raised to 19 or 20 years, were the Panel to find that raising the MLPA to 21 years is considerably more effective than the TPP measures in reducing volumes of tobacco products sold.³³⁹⁶

7.1406. The Dominican Republic also argues that, assuming no origin-based discrimination, an age restriction is not a trade-restrictive measure under the TBT Agreement, the GATT 1994, the TRIPS Agreement, or any other covered agreement. It argues that the reduction in competitive opportunities entailed by non-discriminatory age restriction is not protected by the covered agreements. The Dominican Republic argues that, if an alternative measure is not trade-restrictive under the covered agreements, and a challenged technical regulation is, that is a "strong and even decisive" indication that the alternative is less trade-restrictive under those agreements.³³⁹⁷

7.1407. Cuba adopts the arguments put forward by the Dominican Republic in respect of this alternative.³³⁹⁸

7.1408. Indonesia "endorses" the alternatives "proposed by" the Dominican Republic's regarding raising the legal smoking age from 18 to 21.³³⁹⁹

7.1409. Australia argues that "according to the complainants' own case, the effect of increasing the [MLPA], would, by its design, structure and intended operation, eliminate a 'competitive opportunity' currently available to tobacco companies in Australia, namely the opportunity to compete legally for sales of tobacco products to consumers between the ages of 18 to 21".³⁴⁰⁰ Accordingly, in Australia's view, "under the complainants' own misguided standard of 'competitive opportunities', an increase in the minimum legal purchase age would be 'trade-restrictive'".³⁴⁰¹

7.1410. Australia adds that the Dominican Republic's suggestion that increasing the MLPA would lead to declines in tobacco use necessarily implies that these measures will restrict trade. In addition, Australia submits that the Dominican Republic's argument that increasing the MLPA to 21 years will lead to an equivalent or greater degree of contribution to reducing tobacco use than tobacco plain packaging, necessarily implies an equivalent or greater reduction in the volume of imports of tobacco products; and, therefore, will lead to "an equivalent or greater degree of trade-restrictiveness".³⁴⁰²

Analysis by the Panel

7.1411. As discussed earlier, a measure is trade-restrictive within the meaning of Article 2.2 of the TBT Agreement where that measure has a limiting effect on international trade.³⁴⁰³

³³⁹⁴ Dominican Republic's second written submission, paras. 970-976; and response to Panel question No. 151.

³³⁹⁵ Dominican Republic's response to Panel question No. 151.

³³⁹⁶ Dominican Republic's response to Panel question Nos. 151 and 157.

³³⁹⁷ Dominican Republic's response to Panel question No. 151.

³³⁹⁸ Cuba's first written submission, para. 287.

³³⁹⁹ Indonesia's first written submission, para. 457.

³⁴⁰⁰ Honduras's second written submission, para. 563.

³⁴⁰¹ Honduras's second written submission, para. 563.

³⁴⁰² Australia's comments on the complainants' response to Panel question No. 153.

³⁴⁰³ As expressed by the Appellate Body in *US – Tuna II (Mexico)*, para. 219, also quoted above, "Article 2.2 is thus concerned with restrictions on international trade". This is consistent with the first sentence of Article 2.2, which uses the term "unnecessary obstacles to international trade", not just "unnecessary obstacles to trade". The term "trade" is also qualified by "international" in other key provisions of the TBT Agreement, including "conduct of international trade" (preamble, third recital), "restriction on

7.1412. The complainants argue, in essence, that an increase in the MLPA to 21 would be less trade-restrictive than the TPP measures because it would not involve the type of restrictions on the competitive opportunities arising from the ability to differentiate products on the basis of trademarks and other branded packaging elements. Australia responds, with reference to the complainants' arguments on "competitive opportunities", that increasing the MLPA from 18 to 21 years would eliminate a competitive opportunity currently available to tobacco companies in Australia to compete legally for sales of tobacco products to consumers between the ages of 18 to 21.

7.1413. We agree with Australia that an increase in the MLPA from 18 to 21 years would eliminate the ability of tobacco companies to sell their products to people under the age of 21 years, and any competitive opportunities associated with such sales, including for imported tobacco products. In this respect, we note that, although 18-21 year-olds make up only a segment of the market of people who may, or do, use tobacco products, we have noted the importance of younger smokers to the tobacco industry. We recall in this respect the evidence before us from the tobacco industry itself, suggesting that "[t]he future success of any cigarette brand is driven by its ability to attract younger adult smokers, between the age of 18 and 24 years old", and that "smokers aged 18-24 determine the future trends of the tobacco industry".³⁴⁰⁴

7.1414. We also recall our determination, in respect of the TPP measures, that they are trade-restrictive, to the extent that they have a limiting effect on the total volume of trade in tobacco products.³⁴⁰⁵ To the extent that an increase in the MLPA to 21 years would make a contribution to Australia's objective of improving public health by reducing the use of, and exposure to, tobacco products at least equivalent to that of the TPP measures (which the complainants argue it would) by reducing overall consumption of tobacco products, such an effect would equally affect the overall volume of imports into Australia.³⁴⁰⁶ We find therefore that an increase in the MLPA to 21 years, like the TPP measures, would restrict the volume of trade by an amount commensurate with its contribution to Australia's objective.

7.1415. In addition, we recall our determination above that, while we agree that, by restricting the opportunity for brands to differentiate themselves, the TPP measures limit the opportunity for tobacco manufacturers to compete on the basis of such brand differentiation³⁴⁰⁷, we are not persuaded that this modification of the competitive environment for all tobacco products on the entire market (which may in principle *increase* competition on the market) constitutes, in itself, a restriction on "competitive opportunities" for imported tobacco products that must be assumed to have a "limiting effect" on international trade. In this respect, we also recall our conclusion that we are not persuaded that the complainants have demonstrated that this reduced opportunity for brand differentiation has led to an increase in price competition and a fall in prices and consequently to a decrease in the sales value of tobacco products and the total value of imports.

7.1416. We also note that while the evidence before us provides only a very limited basis upon which to assess with any degree of precision the potential impact of an increase in the MLPA to 21 years on the total value of imports (and thus to determine whether this alternative has a limiting effect on trade, on this basis), we have no reason to assume that such impact would be *less* than that observed in relation to the TPP measures. Along the same lines, we also note that the

international trade" (preamble, 6th recital), and "obstacle[s] to international trade" (preamble, 5th recital; Article 2.5; Article 5.1.2; Annex 3.E).

³⁴⁰⁴ Camel Advertising Development White Paper, (Exhibit AUS-197), p. 1.

³⁴⁰⁵ See para. 7.1208 above.

³⁴⁰⁶ We note in this respect the Dominican Republic's own acknowledgement that its proposed increase in the MLPA from 18 to 21 may result in a greater reduction in smoking than that achieved through the TPP measures, so that the degree of trade-restrictiveness arising from this alternative would be *greater* than that achieved through the TPP measures:

[S]hould the Panel consider that a greater reduction in smoking achieved by an increase in the MLPA from 18 to 21, on its own, necessarily means greater trade restrictiveness, the Dominican Republic offers a calibrated approach to increasing the MLPA This calibrated approach would ensure that the contribution to reducing smoking made by increasing the MLPA would remain equivalent to any contribution that the [T]PP measures might make.

Dominican Republic's response to Panel question No. 157, para. 133. See also para. 7.1396 above.

³⁴⁰⁷ See para. 7.1167 above.

evidence before us in respect of this alternative does not specifically discuss the potential impact of an increase in the MLPA to 21 years on the volume and value of imports of cigarettes by price-segment. Other evidence on the record, however, suggests that young adult smokers are more price-sensitive than older smokers³⁴⁰⁸, thus suggesting that an increase in the MLPA would in the short term be expected to affect the low-price segment more than the premium price segment.

7.1417. In light of these elements, we are not persuaded that the complainants have demonstrated that an increase in the MLPA to 21 years would necessarily be less trade-restrictive than the TPP measures.

7.1418. Notwithstanding this conclusion, we find it appropriate to pursue our analysis and determine also whether, assuming that such a measure could be considered less trade-restrictive than the TPP measures, an increase of the MLPA would make an equivalent contribution to Australia's objective of improving public health by reducing the use of, and exposure to, tobacco products.

7.2.5.6.2.4 Whether an increase in the MLPA would make an equivalent contribution to Australia's objective

Main arguments of the parties

7.1419. Honduras argues that the MLPA increase to 21 years "could ... contribute to Australia's smoking prevalence objective to an equal or even larger extent than the plain packaging trademark and format restrictions".³⁴⁰⁹ Such an increase would have the effect of removing tobacco products from adolescents' social networks, thereby restricting access by those adolescents to tobacco products and reducing smoking prevalence by addressing its root cause (that is, by preventing initiation during adolescence). Honduras refers³⁴¹⁰ to the expert report by Professor Steinberg, who favours interventions that affect the availability of tobacco products to adolescents, instead of interventions that seek to influence adolescents' demand for them.³⁴¹¹ Honduras adds that, since the submission of Professor Steinberg's first report to the Panel, a committee of the USIOM has published a report, to which he contributed, in which it agreed with his recommendation that raising the MLPA for tobacco products to 21 or 25 years would help prevent initiation of tobacco use among adolescents.³⁴¹² Honduras argues that various jurisdictions across the world have successfully reduced smoking prevalence by increasing the MLPA for tobacco products.³⁴¹³ Honduras also refers to studies predicting that, in the United States, an increase in the MLPA to 21 years would, in 75 years, reduce the prevalence among 15- to 17-year-olds from 22.1% to 7.5%, and from 22.3% to 13.6% among those aged 18 and older.³⁴¹⁴

7.1420. Honduras argues that raising the MLPA will likely prevent or delay initiation of tobacco use by adolescents and young adults, reducing significantly smoking rates, such that even in the short term, this measure would address directly Australia's objective of improving public health.³⁴¹⁵ Honduras adds that, "in the long-run, as the size of the Australian smoking population will decrease as a result of Honduras's measure, less people in Australia will need to quit smoking

³⁴⁰⁸ This includes the observation, by the US Surgeon General, that several studies indicate that youth and young adults in the United States are two to three times as responsive to price as adults, and in any case that there is an inverse relationship between age and sensitivity to price. See US Surgeon General's Report 2012, (Exhibit AUS-76), pp. 697-707. This statistic concerning price responsiveness is also noted in Chaloupka et al. 2012, (Exhibit DOM-115). See also 2015 USIOM Report, (Exhibit DOM-232), p. 6-8; 2011 IARC Handbook, (Exhibit DOM-117), p. 352; and Steinberg Report (Exhibit DOM/HND-6, para. 39 and para. 40 (noting that the availability of cheaper tobacco products may lead to an increase in youth initiation).

³⁴⁰⁹ Honduras's first written submission, para. 917.

³⁴¹⁰ Honduras's first written submission, para. 913. See also Honduras's first written submission, para. 571; and second written submission, para. 218.

³⁴¹¹ Honduras's first written submission, paras. 569-570.

³⁴¹² Honduras's second written submission, para. 220 (referring to Steinberg Rebuttal Report, (Exhibit DOM/HND-10)).

³⁴¹³ Honduras's first written submission, paras. 573-575; and second written submission, para. 219. Honduras refers to increases in the MLPA in England, Scotland and Wales, Finland (from 16 years to 18 years), and Needham, Massachusetts (from 18 years to 21 years).

³⁴¹⁴ Honduras's first written submission, para. 576.

³⁴¹⁵ Honduras's second written submission, para. 692.

or abstain from relapsing into smoking, which is in line with Australia's own strategy to reduce its smoking population by addressing smoking initiations among youth".³⁴¹⁶

7.1421. The Dominican Republic argues that an increase in the MLPA to 21 years would have a significant impact on the initial and ongoing consumption of tobacco products "by the age group of greatest concern", and, in the longer term, on the rates of adult tobacco consumption and smoking prevalence. It also refers to the expert report of Professor Steinberg, who explains that "policies that limit adolescents' ability to obtain cigarettes are likely to have a greater impact than those that attempt to diminish adolescents' interest in smoking".³⁴¹⁷ The Dominican Republic adds "raising the MLPA would remove cigarettes from the social networks of younger people", who typically receive their first cigarettes from friends who can legally purchase cigarettes and share them within their social network.³⁴¹⁸ An increase of the MLPA would also, according to the Dominican Republic, have a longer term impact on decreasing adult smoking rates.³⁴¹⁹ The Dominican Republic notes references by Professor Steinberg to real-world examples, including "increases in the MLPA in England, Scotland, Wales, Finland, and Sweden, that have been found to reduce purchase and smoking by young people".³⁴²⁰ The Dominican Republic refers to a separate study from the United States which projects that, over 50 years, raising the MLPA from 18 to 21 in the United States could reduce prevalence for (a) 14-17 year olds, from 20% to as low as 6.6%, (b) 18-20 year olds, from 26.9% to as low as 12.2%, and (c) for those 21 years old and older, from 21.8% to as low as 15.5%.³⁴²¹

7.1422. The Dominican Republic also refers to a 2015 publication by the USIOM entitled *Public Health Implications of Raising the Minimum Age of Legal Access to Tobacco Products*³⁴²² (2015 USIOM Report), which examined the impact of raising the MLPA from 18 to 21 years. According to the Dominican Republic, the 2015 USIOM Report "agreed with Professor Steinberg that raising the MLPA from 18 to 21 years would reduce smoking rates among young people by removing tobacco products from the social networks of young people less than 18"³⁴²³ and found that it would have long-term benefits on adult smoking rates because, if access to tobacco products is delayed, many young people will never take up smoking.³⁴²⁴ The Dominican Republic presents estimates by the USIOM concerning the reduction in initiation rates, if the MLPA were raised from 18 to 21, for those under 15 years (15%); those between 15 and 17 years (25%); those aged 18 years (15%); and those aged 19 to 20 years (15%).³⁴²⁵

7.1423. The Dominican Republic states that the contribution of the TPP measures "could [be] charitably described as little more than speculative"³⁴²⁶ while, "[i]n contrast, the evidence surveyed above, in particular the 2015 USIOM Report, shows that an increase in the MLPA from 18 to 21 would, with virtual certainty, make a large contribution to reducing smoking behaviour, in the short- and long-term, and both among young people and adults".³⁴²⁷ The Dominican Republic

³⁴¹⁶ Honduras's second written submission, para. 692. See also Honduras's response to Panel question No. 151.

³⁴¹⁷ Dominican Republic's first written submission, para. 768 (quoting Steinberg Report, (Exhibit DOM/HND-6), para. 68); and second written submission, para. 604-605. See also Dominican Republic's first written submission, para. 769.

³⁴¹⁸ Dominican Republic's first written submission, para. 770. See also Dominican Republic's first written submission, paras. 769-771.

³⁴¹⁹ Dominican Republic's first written submission, paras. 773-777; and second written submission, para. 606.

³⁴²⁰ Dominican Republic's first written submission, para. 775.

³⁴²¹ Dominican Republic's first written submission, para. 776 (referring to Ahmad 2005a, (Exhibits DOM-130, HND-75)).

³⁴²² 2015 USIOM Report, (Exhibit DOM-232).

³⁴²³ Dominican Republic's second written submission, para. 609.

³⁴²⁴ Dominican Republic's second written submission, para. 610 (referring to 2015 USIOM Report, (Exhibit DOM-232), p. S-6); response to Panel question Nos. 65, 126 and 157.

³⁴²⁵ Dominican Republic's second written submission, para. 609 (referring to 2015 USIOM Report, (Exhibit DOM-232), p. 7-11); and response to Panel question No. 157.

³⁴²⁶ Dominican Republic's second written submission, para. 619; and response to Panel question No. 157.

³⁴²⁷ Dominican Republic's second written submission, para. 620; and response to Panel question No. 157. See also Dominican Republic's second written submission, para. 621.

submits that an increase in the MLPA would also serve as an effective alternative to the TPP measures in curbing cigar smoking among young people.³⁴²⁸

7.1424. Cuba adopts the arguments put forward by the Dominican Republic in respect of an increase in the MLPA.³⁴²⁹ Cuba refers to the 2015 USIOM Report³⁴³⁰ and points out that it concludes that increasing the minimum purchase age can prevent or delay initiation of tobacco use by young people.³⁴³¹ In Cuba's view, restricting youth access through enforcement efforts or by raising the minimum purchase age has a direct impact on smoking prevalence to achieve the objective of public health improvement.³⁴³²

7.1425. Indonesia "endorses" the alternatives "proposed by" the Dominican Republic's regarding raising the legal smoking age from 18 to 21.³⁴³³ Indonesia adds that "there is evidence in the record that increasing the legal minimum purchase age ... also has a positive effect on reducing smoking prevalence".³⁴³⁴

7.1426. Australia submits that any increase in the MLPA would not be effective in decreasing the appeal of tobacco products, and that restrictions on access to tobacco products exist to discourage adolescents from taking up smoking. Such measures would, in Australia's view, have no impact on those aged over 21 years, nor would they encourage quitting or discourage relapse. In contrast, Australia, posits, the TPP measures have the potential to influence all consumers and potential consumers of tobacco products.

7.1427. Australia adds that the Dominican Republic "attempts to transfer to the Panel its burden of proposing less trade-restrictive alternative measures that make an equivalent contribution to the objectives of the" TPP measures, specifically, with respect to "how the alternative measures, or a combination of the alternative measures, could be implemented to make an equivalent contribution" to the TPP measures. Australia submits that the Dominican Republic leaves the alternative measures "completely unspecified, expecting the Panel to determine, for example, how to 'carefully tailor' ... to what extent to increase the MLPA, such that these measures would have an impact on the volume of trade identical to that made by tobacco plain packaging".³⁴³⁵

7.1428. Australia argues that the evidence in support of an increase in the MLPA is equivocal.³⁴³⁶ Australia refers to the conclusion of its experts', Professor Chaloupka and Dr Biglan, that the evidence in support of an increase in the MLPA was "mixed", and that the studies reviewed by Professor Steinberg related almost exclusively to increasing the minimum legal purchase age to 18 years, which Australia has already done.³⁴³⁷ Australia points out that, in the USIOM's assessment, prior to the release of its report there was a "dearth of direct evidence" and no "pertinent studies" on the effect of raising the MLPA for tobacco products.³⁴³⁸

7.1429. Australia adds, however, that an increase in the MLPA "is a policy that Australia may consider implementing in the future, alongside tobacco plain packaging, particularly if the evidence base in support of it continues to grow" (and notes that the state of Tasmania is debating legislation that would ban the sale of tobacco products to anyone born on or after 1 January 2000).³⁴³⁹

³⁴²⁸ Dominican Republic's response to Panel question No. 152.

³⁴²⁹ Cuba's first written submission, para. 287.

³⁴³⁰ Cuba did not submit this report as an exhibit. However, from Cuba's description and discussion of the report it discusses, we understand this to be the same USIOM report submitted by the Dominican Republic as Exhibit DOM-232.

³⁴³¹ Cuba's second written submission, paras. 349-353.

³⁴³² Cuba's second written submission, para. 348.

³⁴³³ Indonesia's first written submission, para. 457.

³⁴³⁴ Indonesia's second written submission, para. 201.

³⁴³⁵ Australia's comments on the complainants' responses Panel question Nos. 151 and 165.

³⁴³⁶ Australia's first written submission, paras. 722-724.

³⁴³⁷ Australia's second written submission, paras. 556-557. See also Australia's response to Panel question No. 148.

³⁴³⁸ Australia's second written submission, paras. 558-559; and response to Panel question No. 139.

³⁴³⁹ Australia's second written submission, para. 560; and response to Panel question No. 139.

7.1430. Australia adds that increasing the MLPA to 21 years cannot achieve an equivalent degree of contribution to Australia's public health objectives. Australia asserts that the only stated aim of increasing the [MLPA] is to discourage youth smoking initiation, and as such it would have no impact on those over 21 years or on cessation or relapse.³⁴⁴⁰ Australia adds that, if tobacco plain packaging were replaced with an adjustment to Australia's approach to restricting youth access to tobacco products, Australia's means of influencing the behaviour of consumers who are affected by advertising on packs or GHGs would be compromised, thus "reducing the comprehensiveness and effectiveness of Australia's tobacco control policy". In Australia's view, "a tobacco control strategy that restricts access to tobacco products *and* reduces their appeal, increases the effectiveness of GHGs, and reduces the ability of the packaging to mislead consumers about the harmful effects of tobacco use ... is more effective than either measure operating alone".³⁴⁴¹

7.1431. Australia submits that the Dominican Republic's contention that the assessment of the equivalence of contribution must focus on the overall contribution to the objective of "reducing smoking prevalence and consumption" ignores the fact that encouraging quitting and discouraging relapse are two of the stated objectives of the TPP measure, as set out in Subsections 3(1)(a)(ii) and (iii) of the TPP Act. For Australia, by generalising the objectives of the TPP measure in this way, the Dominican Republic seeks to avoid the obvious conclusion that its proposed alternative would fail to achieve two of the measure's explicit objectives.

Analysis by the Panel

7.1432. As described above, we must first consider whether and, if so, to what degree, an increase in the MLPA to 21 years would contribute to Australia's objective of improving public health by reducing the use of, and exposure to, tobacco products, to then assess whether such contribution would be "equivalent" to that of the TPP measures to the same objective.

7.1433. To demonstrate the contribution that an increase in the MLPA to 21 years would make to Australia's objective, the complainants rely primarily on Professor Steinberg's expert reports and the 2015 USIOM Report.³⁴⁴² Australia relies primarily on the expert reports by Professor Chaloupka³⁴⁴³, Professor Slovic³⁴⁴⁴ and Dr Biglan³⁴⁴⁵ to respond to Professor Steinberg's reports.

7.1434. We have already described Professor Steinberg's views in respect of the causes of smoking initiation.³⁴⁴⁶ In addition, Professor Steinberg argues that policies that limit adolescents' ability to obtain cigarettes are likely to have a greater impact than those that attempt to diminish adolescents' interest in smoking.³⁴⁴⁷ In Professor Steinberg's view, "the two strategies most likely to succeed in combating minors' access to cigarettes are raising the MLPA (combined with effective enforcement) and increasing the price of cigarettes, both of which will greatly diminish the likelihood that individuals under the age of 18 will find themselves in social situations with peers who have cigarettes".³⁴⁴⁸

7.1435. Professor Steinberg refers to studies in relation to an increase in the MLPA from 16 to 18 years in England, Scotland and Wales. One study, he explains, found that this measure led to a significant drop in the prevalence of smoking among 16 to 17 year-olds; another reported that increasing the MLPA was associated with a reduction in regular smoking and a significant increase in the proportion of pupils who reported finding it difficult to buy cigarettes from a shop.³⁴⁴⁹ Professor Steinberg also states that increases in the MLPA in Finland and Sweden have been reported to reduce underage purchasing and/or underage smoking, and that several studies that

³⁴⁴⁰ Australia's second written submission, para. 561; and response to Panel question No. 139.

³⁴⁴¹ Australia's second written submission, para. 562; and response to Panel question No. 139.

³⁴⁴² 2015 USIOM Report, (Exhibit DOM-232).

³⁴⁴³ Chaloupka Public Health Report, (Exhibit AUS-9).

³⁴⁴⁴ Slovic Report, (Exhibit AUS-12); and Slovic Rebuttal Report, (Exhibit AUS-532).

³⁴⁴⁵ Biglan Report, (Exhibit AUS-13).

³⁴⁴⁶ See, e.g. paras. 7.710-7.711 above.

³⁴⁴⁷ Steinberg Report, (Exhibit DOM/HND-6), para. 68.

³⁴⁴⁸ Steinberg Report, (Exhibit DOM/HND-6), para. 69.

³⁴⁴⁹ Steinberg Report, (Exhibit DOM/HND-6), para. 70.

have attempted to model the impact of increasing the MLPA on underage smoking in the United States have concluded that this "would lead to significant reductions".³⁴⁵⁰

7.1436. Professor Steinberg concludes that raising the MLPA is an effective means of combating underage smoking, provided that the laws are enforced. He notes that some experts "have asked whether more effective enforcement of age of purchase restrictions should be combined with laws criminalizing 'proxy purchases' (adults purchasing cigarettes for minors)", and adds that it is his understanding "that all states and territories in Australia currently prohibit proxy purchasing by adults for minors", and that "it is probable that such laws, if vigilantly enforced, would help restrict proxy sales and therefore reinforce access measures based on ensuring compliance with [MLPA] requirements".³⁴⁵¹

7.1437. Professor Steinberg argues that "[e]ven less dramatic rises of this sort, from 18 to 19, would likely ... have some positive effect", but adds that there are two potential advantages to raising the MLPA significantly beyond the age of 18, to 21 years.³⁴⁵² First, this offers the possibility of removing cigarettes from secondary students' social networks, given that adolescents frequently obtain cigarettes from friends and tend to be friends with people of the same age. Professor Steinberg states that because many 16- and 17-year-olds have friends, romantic partners, and schoolmates who are 18, permitting 18-year-olds to purchase cigarettes "guarantees an easy flow of legally purchased cigarettes into the social networks of many underage smokers, especially if they attend school together".³⁴⁵³ In contrast, far fewer adolescents under 18 socialize with individuals who are significantly older, thus making it more difficult to obtain cigarettes socially "if the MLPA were raised several years beyond age 18".³⁴⁵⁴ Second, given research indicating that the chances of an individual becoming a chronic smoker are far less if the initiation of smoking is delayed until after adolescence, "discouraging more people from smoking as teenagers will have a significant long-term impact on the health of the adult population".³⁴⁵⁵

7.1438. Turning to the 2015 USIOM Report, its stated purpose is "to examine existing literature on tobacco use initiation, and use modelling and other methods to predict the likely public health outcomes of raising the minimum age for purchase of tobacco products to 21 years and 25 years".³⁴⁵⁶ The findings in that report include the following:

- increasing the minimum age of legal access (MLA) to tobacco products will likely prevent or delay initiation of tobacco use by adolescents and young adults³⁴⁵⁷;
- although changes in the MLA to tobacco products will directly pertain to individuals who are age 18 or older, the largest proportionate reduction in the initiation of tobacco use will likely occur among adolescents of ages 15 to 17 years³⁴⁵⁸;
- the impact on the initiation of tobacco use of raising the MLA to tobacco products to 21 will likely be substantially higher than raising it to 19, but the added effect of raising the minimum age beyond age 21 to age 25 will likely be considerably smaller³⁴⁵⁹;
- raising the MLA to tobacco products, particularly to ages 21 and 25, will likely lead to substantial reductions in smoking prevalence³⁴⁶⁰; and
- raising the MLA to tobacco products will likely lead to substantial reductions in smoking-related mortality.³⁴⁶¹

³⁴⁵⁰ Steinberg Report, (Exhibit DOM/HND-6), para. 70.

³⁴⁵¹ Steinberg Report, (Exhibit DOM/HND-6), para. 71.

³⁴⁵² Steinberg Report, (Exhibit DOM/HND-6), paras. 73-74.

³⁴⁵³ Steinberg Report, (Exhibit DOM/HND-6), para. 74.

³⁴⁵⁴ Steinberg Report, (Exhibit DOM/HND-6), para. 74.

³⁴⁵⁵ Steinberg Report, (Exhibit DOM/HND-6), para. 74

³⁴⁵⁶ 2015 USIOM Report, (Exhibit DOM-232), p. S-1.

³⁴⁵⁷ 2015 USIOM Report, (Exhibit DOM-232), pp. S-3 and 7-10.

³⁴⁵⁸ 2015 USIOM Report, (Exhibit DOM-232), pp. S-4 and 7-10.

³⁴⁵⁹ 2015 USIOM Report, (Exhibit DOM-232), pp. S-4 and 7-10.

³⁴⁶⁰ 2015 USIOM Report, (Exhibit DOM-232), pp. S-6 and 7-20.

³⁴⁶¹ 2015 USIOM Report, (Exhibit DOM-232), pp. S-6 and 8-20.

7.1439. The 2015 USIOM Report further concludes that raising the MLA for tobacco products will likely immediately improve the health of adolescents and young adults by reducing the number of those with smoking-caused diminished health status. Moreover, as the initial birth cohorts affected by the policy change age into adulthood, the benefits of the reductions of the intermediate and long-term adverse health effects will also begin to manifest. Raising the MLA to tobacco products will also likely reduce exposure to secondhand smoke and the prevalence of other tobacco products, further reducing their associated adverse health effects, both immediately and over time.³⁴⁶²

7.1440. Australia submits that the evidence in respect of an increase in the MLPA is equivocal³⁴⁶³ and argues that, contrary to the Dominican Republic's assertions to the contrary, the 2015 USIOM Report "does not conclude with certainty that the measure will immediately reduce smoking".³⁴⁶⁴ Australia notes the USIOM's observation that, prior to the release of its report, there was "a dearth of direct evidence" and no "pertinent studies" on the effect of raising the MLPA for tobacco products.³⁴⁶⁵ This is elaborated by its expert, Professor Chaloupka, who states that "[w]hile these policies and related efforts have substantially reduced the commercial supply of cigarettes to young people, they have increased young smokers' reliance on social sources for tobacco products".³⁴⁶⁶ He also submits that "there appears to be little association between levels of retailer compliance and the prevalence of current smoking or ever smoking among high school students in the U.S. or of early initiation of cigarette smoking among U.S. youth".³⁴⁶⁷

7.1441. We note however that the complainants have presented relevant evidence from credible sources suggesting that an increase in the MLPA, including an increase to 21 years, has the potential to contribute to a reduction in tobacco use, by limiting access to tobacco products for youth under 21 years of age, and thereby affecting smoking initiation and prevalence. We are not persuaded that Australia has shown that the underlying logic reflected in this evidence is inapplicable in the Australian context. Specifically, in respect of initiation, there is no evidence before us to suggest that the USIOM's reasoning that eliminating the opportunity for those under 21 years to legally purchase tobacco products would limit access for this age group because they are less likely to be part of social networks that comprised of people of the age of 21 years³⁴⁶⁸, is inapplicable in the Australian context. Similarly, in respect of smoking prevalence, Australia has not submitted evidence to suggest that the predicted *patterns* in changes to prevalence over time as the result of an increase in the MLPA to 21 years are inapplicable in the Australian context – specifically, that reductions in population-wide smoking prevalence would become meaningful after some years, as the measure would primarily affect children, adolescents, and young adults, such that the full health effects would only become apparent after these people have aged.³⁴⁶⁹ Rather, Australia submits that "in the light of the conclusion reached by the [USIOM], and in conformity with Australia's evidence-based approach to policy development, an increase in the [MLPA] is a

³⁴⁶² 2015 USIOM Report, (Exhibit DOM-232), pp. S-6 and 8-20. We note that some or all of these conclusions accord with a number of other studies submitted by the complainants. See Fidler and West 2010, (Exhibits DOM-128, HND-70); Schneider et al. 2015, (Exhibit DOM-370); Ahmad 2005a (Exhibits DOM-130, HND-75); Ahmad and Billimek 2007, (Exhibit HND-74); and Ahmad 2005b, (Exhibit HND-76). Of the other studies submitted to us, a number were cited approvingly by the USIOM. See, e.g. Fidler and West 2010, (Exhibits DOM-128, HND-70); Schneider et al. 2015, (Exhibit DOM-370); Ahmad 2005a (Exhibits DOM-130, HND-75); Ahmad and Billimek 2007, (Exhibit HND-74); and Ahmad 2005b, (Exhibit HND-76). In this respect, we note the assertion by Australia's expert, Dr Biglan, that "the evidence of the effects of access reduction on youth smoking is mixed". In support of this argument, Dr Biglan refers to his involvement in one unpublished study "that suggested that a program to reduce illegal sales to young people may reduce the prevalence of youth smoking". He also refers to a meta-analysis of the evidence which "concluded that there was no evidence that access reduction would affect youth smoking". See Biglan Report, (Exhibit AUS-13), para. 190. We are not persuaded that this description is sufficient to rebut the large number of studies cited and endorsed by the USIOM in its report which support the increase in the MLPA. We note that Dr Biglan also makes further arguments in this connection, which we address below.

³⁴⁶³ Australia's first written submission, para. 724.

³⁴⁶⁴ Australia's second written submission, paras. 558-559; and response to Panel question No. 139.

³⁴⁶⁵ Australia's second written submission, para. 559.

³⁴⁶⁶ Chaloupka Public Health Report, (Exhibit AUS-9), para. 51.

³⁴⁶⁷ Chaloupka Public Health Report, (Exhibit AUS-9), para. 52.

³⁴⁶⁸ 2015 USIOM Report, (Exhibit DOM-232), pp. 7-4 and 7-5. See also Steinberg Report, (Exhibit DOM/HND-6), paras. 73-75.

³⁴⁶⁹ 2015 USIOM Report, (Exhibit DOM-232), p. 7-19. The USIOM report suggests that such patterns would be expected to increase and ultimately yield a "considerable" reduction in smoking prevalence over coming decades. *Ibid.*

policy that Australia may consider implementing in the future, alongside tobacco plain packaging, particularly if the evidence base in support of it continues to grow".³⁴⁷⁰ Australia notes that Tasmania is considering a proposal to ban sales of tobacco products to individuals born after the year 2000.³⁴⁷¹

7.1442. We also note that Australia does not dispute that measures aimed at restricting access to tobacco products, including MLPAs, may contribute to a reduction in the use of tobacco products. Indeed, Australia itself maintains such a measure, through a minimum purchasing age of 18. We also note that the *chapeau* of Article 16(1) of the FCTC, entitled "Sales to and by minors", requires each party to "adopt and implement effective ... measures at the appropriate government level to prohibit the sales of tobacco products to persons under the age set by domestic law, national law, or [18 years]".³⁴⁷² Article 16(4) of the FCTC states that the "parties recognize that in order to increase their effectiveness, measures to prevent tobacco product sales to minors should, where appropriate, be implemented in conjunction with other provisions contained in [the FCTC]".³⁴⁷³

7.1443. At the same time, we note that concerns similar to those raised by Australia in respect of access to tobacco products through social sources are echoed in various studies of an increase in the MLA³⁴⁷⁴, including the 2015 USIOM Report.³⁴⁷⁵ Indeed, the 2015 USIOM Report states that "even a complete cut-off of retail tobacco to underage users will contain, but not eliminate, overall tobacco availability to them unless there is a major crackdown on social distribution".³⁴⁷⁶ In this respect, the USIOM notes that such "social sources" (which the USIOM defines as "causal distributors" (relatives, friends, and strangers who give tobacco to underage users) and "proxy sources" (relatives, friends, and strangers who purchase tobacco for underage users and are paid a small fee)³⁴⁷⁷) will remain the primary sources of tobacco for underage persons.³⁴⁷⁸

7.1444. This evidence suggests that it is recognized that, as a result of access to tobacco products through social sources, the institution of an MLA will "contain, but not eliminate" underage access to tobacco products. The USIOM also suggests that different MLPAs have different effects on access to tobacco products from social sources, and in particular that an MLA of 21 years provides "a greater distancing from social sources" than lower (or even higher) MLPAs:

For adolescents under 15 years of age, raising the MLA from 18 to 19 may have only a modest impact on reducing social sources, given the closeness in age. If adolescents already have networks with 18-year-olds, then these networks may also include 19-year-olds who have access to tobacco. Increasing the MLA to 21, however, provides a greater distancing of social sources. Although 19-year-olds may still be in high schools and thus potentially influence those under 15, it is far less likely that 21-year-olds are in the same social networks. Increasing the MLA from 21 to 25, however, is not likely to achieve any additional notable reductions in social sources for those under 15 than what is achieved with the 21-year-old MLA policy.³⁴⁷⁹

³⁴⁷⁰ Australia's second written submission, para. 560. In this connection, we note that the complainants filed an additional study published in June 2015, which found that an increase in the MLA to 21 in Needham, Massachusetts, contributed to a greater decline in youth smoking relative to communities that did not pass the same measure. See Schneider et al. 2015, (Exhibit DOM-370). Australia has not contested this evidence.

³⁴⁷¹ Tasmania strategic plan, (Exhibit AUS-609).

³⁴⁷² FCTC, (Exhibits AUS-44, JE-19), Article 16(1).

³⁴⁷³ FCTC, (Exhibits AUS-44, JE-19), Article 16(4).

³⁴⁷⁴ See, e.g. Ahmad 2005a, (Exhibits DOM-130, HND-75), p. 75; Ahmad 2005b, (Exhibit HND-76), p. 338; and Schneider et al. 2015, (Exhibit DOM-370).

³⁴⁷⁵ See, e.g 2015 USIOM Report, (Exhibit DOM-232), pp. S-3, S-8, 5-8-5-9, and 6-15.

³⁴⁷⁶ 2015 USIOM Report, (Exhibit DOM-232), p. 6-15.

³⁴⁷⁷ 2015 USIOM Report, (Exhibit DOM-232), p. 5-11.

³⁴⁷⁸ Rimpelä and Rainio 2004, (Exhibit HND-72), cited at 2015 USIOM Report, (Exhibit DOM-232), p. 6-2. The Report also states that "[i]f the law applies only to retailers or is not enforced against non-commercial providers (i.e., social sources), it is likely that any decrease in retail tobacco availability will result in a corresponding increase in access from social sources". 2015 USIOM Report, (Exhibit DOM-232), pp. 6-8 and 6-15.

³⁴⁷⁹ 2015 USIOM Report, (Exhibit DOM-232), p. 7-4. This conclusion is supported by other studies submitted by the complainants. See Ahmad 2005b, (Exhibits DOM-130, HND-75) p. 75; and Ahmad and Billimek 2007, (HND-74), p. 380.

7.1445. We also note the observation by the USIOM that "if a state or locality ramped up the threat of detection and punishment against social sources, the impact on adolescent and young adult consumption could be greater than [the 2015 USIOM Report] has projected".³⁴⁸⁰

7.1446. In this respect, we observe that all Australian States and Territories prohibit the purchase of tobacco products on behalf of persons below the existing MLPA of 18 years³⁴⁸¹, and Queensland, New South Wales (NSW), South Australia, Tasmania, and Western Australia authorise the seizure of tobacco products being smoked by or in the possession of a person under the age of 18.³⁴⁸² Such restrictions are also supported by measures that address compliance at the retail level. Indeed, "[m]ost states and territories have introduced strict proof-of-age requirements for the sale of tobacco, requiring the seller to request and sight approved photo ID to determine the age of a person attempting to purchase tobacco".³⁴⁸³ As of 2011, NSW, Western Australia, Victoria, South Australia, Tasmania, the ACT and the Northern Territory conducted random monitoring of compliance with the MLPA, while Queensland employs "covert surveillance operations" both opportunistically and in response to complaints to monitor and enforce the legislation.³⁴⁸⁴ It appears to us, therefore, that Australia has in place a regulatory framework to address supply of tobacco products to those under 18 years through social and commercial sources, of the kind that could contribute to the reduction of "leakage"³⁴⁸⁵ that could be caused by supply through such sources.³⁴⁸⁶

7.1447. In light of the above, we find that the complainants have provided sufficient evidence to demonstrate that an increase in the MLPA to 21 years would be apt to contribute to Australia's objective of improving public health by reducing the use of, and exposure to, tobacco products. To

³⁴⁸⁰ 2015 USIOM Report, (Exhibit DOM-232), p. S-8.

³⁴⁸¹ See Tobacco (Amendment) Act 1990 (ACT), (Exhibit AUS-351), Section 5 substituting Part II Section 5 in the Tobacco Act 1927 (ACT), Tobacco Products Control Act 2006 (WA), (Exhibit AUS-350), Section 7; Public Health (Tobacco) Act 2008 (NSW), (Exhibit AUS-267), Section 23; and Tobacco Control Act 2002 (NT), (Exhibit AUS-374), Section 43(2). See also Australia's first written submission, Annex C. See specifically Australia's first written submission, fn 1103. See also Chaloupka Public Health Report, (Exhibit AUS-9), Annex C.

³⁴⁸² See Tobacco Products (Prevention of Supply to Children) Act 1998 (Qld), Section 15, 22, 40, (Exhibit AUS-353), Section 40; Public Health Amendment (Juvenile Smoking) Act 2002 (NSW), (Exhibit AUS-358), Schedule 1 item 1, inserting Section 58 into the Public Health Act 1991 (NSW); Tobacco Products Regulation (Miscellaneous Offences) Amendment Act 2007 (SA), (Exhibit AUS-359), Section 15, inserting new Section 70A into the Tobacco Products Regulation Act 1997 (SA); Public Health Act 1997 (Tas), (Exhibit AUS-360), Section 66; and Tobacco Products Control Act 2006 (WA), (Exhibit AUS-350), Section 99. Australia notes that the ACT, the Northern Territory and Victoria did not have seizure laws in place as at 4 March 2013. Australia's first written submission, Annexure C. See specifically *ibid.* fn 1104.

³⁴⁸³ Tobacco in Australia 2012, DOM excerpts, (Exhibit DOM-126), p. 97.

³⁴⁸⁴ Tobacco in Australia 2012, DOM excerpts, (Exhibit DOM-126), p. 97.

³⁴⁸⁵ Ahmad 2005a, (Exhibits DOM-130, HND-75), p. 82; Ahmad and Billimek 2007, (HND-74), p. 388; and Ahmad 2005b, (Exhibit HND-76), p. 338.

³⁴⁸⁶ We are not suggesting that these enforcement mechanisms perfectly address the problem of retailer compliance, or the problem of the provision of tobacco products through social sources. Indeed, as observed by CCV, "[w]hoever supplies their early cigarettes, once smoking is initiated, young smokers adapt their means of access to fit the prevailing social and legislative environment". See Tobacco in Australia 2012, DOM excerpts, (Exhibit DOM-126), p. 53. Indeed, Philip Morris has identified that residual demand for tobacco products threatens to undermine the proposal in Tasmania to ban sales of tobacco products to individuals born after the year 2000 by driving an illicit market for tobacco products. See Philip Morris Submission to Legislative Council of Tasmanian Parliament, (Exhibit AUS-559). Our observation is not to suggest that "leakages" would not occur under Australia's regime, it is simply to observe that a regulatory framework exists in Australia that could contribute to the reduction of such "leakages". We note also Professor Chaloupka's criticism that there is little association between levels of retailer compliance and the percentage of high school students in the United States smoking at least one day in the last 30 days. See Chaloupka Public Health Report, (Exhibit AUS-9), Figure 2. In this respect, we observe that Professor Chaloupka does not distinguish between "the experiences in Australia" (Chaloupka Public Health Report, (Exhibit AUS-9), para. 51) (where the MLPA is already 18 in all states and territories) (cf. Annex C of Australia's first written submission for the measures) and the United States (where the MLPA is set under federal law at 18, but some states and localities have increased the MLPA to various ages between 19 and 22). 2015 USIOM Report, (Exhibit DOM-232, p. 5-3). The evidence summarized above suggests that such a lack of uniformity between MLPAs at the federal, state and municipal level in the United States will concomitantly cause variations in youth prevalence across these jurisdictions. Therefore, it is not clear to us that a straight comparison between the rate of retailer non-compliance and the rate of having smoked in the last 30 days across the United States could be expected to provide an accurate comparison for the purpose of determining the correlation that Professor Chaloupka asserts.

the extent that the degree of effectiveness of an increase in the MLPA to 21 years would likely be affected by factors such as access through social sources or the existence of effective enforcement measures, we have observed in that Australia has in place a regulatory framework to address such issues.³⁴⁸⁷

7.1448. The 2015 USIOM Report estimates the following reduction in initiation rates in the United States for various age groups if the MLPA is raised from 18 to 21:

Table 3: Estimated reduction in US initiation rates following an increase in the MLPA, by age group

Reduction in initiation by age group	MLPA 21	
	Qualitative descriptor	Numeric estimate
Under age 15 years	Medium	15%
Ages 15-17 years	Large	25%
Age 18 years	Medium	15%
Ages 19-20 years	Medium	15%

Source: 2015 USIOM Report, (Exhibit DOM-232), p. 7-11.

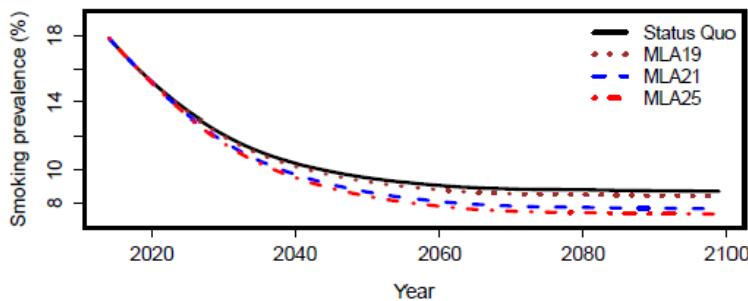
7.1449. The 2015 USIOM Report also models adult smoking prevalence in the United States using the Cancer Intervention and Surveillance Modeling Network (CISNET) and SimSmoke³⁴⁸⁸ models in respect of increasing the MLPA from 18 years to 19, 21 or 25 years. These models produce the following results, respectively:

³⁴⁸⁷ See para. 7.1446 above.

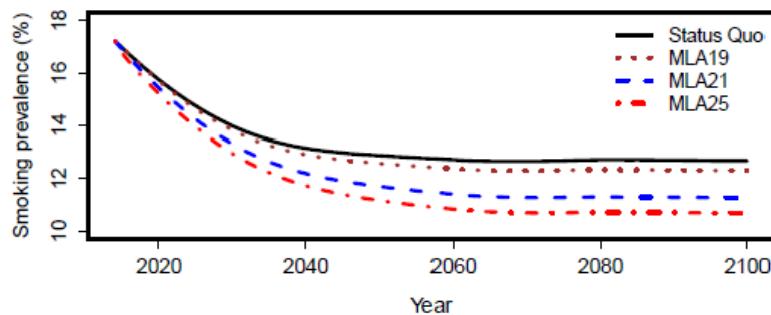
³⁴⁸⁸ The USIOM describes these models in the following terms:

For this report, the committee commissioned the use of two established cigarette smoking macro-simulation models to complement its conclusions about the effects of a change in the [MLPA] on tobacco initiation by providing quantitative estimates of how the likely effects on initiation would affect future smoking prevalence and select measures of smoking-related morbidity and mortality. The models are the Cancer Intervention and Surveillance Modeling Network (CISNET) smoking population model and the SimSmoke model. Both models simulate annual age-specific smoking prevalence and smoking-attributable mortality. In addition, CISNET models the variation in smoking patterns by birth cohort and can account for the effects of smoking intensity. SimSmoke models the effects of important tobacco control policies and supports the simulation of maternal and child health outcomes. While increasing the [MLPA] is currently the purview of states and localities, the models project the effects of a policy change on the United States as a whole and cannot take into consideration important differences across the country that could influence the magnitude of the effect of raising the MLA in states or localities.

See 2015 USIOM Report, (Exhibit DOM-232), p. 1-7.

Figure 15: Adult smoking prevalence - CISNET

Source: 2015 USIOM Report, (Exhibit DOM-232), p. 7-17.

Figure 16: Adult smoking prevalence – SimSmoke

Source: 2015 USIOM Report, (Exhibit DOM-232), p. 7-18.

7.1450. The USIOM explains that despite differences between the CISNET and SimSmoke models, and differences in prevalence predictions by each model in respect of each potential MLPA under consideration in the 2015 USIOM Report, both models "estimate ... an 11-12 per cent decrease for [an MLPA of 21 years]".³⁴⁸⁹ The 2015 USIOM Report also provides CISNET and SimSmoke models that indicate the short and long-term consequences of an increase of the MLPA in respect of the predicted numbers of lives saved.

7.1451. The USIOM summarizes the implications of raising the MLPA as follows:

The [modelling] analysis suggests that raising the [MLPA] could lead to considerable reductions in smoking-attributed mortality and morbidity over time ... Both models suggest a time delay of a few decades for the overall mortality benefits to accrue at the population level because of the lag time between smoking exposure and major health outcomes and because the policy primarily affects adolescents and young adults. Nonetheless, more immediate effects would be observed for maternal and child outcomes, as well as other acute outcomes. Moreover, the analysis shows that new generations, starting with those born between 2000 and 2019, could see significant reductions in mortality and years of life lost accumulated throughout their lifetimes.³⁴⁹⁰

7.1452. We are reluctant to assume that these specific projections of the USIOM, based on modelling in the United States, can be transposed directly onto the Australian market to provide an exact measure of the *degree* of contribution that this measure would or could make to a

³⁴⁸⁹ 2015 USIOM Report, (Exhibit DOM-232), p. 7-18. The report also notes that the models predict "a roughly 3 percent decrease in the 2100 prevalence for [an MLPA of 19 years]", and a "15.7 percent decrease for [an MLPA of 25 years]."

³⁴⁹⁰ 2015 USIOM Report, (Exhibit DOM-232), p. 8-19.

reduction in the use of, or exposure to, tobacco products in Australia.³⁴⁹¹ We note in particular that, as pointed out by Australia, the degree of effectiveness of such a measure would likely be affected by factors such as access through social sources or the existence of effective enforcement mechanisms in the jurisdiction implementing the measure.

7.1453. Overall, in light of the above, we find that the evidence before us suggests that, notwithstanding the difficulty associated with making precise projections on the basis of the evidence before us from other jurisdictions, an increase in the MLPA to 21 years would in principle be apt to make a meaningful contribution to Australia's objective of improving public health by reducing the use of, and exposure to, tobacco products. Having reached this conclusion, we consider whether such a contribution would be equivalent to that made by the TPP measures.

7.1454. As discussed above³⁴⁹², this assessment should be made in the light of the characteristics of the technical regulation at issue as revealed through its design and structure, as well as the nature of the objective pursued and the nature, quantity, and quality of the evidence available.³⁴⁹³ We also recall that a proposed alternative measure may achieve an equivalent degree of contribution in ways different from the technical regulation at issue³⁴⁹⁴ and that what is relevant is the *overall* degree of contribution that the technical regulation makes to the objective pursued, rather than any individual isolated aspect or component of contribution.³⁴⁹⁵

7.1455. For the purpose of assessing equivalence in respect of an increase in the MLPA to 21 years, the question before us is, therefore, whether an increase of Australia's MLPA from 18 to 21 years, as a *substitute* for the TPP measures, would, overall, make a contribution to Australia's objective equivalent to that of the TPP measures, as applied in conjunction with Australia's other existing tobacco control measures.

7.1456. We recall our findings above that, based on the evidence before us, that the TPP measures make a meaningful contribution to Australia's objective. In this context, we found *inter alia* that the images and messages conveyed by tobacco packaging are of such a nature as to be capable of conveying a belief that initiating tobacco use can fulfil certain needs, and that youth and young adults are particularly vulnerable to acting on compulsions that are caused by those needs. We also found that by removing the opportunity for the packaging to convey such messages, plain packaging is apt to reduce the appeal of tobacco products, enhance the effectiveness of GHGs and reduce the ability of the retail packaging of tobacco products to mislead consumers about the harmful effects of smoking or using tobacco products, and, as a consequence, have an impact on smoking behaviours.

7.1457. We note that an increase in the MLPA to 21 years is directed to the availability of tobacco products to individuals between 18 and 21.³⁴⁹⁶ Professor Steinberg argues that interventions "that restrict the availability of cigarettes to adolescents (i.e., supply-based) are far more likely to be effective than those that seek to influence adolescents' demand for them".³⁴⁹⁷ We note that the availability of tobacco products is a recognized factor that may affect whether adolescents initiate smoking³⁴⁹⁸, and that mandatory limitations on sales of tobacco products to and by minors are recognized by the FCTC as an element of a comprehensive tobacco control policy.³⁴⁹⁹ We also recall that all Australian States and Territories maintain an MLPA of 18 years, and that youth is a group recognized to be especially exposed to the risks of smoking.³⁵⁰⁰

³⁴⁹¹ We note also the USIOM's general assessment that an increase in the MLPA to 21 years in the United States could, in the USIOM's words, have a "medium" effect on initiation for those under 15 years an effect that is "greater" than those under 15 years for those who are 15-17 years (2015 USIOM Report, (Exhibit DOM-232), p. 7-5); and a "higher" than "small" reduction in initiation for those between 18 and 20 years. 2015 USIOM Report, (Exhibit DOM-232), p. 7-6.

³⁴⁹² See para. 7.1368 above.

³⁴⁹³ Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.215.

³⁴⁹⁴ Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.215.

³⁴⁹⁵ Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.216.

³⁴⁹⁶ Steinberg Response to Panel Question No. 159, (Exhibit DOM/HND-20), para. 3.

³⁴⁹⁷ Steinberg Response to Panel Question No. 159, (Exhibit DOM/HND-20), para. 9. (emphasis omitted)

³⁴⁹⁸ US Surgeon General's Report 1994, Executive Summary, (Exhibit AUS-73).

³⁴⁹⁹ FCTC, (Exhibits AUS-44, JE-19), Article 16. See also paras. 7.1389 and 7.1442 above.

³⁵⁰⁰ See paras. 7.1316-7.1317 above.

7.1458. To the extent that an increase in the MLPA to 21 years would have the ability to meaningfully affect youth initiation, and thereby, in the longer term, reduce smoking prevalence, it would make a contribution to Australia's objective that would be partly comparable in nature to that of the TPP measures, although it would operate through a different mechanism (i.e. affecting the availability of tobacco products rather than demand, in this particular age group).

7.1459. However, an increase in Australia's MLPA would address *only* the availability of tobacco products to individuals below 21 years of age. As we have found above, the TPP measures, in addition to making a contribution to discouraging initiation by adolescents and young adults, are apt to contribute to encouraging cessation and preventing relapse by smokers not falling within this age group. An increase in the MLPA would not address initiation, cessation or relapse in any age group over 21. In addition, an increase in the MLPA would also not affect the design features of tobacco packaging that, as we have found, convey images and messages which are in turn capable of conveying a belief, in particular to adolescents and young adults, that initiating tobacco use can fulfil certain psychological needs and contribute to making tobacco products appealing. Adolescents would continue to be susceptible to those images and messages, and thus the compulsions to act on them, in an environment where branded packages were still available, including through non-commercial channels. In the absence of the TPP measures, this means of communication would not be addressed *at all*.

7.1460. Overall, therefore, an increase in the MLPA to 21 years would have an impact only on the availability of tobacco products on an important but circumscribed age group, would not address initiation, cessation or relapse in other age groups, and would not address those aspects of *demand* for tobacco products (for all age groups) that are addressed by the TPP measures. For these reasons, we are not persuaded that an increase in the MLPA to 21 years, as a *substitute* for the TPP measures, could be said to make an equivalent contribution to Australia's public health objective.

7.1461. In reaching this finding, we stress that these observations are not to detract from the recognized role of MLPAs (including the possibility of an MLPA of 21 years) as part of a comprehensive tobacco control policy. We note in this respect the observation of the USIOM that "[u]nderage tobacco use is most substantially reduced when the jurisdiction adopts a strong array of tobacco control measures, including strongly enforced youth access restrictions".³⁵⁰¹ However, the substitution of the TPP measures with an increase in the MLPA would not address the fact that Australia's existing MLPA *combined with* the TPP measures addresses more comprehensively the different elements affecting tobacco use by different age groups within Australia. Substituting the TPP measures for an increase in Australia's MLPA could weaken the synergies between the different components of Australia's tobacco control policy, by leaving unaddressed the effect of the images and messages conveyed by the figurative and other design features of tobacco packaging.³⁵⁰²

7.1462. We also note the Dominican Republic's argument that our assessment of equivalence must be made "in light of at least three factors: (1) the degree or extent of the contribution; (2) where the contribution is expected in the future, the likelihood or probability of the contribution materializing; and (3) where the contribution is expected in the future, the timeframe within which the contribution is expected to materialize".³⁵⁰³ We do not exclude that the time-frame within which the effects of a measure may be expected to arise could be pertinent in an assessment of the equivalence of contribution of different measures under Article 2.2 of the TBT Agreement.³⁵⁰⁴ Taking such elements into account, however, does not modify our observation, above, that the effects of tobacco packaging would not be addressed *at all* in the absence of the TPP measures, irrespective of the time-frame within which the effects of an increase in the MLPA to 21 years would manifest. Therefore, a consideration of this factor does not lead us to modify our conclusion that the complainants have not demonstrated that an increase in the MLPA to 21 years would make a contribution to Australia's objective equivalent to that of the TPP measures.

³⁵⁰¹ 2015 USIOM Report, (Exhibit DOM-232), p. 6-20.

³⁵⁰² Appellate Body Report, *Brazil – Retreaded Tyres*, para. 170.

³⁵⁰³ Dominican Republic's response to Panel question No. 157; and comments on Australia's response to Panel question No. 156.

³⁵⁰⁴ Cf. para. 7.938 above.

7.1463. We also recall that the contours of our margin of appreciation in assessing whether a proposed alternative measure achieve an equivalent degree of contribution may be informed by the nature of the risks and the gravity of the consequences arising from the non-fulfilment of the objective being pursued.³⁵⁰⁵ We have determined above that the nature of the risks that non-fulfilment of Australia's objective would create is that public health would not be improved as the use of, and exposure to, tobacco products would not be reduced.³⁵⁰⁶ We have also found that the public health consequences of not fulfilling this objective are particularly grave, and are important to Australia. Such gravity and seriousness supports, in our view, our conclusion that the removal of the TPP measures could not be offset by the implementation of a higher MLPA that would leave unaddressed the effect of the images and messages conveyed by the design features of tobacco packaging. We note in particular in this respect Australia's explanations that it seeks to prevent the existence of regulatory gaps in its overall tobacco control policy, which includes, as one of its pillars, extensive restrictions on advertising and promotion. Taking the nature of these risks and the gravity of these consequences into account thus confirms our earlier conclusion that an increase in the MLPA to 21 years would not make an equivalent contribution to Australia's objective.

7.1464. For all these reasons, we are not persuaded that an increase in the MLPA from 18 to 21 would make an equivalent contribution to Australia's objective of improving public health by reducing the use of, and exposure to, tobacco products.

7.2.5.6.2.5 Whether an increase in the MLPA is a measure reasonably available to Australia

7.1465. As described above, a proposed alternative measure would not be *reasonably available* where it is merely theoretical in nature, for instance, where the responding Member is not capable of taking it, or where it imposes an undue burden on that Member, such as prohibitive costs or substantial technical difficulties.³⁵⁰⁷

7.1466. Honduras argues that an increase in the MLPA to 21 years is reasonably available to Australia, as it merely entails a legislative action to modify various State and Territory laws on the MLPA for tobacco products and the effective enforcement of these laws. Honduras argues that Australia has already adopted numerous anti-tobacco laws at the Federal, State and Territory levels and effectively enforced them, and the proposed alternative measure is thus clearly within Australia's reach. Honduras adds that the mere fact that the adoption of this measure will require some additional costs does not mean that this measure is not reasonably available. Moreover, the measure will not impose any technical difficulties on Australian authorities.³⁵⁰⁸ The Dominican Republic argues that an increase in the MLPA is a reasonably available option in Australia, as it would involve the federal and/or state governments changing the minimum age under Australian law from 18 to 21 years and would not require any additional government resources beyond those for current enforcement of the existing MLPA of 18.³⁵⁰⁹

7.1467. Australia has not disputed the availability to it of an increase in the MLPA as an alternative measure. Indeed, as described above, it has stated that it is a measure that it may consider adopting.³⁵¹⁰

7.2.5.6.2.6 Overall conclusion on an increased MLPA as an alternative to the TPP measures

7.1468. We have found above that the complainants' proposal that Australia increase its MLPA to 21 years would be an "alternative" measure, in that it is a measure not currently applied by Australia.

³⁵⁰⁵ Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.215.

³⁵⁰⁶ See para. 7.1322 above.

³⁵⁰⁷ Appellate Body Report, *Brazil – Retreaded Tyres*, para. 156 (quoting Appellate Body Report, *US – Gambling*, para. 308).

³⁵⁰⁸ Honduras's first written submission, paras. 918 and 583-585.

³⁵⁰⁹ Dominican Republic's first written submission, para. 778.

³⁵¹⁰ See para. 7.1429 above.

7.1469. However, we have also determined that the complainants have not demonstrated that an increase in the MLPA to 21 years would be less trade-restrictive than the TPP measures.

7.1470. We are also not persuaded that this measure, as a substitute to the TPP measures, would make an equivalent contribution to Australia's objective of improving public health by reducing the use of, and exposure to, tobacco products. In particular, we have found that while an increase in the MLPA to 21 years would be apt in principle to make a meaningful contribution to Australia's objective, we are not persuaded that, as a *substitute* for the TPP measures, it would make an equivalent contribution to this objective. In making this finding, we have taken into account in particular the characteristics of the TPP measures, against the broader context in which they operate as part of Australia's comprehensive suite of measures directed at reducing the use of, and exposure to, tobacco products, and the risks that non-fulfilment of the TPP measures' objective would create.³⁵¹¹

7.1471. In light of the above, we conclude that the complainants have not demonstrated that an increase in the MLPA from 18 to 21 years is a less trade-restrictive alternative measure that would make a contribution to Australia's objective equivalent to that of the TPP measures.

7.2.5.6.3 Second proposed alternative measure: Increased taxation of tobacco products

7.1472. All complainants argue that an increase in the taxation of tobacco products in Australia is a reasonably available alternative to the TPP measures.

7.1473. Australia considers that this is not an "alternative" measure, as it is already applied. We therefore consider this question first, after describing the proposed measure.

7.2.5.6.3.1 Description of the proposed measure

7.1474. The complainants have generally characterized this alternative as an excise tax increase that could achieve any reduction in tobacco use resulting from the TPP measures. Accordingly, the complainants do not prescribe a precise level of taxation or manner of implementation, but rather contend that the increase in taxation could be set at the level needed to make the desired contribution to Australia's objective.³⁵¹²

7.1475. We therefore proceed on the basis that the alternative measure proposed by the complainants is an increase of the excise tax levied on tobacco products, with flexibility as to the exact magnitude and manner of such tax increase depending on the degree of contribution found to be achieved by the TPP measures. While it is the complainants' burden to identify and define an alternative measure under Article 2.2 of the TBT Agreement, we assess the tax increase proposed by the complainants having regard to the fact that a complainant may not necessarily be required to provide detailed information on the implementation or operation of a proposed alternative in practice, given the hypothetical nature of such proposed alternative measures.³⁵¹³

7.2.5.6.3.2 Whether increased taxation is an alternative measure

7.1476. Australia argues that an increase in the taxation of tobacco products is not an alternative, as Australia implements "regular and substantial increases" in its tobacco excise duties, and plans to do so in the future. In this regard, Australia refers to separate past and planned increases in its tobacco taxation since the introduction of the TPP measures.³⁵¹⁴ Australia further submits that the reasoning of the panel and Appellate Body in *Brazil – Retreaded Tyres* "completely disposes of tobacco excise increases as an alternative measure", on the basis that measures that have already been implemented, in whole or in part, or are in the process of being implemented, as part of a

³⁵¹¹ See Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.215.

³⁵¹² See, e.g. Honduras's first written submission, paras. 594, 919-921; Honduras's second written submission, para. 221; Dominican Republic's first written submission, para. 761; Dominican Republic's second written submission, para. 975; Cuba's first written submission, paras. 277-280; and Indonesia's first written submission, paras. 430-434.

³⁵¹³ See, e.g. Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, paras. 5.334 and 5.338.

³⁵¹⁴ Australia's first written submission, para. 707; and second written submission, para. 552.

comprehensive policy to address a complex public health problem, are not alternatives to be taken into account in the "weighing and balancing" exercise. Rather, such measures are complementary to the measure at issue.³⁵¹⁵

7.1477. We recall that Australia imposes excise taxes on tobacco products and that, in addition to indexation adjustments, the excise rate has been increased on several occasions with projections for future increases.³⁵¹⁶ Specifically, Australia amended the *Excise Tariff Act 1921* (Cth) in 1999 such that an excise tax was applied to cigarettes, cigars, and other tobacco products on a per stick basis (for products in stick form not exceeding 0.8 grams of tobacco per stick), or on a per kilogram basis (for products exceeding 0.8 grams per stick) at a rate equivalent to the per stick rate.³⁵¹⁷ Further, Australia has increased the excise rate applicable to tobacco on several occasions. On 29 April 2010, Australia announced an increase in the tobacco excise rate of 25% to be applied from 30 April 2010.³⁵¹⁸ On 1 August 2013, Australia announced four additional 12.5% increases in excise tax, effective on 1 December 2013, 1 September 2014, 1 September 2015, and 1 September 2016.³⁵¹⁹ In addition, Australia's National Tobacco Strategy includes recommendations to "[c]ontinue to implement regular staged increases in tobacco excise as appropriate"³⁵²⁰ with a further increase scheduled for 2017.³⁵²¹ These increases are additional to increases in taxes that were historically indexed to the consumer price index and, as of March 2014, indexed to average weekly ordinary time earnings.³⁵²² Moreover, Australia's Goods and Services Tax is applied to all tobacco products³⁵²³, such that Australia's taxes on cigarettes account for over 60% of retail prices for popular brands.³⁵²⁴

7.1478. The alternative proposed by the complainants is characterized as an *increase* on existing levels of taxation. While we recognize the existence of past and planned tobacco tax increases within Australia, we do not consider that this circumstance renders the alternative proposed by the complainants duplicative of existing measures or practices already implemented by Australia. Rather, we understand that, regardless of the precise level of taxation imposed on tobacco products in Australia at present or any future point in time, the complainants propose an *increase* of that level of taxation, as a *replacement* for the TPP measures. We consider that this would necessarily constitute a variation of Australia's existing taxation of tobacco products. To the extent that Australia argues that this variation would compromise the effectiveness of its comprehensive approach to tobacco control, we consider that this argument is more pertinent to whether the increased taxation proposed by the complainants achieves an equivalent degree of contribution to fulfilment of the TPP measures' objective.

³⁵¹⁵ Australia's response to Panel question No. 158.

³⁵¹⁶ See para. 2.62 above.

³⁵¹⁷ See Australia's first written submission, Annexure B, Section D(1); Excise Tariff Amendment Act (No. 1) 2000 (Cth), (Exhibit AUS-417), Schedule 1; and Tobacco Excise Increase PIR, (Exhibits AUS-292, HND-80, DOM-119, CUB-64, IDN-21), paras. 4-5.

³⁵¹⁸ PM Rudd, Anti-Smoking Action Media Release, (Exhibits AUS-115, HND-4, DOM-52); Excise Tariff Amendment (Tobacco) Act 2010 (Cth), (Exhibit AUS-418), Schedule 1; and Tobacco Excise Increase PIR, (Exhibits AUS-292, HND-80, DOM-119, CUB-64, IDN-21), paras. 24-26.

³⁵¹⁹ Tobacco Excise Media Release, (Exhibits AUS-421, HND-85, DOM-114, IDN-5); Statements of the Hon. Chris Bowen MP, Treasurer, and Senator the Hon. Penny Wong, Minister for Finance and Deregulation, (Exhibit AUS-265), p. 33.

³⁵²⁰ National Tobacco Strategy 2012-2018, (Exhibits AUS-129, DOM-131), p. 20.

³⁵²¹ Australia's second written submission, para. 552.

³⁵²² See Tobacco Excise Media Release, (Exhibits AUS-421, HND-85, DOM-114, IDN-5); and Chaloupka Public Health Report, (Exhibit AUS-9), para. 18. Professor Chaloupka further explains that:

In 1983, Australia became the first country to index its tobacco excise taxes to the consumer price index in order to ensure that the value of these taxes was not eroded over time by inflation. More recently, in March 2014, Australia became the first country in the world to index its tobacco excise taxes to average weekly ordinary time earnings so as to ensure that tobacco products do not become more affordable over time.

Ibid. para. 39. See also *Excise Tariff Amendment (Tobacco) Act 2014* (Cth), (Exhibit HND-86), Section 6AA; and Excise Tariff Working Pages, (Exhibit IDN-23), p. 4.

³⁵²³ Tobacco Excise Increase PIR, (Exhibits AUS-292, HND-80, DOM-119, CUB-64, IDN-21), para. 7.

³⁵²⁴ Chaloupka Public Health Report, (Exhibit AUS-9), para. 18; Tobacco Excise Increase PIR, (Exhibits AUS-292, HND-80, DOM-119, CUB-64, IDN-21), paras. 88-89; and PM Rudd, Anti-Smoking Action Media Release, (Exhibits AUS-115, HND-4, DOM-52).

7.1479. We consider, therefore, that the complainants' proposed increase of taxation of tobacco products constitutes a variation of a measure already applied by Australia, and, as such, constitutes an alternative measure.

7.1480. We now turn to assess whether an increase in the level of taxation of tobacco products would be less trade-restrictive than the TPP measures and make an equivalent contribution to Australia's objective, taking account of the risks non-fulfilment of the objective would create.

7.2.5.6.3.3 Whether increased taxation would be less trade-restrictive than the TPP measures

Arguments of the parties

7.1481. Honduras argues that a tax increase is less trade-restrictive than the plain packaging trademark and format restrictions, since tobacco producers would not be prevented from competing in the Australian market by using branded packaging to signal quality and reputation to consumers. Honduras adds that a possible tax increase would not entail compliance costs related to the modification of production processes to produce packaging and tobacco products in compliance with the format restrictions of the TPP measures.³⁵²⁵ In addition, taxes "are predictable and transparent, and therefore less trade restrictive than non-tax measures as evidenced by the preference in the WTO system for transparent and predictable duties, taxes and charges".³⁵²⁶ Honduras, referring to the Appellate Body in *US – COOL*³⁵²⁷, also submits that the costs of a tax increase are normally passed on to consumers, with the effect that a tax increase is clearly less trade-restrictive than the TPP measures.³⁵²⁸ Honduras adds that Australia's argument that industry price increases often coincide with tax increases indicates that tax increases do not distort producers' profitability or market shares, such that excise tax increases do not cause any other distorting market effects and are therefore not more trade-restrictive than the TPP measures.³⁵²⁹

7.1482. Honduras argues that a tax increase "does not modify the conditions of competition for imported products, ... create uncertainties ... [or] disincentivize the importation of tobacco products to Australia". Honduras also submits that a gradual increase in taxes does not impose any additional compliance costs in terms of the production process or importation costs. Honduras adds that an increase in taxes may "also lead to downtrading, as Australia notes", but that does not mean that it is as trade distortive and restrictive as plain packaging, which prevents producers from differentiating their products and thus from fairly competing with one another. Moreover, Honduras submits that, as distinct "from a technical regulation like plain packaging", the only requirement that applies to internal taxes is that they comply with Article III of the GATT 1994. Non-discriminatory taxes are thus *per se* WTO-consistent measures, while a technical regulation is WTO-inconsistent if it is not effective or if it is more trade-restrictive than necessary. Therefore, Honduras asserts, internal non-discriminatory taxes are a WTO-consistent alternative to a WTO-inconsistent measure and are therefore to be preferred.³⁵³⁰

7.1483. The Dominican Republic argues that, by preventing trademarks "from playing their vital role as a differentiator, the [TPP] measures eliminate competitive opportunities for producers of tobacco products, and are likely to have a disproportionate (discriminatory) effect on the trade of premium tobacco products ... in Australia".³⁵³¹ The Dominican Republic argues that increased taxation would have no effect on trademarks, and thus "would do nothing to distort the competitive opportunities of tobacco products and producers".³⁵³²

³⁵²⁵ Honduras's first written submission, para. 920; and second written submission, para. 221. See also Honduras's first written submission, para. 597; and response to Panel question No. 151.

³⁵²⁶ Honduras's response to Panel question No. 151.

³⁵²⁷ Honduras's response to Panel question No. 151, (referring to Appellate Body Reports, *US – COOL*, para. 483).

³⁵²⁸ Honduras's response to Panel question No. 151 (referring to Appellate Body Reports, *US – COOL*, para. 483).

³⁵²⁹ Honduras's second written submission, para. 705.

³⁵³⁰ Honduras's response to Panel question No. 151; and comments on Australia's response to Panel question Nos. 151 and 165.

³⁵³¹ Dominican Republic's first written submission, para. 1022.

³⁵³² Dominican Republic's first written submission, para. 1023.

7.1484. Furthermore, the Dominican Republic "accepts that an increase in taxation is trade restrictive" in that, if the Panel finds that the TPP measures "reduce smoking behaviour, which entails a restriction on the volume of tobacco products sold, an alternative must similarly reduce smoking behaviour and, therefore, be similarly trade restrictive".³⁵³³ Indeed, the "extent of that reduction can be calibrated precisely to ensure that its effects on the volume of sales of tobacco products are equivalent in size to any such volume effects that the [TPP] measures might be found to have".³⁵³⁴ However, the Dominican Republic adds that an increase in taxation "is much less trade restrictive than the [TPP] measures because, even if both restricted the volume of sales to an equivalent extent, an increase in taxation would not prevent producers from enjoying the competitive opportunities that flow from differentiating goods through the use of trademarks". Higher excise taxes would allow producers and exporters to "decide where and how to position their brand on the price-quality spectrum", such that, while the TPP measures restrict trade in goods in two respects, increased taxation restricts it in just one.³⁵³⁵ In response to Australia's argument that an increase in taxation would lead to downtrading, the Dominican Republic argues that "Australia's assertion is vague and unsupported", because Australia does not indicate what level of additional taxation would be needed to reduce smoking to an extent equivalent to the TPP measures, and therefore does not support its assertion by showing how the particular additional taxation in question would lead to more downtrading than the TPP measures. The Dominican Republic argues that the evidence indicates that the TPP measures led to a far greater increase in downtrading than the large 25% tax increase in April 2010, indicating that the TPP measures have had a much greater degree of trade-restrictiveness as measured by value-based downtrading effects.³⁵³⁶

7.1485. In any event, the Dominican Republic argues that taxation, and specifically a non-discriminatory internal tax is not a trade-restrictive measure under the TBT Agreement, the GATT 1994, the TRIPS Agreement, or any other covered agreement. Moreover, internal taxation also does not interfere with competitive opportunities to differentiate products, or with the use of trademarks. The Dominican Republic submits that this "is a strong, even decisive, indication that [this alternative measure is] inherently less trade restrictive under the covered agreements".³⁵³⁷

7.1486. Cuba argues that a "non-discriminatory excise tax increase is fully WTO-consistent and does not restrict the use of intellectual property rights or impose WTO-inconsistent regulatory burdens on exporters". In Cuba's view, "Australia's decision to adopt plain packaging, which can confer marginal efficacy at best but which carries significant risks both in terms of stimulating [d]own-trading and price reductions cannot be justified".³⁵³⁸

7.1487. Indonesia argues that a tax increase is less trade-restrictive than the TPP measures because such increases do not interfere with the ability of producers to distinguish their goods to consumers and they do not disproportionately affect producers of premium and imported products.³⁵³⁹

7.1488. Indonesia adds that tax increases (as an example) might reduce the consumption of a product, while not being trade-restrictive under the WTO covered agreements. It elaborates that a tobacco control measure that makes a contribution to reducing smoking prevalence may also result in a decline in demand for tobacco products, although it does not necessarily follow that such an effect adversely impacts competitive opportunities for imports and is trade-restrictive. A reduction in prevalence, to the extent it also reduced consumption of tobacco products, would only affect overall commercial opportunities as a result of declining demand. Indonesia submits that the question of which measure is "less trade restrictive" should be assessed by comparing the challenged measure with proposed less trade-restrictive alternatives and selecting the measure

³⁵³³ Dominican Republic's second written submission, para. 980.

³⁵³⁴ Dominican Republic's response to Panel question No. 151.

³⁵³⁵ Dominican Republic's second written submission, para. 981.

³⁵³⁶ Dominican Republic's response to Panel question No. 151 (referring to Dominican Republic's first written submission, para. 497 and Figure 15).

³⁵³⁷ Dominican Republic's response to Panel question No. 151.

³⁵³⁸ Cuba's first written submission, para. 280.

³⁵³⁹ Indonesia's first written submission, para. 431.

that interferes the least with "competitive" opportunities available among products in the market place.³⁵⁴⁰

7.1489. Australia submits that, even if the Panel were to consider downtrading to be relevant to an assessment of the trade-restrictiveness of the TPP measures and the proposed alternative measures, the Dominican Republic has not demonstrated that the downtrading allegedly caused by the TPP measures exceeds that caused by excise increases. In Australia's view, rather than providing evidence to demonstrate that the downtrading caused by excise increases is less than that allegedly caused by tobacco plain packaging, the Dominican Republic has simply asserted that this is case.³⁵⁴¹ Australia also submits that the Dominican Republic's suggestion that increasing excise taxes would lead to declines in tobacco use necessarily implies that these measures will restrict trade. In addition, Australia argues that the Dominican Republic's argument that this will lead to an equivalent or greater degree of contribution to reducing tobacco use than tobacco plain packaging, necessarily implies an equivalent or greater reduction in the volume of imports of tobacco products; and, therefore, an equivalent or greater degree of trade-restrictiveness.³⁵⁴²

Analysis by the Panel

7.1490. As presented by the complainants, the alternative of increased taxation would be calibrated to achieve the same overall reduction in the use of, and exposure to, tobacco as that achieved by the TPP measures.

7.1491. To the extent that a taxation increase would be designed to have the same degree of contribution as the TPP measures in reducing the use of, and exposure to, tobacco products, and would therefore have an equal degree of impacts of a reduction of the overall consumption of such products, then it would be equally trade-restrictive in terms of its impact on the *volume* of trade in tobacco products. Thus, the complainants have not shown that it would be less trade-restrictive than the TPP measures in terms of impact on total volumes of imports of tobacco products. Any form of increased taxation that would lead to a commensurate decrease in the volume of imported tobacco products would seem to entail at least the same degree of trade-restrictiveness as is attributable to the TPP measures by virtue of their contribution to Australia's objective.

7.1492. In addition, we note that certain types of taxation measures have been found to give rise to the type of "downtrading" or downward substitution effects that the complainants argue arise from the TPP measures and are, in their view, trade-restrictive. We note that the extent of this effect may depend, in principle, on the type of taxation chosen, and that the WHO suggests that this concern may arise in particular in connection with *ad valorem* taxation.³⁵⁴³ Correspondingly, taxing all tobacco products consistently – so that the tax accounts for a comparable share of price on different products and so that tax increases result in proportionate increases in the prices on all products – should reduce, all things being equal, the potential for substitution among them.³⁵⁴⁴ However, we also note evidence indicating that tobacco taxation in Australia, which, to date, is specific rather than *ad valorem*, is the main recognized source of "downtrading" on the Australian market.³⁵⁴⁵

³⁵⁴⁰ Indonesia's comments on Australia's response to Panel question No. 165.

³⁵⁴¹ Australia's comments on the complainants' responses to Panel question Nos. 161 and 165.

³⁵⁴² Australia's comments on the complainants' responses to Panel question No. 153.

³⁵⁴³ This is explained by studies finding that, in the case of uneven increases in prices across tobacco products, there is potential for substitution among tobacco products in response to changes in the *relative* prices of these products. WHO Tobacco Tax Manual, Full Text, (Exhibit CUB-62), p. 22; and 2011 IARC Handbook, (Exhibit DOM-117), p. 5 ("[d]ifferential rates on different types of tobacco products or even on items within the same product category result in price gaps and opportunities for product substitution to lower-taxed products and brands"). In principle, specific taxation should lower the relative price of premium cigarettes and partly offset a possible downtrading effect of the tax-induced increase in the price of cigarettes.

³⁵⁴⁴ WHO Tobacco Tax Manual, Full Text, (Exhibit CUB-62), pp. 11, 90; and 2011 IARC Handbook, (Exhibit DOM-117), p. 26 ("Applying a similar tax level would reduce the incentive for substitution and increase the effectiveness of taxation policy in reducing tobacco use"). See also Chaloupka et al. 2012, (Exhibit DOM-115), p. 174; and Chaloupka Public Health Report, (Exhibit AUS-9), para. 12.

³⁵⁴⁵ See Australia's first written submission, fn 982. See also HoustonKemp Report, (Exhibit AUS-19) (SCI), Section 3.3, p. 18; Tobacco Excise Increase PIR, (Exhibits AUS-292, HND-80, DOM-119, CUB-64, IDN-21), p. 26; and Industry statements on excise and downtrading, (Exhibit AUS-293).

7.1493. Although the parties have not addressed the precise form of taxation proposed, we take note of evidence before us that increasing tobacco excises may have different impacts according to the type of excise used.³⁵⁴⁶ For instance, there is evidence that specific excises may tend to increase consumer prices relatively more than *ad valorem* excises, leading to relatively higher reductions in consumption³⁵⁴⁷, and that consumer prices are more likely to rise by more than the tax increase when the tax is specific.³⁵⁴⁸ We also note the possibility that *ad valorem* taxation might increase market competition by enhancing existing price differentials between brands, and it has been noted in this connection that *ad valorem* adjustments may increase the possibility of downward substitution to lower priced tobacco products.³⁵⁴⁹ While there are a number of possible tax regimes governments may adopt to balance such effects of increased taxation³⁵⁵⁰, we note that the overall impact of taxation on tobacco use may also entail other effects on product and brand competition due to the elevation of prices. In the specific case of Australia's 2010 increase of the tobacco excise by 25%, it was reported by tobacco companies that the excise increase led to greater market share of low cost brands, altering the relative competitive positions of cigarette suppliers, and a consumer shift to RYO tobacco.³⁵⁵¹

7.1494. In light of these elements, it is not clear to us how an increase in taxation levels would address or avoid the concerns about "downtrading"/downward substitution that the complainants have expressed in connection with the TPP measures, or any resulting impact on the total value of trade in tobacco products. Indeed, to the extent that such downward substitution could contribute to a measure's trade-restrictiveness, it is unclear that a comparable or greater degree of trade-restrictiveness would not result also from the imposition of increased tobacco taxation.

7.1495. Overall, therefore, we are not persuaded that the complainants have demonstrated that an increase of tobacco taxation that would make the same degree of contribution as the TPP measures would be less trade-restrictive than the TPP measures.

7.1496. Notwithstanding this conclusion, we find it appropriate to pursue our analysis and determine also whether, assuming that it may be less trade-restrictive than the TPP measures, an increase in the level of taxation of tobacco products would make an equivalent contribution to Australia's objective of improving public health by reducing the use of, and exposure to, tobacco products.

³⁵⁴⁶ For example, the IARC noted that "[s]pecific and *ad valorem* taxes have different effects on prices, profits and competitive positions of tobacco producers, tax revenues, quality and variety of products, administration and distribution of income. They will contribute in a different way to the achievement of health objectives." 2011 IARC Handbook, (Exhibit DOM-117), p. 16.

³⁵⁴⁷ WHO Tobacco Tax Manual, Full Text, (Exhibit CUB-62), p. 42.

³⁵⁴⁸ WHO Tobacco Tax Manual, Full Text, (Exhibit CUB-62), p. 44.

³⁵⁴⁹ See WHO Tobacco Tax Simulation Model, (Exhibit CUB-63), p. 11. As stated by the IARC, *ad valorem* duties "will maintain the relative (pre-tax) price differentials between high- and low-taxed cigarettes", such that "there will be more price competition under an *ad valorem* system, which may entail a lower average price" and "have a multiplier effect that favours low quality". 2011 IARC Handbook, (Exhibit DOM-117), p. 18.

³⁵⁵⁰ For example, the possibility of downward substitution could be addressed through use of a single-rate specific tax that would lead to relatively higher price increases for cheap cigarettes thereby reducing their market share. In this light, however, a specific excise could be considered to be more favourable to existing brand variety and packaging as there is evidence suggesting an effect of "upwards substitutability" favouring premium brands under specific excises. See WHO Tobacco Tax Manual, Full Text, (Exhibit CUB-62), pp. 45-46. The IARC noted that specific duties "will reduce the relative price differentials between high- and low-taxed cigarettes" that "may lead consumers to switch to higher-priced cigarettes, assuming that more expensive cigarettes are considered to be of a higher quality (and thus more appealing)". 2011 IARC Handbook, (Exhibit DOM-117), p. 18.

³⁵⁵¹ Tobacco Excise Increase PIR, (Exhibits AUS-292, HND-80, DOM-119, CUB-64, IDN-21), paras. 116-121.

7.2.5.6.3.4 Whether increased taxation of tobacco products would make an equivalent contribution to Australia's objective

Arguments of the parties

7.1497. Honduras argues that "it is well recognized that making tobacco products more expensive through increased taxation is the most effective way to reduce tobacco consumption".³⁵⁵²

7.1498. Honduras contends that if the Panel finds that the TPP measures make some contribution to Australia's objective, the proposed tax increase for tobacco products "could achieve an equivalent degree of contribution", because the magnitude of the proposed tax can be calibrated to match any level of desired consumption reduction.³⁵⁵³ Honduras submits that the impact of tax measures is explained by a product's price elasticity (that is, the extent to which demand for a product falls or rises as a result of increases or decreases in its price).³⁵⁵⁴ Honduras refers to the WHO Technical Manual on Tobacco Tax Administration and states that price elasticities for cigarettes are estimated to be -0.4, which means that if the price of cigarettes were to increase by 10%, cigarette consumption would decline by 4%.³⁵⁵⁵ Honduras thus argues that the Panel would need to determine with clarity and precision the degree of contribution that the challenged measure would make, such that the required magnitude of the tax increase would depend on the degree of contribution made by the challenged measure.³⁵⁵⁶

7.1499. The Dominican Republic argues that "[h]ealth institutions, governments and health experts worldwide universally recognize that tobacco taxation is an extremely effective – if not the most effective – policy tool to reduce smoking uptake, and to facilitate cessation".³⁵⁵⁷ The Dominican Republic submits that taxation works well for both cigarettes and cigars.³⁵⁵⁸

7.1500. The Dominican Republic further argues that increased taxation would make an "equivalent or greater contribution" to the objective of the TPP measures. The Dominican Republic argues that "taxation is a 'tried and tested' means of successfully tackling each of the three smoking behaviours identified" in the TPP Act³⁵⁵⁹ and refers to several sources to support its argument that increased taxation is the most effective way of reducing the use of tobacco products.³⁵⁶⁰ The Dominican Republic asserts that "around half of the reduction in overall consumption is attributable to a reduction in smoking prevalence and the other half in smoking intensity".³⁵⁶¹ The Dominican Republic sets out calculations for price and tax increases that would make the same contribution as the TPP measures, based on hypothetical levels of the contribution made by the TPP measures³⁵⁶² (and which "would apply in addition to the prevailing excise tax rate in Australia, whatever that might be at any given time"³⁵⁶³):

³⁵⁵² Honduras's first written submission, para. 589; and second written submission, para. 699.

³⁵⁵³ Honduras's first written submission, para. 921.

³⁵⁵⁴ Honduras's first written submission, para. 590.

³⁵⁵⁵ Honduras's first written submission, para. 590.

³⁵⁵⁶ Honduras's first written submission, paras. 598 and 921; and second written submission, para. 221.

³⁵⁵⁷ Dominican Republic's first written submission, para. 751; and second written submission, para. 636.

³⁵⁵⁸ Dominican Republic's response to Panel question No. 152.

³⁵⁵⁹ Dominican Republic's first written submission, para. 757 and heading VI.H.3.e.ii(1)(b).

³⁵⁶⁰ Dominican Republic's first written submission, paras. 753-756 and 1021.

³⁵⁶¹ Dominican Republic's first written submission, paras. 758-760 and 1021. (emphasis original)

³⁵⁶² Dominican Republic's second written submission, para. 639, Table 4. The Dominican Republic adds that the use of higher elasticity estimates would significantly lower the estimate of the requisite increase in taxation to achieve the stated reductions in prevalence. Dominican Republic's second written submission, para. 640.

³⁵⁶³ Dominican Republic's second written submission, para. 641.

Table 4: Estimated price and tax increase equivalents to hypothetical contributions of the TPP measures to reducing the number of smokers

Equivalence of contribution	Hypothetical contribution of TPP measures to reducing number of smokers (%)	Price increase to make same contribution over current rate (%)	Tax increase to make same contribution over current rate (%)
Example 1	.5	2.5	4.39
Example 2	1.0	5.0	8.78
Example 3	1.5	7.5	13.17
Example 4	2.0	10.0	17.57

Source: Dominican Republic's second written submission, para. 639, Table 4.

7.1501. The Dominican Republic argues that the "clear advantage of increased taxation as an alternative is that the tax increase required to make an equivalent contribution to reducing prevalence can be calibrated with considerable quantitative precision using these elasticities".³⁵⁶⁴ The Dominican Republic also argues that, "unlike [the TPP] measures which will take years for their full effect to be seen, according to Australia", taxation is effective immediately upon implementation, and is likely to be most effective against young people who are known to be particularly price sensitive.³⁵⁶⁵ The Dominican Republic contends that, considering size, likelihood, and timing together, along with the risks of non-fulfilment, an increase in taxation would make a contribution to reducing smoking that is much more than equivalent to any made by the TPP measures.³⁵⁶⁶

7.1502. The Dominican Republic argues that Australia's argument that "taxation is effective for cessation and relapse, but not initiation" contradicts "conventional wisdom espoused by health organizations, governments, and academics alike, that taxation is also successful in preventing smoking initiation, particularly among young people".³⁵⁶⁷ In relation to Australia's argument that "the [TPP] measures may affect different groups of consumers than tax increases"³⁵⁶⁸, the Dominican Republic states that the [TPP] measures are aimed particularly at young people and socially disadvantaged consumers, and that taxation is widely regarded as particularly effective at reducing smoking among these groups. The Dominican Republic adds that Australia and its experts provide no evidence to support the assertions that taxation is not effective in persuading high-income consumers not to smoke, or that the [TPP] measures would be particularly helpful in so doing. The Dominican Republic argues that, in fact, empirical evidence shows that taxation is effective for all demographic groups.³⁵⁶⁹ In relation to Australia's argument that taxation works through different mechanisms, and so cannot reduce the appeal of tobacco products, increasing perceptions of harm, the Dominican Republic argues that so long as an alternative makes an equivalent contribution, it does not matter if it does so through another mechanism.³⁵⁷⁰

7.1503. Cuba argues that any reduction in tobacco use resulting from the TPP measures "could easily be replicated (and improved) through an appropriate excise tax increase. Cuba argues that the requisite tax increase on tobacco products can be quantified by reference to the "price elasticity" of market demand. Cuba submits that it is universally accepted that -0.4 is a good estimate for the price elasticity for tobacco demand in high income countries and that, even assuming an elasticity value of -0.2, Australia would be able to achieve a 2% drop in consumption of tobacco products with a mere 10% increase in their price.³⁵⁷¹ In any event, Cuba argues that "[a] tax increase can be closely fine-tuned to achieve the desired public health benefit".³⁵⁷² Cuba

³⁵⁶⁴ Dominican Republic's first written submission, paras. 761 and 1021; and second written submission, paras. 638 and 646.

³⁵⁶⁵ Dominican Republic's responses to Panel question Nos. 65 and 157; and second written submission, paras. 646-648.

³⁵⁶⁶ Dominican Republic's response to Panel question No. 157.

³⁵⁶⁷ Dominican Republic's second written submission, para. 651.

³⁵⁶⁸ Dominican Republic's second written submission, para. 652.

³⁵⁶⁹ Dominican Republic's second written submission, paras. 653-654.

³⁵⁷⁰ Dominican Republic's second written submission, paras. 655-656.

³⁵⁷¹ Cuba's first written submission, para. 278.

³⁵⁷² Cuba's first written submission, para. 279.

argues that taxes are the single most effective tobacco control measure, especially given its impact on people with lower incomes, such as young people.³⁵⁷³

7.1504. Indonesia states that increasing taxes on tobacco products is widely recognized as "the single most effective policy option for reducing the public health toll from tobacco".³⁵⁷⁴ It submits that the TPP measures have not shown *any* impact on smoking prevalence after its introduction, and tobacco tax increases have consistently demonstrated an immediate, quantifiable reduction in prevalence, while at the same time not disrupting competitive opportunities in the market.³⁵⁷⁵ Furthermore, tobacco tax increases have the added advantage of generating observable impacts. Specifically, the 2010 25% tobacco tax increase resulted in a decline in cigarette consumption of 15 sticks per capita each quarter and Australia has estimated that a 1% increase in the price of cigarettes will result in a reduction in consumption of 0.4%.³⁵⁷⁶

7.1505. Australia responds that, "[w]hile it is recognised that taxation of tobacco products is the single most effective policy for reducing tobacco use (i.e. if only one measure were used)", the best approach to tobacco control is a comprehensive one.³⁵⁷⁷ Australia argues that taxation measures cannot achieve Australia's three specific objectives as set out in the TPP measures (namely decreasing the appeal of tobacco products, increasing the effectiveness of health warnings and reducing the ability of the retail packaging of tobacco products to mislead consumers).³⁵⁷⁸ Rather, Australia contends, "excise increases 'directly impact tobacco use by changing the economic accessibility of tobacco products through increases in retail prices'".³⁵⁷⁹ Relying on evidence from Professor Chaloupka, Australia argues that consumers respond differently to tobacco control interventions depending on where they are in their life-cycle and smoking history, and that this limits the extent to which excise increases are able to influence the smoking behaviour of *all* consumers or potential consumers.³⁵⁸⁰ Australia submits that advertising bans, including tobacco plain packaging, and taxation increases have different degrees of effectiveness at different stages of the initiation process, contrary to the assertion of the Dominican Republic that Australia or Professor Chaloupka suggested that taxation is effective for cessation and relapse, but not initiation.³⁵⁸¹ Australia submits that the "different causal pathways by which tobacco plain packaging and excise influence consumer (and potential consumer) behaviour" means that the measures are together able to influence a broader range of consumers than either measure acting alone.³⁵⁸² Australia thus contends that "replacing tobacco plain packaging with a variation on Australia's already strong excise policy would reduce the synergies between these measures and weaken 'the total effect' of Australia's comprehensive approach".³⁵⁸³ Australia adds that tobacco plain packaging may impact consumers and potential consumers who are impervious to price increases.³⁵⁸⁴

Analysis by the Panel

7.1506. As described above, the complainants contend that the tax level could be increased to reduce tobacco consumption in Australia by the same amount as any reduced consumption attributable to the TPP measures.

³⁵⁷³ Cuba's second written submission, para. 342; and comments on Australia's responses to Panel question Nos. 157 and 158.

³⁵⁷⁴ Indonesia's first written submission, para. 430.

³⁵⁷⁵ Indonesia's first written submission, para. 433.

³⁵⁷⁶ Indonesia's first written submission, para. 433.

³⁵⁷⁷ Australia's first written submission, para. 719.

³⁵⁷⁸ Australia's first written submission, para. 720.

³⁵⁷⁹ Australia's first written submission, para. 720 (referring to Chaloupka Public Health Report, (Exhibit AUS-9), para. 37).

³⁵⁸⁰ Australia's first written submission, para. 720 (referring to Chaloupka Public Health Report, (Exhibit AUS-9), paras. 35, 42 and 44).

³⁵⁸¹ See Australia's comments on the complainants' responses to Panel question No. 161, para. 108 (referring to Chaloupka Public Health Report, (Exhibit AUS-9), para. 35); and Chaloupka Rebuttal Report, (Exhibit AUS-582), para. 29 (referring to Dominican Republic's second written submission, para. 650).

³⁵⁸² Australia's first written submission, para. 721.

³⁵⁸³ Australia's comments on the complainants' responses to Panel question No. 157. See also Australia's response to Panel question No. 148, para. 23 (referring to Appellate Body Report, *Brazil – Retreaded Tyres*, para. 172).

³⁵⁸⁴ Australia's first written submission, para. 721.

7.1507. We note at the outset that it is uncontested that taxation of tobacco products is recognized to be an effective measure for tobacco control.³⁵⁸⁵ Notably, Australia's existing tobacco taxation measures have been based on explicit recognition of taxation's contribution to Australia's public health objectives. The Australian Treasury has observed that "[i]t is well publicised that anti-smoking measures should include higher taxes" as "[h]igher taxes on tobacco products lead to higher prices, which reduce tobacco use, which in turn, reduce the health and social costs associated with tobacco use".³⁵⁸⁶ Australia's National Tobacco Strategy for 2004-2009 recognized that taxes on tobacco products increase prices, which helps to discourage consumption, and further recognized that the policy intention of Australian excise increases was to make tobacco products less affordable.³⁵⁸⁷ Accordingly, Australia's NPHT developed a strategy in which it recommended *inter alia* an increase in tobacco excise on public health grounds and identified the reduced affordability of tobacco products as a key action to reduce tobacco consumption and prevalence.³⁵⁸⁸ Further, Australia announced the staged increases of its tobacco excise recognizing that "increasing excise is the single most effective way for government to reduce premature death and disease due to smoking", with the expectation that it would be "particularly effective in dropping the number of young people who smoke".³⁵⁸⁹

7.1508. The WHO has also recognized the effectiveness of taxation as a tobacco control measure. According to the WHO, taxation is considered to be the most cost-effective tobacco control measure available to governments, particularly as an intervention for reducing tobacco use among the young and the poor.³⁵⁹⁰ The WHO has specifically noted that, "[o]f all tobacco-product taxes, excises are the most important for achieving the health objective of reduced tobacco consumption, since they are uniquely applied to tobacco products and raise the prices of these products relative to the prices of other goods and services."³⁵⁹¹ Summarizing the salient findings from relevant literature, the WHO states that:

[A] large and growing literature clearly demonstrates that the overall demand for tobacco products is significantly affected by changes in tobacco product taxes and prices. These studies demonstrate that price affects all aspects of tobacco consumption, with higher prices preventing initiation among potential users, inducing cessation among current users, and reducing the frequency of consumption and amount consumed by continuing users.³⁵⁹²

7.1509. In accordance with these considerations, the FCTC provides in Article 6(1) that its parties "recognize that price and tax measures are an effective and important means of reducing tobacco consumption by various segments of the population, in particular young persons". Article 6(2)(a) further provides that FCTC parties should "adopt or maintain, as appropriate, measures which may

³⁵⁸⁵ We note in this respect Australia's statement that "Australia and its experts have never contested" that excise increases are an effective tobacco control policy. See Australia's comments on the complainants' responses to Panel question No. 157, para. 80.

³⁵⁸⁶ Tobacco Excise Increase PIR, (Exhibits AUS-292, HND-80, DOM-119, CUB-64, IDN-21), para. 27.

³⁵⁸⁷ Tobacco Excise Increase PIR, (Exhibits AUS-292, HND-80, DOM-119, CUB-64, IDN-21), para. 14.

³⁵⁸⁸ Tobacco Excise Increase PIR, (Exhibits AUS-292, HND-80, DOM-119, CUB-64, IDN-21), para. 16.

We note that the Australian government did not at the time adopt this particular recommendation of staged increases on account of the financial stress on those who continue smoking. See *ibid.* para. 18; and Response to NPHT, The Roadmap for Action, (Exhibits AUS-116, JE-15), p. 63.

³⁵⁸⁹ Tobacco Excise Media Release, (Exhibits AUS-421, HND-85, DOM-114, IDN-5). See also Response to NPHT, The Roadmap for Action, (Exhibits AUS-116, JE-15), pp. 61-62; and National Tobacco Strategy 2012-2018, (Exhibits AUS-129, DOM-131), p. 19.

³⁵⁹⁰ WHO Tobacco Tax Manual, Full Text, (Exhibit CUB-62), pp. 9, 18, 20-22, 104; and WHO Tobacco Tax Simulation Model, (Exhibit CUB-63), p. 1. See also WHO, Raising Tax on Tobacco, (Exhibit IDN-88), p. 6 ("[r]aising taxes on tobacco is the most cost-effective solution for reducing tobacco use in all types of settings"); 2011 IARC Handbook, (Exhibit DOM-117), p. 3 ("A significant increase in tobacco product taxes and prices has been demonstrated to be the single most effective and cost-effective intervention for reducing tobacco use, particularly among the young and the poor ..."); WHO Report on the Global Tobacco Epidemic 2013, (Exhibits DOM-318, CUB-81), p. 79 ("[r]aising taxes to increase the price of tobacco products is the most effective means to reduce tobacco use and encourage smokers to quit"); and WHO Report on the Global Tobacco Epidemic 2015, (Exhibits AUS-595, DOM-319), p. 16 ("raising tobacco taxes to more than 75% of the retail price is among the most effective and cost-effective tobacco control interventions").

³⁵⁹¹ WHO Tobacco Tax Manual, Full Text, (Exhibit CUB-62), p. 11.

³⁵⁹² WHO Tobacco Tax Manual, Full Text, (Exhibit CUB-62), p. 23. See also *ibid.* pp. 76-77.

include ... implementing tax policies and, where appropriate, price policies, on tobacco products so as to contribute to the health objectives aimed at reducing tobacco consumption".³⁵⁹³

7.1510. The general efficacy of taxation as a means of tobacco control also finds recognition in a number of other academic, governmental, and other expert sources on the record of these proceedings.³⁵⁹⁴

7.1511. On this basis, we conclude that taxation is recognized in principle as an effective tobacco control measure, which is capable of contributing to reducing the use of tobacco products. We therefore turn to consider the degree of contribution that might be made to Australia's objective under the complainants' alternative.

7.1512. We begin by recalling our observations concerning Australia's existing excise regime on tobacco products, including its recent increases of the excise rate, the indexation of tax rates to consumer prices and average weekly ordinary time earnings, and evidence of Australia's intention to continue to implement regular staged increases in the tobacco excise.³⁵⁹⁵ Further, it has been noted that Australia has among the highest tobacco product excise taxes in the world, which have been increased steadily over time and have resulted in among the highest tobacco product prices in the world.³⁵⁹⁶

7.1513. Our understanding of the alternative measure proposed by the complainants is that it would entail an increase of the tobacco excise in particular, as distinct from other forms of taxation on tobacco products.³⁵⁹⁷ Beyond this, there are potential variations as to how an excise increase

³⁵⁹³ FCTC, (Exhibits AUS-44, JE-19), Article 6. We also note that the Guidelines for Implementation of Article 6 of the FCTC state: "Tax and price policies are widely recognized to be one of the most effective means of influencing the demand for and thus the consumption of tobacco products." Article 6 FCTC Guidelines, (Exhibit AUS-111), Introduction, p. 1.

³⁵⁹⁴ Chaloupka et al. 2012, (Exhibit DOM-115), pp. 172 and 179; Chaloupka Public Health Report, (Exhibit AUS-9), paras. 10 and 37; Chaloupka and Warner 1998, (Exhibit DOM-116) p. 56; Ross and Chaloupka 2006, (Exhibit DOM-118), p. S114; US Surgeon General's Report 2014, (Exhibits AUS-37, DOM-104, CUB-35), p. 12 ("The evidence is sufficient to conclude that increases in the prices of tobacco products, including those resulting from excise tax increases, prevent initiation of tobacco use, promote cessation, and reduce the prevalence and intensity of tobacco use among youth and adults"); Pechmann et al. 2011, (Exhibit HND-149), p. 24; Jha and Chaloupka 1999, (Exhibit AUS-51), p. 5; C. Tworek et al. 2010, (Exhibit HND-152), p. 9; Tauras et al. 2013, (Exhibit HND-153), p. 4317; Sussman et al. 2013, (Exhibit HND-154), pp. 2-3; Guindon et al. 2013, (Exhibit HND-156), p. 1; Cummings et al. 2009, (Exhibit HND-157), p. 443; Nargis et al. 2013, (Exhibit HND-158), p. 2; Tobacco in Australia 2012, HND excerpts, (Exhibit HND-79), Chapter 13, p. 1 ("[t]he evidence for the effectiveness of tax and price policies is overwhelming"); Dunlop et al. 2011, (Exhibit HND-83), p. 1687 ("tax increases are regarded as the most effective single intervention to reduce demand for tobacco, with research showing that the higher the tax increase, the greater the reduction in cigarette sales"); F. Chaloupka, "How Effective Are Taxes in Reducing Tobacco Consumption", (Exhibit IDN-87), p. 7; U.S. Surgeon General's Report 2000, Executive Summary (Exhibit IDN-89), p. 22; and Chaloupka Rebuttal Report, (Exhibit AUS-582), para. 29 ("My research has consistently demonstrated the effectiveness of higher tobacco taxes in discouraging initiation and uptake of tobacco use among young people, promoting cessation among adult tobacco users, and reducing consumption among continuing users, with relatively larger effects on tobacco use among the young and the poor.").

³⁵⁹⁵ See para. 7.1477 above.

³⁵⁹⁶ Chaloupka Public Health Report, (Exhibit AUS-9), paras. 9(b), 18 and 41; Chaloupka Rebuttal Report, (Exhibit AUS-582), para. 26; and WHO Report on the Global Tobacco Epidemic 2015, (Exhibits AUS-595, DOM-319), p. 39. Professor Chaloupka also notes that Australia has reduced its duty free allowance over time. Chaloupka Public Health Report, (Exhibit AUS-9), para. 18.

³⁵⁹⁷ Australia currently imposes excise and other taxes on tobacco products. Excise is a tax on certain goods produced in Australia that, compared to other taxes designed to raise revenue, can also be applied selectively to pursue non-revenue objectives. Imported goods comparable to those subject to excise are taxed in an equivalent fashion through imposition of a customs duty imposed at the same rate as the excise rate. Tobacco Excise Increase PIR, (Exhibits AUS-292, HND-80, DOM-119, CUB-64, IDN-21), para. 2. Other taxes applied to tobacco products include value added taxes, general sales or consumption taxes, and special levies that fund particular programmes. WHO Tobacco Tax Manual, Full Text, (Exhibit CUB-62), pp. 19, 28-29; and Chaloupka et al. 2012, (Exhibit DOM-115), p. 173. It has also been noted that, of the various taxes imposed by governments on tobacco, "tobacco product excise taxes (including other taxes specifically applied to tobacco products but called by other names) are most important for achieving the health objective of reduced tobacco consumption since these are the taxes that are uniquely applied to tobacco products and that raise the prices of these products relative to the prices of other goods and services." Chaloupka et al. 2012, (Exhibit DOM-115), p. 173.

could be applied under this alternative. For example, both specific and *ad valorem* excises are possible, with the former levied based on quantity (e.g. a fixed amount per cigarette or weight of tobacco) and the latter levied based on value (e.g. a percentage of the factory or retail price).³⁵⁹⁸ Thus, one potential variation of the alternative could be an increase of Australia's existing *specific* excise that is applied on a per stick or per kilogram basis.³⁵⁹⁹

7.1514. Although the parties have not directly addressed some of the potential variations of increased tobacco taxation, we take them into account to the extent they may inform the degree of contribution that could be made by this alternative measure.³⁶⁰⁰ In this regard, we are mindful that variability in the type of tobacco excises imposed may reflect differences in governments' objectives and the particular constraints they face.³⁶⁰¹ We also recall that alternative measures serve as a conceptual tool in the overall analysis under Article 2.2, and that "[s]uch alternative measures are of a hypothetical nature in the context of the analysis under Article 2.2 because they do not yet exist in the Member in question, or at least not in the particular form proposed by the complainant".³⁶⁰² The alternative proposed by the complainants is inherently variable given its hypothetical nature and the complainants' argument that increased taxation could be calibrated to achieve an equivalent contribution to that found by the Panel to be achieved by the TPP measures.

7.1515. In arguing that the level of increased taxation could be calibrated to contribute to Australia's public health objective to a degree equivalent to that of the TPP measures, the complainants have all referred to the magnitude of the effects of price on tobacco consumption as measured by the price elasticity of demand³⁶⁰³, which indicates the proportionate reduction in consumption resulting from an increase in price. The WHO has observed that relevant studies concerning cigarettes have produced a wide range of estimates in this regard, but that "the vast majority of these studies estimate price elasticities in the range from -0.25 to -0.5, with most of these clustered around -0.4", meaning that a price increase of 10% would lead to a 4% reduction in consumption.³⁶⁰⁴ Drawing upon these sources, the Australian government has characterized this as "the consensus price elasticity of around -0.4" that, based on studies by the World Bank and WHO, is valid for high income countries notwithstanding somewhat more dispersed estimates for high-income countries other than the United States and United Kingdom.³⁶⁰⁵

7.1516. The elasticity figure of -0.4, which has not been contested by any party in these proceedings³⁶⁰⁶, refers to the price elasticity of *overall* tobacco demand. In this regard, the WHO

³⁵⁹⁸ See WHO Tobacco Tax Manual, Full Text, (Exhibit CUB-62), p. 11; and Chaloupka et al. 2012, (Exhibit DOM-115), pp. 173-174.

³⁵⁹⁹ See, e.g. Neven Report, (Exhibit UKR-3) (SCI), p. 34, fn 62. An additional consideration that has not been specified is whether the alternative would entail *single-rate* specific taxation for all tobacco products, or whether the alternative could differentiate among different tobacco products (including by price category and other brand characteristics). WHO Tobacco Tax Manual, Full Text, (Exhibit CUB-62), p. 34. See also *ibid.* p. 11 (noting that "[i]n addition to specific taxation, depending on the characteristics of the product consumed most widely and the structure of each industry, the government can also impose an *ad valorem* tax to adjust specification attributes (appeal and variety) to a desired level"). See also Chaloupka et al. 2012, (Exhibit DOM-115), p. 173 (describing different excise regimes levied according to manufacturers' prices, production scale, and characteristics of cigarettes).

³⁶⁰⁰ See, e.g. 2011 IARC Handbook, (Exhibit DOM-117), p. 5 (noting that "[t]he tax level and the tax regime have implications for consumer behaviour, the behaviour of the tobacco industry, and the effectiveness of tobacco tax as a public policy measure").

³⁶⁰¹ See, e.g. WHO Tobacco Tax Manual, Full Text, (Exhibit CUB-62), p. 11.

³⁶⁰² Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.328.

³⁶⁰³ See Honduras's first written submission, para. 590; the Dominican Republic's first written submission, paras. 759-761; Cuba's first written submission, para. 278; and Indonesia's first written submission, para. 433.

³⁶⁰⁴ WHO Tobacco Tax Manual, Full Text, (Exhibit CUB-62), p. 21. See also Chaloupka et al. 2012, (Exhibit DOM-115), p. 175; US Surgeon General's Report 2014, (Exhibits AUS-37, DOM-104, CUB-35), p. 789 (referring to a "consensus estimate" from two reviews "that a 10% increase in cigarette price will result in a 3-5% reduction in overall cigarettes consumed"). Moreover, studies on tobacco use in low-income and middle-income countries have indicated that demand for tobacco products is more responsive to price than it is in high income countries. See 2011 IARC Handbook, (Exhibit DOM-117), p. 350.

³⁶⁰⁵ Tobacco Excise Increase PIR, (Exhibits AUS-292, HND-80, DOM-119, CUB-64, IDN-21), para. 32. See also *ibid.* para. 64.

³⁶⁰⁶ The Dominican Republic has also cited empirical estimates of the smoking prevalence elasticity calculated for the Australian market, ranging from -0.436 to -0.863, which the Dominican Republic interprets

has observed that the reduced overall consumption of tobacco attributable to increased taxation is composed both of reduced smoking prevalence (due to cessation by tobacco users) and reduced intensity (due to reductions in the amount of tobacco consumed by the remaining smokers).³⁶⁰⁷ Moreover, we note that the impact of excise and corresponding price increases may differ over the short term and long term, with evidence that long-term impacts may be greater than those in the short term.³⁶⁰⁸ As stated by the Australian government, "a reduction in smoking prevalence due to current smokers quitting will have an immediate impact on smoking rates whereas a reduction in prevalence due to a lower take-up of smoking will have an impact over the longer terms as it affects potential future smokers".³⁶⁰⁹

7.1517. In respect of its increase of the tobacco excise by 25% in 2010, Australia's aims included cutting total tobacco consumption by around 6% and reducing the prevalence of smokers by 2%-3%.³⁶¹⁰ In its PIR of this excise increase, Australia identified certain effects through which tobacco consumption would be reduced, namely less smoking by some smokers, cessation by others, discouragement/prevention of relapse, and decline in smoking initiation.³⁶¹¹ Subject to certain data limitations, the Australian Treasury's Post-Implementation Review reported positive improvements in respect of reducing total tobacco consumption and, to a lesser extent, prevalence among adults.³⁶¹²

7.1518. The elasticity figures estimated in academic research, and Australia's own experience in levying a tobacco excise, are indicative of the potential contribution of increased taxation to Australia's objective. Nevertheless, in assessing the degree of such contribution, we note that the complainants have not defined the exact contours of their proposed increase in taxation, but have instead referred primarily to these figures concerning price elasticity of demand as a basis for

to comprise half of an elasticity of *overall consumption* in Australia. See Dominican Republic's first written submission, paras. 760-761.

³⁶⁰⁷ WHO Tobacco Tax Manual, Full Text, (Exhibit CUB-62), p. 21; WHO, Raising Tax on Tobacco, (Exhibit IDN-88), p. 8; WHO Report on the Global Tobacco Epidemic 2015, (Exhibits AUS-595, DOM-319), p. 26. Various other sources similarly attest to a combined impact of reduced smoking prevalence and intensity. The IARC of the WHO reports that "studies that examine both smoking prevalence and intensity generally find that the effects of price on consumption are about evenly split between the effect of price on smoking prevalence and the effect of price on intensity of smoking among those who smoke." 2011 IARC Handbook, (Exhibit DOM-117), p. 176. Similarly, academic studies regarding price effects on consumption have indicated that "about half of the impact of price on tobacco use results from its effect on prevalence, largely reflecting cessation among adult users." Chaloupka et al. 2012, (Exhibit DOM-115), p. 175. This dual impact on intensity and prevalence has been submitted to imply that the price elasticity of overall consumption is double the elasticity of prevalence, referred to as a "rule of two". See Dominican Republic's first written submission, para. 758.

³⁶⁰⁸ See, e.g. 2011 IARC Handbook, (Exhibit DOM-117), p. 119, Tables 4.1, 4.2, and 4.3 presenting elasticity estimates from countries of varying income levels and presenting many long-run elasticity estimates that are greater than short-run elasticity estimates. See also Chaloupka et al. 2012, (Exhibit DOM-115), p. 175 (noting that several studies have "modelled the addictive nature of tobacco use, finding that tobacco demand is more price responsive in the long run than in the short run"); and WHO Tobacco Tax Manual, Full Text, (Exhibit CUB-62), p. 23 (noting that "[a]s predicted by economic theories of addiction, the impact of a permanent increase in price will be larger in the long run than in the short run").

³⁶⁰⁹ Tobacco Excise Increase PIR, (Exhibits AUS-292, HND-80, DOM-119, CUB-64, IDN-21), para. 33. We note that this is consistent with empirical estimates for price elasticities calculated specifically for the Australian market. See Bardsley and Olekalns 1999, (Exhibit DOM-122), p. 237, Figure 5; and 2011 IARC Handbook, (Exhibit DOM-117), pp. 117-118.

³⁶¹⁰ PM Rudd, Anti-Smoking Action Media Release, (Exhibits AUS-115, HND-4, DOM-52); and Tobacco Excise Increase PIR, (Exhibits AUS-292, HND-80, DOM-119, CUB-64, IDN-21), para. 59. The reduction of total tobacco consumption by 6% was estimated on the basis that a 25% excise increase would lead to a 15% price increase (assuming approximately 60% of a packet of cigarettes is excise), and then calculating the decline in consumption with an assumed elasticity figure. See Tobacco Excise Increase PIR, (Exhibits AUS-292, HND-80, DOM-119, CUB-64, IDN-21), para. 64. The reduction of smoking prevalence was estimated on the basis a smoking rate of 17% among the adult population. See *ibid.* para. 69.

³⁶¹¹ Tobacco Excise Increase PIR, (Exhibits AUS-292, HND-80, DOM-119, CUB-64, IDN-21), para. 62.

³⁶¹² Tobacco Excise Increase PIR, (Exhibits AUS-292, HND-80, DOM-119, CUB-64, IDN-21), paras. 133-135. Moreover, research conducted after the 2010 tax increase indicated that recent quitters who had quit after the tax increase (versus before) were more likely to report that they were influenced by price, and smokers' responses to the price increases included smoking-related changes (i.e. trying to quit or cut down) and product-related changes (i.e. changing to lower priced brands, using loose tobacco, or buying in bulk). National Tobacco Strategy 2012-2018, (Exhibits AUS-129, DOM-131), p. 19.

arguing that taxation could be calibrated to make a contribution equivalent to any contribution made by the TPP measures.

7.1519. We further note that, as we discuss below, there are various other considerations that could have implications on the degree of contribution to Australia's objective that might be achieved under this alternative.

7.1520. Evidence before us regarding the impacts of tobacco excise increases suggests that the potential contribution may vary across different population groups.³⁶¹³ In this vein, the WHO estimates that the impact of a tobacco excise increase will be 2-3 times greater for those with less money, including youth.³⁶¹⁴ The IARC, noting that adult smoking prevalence and intensity are inversely related to price, reports that empirical evidence supports the prediction of economic theory that tobacco use among young people would be more responsive to price than would adult tobacco use.³⁶¹⁵ With regard to different socio-economic groups, in setting the National Tobacco Strategy 2012-2018, Australia's Intergovernmental Committee on Drugs noted research showing that the impact of price rises is most significant in low-income groups.³⁶¹⁶ This is in line with the IARC's conclusion that the price responsiveness of tobacco demand is generally higher among the poor than the rich in high-income countries.³⁶¹⁷ This evidence is indicative of the potentially greater effectiveness of taxation for certain population groups, while others may be relatively less responsive to price changes than to other tobacco control measures.³⁶¹⁸

7.1521. In addition, in support of their arguments regarding the adoption of increased taxation as an alternative to the TPP measures, the complainants have drawn attention to the fact that Australia's tobacco taxes are lower than the WHO recommended taxation level of 70% of the consumer price of tobacco products.³⁶¹⁹ We note that this recommended level is an indicative benchmark for which the WHO has recognized that other considerations may be relevant for an implementing government.³⁶²⁰ In any event, given the incentives through which an excise increase would contribute to the objective at issue, we consider that it is tobacco product prices, rather than underlying tax rates alone, that are most directly relevant to the influence on tobacco

³⁶¹³ As stated by Professor Chaloupka, the behavioural impact from increasing the tobacco excise may not be uniform, and further increases in Australia's existing excise taxes on tobacco "will reduce tobacco among some current and potential users, while others will change their behaviors in a ways that have a smaller impact on consumption, while still others will be unaffected". Chaloupka Public Health Report, (Exhibit AUS-9), para. 9(b). See also *ibid.* paras. 34, 42, and 44. With regard to age groups, the Australian Treasury has noted findings of studies that teenagers and young adults are significantly more responsive to price increases. Tobacco Excise Increase PIR, (Exhibits AUS-292, HND-80, DOM-119, CUB-64, IDN-21), para. 35 (referring to economic literature on price elasticity of demand that estimates that a 10% increase in cigarette prices reduces consumption by approximately 5-12% for teenage smokers compared to around 1% for smokers in their late 20s).

³⁶¹⁴ WHO, Raising Tax on Tobacco, (Exhibit IDN-88), pp. 6-7.

³⁶¹⁵ 2011 IARC Handbook, (Exhibit DOM-117), p. 352.

³⁶¹⁶ National Tobacco Strategy 2012-2018, (Exhibits AUS-129, DOM-131), p. 19.

³⁶¹⁷ 2011 IARC Handbook, (Exhibit DOM-117), p. 353 (noting that this is based largely on evidence from the United States and the United Kingdom).

³⁶¹⁸ Tobacco Excise Increase PIR, (Exhibits AUS-292, HND-80, DOM-119, CUB-64, IDN-21), para. 34. (referring to a study by the US National Bureau of Economic Research claiming that increases in cigarette taxes are associated with insignificant decreases in adults' consumption, and that it would take a 100% tax increase to decrease adult smoking by as much as 5%). Chaloupka observes that "while higher income smokers are relatively unresponsive to cigarette price increases, they are more likely to respond to less than fully comprehensive smoke-free workplace policies ... given their greater exposure to these policies." Chaloupka Public Health Report, (Exhibit AUS-9), para. 34.

³⁶¹⁹ See Honduras's first written submission, para. 595; Honduras's second written submission, para. 702; and Cuba's second written submission, para. 343.

³⁶²⁰ WHO Tobacco Tax Manual, Full Text, (Exhibit CUB-62), pp. 53 and 104 (referring to the 70% excise tax level as a "best practice" that should account for factors such as differences in countries' "starting point with respect to tax structure and tax rates"). In addition, the WHO Report on the Global Tobacco Epidemic 2015, (Exhibits AUS-595, DOM-319), p. 111 states that "it is important to note that changes in tax as a share of price are not only dependent on tax changes but also on price changes. Therefore, despite an increase in tax, the tax share could remain the same or go down; similarly sometimes a tax share can increase even if there is no change/increase in the tax." We also note that the Article 6 FCTC Guidelines, (Exhibit AUS-111), Section 3.2, entitled "Level of tax rates to apply", states that "[t]here is no single optimal level of tobacco taxes that apply to all countries ...".

consumption.³⁶²¹ This is consistent with the WHO's recommended best practice that, "[i]n order to maximize the public health impact of higher tobacco taxes, while at the same time generating higher revenues, governments should raise taxes so as to raise prices and reduce the affordability of tobacco products".³⁶²² In this regard, we note that Australia has among the highest tobacco prices in the world.³⁶²³ Further, Australia's automatic increases of its specific excise based on average weekly earnings have been recognized by the WHO as ensuring that tobacco products do not relatively become more affordable over time.³⁶²⁴ Indeed, there is evidence that Australia's excise increases have been successful in leading to a decline in consumer affordability.³⁶²⁵

7.1522. We also note that a central premise underlying the complainants' alternative appears to be that tax increases would be passed on to smokers through an increase in the consumers' price, rather than being absorbed by the industry, so as to create the deterrent effect on tobacco use.³⁶²⁶ To the extent that the benchmark taxation level recommended by the WHO has not been achieved due to industry pricing practices, such "over-shift" practices by the industry may augment, rather than negate, the reduced affordability of tobacco products that is effected by a tax increase. We therefore do not consider the proportion of excise taxes in the total price in itself to be conclusive as to the potential degree of contribution that would be achieved by increased taxation.

7.1523. Taking these considerations into account, we agree that an increase in tobacco excise taxes in Australia could, in principle, make a meaningful contribution to Australia's objective of improving public health by reducing the use of, and exposure to, tobacco products. Indeed, we do not understand Australia to challenge the proposition that taxation of tobacco products is capable of contributing to the achievement of its objective.

7.1524. We therefore consider whether such increased taxation would achieve a degree of contribution to the objective of reducing use of, and exposure to, tobacco products, *equivalent* to that made by the TPP measures.

7.1525. As described above, it is uncontested that taxation is an effective instrument of tobacco control and would be expected to impact consumer behaviour, and thereby contribute to the objective of reducing the use of, and exposure to, tobacco products. Australia has accordingly implemented scaled increases of its own tobacco excise for the same public health objective as that pursued by the TPP measures, and with indications of its intention to continue to do so in the future as part of its comprehensive tobacco control strategy.³⁶²⁷ In this case, we consider it highly relevant that part of this comprehensive strategy entails a version of the alternative proposed, which Australian authorities have successively augmented in the past while taking into account potentially undesirable impacts of increased taxation.³⁶²⁸ We have also noted evidence that

³⁶²¹ Tobacco Excise Increase PIR, (Exhibits AUS-292, HND-80, DOM-119, CUB-64, IDN-21), para. 91. We note in this connection the Dominican Republic's observation that "the tax-to-retail price ratio is just one benchmark for assessing levels of taxation, and not necessarily the most appropriate", as "[t]here are several other benchmarks used to assess the affordability of tobacco products". Dominican Republic's second written submission, para. 662. For instance, the WHO has also examined the measure of tobacco affordability based on the relationship between per capita income growth and the rise in tobacco prices, and has further noted that "[t]ax as a proportion of price does not tell the whole story". See WHO Report on the Global Tobacco Epidemic 2015, (Exhibits AUS-595, DOM-319), pp. 82 and 112.

³⁶²² WHO Tobacco Tax Manual, Full Text, (Exhibit CUB-62), p. 107.

³⁶²³ See WHO Report on the Global Tobacco Epidemic 2015, Appendix IX, (Exhibit AUS-595.A), Table 9.1, Graph 9.2.0. See also fn 3596 above.

³⁶²⁴ See WHO Report on the Global Tobacco Epidemic 2015, (Exhibits AUS-595, DOM-319), p. 39; and Chaloupka Rebuttal Report, (Exhibit AUS-582), para. 28.

³⁶²⁵ British American Tobacco Australia, Submission to the Australian Government's Re:think – Tax discussion paper consultation, 5 June 2015, (BATA Submission on Australian Government Tax Discussion Paper), (Exhibit AUS-593), p. 9; and Chaloupka Rebuttal Report, (Exhibit AUS-582), para. 28.

³⁶²⁶ See, e.g. WHO Tobacco Tax Simulation Model, (Exhibit CUB-63), p. 9.

³⁶²⁷ See Australia's second written submission, para. 552; and National Tobacco Strategy 2012-2018, (Exhibits AUS-129, DOM-131), p. 20.

³⁶²⁸ See NPHT Technical Report 2, (Exhibits AUS-52, JE-12), p. 15 (providing recommendations to increase taxation in conjunction with effective measures to prevent revenue evasion and better services for quitters); and Response to NPHT, The Roadmap for Action, (Exhibits AUS-116, JE-15), p. 63 (noting that the Australian government declined to pursue the full excise increase advocated by the Preventative Health Taskforce in light of potential financial stress among people who continue to smoke).

tobacco prices in Australia are among the highest in the world, and that indexation of excises to wages has been recognized as contributing to reduced affordability of tobacco products.

7.1526. Nonetheless, we are not persuaded that *substituting* the TPP measures with additional tobacco taxation would result in an equivalent contribution to Australia's objective. The complainants have argued that the level of taxation could be calibrated to replicate any contribution made by the TPP measures. However, even assuming that the exact reduction in overall consumption caused by the TPP measures could be isolated and quantified, an increase in taxation designed to achieve the same overall reduction would necessarily leave in place those aspects of tobacco product and retail packaging that the TPP measures address as "part of a more complex suite of measures directed at the same objective" of tobacco control.³⁶²⁹ Indeed, we have already found that the TPP measures contribute to Australia's objective, *inter alia* by removing the types of images and associated messages that may be conveyed by tobacco packaging that are of such a nature as to be capable of conveying a belief that initiating tobacco use can fulfil certain needs, to which youth and young adults are particularly vulnerable, and by influencing smoking cessation or relapse by acting on the ability of the pack to act as a conditioned cue for smoking and thus affect the ability of smokers to quit smoking, or not relapse. We have also found that, more generally, by removing the opportunity for the packaging to have such effects, plain packaging is apt to reduce the appeal of tobacco products, enhance the effectiveness of GHWs and reduce the ability of the retail packaging of tobacco products to mislead consumers about the harmful effects of smoking or using tobacco products, and, as a consequence, have an impact on smoking behaviours.

7.1527. We are mindful that a proposed alternative measure need not achieve a degree of contribution *identical* to that achieved by the challenged technical regulation in order for it to be found to contribute to an *equivalent* degree of contribution. At the same time, as described above, we consider that the operation of the TPP measures, including their contribution to Australia's objective of reducing the use of, and exposure to, tobacco products, must be viewed against the broader context of the comprehensive strategy designed and implemented by Australia to address tobacco control. In this connection, we note that were an increase in tobacco excise tax implemented in Australia as a *substitute* for the TPP measures, the effects of tobacco packaging that the TPP measures seek to address, including any images or messaging conveyed by tobacco packaging and the ability of the pack to act as a conditioned cue, would not be addressed, and any associated impact on smoking behaviours would be foregone. We further note, in this respect, that while taxation as an instrument of tobacco control may contribute to reducing prevalence and intensity of smoking generally³⁶³⁰, the limitations of tobacco taxation as an isolated measure are recognized in the FCTC Guidelines for Implementation of Article 6³⁶³¹, which state that "tobacco taxes do not exist in a vacuum and should be implemented as part of a comprehensive tobacco-control strategy".³⁶³² In our view, this statement is consistent with the potential indirect effects that may need to be accounted for in the implementation of increased taxation, as well as the failure of increased taxation to address aspects of the appearance of tobacco products and their retail packaging that are addressed by the TPP measures.

7.1528. We consider the situation before us to be one in which "[s]ubstituting one element of this comprehensive policy for another would weaken the policy by reducing the synergies between its components, as well as its total effect."³⁶³³ While different measures may have the capacity to contribute through various means to the same objective of reducing the use of, and exposure to, tobacco products, this does not imply that they would be interchangeable or substitutable, and thereby constitute "alternatives" to each other, where each measure is intended to address a distinct aspect of a multifaceted problem, and where the comprehensive and complementary nature of the measures is an integral part of the approach pursued. In such a context, the removal

³⁶²⁹ Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.216 fn 660.

³⁶³⁰ As discussed above, the imposition of taxes may entail competitive impacts between tobacco brands and products as well as the potential for incidental effects relating to illicit trade, tax evasion, and financial hardship on lower-income groups of the population. See, e.g. WHO Tobacco Tax Manual, Full Text, (Exhibit CUB-62), Chapter 4.

³⁶³¹ See para. 7.1509 above.

³⁶³² Article 6 FCTC Guidelines, (Exhibit AUS-111), Section 1.6, p. 2. See also *ibid.* Section 1, "Introduction", p. 1.

³⁶³³ Appellate Body Report, *Brazil – Retreaded Tyres*, para. 172.

of one element of the comprehensive policy may, as the Appellate Body has described it, weaken the policy by reducing the synergies between its components, as well as its total effect.

7.1529. In addressing the particular risks arising from tobacco use and exposure, it is recognized that "a combination of measures may be appropriate" and the public health objective in this case is pursued by "different measures [that] address different aspects of the same risk and complement each other towards addressing this risk".³⁶³⁴ Specifically, the TPP measures occupy a role as a contributing element in the comprehensive tobacco control regime maintained by Australia, which includes in particular a total prohibition on advertising and promotion and GHWs, as well as regular scaled increases of tobacco taxation. In this context, as discussed above, the TPP measures contribute to reinforcing, and avoid undermining, the broader prohibition on advertising and promotion for tobacco products and GHWs that Australia also maintains, neither of which is challenged in these proceedings. We also note that, as discussed above, Australia also already maintains a high level of excise and other taxes on tobacco products, as an integral component of its comprehensive tobacco control strategy. In this context, an increased tobacco excise without the simultaneous contribution by the TPP measures, described above, would impact consumer behaviour while at the same time preserving packaging features and brand appeal that could possibly frustrate or undermine the price disincentive effected by excise increases.³⁶³⁵

7.1530. As provided in Article 2.2, we also take account of the risks non-fulfilment of Australia's objective would create, particularly considering the nature of the risks and gravity of the consequences that are posed by tobacco use and exposure. The risk to human health from the use of, and exposure to, tobacco products is recognized to be particularly grave.³⁶³⁶ In our view, this is consonant both with Australia's aim of closing potential regulatory gaps in its broader approach to tobacco control³⁶³⁷, as well as WTO Members' entitlement under the TBT Agreement to pursue legitimate regulatory objectives at levels they consider appropriate.³⁶³⁸

7.1531. In light of all these elements, we are not persuaded that the complainants have demonstrated that increased tobacco taxation, as a substitute for the TPP measures, would achieve Australia's objective to an equivalent degree, taking into account the nature of the objective, the risks non-fulfilment would create, and the evidence before us regarding the TPP measures' complementarity with other existing tobacco control measures.

7.2.5.6.3.5 Whether an increase in taxation of tobacco products is reasonably available to Australia

Arguments of the parties

7.1532. Honduras argues that the proposed tax increase is *reasonably available* to Australia, since it does not involve substantial technical difficulties or prohibitive costs, and because Australia had adopted various tax increases over the past years.³⁶³⁹ Honduras adds that 54 other FCTC parties had reached a 70% tax rate by 2015³⁶⁴⁰, and 25 other parties have a higher overall tax than Australia.³⁶⁴¹ With reference to Australia's argument that its taxes do not account for 70% of the retail price of tobacco products because of industry pricing policy, Honduras submits that it "is no defense" to "blame its own regulatory failure on the industry when the industry is merely implementing common and well-understood pricing policies".³⁶⁴² Honduras asserts that the industry does not react differently in Australia than it does in any other markets where tax

³⁶³⁴ Panel Report, *Brazil – Retreaded Tyres*, para. 7.213.

³⁶³⁵ See WHO Tobacco Tax Manual, Full Text, (Exhibit CUB-62), pp. 45, 51, 105.

³⁶³⁶ See para. 7.1310 above. Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, fn 660.

³⁶³⁷ See, e.g. Australia's first written submission, para. 45; response to Panel question No. 64, para. 144; and response to Panel question No. 152, para. 56.

³⁶³⁸ Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.215.

³⁶³⁹ Honduras's first written submission, paras. 600 and 922; and second written submission, para. 221.

³⁶⁴⁰ Honduras's second written submission, para. 702.

³⁶⁴¹ Honduras's second written submission, para. 703.

³⁶⁴² Honduras's second written submission, para. 702.

increases are frequently complemented with price increases because such price increases are less noticeable when they are combined with tax increases.³⁶⁴³

7.1533. The Dominican Republic also submits that excise tax increases on tobacco products are *reasonably available* to Australia, as there would be no additional government administrative or enforcement costs for an increased tax rate. The Dominican Republic adds that increased tax rates may increase overall revenue, which could be earmarked to fund tobacco control programmes that promote cessation and prevent initiation of tobacco use (including the social marketing programmes, also advocated by the Dominican Republic).³⁶⁴⁴ The Dominican Republic also submits that Australia's current taxes do not meet the WHO's recommendations for tobacco products, i.e. that total taxes (the sum of excise tax, general sales tax, value-added tax, etc.) account for at least 75% of the retail price³⁶⁴⁵ and notes that these WHO recommendations take account of the fact that the tobacco industry (like any other industry) raises its prices over time, such that "sustained" tax increases are needed to "raise" and "preserve" the share of excise tax in the price.³⁶⁴⁶

7.1534. Cuba argues that gradual tax increases are "reasonably possible and less trade-restrictive".³⁶⁴⁷ Cuba refers to the WHO's Tobacco Tax Simulation Model and argues that the "Australian Treasury is able easily to conduct the analyses that would allow for this alternative measure to be adopted and implemented successfully".³⁶⁴⁸ Cuba also considers that Australia has not rebutted the argument that its tobacco taxes are lower than the WHO recommendation of 70% of the retail price, that it is "no defence" to blame industry pricing policy for its own regulatory failure, and that 38 States Parties to the FCTC (and Cuba) met the objective of 70% in 2013 contradicting Australia's assertions.³⁶⁴⁹

7.1535. Indonesia also argues that tax increases are reasonably available as they are already in effect, as evidenced by Australia's 25% tobacco tax increase in April 2010, and the four annual 12.5% increases announced by Australia that began in December 2013. Indonesia notes that even with planned tax increases, Australia's level of tobacco taxation remains low by international standards and is below the WHO's recommended target of 70% (Indonesia points out that "the Australian Treasury Department estimated that Australia's total excise tax rate was only at 60 per cent" in its PIR of the April 2010 25% tax increase).³⁶⁵⁰

7.1536. Australia submits that the complainants have not specified "with any precision" the magnitude of the excise increases they propose as an alternative measure. To the extent the complainants advocate excise increases in excess of those already, or to be, introduced, Australia argues that it balances its tobacco control objectives against other considerations, such as the extent to which tax increases result in financial hardship for those smokers who are unable to give up their addiction³⁶⁵¹, which, Australia states, is "entirely consistent" with Article 6 of the FCTC, which states that its recommendations are "[w]ithout prejudice to the sovereign right of the Parties to determine and establish their taxation policies".³⁶⁵²

7.1537. Australia further argues that the complainants' attempts to compare Australia's policy unfavourably with the WHO recommendation that taxes account for 70% of the retail prices of tobacco products are not credible, as Australia's excise taxes and tobacco prices are among the highest in the world. In addition, Australia contends that the tobacco industry has "typically 'over-shifted' excise increases", with the effect that the "70% tax/price ratio effectively becomes a

³⁶⁴³ Honduras's comments on Australia's response to Panel question No. 158.

³⁶⁴⁴ Dominican Republic's first written submission, paras. 762 and 1021; and second written submission, paras. 657-669.

³⁶⁴⁵ Dominican Republic's comments on Australia's response to Panel question No. 158 (referring to WHO Report on the Global Tobacco Epidemic 2015, (Exhibits AUS-595, DOM-319), p. 78).

³⁶⁴⁶ Dominican Republic's comments on Australia's response to Panel question No. 158 (referring to WHO Report on the Global Tobacco Epidemic 2015, (Exhibits AUS-595, DOM-319), pp. 39 and 82).

³⁶⁴⁷ Cuba's second written submission, para. 342.

³⁶⁴⁸ Cuba's first written submission, para. 279.

³⁶⁴⁹ Cuba's second written submission, para. 343.

³⁶⁵⁰ Indonesia's first written submission, para. 432.

³⁶⁵¹ Australia's first written submission, para. 738; and response to Panel question No. 158.

³⁶⁵² Australia's first written submission, paras. 738-739.

moving target".³⁶⁵³ Australia adds that "while this strategy means that Australia moves more slowly towards the 70% target than would otherwise be the case, it in fact enhances the effectiveness of Australia's excise increases by providing an additional boost to price".³⁶⁵⁴

Analysis by the Panel

7.1538. The Panel notes that the WHO and tobacco control experts have recognized the cost-effective nature of taxation as a tobacco control measure. In this regard, it has been noted that higher tobacco taxes generate additional government revenue while at the same time reducing tobacco consumption.³⁶⁵⁵ The relatively low price elasticity of demand for tobacco products (less than -1.0), as well as a relatively low share of excises in retail prices³⁶⁵⁶, is indicative that there may be room to increase excises in a manner that would increase revenues while still reducing tobacco consumption.³⁶⁵⁷ As a general matter, there is also evidence before us to suggest that, in comparison to other tobacco control measures, the taxation of tobacco products entails relatively little governmental expense.

7.1539. At the same time, we are mindful that the imposition or escalation of tobacco taxation may pose potential challenges and administrative burdens. These may relate, for example, to illicit trade, domestic employment, tax avoidance and evasion, and the regressivity of tax rates for lower-income groups of the population.³⁶⁵⁸ This suggests that, notwithstanding its relative cost-effectiveness for governments, increased taxation may present a variety of potential concerns that may need to be taken into account within a specific regulatory and market context. In this regard, we note that Australia's past excise increases have reflected consideration of other factors such as financial stress among those who continue to smoke and the prevention of illicit trade in tobacco.³⁶⁵⁹

7.1540. Nevertheless, we do not understand Australia to argue that it is incapable of increasing its existing taxes on tobacco products, for example due to prohibitive costs or substantial technical difficulties.³⁶⁶⁰ In addition, we note the existence of resources and models that provide elaborate guidance for tobacco tax administration across different settings and situations to facilitate governments' utilization of taxation as a public policy tool while accounting for the burdens and potential complexities of implementation and administration.³⁶⁶¹

7.1541. We therefore conclude that the implementation of increased taxation of tobacco products would be a measure reasonably available to Australia, to the extent that it would be feasible in practice.

7.2.5.6.3.6 Overall conclusion on increased taxation as an alternative to the TPP measures

7.1542. On the basis of the foregoing, we have concluded above that the complainants' proposal that Australia adopt increased taxation of tobacco products would be an alternative measure, in that it is not currently being applied by Australia.

³⁶⁵³ Australia's first written submission, para. 708; and response to Panel question No. 158.

³⁶⁵⁴ Australia's response to Panel question No. 158.

³⁶⁵⁵ WHO Tobacco Tax Simulation Model, (Exhibit CUB-63), p. 1. See also WHO, Raising Tax on Tobacco, (Exhibit IDN-88), p. 6 ("[r]aising taxes on tobacco is the most cost-effective solution for reducing tobacco use in all types of settings").

³⁶⁵⁶ See WHO Report on the Global Tobacco Epidemic 2015, Appendix IX, (Exhibit AUS-595.A), Graph 9.1.0; and WHO Report on the Global Tobacco Epidemic 2015, (Exhibits AUS-595, DOM-319), Table 2.3.6.

³⁶⁵⁷ WHO Tobacco Tax Manual, Full Text, (Exhibit CUB-62), p. 71.

³⁶⁵⁸ See, e.g. WHO Tobacco Tax Manual, Full Text, (Exhibit CUB-62), Chapter 4; WHO Tobacco Tax Simulation Model, (Exhibit CUB-63); and Tobacco Excise Increase PIR, (Exhibits AUS-292, HND-80, DOM-119, CUB-64, IDN-21), paras. 96-110.

³⁶⁵⁹ See Response to NPHT, The Roadmap for Action, (Exhibits AUS-116, JE-15), p. 63; Tobacco Excise Increase PIR, (Exhibits AUS-292, HND-80, DOM-119, CUB-64, IDN-21), paras. 99-100; and National Tobacco Strategy 2012-2018, (Exhibits AUS-129, DOM-131), p. 20.

³⁶⁶⁰ See Appellate Body Report, *Brazil – Retreaded Tyres*, para. 156.

³⁶⁶¹ See WHO Tobacco Tax Simulation Model, (Exhibit CUB-63).

7.1543. However, we have also found that we are not persuaded that the complainants have demonstrated that increased taxation would be less trade-restrictive than the TPP measures. In this context, we have found, *inter alia*, that taxation is recognized to give rise, including on the Australian market, to the type of "downtrading" or "downward substitution" effects that are of concern to the complainants in respect of the TPP measures.

7.1544. We also concluded that, while increased taxation could be expected to make a meaningful contribution to Australia's objective of improving public health by reducing the use of, and exposure to, tobacco products, we are not persuaded that, as a substitute to the TPP measures, it would make an equivalent contribution to this objective, as it would leave unaddressed a number of aspects of demand for tobacco products that are addressed by the TPP measures as part of Australia's comprehensive tobacco control strategy. In making this finding, we have taken into account the design of the TPP measures, the risks that non-fulfilment of the TPP measures' objective would create, as well as the broader context of Australia's comprehensive suite of measures directed at reducing the use of, and exposure to, tobacco products, including the fact that it currently already maintains high levels of taxation on tobacco products.³⁶⁶²

7.1545. We therefore find that the complainants have not demonstrated that increased tobacco taxation would be a less trade-restrictive alternative to the TPP measures, that would make an equivalent contribution to Australia's objective.

7.2.5.6.4 Third proposed alternative measure: social marketing campaigns

7.1546. All complainants argue that "improvements" to³⁶⁶³, or "effective"³⁶⁶⁴, social marketing campaigns in Australia would be a less trade-restrictive alternative to the TPP measures, which would make an equivalent contribution to Australia's objective.

7.1547. Australia's primary argument in response to this proposed alternative is that it "has a long history of using education and social marketing campaigns as a tobacco control measure", and that the complainants' "attempt to dress-up an existing Australian tobacco control measure as an 'alternative' is simply not credible".³⁶⁶⁵ We therefore consider the proposal by the complainants, before turning to Australia's argument on this point.

7.2.5.6.4.1 Description of the proposed measure

7.1548. Honduras proposes as an additional alternative "improve[ments to] key aspects of Australia's existing anti-smoking social marketing campaigns".³⁶⁶⁶

7.1549. Specifically, Honduras refers to an expert report by Professor Keller jointly submitted by Honduras and the Dominican Republic. In this report, Professor Keller submits that Australia's National Tobacco Campaign's (NTC) "main campaign" has consistently failed to contribute to Australia's goal of reducing smoking prevalence, and that the NTC is deficient in all of the eight steps that should be used for the development of an effective social marketing campaign.³⁶⁶⁷

7.1550. Professor Keller presents an alternative social marketing campaign which consists of specific changes to the NTC campaigns for each stage of this framework, which Honduras summarizes as follows:

- a. Step 1: segment the target audience on the basis of "usage status" and age, which would provide three distinct ways of reaching the Australian population: by lowering

³⁶⁶² See Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.215.

³⁶⁶³ Honduras's first written submission, paras. 626, 927.

³⁶⁶⁴ Dominican Republic's first written submission, para. 779. Cuba "adopts" the arguments put forward by the Dominican Republic in respect of social media campaigns. Cuba's first written submission, para. 288. Indonesia "endorses" the alternatives "proposed by" the Dominican Republic's regarding "increasing the effectiveness of social marketing campaigns". Indonesia's first written submission, para. 457.

³⁶⁶⁵ Australia's first written submission, para. 714.

³⁶⁶⁶ Honduras's first written submission, paras. 626 and 927.

³⁶⁶⁷ Honduras's first written submission, para. 633.

smoking initiation; achieving higher cessation rates; as well as enabling lower relapse levels.³⁶⁶⁸

- b. Step 2: determine objectives, which should be applied for each communication objective and for each target audience.³⁶⁶⁹
- c. Step 3: redesign the message in a manner that should reflect and amplify the needs of each of its target audiences.³⁶⁷⁰
- d. Step 4: select the communication channels, which, instead of relying primarily on TV and other mass media, should include multiple channels, particularly channels that facilitate personal communication. Moreover, new message themes and the communication channels would be chosen, which use personal testimonies presented online and on social media.³⁶⁷¹
- e. Step 5: establish media budget accountability, using four concrete strategies: (i) NTC marketers should use the Centre for Disease Control's ... MessageWorks to identify the most effective message, and to test-run multiple messages for *Non-smokers* and *Reflectors* before they are launched; (ii) NTC use social media and mHealth (SMS and text messages) to reduce communication costs; and (iv) the NTC should build relationships with partners, especially network partners and service providers, to get *pro bono* air time, bandwidth or server space, and thereby lower costs to deliver personal messages to target audiences.³⁶⁷²
- f. Step 6: decide on the media mix, shifting the thrust of its activities on social networks and internet-based channels, especially to address young adult "*Reflectors*".³⁶⁷³
- g. Step 7: improve evaluation design and metrics.³⁶⁷⁴
- h. Step 8: manage integrated marketing communications, by integrating programs, campaigns, messages, and communication channels in the following manner: (i) improve coverage; (ii) improve contribution; (iii) improve commonality; (iv) improve complementarity; (v) improve conformability; and (vi) improve costs.³⁶⁷⁵

7.1551. The Dominican Republic argues that a less restrictive alternative to the TPP measures is "the formulation and execution of effective social marketing campaigns in Australia", also with reference to the expert report by Professor Keller.³⁶⁷⁶ The Dominican Republic describes social marketing campaigns as "public service messages transmitted over a range of communication platforms (e.g. advertising online and social media, mobile marketing, direct marketing and personal selling) to reach vulnerable segments of the population".³⁶⁷⁷ The Dominican Republic asserts that Australia has failed to make effective use of social marketing campaigns, and that its recent social marketing campaigns under the umbrella of the NTC "have not had any appreciable

³⁶⁶⁸ Honduras's first written submission, para. 635 (referring to Keller Report, (Exhibit DOM/HND-8), paras. 111-123).

³⁶⁶⁹ Honduras's first written submission, para. 635 (referring to Keller Report, (Exhibit DOM/HND-8), paras. 124-128).

³⁶⁷⁰ Honduras's first written submission, para. 635 (referring to Keller Report, (Exhibit DOM/HND-8), paras. 129-135).

³⁶⁷¹ Honduras's first written submission, para. 635 (referring to Keller Report, (Exhibit DOM/HND-8), paras. 136-140).

³⁶⁷² Honduras's first written submission, para. 635 (referring to Keller Report, (Exhibit DOM/HND-8), paras. 141-145).

³⁶⁷³ Honduras's first written submission, para. 635 (referring to Keller Report, (Exhibit DOM/HND-8), paras. 146-152).

³⁶⁷⁴ Honduras's first written submission, para. 635 (referring to Keller Report, (Exhibit DOM/HND-8), paras. 153-156).

³⁶⁷⁵ Honduras's first written submission, para. 635.

³⁶⁷⁶ Dominican Republic's first written submission, para. 779.

³⁶⁷⁷ Dominican Republic's first written submission, para. 781 (quoting Keller Report, (Exhibit DOM/HND-8), para. 5).

results regarding key behavioural metrics over the last years".³⁶⁷⁸ More specifically, Professor Keller points out that recent campaigns do not target the prevention of smoking initiation and relapse but only focus on efforts to encourage attempts to quit among an overly broad group of existing smokers aged 16-40.³⁶⁷⁹ The Dominican Republic thus refers to Professor Keller's proposed social marketing campaigns, using the same eight-step process described by Honduras.³⁶⁸⁰ The Dominican Republic summarizes this as follows:

Professor Keller recommends an improvement of NTC's current social marketing campaign with the goal of developing a multi-channel campaign that target audiences will perceive as relatable and relevant to their own situation. The campaign would be tailored to meet the target audiences' needs, while reducing NTC's development and transmission costs by leveraging empirical tools to design more effective messages, using online and social media to reduce creation and dissemination costs, and by getting pro bono air time, bandwidth, and exposure through partner organizations and corporate sponsors.³⁶⁸¹

7.1552. Cuba "adopts the arguments put forward by the Dominican Republic" with respect to implementing more effective social media campaigns.³⁶⁸²

7.1553. Indonesia "endorses [the alternative measures] proposed by the Dominican Republic regarding increasing the effectiveness of social marketing campaigns".³⁶⁸³

7.1554. Australia argues that the complainants' "attempt to dress-up an existing Australian tobacco control measure as an 'alternative' is simply not credible".³⁶⁸⁴ Australia elaborates that it "has a long history of using education and social marketing campaigns as a tobacco control measure and is regarded as a world leader in this area". Australia argues that it has received positive reviews across all metrics used by the WHO to analyse campaigns, and cites the adaptation of campaigns developed in Australia for use in other countries.³⁶⁸⁵

7.1555. In light of these arguments, we first address Australia's argument that the proposal does not amount to an alternative measure.

7.2.5.6.4.2 Whether "improved" social marketing campaigns are an alternative measure

7.1556. As noted above, the complainants rely on an expert report by Professor Keller in support of their contention that the improvement of Australia's anti-smoking social marketing campaigns is a less trade-restrictive alternative to the TPP measures that is reasonably available to Australia.³⁶⁸⁶ Professor Keller states that:

The key question that I address in my report is whether Australia was justified in implementing plain packaging as a back-up for its failing social marketing campaigns for tobacco control, or whether it could simply have improved its existing social marketing campaigns such that they create a viable alternative to plain packaging regulation.³⁶⁸⁷

7.1557. Professor Keller also states:

³⁶⁷⁸ Dominican Republic's first written submission, para. 782 (quoting Keller Report, (Exhibit DOM/HND-8), para. 10).

³⁶⁷⁹ Dominican Republic's first written submission, para. 782 (quoting Keller Report, (Exhibit DOM/HND-8), paras. 11(i) and 89).

³⁶⁸⁰ Dominican Republic's first written submission, paras. 785-790 (referring to Keller Report, (Exhibit DOM/HND-8), para. 8 and Section 3).

³⁶⁸¹ Dominican Republic's first written submission, para. 786.

³⁶⁸² Cuba's first written submission, para. 288.

³⁶⁸³ Indonesia's first written submission, para. 457; and second written submission, para. 293.

³⁶⁸⁴ Australia's first written submission, para. 714.

³⁶⁸⁵ Australia's first written submission, para. 714 (referring to WHO Country Profile - Australia, (Exhibit AUS-281), p. 5); and second written submission, para. 552.

³⁶⁸⁶ See Honduras's first written submission, paras. 927 and 626. See also Dominican Republic's first written submission, para. 779.

³⁶⁸⁷ Keller Report, (Exhibit DOM/HND-8), para. 4.

I limit myself to examining the question brought before me by the Dominican Republic and Honduras, namely how a successful anti-tobacco marketing campaign, that could make a significant contribution to Australia's ambitious prevalence objectives, would be structured. In so doing, I also assess whether Australia has fully exhausted the potential of its current federal social marketing campaigns, and what kind of changes in the current campaigns could further reduce smoking prevalence to a level that is equal or superior to the effects generated by plain packaging (if ever there were any positive effects from plain packaging). In other words, I examine whether Australia's federal social marketing campaigns can be improved such as to constitute a *less restrictive alternative* to plain packaging.³⁶⁸⁸

7.1558. Professor Keller proceeds to consider the NTC's 2011–2013 campaigns and identifies what are, in her view, a number of shortcomings of those campaigns. In Professor Keller's description, the NTC is the name by which Australia's federal anti-tobacco campaigns are collectively known.³⁶⁸⁹ Professor Keller discusses the "current series of NTC campaigns" (which, she states, is from 2011 to the time of her report), which include the "NTC – Main" campaign, the "NTC – Break the Chain" campaign, and the "NTC – More Targeted Approach" campaign.³⁶⁹⁰ Professor Keller's report is based on a "review of all publicly available NTC evaluation reports that the Government of Australia's Department of Health has commissioned to assess the success (or lack thereof) of NTC campaigns", with a particular "focus on five annual evaluation reports commissioned by [the Australian National Preventive Health Agency (ANPHA)] and [Tobacco Control Taskforce (TCT)]".³⁶⁹¹ Professor Keller then sets out a number of recommendations in respect of "designing effective federal social marketing campaigns to reduce smoking prevalence in Australia".³⁶⁹² It is on the basis of these recommendations that the complainants identify "improvement of Australia's anti-smoking campaigns"³⁶⁹³ and "effective social marketing campaigns" as an alternative to the TPP measures.³⁶⁹⁴ Australia considers that this is not a genuine alternative and is rather an "attempt to dress-up" an existing measure as an alternative.³⁶⁹⁵

7.1559. We therefore first consider whether the measure identified by the complainants constitutes an alternative measure, and in particular to what extent it differs from Australia's existing social marketing measures. In doing so, we recall our initial observations that we do not exclude that a variation on an existing measure may validly constitute an alternative measure to be considered in an assessment under Article 2.2 of the TBT Agreement, and that a measure may be a valid alternative where it exists in the responding Member, albeit in a different form from that proposed by the complainant.³⁶⁹⁶

7.1560. We first observe that Professor Keller's assessment, as she acknowledges, relates to "whether Australia's *federal* social marketing campaigns can be improved such as to constitute a less restrictive alternative to plain packaging".³⁶⁹⁷ However, responsibility for social marketing campaigns in respect of tobacco use in Australia is shared between federal campaigns and campaigns undertaken at the state and territory level.

7.1561. Professor Keller, while explicitly limiting her assessment to federal campaigns, acknowledges that "[e]very State or Territory in Australia has its own tobacco control program which organizes anti-smoking social marketing campaigns within its geographic region. Australian State and Territory anti-tobacco programs are implemented through various State and Territory organizations."³⁶⁹⁸

7.1562. Professor Keller notes that Australian state and territory tobacco control programs "have memorandums of understanding with the Commonwealth Government to coordinate some aspects

³⁶⁸⁸ Keller Report, (Exhibit DOM/HND-8), para. 6. (emphasis original)

³⁶⁸⁹ Keller Report, (Exhibit DOM/HND-8), Annex 1, para. 1.

³⁶⁹⁰ Keller Report, (Exhibit DOM/HND-8), Annex 1, para. 7.

³⁶⁹¹ Keller Report, (Exhibit DOM/HND-8), para. 65.

³⁶⁹² Keller Report, (Exhibit DOM/HND-8), Chap. 5.

³⁶⁹³ Honduras's first written submission, para. 927.

³⁶⁹⁴ The Dominican Republic's first written submission, para. 779.

³⁶⁹⁵ Australia's first written submission, para. 714.

³⁶⁹⁶ See para. 7.1385.

³⁶⁹⁷ Keller Report, (Exhibit DOM/HND-8), para. 6. (emphasis added)

³⁶⁹⁸ Keller Report, (Exhibit DOM/HND-8), para. 61, fn 92.

of anti-tobacco activities".³⁶⁹⁹ She states that there "exists significant overlap between state and federal activities", and that "[d]uplication is especially evident in the anti-tobacco social marketing communication and advertising campaigns, and the quit lines".³⁷⁰⁰ For example, Professor Keller notes that states and territories operate their own quit lines, produce their own anti-smoking campaigns and messages, fund and conduct their own smoking research, train health professionals, print their own posters, pamphlets and brochures, and provide sponsorship of organizations and events.³⁷⁰¹ In Australia's description, state-level campaigns are "typically focused on 'Quit week' activities", but also encompass mass media campaigns, sports sponsorships, community events, and education campaigns in schools, hospitals, worksites, health centres and other community-based events.³⁷⁰² We note that the division of responsibility for delivery of Australia's social marketing campaigns is further elaborated in Australia's National Tobacco Strategy 2012-2018, which indicates that responsibility for "run[ning] effective mass media campaigns (including television, radio, print and digital media formats) at levels of reach and frequency demonstrated to reduce smoking and based on current best practice principles", as well as other social media-related responsibilities, is to be shared between the Australian Government, and state and territory governments (and in some cases non-government organisations as well).³⁷⁰³

7.1563. It is therefore clear to us that, as Australia suggests³⁷⁰⁴, a thorough and accurate assessment of Australia's social marketing landscape must include an assessment of those social marketing measures that exist at the federal, and state and territory, levels. Such an assessment is, in our view, essential considering that the complainants' alternative in this respect relates to the "improvement of Australia's anti-smoking campaigns"³⁷⁰⁵ and "effective social marketing campaigns"³⁷⁰⁶, and is not limited to the NTC, even though Professor Keller's report is focused exclusively on measures at the federal level and specifically on the NTC. Consideration of campaigns other than the NTC is absent from Professor Keller's report, with the exception of where Professor Keller argues that there is insufficient integration between social marketing activities at these different levels of government.³⁷⁰⁷ We are therefore not persuaded that Professor Keller's report presents a thorough audit of the use of social media campaigns in Australia.³⁷⁰⁸

7.1564. Notwithstanding this observation, Australia's argument is that the complainants' assertions about social marketing as an alternative to the TPP measures do not amount to them having identified a genuine alternative, but rather is an "attempt to dress-up" an existing measure as an alternative.³⁷⁰⁹ We will now consider this question, notwithstanding the fact that Professor Keller's criticisms are limited to federal anti-smoking campaigns under the umbrella of the NTC.³⁷¹⁰

³⁶⁹⁹ Keller Report, (Exhibit DOM/HND-8), Annex 1, para. 18.

³⁷⁰⁰ Keller Report, (Exhibit DOM/HND-8), Annex 1, para. 18.

³⁷⁰¹ Keller Report, (Exhibit DOM/HND-8), Annex 1, para. 18.

³⁷⁰² Tobacco in Australia 2012, IDN excerpts, (Exhibit IDN-24), p. 12.

³⁷⁰³ National Tobacco Strategy 2012-2018, (Exhibits AUS-129, DOM-131) p. 18. Other relevant areas of shared responsibility include: "continue mass media campaigns targeted to Aboriginal and Torres Strait Islander people, including robust evaluation to inform future campaign strategies"; "continue to monitor the appropriateness and effectiveness of recommended media weights and media types/channels, including exploration of the potential role of digital media such as YouTube, Facebook and Twitter"; "continue to implement national tobacco campaigns and state and territory campaigns, including a balance of existing material with proven effectiveness and a suite of new materials"; "enhance collaborative action between the Australian Government, state and territory governments and non-government organisations to maximise the effectiveness of mass media campaigns"; "complement the implementation of tobacco control policies (e.g. new health warnings on packs and plain packaging) with mass media campaigns to enhance cessation efforts by smokers"; "continue to build the evidence base on the effectiveness of mass media to inform and refine future campaign development, including specific analysis of the effectiveness of these campaigns among groups with a high prevalence of smoking"; and "continue to share campaign materials, evaluations and other evidence of effectiveness of mass media campaigns with the global tobacco control community".

³⁷⁰⁴ Australia's first written submission, paras. 715-716.

³⁷⁰⁵ Honduras's first written submission, para. 927.

³⁷⁰⁶ Dominican Republic's first written submission, para. 779.

³⁷⁰⁷ Keller Report, (Exhibit DOM/HND-8), Annex 3, paras. 54-61.

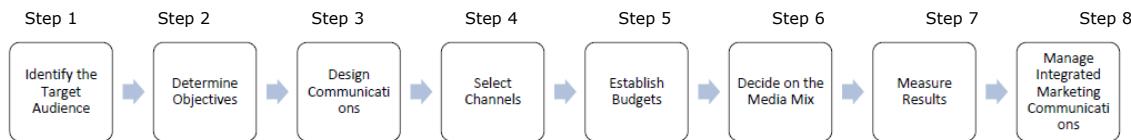
³⁷⁰⁸ Keller Report, (Exhibit DOM/HND-8), para. 81.

³⁷⁰⁹ Australia's first written submission, para. 714.

³⁷¹⁰ We note Professor Keller's general observations that the NTC has "failed to increase quit actions and quit-related behaviour", and her criticisms of the indirect contribution made by the NTC to Australia's objectives, including that: the NTC is not a significant motivator for quitting; the NTC did not increase the

7.1565. Professor Keller conducts a "social marketing audit of Australia's federal social marketing campaigns" from 2011 to 2013, in which she "assess[es] the reasons for the weak performance of Australia's federal social marketing campaigns over the period 2011 to 2013".³⁷¹¹ She does so with reference to an 8-step framework used by "academics and public health professionals" to develop effective marketing communications. As described above, this involves the following steps:

Figure 17: Framework proposed by Professor Keller regarding effective marketing communications



Source: Keller Report, (Exhibit DOM/HND-8), para. 8.

7.1566. As a preliminary observation, Professor Keller argues that "[d]uring the 2011 to 2013 period, NTC has focused almost exclusively on smoking *cessation* strategies, with some limited emphasis on preventing *relapse*, and virtually no NTC campaigns specifically targeted at the prevention of smoking *initiation*".³⁷¹² For Professor Keller, "the omission of initiation-related communication is one of the key flaws in Australia's current federal social marketing efforts".³⁷¹³ Professor Keller adds that, "[a]long the same lines, smokers aged 40 and older are not targeted by the NTC, despite the facts that Australia explicitly wishes to discourage smoking uptake and relapse and to encourage quitting for *all* Australians", and that "[p]eople aged 40–49 were the age group most likely to smoke daily (16.2%)"; "[p]eople aged 18–49 today are far less likely to smoke daily than they were 12 years ago, but over the same period, there was little change in daily smoking by people aged 60 or older"; and "[o]ver time, smokers in general reduced the average number of cigarettes smoked per week, from 111 cigarettes in 2010 to 96 in 2013", though "[s]mokers aged 50–69 [...] continued to smoke the largest number of cigarettes per week on average (about 120), nearly double the number for smokers in their 20s (about 75)".³⁷¹⁴

7.1567. Professor Keller then assesses the NTC's social marketing campaigns between 2011 and 2013 according to the 8-step approach described above, and makes a number of recommendations:

range of health harms and the certainty of health damage associated with smoking; the NTC has failed to strengthen anti-smoking norms and attitudes; the NTC has failed to enhance desire to quit smoking; the NTC has failed to enhance perceived behavioural control; and the NTC has failed to strengthen intentions to quit smoking. Professor Keller summarizes that:

Compared to the 2010 benchmark period, the contemporary series of NTC campaigns under the umbrella of the NTC has failed to change smoking behavior and quit-related actions, such as trying nicotine replacement therapy, talking to a health professional, or even accessing information on the QuitNow website. While almost all Australians are aware of the negative health effects of smoking and of the NTC's anti-smoking messages, a consistently small minority of 2% gave the NTC credit for having been able to quit. Significant changes in NTC's impact on the antecedents of a potential behavior change (such as attitudes, social norms, perceived behavioral control, and intentions to quit) are equally absent, which exacerbates the situation.

NTC had evidence spanning three consecutive years that the national anti-smoking campaigns were not working. By repeatedly ignoring evaluation data, NTC has missed multiple opportunities to improve the effectiveness of Australia's federal anti-smoking campaigns, for example by creating more effective anti-smoking messages and refraining from airing messages verifiably deemed to be ineffective by Australian smokers. Instead, Australia continued to increase NTC funding, despite unequivocal evidence on absence of significant improvements toward communication and behavioral goals.

See Keller Report, (Exhibit DOM/HND-8), paras. 70-80.

³⁷¹¹ Keller Report, (Exhibit DOM/HND-8), para. 81.

³⁷¹² Keller Report, (Exhibit DOM/HND-8), para. 84. (emphasis original)

³⁷¹³ Keller Report, (Exhibit DOM/HND-8), para. 86.

³⁷¹⁴ Keller Report, (Exhibit DOM/HND-8), para. 87. (emphasis original)

- a. *The NTC's segmentation and targeting strategy is deficient.* In respect of this criticism, Professor Keller recommends i) segmentation of the market using behavioral segmentation because, "[a]ccording to Australia's own research, the key need is to provide support services to help smokers who want to quit, to help smokers stay non-smokers, to help smokers who don't believe they are smokers (e.g. people who smoke cigars and cigarillos), and to help people resist the peer pressure to start smoking". For each of these segments, Australia should identify the age (12- 17, 18-24, 25+ years) and usage behavior (Non-Smokers, "Rejectors", "Reflectors", Quitters)³⁷¹⁵. It should then ii) evaluate these segments, by considering "predetermined segment attractiveness criteria such as need (size, vulnerability, how large is the group), vulnerability (level of health risk), accessibility (personal and non-personal reach), and responsiveness (how likely are they to change their behaviour)".³⁷¹⁶
- b. *The NTC's communication objectives are mis-specified.* In respect of this criticism, Professor Keller recommends that Australia apply the "SMART" principle (definition of specific, measurable, attainable, realistic, time-bound criteria) for each communication objective and for each target audience. Professor Keller suggests that an "example of a 'SMART' objective is to reduce smoking initiation rates among adolescent Non-Smokers by 0.25% per year, from approximately 1.5% to 1.25% in 2015", and that the "overarching behavioral objectives [of] 'reducing initiation', 'induc[ing] quitting', and 'prevent[ing] relapse' should guide the marketer to establish concrete process goals".
- c. *The NTC's messages are flawed in their design.* In respect of this criticism, Professor Keller recommends that Australia tailor the messages to reflect and amplify the needs of different target audiences; conduct new, and use existing, research on audience needs to create relevant message content for target audiences; modify the content of NTC messages through i) inclusion of social consequences of smoking in the message; and ii) provision of concrete guidelines on how to quit smoking; creation of positive, empowering messages that emphasize the benefits of not smoking rather than the harmful effects of smoking; and the use of credible (familiar, relatable, authentic, successful, and trustworthy) sources and positive images (e.g. people who have quit successfully), to communicate the message.³⁷¹⁷
- d. *NTC's selection of communication channels is unbalanced and too mass media-centric.* In respect of this criticism, Professor Keller recommends the selection of proper communication channels that efficiently support key messages and enable social marketers to reach the target audience (i.e. channels that facilitate personal communication, and integrated face-to-face and digital channels), rather than relying primarily on TV and other mass media. Professor Keller also recommends ensuring that the communication channels fit with message content and execution; more usage of online, social media, and personal communication channels, and less mass media advertising).³⁷¹⁸
- e. *NTC's budget allocation is erratic, allots insufficient funds to social media, and lacks transparency.* In respect of this criticism, Professor Keller recommends application of the objective-and-task method³⁷¹⁹ to determine the budget for each target audience; leveraging social media to reduce communication costs; use of assessment tools such as

³⁷¹⁵ Keller Report, (Exhibit DOM/HND-8), paras. 92 and 127-132.

³⁷¹⁶ Keller Report, (Exhibit DOM/HND-8), paras. 92 and 133-137.

³⁷¹⁷ Keller Report, (Exhibit DOM/HND-8), paras. 101 and 143-149.

³⁷¹⁸ Keller Report, (Exhibit DOM/HND-8), paras. 105 and 150-154.

³⁷¹⁹ Professor Keller elaborates on this method in the following terms:

In marketing, there are three main methods used to determine an advertising budget: (i) the affordable method (i.e., available budget); (ii) the competitive parity method (benchmark budget against what is spent by competitors); and (iii) the objective-and-task method (i.e., sum of costs of tasks required to meet the objective). Although the objective-and-task method is typically used to determine the budget for mass media advertising, it may equally be used to determine campaign costs for personal communication campaigns as well.

MessageWorks to design more effective and cost-saving messages; and teaming up with partners, especially network partners and service providers, to get pro bono airtime and lower costs to deliver personal messages.³⁷²⁰

- f. *NTC's media mix decisions are ineffective.* In respect of this criticism, Professor Keller recommends that the media plan reflect target audience needs, and identify those sources of information that influence the target audience; the use of less mass media advertising and more social networks and personal influence, including "mHealth"³⁷²¹ applications such as SMS and text messaging; the creation of fewer but more effective mass media advertising messages to reduce development and transmission costs; and the use of all available data to establish the optimal fit between the media plan and each target audience.³⁷²²
- g. *NTC uses the wrong methods and metrics to measure its communication results.* In respect of this criticism, Professor Keller recommends that an evaluation plan track results and redesign the weak components of campaign; assessment of the effect of each campaign as well as the joint effect of multiple messages; assessment of the effect of each communication channel separately; use of appropriate timeframes as baseline; use of consistent evaluation methods for all NTC campaigns; and measurement of intended and unintended results in a pilot prior to mass exposure.³⁷²³
- h. *NTC's communication is insufficiently integrated.* In respect of this criticism, Professor Keller recommends that the communication plan use and implement the six criteria for measuring the effectiveness of integrated marketing communication strategies to integrate its communication assets. Under this "six C's" approach³⁷²⁴, Professor Keller highlights improving "contribution" by pretesting each message to assess message uniqueness or whether the message offers new information; improving "commonality" by using a consistent and cohesive brand image around the QuitNow brand; improving "complementarity" by ensuring that complimentary quitting benefits add up to a healthy lifestyle across messages and channels; and improving "conformability" by continuously updating challenges for the target audience. Professor Keller also argues that online and traditional media should complement each other to reduce costs.³⁷²⁵
- i. *NTC does not build on the evaluation results of previous periods.* In respect of this criticism, Professor Keller recommends the use of feedback to constantly improve the next communication plan; analysis of low quit rates to examine which audiences have unmet needs; the conduct of marketing research to uncover benefits sought by behavioural segments; accountability for involved agencies if SMART communication

³⁷²⁰ Keller Report, (Exhibit DOM/HND-8), paras. 109, 155-159.

³⁷²¹ Professor Keller defines "mHealth" in the following terms:

mHealth or m-Health is short for "mobile health". It refers to the practice of public health supported by mobile devices. mHealth initiatives use mobile communication devices, such as mobile phones, tablet computers and PDAs, for health services and information, but also to affect emotional states. The simplest form of mHealth are SMS alerts, but more interactive communication, such as games and quizzes for communicating health prevention messages and motivating behavior change, are becoming ever more popular.

Keller Report, (Exhibit DOM/HND-8), fn 11.

³⁷²² Keller Report, (Exhibit DOM/HND-8), paras. 113, 160-166.

³⁷²³ Keller Report, (Exhibit DOM/HND-8), paras. 117 and 167-171.

³⁷²⁴ Professor Keller defines the "six C's" as follows:

1. Coverage (to what extent do different communication options reach the designated target market?);
2. Contribution (do different communication options create behavior change?);
3. Commonality (is there a consistent brand image across communication options?);
4. Complementarity (are different messages/channels evoking complimentary brand associations?);
5. Conformability (will the communication options sustain audience interest?); and
6. Cost (what is the cost to deliver on all the preceding criteria?).

Keller Report, (Exhibit DOM/HND-8), para. 55.

³⁷²⁵ Keller Report, (Exhibit DOM/HND-8), paras. 121 and 172-173.

objectives are not met and the communication plan is largely unchanged; analysis of effects of mass media advertising and communication channels to determine budget reallocation; design of rigorous evaluation with controls to "weed out" weak messages, inefficient channels, and unresponsive audiences.³⁷²⁶

7.1568. Australia argues that Professor Keller's criticisms of federal social marketing campaigns are "unwarranted".³⁷²⁷ In respect of Professor Keller's suggestion that Australia segment the audience for its social marketing campaigns, Australia submits that "[t]his suggestion is in direct conflict with the recommendations of the United States Surgeon General and the World Health Organization".³⁷²⁸ Australia also points out that Professor Keller also "entirely overlooks the campaigns run by Australia's states and territories, which are a major and critical component of Australia's social marketing efforts".³⁷²⁹ In doing so, Australia contends that Professor Keller's analysis misrepresents, "for example, the extent to which 'new communication' channels are an element in Australia's social marketing mix; the extent to which 'personal influencers', such as healthcare providers are used as a communication channel; the extent to which audiences are exposed to positive messages, which provide guidelines regarding how to quit and highlight the social consequences of smoking; and the extent to which Australia's social marketing campaigns target specific audiences".³⁷³⁰

7.1569. Australia refers to a number of campaigns in operation at the state and territory level in Australia. For example, Australia refers to the campaign "Your future's not pretty", which was run in Queensland and directed "to young females aged 18-24 about the damaging effects of smoking to their looks", which was "rolled out across TV, digital and out-of-home channels", and was also "brought to life as an experiential campaign in shopping malls—where young females are made-over to experience what they will look like in the future if they smoked".³⁷³¹ That campaign noted that:

Market research has revealed that young females are highly aware of the negative impacts of smoking on their health. They have a strong desire to quit smoking, but they see this happening in the distant future. But, they are generally concerned about the aesthetic impacts of smoking on their skin.

Communicating the life-threatening health risks of smoking isn't enough to deter young females.

Your future's not pretty focusses on another truth, that smoking damages one's skin and speeds up the aging process.

The campaign used state-of-the-art 3D modelling to show a young woman transforming into her future self with the tell-tale signs of long-term smoking – wrinkles, discoloured skin, crow's feet, frayed hair and increased acne.³⁷³²

7.1570. Australia further refers to an "All by myself campaign" in Queensland, which used "television, radio, digital and outdoor ads" to "remind[] smokers [that] the rest of Queensland has quit smoking and 'it's time you did too'".³⁷³³ Australia also refers to the "iCanQuit" website,³⁷³⁴ and

³⁷²⁶ Keller Report, (Exhibit DOM/HND-8), paras. 124 and 174.

³⁷²⁷ Australia's first written submission, para. 716.

³⁷²⁸ Australia's comments on the complainants' responses to Panel question No. 157.

³⁷²⁹ Australia's first written submission, para. 716.

³⁷³⁰ Australia's first written submission, para. 716.

³⁷³¹ Queensland Health website, (Exhibit AUS-289), p. 1.

³⁷³² Queensland Health website, (Exhibit AUS-289), p. 1.

³⁷³³ Queensland Health website, (Exhibit AUS-289), p. 3. Information concerning this campaign indicates that "smoking rates remain high among adults aged 25-44 years old with children at home or those who are considering having children", and that research "revealed that financial costs and concern for health and family were the key motivators for smokers to quit". This campaign also notes that "[c]oncepts built around guilt and isolation had the greatest impact, relevance and believability among target groups". Noting that "most smokers" have "seen, heard and become immune to all the messages before", the "creative challenge behind this campaign was to communicate in a different way the other aspects of smoking that were affecting their lives" by "send[ing] an emotional message rather than using graphic images to shock smokers into quitting". See generally *ibid*.

the "WeCanQuit" campaign, both maintained by the Cancer Institute of NSW, which "encourages smokers to quit smoking by letting them know that their friends, family and Australian celebrities are quitting something too to support them".³⁷³⁵ This campaign features "messages are embedded in media content using editorial, advertorials, sponsorship and in program segments", and television commercials featuring an actress from a popular television program and an Australian Football League "legend".³⁷³⁶ Australia also refers to the Quit Victoria website, where individuals can learn more about quitting, make preparations for quitting, and managing the aftermath of having quit in order to avoid relapse.³⁷³⁷

7.1571. Australia has also submitted evidence concerning social marketing measures taken to address tobacco use in the indigenous community. For example, Australia refers to "SmokeCheck", an "indigenous smoking program" in Queensland pursuant to which trained health professionals can "identify, encourage and support Aboriginal and Torres Strait Islander people who smoke tobacco to make positive and healthy behaviour changes".³⁷³⁸ It also refers to the "Butt out boondah (smoke)" campaign, a "smoking cessation and healthy lifestyle program designed for Aboriginal communities in southern NSW".³⁷³⁹

7.1572. We read this evidence as indicating that a number of measures in existence in Australia address many of the criticisms or areas for improvement identified by Professor Keller in connection with Australia's federal social marketing campaigns. Specifically, it reveals that a number of her recommendations align with the approach pursued within Australia, either at the federal or state/territory level (or, indeed, through combined federal/state/territory government endeavours), and thus already form part of the social marketing strategy to address tobacco use that has been, or is being, implemented at the federal or state/territory level. For example, Australia already tailors, or is in the process of tailoring, messages to reflect the needs of different target audiences on the basis of audience research, and through the use of positive messages and celebrities.³⁷⁴⁰ These comport with Professor Keller's proposal in respect of the design of messages. Moreover, Australia and its states and territories are already, or are in the process of, utilizing television, radio, print, and digital media formats, and are using or exploring the role of digital media outlets such as YouTube, Facebook and Twitter for its messages.³⁷⁴¹ Indeed, Professor Keller acknowledges that "[i]ncreasingly, NTC utilizes the internet (e.g., the *QuitNow* Facebook page) and electronic applications to deliver the quit smoking message [which are] available through the NTC *QuitNow* website".³⁷⁴² This indicates that effective and efficient communication channels, as Professor Keller describes them³⁷⁴³, including so-called "old media" (such as, *inter alia*, advertising, promotions, events) and new media (online and social media, mobile marketing, and direct marketing) are already in use in Australia. The evidence also indicates to us that Australia is already utilizing a "media mix", including through the use of

³⁷³⁴ Cancer Institute NSW website, (Exhibit AUS-283). This webpage is a forum with areas where individuals can share stories and experiences, make a plan to quit, find information on how to quit, get started with quitting, remain quit, and calculate the financial and health benefits associated with quitting.

³⁷³⁵ NSW YouTube video, (Exhibit AUS-288).

³⁷³⁶ NSW YouTube video, (Exhibit AUS-288).

³⁷³⁷ Victorian QuitTxt application, (Exhibit AUS-284). This website also provides access to a Quitline call service; a "Quitcoach" service, which collects information about individuals' smoking habits and uses that information to provide personalized advice; and a QuitTxt service, which "provides regular SMS messages including tips and encouragement to help you keep on track throughout your quit attempt". This Quit website also contains a "triggers" page, separately referred to by Australia, which identifies situations which may trigger a cigarette craving and provides, *inter alia*, "tips on how to beat them from other ex-smokers". See Quit Victoria, (Exhibit AUS-287).

³⁷³⁸ Queensland Health program, (Exhibit AUS-285).

³⁷³⁹ Anti-smoking campaign website, (Exhibit AUS-286). This programme consisted of a promotional film and four short videos which feature local Indigenous people who share their stories about helping family and community to quit smoking or not to take up the habit. A factsheet was developed to inform local general practitioners about the program and "how their patients could benefit from registering with the programs available as part of the campaign".

³⁷⁴⁰ See NSW YouTube video, (Exhibit AUS-288); and Queensland Health website, (Exhibit AUS-289).

³⁷⁴¹ See Keller Report, (Exhibit DOM/HND-8), paras. 105, 150-154; and National Tobacco Strategy 2012-2018, (Exhibits AUS-129, DOM-131), pp. 16 and 18 (actions 6.2.1 and 6.2.3). See also Cancer Institute NSW website, (Exhibit AUS-283); Victorian QuitTxt application, (Exhibit AUS-284); Queensland Health program, (Exhibit AUS-285); NSW YouTube video, (Exhibit AUS-288); and Queensland Health website, (Exhibit AUS-289).

³⁷⁴² Keller Report, (Exhibit DOM/HND-8), Annex 1, para. 9.

³⁷⁴³ Keller Report, (Exhibit DOM/HND-8), paras. 150-154.

"mHealth" applications like "myquitbuddy".³⁷⁴⁴ In our view, this addresses directly Professor Keller's observations concerning whether Australia's campaigns are "unbalanced and too mass media centric"³⁷⁴⁵ or reflect ineffective media mix decisions.³⁷⁴⁶ We also note that Australia's National Tobacco Strategy 2012-2018 includes as "actions" the implementation of campaigns which "include a balance of existing material with proven effectiveness and a suite of new materials"³⁷⁴⁷, and its aim to "continue to build the evidence base on the effectiveness of mass media to inform and refine future campaign development".³⁷⁴⁸ Australia already appears to be doing this with respect to smokers of "lower socio-economic status".³⁷⁴⁹ In our view, this addresses Professor Keller's criticism in respect of the evaluation of past programmes³⁷⁵⁰, and the methods used to measure communication results.³⁷⁵¹ Furthermore, the various cost-saving measures proposed by Professor Keller appear to us to flow from a number of the other steps she identifies which, as indicated above, Australia has already adopted or is in the process of incorporating into its campaigns, such as use of social media and mHealth applications.³⁷⁵²

7.1573. We noted above³⁷⁵³ that, when a complaining party identifies an alternative measure³⁷⁵⁴, that alternative measure may be one that is not maintained by the responding Member in the particular form proposed by the complainant³⁷⁵⁵, and that a respondent may be required to articulate why a proposed measure that is a *variation* of an existing measure is not a valid alternative in the context of a given case.³⁷⁵⁶ Based on the relevant evidence before us, we have found that almost all of the elements identified by Professor Keller have already been implemented, or are being implemented³⁷⁵⁷, by the Australian government, acting either alone, in conjunction with, or exclusively through the state and territory governments within Australia. In our view, these elements are not, therefore, a variation of existing or planned measures in Australia.

7.1574. Overall, based on the evidence before us, it appears to us that the only elements of the proposal that would be a variation of Australia's existing measures are the following:

- a. What Professor Keller describes as "proper" segmentation of the market and identification of relevant target audiences (i.e. Step 1 of the framework relied on by Professor Keller)³⁷⁵⁸: we understand the segmentation proposed by Professor Keller (based on dividing the population by age, and by different "usage statuses") to be different from the manner in which Australia currently divides the Australian market for the purposes of its social marketing campaigns³⁷⁵⁹;
- b. What Professor Keller describes as the better integration by the NTC of its individual efforts and messages (i.e. Step 8 of the framework relied on by Professor Keller)³⁷⁶⁰: Australia does not adduce evidence in respect of how existing measures address Professor Keller's arguments that the NTC needs to better integrate its individual efforts

³⁷⁴⁴ Keller Report, (Exhibit DOM/HND-8), paras. 113 and 160-166; and Evidence Brief: Tobacco Control and Mass Media Campaigns, (Exhibit AUS-280), p. 12. We also note that such mHealth applications are already in place in Victoria. See Victorian QuitTxt application, (Exhibit AUS-284).

³⁷⁴⁵ Keller Report, (Exhibit DOM/HND-8), paras. 105 and 150-154.

³⁷⁴⁶ Keller Report, (Exhibit DOM/HND-8), paras. 113 and 160-166.

³⁷⁴⁷ National Tobacco Strategy 2012-2018, (Exhibits AUS-129, DOM-131), p. 18 (action 6.2.4).

³⁷⁴⁸ National Tobacco Strategy 2012-2018, (Exhibits AUS-129, DOM-131), p. 18 (action 6.2.7).

³⁷⁴⁹ National Tobacco Strategy 2012-2018, (Exhibits AUS-129, DOM-131), p. 17.

³⁷⁵⁰ Keller Report, (Exhibit DOM/HND-8), paras. 124 and 174.

³⁷⁵¹ Keller Report, (Exhibit DOM/HND-8), paras. 117 and 167-171.

³⁷⁵² Keller Report, (Exhibit DOM/HND-8), paras. 155-159.

³⁷⁵³ See para. 7.1385 above.

³⁷⁵⁴ See Appellate Body Reports, *US – COOL*, para. 379.

³⁷⁵⁵ Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.328.

³⁷⁵⁶ See Panel Reports, *China – Rare Earths*, para. 7.186.

³⁷⁵⁷ We note that this strategy encompasses 2012-2018 such that elements of the "actions" it recommends may still be in the process of implementation. We note that the findings in *Brazil – Retreaded Tyres* illustrate that measures that have been adopted, or are in the process of being implemented, are not valid alternatives. See Panel Report, *Brazil – Retreaded Tyres*, paras. 7.169; and Appellate Body Report, *Brazil – Retreaded Tyres*, fn 297.

³⁷⁵⁸ Keller Report, (Exhibit DOM/HND-8), paras. 13(i), 92, 127-132.

³⁷⁵⁹ See paras. 7.1600-7.1604.

³⁷⁶⁰ Keller Report, (Exhibit DOM/HND-8), paras. 118-121 and 172-173.

and messages³⁷⁶¹ and, therefore, has not indicated why such integration would not constitute a variation on an existing measure.

7.1575. In respect of the other elements of the campaign design proposed by Professor Keller, we are not persuaded that the complainants have demonstrated that such elements vary the social marketing campaigns currently maintained in Australia, or that are currently being implemented pursuant to the National Tobacco Strategy 2012-2018.

7.1576. We therefore consider that the complainants' proposal in respect of Australia's social marketing campaigns is a variation of Australia's existing social marketing campaigns only to the extent that it proposes to segment the market in the specific manner proposed by Professor Keller; and to better integrate messages. We shall now consider whether this amounts to a reasonably available less trade-restrictive alternative to the TPP measures, which will make an equivalent contribution to Australia's objective of reducing use of, and exposure to, tobacco products.

7.2.5.6.4.3 Whether "improved" social marketing campaigns would be less trade-restrictive than the TPP measures

Arguments of the parties

7.1577. Honduras argues that its proposed improvements to Australia's anti-smoking campaigns are less *trade-restrictive* than the trademark and the format requirements in the TPP measures. Specifically, this alternative does not entail any restriction on the use of trademarks on packaging of tobacco products, such that tobacco products would be able to compete in the Australian market by relying on the brand differentiation that is normally achieved through brand packaging. Moreover, Honduras argues that this alternative measure does not result in any compliance costs for tobacco producers.³⁷⁶² Honduras adds that this alternative "is not trade restrictive in any way given that it merely affects the demand side and does not impose any burden on traders", as it does not entail any restriction on the use of trademarks such that tobacco products would be able to compete in a fair manner, and does not result in any compliance costs for tobacco producers.³⁷⁶³

7.1578. The Dominican Republic submits that the formulation and execution of effective social marketing campaigns in Australia would have no effect on trademarks, and thus would do nothing to distort the competitive opportunities of tobacco products and producers.³⁷⁶⁴ Specifically with respect to trade-restrictiveness measured by changes in volume of sales, the Dominican Republic adds that "[s]ocial marketing does not involve any regulation of the market at all, even though it reduces the volume of sales", and as such is not "a trade restrictive measure subject to the disciplines under the covered agreement[s]."³⁷⁶⁵ In any event, the Dominican Republic submits that "social marketing does not involve any regulation of the market at all, and is not a trade/IP restrictive measure subject to any disciplines under the covered agreement".³⁷⁶⁶

7.1579. Indonesia, in "endors[ing] [the alternative measures] proposed by the Dominican Republic regarding increasing the effectiveness of social marketing campaigns"³⁷⁶⁷, notes that "[i]mplementing the kinds of structural programmatic changes recommended by Professor Keller would result ... be less trade-restrictive than the [TPP] measures".³⁷⁶⁸

7.1580. Australia argues that the Dominican Republic "attempts to transfer to the Panel its burden of proposing less trade-restrictive alternative measures that make an equivalent contribution to

³⁷⁶¹ Professor Keller argues that this is because they lack consistency across channels and communication vehicles; commonality and consistency among messages; complementarity across channels; and coordination of its Main and More Targeted Approach, and between national, State and Territory tobacco social marketing communication programs. See Keller Report, (Exhibit DOM/HND-8), para. 172.

³⁷⁶² Honduras's first written submission, paras. 638 and 928.

³⁷⁶³ Honduras's response to Panel question No. 151.

³⁷⁶⁴ Dominican Republic's first written submission, para. 1023; and second written submission, para. 976.

³⁷⁶⁵ Dominican Republic's response to Panel question No. 151.

³⁷⁶⁶ Dominican Republic's comments on Australia's response to Panel question No. 151.

³⁷⁶⁷ Indonesia's first written submission, para. 457; and second written submission, para. 293.

³⁷⁶⁸ Indonesia's second written submission, para. 289.

the objectives of the" TPP measures, specifically, with respect to "how the alternative measures, or a combination of the alternative measures, could be implemented to make an equivalent contribution" to the TPP measures. Australia submits that the Dominican Republic leaves the alternative measures "completely unspecified, expecting the Panel to determine, for example, how to 'carefully tailor' Australia's existing social marketing campaigns ... such that these measures would have an impact on the volume of trade identical to that made by tobacco plain packaging".³⁷⁶⁹

Analysis by the Panel

7.1581. As we have noted, a measure is trade-restrictive within the meaning of Article 2.2 of the TBT Agreement where that measure has a limiting effect on international trade.³⁷⁷⁰

7.1582. The Dominican Republic submits that social marketing campaigns are not, as such, "a trade restrictive measure subject to the disciplines under the covered agreements".³⁷⁷¹ We are not persuaded, however, that this is a directly pertinent consideration in our assessment of the extent to which the proposed alternative measure would or would not be trade-restrictive. Rather, as described above, we must consider the extent to which it could be expected to have a limiting effect on international trade.

7.1583. We recall our findings above that the TPP measures are trade-restrictive to the extent that they reduce overall consumption of tobacco products and thereby reduce the overall volume of imports of tobacco products.³⁷⁷² To the extent that improved social marketing campaigns would make an equivalent contribution to Australia's objective, as the complainants argue would be the case, and that they would do so by reducing the consumption of tobacco products, they would at least be as trade-restrictive as the TPP measures.

7.1584. We are not persuaded, therefore, that improved social marketing campaigns, to the extent that they would be as effective as the TPP measures in contributing to Australia's objective, would be less trade-restrictive than the TPP measures.

7.1585. Notwithstanding this conclusion, we find it appropriate to pursue our analysis and determine also, assuming that this alternative may be less trade-restrictive than the TPP measures, whether it would make an equivalent contribution to Australia's objective of improving public health by reducing the use of, and exposure to, tobacco products.

7.2.5.6.4.4 Whether "improved" social marketing campaigns would make an equivalent contribution to Australia's objective

Arguments of the parties

7.1586. Honduras argues that the proposed improvements to Australia's anti-tobacco campaigns can make the same degree of contribution to Australia's objective as the trademark and format requirements of the TPP measures. According to Honduras, Professor Keller's plan, "if implemented correctly, can contribute to preventing smoking initiation among non-smokers, increase cessation among current smokers, and prevent relapse among ex-smokers", thus contributing "to Australia's objective of reducing smoking prevalence to the same extent as the trademark and format restrictions contained in the plain packaging measures".³⁷⁷³

³⁷⁶⁹ Australia's comments on the complainants' responses to Panel question Nos. 151 and 165.

³⁷⁷⁰ As expressed by the Appellate Body in *US – Tuna II (Mexico)*, para. 219, also quoted above, "Article 2.2 is thus concerned with restrictions on international trade". This is consistent with the first sentence of Article 2.2, which uses the term "unnecessary obstacles to international trade", not just "unnecessary obstacles to trade". The term "trade" is qualified by "international" in other key provisions of the TBT Agreement, including: "conduct of international trade" (preamble, third recital); "restriction on international trade" (preamble, 6th recital); and "obstacles to international trade" (preamble, 5th recital; Article 2.5; Article 5.1.2; and Annex 3.E).

³⁷⁷¹ Dominican Republic's response to Panel question No. 151.

³⁷⁷² See para. 7.1255.

³⁷⁷³ Honduras's first written submission, paras. 639-640 and 929.

7.1587. Honduras argues that the non-fulfilment of Australia's objective through the TPP measures would not result in grave consequences, given Australia's declining smoking rates and its comprehensive regulatory framework. Honduras submits that these circumstances would not change if Australia were to adopt an alternative measure to the TPP measures. The low gravity of the consequences of non-fulfilment, therefore, remains unchanged when considering either the TPP measures or any other alternative measure.

7.1588. The Dominican Republic submits that the development and launch of effective social marketing campaigns can make at least an equivalent *contribution* to the objective of reducing tobacco use in Australia.³⁷⁷⁴ The Dominican Republic submits that social marketing tobacco control campaigns have been used successfully by governments around the world to reduce smoking prevalence since the 1970s. It refers to Australia's National Tobacco Strategy 2012-2018, which "highlights evidence demonstrating that media campaigns can be particularly useful in preventing relapse among smokers who have recently quit, and references evidence demonstrating the effectiveness of media campaigns for low socioeconomic groups".³⁷⁷⁵ The Dominican Republic also refers to campaigns in New York and the United Kingdom.³⁷⁷⁶ It submits that social marketing campaigns are as effective for cigars as they are for cigarettes³⁷⁷⁷, and impact all segments of the population and all smoking behaviours.³⁷⁷⁸ The Dominican Republic adds, with reference to Professor Keller's report, in comparison with the TPP measures, that through segmentation, social marketing "can be carefully tailored to address the needs and choices of each target audience", such that "social marketing is also scalable to have an equal impact on all the smoking behaviours – initiation and cessation – that the [TPP] measures could have".³⁷⁷⁹

7.1589. Cuba adopts the arguments put forward by the Dominican Republic with respect to social media campaigns.³⁷⁸⁰ Cuba adds, in its second written submission, that Australia's argument that the Keller report overlooks the campaigns run by States and Territories "misses the point".³⁷⁸¹ Specifically, by focusing on the quantity rather than the quality of these social marketing campaigns, Australia is pointing out the availability of these measures, but ignores their effectiveness.³⁷⁸²

7.1590. Indonesia endorses the alternative measures proposed by the Dominican Republic regarding increasing the effectiveness of social marketing campaigns.³⁷⁸³ Indonesia adds that Australia recognizes that its social marketing campaigns could be more effective, and that "[i]mplementing the kinds of structural programmatic changes recommended by Professor Keller would result in new, more effective, programs that would make an increased contribution to reducing prevalence and be less trade-restrictive than the [TPP] measures".³⁷⁸⁴

7.1591. Australia submits that Professor Keller's critique of its social marketing campaigns "is fundamentally misconceived" and "entirely overlooks the campaigns run by Australia's states and territories, which are a major and critical component of Australia's social marketing efforts". Australia therefore contends that Professor Keller misrepresents, for example, "the extent to which 'new communication' channels are an element in Australia's social marketing mix; the extent to which 'personal influencers', such as healthcare providers are used as a communication channel; the extent to which audiences are exposed to positive messages, which provide guidelines regarding how to quit and highlight the social consequences of smoking; and the extent to which Australia's social marketing campaigns target specific audiences".³⁷⁸⁵ Australia adds that tobacco plain packaging enhances the effectiveness of its social marketing campaigns, which are otherwise

³⁷⁷⁴ Dominican Republic's first written submission, para. 792; and response to Panel question No. 151.

³⁷⁷⁵ Dominican Republic's first written submission, para. 793 (referring to National Tobacco Strategy 2012-2018, (Exhibits AUS-129, DOM-131), pp. 16-17).

³⁷⁷⁶ Dominican Republic's first written submission, para. 796. See also Dominican Republic's response to Panel question No. 65.

³⁷⁷⁷ Dominican Republic's response to Panel question No. 152.

³⁷⁷⁸ Dominican Republic's response to Panel question No. 157.

³⁷⁷⁹ Dominican Republic's response to Panel question No. 151.

³⁷⁸⁰ Cuba's first written submission, para. 288.

³⁷⁸¹ Cuba's second written submission, para. 354.

³⁷⁸² Cuba's second written submission, para. 354.

³⁷⁸³ Indonesia's first written submission, para. 457; and second written submission, para. 293.

³⁷⁸⁴ Indonesia's second written submission, para. 289.

³⁷⁸⁵ Australia's first written submission, para. 716.

hindered by tobacco product marketing, and that plain packaging enhances the effectiveness of GHWs, which themselves reinforce the messages conveyed in anti-tobacco social marketing campaigns (and do so at the point of consumption).³⁷⁸⁶

7.1592. In addition, Australia argues that the Dominican Republic "attempts to transfer to the Panel its burden of proposing less trade-restrictive alternative measures that make an equivalent contribution to the objectives of the" TPP measures, specifically, with respect to "how the alternative measures, or a combination of the alternative measures, could be implemented to make an equivalent contribution" to the TPP measures. Australia submits that the Dominican Republic leaves the alternative measures "completely unspecified, expecting the Panel to determine, for example, how to 'carefully tailor' Australia's existing social marketing campaigns [...] such that these measures would have an impact on the volume of trade identical to that made by tobacco plain packaging".³⁷⁸⁷ Australia also submits that the Dominican Republic's contention, on the basis of Professor Keller's recommendation, that Australia should divide its social marketing audience into narrow segments, including targeting 12-17 year olds, "is in direct conflict with the recommendations of the United States Surgeon General and the World Health Organization".³⁷⁸⁸

7.1593. Australia adds that its approach to social marketing is dynamic, such that it reviews and updates its approach on an annual basis. For Australia, "[l]eaving aside other problems in Professor Keller's report", it reviews Australia's social marketing strategy up until 2013 and was therefore out-of-date at the time that it was filed in 2014. On this basis, Australia argues that the 2013 campaign is no longer an appropriate reference point for proposing improvements to its social marketing strategy.³⁷⁸⁹

Analysis by the Panel

7.1594. At the outset, we note that the parties appear to agree that social marketing campaigns can contribute to a reduction in the use of tobacco products.³⁷⁹⁰ This is also recognized in Article 12 of the FCTC, entitled "Education, communication, training and public awareness", which, in its *chapeau*, obliges all parties to "promote and strengthen public awareness of tobacco control issues, using all available communication tools, as appropriate".³⁷⁹¹ We also note that the importance of effective social marketing campaigns as an element of a tobacco control policy is

³⁷⁸⁶ Australia's comments on the complainants' responses to Panel question No. 161.

³⁷⁸⁷ Australia's comments on the complainants' responses to Panel question Nos. 151 and 165.

³⁷⁸⁸ Australia's comments on the complainants' responses to Panel question No. 157 (referring to WHO Policy Package to Reverse the Tobacco Epidemic , (Exhibit AUS-607) and US Surgeon General's Report 2012, (Exhibit AUS-76)).

³⁷⁸⁹ Australia's response to Panel question No. 158.

³⁷⁹⁰ See, in particular, Australia's first written submission, para. 714 (noting that "Australia has a long history of using education and social marketing campaigns as a tobacco control measure and is regarded as a world leader in this area"). See also Evidence Brief: Tobacco Control and Mass Media Campaigns, (Exhibit AUS-280).

³⁷⁹¹ Article 12 elaborates that, towards this end, each Party shall adopt and implement effective legislative, executive, administrative or other measures to promote: "(a) broad access to effective and comprehensive educational and public awareness programmes on the health risks including the addictive characteristics of tobacco consumption and exposure to tobacco smoke; (b) public awareness about the health risks of tobacco consumption and exposure to tobacco smoke, and about the benefits of the cessation of tobacco use and tobacco-free lifestyles as specified in Article 14.2; (c) public access, in accordance with national law, to a wide range of information on the tobacco industry as relevant to the objective of this Convention; (d) effective and appropriate training or sensitization and awareness programmes on tobacco control addressed to persons such as health workers, community workers, social workers, media professionals, educators, decision-makers, administrators and other concerned persons; (e) awareness and participation of public and private agencies and nongovernmental organizations not affiliated with the tobacco industry in developing and implementing intersectoral programmes and strategies for tobacco control; and (f) public awareness of and access to information regarding the adverse health, economic, and environmental consequences of tobacco production and consumption". FCTC, (Exhibits AUS-44, JE-19), Article 12. See also FCTC Guidelines for Implementation (2013 edition), (Exhibits AUS-109, DOM-44), Article 12, pp. 73-91.

recognized in publications by other public health bodies, such as the US Surgeon General³⁷⁹², the USIOM³⁷⁹³, and the USCDC.³⁷⁹⁴

7.1595. Furthermore, as Australia submits, it already maintains social marketing programs, details of which we have already discussed above. As we have concluded, however, our inquiry for present purposes is whether Australia, by modifying its existing social marketing campaigns so as to segment the market in the manner proposed by Professor Keller, and to integrate messages, could make a contribution equivalent to that made by the TPP measures in a less trade-restrictive manner.

7.1596. We consider first the segmentation of the market and targeting of audiences in Australia, in the manner proposed by Professor Keller. Professor Keller argues that:

All of NTC's campaigns from 2011 to 2013 have selected one target audience – Australian smokers between the ages of 16 and 40 years. Under ANPHA, the *NTC – Main* campaign does not single out any smokers in this group, whereas NTC's tailored campaigns [that is, the *NTC – Break the Chain* and *NTC – More Targeted Approach* campaigns], organized by TCT, single out five smoker audiences: 1) culturally and linguistically diverse (CALD) smokers of 18-40 years of age; 2) indigenous smokers (16-40 years); 3) pregnant women who smoke, and smokers planning to get pregnant (16-40 years); 4) prisoners and recently released prisoners who smoke (age-unspecified); and 5) mentally ill smokers (age unspecified). It is important to note that even though these groups are under the umbrella of the *NTC – More Targeted Approach* and *NTC – Break the Chain* campaigns, they remain within the single target audience segment of the *Main* campaign – smokers, primarily between 18 years (occasionally 16) and 40 years of age. Non-smokers, i.e., never-smokers and ex-smokers, are not included in the target audience.³⁷⁹⁵

7.1597. Professor Keller therefore proposes to segment the market "using behavioral segmentation":

According to Australia's own research, the key need is to provide support services to help smokers who want to quit, to help smokers stay non-smokers, to help smokers who don't believe they are smokers (e.g., people who smoke cigars and cigarillos), and to help people resist the peer pressure to start smoking. For each of the segments above, identify the age (12-17, 18-24, 25+ years) and usage behavior (Non-Smokers, "Rejectors", "Reflectors", Quitters).³⁷⁹⁶

7.1598. In respect of these "usage" categories, Professor Keller defines "reflectors" as smokers who would like to quit but are in need of support services to help them quit; "quitters" as ex-smokers seeking help to stay quit; "rejectors" as smokers who don't see themselves as addicted and need information to enable them to realize that they have a problem; and non-smokers as those whose need is to develop tools and strategies enabling them to resist the temptation and peer pressure to start smoking.³⁷⁹⁷

7.1599. Regarding the age categories, Professor Keller's segmentation is "rooted in the different needs, wants, motivators and costs that each group exhibits when it comes to (non-)smoking", a conclusion which Professor Keller derives in part from Australian government research and evaluations.³⁷⁹⁸ According to her proposal, Australia's social marketing campaigns should be segmented on the following basis:

³⁷⁹² US Surgeon General's Report 2014, (Exhibits AUS-37, DOM-104, CUB-35), p. 812; US Surgeon General's Report 2000, (Exhibit AUS-53), p. 20; and US Surgeon General's Report 2012, (Exhibit AUS-76), pp. 691 and 853.

³⁷⁹³ 1994 USIOM Report, Chap. 8, (Exhibit AUS-547), p. 240.

³⁷⁹⁴ USCDC Best Practices for Comprehensive Tobacco Control Programs, (Exhibit AUS-50), p. 31.

³⁷⁹⁵ Keller Report, (Exhibit DOM/HND-8), para. 89. See also para. 125.

³⁷⁹⁶ Keller Report, (Exhibit DOM/HND-8), paras. 92 and 127-132.

³⁷⁹⁷ Keller Report, (Exhibit DOM/HND-8), paras. 127-129.

³⁷⁹⁸ Keller Report, (Exhibit DOM/HND-8), para. 132 and fns 173 and 175.

Table 5: Proposed segmentation for Australian social marketing campaigns

Segment no.	Non-smokers	Quitters	Rejectors	Reflectors
12-17 years (adolescents)	1	2	3	4
18-24 years (young adults)	5	6	7	8
25+ years (adults)	9	10	11	12

Source: Keller Report, (Exhibit DOM/HND-8), para. 129, Figure 3.

7.1600. We note that Australia appears to recognize that anti-smoking campaign messages are often tailored to particular sub-groups in the population.³⁷⁹⁹ The ANPHA notes, however, that the development of tailored campaigns is burdened by the increased cost of creating multiple campaigns to suit each sub-group, and the danger of creating public perceptions that the targeted sub-group is the only one for whom the behaviour is a problem, such that the decision whether or not to pursue this option must take into account the "mixed evidence for campaigns tailored to different subgroups".³⁸⁰⁰ For example, the ANPHA notes that "with the exception of the US 'truth' campaign, youth campaigns often include message themes known to be less effective (short-term consequences, humour, social norms) and there is potential for these campaigns to promote the undesirable notion that smoking is something only youth in particular should avoid, and is not so much an issue for adults".³⁸⁰¹ This report also notes that some campaigns targeted to specific ethnic groups have reported success, whereas other evaluations found general audience campaigns more successful than tailored campaigns, and that widely broadcast mass media campaigns developed for a general audience have the potential to be at least equally effective across socio-economic sub-groups, as long as each group has equal opportunity to be exposed.³⁸⁰²

7.1601. In this connection, we also note that the US Surgeon General has observed that tailoring a message's content to specific audience subgroups (defined, for example, by age, gender, race/ethnicity, a desire for sensation, or socioeconomic status) has the potential advantage of increasing a message's relevance and ability to persuade.³⁸⁰³ However, it has also appraised evidence indicating, in respect of youth- versus adult-targeted campaigns, that "it is a matter of debate whether these campaigns are the best choice for reducing youth smoking".³⁸⁰⁴ For example, studies examined by the US Surgeon-General observe that it may be particularly difficult to design messages that appeal to older youth; that evidence that younger youth may be more likely than older youth to decrease their intentions to smoke in response to counter industry mass media campaigns was interpreted as indicating that older adolescents may be better addressed by campaigns targeted to a general audience; that youth responded as favorably to adult-targeted ads as to youth-targeted ads, which is consistent with findings from adult-targeted mass media campaigns that have successfully reduced the initiation of smoking and of smoking behavior among youth; and that, in the US, beneficial effects on youth smoking were found from exposure to the overall complement of state anti-tobacco campaign ads, not just youth-targeted campaigns, and that a majority of the state campaign gross rating points (GRPs)³⁸⁰⁵ came from adults rather than youth.³⁸⁰⁶ The US Surgeon-General also notes reviews of the media and tobacco use which propose that the success of adult-targeted campaigns for adolescents may be due in part to changing the broader social norms about smoking, and that adult-focused campaigns for reducing

³⁷⁹⁹ Evidence Brief: Tobacco Control and Mass Media Campaigns, (Exhibit AUS-280), p. 10; and Tobacco in Australia 2012, IDN excerpts, (Exhibit IDN-24), pp. 24-26.

³⁸⁰⁰ Evidence Brief: Tobacco Control and Mass Media Campaigns, (Exhibit AUS-280), p. 10.

³⁸⁰¹ Evidence Brief: Tobacco Control and Mass Media Campaigns, (Exhibit AUS-280), p.11. See also Tobacco in Australia 2012, IDN excerpts, (Exhibit IDN-24), pp. 22-23.

³⁸⁰² Evidence Brief: Tobacco Control and Mass Media Campaigns, (Exhibit AUS-280), p. 11.

³⁸⁰³ US Surgeon General's Report 2012, (Exhibit AUS-76), pp. 689-690.

³⁸⁰⁴ US Surgeon General's Report 2012, (Exhibit AUS-76), p. 690.

³⁸⁰⁵ GRPs "measure the relative reach and frequency of exposure to the campaign among the target audience within specific media markets". US Surgeon General's Report 2012, (Exhibit AUS-76), p. 684.

³⁸⁰⁶ US Surgeon General's Report 2012, (Exhibit AUS-76), p. 690.

smoking in youth may avoid the danger that the use of youth targeted mass media campaigns in isolation creates the impression that, whilst children should avoid it, tobacco use is an acceptable adult behaviour.³⁸⁰⁷

7.1602. The foregoing suggests that while different age groups may exhibit different needs, as identified by Professor Keller³⁸⁰⁸, those differences alone may not always justify segmentation on the basis of age, as Professor Keller recommends. Specifically, some of the evidence before us suggests that segmentation on the basis of age may not duly account for significant overlaps with respect to the needs of different age groups, with the potential that segmentation on the basis of age can potentially undermine the overall effectiveness of social marketing campaigns.

7.1603. We further note that the evidence before us demonstrates that Australia has in fact taken a number of social marketing actions on the basis of the identification and targeting of particularly vulnerable groups. As we noted above, Professor Keller points out that the NTC's "Break the Chain" campaign aims at halving the smoking rate among indigenous Australians by 2018, and is specifically aimed at smokers and recent quitters from the Aborigine and Torres Strait Islander community aged 16 to 40 years. In addition, the "More Targeted Approach" campaign targets vulnerable groups that are difficult to reach, and specifically culturally and linguistically diverse, non-white, audiences, between 18 and 40; pregnant women who smoke, aged 16 to 30 years, as well as smokers who are planning to become pregnant within the next two years, aged 18 to 30 years; imprisoned and recently released persons; and persons with mental illnesses.³⁸⁰⁹ Australia identifies that "[s]moking rates among these groups remains unacceptably high": in 2010, while overall smoking prevalence was 16.6% among Australians aged 14 and over, smoking rates were 41% among pregnant teenagers, 38% among unemployed people, 34% among people unable to work, 32% among people with a mental illness, and 78% and 83% among male and female prisoners, respectively.³⁸¹⁰ We have less information before us concerning the details of the specific campaigns that target these groups. However, we are aware that campaigns directed towards pregnant women involve "[a] range of advertising material has been specifically developed to target these groups and raise awareness of the support which is available to assist this group in their quit attempt without stigma", and specifically that "[t]he 'Quit for you – Quit for Two' campaign promotes that there are health harms associated with smoking while pregnant and that women can call the quitline or download the 'Quit for you – Quit for Two' mobile app to support their quit journey".³⁸¹¹ Moreover, the campaign provides information in a range of languages in print and on radio to individuals from culturally and linguistically diverse backgrounds.³⁸¹²

7.1604. It appears, therefore, that Australia has in fact segmented the audience insofar as it has identified those sub-groups within its population who are particularly affected by tobacco use and has designed campaigns in order to target those groups. We therefore disagree with Professor Keller's assertion that "Australia more or less applies a 'one-size/message-fits-all' approach to anti-tobacco campaigns".³⁸¹³ However, as noted, Professor Keller has also proposed to segment the Australian market on the basis of "usage status" (in addition to segmenting it on the basis of age, as we discussed above), and specifically whether an individual is a non-smoker, a "rejector", a "reflector", or a quitter.³⁸¹⁴ In this connection, Professor Keller argues that this segmentation is "[b]ased on existing research conducted in Australia".³⁸¹⁵ In support of this, Professor Keller refers to a 2010 "Tobacco Social Marketing Campaign Report", which is not on the record of these proceedings³⁸¹⁶, and provides no further elaboration or explanation of the basis upon which she has segmented the market in this manner. We are not persuaded that the assertion that Australia

³⁸⁰⁷ US Surgeon General's Report 2012, (Exhibit AUS-76), pp. 690 and 692.

³⁸⁰⁸ Keller Report, (Exhibit DOM/HND-8), para. 132.

³⁸⁰⁹ Keller Report, (Exhibit DOM/HND-8), para. 89. See also Quitnow website, (Exhibit AUS-441).

³⁸¹⁰ Response to NPHT, The Roadmap for Action, (Exhibits AUS-116, JE-15), pp. 64-65.

³⁸¹¹ Quitnow website, (Exhibit AUS-441), p. 1.

³⁸¹² Quitnow website, (Exhibit AUS-441), p. 2.

³⁸¹³ Keller Report, (Exhibit DOM/HND-8), para. 91.

³⁸¹⁴ Keller Report, (Exhibit DOM/HND-8), para. 92.

³⁸¹⁵ Keller Report, (Exhibit DOM/HND-8), para. 127.

³⁸¹⁶ Keller Report, (Exhibit DOM/HND-8), para. 127 fn 166. Professor Keller defines in her report the "Tobacco Social Marketing Campaign Report (2010)" as "Tobacco social marketing campaign report, Stage 2, Qualitative Exploration, prepared for Marketing Research Unit, URBIS, Communications Branch, Department of Health & Aging (June 2010)". Ibid. p. 138.

should segment the market along these lines is sufficient to demonstrate that Australia's existing targeting and segmentation of the market is invalid. Specifically, we are not persuaded that the complainants have demonstrated that the specific segmentation proposed by Professor Keller would be as, or any more, effective than Australia's current approach of targeting those segments of the population that it has identified as having the greatest vulnerability to and use of tobacco products.

7.1605. We turn now to consider the integration of messages proposed by Professor Keller. In her description, an "integrated marketing communication should follow the so-called "six C's":

- 1) coverage (to what extent do different communication options reach the designated target markets?); 2) contribution (do different communication options create behavior change?); 3) commonality (is there a consistent brand image across communication options?); 4) complementarity (do different communications evoke complimentary brand associations?); 5) conformability (will the communication options sustain audience interest?); and 6) cost (what is the cost to deliver on all the preceding criteria?).³⁸¹⁷

7.1606. Professor Keller elaborates her arguments in respect of the first five of these "six C's", with reference to her description of shortcomings of the NTC.

7.1607. It is unclear to us how Professor Keller's observations regarding the NTC are indicative of its being ineffective. For example, it is unclear why the NTC is rendered ineffective because two campaigns target the same demographic³⁸¹⁸; how or why it is problematic that the Main and tailored campaigns are assessed differently³⁸¹⁹; how the achievement of a brand identity is a "vital NTC project" and the significance of the alleged failure to do so³⁸²⁰; why the absence of the quitting methods featured on the Quit websites in television advertisements renders them less effective³⁸²¹, considering the importance of utilizing different media mixes for different purposes, including "powerful social media and mHealth applications [that] provide unique peer network support benefits and 'just-in-time' communication devices to interact with target audiences"³⁸²²; and how or why the fact that "almost identical" Quitlines are maintained at the federal and state/territory level means that they are *not* integrated.³⁸²³ Moreover, Professor Keller's recommendations in respect of each of these supposed shortcomings seems to be predicated on the target audience being adolescent non-smokers and 18-24 year-old "reflectors", pursuant to her proposed market segmentation. However, as described above, we are not persuaded that the complainants have demonstrated that the proposal to segment audiences along these lines would necessarily be as, or any more, effective than Australia's current approach of targeting those segments of the population that it has identified as having the greatest vulnerability to exposure to and use of tobacco products.

7.1608. In addition, notwithstanding our observation above regarding the design of social marketing campaign messages in Australia, and our conclusion that Professor Keller's recommendations already have been, or are being, implemented in Australia, we consider it pertinent to address certain arguments made by Professor Keller in this respect. Specifically, one of the key tenets of Professor Keller's arguments relates to the content of social marketing campaign messages – she advocates for messages that focus on the individual, not others; that use "loss frames" ("for example, if you smoke, you will not be able to excel in sports"); that highlight social consequences of tobacco use; that use "emotional" messages; and that present tips on quitting or saying no "in a vivid fashion". Professor Keller elaborates that NTC messages "should focus on the 'why' of quitting/not smoking", and "provide *Non-Smokers* and *Rejectors* with concrete 'how to' strategies for coping with temptation or other obstacles".³⁸²⁴ Professor Keller also argues that "[a]vailable evidence from the Australian market indicates the benefits of creating positive, empowering messages that emphasize the benefits of not smoking, such as stamina and

³⁸¹⁷ Keller Report, (Exhibit DOM/HND-8), Annex 3, para. 8.

³⁸¹⁸ Keller Report, (Exhibit DOM/HND-8), Annex 3, para. 56.

³⁸¹⁹ Keller Report, (Exhibit DOM/HND-8), Annex 3, para. 57.

³⁸²⁰ Keller Report, (Exhibit DOM/HND-8), Annex 3, para. 58.

³⁸²¹ Keller Report, (Exhibit DOM/HND-8), Annex 3, para. 59.

³⁸²² Keller Report, (Exhibit DOM/HND-8), para. 13(vi).

³⁸²³ Keller Report, (Exhibit DOM/HND-8), Annex 3, para. 60.

³⁸²⁴ Keller Report, (Exhibit DOM/HND-8), para. 145.

virility for males and anti-aging and fertility for females, rather than fear-appeals that repeat the harmful effects of smoking".³⁸²⁵ She thus argues that, to engage adolescent *Non-Smokers*, if the NTC wants to design mass media advertising messages it should focus on tying foregoing cigarettes to better physical shape and appearance. To reach young adult *Reflectors*, the NTC should aim to reduce smokers' stress by creating messages that focus on the practical tips for quitting in an empowering message format.³⁸²⁶

7.1609. We address in particular Professor Keller's assertion regarding the imperative of "creating positive, empowering messages that emphasize the benefits of not smoking". In this connection, we note that the US Surgeon-General reports a series of findings which present mixed results concerning the relative effectiveness of various message contents. Specifically, it reports findings that "ads showing the serious physical consequences of smoking – portrayed either graphically, dramatically, or emotionally – performed well"; that a summary of 186 focus groups indicated that "ads about second-hand smoke or about industry manipulation rated best"; and that "ads depicting the impact of smoking on infants and children, those showing that smoking is socially unacceptable, and ads indicating that non-smoking is the norm significantly decreased youth's reported intentions to smoke".³⁸²⁷ The US Surgeon-General's review also, however, echoes Professor Keller's assertions in respect of the relative merit of positive and negative messages³⁸²⁸; indeed, its 2012 report also states "exposure to high levels of negative emotion may actually hinder persuasiveness and elicit undesirable negative consequences depending on the stimulus itself"³⁸²⁹, and that ads about the social consequences of smoking can be effective.³⁸³⁰ In short, the US Surgeon-General identifies that different message designs, positive and negative, are both capable of producing relatively successful outcomes.³⁸³¹ Moreover, in the Australian context, CCV reports that in respect of both adults and youth campaigns that focus on negative health effects and contain high levels of emotion and personal testimony are most effective.³⁸³² Though the ANPHA echoes this observation, it also notes research indicating that positive, supportive messages have also been effective, and concludes that further research into this question is required.³⁸³³ Such divergences in results would seem to confirm the importance of message testing, as identified by the US-Surgeon-General.³⁸³⁴

7.1610. Overall, this evidence before us suggests that the success of different types of messages and campaigns is relative to the context in which they appear, and that a range of types of messages may be effective. In light of this evidence, it is not clear to us that we are in a position to assess in the abstract whether social marketing campaign messages designed along the lines proposed by Professor Keller would be effective in contributing to Australia's objective to a greater degree than its current mix of campaign messages does.

7.1611. The evidence before us also shows that Australia already applies a broad range of social media campaigns, both at the federal and state levels, that includes most of features considered desirable in Professor Keller's report. We also note that it is inherent in Australia's approach to these campaigns that they are subject to evaluation and review in light of evidence available. This is reflected in Australia's National Tobacco Strategy 2012-2018, which identifies the imperative of "strengthen[ing] mass media campaigns", and "[c]ontinu[ing] to build the evidence base on the effectiveness of mass media to inform and refine future campaign development, including specific analysis of the effectiveness of these campaigns among groups with a high prevalence of smoking"

³⁸²⁵ Keller Report, (Exhibit DOM/HND-8), para. 146.

³⁸²⁶ Keller Report, (Exhibit DOM/HND-8), para. 146.

³⁸²⁷ US Surgeon General's Report 2012, (Exhibit AUS-76), p. 686. The same report also notes that reviews that have considered both the theme and emotional tone of advertisements, and have concluded "that there is consistent evidence that ads eliciting strong emotional responses (such as disgust, loss, sadness, dread, and anger) through personal testimonials and visceral imagery of the health effects of smoking, or that portray deception on the part of the tobacco industry, can increase attention, generate greater recall and appeal, and affect young audiences' smoking-related beliefs and intentions to smoke". Ibid.

³⁸²⁸ Keller Report, (Exhibit DOM/HND-8), para. 146.

³⁸²⁹ US Surgeon General's Report 2012, (Exhibit AUS-76), p. 686.

³⁸³⁰ US Surgeon General's Report 2012, (Exhibit AUS-76), p. 687.

³⁸³¹ US Surgeon General's Report 2012, (Exhibit AUS-76), pp. 686-687.

³⁸³² Tobacco in Australia 2012, IDN excerpts, (Exhibit IDN-24), pp. 21-22.

³⁸³³ Evidence Brief: Tobacco Control and Mass Media Campaigns, (Exhibit AUS-280), pp. 15-16.

³⁸³⁴ US Surgeon General's Report 2012, (Exhibit AUS-76), p. 686.

as an "action".³⁸³⁵ We also note that Australia's campaigns have been used as a basis for campaigns internationally.³⁸³⁶

7.1612. For these reasons, we are not persuaded by the complainants' argument that social marketing campaign messages should necessarily be redesigned in the exact form proposed by Professor Keller.

7.1613. More generally, in light of the above, we are not persuaded that the complainants have demonstrated that the elements of social media campaigns identified in Professor Keller's report, including those specific aspects that appear to be a variation of what Australia is currently implementing would necessarily constitute improvements that would make a meaningful contribution to Australia's objective beyond that of its existing social media campaigns.

7.1614. Even assuming that the proposed modifications to Australia's social media campaigns *would* constitute improvements over its current set of social marketing actions, we are not persuaded that the effect of such social media campaigns would be equivalent to the effect of Australia's existing social marketing campaigns *together with* the removal of the branding elements of tobacco packaging through the TPP measures. Specifically, we are not persuaded that the improvement of social media campaigns, as proposed by the complainants, as a *substitute* to the TPP measures, would achieve a contribution to Australia's objective equivalent to the combined effect of Australia's existing social marketing campaigns *and* the TPP measures. Specifically, in the absence of the TPP measures applied simultaneously with effective social media campaigns, consumers would be faced with competing messages on tobacco products and their retail packaging, thus potentially undermining the effectiveness of those social marketing campaigns. Put differently, a measure that would permit the continued use of design features on tobacco packaging, together with the deleterious effect that such elements may have on the effectiveness of other tobacco control policies, including social marketing, cannot be said to be as effective, overall, as Australia's existing social marketing campaigns *and* the TPP measures operating together, where no such counterproductive effects would be expected to occur. This is consistent, in our view, with the gravity of the consequences of non-fulfilment of Australia's objective and Australia's stated objective of avoiding any regulatory gaps in addressing them. In this respect, we recall our observation above that the importance of a comprehensive approach to tobacco control, (including, relevantly to the present question, social marketing campaigns), is recognized in the FCTC³⁸³⁷, as well as by the WHO³⁸³⁸, the World Bank³⁸³⁹, the US Surgeon General³⁸⁴⁰, and the USCDC.³⁸⁴¹

7.1615. For these reasons, we consider that the complainants have not demonstrated that the modified social media campaigns proposed by the complainants would, as a substitute to the TPP measures, make a contribution to Australia's objective equivalent to that of the TPP measures operating in conjunction with Australia's existing social marketing campaigns.

³⁸³⁵ National Tobacco Strategy 2012-2018, (Exhibits AUS-129, DOM-131), p. 18.

³⁸³⁶ Evidence Brief: Tobacco Control and Mass Media Campaigns, (Exhibit AUS-280), p. 5; and Tobacco in Australia 2012, IDN excerpts (Exhibit IDN-24), p. 14.

³⁸³⁷ FCTC, (Exhibits AUS-44, JE-19), Articles 4.2, 4.4, 5.1, 7 and 12.

³⁸³⁸ WHO Policy Package to Reverse the Tobacco Epidemic, (Exhibit AUS-607), pp. 11-12 (recognizing that tobacco control policies "are complementary and synergistic", and noting, in particular, under the notion of "warn[ing] people] about the dangers of tobacco", that this involves "require[ing] effective package warning labels", "implement[ing] counter-tobacco advertising", and "obtain[ing] free media coverage of anti-tobacco activities").

³⁸³⁹ Jha and Chaloupka 1999, (Exhibit AUS-51), p. 6 (identifying information measures such as mass media counter-advertising, prominent health warning labels and the publication and dissemination of research findings on the health consequences of smoking as a non-price measure to reduce demand for tobacco products).

³⁸⁴⁰ US Surgeon General's Report 2000, (Exhibit AUS-53), pp. 7-8 and Figures 1.1 and 1.2 (the former of which identifies "health education" and "social advocacy" as among the many anti-tobacco influences on young non-smokers, current smokers and former smokers).

³⁸⁴¹ USCDC Best Practices for Comprehensive Tobacco Control Programs, (Exhibit AUS-50), pp. 6 and 9 (recognizing the effectiveness of comprehensive tobacco control approaches that combine "educational, clinical, regulatory, economic, and social strategies", and noting that "research has shown greater effectiveness with interventional efforts that integrate the implementation of programmatic and policy initiatives to influence social norms, systems, and networks").

7.2.5.6.4.5 Whether "improved" social marketing campaigns are reasonably available to Australia

7.1616. Honduras argues that Professor Keller's suggestions are reasonably available to Australia as they would not require any additional financial resources, as cost-saving measures would mean that revised marketing would not lead to an increase of the overall NTC budget. Honduras adds that the revised marketing plan does not entail technical aspects outside the expertise or experience of the ANPHA or the TCT.³⁸⁴²

7.1617. The Dominican Republic submits that Australia can make effective use of social marketing campaigns without increasing its current levels of expenditures on its "existing, but ineffective, social marketing campaigns", and can make more efficient use of the current funding. In addition, the Dominican Republic argues that Australia could consider increasing its budget for social marketing campaigns from revenue raised by an increase in excise taxes on tobacco products. The Dominican Republic states that Australia's social marketing spending "has used less than 0.5 percent ... of the tobacco excise taxes collected, which leaves significant room for increasing Australia's federal social marketing budget".³⁸⁴³

7.1618. Australia does not address the reasonable availability of this measure as an "alternative" measure. It has also not suggested, however, that it would not be feasible for it to implement changes to its social marketing campaigns of the type proposed by the complainants.

7.1619. We therefore find that the above changes to Australia's social marketing campaigns would be reasonably available, to the extent that their implementation would not entail an excessive cost or burden.

7.2.5.6.4.6 Overall conclusion on improved social marketing campaigns as an alternative to the TPP measures

7.1620. We have concluded above that the complainants' proposal for "improvements" to³⁸⁴⁴, or "effective"³⁸⁴⁵, social marketing campaigns in Australia is only an alternative measure to the extent that certain elements of the proposal that the complainants have made – that is, in respect of segmentation of the market and integration of messages – are not already in place in Australia.

7.1621. We have also found that we are not persuaded that this alternative would necessarily be less trade-restrictive than the TPP measures, insofar as it would, if it were at least as effective as the TPP measures in reducing tobacco consumption, entail at least the same degree of impact on the total volume of imports of tobacco products.

7.1622. We have also found that we are not persuaded that the complainants have demonstrated that the proposed modifications to Australia's social marketing campaigns would be as, or any more, effective than Australia's current approach to social marketing. Furthermore, we are not persuaded that such "improved" social media campaigns, would, as a *substitute* to the TPP measures, achieve a contribution to Australia's objective equivalent to the combined effect of Australia's existing social marketing campaigns *and* the TPP measures.

7.1623. In making this finding in respect of the "equivalence" of the contribution made by this alternative, we have also taken into account the nature of Australia's objective, the risks that non-fulfilment of the TPP measures' objective would create (including the nature of the risks and the gravity of the consequences arising from the non-fulfilment of the technical regulation's objective), the characteristics of the TPP measures (including the regulatory context in which they operate, including Australia's existing social marketing campaigns), and the evidence available.³⁸⁴⁶

³⁸⁴² Honduras's first written submission, paras. 641 and 931.

³⁸⁴³ Dominican Republic's first written submission, paras. 797-798.

³⁸⁴⁴ Honduras's first written submission, paras. 626, 927.

³⁸⁴⁵ Dominican Republic's first written submission, para. 779.

³⁸⁴⁶ Appellate Body Report, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.215.

7.1624. We therefore find that the complainants have not demonstrated that improved social marketing campaigns would be a less trade-restrictive alternative to the TPP measures that would make an equivalent contribution to Australia's objective.

7.2.5.6.5 Fourth proposed alternative measure: pre-vetting

7.1625. Honduras argues that, in the event that "the Panel finds that smoking prevalence in Australia could be influenced by particular elements of tobacco packaging and products", its expert Mr Shavin explains how a pre-vetting mechanism, administered by the ACCC, could regulate the use of these elements in a less restrictive manner than the TPP measures.³⁸⁴⁷

7.1626. The Dominican Republic submits that the creation of a new pre-vetting mechanism for tobacco packaging would impose less of a restriction to trade, make at least an equal contribution to Australia's objective; and be reasonably available to the respondent.³⁸⁴⁸ Specifically (and assuming the Panel finds that the TPP measures actually contribute to their objective to some extent), pre-vetting would achieve the same objective through the very same mechanisms set out in the TPP measures because, rather than imposing a blanket prohibition that indiscriminately strips all design elements of all retail packaging for tobacco products and of individual cigars and cigarettes, pre-vetting would provide for an individualized assessment of packaging and sticks, including individual elements of individual trademarks, to ensure that they do not include any allegedly problematic design features.³⁸⁴⁹

7.1627. Cuba argues that imposing a "mandatory *ex ante* approval regime for the packaging and trademarks of tobacco products" is an alternative measure.³⁸⁵⁰ Indonesia argues that the TPP measures "regulate virtually all features of tobacco packaging and sticks on all tobacco products, without any consideration for which particular tobacco packaging or stick element (if any) induces tobacco consumption, creates confusion, or undermines the graphic health warning, without testing that proposition for any of those features".³⁸⁵¹ In Indonesia's view, because the TPP measures fail to make this distinction, a pre-vetting mechanism involving an individualized assessment of each tobacco package and stick is a less trade-restrictive alternative that would achieve the same level of protection, make the same contribution to the TPP measures' legitimate objective, and is reasonably available to Australia.³⁸⁵²

7.1628. Australia submits that the complainants' proposed pre-vetting mechanism would be highly trade-restrictive, as it would be costly to administer and impose significant expenses upon the tobacco industry. Australia also argues that pre-vetting would not make an equivalent contribution to the objectives of the TPP measures. The effectiveness of packaging restrictions is dependent upon standardization, and pre-vetting would undermine the mechanisms of the TPP measures by reinstating tobacco packaging as a vehicle for advertising and promotion. According to Australia, the complainants' proposal would also place a significant burden upon the ACCC. No study the ACCC could ever conduct would satisfy the tobacco industry that a package submitted for pre-vetting was likely to induce consumption, prior to releasing the package onto the market. Further, any attempt by the ACCC to restrain the use of a particular package would almost certainly trigger lengthy and costly litigation. Pre-vetting is not, according to Australia, a reasonably available alternative to the TPP measures.³⁸⁵³

7.2.5.6.5.1 Description of the proposed measure

7.1629. The complainants broadly concur in their descriptions of this alternative by proposing a pre-vetting mechanism as described in the expert report prepared by Mr Shavin.³⁸⁵⁴ The essential feature of the pre-vetting mechanism is that it would involve "an individualised assessment of each

³⁸⁴⁷ Honduras's first written submission, paras. 923 and 603-604.

³⁸⁴⁸ Dominican Republic's first written submission, paras. 1020-1021.

³⁸⁴⁹ Dominican Republic's first written submission, paras. 799-801.

³⁸⁵⁰ Cuba's first written submission, para. 281.

³⁸⁵¹ Indonesia's first written submission, para. 439.

³⁸⁵² Indonesia's first written submission, para. 440.

³⁸⁵³ Australia's first written submission, paras. 718, 726-728, 736, and 740; and second written submission, paras. 564-569.

³⁸⁵⁴ See Shavin Pre-Vetting Report, (Exhibit DOM/HND-9), paras. 1-6.

tobacco package and stick, and their constitutive elements, before it is allowed on the market in Australia".³⁸⁵⁵ Based on the proposal of the complainants as elaborated in the expert report by Mr Shavin, the creation of such a pre-vetting mechanism would involve the following main elements:

- a. the development of disqualifying criteria on the basis of which Australia could assess "any proposed use of marks on the packaging and sticks of tobacco products, as well as of the physical properties of packaging and sticks, prior their being used";
- b. a compulsory pre-notification regime in which a designated regulatory authority would have the mandate to pre-approve or refuse the use of various aspects of tobacco packaging and products;
- c. the possibility of reconsideration of the regulatory authority's pre-vetting decisions, including through recourse to an appellate mechanism; and
- d. provisions for the enforcement of determinations made through the pre-vetting mechanism.³⁸⁵⁶

7.1630. We discuss each of these elements in turn, principally drawing upon the description contained in Mr Shavin's report, as submitted and relied upon by the complainants.

7.1631. First, Mr Shavin describes a pre-vetting mechanism that would include "disqualifying criteria against which marks and physical features could be assessed" whereby "Australia could eliminate any packaging or stick elements that would likely induce consumption, while allowing all other elements that do not otherwise violate Australian law".³⁸⁵⁷ Additionally, Mr Shavin suggests that such a mechanism could also include consideration of misleading or deceptive aspects of tobacco packaging, although he separately concludes that any concern about misleading or deceptive packaging is already fully addressed in Australia under the ACL. Thus, Mr Shavin states that the disqualifying criteria for marks and physical features might include:

(A) Any elements of the sign or physical feature which, apart from any reputation that subsists in the trademark, are likely to:

- (i) increase the appeal of using tobacco products; and/or
- (ii) detract from the impact of the health warnings, including the graphic health warnings otherwise contained on the packaging; and/or
- (iii) contravene section 18 of the Australian Consumer Law ("ACL") because use of such elements or physical features would be likely to mislead or deceive consumers;

and thereby promote, directly or indirectly, consumption or use of tobacco products, whether or not by persons who have previously consumed or used tobacco products.

(B) Among the "elements" of the sign considered in section (A) are, *inter alia*, the colours or colour combinations, images, figures, metaphors, and the relative size of letters and images.³⁸⁵⁸

7.1632. We note Mr Shavin's statement that such criteria could be guided by existing standards under Australian law regarding the term "likely" in Australian legislation, as interpreted by

³⁸⁵⁵ Shavin Pre-Vetting Report, (Exhibit DOM/HND-9), paras. 17 and 25.

³⁸⁵⁶ See, e.g. Shavin Pre-Vetting Report, (Exhibit DOM/HND-9), paras. 27 and 36. See also Honduras's first written submission, paras. 923, 606-608; Honduras's second written submission, para. 223; Dominican Republic's first written submission, para. 809; Dominican Republic's response to Panel question No. 41; Cuba's first written submission, paras. 283-284; and Indonesia's first written submission, para. 441.

³⁸⁵⁷ Shavin Pre-Vetting Report, (Exhibit DOM/HND-9), para. 38.

³⁸⁵⁸ Shavin Pre-Vetting Report, (Exhibit DOM/HND-9), para. 40.

Australian courts.³⁸⁵⁹ Further, Mr Shavin states that applying these criteria in practice would involve "any credible evidence from relevant disciplines" that could be drawn, for example, "from marketing, social psychology, public health, and other relevant disciplines, and could also include relevant data and information on consumer behaviour as well as market data, for example, relating to similar packaging in Australia or even from other markets".³⁸⁶⁰ As described by Mr Shavin, the disqualifying criteria set out above "could be included in the form of an information standard" based on legal provisions and mechanisms currently existing in Australia.³⁸⁶¹

7.1633. Second, as the next "key step" to establishing the pre-vetting mechanism, Mr Shavin describes the creation of a pre-notification regime leading either to the pre-approval or refusal of tobacco packaging and sticks, which could involve a number of elements. According to Mr Shavin, one possible version would entail suppliers of tobacco products undertaking, on a compulsory basis, "a pre-notification of the proposed form of packaging and sticks, including by submission of mock-ups of the proposed packaging items and sticks" to a regulatory authority.³⁸⁶² Under Mr Shavin's description, "[t]he ACCC could be vested with the power to accept such a notification and to provide a ruling, formally or informally, as to whether, based on the information available to it at the time, it had any objection to the proposed packaging and sticks", whether in the context of existing consumer protection laws generally or the "yet to be developed" information standard described above.³⁸⁶³

7.1634. We note that the complainants have generally presented arguments related to pre-vetting based on Mr Shavin's suggestion that the ACCC could administer such a scheme. At the same time, Mr Shavin notes that "Australia could, of course, choose to administer the mechanism through a different agency or commission", and his proposal does not foreclose the creation of a new agency or body to administer the pre-vetting mechanism.³⁸⁶⁴ Accordingly, we will refer generically to the "regulatory authority" responsible for administration of a pre-vetting scheme so as to accommodate the possibility of either the ACCC or some other body assuming this function. As described by the complainants, under either scenario the pre-vetting process and mechanism would be similar in design.³⁸⁶⁵

7.1635. Under the compulsory pre-notification process described by Mr Shavin, "the relevant tobacco product could not be put on the market unless the ACCC had first granted the approval of the packaging and stick elements subject to pre-notification".³⁸⁶⁶ Mr Shavin contemplates that "Australia could enact and implement a set of provisions that establish a procedure for vetting, prior to public use, the proposed use of signs and physical features", and that such provisions could be included within Australia's CCA or established as self-standing legislation.³⁸⁶⁷

7.1636. The process of pre-notification and approval would involve applicants submitting any proposed new form of packaging or sticks to the regulatory authority "when the producers are ready to transition from the current packages and sticks (which comply with the existing [T]PP Act) to add distinguishing features that are not now permitted under the [T]PP Act".³⁸⁶⁸ Within a specified period of receiving the proposed packaging, the regulatory authority "would need to publish a draft assessment as to whether the packaging and sticks would comply" with the

³⁸⁵⁹ See Shavin Pre-Vetting Report, (Exhibit DOM/HND-9), para. 41 (explaining that the standard applied by courts regarding conduct that is likely to mislead or deceive turns on whether there is a "real or not remote chance or probability" of misleading or deceiving, and that this "is not a strictly mathematical formula" but rather that in the civil context "the courts must be persuaded on the balance of probabilities"). See also Shavin Report, (Exhibit DOM/HND-1), para. 41.

³⁸⁶⁰ Shavin Pre-Vetting Report, (Exhibit DOM/HND-9), para. 42.

³⁸⁶¹ Shavin Pre-Vetting Report, (Exhibit DOM/HND-9), paras. 44-47 (referring to provisions in the ACL); and Shavin Report, (Exhibit DOM/HND-1), para. 16.

³⁸⁶² Shavin Pre-Vetting Report, (Exhibit DOM/HND-9), para. 48.

³⁸⁶³ Shavin Pre-Vetting Report, (Exhibit DOM/HND-9), para. 49.

³⁸⁶⁴ See Shavin Pre-Vetting Report, (Exhibit DOM/HND-9), fn 11.

³⁸⁶⁵ See, e.g. Cuba's first written submission, paras. 281-282; and Dominican Republic's second written submission, para. 719.

³⁸⁶⁶ Shavin Pre-Vetting Report, (Exhibit DOM/HND-9), para. 50.

³⁸⁶⁷ Shavin Pre-Vetting Report, (Exhibit DOM/HND-9), para. 51 (further stating Mr Shavin's opinion in either case "there would be no substantive legal difference; the choice of implementation would be one only of policy").

³⁸⁶⁸ Shavin Pre-Vetting Report, (Exhibit DOM/HND-9), para. 53.

relevant regulations.³⁸⁶⁹ Mr Shavin describes the potential for an applicant to "have a specified period within which to make further submissions" on the basis of the draft determination, which "could include proposed variations to the packaging and sticks designed to meet issues raised by the draft determination".³⁸⁷⁰ The scheme could also provide that the decision as to whether or not to grant approval for the use of the proposed packaging and sticks would be based upon the material made available to the regulatory authority at the time.³⁸⁷¹

7.1637. Third, the pre-vetting proposal set out by Mr Shavin contemplates possible avenues for reconsideration of pre-vetting decisions in addition to possible appeals of pre-vetting decisions through recourse to the Australian judiciary. The first instance of reconsideration would pertain to *approvals* and would reside with the pre-vetting regulatory authority itself, whereby the regulator "could revisit its decision after packaging or sticks containing the pre-vetted marks or physical features appear on the market, in case it later can be demonstrated that the use of those marks or physical features in fact has the effect of inducing consumption, misleading, or otherwise undermining the impact of the graphic health warnings".³⁸⁷² In other words, the regulatory authority "would not, by reason of having previously granted an approval during the pre-vetting process to the Applicant, be prevented or otherwise constrained from subsequently instituting proceedings to seek orders from the Federal Court of Australia restraining the further use of the packaging or sticks".³⁸⁷³ Under such a scenario, the regulatory authority would be able to seek orders from Australian courts restraining the further use of the packaging or sticks, and an applicant having been granted approval (in the absence of fraud) would be able to continue to use the approved packaging without penalty until the date of any restraining order by a court.³⁸⁷⁴

7.1638. Mr Shavin describes an additional layer of judicial review for *denials* of applications by the regulatory authority. Specifically, Mr Shavin suggests that such review could be carried out by the Australian Competition Tribunal established by the CCA, which, although principally concerned with the administrative review of competition matters, could "readily deal with any issues arising from the use of trademarks on, or physical aspects of, tobacco packaging".³⁸⁷⁵

7.1639. Fourth, Mr Shavin describes "[m]odelling the enforcement of the pre-vetting scheme on the enforcement mechanisms in the [T]PP Act" to create effective mechanisms to ensure compliance.³⁸⁷⁶ According to Mr Shavin, such enforcement provisions "would be directed to the use of a mark on the packaging of tobacco products where the ACCC has not first granted approval, and also where the marks have been used after first having been approved through the pre-vetting mechanism, but subsequently assessed by the ACCC as inducing tobacco consumption".³⁸⁷⁷ This could entail the imposition of civil and criminal penalties, as well as the granting of restraining orders.³⁸⁷⁸

7.1640. Finally, Mr Shavin addresses the costs of administering and enforcing a pre-vetting scheme, suggesting that such costs "could readily be recovered by charges levied on persons seeking approval of the use of new tobacco packaging or sticks".³⁸⁷⁹ Mr Shavin states that the scheme could therefore be funded on a "user pays" basis, citing the examples of the Alcohol Beverages Advertising (and Packaging) Code (ABAC) in Australia as well as Australia's application

³⁸⁶⁹ Shavin Pre-Vetting Report, (Exhibit DOM/HND-9), para. 54.

³⁸⁷⁰ Shavin Pre-Vetting Report, (Exhibit DOM/HND-9), para. 55.

³⁸⁷¹ Shavin Pre-Vetting Report, (Exhibit DOM/HND-9), para. 56.

³⁸⁷² Shavin Pre-Vetting Report, (Exhibit DOM/HND-9), para. 43. See also *ibid.* para. 27(c).

(contemplating "the preservation of the right of the ACCC to change its mind after packaging and sticks containing the marks and physical features are used in the marketplace, if it is shown that the use of individual aspects of those marks or physical features induce consumption").

³⁸⁷³ Shavin Pre-Vetting Report, (Exhibit DOM/HND-9), para. 56.

³⁸⁷⁴ Shavin Pre-Vetting Report, (Exhibit DOM/HND-9), paras. 56-57.

³⁸⁷⁵ Shavin Pre-Vetting Report, (Exhibit DOM/HND-9), paras. 58 and 60. See also *ibid.* para. 27(b).

³⁸⁷⁶ In this regard, Mr Shavin refers to provisions of the TPP Act relating to offences as well as the attendant criminal and civil penalties for contravention of the TPP Act. See Shavin Pre-Vetting Report, (Exhibit DOM/HND-9), paras. 67-73.

³⁸⁷⁷ Shavin Pre-Vetting Report, (Exhibit DOM/HND-9), para. 66.

³⁸⁷⁸ Shavin Pre-Vetting Report, (Exhibit DOM/HND-9), para. 66. See also *ibid.* para. 27(b).

³⁸⁷⁹ Shavin Pre-Vetting Report, (Exhibit DOM/HND-9), para. 74.

of the "user pays" principle to the supply of government services by, for example, the ACCC and the Federal Court.³⁸⁸⁰

7.2.5.6.5.2 Whether a pre-vetting mechanism would be less trade-restrictive than the TPP measures

Arguments of the parties

7.1641. Honduras argues that the pre-vetting mechanism is less restrictive than the TPP measures, "as it envisages an individualised assessment by the ACCC of signs, design and format features of tobacco packages and products"; as opposed to "a blunt attempt to regulate the use of all signs and features, regardless of their potential effect on tobacco consumption".³⁸⁸¹ Honduras submits that if credible evidence were to demonstrate that particular features or elements of a trademark do induce tobacco consumption, those specific design elements would not be allowed on the market, the effect of which is that the pre-vetting mechanism "would by definition" constitute a measure that is less restrictive than prohibiting all design features on a tobacco trademark, as do the TPP measures.³⁸⁸²

7.1642. In comparing the trade-restrictiveness of a pre-vetting mechanism with the TPP measures, Honduras submits that such a mechanism "is a less blunt instrument compared to plain packaging as it only stops those trademarks that are considered to be problematic", as it "necessarily allows for more product differentiation than is currently the case under" the TPP measures. For Honduras, "it is therefore less restrictive in terms of access to the Australian market and less trade restrictive in terms of the down-trading effect that plain packaging is causing". Honduras also argues that pre-vetting "does not require a change in the entire production process and does not impose any compliance costs", and "merely affects the demand side and does not impose any burden on traders". Honduras adds that "it does not entail any restriction on the use of trademarks on packaging of tobacco products and tobacco products would be able to compete in a fair manner in the Australian market", or "result in any compliance costs for tobacco producers".³⁸⁸³

7.1643. In addition, in response to Australia's arguments, Honduras states that Australia has not substantiated its claim that the costs of compliance with the pre-vetting mechanism would be far greater than the costs of compliance with the TPP measures. Those market participants that prefer not to apply for pre-vetting would be allowed to sell their products on the Australian market in plain packs. Honduras points out that Australia fails to acknowledge similar schemes, such as the ABAC, which are funded on a "user pays" basis. Honduras also classifies as "speculative" Australia's argument that the pre-vetting mechanism would be "highly litigious", and adds that it will be in the interests of the suppliers to make the system work rather than to frustrate it.³⁸⁸⁴

7.1644. The Dominican Republic submits that a pre-vetting mechanism would be less trade-restrictive by preserving the ability of producers to maintain those aspects of trademarks and packaging that are permitted under the mechanism, such that "the limitation, if any, on trademarks, and the ensuing restriction on trade, would be significantly decreased relative to the impact of the blanket prohibitions and extreme conditions mandated by the [TPP] measures".³⁸⁸⁵

7.1645. Insofar as the volume of sales are used to assess trade-restrictiveness, the Dominican Republic argues that pre-vetting would enable the regulator to ban any pack design features that lead to increased smoking, without banning others, thereby making an equivalent contribution to reducing sales volumes, while still maintaining more differentiation than the TPP measures and

³⁸⁸⁰ Shavin Pre-Vetting Report, (Exhibit DOM/HND-9), para. 75.

³⁸⁸¹ Honduras's first written submission, paras. 924, 613; and second written submission, para. 224.

³⁸⁸² Honduras's first written submission, para. 614; second written submission, para. 224; and response to Panel question No. 151.

³⁸⁸³ Honduras's response to Panel question No. 151.

³⁸⁸⁴ Honduras's second written submission, paras. 713-714.

³⁸⁸⁵ Dominican Republic's first written submission, para. 1024. See also Dominican Republic's response to Panel question Nos. 41 and 65.

thus causing less downtrading. According to the Dominican Republic, a pre-vetting mechanism would therefore be less trade-restrictive than the TPP measures.³⁸⁸⁶

7.1646. In respect of the trade-restrictiveness of this alternative, Cuba submits that a pre-vetting mechanism "would effectively target only the elements of packaging and trademarks that Australia claims may encourage tobacco consumption, whilst at the same time upholding the rights of trademark owners to use those trademarks to differentiate their products". The alternative would therefore "be both more effective (and at least as effective) in contributing to Australia's health objectives and less restrictive than the [TPP] measures".³⁸⁸⁷

7.1647. Indonesia submits that a pre-vetting mechanism would be less trade-restrictive because it would still allow producers to use other marks and design elements to distinguish their products based on factors such as quality.³⁸⁸⁸

7.1648. Australia argues that, as the pre-vetting scheme would be user-pays it would therefore "add a very significant expense for producers selling their products in the Australian market" (which would "be far greater than any of the alleged costs of complying with the tobacco plain packaging measure").³⁸⁸⁹ Furthermore, for Australia, the extent to which tobacco producers have changed their packaging in the Australian market in the past means that the pre-vetting system would require the commitment of significant resources by the ACCC. Australia also argues that the system is likely to be "highly litigious", with several avenues of appeal of any decision. Moreover, if a producer were required to change its packaging as a result of the scheme, additional costs would be incurred. Thus, according to Australia, "on the complainants' own terms, the system would be highly trade-restrictive".³⁸⁹⁰ Moreover, with respect to the argument that the tobacco industry would not incur significant costs under the pre-vetting scheme because the industry rarely changes its packaging, Australia argues that such an argument is belied by the submissions of the tobacco industry in the litigation against the United States Food and Drug Administration (USFDA) in relation to that similar pre-vetting scheme. Specifically, Australia states that the industry is arguing that the scheme will cause "concrete injury and hardship" to it because of how "frequently [tobacco companies] modify the labels of their products".³⁸⁹¹

Analysis by the Panel

7.1649. To the extent that a pre-vetting mechanism would make a contribution to Australia's objective at least equivalent to that of the TPP measures, as the complainants argue, and would do so by reducing overall consumption of tobacco products, it would also have a corresponding effect on the total volume of trade, to at least the same extent as the TPP measures. In that respect, it would therefore be at least as trade-restrictive as the TPP measures.

7.1650. The complainants' contentions in respect of trade-restrictiveness rest on the premise that a pre-vetting mechanism would necessarily allow for more product differentiation than is currently the case under the TPP measures, and thereby be less trade-restrictive than the TPP measures. We recall in this respect our earlier conclusion that we are not persuaded, however, that a modification of the competitive environment for all tobacco products on the entire market through a reduction in the opportunity to differentiate products on the basis of branding features (which may in principle *increase* competition on the market) constitutes, in itself, a restriction on "competitive opportunities" for imported tobacco products that must be assumed to have a "limiting effect" on international trade.³⁸⁹² Rather, it needs to be established *how* such effects on

³⁸⁸⁶ Dominican Republic's response to Panel question No. 151.

³⁸⁸⁷ Cuba's first written submission, para. 286.

³⁸⁸⁸ Indonesia's first written submission, para. 440.

³⁸⁸⁹ Australia's first written submission, para. 736. Australia adds that, under the methodology proposed by the complainants, the ACCC would need to conduct a 12-month study for each and every package submitted for pre-vetting. In its view, this highlights that the complainants' proposed measure would be unworkable and highly trade-restrictive because of the extreme costs. The voluntary ABAC scheme, to which the complainants compare their proposal, contemplates four days for the pre-vetter to reach a decision on whether to approve the advertisement. Australia's second written submission, fn 633.

³⁸⁹⁰ Australia's first written submission, para. 736.

³⁸⁹¹ Australia's response to Panel question No. 151; and comment on the complainants' responses to Panel question No. 157.

³⁸⁹² See para. 7.1415 above.

the conditions of competition on the market give rise to a limiting effect on international trade in tobacco products.³⁸⁹³ We further recall our examination in that context of the effects of the TPP measures on the opportunity for brand differentiation and its impact on the overall value of trade.

7.1651. To the extent that the pre-vetting mechanism proposed by the complainants would entail the same type of limitations on the use of branding and other design features on tobacco products and their retail packaging as the TPP measures (albeit potentially to a lesser extent), it would give rise to similar concerns in this respect. To the extent that this would, in turn, give rise to a limiting effect on international trade, this effect would arise under the pre-vetting mechanism.

7.1652. A pre-vetting mechanism could potentially permit packaging differentiation and individual elements of tobacco packaging to a greater extent than the TPP measures, such that approval of certain branding features by a pre-vetting authority could result in greater differentiation as well as the attendant associations made by consumers in respect of the brands and packaging attributes that are permitted onto the market. In this respect, a pre-vetting mechanism might lead to a lesser impact on product differentiation between tobacco products when compared with the TPP measures. To the extent that this would, in turn, give rise to a limiting effect on international trade, this effect could arise to a lesser degree under the pre-vetting mechanism. However, such an outcome cannot be guaranteed, inasmuch as the complainants' proposed alternative could potentially result in restrictions (subject to the pre-vetting approval process) that equal or go beyond elements of tobacco plain packaging that are regulated by the TPP measures. To the extent that the pre-vetting mechanism described by the complainants does not preclude the restriction of packaging features such as brand names and brand variants that are not currently covered by the TPP measures, it would be possible that the packages permitted onto the market would reflect even greater stringency.

7.1653. Moreover, a pre-vetting mechanism would introduce significant additional administrative and operational costs that, by the complainants' own description, could potentially be placed on industry participants themselves.³⁸⁹⁴ Regardless of the precise criteria adopted and the scope of packaging features covered, a core component of the pre-vetting alternative is the addition of a regulatory process through which proposed deviations from plain packaging would be assessed, with multiple layers of potential review. We note in this regard the compound burdens and challenges that would be posed under a pre-vetting mechanism across the various elements of its operation, were all procedural elements to be utilized. This is especially evident in considering the potential recourse to judicial appeal and further review, for which there is evidence that substantial time and resources might be required.³⁸⁹⁵ It is therefore clear, from the complainants' own descriptions of this alternative, that pre-vetting would introduce an additional element of costliness that could be directly incurred by industry participants. While, in the absence of precise figures in this respect, it is difficult to quantify such costs and assess whether they would be of such magnitude as to have a limiting effect on trade, it is clear that these costs, whatever their magnitude, would be additional to those arising under the TPP measures.

7.1654. In sum, any degree of trade-restrictiveness stemming from reduced product differentiation under the TPP measures would not necessarily be greater than under the pre-vetting mechanism proposed by the complainants, which would additionally introduce implementation costs that do not arise under the TPP measures. In light of the above, we are therefore not persuaded that the complainants have demonstrated that the pre-vetting mechanism that they have proposed would be less trade-restrictive than the TPP measures.

³⁸⁹³ Australia's first written submission, para. 516.

³⁸⁹⁴ The complainants have suggested that the pre-vetting regime could be funded on a "user pays" basis, as is the case in the ABAC system regarding alcoholic beverages in Australia. While this possibility addresses *how* the costs of administering a pre-vetting regime might be defrayed, it is not necessarily informative of the magnitude of those costs. The parties have presented various arguments with respect to the implications of a "user pays" approach for industry litigiousness and the prolongation of the process, with the complainants notably contending that the tobacco industry would lack the incentive to pursue lengthy proceedings if it were to incur all associated costs.

³⁸⁹⁵ See generally Sims Report, (Exhibit AUS-22) (SCI); and Finkelstein Report, (Exhibit AUS-21).

7.2.5.6.5.3 Whether a pre-vetting mechanism would make an equivalent contribution to Australia's objective

Arguments of the parties

7.1655. Honduras argues that a pre-vetting mechanism will achieve "the same degree" of contribution as the TPP measures, as it would address those elements of tobacco packaging and products that, "on the basis of credible evidence", were found "to induce consumption, and will, therefore, increase the smoking prevalence rate in Australia".³⁸⁹⁶ Specifically, Honduras proposes this alternative in the event the Panel finds that smoking prevalence could be reduced through one of the two "mechanisms" set out in Section 3(2) of the TPP Act, namely reducing the appeal of tobacco products and packaging, or increasing the effectiveness of GHWs. Honduras's expert Mr Shavin argues that the pre-vetting mechanism would not need to include consideration of misleading or deceptive aspects of tobacco packaging (as this issue is already fully covered by the ACL); however, an additional element of the pre-vetting proposal does include the possibility of pre-vetting with respect to aspects of the packaging that would likely be misleading or deceptive to consumers.³⁸⁹⁷

7.1656. Honduras submits that Australia has failed to substantiate its allegation that the ACCC lacks the expertise to assess the appeal of tobacco products and packaging, or the effect of trademarks on the effectiveness of GHWs.³⁸⁹⁸ Honduras adds that the analysis of whether a trademark on a cigarette pack is appealing or may undermine the effectiveness of GHWs is not substantially different and that the ACCC could engage external consultants specialised in marketing, social psychology, public health for this purpose.³⁸⁹⁹ In response to Australia's submission that the pre-vetting proposal would require "testing thousands of combinations of packaging features", Honduras submits that this is an exaggeration, as the packaging of tobacco products remains relatively constant over time, and in any case Australia is free to implement the measure in its own way in order to address any practical concerns arising from the application of the mechanism (for example, by setting a limit on the frequency of changes in packaging).³⁹⁰⁰

7.1657. The Dominican Republic relies on the expert report by Mr Shavin in respect of the contribution that a pre-vetting mechanism would make to Australia's objectives. Citing Mr Shavin's report, the Dominican Republic submits that the same contribution, if any, to reducing tobacco consumption could be achieved by regulating only those aspects of tobacco packaging or sticks in respect of which credible evidence demonstrates induce consumption. The proposed mechanism could be formulated in a manner that closely tracks the mechanisms through which the TPP Act is supposed to achieve Australia's objectives, and be substantiated on the basis of credible evidence drawn from relevant disciplines, including marketing, psychology, and public health.³⁹⁰¹ In addition, such a measure would allow for subsequent reconsideration, whereby the ACCC, having granted an approval during the pre-vetting process, would not be prevented from subsequently instituting proceedings or seeking orders from the Federal Court of Australia restraining the further use of packaging or sticks found to be non-compliant.³⁹⁰²

7.1658. Cuba submits that a pre-vetting mechanism "would effectively target only the elements of packaging and trademarks that Australia claims may encourage tobacco consumption, whilst at the same time upholding the rights of trademark owners to use those trademarks to differentiate their products". The alternative would therefore "be both more effective (and at least as effective) in contributing to Australia's health objectives and less restrictive than the [TPP] measures".³⁹⁰³

7.1659. Indonesia argues that a pre-vetting mechanism could achieve all of the stated objectives with respect to appeal of tobacco products, effectiveness of the GHWs, and not misleading consumers "by regulating only those individual elements of tobacco packaging or tobacco sticks

³⁸⁹⁶ Honduras's first written submission, paras. 925, 615; and second written submission, para. 225.

³⁸⁹⁷ Honduras's second written submission, para. 222.

³⁸⁹⁸ Honduras's second written submission, para. 708.

³⁸⁹⁹ Honduras's second written submission, para. 709.

³⁹⁰⁰ Honduras's second written submission, para. 710.

³⁹⁰¹ Dominican Republic's first written submission, paras. 816-819.

³⁹⁰² Dominican Republic's first written submission, paras. 820-821.

³⁹⁰³ Cuba's first written submission, para. 286.

that credible evidence demonstrates are contributing to prevalence".³⁹⁰⁴ Indonesia states that "the pre-vetting regulatory review mechanism makes the *same contribution* to the objective of reducing smoking prevalence as PP", as marks "that are proven to be objectionable will *continue to be prohibited*".³⁹⁰⁵

7.1660. Australia responds that pre-vetting would not make an equivalent *contribution* to the objectives of the measure.³⁹⁰⁶ Australia argues that Mr Shavin, upon whose expert report the complainants rely in respect of pre-vetting, has "absolutely no expertise" upon which to base his "assumption that tobacco plain packaging goes 'much further than is required to achieve [its] public policy objectives' and that 'the physical features of tobacco packaging and sticks regulated under the [TPP] measures [...] are unlikely to encourage consumption of tobacco products'".³⁹⁰⁷ In addition, Australia argues that the assessment of whether a particular feature of tobacco packaging is appealing or may diminish the effectiveness of the required GHWs is not within the ACCC's area of expertise, and that the scheme would require testing thousands of combinations of packaging features, across many brands, against the proposed disqualifying criteria. Australia adds that the effectiveness of packaging restrictions in achieving the specific objectives of the measures "is dependent upon standardised packaging, including the standardisation of both the graphic and structural features of the pack"³⁹⁰⁸, which is in accordance with the recommendations in the Article 13 FCTC Guidelines.³⁹⁰⁹ In Australia's view, the relaxation of the restrictions imposed by the TPP measures would lead to packaging innovations that make the initiation and continuance of smoking more likely to occur.³⁹¹⁰

7.1661. Australia also argues that "a fundamental problem" with this proposal lies in the fact that, were a package submitted to the ACCC for pre-vetting, the ACCC would need to conduct some form of study or testing to determine whether there was credible evidence that the pack would be likely to induce consumption if released onto the market. Australia argues that "no study the ACCC could ever conduct, prior to the release of the package onto the market, would satisfy the tobacco industry". Australia states that "hundreds of pre-implementation studies assessing the likely impact of a particular pack design (namely, plain packaging) were conducted over the course of two decades, [and] the complainants have purported to find fault with every study".³⁹¹¹ Australia contends that the ACCC, were it to reach a conclusion that a particular package were likely to induce consumption, would almost certainly result in the ACCC becoming mired in a spate of litigation, due to alleged deficiencies in the evidence in support of its conclusion. Australia adds that, in "the absence of sufficient funding for this course of action to be reasonably available, the ACCC would have no option but to approve the release of the branded packaging onto the market, and wait for evidence to emerge that particular features of the pack had actually induced consumption before restraining its further use".³⁹¹² Waiting until new consumers have been induced to consume an addictive product before taking action is not acceptable to Australia and would not achieve, but would instead undermine, its public health objectives.³⁹¹³ Australia refers to a directive issued by the USFDA which "effectively requir[es] pre-market approval of changes in the appearance of tobacco product labels", the validity of which the tobacco industry challenged in the United States District Court for the District of Columbia.³⁹¹⁴

7.1662. Australia also submits that an assertion that a pre-vetting mechanism would make an equivalent contribution to Australia's objectives is "implausible". For Australia, this is because "the pre-vetting scheme would operate through the same causal mechanisms as tobacco plain packaging but in a manner that would fundamentally undermine those mechanisms by reinstating tobacco packaging as a vehicle for advertising and promoting the 'intangible benefits' of tobacco

³⁹⁰⁴ Indonesia's first written submission, para. 440.

³⁹⁰⁵ Indonesia's first written submission, para. 442. (emphasis original)

³⁹⁰⁶ Australia's first written submission, para. 718.

³⁹⁰⁷ Australia's first written submission, para. 725 (quoting Shavin Pre-Vetting Report, (Exhibit DOM/HND-9), paras. 34-35).

³⁹⁰⁸ Australia's first written submission, para. 728.

³⁹⁰⁹ Australia's second written submission, paras. 564 and 569.

³⁹¹⁰ Australia's first written submission, para. 728; second written submission, para. 564; response to Panel question No. 157; and comment on the complainants' responses to Panel question No. 157.

³⁹¹¹ Australia's second written submission, para. 566.

³⁹¹² Australia's second written submission, para. 566.

³⁹¹³ Australia's second written submission, para. 566.

³⁹¹⁴ Australia's second written submission, para. 567.

products".³⁹¹⁵ Australia elaborates that, "relative to the standardised packaging implemented by the tobacco plain packaging measure, the proposed pre-vetting scheme would increase the appeal of tobacco products, reduce the effectiveness of graphic health warnings, and potentially mislead consumers, [such that] there is simply no basis for concluding that this alternative would make 'an equivalent or greater contribution' to" the objectives of the TPP measures.³⁹¹⁶

7.1663. Australia further observes that the types of packages that have been approved for release onto the Turkish market under the process referred to by the complainants "are precisely of the kind that Australia's experts have established appeal to particular segments of the market, mislead regarding the harmful effects of smoking and reduce the effectiveness of health warnings".³⁹¹⁷ For these reasons, Australia argues that pre-vetting is an "inadequate" substitute for the TPP measures.³⁹¹⁸

Analysis by the Panel

7.1664. Unlike the other alternative measures proposed by the complainants, the pre-vetting mechanism would be intended to achieve Australia's objective of improving public health by reducing use of, and exposure to, tobacco products through the same causal mechanisms as those employed by the TPP measures, namely reducing appeal, increasing the effectiveness of the GHWs, and reducing the ability of the retail packaging of tobacco products to mislead consumers about the harmful effects of smoking or using tobacco products.³⁹¹⁹

7.1665. The central premise of the complainants' proposal is that a pre-vetting alternative would not require the comprehensive restriction of packaging and design features, but instead would ensure that such features "were used only in circumstances to distinguish the products, rather than to promote the use or consumption of tobacco products (or to mislead consumers)".³⁹²⁰

7.1666. We note in this respect that Australia, through the expert opinion of Professor Fong, describes two linked components addressed by the TPP measures, namely the non-structural features of the pack (the graphic design, lettering, font, colours, etc.) and the physical, structural features of the pack (the physical dimensions, style of the opening, shape, edges, material used in packaging, and physical aspects of the cigarette itself).³⁹²¹ According to Professor Fong, "[t]hese two components are inherently linked together because the tobacco industry has used both to increase appeal, reduce the effectiveness of the warnings, and to communicate to consumers or potential consumers that some kinds of cigarettes are less harmful".³⁹²² Professor Fong thus considers that, "in the same way that advertising bans must be comprehensive" to prevent advertising from being "channelled more intensely into the channels not covered, the standardisation of the package must be comprehensive" given that "otherwise this would allow the marketing efforts of the tobacco industry on the package to be continued".³⁹²³

7.1667. Professor Fong submits that, to achieve the objectives of the TPP measures, "standardisation of the physical structure and standardisation of the graphical design elements of the tobacco package are both critically important" as "[t]o omit one of them would substantially weaken the [TPP] Act".³⁹²⁴ More specifically, regarding the first causal mechanism of the TPP measures, Professor Fong cites evidence that the package structure (shape and size) for a variety of tobacco products can have "a powerful effect on perceptions of appeal"³⁹²⁵, and that

³⁹¹⁵ Australia's comments on the complainants' responses to Panel question No. 157.

³⁹¹⁶ Australia's comments on the complainants' responses to Panel question No. 157.

³⁹¹⁷ Australia's first written submission, para. 727.

³⁹¹⁸ Australia's first written submission, paras. 726-727.

³⁹¹⁹ See, e.g. Honduras's response to Panel question No. 157; Dominican Republic's first written submission, paras. 799, 810-811; and Dominican Republic's second written submission, para. 706.

³⁹²⁰ Shavin Pre-Vetting Report, (Exhibit DOM/HND-9), para. 112.

³⁹²¹ Fong Report, (Exhibit AUS-14), para. 18. See also ibid. paras. 121-126; and Australia's first written submission, para. 728.

³⁹²² Fong Report, (Exhibit AUS-14), para. 19.

³⁹²³ Fong Report, (Exhibit AUS-14), para. 124.

³⁹²⁴ Fong Report, (Exhibit AUS-14), para. 21.

³⁹²⁵ Fong Report, (Exhibit AUS-14), para. 169. See also ibid. paras. 170-177. Elsewhere, Professor Fong cites a survey of 762 youth in the United Kingdom finding that, compared to a branded pack, a standardized

"packaging is an essential marketing tool within the tobacco industry".³⁹²⁶ In addition, Professor Fong considers that "[t]he impact of the attractive designs on tobacco packaging in increasing the appeal of the product is also experienced among potential consumers".³⁹²⁷ With regard to the second causal mechanism of the TPP measures, Professor Fong states that the standardized packaging required by the TPP measures bans "packaging innovations that would decrease the salience and prominence of the health warning".³⁹²⁸ Finally, with regard to the third causal mechanism, Professor Fong extensively reviews evidence and studies as to the potential for creative package design and variant descriptors to mislead consumers *inter alia* as to product attributes³⁹²⁹ and the harmful effects of using tobacco.³⁹³⁰ On the basis of his review, Professor Fong states that, "[b]y removing branding elements such as imagery and unique package designs, there is strong evidence to suggest that the plain packaging measure will have the effect of reducing the ability of the retail packaging of tobacco products to mislead consumers about the harmful effects of smoking or using tobacco products".³⁹³¹

7.1668. With regard to the potential exploitation of greater packaging permissiveness in a manner that would undermine the objective of the TPP measures, we note the opinion of Australia's expert, Professor Slovic, that the policy of standardizing packages rests on the view that the tobacco industry deliberately goes to great lengths "to build into every feature of a brand's design the very qualities of appeal that the complainants deny".³⁹³² We also note that Australia's expert, Dr Biglan, submits that relaxing or eliminating the current Australian policy would open the way to numerous marketing innovations. Dr Biglan cites various studies in support of this position to conclude that "modifying the plain packaging regulations so that some variation among brands in the features of their packs would open the way for the tobacco industry to develop and test package innovations that make the initiation and continuance of smoking more likely to occur".³⁹³³ We recall our own assessment of evidence as to the role of tobacco packaging as an advertising tool and instrument of communication³⁹³⁴, as well as the evidence we have reviewed suggesting that plain packaging of tobacco products reduces their appeal to consumers.³⁹³⁵

7.1669. We note that the "disqualifying criteria" presented by Mr Shavin and the complainants that would be used in a pre-vetting mechanism are based on the three causal mechanisms themselves, and are framed according to the promotion of tobacco consumption through physical features and a non-exhaustive set of elements of signs.³⁹³⁶ Given our findings on the contribution made by the TPP measures to their objective (in particular through these mechanisms), and to the extent that the proposed pre-vetting mechanism would operate through the same "mechanisms" as the TPP measures, we are of the view that a pre-vetting mechanism would contribute to Australia's objective of improving public health by reducing the use of, and exposure to, tobacco products. However, the foregoing considerations raise the question of the degree of contribution that could be made to this objective by targeting, and potentially permitting, individual elements of tobacco packaging that deviate from the standard plain package currently required by the

plain pack was significantly less likely to be perceived as more attractive across six different pairs of packs.
Ibid. para. 205.

³⁹²⁶ Fong Report, (Exhibit AUS-14), para. 179. See also Fong Supplemental Report, (Exhibit AUS-531), para. 132 (referring to a review by Sir Cyril Chantler).

³⁹²⁷ Fong Report, (Exhibit AUS-14), para. 183 (underlining original). Professor Fong further concludes based on a review of selected studies that "branding on tobacco packaging, such as shape and colour, has an influence on perceptions of taste" and that, "[b]ecause taste has an influence on appeal, it is reasonable to conclude that the plain packaging measure would eliminate or reduce the appeal of tobacco products to consumers by reducing the ability of branding on the pack to communicate messages about taste". Ibid. para. 190.

³⁹²⁸ Fong Report, (Exhibit AUS-14), para. 37. Professor Fong also cites reports by the US National Cancer Institute (2008) and the US Surgeon General (2012) that "have converged in their conclusion that plain packaging prevents innovations in packaging that could otherwise decrease the prominence of the health warnings". Ibid. para. 308.

³⁹²⁹ Fong Report, (Exhibit AUS-14), paras. 357-398.

³⁹³⁰ Fong Report, (Exhibit AUS-14), paras. 399-412.

³⁹³¹ Fong Report, (Exhibit AUS-14), para. 413.

³⁹³² Slovic Report, (Exhibit AUS-12), paras. 122-127.

³⁹³³ Biglan Report, (Exhibit AUS-13), paras. 131-134.

³⁹³⁴ See "Analysis by the Panel" within section 7.2.5.3.5.2 above.

³⁹³⁵ See "Impact of plain packaging on the appeal of tobacco products" within section 7.2.5.3.5.2 above.

³⁹³⁶ See Shavin Pre-Vetting Report, (Exhibit DOM/HND-9), para. 40.

TPP measures, and whether such a degree of contribution would be equivalent to that made by the TPP measures.

7.1670. At the outset, we note that the understanding of tobacco plain packaging as extending further than the restriction of individual features finds confirmation particularly in the Article 13 FCTC Guidelines, which, under the "Recommendation" that FCTC Parties "should consider" adopting "plain packaging requirements", state that "[p]ackaging, individual cigarettes or other tobacco products should carry *no* advertising or promotion, *including* design features that make products attractive".³⁹³⁷ On the other hand, in paragraph 17, the Article 13 FCTC Guidelines state that: "[i]f plain packaging is *not yet* mandated, the restriction should cover as many as possible of the design features that make tobacco products more attractive to consumers such as animals or other figures, 'fun' phrases, coloured cigarette papers, attractive smells, novelty or seasoned packs."³⁹³⁸

7.1671. The pre-vetting proposal put before us by the complainants would hinge on the presentation of "credible evidence" that certain features and signs induce tobacco consumption through any of the three causal mechanisms of the TPP measures.³⁹³⁹ We note there is potentially a significant difference between, on the one hand, requiring the regulatory authority to present credible evidence for a positive determination that certain features induce consumption³⁹⁴⁰ and, on the other hand, requiring applicants to present credible evidence that a given feature does *not* induce consumption through any of the causal mechanisms of the TPP measures. Under the former scenario, which we understand to be that envisaged under the complainants' proposed alternative, based on Mr Shavin's description³⁹⁴¹, the potential degree of contribution would appear to be dependent on the regulatory authority's ability to make a positive determination based on "credible evidence" that isolated packaging features induce consumption. This, in turn, could be understood as a presumption that no feature induces consumption through the three causal mechanisms of the TPP measures, which would then be for the regulatory authority to disprove by presenting credible evidence to the contrary.³⁹⁴² We refer as relevant to this aspect of the complainants' proposed alternative in our assessment of its potential degree of contribution to Australia's objective.

7.1672. As a fundamental matter, the design of the pre-vetting mechanism proposed by the complainants does not necessarily pre-determine in any detail the precise packaging or product features that would be permitted on the market. Accordingly, it cannot be precluded that, under the complainants' proposed pre-vetting scheme, the resulting packages would be identical to those required under the TPP measures in respect of the limitations on physical and graphic design features. Were such a scenario to be the result of a pre-vetting mechanism, it would logically follow that the pre-vetting scheme makes not only an equivalent but also an *identical* contribution as that achieved by the TPP measures.

7.1673. We note, however, that the premise underlying the complainants' proposed alternative is that it could achieve an equivalent contribution by targeting *only* those elements that are found to

³⁹³⁷ Article 13 FCTC Guidelines, FCTC/COP/3(12), (Exhibit JE-21), Annex, "Recommendation" following para. 17. (emphasis added)

³⁹³⁸ Article 13 FCTC Guidelines, FCTC/COP/3(12), (Exhibit JE-21), Annex, para. 17 (emphasis added). We also recall that paragraph 15 of the Article 13 FCTC Guidelines states *inter alia* that "[t]obacco pack or product features are used in various ways to attract consumers, to promote products and to cultivate and promote brand identity, for example by using logos, colours, fonts, pictures, shapes and materials on or in packs or on individual cigarettes or other tobacco products." Ibid. Annex, para. 15.

³⁹³⁹ See Shavin Pre-Vetting Report, (Exhibit DOM/HND-9), para. 42.

³⁹⁴⁰ See Shavin Pre-Vetting Report, (Exhibit DOM/HND-9), paras. 24-25 and 30.

³⁹⁴¹ Throughout his report, Mr Shavin consistently refers to "credible evidence" that a given feature induces consumption, rather than evidence that a given feature does *not* induce consumption. See Shavin Pre-Vetting Report, (Exhibit DOM/HND-9), paras. 18, 24-25 and 30.

³⁹⁴² Although it has been clarified that the TPP measures might remain in place pending entry into force of a pre-vetting mechanism, it is not clear from the complainants' descriptions that the proposed alternative would consist of a default regime of plain packaging from which applicants could seek specific derogations based on credible evidence, presented by the applicants, that a given feature does *not* fall within the disqualifying criteria. See, e.g. Dominican Republic's response to Panel question No. 41, para. 199; and Shavin Pre-Vetting Report, (Exhibit DOM/HND-9), para. 53.

induce consumption, or otherwise infringe the disqualifying criteria.³⁹⁴³ By comparison, the TPP measures are characterised by the complainants' expert, Mr Shavin, as prohibiting in a "blanket manner" packaging characteristics without any attempt at differentiation, potentially resulting in an *over-inclusive* restriction of the possible features of tobacco packaging for the purposes of Australia's objective.³⁹⁴⁴ At the same time, although the pre-vetting mechanism is proposed as a potentially more permissive regime, we note that it could extend to aspects beyond those regulated by the TPP measures. For instance, as noted by Australia's expert, Professor Fong:

[A]lthough the [TPP measures] eliminate[] the use of packaging design and colours of the pack to mislead consumers, there remains the name itself of the brand, for example, the use of names of colours in the names of brand variants that are not banned (e.g. "blue", "gold") as well as word descriptors that are not banned (e.g. "smooth").³⁹⁴⁵

7.1674. Professor Fong goes on to state that this "is a consequence of the fact that the industry still has other tools besides packaging that have also been shown to be effective in misleading consumers into believing that some brands are less harmful than others".³⁹⁴⁶ Thus, it is theoretically possible that a pre-vetting mechanism could apply to, and result in disqualification of, a *greater* number of packaging elements than under the TPP measures, based on a regulatory determination that they increase appeal, reduce the effectiveness of GHWs, or mislead consumers, thus potentially making a *greater* contribution to Australia's objective.

7.1675. Regardless, the parties' contentions as to the potential contribution of a pre-vetting mechanism largely relate to the capacity of a pre-vetting authority to effectively isolate and distinguish *individual* packaging features that undermine the objective and causal mechanisms of the TPP measures. We consider that a critical aspect of the degree of contribution that could be achieved by pre-vetting is the extent to which the regulatory authority administering a pre-vetting mechanism would successfully be able to ascertain precisely which individual features are likely to induce consumption or otherwise run counter to the disqualifying criteria based on the TPP measures' causal mechanisms. This would be the case even if the pre-vetting mechanism were to encompass packaging features in the review process that are not restricted by the TPP measures. Further, as noted, the pre-vetting regime described by Mr Shavin may require a regulatory authority to prohibit *only* those particular features in respect of which it can adduce specific "credible evidence" that they increase product appeal, reduce the effectiveness of GHWs, or mislead consumers, while all other packaging features submitted by applicants would be allowed onto the market. As noted above, this description indicates that the proposed pre-vetting mechanism would essentially place the burden on the regulatory authority to put forward positive evidence of its determinations as to each and every *individual* packaging element for which an applicant sought approval.

7.1676. We have reviewed above the parties' arguments as to the competence of an existing regulator, the ACCC, to carry out this function under a regime for pre-vetting assessment and approval. We have been presented with expert opinion that the ACCC has expertise and enforcement capability in respect of misleading conduct³⁹⁴⁷, and further that, for causal

³⁹⁴³ According to the complainants, the greater potential permissiveness as to tobacco packaging features is in fact the basis for arguing that pre-vetting would be less trade-restrictive than the TPP measures. See Honduras's response to Panel question No. 151 (stating that pre-vetting "necessarily allows for more product differentiation than is currently the case under the plain packaging regime"); Dominican Republic's response to Panel question No. 151, paras. 64-65 (referring to the TPP measures as "over-inclusive" and the pre-vetting mechanism as banning "solely those pack design features that lead to smoking" and "maintaining more differentiation"); Cuba's first written submission, para. 286; and Indonesia's first written submission, para. 440 (arguing that a pre-vetting "mechanism would be less trade-restrictive because it would still allow producers to use other marks and design elements to distinguish their products based on factors such as quality").

³⁹⁴⁴ See Shavin Pre-Vetting Report, (Exhibit DOM/HND-9), paras. 20-21 and 114.

³⁹⁴⁵ Fong Report, (Exhibit AUS-14), para. 414.

³⁹⁴⁶ Fong Report, (Exhibit AUS-14), para. 414. In this regard, the Dominican Republic submits that the pre-vetting mechanism could actually make a greater contribution to Australia's objectives to the extent that it is accepted that brand and variant names can impact smoking prevalence or consumption through the mechanisms specified in the TPP Act. Dominican Republic's second written submission, para. 709.

³⁹⁴⁷ See generally Heydon Report, (Exhibit UKR-11); and Shavin Report, (Exhibit DOM/HND-1), Section V. In particular, with respect to the causal mechanism of reducing the ability of the retail packaging of tobacco

mechanisms unrelated to misleading information or conduct, the ACCC would nonetheless be the most suitable entity currently existing in Australia to perform the functions of a pre-vetting regulatory authority.³⁹⁴⁸

7.1677. At the same time, we have been presented with evidence regarding the limitations of the ACCC in respect of the responsibilities that a pre-vetting mechanism would entail. Notably, the Chairman of the ACCC since 2011, Mr Sims, has submitted the view that, notwithstanding the ACCC's expertise and experience to assess whether packaging is likely to mislead or deceive, the ACCC does not *pre-approve* proposed marketing or packaging (of any product) for this purpose, nor does it assess whether packaging is appealing or diminishes the effectiveness of health warnings.³⁹⁴⁹ Further, within the scope of its current enforcement capabilities under the ACL, the ACCC would be faced with its own resource limitations in the course of potentially uncertain proceedings against misleading or deceptive tobacco packaging.³⁹⁵⁰ The limited capacity of the ACCC would either mean that fulfilment of the objective could be achieved partially through only one causal mechanism (i.e. enforcing provisions against misleading or deceptive conduct and false or misleading representations), or with the additional external assistance of experts, as suggested by Mr Shavin, to assist in the gathering of "credible evidence" regarding a proposed tobacco package and whether its features increase the appeal of the product, or undermine the effectiveness of the GHWs.

7.1678. Moreover, the several layers of review in the proposed pre-vetting mechanism also implicate the capacity of the Australian judiciary to review determinations based on the pre-vetting criteria and objective of the TPP measures. In this regard, Australia's expert Mr Finkelstein, a former President of the Australian Competition Tribunal and judge of the Federal Court, opines that the objectives of the TPP measures "are not capable of being achieved by the application of any other existing Australian law, specifically the ACL", for the reason that "the objectives of the [TPP Act] go far beyond the prevention of misleading or deceptive conduct, and are beyond the reach of any other Australian law".³⁹⁵¹ Mr Finkelstein further describes how, even if specific tobacco advertising or promotion could be characterised as misleading or deceptive, any resulting litigation will be "problematic" due to a variety of contributing factors, including the complexity of the legal and factual questions presented as well as the costliness and burdens of litigation.³⁹⁵² Thus, even if a pre-vetting regime could be legally introduced, this would "involve the courts at various stages of giving effect to the scheme", which could potentially generate additional uncertainties and inefficiencies.³⁹⁵³ In our view, the considerations raised by Mr Finkelstein and Mr Sims, both in terms of requiring a scope of review beyond misleading effects and the potential magnitude and complexity of proceedings, are indicative of the compound difficulties and uncertainties of pre-vetting at the stage of the initial determination, as well as in the subsequent judicial review.

7.1679. We note in this respect the parties' arguments regarding the example of Turkey's pre-vetting system for tobacco products. Australia contends that such a system allows precisely the features the TPP measures seek to avoid³⁹⁵⁴, whereas the complainants argue that Australia would be free to adapt such a regime to its own standards.³⁹⁵⁵ In our view, Australia's existing regulatory structure and tobacco pre-vetting in other jurisdictions, while potentially informative of reasonable availability, are not conclusive in the assessment of a hypothetical pre-vetting system's comparative degree of contribution to Australia's objective, in the context of its own overall approach to tobacco control policy, including its chosen level of protection.

products to mislead consumers about the harmful effects of smoking or using tobacco products, Mr Shavin concludes that the TPP measures will not contribute anything beyond the consumer protection regime and mechanisms that already exist in Australia. See also Australia's first written submission, para. 740.

³⁹⁴⁸ See Shavin Pre-Vetting Report, (Exhibit DOM/HND-9), para. 16.

³⁹⁴⁹ Sims Report, (Exhibit AUS-22) (SCI), paras. 6.8-6.11.

³⁹⁵⁰ Sims Report, (Exhibit AUS-22) (SCI), paras. 5.10-5.11.

³⁹⁵¹ Finkelstein Report, (Exhibit AUS-21), para. 5. See also *ibid.* para. 70.

³⁹⁵² Finkelstein Report, (Exhibit AUS-21), para. 6. See also *ibid.* paras. 78-93 and 135-146. In this regard, Finkelstein describes tobacco litigation in Australia to illustrate the potential challenges of litigating a claim for false and misleading conduct in relation to tobacco packaging, which he considers "likely to be complex, protracted and expensive". See *ibid.* paras. 94-123.

³⁹⁵³ Finkelstein Report, (Exhibit AUS-21), para. 9.

³⁹⁵⁴ Australia's first written submission, para. 727.

³⁹⁵⁵ See, e.g. Dominican Republic's second written submission, fn 689.

7.1680. In assessing the above elements to make a determination in respect of the degree of contribution that would be made by pre-vetting, we consider particularly relevant the Appellate Body's guidance that the assessment "should also be made in the light of the characteristics of the technical regulation at issue as revealed through its *design and structure*, as well as the nature of the objective pursued and the nature, quantity, and quality of the evidence available".³⁹⁵⁶ In this respect, we consider that a pre-vetting mechanism, in its design and structure, necessarily introduces the possibility of a reduction in the degree of contribution to the objective. This is due to the defining character of the pre-vetting mechanism, namely the introduction of administrative discretion and the possibility of permitting certain tobacco packaging elements that would lead to greater consumer appeal, reduced effectiveness of GHWs or a greater likelihood that consumers are misled about the harmful effects of smoking or using tobacco products.³⁹⁵⁷ To the extent that such a possibility materialized under a pre-vetting mechanism, this would lead to a lesser degree of contribution than that made by the TPP measures. The very design of a pre-vetting mechanism would imply the possibility of such potential deviations in a manner and to a degree that is foreclosed by the TPP measures. Thus, in any form of a pre-vetting mechanism, there would be a possibility of a lesser degree of contribution to Australia's objective, depending to a great extent on the disqualifying criteria and the enforcement standards applied by the regulatory authority.

7.1681. In this connection, we recall the evidence presented that plain packaging can serve to reduce packaging appeal, misleading of consumers, and distraction from GHWs³⁹⁵⁸, and that tobacco packaging has been utilized by the tobacco industry to introduce graphic and structural features in ways that undermine the objective and causal mechanisms of the TPP measures.³⁹⁵⁹ We also find compelling the fact that the uniform appearance of packages may itself prevent the use of differentiating features or the introduction of packaging variety, which could be used as part of the use of branding on tobacco retail packs, for the purposes of creating a brand image and positive associations with the products in such a manner as to potentially increase product appeal, reduce the effectiveness of GHWs, or mislead consumers about the harmful effect of smoking or using tobacco products.³⁹⁶⁰ Moreover, while such elements could, under the complainants' proposal, be retrospectively removed from the market as part of a review process, this would not remedy the effect that any such elements may have had whilst on the market (such as, for example, transmitting images and associations which may influence adolescents to initiate smoking).

7.1682. In conclusion, despite various possibilities under a hypothetical pre-vetting mechanism, the primary scenario under consideration for the alternative measure proposed by the complainants is the potential allowance of packaging features that are currently prohibited. The fact that a pre-vetting mechanism entails a degree of discretion and potential error in the process of permitting approved packaging features is particularly significant in this context. While this risk would be generally present under a pre-vetting mechanism, it is apparent in the possibility that a pre-vetting mechanism may permit packages which are subsequently deemed to meet the disqualifying criteria identified in the pre-vetting mechanism, creating a window during which the subsequent public health effects may arise. Moreover, we have described how the challenges of the pre-vetting review may be compounded by placing the burden on an authority to present

³⁹⁵⁶ Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.215. (emphasis added)

³⁹⁵⁷ We note in this regard Mr Shavin's explicit contemplation of the subsequent discovery of appealing, distracting, or deceptive elements, which is indicative of the inherent variability and possibility of error under a pre-vetting mechanism.

³⁹⁵⁸ See, e.g. Fong Report, (Exhibit AUS-14), paras. 21, 37, 124-126.

³⁹⁵⁹ See, e.g. Fong Report, (Exhibit AUS-14), p. 94; Biglan Report, (Exhibit AUS-13), paras. 133-134; and Slovic Report, (Exhibit AUS-12), paras. 122-128.

³⁹⁶⁰ We note, for example, the Imperial Tobacco promotional material referred to by Dr Biglan depicting a new "Camel" pack and indicating the messages indicated by different elements of that pack. These include the use of a "refined embossed logo "in "richer gold" (denoting "quality"), the adoption of a "smoother 'walking icon' with rounded shapes", denoting "generosity, liveliness", the use of a curved inner frame in the pack to denote "smoothness", the absence of another frame denoting a "sense of freedom, space and modernity", and the use of a "white halo" to indicate "stylishness". See Biglan Report, (Exhibit AUS-13), p. 30, Figure 6. Such evidence, in our view, is consistent with Professor Slovic's observation, which he also bases on internal tobacco industry documents, that "the tobacco industry has done everything possible to build into every feature of a brand's design the very qualities of appeal that the complainants deny". See Slovic Report, (Exhibit AUS-12), paras. 122-127. See also paras. 7.660, 7.731, and 7.1666-7.1668 above.

credible evidence and make positive determinations that *individual* features induce consumption through any of the causal mechanisms of the TPP measures. Such considerations are indicative of the potential under any pre-vetting regime for greater permissiveness of the type of packaging features that Australia seeks to prevent from being placed on the market.

7.1683. We recall our findings above as to the degree of contribution achieved by the TPP measures as well as the risks non-fulfilment of the objective would create. We have found that these risks are grave on the basis of the public health objective pursued, and have taken into account that there is no safe use of, or exposure to, tobacco products in the course of identifying the nature of these risks and the gravity of the consequences of non-fulfilment of the objective.³⁹⁶¹ The potential shortcomings we have described in respect of a pre-vetting mechanism introduce the possibility of a lesser fulfilment of Australia's objective in a manner that would prevent Australia from pursuing its legitimate public health objective at the levels it considers appropriate.

7.1684. In this regard, our assessment of the pre-vetting mechanism as an alternative to the TPP measures is informed by the sixth preambular recital of the TBT Agreement that a Member should not be prevented from pursuing a legitimate objective "at the levels it considers appropriate".³⁹⁶² We are also mindful of the Appellate Body's guidance that the level a Member considers appropriate "is usually revealed by the degree of contribution that a technical regulation *actually* makes to its objective"³⁹⁶³ and that this "may also be discernible in other ways, such as through an express provision or statement in the instrument at issue".³⁹⁶⁴ Both the degree of contribution actually made by the TPP measures, as well as provisions and statements found within the TPP measures³⁹⁶⁵, provide support for our conclusion that pre-vetting would not achieve an equivalent degree of contribution to that made by the TPP measures, taking into account the risks non-fulfilment of the objective would create.

7.1685. Accordingly, we find that the complainants have not demonstrated that their proposed alternative measure of a pre-vetting mechanism for tobacco packaging would make an equivalent contribution to Australia's objective, taking into account the nature of the objective and the risks non-fulfilment would create.

7.2.5.6.5.4 Whether a pre-vetting mechanism is reasonably available to Australia

Arguments of the parties

7.1686. Honduras argues that the ACCC already has "well defined obligations in relation to analogous circumstances", and could thus easily administer and enforce such a pre-vetting mechanism.³⁹⁶⁶ Honduras elaborates that the ACCC administers information standards and industry codes, and has successfully enforced compliance with the provisions of these instruments. It also refers to Australia's CCA, under which pre-vetting/pre-notification processes exist with respect to certain forms of potentially anti-competitive conduct and mergers. Honduras states that it does not see any compelling reason why this experience is not transposable to pre-vetting in the area of tobacco packaging.³⁹⁶⁷

7.1687. Honduras also asserts that a pre-vetting mechanism can be funded on a "user pays" basis by the tobacco industry itself, such that it not entail an undue burden for the Australian Government. Honduras refers to the pre-vetting scheme established under the ABAC as a good example of an existing industry-funded scheme for pre-vetting packaging (and advertisements). According to Honduras's expert, Mr Shavin, the ABAC regulates the content of the naming and packaging based on the understanding of how that naming and packaging might induce consumers to use, or abuse, alcoholic products. The ABAC also creates a panel which is responsible for

³⁹⁶¹ This is particularly the case given the evidence we have reviewed regarding the addictive nature of tobacco. See, e.g. US Surgeon General's Report 2012, (Exhibit AUS-76).

³⁹⁶² See Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.201 (footnote omitted).

³⁹⁶³ Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.201. (emphasis original; footnote omitted)

³⁹⁶⁴ Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.201 fn 632.

³⁹⁶⁵ See, e.g. TPP Bill Explanatory Memorandum, (Exhibits AUS-2, JE-7), p. 1.

³⁹⁶⁶ Honduras's first written submission, paras. 616, 926.

³⁹⁶⁷ Honduras's first written submission, para. 617.

adjudicating on complaints concerning compliance of packaging with the ABAC which, according to Honduras and Mr Shavin, attests to its competence and effectiveness in assessing the impact of packaging and advertising on consumption. Under Honduras's proposal, if a similar adjudication body were to examine the likely impact of a package on tobacco consumption, the elements under consideration would have to include the trademark at issue as well as the large GHWs appearing on the package.³⁹⁶⁸

7.1688. The Dominican Republic similarly argues that the pre-vetting mechanism would be reasonably available as it could be built upon the foundation of Australian laws and regulations already in effect, and could be administered by the ACCC. According to the Dominican Republic, the ACCC has regularly taken action against misleading aspects of product packaging pursuant to the ACL, and is currently responsible for regulating compliance with information standards and other instruments.³⁹⁶⁹ In addition, costs would be recovered from the tobacco industry, which would be obliged to submit their tobacco products and packaging for pre-vetting.³⁹⁷⁰

7.1689. The Dominican Republic also refers to the voluntary regime for pre-vetting packaging for alcoholic beverages under the ABAC, which it describes as a "quasi-regulatory scheme", with marketing guidelines that have been negotiated with government.³⁹⁷¹ It explains that the ABAC operates entirely on a user-pay basis, is used on a regular basis, and includes a process to adjudicate complaints over violations of the Code. For the Dominican Republic, this scheme indicates that regulatory schemes dealing with the content of packaging can function successfully.³⁹⁷²

7.1690. The Dominican Republic also points out that Turkey has enacted a mandatory pre-vetting mechanism for the retail packaging of tobacco products, to consider the outer packaging, opening band, internal package and aluminium folio of a unit package of tobacco product imported or produced in Turkey and cigarettes, to ensure that no misleading or incomplete information regarding their features, effects on health, hazards or emissions may be given, and "no text, name, brand, type name, metaphor, figure, sign, color or color combinations implying that a particular tobacco product is less harmful than another or inducing or encouraging its consumption, or misleading the consumer or making the product attractive, can be used".³⁹⁷³

7.1691. Cuba also refers to the ABAC for alcoholic beverages as something that would assist Australia in designing and successfully implementing a pre-vetting mechanism for tobacco products.³⁹⁷⁴ Cuba adds that it does not understand why Australia thinks that this alternative, "which clearly works in connection with alcoholic beverages, would not work with respect to tobacco products".³⁹⁷⁵

7.1692. Indonesia argues that a pre-vetting system "is not just 'theoretical'"³⁹⁷⁶ as the ACCC already conducts regulatory reviews under similar circumstances and has the authority to prohibit deceptive packaging.³⁹⁷⁷ Indonesia refers by way of example to the fact that persons may request from the ACCC a form of "pre-clearance" for certain forms of potentially anti-competitive mergers. Moreover, Indonesia submits that the ACCC has gained considerable experience in the administration and enforcement of information standards and industry codes, and has dealt with

³⁹⁶⁸ Honduras's first written submission, paras. 926, 618-625; and second written submission, para. 226.

³⁹⁶⁹ Dominican Republic's first written submission, para. 825.

³⁹⁷⁰ Dominican Republic's first written submission, para. 826.

³⁹⁷¹ Dominican Republic's first written submission, paras. 827-828.

³⁹⁷² Dominican Republic's first written submission, paras. 829-830.

³⁹⁷³ Dominican Republic's first written submission, paras. 805-807; and response to Panel question No. 41.

³⁹⁷⁴ Cuba's first written submission, para. 285.

³⁹⁷⁵ Cuba's second written submission, para. 346.

³⁹⁷⁶ Indonesia's first written submission, para. 449.

³⁹⁷⁷ Indonesia's first written submission, paras. 443-445. Indonesia also states that the ACCC undertakes investigations of alleged contraventions of the Australian Consumer Law, and has taken action against "descriptors" such as "light" or "mild" that were previously used on tobacco packaging, alleging that these terms mislead consumers into believing that products with this label were less harmful than other tobacco products. Indonesia's first written submission, paras. 446-447.

the pre-notification of conduct.³⁹⁷⁸ Indonesia adds that the system could be funded through user fees from manufacturers filing a request for pre-vetting with the ACCC.³⁹⁷⁹

7.1693. Indonesia also refers to the ABAC for pre-vetting packaging of alcoholic beverages, which in its view demonstrates that both conceptually and in practice, regulatory schemes dealing with the content of packaging can function successfully.³⁹⁸⁰ Indonesia also cites the example of the pre-vetting mechanism maintained by Turkey, which requires any tobacco product offered on the domestic market to be reviewed by a regulatory authority that must consider whether the proposed packaging includes any features that could increase appeal of the product or be misleading to consumers.³⁹⁸¹

7.1694. Australia argues that a pre-vetting mechanism would not be reasonably available. In Australia's view, the complainants' contention that the role allocated to the ACCC would be similar to that which it assumes in other contexts is inapposite. While the ACCC has the expertise and experience which would enable it to assess whether packaging is likely to mislead or deceive, Australia submits that it does not have the expertise to assess whether aspects of packaging, including colour, pictures and other devices, might separately or in combination make the packaging appealing or diminish the effectiveness of the required health warnings. Australia adds that the ACCC does not issue advisory opinions on whether a corporation has engaged in misleading and deceptive conduct, and the proposal that it do so would impose a considerable burden on the ACCC.³⁹⁸² According to Australia, the litigation costs entailed in defending pre-vetting decisions in courts would make such an alternative "prohibitively costly".³⁹⁸³ In Australia's view, the Dominican Republic's suggestion that, in view of these difficulties, Australia could create an entirely new agency with the relevant expertise to administer the pre-vetting mechanism only reinforces that this alternative is not reasonably available.³⁹⁸⁴

Analysis by the Panel

7.1695. Having set out above the main characteristics of the pre-vetting mechanism proposed by complainants, we note that a central point of contention as to its reasonable availability relates to the capacity of the ACCC to perform the regulatory functions of pre-vetting review and approval. The complainants largely rely on Mr Shavin's expert opinion regarding the role of the ACCC and its competency to administer and enforce a pre-vetting system.³⁹⁸⁵ In reviewing this opinion, we also bear in mind the possibility that the pre-vetting functions could be performed by another regulatory authority.

7.1696. According to Mr Shavin, "the ACCC has a long history of protecting and promoting fair competition in the marketplace through its enforcement of Australia's competition law pursuant to the Competition and Consumer Act (CCA), including in the tobacco industry".³⁹⁸⁶ Mr Shavin adds that the ACCC is authorized to prescribe an "industry code" (either mandatory or voluntary), which is defined by the CCA as "a code regulating the conduct of participants and industry towards other participants in the industry or towards consumers in the industry".³⁹⁸⁷ Mr Shavin notes the broad range of matters covered in the existing four mandatory industry codes prescribed under the

³⁹⁷⁸ Indonesia's first written submission, para. 450.

³⁹⁷⁹ Indonesia's first written submission, para. 448.

³⁹⁸⁰ Indonesia's first written submission, paras. 451-453.

³⁹⁸¹ Indonesia's first written submission, paras. 454-455.

³⁹⁸² Australia's first written submission, para. 740.

³⁹⁸³ Australia's second written submission, para. 566, footnote 634 and para. 569, footnote 643; and Australia's comments on the complainants' responses to Panel question No. 157, para. 82, fn 132.

³⁹⁸⁴ Australia's comments on the complainants' responses to Panel question No. 157.

³⁹⁸⁵ See, e.g. Honduras's first written submission, para. 616; Cuba's first written submission, para. 282; Dominican Republic's first written submission, para. 825; and Indonesia's first written submission, para. 443. Mr Shavin explains in his report that he is an Australian legal practitioner with experience conducting cases in the fields of competition law and intellectual property law, having acted both on behalf of and opposed to the ACCC in a number of proceedings. Shavin Pre-Vetting Report, (Exhibit DOM/HND-9), paras. 1-6.

³⁹⁸⁶ Shavin Pre-Vetting Report, (Exhibit DOM/HND-9), para. 77. Mr Shavin specifically cites the ACCC's past involvement in requiring certain tobacco companies to address its concerns as to the likely effect on competition of their merger.

³⁹⁸⁷ Shavin Pre-Vetting Report, (Exhibit DOM/HND-9), para. 80. (emphasis omitted)

CCA.³⁹⁸⁸ In addition, Mr Shavin refers to "a pre-vetting type" notification process whereby a person may seek from the ACCC a form of clearance in relation to certain forms of potentially anti-competitive conduct. The ACCC may assess the proposed conduct, with the possibility of changing its decision upon learning of additional information.³⁹⁸⁹

7.1697. In this context, we also note the expert opinion of Mr Heydon³⁹⁹⁰ submitted by Ukraine, and referred to by Cuba and Indonesia, addressing the scope and application of existing laws in Australia, and in particular the CCA and ACL, to regulate misleading retail packaging in relation to tobacco products.³⁹⁹¹ Mr Heydon submits that "[t]here is no element of the allegedly misleading conduct precluded by the challenged regime which is incapable of remedy under the [ACL]."³⁹⁹² Mr Heydon further cites the remedies under the CCA that are similar to but also "in many respects wider than those available under the [TPP] Act", and that the CCA "is capable of enforcement, and is enforced, in a determined way by a well-resourced and powerful government agency", the ACCC.³⁹⁹³

7.1698. Australia disputes the reasonable availability of pre-vetting on the basis that, "while the ACCC has the expertise and experience which would enable it to assess whether packaging is likely to mislead or deceive, it does not have the expertise to assess whether aspects of packaging, including colour, pictures and other devices, might separately or in combination make the packaging appealing or diminish the effectiveness of the required health warnings".³⁹⁹⁴

7.1699. In support of this position, Australia submits the report by Mr Sims which explains the mandate, structure, and functions of the ACCC. As explained by Mr Sims, "[t]he ACCC's role is to enforce the CCA and a range of additional legislation, promote competition and fair trading, and regulate national infrastructure for the benefit of all Australians".³⁹⁹⁵ The purpose of the CCA, in turn, is to enhance the welfare of Australia by promoting competition among business, promoting fair trading by business, and providing for the protection of consumers in their dealings with business.³⁹⁹⁶ Mr Sims further explains that the ACL is a schedule to the CCA administered by the ACCC and "each State and Territory's consumer law agency", and that it is enforced by all Australian courts and tribunals, including those of the States and Territories.³⁹⁹⁷

7.1700. Mr Sims describes the enforcement priorities and exercise of the ACCC's discretion, stating that the ACCC cannot pursue all complaints it receives about the conduct of traders or businesses, and that its role "is to focus on those circumstances that will, or have the potential to, harm the competitive process or result in widespread consumer detriment".³⁹⁹⁸ The ACCC sets enforcement priorities based on a variety of factors³⁹⁹⁹ each year⁴⁰⁰⁰ and uses a range of compliance and enforcement tools in order to encourage compliance with the CCA.⁴⁰⁰¹

7.1701. Mr Sims reports that the ACCC has received a substantial number of complaints and inquiries about tobacco, often related to labelling issues (including plain packaging), issues about

³⁹⁸⁸ Shavin Pre-Vetting Report, (Exhibit DOM/HND-9), paras. 82-84. See also ACCC industry codes, (Exhibit HND-78).

³⁹⁸⁹ Shavin Pre-Vetting Report, (Exhibit DOM/HND-9), para. 87. Mr Shavin also refers to the voluntary pre-notification of mergers to the ACCC.

³⁹⁹⁰ Mr Heydon explains in his report that he previously served as a member of the High Court of Australia, in which capacity he participated in several decisions on misleading and deceptive conduct. Mr Heydon additionally describes his experience and expertise as a practitioner and scholar in the field of consumer protection. Heydon Report, (Exhibit UKR-11), pp. 4-5, Annexure A.

³⁹⁹¹ We note that Mr Heydon's opinion was submitted in connection with the proposal by Ukraine that Australia's existing consumer protection laws already serve to address "the key concern" of Australia regarding the prevention of deceptive packages.

³⁹⁹² Heydon Report, (Exhibit UKR-11), p. 3.

³⁹⁹³ Heydon Report, (Exhibit UKR-11), p. 4.

³⁹⁹⁴ Australia's first written submission, para. 740.

³⁹⁹⁵ Sims Report, (Exhibit AUS-22) (SCI), para. 1.4.

³⁹⁹⁶ Sims Report, (Exhibit AUS-22) (SCI), para. 3.1.

³⁹⁹⁷ Sims Report, (Exhibit AUS-22) (SCI), paras. 2.1-2.2.

³⁹⁹⁸ Sims Report, (Exhibit AUS-22) (SCI), para. 3.5.

³⁹⁹⁹ Sims Report, (Exhibit AUS-22) (SCI), paras. 3.6-3.9.

⁴⁰⁰⁰ Sims Report, (Exhibit AUS-22) (SCI), para. 3.10.

⁴⁰⁰¹ Sims Report, (Exhibit AUS-22) (SCI), paras. 3.15-3.34.

tobacco sales, pricing, importation, and manufacturing standards.⁴⁰⁰² Mr Sims details in-depth investigations undertaken by the ACCC in relation to tobacco matters, including the investigation against representations by tobacco companies in promoting their cigarette brands as "light", "ultra-light", "mild", "ultra-mild", or "low tar".⁴⁰⁰³ This was resolved in 2005 when the ACCC accepted court enforceable undertakings that provided for the removal of "light" and "mild" descriptors and other remedial measures, while stipulating that the tobacco companies concerned did not accept that the use of the descriptors amounted to misleading or deceptive conduct.⁴⁰⁰⁴ Mr Sims states that the ACCC incurred significant costs during the investigation, and that even greater resources would have been required, had the matter proceeded to litigation.⁴⁰⁰⁵ Other tobacco-related investigations described by Mr Sims include various proceedings for non-compliance with labelling requirements, including with respect to deficient labelling of the required warning, explanatory and information messages, and graphic images.⁴⁰⁰⁶

7.1702. Referring to the causal mechanisms set out in the TPP Act, the Sims report states that "the ACCC does not agree with Mr Heydon's premise that the three legislative aims of the [TPP Act] are directed at misleading and deceptive conduct, nor his confidence that there is no practical loophole when reliance is based solely on provisions in the ACL which prevent misleading or deceptive conduct, and that the ACCC could in all cases successfully prevent such conduct by instituting proceedings".⁴⁰⁰⁷ Mr Sims challenges the notion "that any packaging that makes tobacco products appealing would be found by a court to be misleading or deceptive or likely to mislead or deceive", citing as examples the use of a particular colour on packaging⁴⁰⁰⁸ and distractions from warnings that are not necessarily misleading even if they make the warning less effective.⁴⁰⁰⁹ Accordingly, Mr Sims presents the view of the ACCC that the provisions of the ACL would only partially address the objectives of the TPP Act.⁴⁰¹⁰

7.1703. Mr Sims further underscores the limitations of the ACCC's resources and capacity, particularly in light of the rigours and uncertainties of the investigative and enforcement process.⁴⁰¹¹ Mr Sims submits that the proposed pre-vetting mechanism would involve new legislation to empower the ACCC to carry out the necessary functions.⁴⁰¹² Mr Sims further contrasts existing provisions and procedures with the functions of pre-vetting tobacco packaging, for example by stating that the notification process referred to by Mr Shavin differs from the "entirely different (and novel) test and approach" that would be called for under a pre-vetting mechanism to consider "whether aspects of the packaging including colour, picture and other devices, such as the brand name and logos, might separately or in combination make the packaging appealing or diminish the effectiveness of the health warnings".⁴⁰¹³

7.1704. Mr Sims concludes that "the ACCC has demonstrated expertise and experience which would enable it to assess whether packaging, in the ACCC's view, is likely to mislead or

⁴⁰⁰² Sims Report, (Exhibit AUS-22) (SCI), para. 4.1.

⁴⁰⁰³ Sims Report, (Exhibit AUS-22) (SCI), para. 4.4. In the course of this four-year, "lengthy and complex" investigation, the ACCC issued compulsory information notices to certain tobacco companies. Ibid. paras. 4.6-4.7. The ACCC ultimately concluded that certain tobacco companies had misleadingly represented that low yield cigarettes had certain health benefits in comparison to regular or higher yield cigarettes. Ibid. paras. 4.9-4.10.

⁴⁰⁰⁴ Sims Report, (Exhibit AUS-22) (SCI), para. 4.12. See also Australian Competition and Consumer Commission, "ACCC Resolves 'Light' and 'Mild' Cigarette Issue with B.A.T. and Philip Morris", Media Release No. 119/05 (12 May 2005), available at:

<<https://www.accc.gov.au/media-release/accc-resolves-light-and-mild-cigarette-issue-with-bat-and-philip-morris>>, accessed 29 May 2015, (Exhibit DOM-229).

⁴⁰⁰⁵ Sims Report, (Exhibit AUS-22) (SCI), paras. 4.13-4.15.

⁴⁰⁰⁶ See, e.g. Sims Report, (Exhibit AUS-22) (SCI), paras. 4.20-4.27.

⁴⁰⁰⁷ Sims Report, (Exhibit AUS-22) (SCI), para. 5.4.

⁴⁰⁰⁸ Sims Report, (Exhibit AUS-22) (SCI), para. 5.5.

⁴⁰⁰⁹ Sims Report, (Exhibit AUS-22) (SCI), para. 5.7.

⁴⁰¹⁰ Sims Report, (Exhibit AUS-22) (SCI), para. 5.8. Sims additionally states that "the assessment of whether proposed tobacco packaging might make the packaging *appealing* or *diminish the effectiveness of health warnings* would be in a very different category to the application of the well-established legal jurisprudence relating to misleading and deceptive conduct". Sims Report, (Exhibit AUS-22) (SCI), para. 6.11. (emphasis original)

⁴⁰¹¹ Sims Report, (Exhibit AUS-22) (SCI), paras. 5.9-5.12.

⁴⁰¹² Sims Report, (Exhibit AUS-22) (SCI), paras. 6.1-6.4.

⁴⁰¹³ Sims Report, (Exhibit AUS-22) (SCI), paras. 6.6-6.8.

deceive".⁴⁰¹⁴ By contrast, Mr Sims states that "the ACCC does not pre-approve proposed marketing or packaging to assess whether it is likely to mislead or deceive", and lacks the necessary expertise for an assessment that is not "similar to any other role the ACCC currently performs".⁴⁰¹⁵

7.1705. In light of the expert views outlined above, we examine whether the complainants have established that a pre-vetting mechanism would be reasonably available, bearing in mind that proposed alternative measures are of a hypothetical nature and do not yet exist in the Member in question, or at least not in the particular form proposed by the complainants.⁴⁰¹⁶ It is clear that the pre-vetting mechanism described by Mr Shavin would entail certain burdens and potential challenges in each of its necessary elements, including the initial specification of disqualifying criteria that go beyond the causal mechanisms set out in the TPP Act. In addition, there is compelling evidence from the ACCC that it does not currently perform the precise functions that would be demanded if it were to fill the role of the regulatory authority for pre-vetting approval, such that it would either require external assistance or need to have the role of a pre-vetting authority vested in a separate and possibly new regulatory body.

7.1706. We note that the complainants' proposal specifically contemplates the possibility that the ACCC's assessment could be supplemented with outside expertise and external assistance as necessary.⁴⁰¹⁷ Moreover, the proposed pre-vetting scheme does not necessitate that the ACCC serve the role of regulatory authority, and the main aspects of the design of the scheme would remain the same even if a different administrative agency were charged with the necessary functions. These essential features could potentially be reflected in a number of different ways, drawing to a greater or lesser extent on existing elements of Australian legislation and regulatory administration with respect to the prevention of misleading or deceptive representations on product packaging.

7.1707. In this connection, the complainants have cited an existing pre-vetting scheme in Turkey as an illustrative example of the mechanism that could be reasonably available to Australia. Specifically, in Turkey's Regulations on Procedures and Rules Applicable to Production and Trading of Tobacco Products, eligibility to supply tobacco products to the market requires submission of several types of information relating to the type of product, including its packaging and health warnings.⁴⁰¹⁸

7.1708. While the example of the Turkish pre-vetting mechanism is not prescriptive as to the exact features of tobacco packaging as the proposed pre-vetting regime in Australia, it is an existing example of such a scheme that relies on assessments and pre-approval of proposed tobacco packages according to certain regulatory criteria regarding the inducement and misleading of consumers. We are mindful that the complainants are not required to "provide complete and exhaustive descriptions of the alternative measures they propose" under Article 2.2 of the

⁴⁰¹⁴ Sims Report, (Exhibit AUS-22) (SCI), para. 6.9.

⁴⁰¹⁵ Sims Report, (Exhibit AUS-22) (SCI), paras. 6.10-6.11. (emphasis original)

⁴⁰¹⁶ See Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.328.

⁴⁰¹⁷ See, e.g. Dominican Republic's second written submission, para. 722.

⁴⁰¹⁸ This includes "[u]nit pack and product grouping designs which bear the measurement data; design of label on transparent packing if used for product grouping"; "[h]ealth warnings application plan"; and "[i]nformation about production encoding or any other marking". Turkey, The Regulations on Procedures and Rules Applicable to Production and Trading of Tobacco Products, Official Gazette , Issue 27749 (4 November 2010), (Exhibits DOM-133, IDN-93), Article 12(2). This pre-vetting process for tobacco packaging requires as follows:

On the visible outside packaging, opening band, internal package and aluminum folio of a unit package of tobacco product imported or produced in Turkey as well as on the cigarettes, no misleading or incomplete information regarding their features, effects in health, hazards or emissions may be given, and no text, name, brand, type name, metaphor, figure, sign, color or color combinations implying that a particular tobacco product is less harmful than another or inducing or encouraging its consumption, or misleading the consumer or making the product attractive, can be used.

Turkey, Regulations Relating to the Principles and Procedures Applicable to the Manufacturing Methods, Labeling and Control Measures Related to Protection from the Harmful Effects of Tobacco Products, Official Gazette, Issue 25692 (6 January 2005), (Exhibits DOM-134, IDN-94), Article 9.

TBT Agreement⁴⁰¹⁹, and their reference to an existing regime is simply indicative of the potential feasibility of a pre-vetting mechanism for tobacco packaging.

7.1709. That said, it is possible that alternative measures may not be reasonably available on account of undue burdens and prohibitive costs.⁴⁰²⁰ The relevant costs that may be taken into consideration include the enforcement and implementation costs incurred by the regulating Member, but may also include "significant costs or difficulties faced by the affected industry, in particular where such costs or difficulties could affect the ability or willingness of the industry to comply with the requirements of that measure".⁴⁰²¹

7.1710. In this connection, the complainants have raised the possibility that the costs associated with pre-vetting review and enforcement could be defrayed through application of the "user pays" principle, whereby tobacco producers would provide funding for their own approval proceedings. As an example of such a system, the parties have referred to ABAC⁴⁰²², which is a voluntary, industry-funded scheme that considers *inter alia* the likely impact on consumption of alcohol packaging and advertising.⁴⁰²³ In particular, the ABAC provides in relevant part that the naming or packaging of alcohol "must not encourage excessive consumption or abuse of alcohol", "must not encourage under-age drinking", and must "not have a strong or evident appeal to children or adolescents".⁴⁰²⁴ Further, an Alcohol Advertising Pre-Vetting Service is offered in conjunction with ABAC that offers user-pays advice as to whether prospective advertisements comply with the compulsory pre-vetting of advertisements under ABAC⁴⁰²⁵, to offer assurance to companies that advertising or packaging will not later be precluded from the marketplace via the ABAC complaint process.⁴⁰²⁶

7.1711. The administration of ABAC differs from the complainants' proposed pre-vetting scheme notably in respect of the products concerned and the fact that it is voluntary for packaging. Nevertheless, it provides some evidence of the possible flexibility in a pre-vetting regime to distribute costs of administration between the industry and regulator, which may in turn address the associated burdens of establishing review, approval, and enforcement procedures, including the burdens of appellate litigation where applicants pursue judicial review of pre-vetting determinations.⁴⁰²⁷

7.1712. Overall, on the basis of these elements, we do not consider that a pre-vetting mechanism as proposed by the complainants is "merely theoretical in nature"⁴⁰²⁸, such as to disqualify it from being considered reasonably available to Australia. The operation of the ABAC is indicative of the possibility of adopting some form of pre-marketing vetting of a particular product. However, it is clear that the administration of such a system – whether the regulatory functions involved would be fulfilled by an existing body such as the ACCC (possibly aided by external expert assistance) or

⁴⁰¹⁹ Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.334.

⁴⁰²⁰ Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.330.

⁴⁰²¹ Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.330 (quoting Appellate Body Report, *EC – Seal Products*, para. 5.277).

⁴⁰²² See "Alcohol Beverages Advertising Code", available at:

<[http://www.alcohol.gov.au/internet/alcohol/publishing.nsf/Content/BFE15C2AC3242C22CA25718E0081F1C5/\\$File/advertising.pdf](http://www.alcohol.gov.au/internet/alcohol/publishing.nsf/Content/BFE15C2AC3242C22CA25718E0081F1C5/$File/advertising.pdf)>, accessed 7 October 2014, (Exhibit DOM-137).

⁴⁰²³ See Alcohol Beverages Advertising Code, "About the ABAC Scheme", available at:

<<http://www.abac.org.au/about/>>, accessed 7 October 2014, (Exhibits DOM-136, HND-87); and Shavin Pre-Vetting Report, (Exhibit DOM/HND-9), para. 93. Mr Shavin explains that, while the pre-vetting of advertisements for alcoholic beverages is required for ABAC signatories, the pre-vetting of naming and packaging is optional for those signatories. Shavin Pre-Vetting Report, (Exhibit DOM/HND-9), para. 94.

⁴⁰²⁴ See "Alcohol Beverages Advertising Code", available at:

<[http://www.alcohol.gov.au/internet/alcohol/publishing.nsf/Content/BFE15C2AC3242C22CA25718E0081F1C5/\\$File/advertising.pdf](http://www.alcohol.gov.au/internet/alcohol/publishing.nsf/Content/BFE15C2AC3242C22CA25718E0081F1C5/$File/advertising.pdf)>, accessed 7 October 2014, (Exhibit DOM-137); and Shavin Pre-Vetting Report, (Exhibit DOM/HND-9), para. 97.

⁴⁰²⁵ Shavin Pre-Vetting Report, (Exhibit DOM/HND-9), para. 103. See *ibid.* para. 106 for a summary of the ABAC pre-vetting process.

⁴⁰²⁶ Shavin Pre-Vetting Report, (Exhibit DOM/HND-9), para. 107. See also Alcohol Beverages Advertising Code, "About the ABAC Scheme", available at: <<http://www.abac.org.au/about/>>, accessed 7 October 2014, (Exhibits DOM-136, HND-87), p. 3.

⁴⁰²⁷ See the concerns as to costliness raised by Australia and its expert Mr Finkelstein, discussed further below and in Australia's comments on complainants' responses to Panel question No. 157, para. 82.

⁴⁰²⁸ See Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.330.

a new regulatory authority – would entail administrative burdens, notwithstanding the fact that, some of the associated costs could be, as discussed above, distributed between the industry and the regulator.

7.2.5.6.5.5 Overall conclusion on a pre-vetting mechanism as an alternative to the TPP measures

7.1713. We conclude that the complainants' proposal that Australia adopt a pre-vetting mechanism would be an alternative measure, not currently applied by Australia.

7.1714. We have also determined, however, that it is unclear that such mechanism would be less trade-restrictive than the TPP measures. To the extent that implementation and compliance costs are a factor of trade-restrictiveness in this case, it appears that a pre-vetting mechanism would likely entail costs that, however distributed between the government and industry, do not similarly arise under the TPP measures.

7.1715. We also determined that a pre-vetting mechanism would not make an equivalent contribution to Australia's objective of improving public health by reducing the use of, and exposure to, tobacco products, taking into account the nature of the objective and the risks non-fulfilment would create. In particular, we consider the potential for a pre-vetting mechanism to lead to the entry on the market of packaging features that would create the possibility of a reduced degree of contribution to Australia's objective of reducing the use of, and exposure to, tobacco products to be contrary to the principle set out in the sixth preambular recital of the TBT Agreement that a Member should not be prevented from pursuing a legitimate objective "at the levels it considers appropriate". This conclusion is, in our view, further supported by a consideration of the nature of the risks and the gravity of the consequences of non-fulfilment of Australia's public health objective, and its importance to Australia.

7.1716. In light of the above, we find that the complainants have not demonstrated that a pre-vetting mechanism would be a less trade-restrictive alternative measure reasonably available to Australia, that would make an equivalent contribution to its objective.

7.2.5.6.6 "Cumulative" application of alternatives

7.1717. Honduras argues that "Australia may also decide to adopt *all* these alternatives if it considers that their combined effects will lead to a greater reduction in smoking prevalence rate".⁴⁰²⁹ The Dominican Republic "offers its alternative cumulatively" – it argues that the complainants' proposed alternatives, "whether viewed individually or in combination", make an equivalent or greater contribution than the TPP measures to the objective of reducing smoking prevalence and consumption.⁴⁰³⁰ The Dominican Republic elaborates on this argument in several ways. For example, the Dominican Republic argues that its proposed social marketing campaign "would have a significant impact on reducing tobacco use by existing and potential smokers, either independently or in combination with the other alternatives proposed" by it during these proceedings.⁴⁰³¹ In response to Australia's argument that an increase in the MLPA would not reduce smoking by existing smokers, the Dominican Republic argues that an increase in the MLPA can be combined with another alternative, such as increased taxation, which would increase cessation.⁴⁰³²

7.1718. We note that these complainants have not elaborated on which precise combination of alternatives they propose. For example, the Dominican Republic mentions the possibility of combining an increase in the MLPA and increases in taxation, or increasing the budget for social marketing campaigns by introducing them in conjunction with increases in taxation.⁴⁰³³ However, no systematic combination is put forward, and it is therefore unclear to us which precise combination of alternative measures is being proposed. As we understand these submissions, the Panel is being asked to combine the alternatives in whatever manner is required to overcome any

⁴⁰²⁹ Honduras's second written submission, para. 217.

⁴⁰³⁰ Dominican Republic's response to Panel question No. 157.

⁴⁰³¹ Dominican Republic's first written submission, para. 779.

⁴⁰³² Dominican Republic's response to Panel question No. 157.

⁴⁰³³ Dominican Republic's first written submission, para. 798.

shortcoming with any single alternative that we might identify in our assessment of the equivalence of contribution of each alternative individually, and the TPP measures.⁴⁰³⁴ In this respect, we recall that the burden rests with the complainant to identify a possible alternative measure that is less trade-restrictive, makes an equivalent contribution to the relevant objective, and is reasonably available. We do not consider that it is for us to bear the burden of establishing the existence of an alternative measure by constructing an alternative that is comprised of various suggested components (in this case, some combination of the four alternatives proposed by the complainants).⁴⁰³⁵

7.1719. Moreover, in a panel's assessment of equivalence of contribution, we recall that it is the overall degree of contribution that the technical regulation makes to the objective pursued that is relevant, rather than any individual isolated aspect or component of contribution. The complainants have advanced no argumentation in respect of the overall contribution that would be made in the event that some combination of these alternatives was adopted, other than to point out in the specific context of the increase in MLPA to 21 years that this measure could be combined with taxation so that initiation and cessation were both addressed.⁴⁰³⁶ Nor is there any elaboration of the level of trade-restrictiveness that would arise, or whether this would be more or less than the TPP measures. We are therefore not persuaded that the complainants have discharged their burden of proof under Article 2.2 of the TBT Agreement in respect of the "cumulative" application of the four alternatives that they have identified.

7.1720. Although it is unclear to us how the alternative measures discussed above might be combined under the complainants' proposal, it would appear to us that such a proposal implicitly rests upon the pursuit of Australia's objective through multiple complementary tobacco control measures. To the extent that the complainants propose a multifaceted alternative with individual elements tailored to achieve a certain degree of contribution, we do not consider this to be contrary to Australia's own approach in implementing the TPP measures in conjunction with its existing tobacco control measures.

7.1721. In any event, we have found above that, individually, each of the four alternatives proposed by the complainants would not make a contribution to Australia's objective that is equivalent to the contribution made by the TPP measures as part of Australia's broader regulatory framework regarding tobacco control. One basis for that conclusion is that, as detailed above, three of these alternatives would not address the effect of branding on the appeal of tobacco products, on the effectiveness of GHGs, and on the ability of retail packaging of tobacco products to mislead consumers about the harmful effects of smoking or using tobacco products. This leaves one aspect of Australia's multifaceted approach to tobacco control entirely or partly unaddressed. This assessment would not, in the circumstances of this case, change even in the event that the four alternatives were combined in some way, taking into account the characteristics of the TPP measures and the regulatory context in which they operate.

7.1722. In this respect, we are mindful of the Appellate Body's observation that a proposed alternative measure need not contribute to the objective to a degree that is identical to the measure at issue, and that a proposed alternative measure may achieve an equivalent degree of contribution in ways different from the technical regulation at issue.⁴⁰³⁷ However, as discussed above, we do not understand this to imply that, where the concern being addressed is of a multifaceted nature and legitimately involves a multidimensional response, one aspect of a comprehensive strategy could be substituted for another, where they would address different aspects of the problem. In addition, a panel's "margin of appreciation" in assessing equivalence should be informed by the risks that non-fulfilment of the technical regulation's objective would create, the nature of the risks and the gravity of the consequences arising from the non-fulfilment of the technical regulation's objective, the characteristics of the technical regulation at issue as revealed through its design and structure, the nature of the objective pursued, and the nature, quantity and quality of the evidence available.⁴⁰³⁸ In the context of these proceedings, considering the design of the TPP measures, the nature of the risks of non-fulfilment (including the gravity of

⁴⁰³⁴ Dominican Republic's response to Panel question No. 157.

⁴⁰³⁵ Appellate Body Report, *Japan – Agricultural Products II*, paras. 118-131.

⁴⁰³⁶ Dominican Republic's response to Panel question No. 157.

⁴⁰³⁷ Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.215.

⁴⁰³⁸ Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.215.

the consequences), and in particular the fact that the TPP measures are designed and structured as one of a number of elements of Australia's comprehensive tobacco control strategy (which includes taxation, social marketing, and MLPA requirements), we consider that a comparative assessment of alternative measures needs to take into account the element of tobacco control that would be left unaddressed in the absence of the TPP measures.

7.1723. In our assessment of whether the complainants' proposed alternatives make an equivalent contribution to Australia's objective, we have thus considered the failure to address the effects of design elements on tobacco packaging on the appeal of tobacco products, the effectiveness of GHWs and their ability to mislead consumers about the harmful effects of smoking or using tobacco products, that we have found above to play a role in the contribution to Australia's objective that is made by the TPP measures. Although the proposed pre-vetting mechanism would have the ability to address such aspects to some degree, for the reasons described above, we are nonetheless not persuaded that such a mechanism would make an equivalent contribution to Australia's objective as the TPP measures, taking into account the risks non-fulfillment would create, Australia's chosen level of protection, and the design of the TPP measures as one element in the context of Australia's comprehensive tobacco control policy.

7.2.5.7 Overall conclusion on Article 2.2

7.1724. As described above, an assessment of whether a technical regulation is more trade-restrictive than necessary under Article 2.2 of the TBT Agreement involves the holistic weighing and balancing of various elements, including the degree of contribution made by the challenged measure to the legitimate objective at issue; the trade-restrictiveness of the measure; and the nature of the risks at issue as well as the gravity of the consequences that would arise from non-fulfilment of the objective pursued by the Member through the measure. In addition, where a comparison of the challenged measure and possible alternative measures proposed by the complainant is undertaken, consideration must be given to whether the proposed alternative would be less trade-restrictive; whether it would make an equivalent contribution to the relevant legitimate objective, taking account of the risks non-fulfilment would create; and whether it is reasonably available to the Member.⁴⁰³⁹

7.1725. In our assessment of the complainants' claims under Article 2.2 of the TBT Agreement, we reached the following conclusions in respect of the various relevant factors:

- a. The objective of the TPP measures is to improve public health by reducing the use of, and exposure to, tobacco products.
- b. The TPP measures are apt to, and do, make a meaningful contribution to this objective;
- c. The TPP measures are trade-restrictive, to the extent that they result in a reduction in the total volume of imports; and
- d. The nature of the risks that would arise from the non-fulfilment of Australia's objective is that public health would not be improved, as the use of, or exposure to, tobacco products, would not be reduced, and the consequences of such use, and exposure, are particularly grave.

7.1726. We have also considered each of the four alternative measures proposed by the complainants, and determined, in respect of each of these, that the complainants have not demonstrated that it would constitute a less trade-restrictive alternative measure that would make an equivalent contribution to Australia's objective, as a substitute for the TPP measures.

7.1727. Our determinations as to the degree of contribution achieved by the TPP measures, and our comparison with the contribution that would be made by reasonably available alternative

⁴⁰³⁹ Appellate Body Reports, *US – COOL* (Article 21.5 – Canada and Mexico), paras. 5.197-5.198 (quoting Appellate Body Reports, *US – COOL*, para. 471).

measures, are made within the context of the comprehensive strategy designed and implemented by Australia to address tobacco control.⁴⁰⁴⁰

7.1728. In this connection, we consider highly relevant the recognition in a number of sources of the comprehensive nature of tobacco control in particular, including the numerous iterations to this effect within the FCTC and its supporting guidelines for implementation. For instance, "tobacco control" is itself defined as "a range of supply, demand and harm reduction strategies"⁴⁰⁴¹, and a general obligation under the FCTC calls upon its parties to "develop, implement, periodically update and review *comprehensive* multisectoral national tobacco control strategies, plans and programmes".⁴⁰⁴² The multi-faceted nature of tobacco control policies in particular is underscored throughout the evidence on record before us⁴⁰⁴³, and underscores the proposition mentioned above, that the use of, and exposure to, tobacco products should be addressed through a combination of measures working together.⁴⁰⁴⁴ We also note, in this respect, Australia's observation on the importance of avoiding a regulatory gap in the product coverage of the measures by covering all tobacco products.⁴⁰⁴⁵ This is consistent also with the FCTC's recommendation for comprehensive, multisectoral tobacco control measures addressing all tobacco products.⁴⁰⁴⁶

7.1729. Specifically, we are mindful that the TPP measures are, by their design, not intended to operate as a stand-alone policy, but rather were implemented as part of "a comprehensive suite of reforms to reduce smoking and its harmful effects" in Australia.⁴⁰⁴⁷ In our view, taking due account of this broader regulatory context of the TPP measures is essential to our understanding of their degree of contribution to Australia's objective. We have thus given due weight in our analysis to the fact that the TPP measures operate in conjunction with a number of other wide-ranging tobacco control measures, including mandatory GHWs, restrictions on advertisement and promotion, taxation measures, restrictions on the sale and consumption of tobacco products, social marketing campaigns, and measures to address illicit tobacco trade.⁴⁰⁴⁸

⁴⁰⁴⁰ See paras. 7.1043, 7.1384, and 7.1387 above.

⁴⁰⁴¹ FCTC, (Exhibits AUS-44, JE-19), Article 1(d).

⁴⁰⁴² FCTC, (Exhibits AUS-44, JE-19), Article 5.1 (emphasis added). The overall structure and specific provisions of the FCTC, as well as the FCTC Guidelines, attest that tobacco control involves a comprehensive regulatory approach of integrated measures. See, e.g. FCTC, (Exhibits AUS-44, JE-19), Articles 4.1, 4.4, and 5.1; Article 11 FCTC Guidelines, FCTC/COP/3(10), (Exhibit JE-20), p. 21; FCTC Guidelines for Implementation (2013 edition), (Exhibits AUS-109, DOM-44), Article 12, p. 74 and Article 14, pp. 129 and 126; and Article 6 FCTC Guidelines, (Exhibit AUS-111), Section 1.6 (noting that other policies like "tobacco taxes do not exist in a vacuum and should be implemented as part of a comprehensive tobacco-control strategy alongside other policies undertaken in line with other articles of the WHO FCTC").

⁴⁰⁴³ This conclusion has been reached by, for example, the WHO, the US Surgeon General, the USIOM, and the USCDC. See USCDC Best Practices for Comprehensive Tobacco Control Programs, (Exhibit AUS-50), p. 6 (recognizing the effectiveness of comprehensive tobacco control approaches that combine "educational, clinical, regulatory, economic, and social strategies", and noting that "research has shown greater effectiveness with interventional efforts that integrate the implementation of programmatic and policy initiatives to influence social norms, systems, and networks"); and WHO Policy Package to Reverse the Tobacco Epidemic, (Exhibit AUS-607), p. 11 (recognizing that tobacco control policies "are complementary and synergistic"). See also Australia's first written submission, paras. 38-49; Samet Report, (Exhibit AUS-7), paras. 106-108; and Chaloupka Public Health Report, (Exhibit AUS-9), paras. 9(a), 11-16, 31, and 35, and fns 7 and 8.

⁴⁰⁴⁴ As we noted in paragraph 7.1390 above, this has been recognized in publications by the World Bank, the US Surgeon General, the USIOM, and the USCDC. See, respectively, Jha and Chaloupka 1999, (Exhibit AUS-51), pp. 82-83; US Surgeon General's Report 2014, (Exhibits AUS-37, DOM-104, CUB-35), p. 7; US Surgeon General's Report 2000, (Exhibit AUS-53), p. 11; US Surgeon General's Report 2012, (Exhibit AUS-76), Chap. 6; 1994 IOM Report, Chap. 4, (Exhibit AUS-78), pp. 125-128; and 2015 USIOM Report, (Exhibit DOM-232), p. 6-20; and USCDC Best Practices for Comprehensive Tobacco Control Programs, (Exhibit AUS-50), p. 9.

⁴⁰⁴⁵ Australia's response to Panel question No. 13 (referring to Chaloupka Public Health Report, (Exhibit AUS-9), para. 11 ("Tobacco control policies and other interventions need to be comprehensive in terms of the tobacco products they cover, given that a policy that impacts only a subset of tobacco products will be effective in reducing the use of those products, but will likely result in substitution to other products.")); and Biglan Report, (Exhibit AUS-13), para. 137). See also Samet Report, (Exhibit AUS-7), paras. 56 and 114.

⁴⁰⁴⁶ Australia's response to Panel question No. 13 (referring to FCTC, (Exhibits AUS-44, JE-19), Articles 4.4 and 5.1).

⁴⁰⁴⁷ See, e.g. TPP Bill Explanatory Memorandum, (Exhibits AUS-2, JE-7), p. 1.

⁴⁰⁴⁸ See section 2.2 above.

7.1730. Moreover, in our comparative analysis, we have set out the reasons for which we are not persuaded that the complainants have demonstrated that the proposed alternatives would be less trade-restrictive than the TPP measures. We have also considered how each proposed alternative would contribute to Australia's objective, as a *substitute* to the TPP measures. In doing so, we have taken due account of the fact that the challenged measures form part of a broader policy scheme with multiple complementary elements designed to pursue in a comprehensive manner a public health objective over time.⁴⁰⁴⁹ We note in this respect the Appellate Body's observations that "there may be instances where it is difficult to assess with precision whether there is equivalence between the technical regulation's degree of contribution and that of a proposed alternative measure"⁴⁰⁵⁰, including where a technical regulation and the proposed alternative measures may deploy various methods or techniques that jointly or separately contribute to achieving the objective pursued, which may not each be quantifiable in an isolated manner.⁴⁰⁵¹

7.1731. The fact that a proposed alternative measure need not contribute to the objective to a degree that is identical to the measure at issue⁴⁰⁵² does not, in our view, imply that, where the concern being addressed is of a multifaceted nature and legitimately involves a multidimensional response, one aspect of a comprehensive strategy could be substituted for another, where this would leave unaddressed the aspect of the problem that the challenged measures seek to address. We have found that, in the particular context of tobacco control and the regulatory efforts of Australia to improve public health by reducing the use of, and exposure to, tobacco products, none of the alternatives proposed by complainants would contribute to Australia's objective to an equivalent degree as the TPP measures, taking into account the risks non-fulfilment of the objective would create and the actual contribution made by the challenged measures as well as the principle reflected in the sixth recital of the TBT Agreement, that no Member should be prevented from pursuing legitimate objectives "at the levels it considers appropriate".

7.1732. Overall, on the basis of the above, we conclude that the complainants have not demonstrated that the TPP measures are more trade-restrictive than necessary to fulfil a legitimate objective, within the meaning of Article 2.2 of the TBT Agreement.

7.3 The TRIPS Agreement

7.3.1 Article 6*quinquies* of the Paris Convention (1967), as incorporated by Article 2.1 of the TRIPS Agreement

7.3.1.1 Introduction

7.1733. We will now turn to the complainants' claims relating to the provisions of the TRIPS Agreement. As discussed in paragraph 7.11 above, we will first address those provisions that concern the protection of trademarks. We will start our analysis with the provisions invoked by the complainants that concern the protectable subject matter, including conditions for registration, namely first Article 2.1 of the TRIPS Agreement in conjunction with Article 6*quinquies* of the Paris Convention (1967) and then Article 15.4 of the TRIPS Agreement.

7.1734. Paragraph 1 of Article 2 of the TRIPS Agreement, entitled "Intellectual Property Conventions", reads as follows:

In respect of Parts II, III and IV of this Agreement, Members shall comply with Articles 1 through 12, and Article 19, of the Paris Convention (1967).

7.1735. Article 6*quinquies* A(1) of the Paris Convention (1967) reads as follows:

Every trademark duly registered in the country of origin shall be accepted for filing and protected as is in the other countries of the Union, subject to the reservations

⁴⁰⁴⁹ See Appellate Body Reports, *EC – Seal Products*, paras. 5.212-5.213. See also Appellate Body Report, *Brazil – Retreaded Tyres*, para. 172.

⁴⁰⁵⁰ Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.216.

⁴⁰⁵¹ Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.216 (referring to Appellate Body Report, *Brazil – Retreaded Tyres*, para. 151).

⁴⁰⁵² Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.215.

indicated in this Article. Such countries may, before proceeding to final registration, require the production of a certificate of registration in the country of origin, issued by the competent authority. No authentication shall be required for this certificate.⁴⁰⁵³

7.1736. Honduras and Cuba, by reference⁴⁰⁵⁴, claim that the TPP measures are inconsistent with Article 2.1 of the TRIPS Agreement in conjunction with Article 6*quinquies* of the Paris Convention (1967). More specifically, they claim that the TPP measures are inconsistent with Article 6*quinquies* because a trademark duly registered in the country of origin outside Australia is not protected "as is", i.e. in its original format.⁴⁰⁵⁵

7.1737. Australia asks the Panel to reject these claims in their entirety.

⁴⁰⁵³ The arguments by Honduras and Cuba (by reference) focus on paragraph A(1) of Article 6*quinquies*. The other paragraphs of Article 6*quinquies* read as follows:

(2) Shall be considered the country of origin the country of the Union where the applicant has a real and effective industrial or commercial establishment, or, if he has no such establishment within the Union, the country of the Union where he has his domicile, or, if he has no domicile within the Union but is a national of a country of the Union, the country of which he is a national.

B. Trademarks covered by this Article may be neither denied registration nor invalidated except in the following cases:

1. when they are of such a nature as to infringe rights acquired by third parties in the country where protection is claimed;
2. when they are devoid of any distinctive character, or consist exclusively of signs or indications which may serve, in trade, to designate the kind, quality, quantity, intended purpose, value, place of origin, of the goods, or the time of production, or have become customary in the current language or in the bona fide and established practices of the trade of the country where protection is claimed;
3. when they are contrary to morality or public order and, in particular, of such a nature as to deceive the public. It is understood that a mark may not be considered contrary to public order for the sole reason that it does not conform to a provision of the legislation on marks, except if such provision itself relates to public order.

This provision is subject, however, to the application of Article 10*bis*.

C. (1) In determining whether a mark is eligible for protection, all the factual circumstances must be taken into consideration, particularly the length of time the mark has been in use.

(2) No trademark shall be refused in the other countries of the Union for the sole reason that it differs from the mark protected in the country of origin only in respect of elements that do not alter its distinctive character and do not affect its identity in the form in which it has been registered in the said country of origin.

D. No person may benefit from the provisions of this Article if the mark for which he claims protection is not registered in the country of origin.

E. However, in no case shall the renewal of the registration of the mark in the country of origin involve an obligation to renew the registration in the other countries of the Union in which the mark has been registered.

F. The benefit of priority shall remain unaffected for applications for the registration of marks filed within the period fixed by Article 4, even if registration in the country of origin is effected after the expiration of such period.

⁴⁰⁵⁴ "Cuba endorses and hereby incorporates by reference all of the claims, arguments and evidence advanced in their first written submissions by the Dominican Republic, Honduras, Indonesia and Ukraine, under Articles 15.4, 16.1, 16.3 and 22.2(b) of the TRIPS Agreement and Article 6*quinquies* of the Paris Convention (read with Article 2 of the TRIPS Agreement)." Cuba's first written submission, para. 428. Furthermore, "Cuba adopts and hereby incorporates by reference all the claims, arguments and evidence submitted in the second written submissions of the Dominican Republic, Honduras and Indonesia, on Articles 15.4, 16.1, 16.3 and 22.2(b) of the TRIPS Agreement and Article 6*quinquies* of the Paris Convention (read with Article 2 of the TRIPS Agreement)." Cuba's second written submission, para. 414.

⁴⁰⁵⁵ Honduras's first written submission, para. 938.

7.3.1.2 Main arguments of the parties

7.1738. Honduras and Cuba, by reference, claim that the TPP trademark restrictions are inconsistent with Article 6*quinquies* of the Paris Convention, which requires that a trademark registered in one country shall be accepted for filing and protected "as is" in other countries.⁴⁰⁵⁶

7.1739. Honduras submits that the basic obligation stipulated in Article 6*quinquies* A(1) is that a trademark registered in the country of origin shall be accepted for filing and protected "as is" in other countries, according to what is known as the "*telle quelle*" principle. Pursuant to Article 6*quinquies* A(1), Members may not require that a trademark, already registered in the country of origin, be modified or altered as a condition for acceptance for filing and protection in their territory.⁴⁰⁵⁷ Countries may depart from the "as is" principle to the extent contemplated in the "reservations indicated in this Article", which stipulate various grounds for denial or invalidation of registration, including where the trademark is contrary to morality or public order, or when it lacks distinctiveness.⁴⁰⁵⁸

7.1740. Honduras explains that its "claim relates to the second aspect of this provision, namely the protection of trademarks". Building on dictionary definitions, it argues that the term "protection" in the context of Article 6*quinquies* A(1) refers to the defence, support, assistance or safety that WTO Members are expected to provide to trademarks.⁴⁰⁵⁹ In its view, footnote 3 of the TRIPS Agreement serves as useful context for interpreting the term "protection" in Article 6*quinquies* A(1). Honduras asserts that the notions of availability, acquisition, scope, maintenance and enforcement mentioned in footnote 3 have one underlying common denominator: the "use" of a trademark. A measure that disallows the use of a trademark seriously undermines that trademark owner's rights concerning availability, acquisition, scope, maintenance and enforcement. Hence, Honduras concludes, a measure that prohibits the use of trademarks cannot qualify as a measure that protects trademarks.⁴⁰⁶⁰

7.1741. Honduras argues that Article 6*quinquies* A(1) obliges Australia to protect, in its original form, any trademark that has been previously registered in the country of origin. Australia, therefore, may not require, as a condition for protection, that a trademark's original form be modified or altered. Honduras adds that "the obligation to afford 'protection', in the sense of Article 6*quinquies* A(1), necessarily involves ensuring that trademark owners can 'use' their trademarks, since this is an integral part of the availability, acquisition, scope, maintenance and enforcement of trademark rights".⁴⁰⁶¹

7.1742. Honduras submits that the TPP measures prohibit the use of certain trademarks in their original form – i.e. design marks and composite marks – in the retail packaging of tobacco products and on those products themselves. Australia only allows these trademarks to be used if they are displayed in the standardized form. Honduras argues that "by conditioning the protection of trademarks to compliance with these requirements", Australia fails to protect design marks and composite marks in their original form. According to Honduras, this "amounts to an outright infringement of the '*telle quelle*' principle contained in Article 6*quinquies* A(1) of the Paris Convention".⁴⁰⁶²

7.1743. Australia responds that Article 6*quinquies* A(1) addresses the conditions that a Member may impose with respect to the acceptance of a particular category of trademarks for registration. Specifically, where a trademark is already duly registered in the country of origin, Article 6*quinquies* A(1) provides that a Member may not refuse to register that trademark in its

⁴⁰⁵⁶ Honduras's first written submission, para. 258.

⁴⁰⁵⁷ Honduras's first written submission, para. 261.

⁴⁰⁵⁸ Honduras's first written submission, para. 262.

⁴⁰⁵⁹ Honduras's first written submission, para. 263.

⁴⁰⁶⁰ Honduras's first written submission, para. 264.

⁴⁰⁶¹ Honduras's first written submission, para. 266.

⁴⁰⁶² Honduras's first written submission, para. 267.

territory, even if the trademark would not otherwise comply with the domestic law of that Member concerning the permissible form of the trademark.⁴⁰⁶³

7.1744. It argues that the reference to "protected" in Article 6*quinquies* A(1) refers to the protection conferred as a result of the registration of a trademark – it does *not* set minimum standards with respect to *how* that trademark is to be protected. Rather, Article 6*quinquies* A(1) simply provides that a Member may not deny the registration of a trademark that is registered in the territory of another Member based on its form.⁴⁰⁶⁴

7.1745. Australia argues that, in order to establish a *prima facie* case of violation under Article 6*quinquies* A(1), Honduras would need to demonstrate that the TPP measures prevent the *registration* of trademarks that are registered in the territory of another Member based on their form. It submits that Honduras has made no such demonstration.⁴⁰⁶⁵

7.1746. Australia contends that Honduras's interpretation that a Member's obligation to "protect" a trademark registered in the territory of another Member necessarily involves ensuring that trademark owners can "use" their trademarks cannot be reconciled with the plain text of Article 6*quinquies* A(1). It adds that Article 6*quinquies* A(1) does not address the nature of the protection that flows from the registration of a trademark, and does not obligate Members to grant trademark owners a "right of use" in respect of their trademarks.⁴⁰⁶⁶ Australia adds that "[n]or is Honduras able to reconcile its argument with its own recognition that the 'WIPO-administered treaties *did not establish substantive standards for the protection of intellectual property rights*'".⁴⁰⁶⁷

7.1747. Australia concludes that the TPP measures are consistent with Article 6*quinquies* A(1). It adds that Section 28 of the TPP Act expressly provides that the operation of the TPP Act does not affect a trademark owner's ability to register a trademark under the TM Act. The ability of a trademark owner to use a trademark falls outside the scope of Article 6*quinquies* A(1).⁴⁰⁶⁸

7.1748. Honduras responds that Article 6*quinquies*(A)(1) establishes two independent obligations: (i) to accept for filing "as is", and then (ii) to protect "as is" every trademark duly registered in the country of origin. In its view, Australia reads out of the scope of Article 6*quinquies* A(1) the second independent obligation when it states that "protection" within the meaning of Article 6*quinquies*(A)(1) "flows from the registration of a trademark". In Honduras's view, this interpretation results in the redundancy or inutility of the terms "protected as is", and is, therefore, inconsistent with the principle of effective treaty interpretation, recognized by the Appellate Body in previous disputes.⁴⁰⁶⁹ Australia responds that the term "protected" refers to the protection that "may or may not flow as a result of a trademark being registered in its original

⁴⁰⁶³ Australia's first written submission, para. 292 (referring to Panel Report, *US – Section 211 Appropriations Act*, para. 8.83).

⁴⁰⁶⁴ Australia's first written submission, para. 293 (referring to Appellate Body Report, *US – Section 211 Appropriations Act*, para. 137; and Panel Report, *US – Section 211 Appropriations Act*, para. 8.79).

⁴⁰⁶⁵ Australia's first written submission, paras. 294-295.

⁴⁰⁶⁶ Australia's first written submission, paras. 295-296. Australia refers to a Letter from L. Baeumer, Director Industrial Property Law Department, WIPO to R. Oman, Mudge Rose Guthrie Alexander and Ferdon, (31 August 1994), Bates No. 515446013-515446015, (Letter from L. Baeumer, WIPO), (Exhibit AUS-235), p. 3:

[I]t is to be noted that Article 6*quinquies* A does not address the question of use, but the obligation, for any country party to the Paris Convention, to accept for filing and protect (against infringement by others) a mark already registered in the country of origin. ... Article 6*quinquies* B does not mean that the use of a trademark registered under Article 6*quinquies* cannot be the subject of a limitation or prohibition for other grounds contained in laws other than trademark law.

⁴⁰⁶⁷ Australia's first written submission, para. 296 (emphasis added by Australia) (referring to Honduras's first written submission, para. 146).

⁴⁰⁶⁸ Australia's first written submission, para. 297.

⁴⁰⁶⁹ Honduras's second written submission, para. 377 (referring to Appellate Body Reports, *US – Gasoline*, para. 61; and *Argentina – Footwear (EC)*, para. 81).

form". Article 6*quinquies* A(1), Australia argues, "does not set out minimum standards with respect to the *nature* of the protection that may be conferred as a result of registration".⁴⁰⁷⁰

7.1749. Honduras clarifies that it has not argued that the terms of Article 6*quinquies* A(1) create a "right to use". In Honduras's view, "the ability to use a trademark is an 'integral part' of the availability, acquisition, scope, maintenance and enforcement of trademark rights, and is, therefore, of crucial importance for the effective 'protection' of a trademark 'as is'". Honduras adds that "the ability to exercise the right to 'protect[ion] as is' ... depends inherently on the ability of trademark owners to use their trademarks following their registration".⁴⁰⁷¹

7.1750. Honduras does not see how Australia's argument that the WIPO-administered treaties, such as the Paris Convention, did not establish substantive standards for the protection of IP rights is relevant to its claim, as it does not argue that the "substantive standards" under Article 6*quinquies* A(1) include the "right of use". Honduras adds that "Australia appears to overlook an important difference between the Paris Convention, as a WIPO-administered independent legal instrument, and the TRIPS Agreement, incorporating some (but not all) elements of this Convention. These two distinct treaties have different administering bodies, contexts, and object and purposes; their interpretation can, therefore, lead to different outcomes." For Honduras, "[t]he fact that the link between 'use' and 'the minimum internationally-guaranteed level of protection of intellectual property rights' may have been weaker under the Paris Convention does not mean that this link remains the same after the creation of the TRIPS framework". Therefore, for WTO purposes, Honduras argues, the meaning of the obligations under Article 6*quinquies* A(1) of the Paris Convention must be interpreted in the context of other relevant provisions of the TRIPS Agreement, and the object and purpose of the TRIPS Agreement.⁴⁰⁷²

7.1751. Australia considers that there is a fundamental contradiction in Honduras's claim, as "[i]t is not possible for Honduras to continue to interpret Article 6*quinquies* A(1) as imposing an obligation on Members to *ensure* that trademark owners can use their trademarks, while at the same time acknowledging that trademark owners have no positive right to use those trademarks".⁴⁰⁷³

7.1752. Australia submits that its interpretation of Article 6*quinquies* A(1) is based on the plain text of this provision interpreted in accordance with the Vienna Convention and is consistent with the views of the Appellate Body and WIPO. While several third parties have expressly agreed with Australia's interpretation⁴⁰⁷⁴, Honduras has received no third-party support for its claim. Australia adds that its interpretation also appears to be supported by an expert relied upon by Honduras, Professor Dinwoodie⁴⁰⁷⁵, Cuba⁴⁰⁷⁶, and seemingly even Honduras itself.⁴⁰⁷⁷

⁴⁰⁷⁰ Australia's second written submission, para. 20. (emphasis original)

⁴⁰⁷¹ Honduras's second written submission, para. 378.

⁴⁰⁷² Honduras's second written submission, para. 379. (footnote omitted)

⁴⁰⁷³ Australia's second written submission, para. 19. (emphasis original)

⁴⁰⁷⁴ Australia's second written submission, para. 21 (referring to New Zealand's third-party submission, paras. 14-15; Singapore's third-party submission, para. 11; and South Africa's third-party statement, paras. 3.1-3.2).

⁴⁰⁷⁵ Australia's second written submission, para. 21. Australia notes that Ukraine's expert, Professor Dinwoodie, submits that "the overall context – including the lack of any general guarantee of rights accorded the owner of a trade mark – suggests that the registration provisions of the Paris Convention did not articulate a right to use a mark". *Ibid.* para. 21 fn 20 (quoting Dinwoodie Report, (Exhibit UKR-1), para. 47).

⁴⁰⁷⁶ Australia's second written submission, para. 21. Australia recalls that, in its response to Panel question No. 93, Cuba noted that Article 6*quinquies* of the Paris Convention and Article 15.2 of the TRIPS Agreement, on one hand, and Article 20 of the TRIPS Agreement, on the other, deal with different aspects of the life-cycle of a brand (i.e. registration vs. use). In Australia's view, Cuba, therefore, appears to agree that Article 6*quinquies* deals with registration and does *not* deal with *use* of a trademark. *Ibid.* para. 21 fn 21.

⁴⁰⁷⁷ Australia's second written submission, para. 21. Australia refers to Honduras's response to Panel question No. 93: "Articles 6*quinquies*/15 and 20 deal with different aspects in the life cycle of a trademark (i.e. initial registration vs. ongoing use)". *Ibid.* para. 21 fn 22. Australia also refers to Honduras's first written submission, para. 146: "WIPO-administered treaties did not establish substantive standards for the protection of intellectual property rights." *Ibid.*

7.1753. Australia submits that Honduras has failed to demonstrate that the TPP measures are inconsistent with Article 2.1 of the TRIPS Agreement incorporating Article 6*quinquies* A(1) of the Paris Convention.⁴⁰⁷⁸

7.3.1.3 Main arguments of the third parties

7.1754. New Zealand agrees with Australia's interpretation of Article 6*quinquies* A(1) of the Paris Convention, as incorporated into Article 2.1 of the TRIPS Agreement.⁴⁰⁷⁹

7.1755. Singapore argues that Article 6*quinquies* A(1) addresses the form of a trademark. It obliges a Member to accept for filing and protection "as is" trademarks that are duly registered in another country, subject to the reservations indicated in the Article. The TPP measures do not affect a trademark owner's ability to register its trademark in its original form.⁴⁰⁸⁰ Singapore considers that the term "protected" in Article 6*quinquies* A(1) refers to the protection conferred as a result of the registration of a trademark. Article 6*quinquies* A(1) itself does not address the nature of the protection that flows from registration, or obligate Members to grant trademark owners a "right of use" in respect of their trademarks.⁴⁰⁸¹ Singapore also notes that WIPO has indicated that "[t]he Paris Convention does not contain any obligation to the effect that the use of a registered trademark must be permitted".⁴⁰⁸² To the extent that Honduras argues that the inability to use a trademark negates the protection guaranteed by Article 6*quinquies* A(1), Singapore submits that the argument is without merit in light of Section 28 of the TPP Act, which allows a tobacco-related trademark to be registered or maintained, and consequently protected "as is".⁴⁰⁸³ Singapore concludes that, since the TPP measures do not prevent the registration, maintenance or protection of a trademark in its original form, the measures do not contravene Article 2.1 of the TRIPS Agreement incorporating Article 6*quinquies* A(1) of the Paris Convention (1967).⁴⁰⁸⁴

7.1756. South Africa submits that Article 6*quinquies* A(1) of the Paris Convention (1967), as incorporated into the TRIPS Agreement, provides that a Member may not deny the registration of a trademark that is registered in the territory of another Member based on its form. It is not directed towards the "use" of trademarks but towards their registration and validity and does not grant trademark owners a positive "right of use". "A trademark registered under Article 6*quinquies* can be the subject of a limitation or prohibition for other grounds contained in laws outside of trademark law".⁴⁰⁸⁵

7.1757. Uruguay requests the Panel to reject the claims of the complainants under Article 6*quinquies* of the Paris Convention (1967).⁴⁰⁸⁶

7.3.1.4 Analysis by the Panel

7.1758. We recall that Article 6*quinquies* A(1) of the Paris Convention (1967) reads as follows:

Every trademark duly registered in the country of origin shall be accepted for filing and protected as is in the other countries of the Union, subject to the reservations indicated in this Article. Such countries may, before proceeding to final registration, require the production of a certificate of registration in the country of origin, issued by the competent authority. No authentication shall be required for this certificate.

⁴⁰⁷⁸ Australia's second written submission, para. 22.

⁴⁰⁷⁹ New Zealand's third-party submission, para. 14.

⁴⁰⁸⁰ Singapore's third-party submission, para. 9 (referring to Section 28 of the TPP Act).

⁴⁰⁸¹ Singapore's third-party submission, para. 11 (referring to Letter from L. Baeumer, WIPO, (Exhibit AUS-235), p. 3; and Carvalho 3rd edn, AUS excerpts, (Exhibit AUS-236), p. 233).

⁴⁰⁸² Singapore's third-party submission, para. 11 (referring to Australia's first written submission, para. 246).

⁴⁰⁸³ Singapore's third-party submission, para. 12.

⁴⁰⁸⁴ Singapore's third-party submission, para. 13.

⁴⁰⁸⁵ South Africa's third-party statement, paras. 3.1-3.2.

⁴⁰⁸⁶ Uruguay's third-party submission, para. 107.

7.1759. Paragraph A(1) of Article 6^{quinquies}, as incorporated into the TRIPS Agreement by means of a reference in its Article 2.1, thus requires Members of the WTO⁴⁰⁸⁷ to accept for filing and to protect "as is" (or in the authentic French text, "*telle quelle*"⁴⁰⁸⁸) every trademark duly registered in the country of origin, subject to reservations indicated in Article 6^{quinquies}.

7.1760. As observed by the Appellate Body, the Paris Convention (1967) provides two ways in which a national of a country of the Paris Union may obtain registration of a trademark in a country of that Union other than the country of the applicant's origin: one is by registration under Article 6 of the Paris Convention (1967); and the other is by registration under Article 6^{quinquies} of that same Convention.⁴⁰⁸⁹

7.1761. Article 6(1) states the general rule that each country of the Paris Union has the right to determine the conditions for filing and registration of trademarks in its domestic legislation.⁴⁰⁹⁰ However, Article 6 is not the only way to register a trademark in another country. If an applicant has duly registered a trademark in its country of origin, "Article 6^{quinquies} A(1) provides an alternative way of obtaining protection of that trademark in other countries of the Paris Union".⁴⁰⁹¹

7.1762. The requirement under Article 6^{quinquies} is for the relevant trademark to be "accepted for filing and protected as is" in the other countries of the Paris Union. The panel in *US – Section 211 Appropriations Act* found that "[t]he ordinary meaning of the term 'as is' and read in its context and as confirmed by the negotiating history indicates that Article 6^{quinquies} A(1) addresses the form of the trademark; that is, those trademarks duly registered in one country, even when they do not comply with the provisions of domestic law of a Member concerning the permissible form of trademarks, have nevertheless to be accepted for filing and protection in another country".⁴⁰⁹² The Appellate Body upheld the panel's finding that "Section 211(a)(1) is not inconsistent with Article 2.1 of the TRIPS Agreement in conjunction with Article 6^{quinquies} A(1) of the Paris Convention (1967)".⁴⁰⁹³

7.1763. As described in greater detail above⁴⁰⁹⁴, the TPP measures regulate the appearance of trademarks on tobacco retail packaging and products in various ways.⁴⁰⁹⁵ In respect of retail packaging of tobacco products, the TPP measures permit the use of word marks that denote the brand, business or company name, or the name of the product variant, provided that they appear in the form prescribed by the TPP Regulations. They prohibit the use of stylized word marks, composite marks and figurative marks. In respect of tobacco products, the TPP measures prohibit

⁴⁰⁸⁷ Consistent with the past WTO jurisprudence, we understand the reference in Article 6^{quinquies} A(1) of the Paris Convention (1967) to the countries of the Paris Union in the context of the TRIPS Agreement to mean the Members of the WTO, and the reference to nationals of such countries to mean nationals of other WTO Members as defined in Article 1.3 of the TRIPS Agreement. See Appellate Body Report, *US – Section 211 Appropriations Act*, para. 132.

⁴⁰⁸⁸ Article 29(1)(c) of the Paris Convention (1967) provides: "In case of differences of opinion on the interpretation of the various texts, the French text shall prevail."

⁴⁰⁸⁹ Appellate Body Report, *US – Section 211 Appropriations Act*, para. 130.

⁴⁰⁹⁰ Appellate Body Report, *US – Section 211 Appropriations Act*, para. 132.

⁴⁰⁹¹ Appellate Body Report, *US – Section 211 Appropriations Act*, para. 134.

⁴⁰⁹² Panel Report, *US – Section 211 Appropriations Act*, para. 8.83. (emphasis added)

⁴⁰⁹³ Appellate Body Report, *US – Section 211 Appropriations Act*, para. 148 (referring to Panel Report, *US – Section 211 Appropriations Act*, para. 8.89).

⁴⁰⁹⁴ See section 2.1.2 above.

⁴⁰⁹⁵ We note that the impact of the TPP measures varies in respect of different types of trademarks or elements of which they are composed. For the purposes of their claims under various provisions of the TRIPS Agreement, the complainants (using somewhat different terminology) have generally divided trademarks into the following categories: (i) word marks; (ii) figurative marks (or design marks, image marks, device marks); and (iii) composite marks (or combination marks, combined marks). We have used the same categories for the purposes of our analysis under the relevant provisions of the TRIPS Agreement invoked by the complainants. These categories reflect general trademark practice, although terminology does vary, and views on the boundaries between them can also differ. A "word mark" is registered when the textual content as such is considered eligible for trademark protection, and it is registered and protected regardless of the font or form of its presentation. Other trademarks may combine textual and graphic content. Hence a word mark, when presented in a distinctive stylized typeface, may also be considered distinctive on account of the additional figurative content ("stylized word mark"). This is why one may find separate registrations for a term as a pure word mark, and also for the textual material presented in the specific, distinctive typeface used by the owner of the trademark. A logo without textual context is a purely "figurative mark". A "composite mark" presents textual material together with figurative elements.

the use of all trademarks on cigarettes. In respect of cigar bands, they permit the use of trademarks denoting the brand, business or company name, or the name of the product variant, as well as the country of origin, so long as they appear in the form prescribed by the TPP Regulations.

7.1764. We understand that Honduras, and Cuba, by reference, are not claiming that Australia fails to accept for filing "as is" every trademark duly registered in the country of origin. Rather, their claims relate to what they perceive as being "the second aspect of this provision"⁴⁰⁹⁶, namely the obligation to protect such a trademark "as is".⁴⁰⁹⁷ Honduras asserts that the obligation to afford "protection", in the sense of Article 6*quinquies* A(1), necessarily involves ensuring that trademark owners can use their trademarks.⁴⁰⁹⁸ Subsequently, Honduras clarified that it does not argue that the terms of Article 6*quinquies* A(1) create a "right to use", but that the ability to use a trademark is an integral part of the availability, acquisition, scope, maintenance, and enforcement of trademark rights, and is, therefore, of crucial importance for the effective "protection" of a trademark "as is".⁴⁰⁹⁹ Since the TPP measures prohibit the use of composite and figurative trademarks on tobacco retail packaging and products in their original form, Honduras contends that Australia does not "protect" them "as is".⁴¹⁰⁰ Australia responds that the term "protected" refers to the protection that "may or may not flow as a result of a trademark being registered in its original form". Article 6*quinquies* A(1), continues Australia, "does not set out minimum standards with respect to the *nature* of the protection that may be conferred as a result of registration".⁴¹⁰¹

7.1765. We note that the obligation that a Member has pursuant to Article 6*quinquies* A(1) is to "accept[] for filing and protect[] as is" every trademark duly registered in the country of origin. On the plain reading of the text, the obligation is to provide a way of obtaining trademark registration and the protection resulting from the registration. In our view, the text suggests that the term "protected" refers to the protection that flows from the registration of a sign as a trademark in that jurisdiction where the registration is obtained pursuant to the requirements of Article 6*quinquies* A(1). We note that the term "protected" in Article 6*quinquies* A(1) in itself does not provide any guidance as to what the protection flowing from the registration under the domestic law should consist of. In particular, we do not find any support in the language of Article 6*quinquies* A(1) for a substantive minimum standard of rights that WTO Members would be obliged to make available to the owner of a trademark that has been registered pursuant to the requirements of Article 6*quinquies* A(1).⁴¹⁰²

7.1766. This interpretation is supported by the immediate context of Article 6*quinquies* A(1). As described above, the Paris Convention (1967) provides two ways in which a national of a country of the Paris Union may obtain registration of a trademark in a country of that Union other than the country of the applicant's origin: by registration under Article 6 of the Paris Convention (1967) or by registration under Article 6*quinquies* of that same Convention.⁴¹⁰³ We also note that the obligation in the first sub-clause of Article 6*quinquies* A(1) is "subject to the reservations indicated in this Article". Article 6*quinquies* B provides various grounds on which a trademark covered by that Article can be "denied registration" or "invalidated". Paragraphs C to F of Article 6*quinquies* also deal with various aspects of registration, such as the renewal of registration and priority. None of these reservations concern rights conferred on the owner of a trademark that has been registered pursuant to Article 6*quinquies* A(1).

7.1767. Honduras contends that Australia's interpretation that "protection" within the meaning of Article 6*quinquies*(A)(1) "flows from the registration of a trademark" results in the redundancy or inutility of the terms "protected as is", and is, therefore, inconsistent with the principle of effective

⁴⁰⁹⁶ Honduras's first written submission, para. 263.

⁴⁰⁹⁷ Honduras's second written submission, para. 377.

⁴⁰⁹⁸ Honduras's first written submission, para. 266.

⁴⁰⁹⁹ Honduras's second written submission, para. 378.

⁴¹⁰⁰ Honduras's first written submission, para. 267.

⁴¹⁰¹ Australia's second written submission, para. 20. (emphasis original)

⁴¹⁰² This understanding is consistent with the underlying approach of the Paris Convention (1967) that does not itself define the scope of substantive protection of a trademark, except in a few special cases. In this regard, we refer to our discussion in para. 7.1906 below.

⁴¹⁰³ Appellate Body Report, US – Section 211 Appropriations Act, para. 130.

treaty interpretation.⁴¹⁰⁴ We recall our above interpretation that the term "protected" in Article 6^{quinquies} (A)(1) refers to the protection under the domestic law that flows from the registration of a sign as a trademark. The terms "protected as is" thus make explicit that Members must not only accept such trademarks from other Members for registration under the conditions determined by the provision, but also must provide them the protection that flows from such registration under their domestic law. In our view, this understanding gives meaning and effect to the terms "protected as is" and does not reduce them to redundancy or inutility, since it is the step of registration of a sign that forms the basis of its ensuing legal protection as a registered trademark.

7.1768. Our interpretation is also consistent with the object and purpose of Articles 6 and 6^{quinquies} A(1) of the Paris Convention (1967), which is to provide, and thus secure, two ways of obtaining registration of a trademark in a country of the Paris Union.⁴¹⁰⁵

7.1769. We find this interpretation to be consistent also with Honduras's own overall description of the legal protection of trademarks under the TRIPS Agreement, in which context it submits that "a number of developed countries considered the WIPO system to be imperfect, because, *inter alia*, the WIPO-administered treaties did not establish substantive standards for the protection of intellectual property rights".⁴¹⁰⁶

7.1770. In the context of this claim, however, Honduras, maintains that the Paris Convention and the TRIPS Agreement are two distinct treaties that "have different administering bodies, contexts, and object and purposes; their interpretation can, therefore, lead to different outcomes". Honduras submits that "[t]he fact that the link between 'use' and 'the minimum internationally-guaranteed level of protection of intellectual property rights' may have been weaker under the Paris Convention does not mean that this link remains the same after the creation of the TRIPS framework. Clearly, with the introduction of the TRIPS Agreement, the scope of the internationally-guaranteed intellectual property rights, namely trademark rights, has evolved."⁴¹⁰⁷ In this regard, Honduras argues that footnote 3 of the TRIPS Agreement serves as useful context for interpreting the term "protection" in Article 6^{quinquies} A(1) of the Paris Convention (1967). It asserts that the notions of availability, acquisition, scope, maintenance and enforcement mentioned in footnote 3 have one underlying common denominator, namely the "use" of a trademark. According to Honduras, "a measure that prohibits the use of trademarks cannot qualify as a measure that protects trademarks".⁴¹⁰⁸

7.1771. Footnote 3 to the TRIPS Agreement reads as follows:

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

7.1772. By its own terms, footnote 3 defines the term "protection" for the purposes of the national and MFN treatment obligations under Articles 3 and 4 of the TRIPS Agreement. The panel in *Indonesia – Autos* explained that "[a]s is made clear by the footnote to Article 3 of the TRIPS Agreement, the national treatment rule set out in that Article does not apply to use of intellectual property rights generally but only to 'those matters affecting the use of intellectual property rights specifically addressed in this Agreement'".⁴¹⁰⁹ In its context, its express purpose is to define the scope of national and MFN treatment obligations relating to IP rights, and not to define the scope of the rights as such. The substantive standards for rights accorded to trademark owners are defined elsewhere in the Agreement. We do not agree with Honduras that footnote 3 of the TRIPS Agreement should be interpreted to serve an additional function beyond this express purpose, and thus expand the meaning of the term "protected" in the Paris Convention (1967) to

⁴¹⁰⁴ Honduras's second written submission, para. 377. For a discussion of the principle of effective treaty interpretation, see para. 7.2022 below.

⁴¹⁰⁵ See discussion in para. 7.1760 above.

⁴¹⁰⁶ Honduras's first written submission, para. 146.

⁴¹⁰⁷ Honduras's second written submission, para. 379. (footnote omitted)

⁴¹⁰⁸ Honduras's first written submission, para. 264. (emphasis original)

⁴¹⁰⁹ Panel Report, *Indonesia – Autos*, para. 14.275.

include substantive minimum rights that Members would be obliged to confer to the owner of a trademark or, in particular, that such minimum rights should include "some minimal use of trademarks" or "ability to use a trademark".⁴¹¹⁰ We see no basis for conflating the scope of the national and MFN treatment obligations with the separately defined scope of trademark rights afforded under the TRIPS Agreement.

7.1773. Honduras suggests that the interpretation of Article 6*quinquies* in the context of the Paris Convention and as incorporated into the TRIPS Agreement "can ... lead to different outcomes".⁴¹¹¹ As regards the interpretation of the provisions of the pre-existing treaties incorporated by reference into the TRIPS Agreement, we note that, as the panel in *US – Section 110(5) Copyright Act* observed, "it is a general principle of interpretation to adopt the meaning that reconciles the texts of different treaties and avoids a conflict between them. Accordingly, one should avoid interpreting the TRIPS Agreement to mean something different than the Berne Convention except where this is explicitly provided for."⁴¹¹² In our view, this statement, which was made in relation to the provisions of the Berne Convention (1971) as incorporated into the TRIPS Agreement, applies equally to the interpretation of the provisions of the Paris Convention (1967) as incorporated into the TRIPS Agreement. Dispute settlement panels and the Appellate Body have consistently understood the meaning of relevant provisions of the Paris and Berne Conventions incorporated in the TRIPS Agreement, and even certain provisions of the TRIPS Agreement itself⁴¹¹³, with reference to their meaning in these conventions.⁴¹¹⁴ There is no indication in the text of the TRIPS Agreement that negotiators wished to modify the contents of Article 6*quinquies* of the Paris Convention (1967) by incorporating it by reference into the TRIPS Agreement. In the absence of any indication to the contrary, we therefore have no basis to assume that the incorporation of this provision was intended to refer to anything other than its content as contained in the Paris Convention (1967). Accordingly, we also see no basis to interpret it to mean anything other than what it means in this Convention. It is notable that the Appellate Body, in its extensive review of Article 6*quinquies*⁴¹¹⁵, viewed this provision within its Paris Convention context and cited a standard commentary on the Paris Convention⁴¹¹⁶ when establishing its scope. Against this background, we disagree with Honduras that the provisions of Article 6*quinquies* should be interpreted differently as incorporated into the TRIPS Agreement than in the context of the Paris Convention (1967).

7.1774. We conclude that Honduras and Cuba have not demonstrated that, as a result of the TPP measures, Australia does not "accept[] for filing and protect[] as is" every trademark duly registered in the country of origin within the meaning of Article 6*quinquies* of the Paris Convention (1967). As regards the operation of the TPP Act, we note that, as explained in its Explanatory Memorandum, Section 28 of the TPP Act "preserves a trade mark owner's ability to protect a trade mark, and to register and maintain registration of a trade mark".⁴¹¹⁷ As noted above, we understand that the complainants are not claiming that, as a result of the TPP measures, a national of another WTO Member could not obtain registration of a trademark in Australia under the conditions determined by Article 6*quinquies*.⁴¹¹⁸ As regards the meaning of the terms "protected as is", we recall our interpretation that these terms make explicit that Members must not only accept relevant trademarks from other Members for registration under the conditions determined by Article 6*quinquies*, but also must provide them the protection that flows from such registration under their domestic law.⁴¹¹⁹ The complainants have not shown that a

⁴¹¹⁰ Honduras's second written submission, para. 374.

⁴¹¹¹ Honduras's second written submission, para. 379. (footnote omitted)

⁴¹¹² Panel Report, *US – Section 110(5) Copyright Act*, para. 6.66.

⁴¹¹³ The panel in *Canada – Pharmaceutical Patents* noted that Article 30 of the TRIPS Agreement was based on the text of Article 9(2) of the Berne Convention (1971), and examined the drafting history of the latter provision to confirm the panel's interpretation of the former provision. Panel Report, *Canada – Pharmaceutical Patents*, paras. 7.70-7.72. See also paras. 7.1909-7.1911 below, noting that Article 15.4 of the TRIPS Agreement is based on Article 7 of the Paris Convention (1967).

⁴¹¹⁴ See, e.g. Appellate Body Report, *US – Section 211 Appropriations Act*, paras. 145-146; Panel Report, *US – Section 211 Appropriations Act*, paras. 8.81-8.82; and Panel Report, *US – Section 110(5) Copyright Act*, paras. 6.48-6.59 and 6.72-6.73.

⁴¹¹⁵ Appellate Body Report, *US – Section 211 Appropriations Act*, paras. 122-148.

⁴¹¹⁶ Appellate Body Report, *US – Section 211 Appropriations Act*, para. 138. The Appellate Body also cited a 1983 WIPO publication commenting on the negotiating history of the Paris Convention. *Ibid.* para. 146.

⁴¹¹⁷ TPP Bill Explanatory Memorandum, (Exhibits AUS-2, JE-7), p. 15.

⁴¹¹⁸ See para. 7.1764 above.

⁴¹¹⁹ See para. 7.1767 above.

trademark registered in Australia pursuant to Article 6^{quinquies} would not be "protected as is" within the meaning of Article 6^{quinquies} A(1), namely that Australia would not provide such a trademark the protection that flows from the registration under its domestic law. We, consequently, also conclude that the TPP measures do not constitute a violation of Australia's obligations under Article 6^{quinquies} A(1) to accept for filing and protect as is every trademark duly registered in the country of origin within the meaning of that provision on the grounds that they restrict the use of certain trademarks on tobacco retail packaging and products.

7.1775. In light of the above, we find that Honduras and Cuba have not demonstrated that the TPP measures are inconsistent with Australia's obligations under Article 2.1 of the TRIPS Agreement in conjunction with Article 6^{quinquies} of the Paris Convention (1967).

7.3.2 Article 15.4 of the TRIPS Agreement

7.1776. We will now turn to the complainants' claims under Article 15.4 of the TRIPS Agreement. Article 15.4 is contained within Section 2 of Part II of the TRIPS Agreement on trademarks, and is part of Article 15, entitled "Protectable Subject Matter".

7.1777. Article 15.4 reads as follows:

The nature of the goods or services to which a trademark is to be applied shall in no case form an obstacle to registration of the trademark.

7.1778. Honduras, the Dominican Republic, Cuba, by reference⁴¹²⁰, and Indonesia claim that the TPP measures violate Article 15.4 of the TRIPS Agreement because they constitute an obstacle to the registration of trademarks based on the nature of the goods to which they would be applied.

7.1779. Australia asks the Panel to reject these claims in their entirety.

7.1780. We first provide an overview of the claims and arguments of the parties, and of the main arguments of the third parties, before defining our approach to the examination of these claims and addressing them.

7.3.2.1 Main arguments by the parties

7.1781. Honduras argues that if a Member requires use to register inherently non-distinctive signs, but, at the same time, restricts the ability of a trademark applicant to use that sign on a particular good (but not other goods), solely because of the nature of the good, the Member has violated Article 15.4 of the TRIPS Agreement, read in the context of Article 15.1.⁴¹²¹ In its view, in Australia the nature of the goods (*in casu* tobacco products) is a key obstacle to registering a trademark, contrary to Article 15.4.⁴¹²²

7.1782. Honduras notes that under the TPP measures, a non-inherently distinctive word-mark may be used on tobacco products so as to acquire distinctiveness through use. However, a non-inherently distinctive design mark, such as a logo, is not permitted to be used on a tobacco product and therefore it will never be able to acquire distinctiveness through use.⁴¹²³ Therefore, an applicant could not establish that a non-inherently distinctive non-word mark does in fact distinguish the product in the mind of consumers within the meaning of Section 41 of the TM Act, and would not be permitted to register it as a trademark. This obstacle to registration is due solely to the nature of the goods, namely tobacco products.⁴¹²⁴

7.1783. Honduras adds that it is important to note that Article 15.1, third sentence, recognises that registrable signs can be either inherently distinctive or not inherently distinctive but capable

⁴¹²⁰ See fn 4054 above.

⁴¹²¹ Honduras's first written submission, para. 215; and second written submission, para. 239.

⁴¹²² Honduras's second written submission, para. 239.

⁴¹²³ Honduras's comments on Panel question No. 27.

⁴¹²⁴ Honduras's first written submission, para. 205.

of acquiring distinctiveness through use. Honduras's claim under Article 15.4 concerns the obstacles imposed on the registration of trademarks that fall into the latter category of signs.⁴¹²⁵

7.1784. Honduras further argues that Section 28 of the TPP Act did not remedy the negative effects of the TPP measures on the ability of applicants to register non-distinctive trademarks.⁴¹²⁶ It argues that, while Section 28 of the TPP Act mainly protects against the loss of registration or protection that could otherwise have been the consequence of the requirement of genuine use of the trademark for maintaining registration and protection⁴¹²⁷, it does not address the fundamental obligation under Australia's trademark law, namely Section 43(1) of the TM Act, that only signs that are distinctive merit trademark protection.⁴¹²⁸

7.1785. The Dominican Republic argues that where a Member, like Australia, requires use in order to register a non-inherently distinctive sign, but prevents or severely restricts use of that sign with respect to certain types of goods but not others, the Member creates "an obstacle to registration of" a trademark that is due to the "nature of the goods". Such a legal regime violates the principle of non-discrimination in Article 15.4 because, with respect to the registration of non-inherently distinctive signs, it discriminates based on the nature of the good.⁴¹²⁹

7.1786. The Dominican Republic argues that Article 15.4 is a form of non-discrimination obligation that prevents Members, in registering trademarks, from discriminating based on the nature or type of good or service that the trademark will distinguish.⁴¹³⁰ Under the TPP measures, the use of all signs on tobacco products is prohibited or greatly restricted. As a result, there is no opportunity for a non-inherently distinctive sign for tobacco products to gain distinctiveness through use (with the exception of word marks) and, consequently, no possibility of registering such signs as trademarks for tobacco products.⁴¹³¹ The Dominican Republic argues that since this obstacle applies precisely because of the "nature" of the products as tobacco products⁴¹³², Australia has violated Article 15.4 because the TPP measures discriminate against trademark registration for non-inherently distinctive signs for tobacco products.⁴¹³³

7.1787. Cuba, by reference, incorporates the arguments in respect of Article 15.4 made by Honduras, the Dominican Republic, Indonesia, and Ukraine.⁴¹³⁴ Cuba argues, by reference to Ukraine's first written submission, that where a measure makes it impossible for non-inherently distinctive signs to acquire distinctiveness and thus to meet the basic requirement that conditions registration as a trademark because of the nature of the product, an obstacle to the registration of the trademark has been created in violation of Article 15.4 of the TRIPS Agreement.⁴¹³⁵ The TPP measures thus act as an unlawful obstacle to registration and protection of non-word marks and stylized word marks that are to be applied to tobacco products.⁴¹³⁶

7.1788. Cuba further argues that if the possibility for qualifying for protection under Article 16.1, or for extended protection under Article 16.3, is reduced, restricted, or removed by imposing constraints upon the use of the protected trademark based on the nature of the goods for which the trademark is to be used – notwithstanding that they continue to be goods of a nature which may lawfully be sold and supplied in the course of trade – the governing principle of Article 15.4 of

⁴¹²⁵ Honduras's first written submission, para. 188.

⁴¹²⁶ Honduras's first written submission, para. 214.

⁴¹²⁷ Honduras's second written submission, para. 244.

⁴¹²⁸ Honduras's second written submission, para. 244.

⁴¹²⁹ Dominican Republic's first written submission, para. 283.

⁴¹³⁰ Dominican Republic's first written submission, para. 277.

⁴¹³¹ Dominican Republic's second written submission, para. 52.

⁴¹³² Dominican Republic's first written submission, para. 293.

⁴¹³³ Dominican Republic's first written submission, para. 294.

⁴¹³⁴ As noted in fn 4054 above, Cuba incorporates by reference the claims and arguments advanced by the Dominican Republic, Honduras, Indonesia and Ukraine in their first written submissions. Cuba's first written submission, para. 428. Since we have described separately the other complainants' relevant arguments, in the following two paragraphs we will only summarize the main arguments incorporated from Ukraine.

⁴¹³⁵ Cuba's first written submission, para. 428 (incorporating Ukraine's first written submission, para. 201).

⁴¹³⁶ Cuba's first written submission, para. 428 (incorporating Ukraine's first written submission, para. 188).

the TRIPS Agreement has been violated.⁴¹³⁷ In support, it elaborates that the term "registration" can also be read in a more substantive manner as necessarily encompassing the rights flowing from the administrative act of registration.⁴¹³⁸ Article 15.4 confirms that trademarks must be examined and protected independently of the product or service to which they are to be applied⁴¹³⁹, and prevents national laws from establishing a different system for the protection of trademarks for tobacco products as compared to other products.⁴¹⁴⁰ As a result of the TPP measures, Cuba argues, Australia provides lesser protection under Articles 16.1 and 16.3, as well as under its domestic law, which surpasses the minimum rights guaranteed under the TRIPS Agreement, to tobacco-related marks as compared to non-tobacco related marks, solely because of the nature of the product. The TPP measures thus act as an unlawful obstacle to registration and protection of non-word marks and stylized word marks that are to be applied to tobacco products⁴¹⁴¹, in breach of Australia's obligation to confer trademark protections on the same terms and conditions notwithstanding the nature of the product.⁴¹⁴²

7.1789. Indonesia argues that when a Member requires prior use in order to register non-inherently distinctive marks, as Australia has done, but at the same time restricts the ability of a trademark applicant to use a sign related to a particular class of goods in order to acquire distinctiveness, it violates Article 15.4 of the TRIPS Agreement.⁴¹⁴³ Indonesia explains that, aside from simple word marks, marks for tobacco products that are not inherently distinctive are prevented by the TPP measures from acquiring distinctiveness through use, which is expressly required for registration under Australian law. The registration of non-inherently distinctive marks in Australia, therefore, depends on the nature of the goods to which they will be applied⁴¹⁴⁴, in violation of Article 15.4 of the TRIPS Agreement.⁴¹⁴⁵

7.1790. While agreeing that Article 15.4 does not create a right to use a trademark, Indonesia argues that when a Member elects to make registrability of trademarks depend upon use, it is bound by Article 15.4 to not prohibit the use of such trademarks based on the nature of the goods to which they are applied. By Australia's own admission, the TPP measures completely restrict the use of non-inherently distinctive trademarks on the basis of the nature of the goods to which they are applied, thereby preventing their ability to be registered as trademarks in violation of Article 15.4.⁴¹⁴⁶ Indonesia notes that Section 28 of the TPP Act is not a remedy, as it does not offer non-inherently distinctive marks that are developed in the future an opportunity for registration.⁴¹⁴⁷

7.1791. Australia argues that Article 15 of the TRIPS Agreement provides certain limitations on a Member's ability to set eligibility requirements for the registration of a trademark in its territory. Article 15.4 makes clear, however, that a Member can regulate a product in a way that may restrict or prohibit the use of a trademark in its territory, as long as a Member does not refuse to register a trademark based on the nature of a product.⁴¹⁴⁸ Australia submits that the complainants have failed to establish a *prima facie* case of violation of Article 15.4, as they have not demonstrated that, under the TPP measures, Australia does not register trademarks based on the nature of the underlying product.⁴¹⁴⁹

⁴¹³⁷ Cuba's first written submission, para. 428 (incorporating Ukraine's first written submission, para. 201).

⁴¹³⁸ Cuba's first written submission, para. 428 (emphasis added) (incorporating Ukraine's first written submission, para. 187).

⁴¹³⁹ Cuba's first written submission, para. 428 (incorporating Ukraine's first written submission, para. 179).

⁴¹⁴⁰ Cuba's first written submission, para. 428 (incorporating Ukraine's first written submission, para. 216).

⁴¹⁴¹ Cuba's first written submission, para. 428 (incorporating Ukraine's first written submission, para. 188).

⁴¹⁴² Cuba's first written submission, para. 428 (incorporating Ukraine's first written submission, para. 219).

⁴¹⁴³ Indonesia's second written submission, para. 61.

⁴¹⁴⁴ Indonesia's first written submission, para. 194.

⁴¹⁴⁵ Indonesia's first written submission, para. 200.

⁴¹⁴⁶ Indonesia's second written submission, para. 64.

⁴¹⁴⁷ Indonesia's first written submission, para. 199.

⁴¹⁴⁸ Australia's first written submission, paras. 298-299.

⁴¹⁴⁹ Australia's first written submission, para. 301.

7.1792. Australia notes the complainants' argument that by preventing the use of certain non-inherently distinctive "signs", the TPP measures prevent such signs from acquiring distinctiveness through use, and thereby constitute an "obstacle to registration" of these signs as trademarks. Australia claims that the complainants are confusing the concepts of "signs" and "trademarks". As provided in Article 15.1, a sign must be capable of distinguishing between the goods and services of one undertaking from those of another undertaking in order to "constitute a trademark" (and therefore be eligible for registration). If a sign is non-inherently distinctive, and has not yet acquired distinctiveness through use (for whatever reason), it is simply not a "trademark"⁴¹⁵⁰ and therefore not covered by the scope of Article 15.4.

7.1793. Australia argues that Article 15.4 provides that Members may not refuse to register a trademark (which, by necessary implication, must already be capable of distinguishing goods) based on the nature of the underlying goods. The obligation is not, as the complainants suggest, to guarantee the use of all non-inherently distinctive signs so that they may become distinctive in the future and therefore may constitute a trademark that is eligible for registration.⁴¹⁵¹

7.1794. Australia adds that Section 28 of the TPP Act ensures that the operation of the TPP Act does not prevent an owner from registering a trademark under the TM Act. Further, none of the complainants have provided any evidence to demonstrate that trademarks cannot be registered as a result of the TPP measures.⁴¹⁵²

7.1795. Australia further notes that many signs are non-distinctive in the absence of use, and that in practical terms, the complainants' interpretation would mean that Members must guarantee the right to sell and advertise products in their territory, regardless of the nature of those products, to allow non-distinctive signs to acquire distinctiveness.⁴¹⁵³ Australia considers the distinction made by the complainants between regulation of the product and regulation of use of the trademark to be "both disingenuous and false" because the TPP measures were implemented "in order to regulate a dangerous and addictive product by restricting its advertising and promotion".⁴¹⁵⁴

7.1796. Australia notes Cuba's second claim, as articulated by Ukraine, that Article 15.4 prohibits a Member from providing lesser protection under Articles 16.1 and 16.3, or under domestic law, to certain trademarks based on the nature of the product to which the trademark is to be applied.⁴¹⁵⁵ Australia responds that the claim is based entirely on its assertion that despite its ordinary meaning, the term "registration" can also be read in a more substantive manner as necessarily referring to the rights flowing from registration. Article 15.4, however, provides only that Members may not refuse to register trademarks based on the nature of the underlying goods. Article 15.4 says nothing about the nature of the protection that flows from registration. If Article 15.4 were intended to cover the nature of the protection afforded to trademarks as a result of registration, the drafters would have made this clear.⁴¹⁵⁶

7.1797. Honduras responds that Australia's distinction between the concepts of "trademarks" and "signs" in the context of Article 15 "is artificial"⁴¹⁵⁷ and "based on circular reasoning and an overly formalistic interpretation of the terms in Article 15.4, isolated from their context".⁴¹⁵⁸ It argues that Article 15.1 refers to distinctive signs that are capable of constituting trademarks. Those signs are eligible for registration as a trademark, as are non-inherently distinctive signs that, in several jurisdictions, including Australia, acquire the required distinctiveness through use. Article 15 thus focuses on *signs* that either are distinctive or acquire distinctiveness through use and therefore can be registered as *trademarks*. Honduras submits that its focus on signs and whether they can be registered as trademarks, without the nature of the product to which they apply creating an

⁴¹⁵⁰ Australia's first written submission, paras. 302-303.

⁴¹⁵¹ Australia's first written submission, para. 304.

⁴¹⁵² Australia's first written submission, para. 308.

⁴¹⁵³ Australia's first written submission, para. 306.

⁴¹⁵⁴ Australia's first written submission, para. 307.

⁴¹⁵⁵ Australia's first written submission, para. 309 fn 500.

⁴¹⁵⁶ Australia's first written submission, para. 309 fn 500.

⁴¹⁵⁷ Honduras's opening statement at the first meeting of the Panel, para. 30.

⁴¹⁵⁸ Honduras's second written submission, para. 239.

obstacle to registration, is thus appropriate and consistent with the text and context of Article 15.4.⁴¹⁵⁹

7.1798. The Dominican Republic responds that Australia ignores the interpretative context of the definition of trademarks in Article 15.1, and reads the term "capable" out of this definition.⁴¹⁶⁰ In view of the ordinary meaning of "capable", the Dominican Republic argues, non-inherently distinctive signs that have the capacity for "distinguishing the goods of one undertaking from those of other undertakings" qualify as "trademarks", as that term is defined in Article 15.1. Moreover, Article 15.1 states that Members *may* make the registrability of non-inherently distinctive signs depend on distinctiveness acquired through use, thereby indicating that Members can also opt to register non-inherently distinctive signs as "trademarks" even without actual distinctiveness acquired through use.⁴¹⁶¹

7.1799. The Dominican Republic seeks further guidance from Article 6*quinquies* B of the Paris Convention. It argues that since Article 6*quinquies* B(2) refers to the possibility of denying registration to "trademarks" that are "devoid of any distinctive character"⁴¹⁶², the term "trademark" encompasses signs that are not inherently distinctive and that have not yet acquired distinctiveness through use.⁴¹⁶³

7.1800. Indonesia does not agree that acceptance of its position would force all WTO Members to permit advertising and sale of all products regardless of how dangerous or addictive those products might be. Since nothing in the TRIPS Agreement prevents the regulation of products, a Member would be free to ban the sale of tobacco if it wished to do so.⁴¹⁶⁴

7.3.2.2 Main arguments by the third parties

7.1801. Argentina sees Article 15 of the TRIPS Agreement as establishing certain limitations in the ability of a Member to impose eligibility requirements for the registration of a trademark in its territory.⁴¹⁶⁵ It notes that Article 15.4 does not refer to enjoyment of the rights, but merely to their availability⁴¹⁶⁶, while Article 16 defines the exclusive rights of the trademark owner in negative terms (the right to exclude others).⁴¹⁶⁷ In its view, therefore, Article 15.4 cannot be interpreted as preventing a Member from limiting or prohibiting the use of trademarks for the marketing of goods or services on the basis of public health, security, or other reasons.⁴¹⁶⁸

7.1802. Argentina believes that the prohibition under Article 15.4 of the TRIPS Agreement refers to the registration of a trademark, while the TPP Act refers to the use of the registered trademark.⁴¹⁶⁹ It acknowledges that use of the registered trademark is one of the main objectives of registration and notes that "distinctiveness only serves its purpose under a declarative registration system, because in such cases there is always prior use, so that the differentiation already exists. On the other hand, under a constitutive system, the distinctiveness will always be potential and will be examined with respect to the good or service to be distinguished." Argentina believes that the Panel should consider this difference between the two different trademark registration traditions, since in a constitutive system, distinctiveness will never exist until the trademark has actually been used.⁴¹⁷⁰

7.1803. Canada argues that Article 15.4 ensures that registration of a trademark is independent of both the category of goods/services and the legality of the goods/services in the jurisdiction (i.e. whether the goods/services are for legal sale).⁴¹⁷¹ In its view, the provision neither addresses

⁴¹⁵⁹ Honduras's second written submission, para. 239.

⁴¹⁶⁰ Dominican Republic's second written submission, para. 47.

⁴¹⁶¹ Dominican Republic's first written submission, para. 280; and second written submission, para. 48.

⁴¹⁶² Dominican Republic's second written submission, para. 49.

⁴¹⁶³ Dominican Republic's second written submission, para. 49.

⁴¹⁶⁴ Indonesia's second written submission, para. 65.

⁴¹⁶⁵ Argentina's third-party submission, para. 21.

⁴¹⁶⁶ Argentina's third-party submission, para. 22.

⁴¹⁶⁷ Argentina's third-party submission, para. 22.

⁴¹⁶⁸ Argentina's third-party submission, para. 22.

⁴¹⁶⁹ Argentina's third-party submission, para. 24.

⁴¹⁷⁰ Argentina's third-party submission, para. 25.

⁴¹⁷¹ Canada's third-party submission, para. 36.

protections flowing from trademark registration, nor establishes a right to use a registered trademark, but simply and exclusively requires Members not to establish obstacles to registration based on the nature of the goods/services. Therefore a measure will only violate Article 15.4 where it is proven to be an obstacle to registration based on the nature of the product/services. It follows that where a measure restricts or prevents use of a trademark but does not interfere with its registration, there will be no basis for a successful claim under Article 15.4.⁴¹⁷²

7.1804. Canada further argues that Article 15.4 does not guarantee an opportunity, or grant a right, to acquire distinctiveness for non-inherently distinctive signs. This would create a right to use a sign if that sign has the potential to become a trademark, which is not a right protected under the TRIPS Agreement. The complainants' arguments and examples demonstrate that it is the element of the sign itself (that it is not distinctive), rather than a measure that prohibits use, that creates the obstacle to registration.⁴¹⁷³ To read a right to use a sign or a trademark into the TRIPS Agreement would, Canada submits, create untenable results,⁴¹⁷⁴ since such an interpretation would render redundant Articles 15.1 and 15.3, which establish that Members have the right to require use prior to registration.⁴¹⁷⁵ Canada further argues that such an interpretation would prevent Members from banning any good or service because a ban would necessarily result in preventing the use of signs and trademarks associated with the banned goods/services and a resulting inability for non-inherently distinctive signs to attain distinctiveness.⁴¹⁷⁶

7.1805. In Canada's view, Members have clearly and unequivocally preserved the freedom to regulate in the interest of protecting public health, as evident in Articles 7 and 8.1 of the TRIPS Agreement, and paragraph 4 of the Doha Declaration on Public Health.⁴¹⁷⁷ Article 15.4 must therefore be interpreted in a manner supportive of a Member's right to protect public health, and not so as to restrict a Member's ability to take measures to protect public health.⁴¹⁷⁸

7.1806. Guatemala submits that, under the TPP measures as challenged in Ukraine's first written submission, "the alleged obstacle to registration of a trademark would be the lack of use (pursuant to Article 15.3) but not necessarily the 'nature of the goods or services to which a trademark is to be applied' (in accordance with Article 15.4)".⁴¹⁷⁹ Guatemala thus does not believe that the TPP measures violate Article 15.4 of the TRIPS Agreement.⁴¹⁸⁰

7.1807. New Zealand argues that Article 15.4 does not refer to the enjoyment of rights, but only to their availability⁴¹⁸¹, and cannot be interpreted as preventing a Member from limiting or prohibiting the use of trademarks for the commercialization of goods or services based on public health, security, or other reasons.⁴¹⁸² In its view, for there to be a violation of Article 15.4, the nature of the goods to which a trademark applies (including whether the goods have a detrimental impact on health) must be an obstacle to the registration of the trademark.⁴¹⁸³ New Zealand argues that the complainants ignore the ordinary meaning and effect of Section 28 of the TPP Act⁴¹⁸⁴, which makes it clear that the operation of the TPP Act does not prevent an owner from registering a trademark.⁴¹⁸⁵ New Zealand also submits that the complainants conflate Article 15.1, which embodies a definition of what can constitute a trademark, with Article 15.4, which addresses the registration of trademarks.⁴¹⁸⁶

7.1808. Nicaragua argues that the TPP measures violate Articles 15.1 and 15.4 of the TRIPS Agreement by preventing certain valid trademarks from being used to distinguish products

⁴¹⁷² Canada's third-party submission, para. 37.

⁴¹⁷³ Canada's third-party submission, para. 39.

⁴¹⁷⁴ Canada's third-party submission, para. 40.

⁴¹⁷⁵ Canada's third-party submission, para. 40.

⁴¹⁷⁶ Canada's third-party submission, para. 41.

⁴¹⁷⁷ Canada's third-party submission, para. 42.

⁴¹⁷⁸ Canada's third-party submission, para. 42.

⁴¹⁷⁹ Guatemala's third-party submission, para. 30.

⁴¹⁸⁰ Guatemala's third-party submission, para. 31.

⁴¹⁸¹ New Zealand's third-party submission, para. 22.

⁴¹⁸² New Zealand's third-party submission, para. 22.

⁴¹⁸³ New Zealand's third-party submission, para. 23.

⁴¹⁸⁴ New Zealand's third-party submission, para. 23.

⁴¹⁸⁵ New Zealand's third-party submission, para. 24.

⁴¹⁸⁶ New Zealand's third-party submission, para. 24.

without an individual assessment of the nature of the trademark. "For figurative signs and non-inherently distinctive signs, the violation is clear as they cannot constitute a 'trademark' as properly defined and are barred from being registered because of the nature of the product respectively."⁴¹⁸⁷ Nicaragua further submits that the terms used and conditions imposed by the TRIPS Agreement, including "capable of distinguishing", "capable of constituting a trademark", and "distinctiveness acquired through use", reflect the functional nature of trademarks and must be given meaning. A formalistic approach to the interpretation of the TRIPS Agreement would effectively render inutile these terms and conditions and would thus not be consistent with the principle of effective treaty interpretation.⁴¹⁸⁸

7.1809. Norway argues that the text of Article 15.4 makes clear that it concerns limitations on Members as regards registration of a trademark, rather than obstacles to use of a trademark. This understanding is supported by the fact that the wording is the same as the wording of Article 7 of the Paris Convention, a provision that is understood to have "a rather narrow scope". It is of particular importance for the current dispute that WIPO has explained that "[i]f a national law does not exclude trademarks for certain kinds of products from registration, but only limits the use of such trademarks, this would not constitute a violation" of Article 7. In light of this, Norway submits that Article 15.4 only restricts the rights of Members to refuse registration. It does not restrict – or indeed does not affect – Members' rights to limit the use of a trademark.⁴¹⁸⁹

7.1810. Oman supports the legal arguments of Australia⁴¹⁹⁰ and submits that nothing in the TRIPS Agreement confers on owners of trade marks a positive right to use their trade marks. Moreover, Article 8.1 of the TRIPS Agreement contemplates Members' right to formulate and amend their regulations for the protection of public health as long as they are consistent with the TRIPS Agreement.⁴¹⁹¹

7.1811. Singapore submits that Article 15.4 is inapplicable. By its terms, Article 15.4 applies to trademarks which, according to Article 15.1, are signs that are capable of distinguishing the goods or services of one undertaking from those of other undertakings, i.e. signs that are already distinctive. Read in conjunction with Article 15.1, signs that are inherently distinctive are capable of constituting a trademark and may not be refused registration on account of the nature of the goods or services to which the trademark is to be applied. Signs that are non-inherently distinctive but which have acquired distinctiveness are also capable of constituting a trademark and may not be refused registration on account of the nature of the goods or services to which the trademark is to be applied. However, signs that are non-inherently distinctive and have not acquired distinctiveness are not capable of constituting trademarks; they are non-registrable *per se* and therefore *a fortiori*, there cannot be any "obstacle to registration" because of the nature of the goods or services involved.⁴¹⁹²

7.1812. Singapore adds that the plain packaging measure does not prevent tobacco companies from registering or maintaining their trademarks through the operation of Section 28 of the TPP Act (whether they are signs that are inherently distinctive, or signs that have acquired distinctiveness). To the extent that Section 28 does not apply to signs that are not inherently distinctive and have not acquired distinctiveness through use, Singapore submits that Members are under no obligation to enable a sign to acquire distinctiveness.⁴¹⁹³ It argues that no such obligation is expressed in Article 15.4 (or Article 7 of the Paris Convention). Taking the complainants' arguments to their logical conclusion would mean that Members would not be able to ban the sale of products with non-distinctive signs which may become registrable through use. Product bans are not, however, prohibited if they accord with the applicable rules under the covered agreements. Implying such an obligation would also be contrary to the rationale behind Article 15.4 (and Article 7 of the Paris Convention), which is to make protection independent of whether the goods in question may or may not be legally sold within the country. Therefore,

⁴¹⁸⁷ Nicaragua's third-party submission, para. 21.

⁴¹⁸⁸ Nicaragua's third-party submission, para. 23.

⁴¹⁸⁹ Norway's third-party submission, para. 30.

⁴¹⁹⁰ Oman's third-party statement, para. 4.

⁴¹⁹¹ Oman's third-party statement, para. 4.

⁴¹⁹² Singapore's third-party submission, para. 24.

⁴¹⁹³ Singapore's third-party submission, para. 25.

Singapore concludes, the obligation under Article 15.4 is not intended to, and cannot extend to, ensuring that a non-inherently distinctive sign can acquire distinctiveness through use.⁴¹⁹⁴

7.1813. Uruguay submits that Article 15.4 restricts the capacity of Members to refuse registration of a trademark, but not the capacity to restrict or prohibit the use of the mark. The Australian measure does not prevent registration, nor does it constitute an obstacle to registration.⁴¹⁹⁵

7.1814. Zimbabwe argues that Australia has imposed a ban on trademarks without examining whether individual marks increase smoking rates or prevent existing smokers from quitting. This is contrary to the principle of "product independence" reflected in Article 15.4 of the TRIPS Agreement, and cannot be justified.⁴¹⁹⁶

7.3.2.3 Analysis by the Panel

7.1815. As described above⁴¹⁹⁷, the TPP measures regulate the appearance of trademarks⁴¹⁹⁸ and "marks"⁴¹⁹⁹ on tobacco retail packaging and products in various ways. In respect of retail packaging, the TPP measures permit the use of word marks and marks that denote the brand, business or company name, or the name of the product variant, as long as these trademarks appear in the form prescribed by the TPP Regulations. They prohibit the use of stylized word marks, composite marks and figurative marks, as well as other decorative elements both on tobacco products and on their retail packaging.

7.1816. All complainants argue that, while Australian trademark law in general permits non-distinctive signs to acquire distinctiveness through use to qualify for registration, the fact that non-word signs are prohibited from being used on tobacco products and packaging means that new non-word signs that are not inherently distinctive have no opportunity to acquire distinctiveness through use on such products, and therefore face obstacles to registration based on the nature of the goods as tobacco products, in violation of Article 15.4.⁴²⁰⁰ Australia responds that a non-distinctive sign is not a "trademark" within the meaning of Article 15.4, and that therefore Article 15.4 does not contain any obligation for Members to permit the use of such a non-distinctive sign notwithstanding the nature of the goods or services on which it is to be used.⁴²⁰¹

7.1817. The Dominican Republic and Honduras also argue that the TPP measures are inconsistent with Article 15.4 in that a sign, which is not inherently distinctive and has not yet acquired distinctiveness through use, should, nonetheless, be eligible for registration to the extent that it is "capable of acquiring distinctiveness through use".⁴²⁰² Australia responds that the definition of what can constitute a "trademark" in Article 15.1 does not encompass a sign that is not inherently distinctive and has not yet acquired distinctiveness through use, and that the obligation in Article 15.4 therefore does not extend to signs that may become distinctive in the future.⁴²⁰³

7.1818. In addition, Cuba, by reference, argues that the restriction on the use of signs under the TPP measures reduces the protection Australia provides to tobacco-related trademarks that flows from trademark registration, both under Article 16 and under domestic law, and thereby violates what it considers to be the governing principle of Article 15.4 to confer protection to trademarks on the same terms and conditions notwithstanding the nature of the product.⁴²⁰⁴ Australia

⁴¹⁹⁴ Singapore's third-party submission, para. 26.

⁴¹⁹⁵ Uruguay's third-party submission, para. 50.

⁴¹⁹⁶ Zimbabwe's third-party submission, para. 34.

⁴¹⁹⁷ See sections 2.1.2.3.3 and 2.1.2.4 above.

⁴¹⁹⁸ For an explanation of the terminology used in these Reports for different types of trademarks, see fn 4095 above.

⁴¹⁹⁹ The definition of "mark" in Section 4 of the TPP Act reads as follows: "(a) includes (without limitation) any line, letters, numbers, symbol, graphic or image; but (b) (other than when referring to a trade mark) does not include a trade mark". TPP Act, (Exhibits AUS-1, JE-1), Section 4.

⁴²⁰⁰ See paras. 7.1782, 7.1786 and 7.1789, and fn 4120, above.

⁴²⁰¹ See para. 7.1792 above.

⁴²⁰² Dominican Republic's second written submission, paras. 47-48; and Honduras's second written submission, paras. 239-241.

⁴²⁰³ Australia's first written submission, paras. 302-304.

⁴²⁰⁴ See para. 7.1788 above.

responds that Article 15.4 only prohibits obstacles to the registration of trademarks and does not relate to the nature of the protection that flows from registration.⁴²⁰⁵

7.1819. The question before us is, therefore, whether the TPP measures amount to an obstacle to the registration of a trademark based on the nature of the goods or services to which the trademark is to be applied, within the meaning of Article 15.4, in that they:

- a. prevent registration of signs, which are not inherently distinctive and have not yet acquired distinctiveness through use, but which are "capable of acquiring distinctiveness through use";
- b. prevent new non-inherently distinctive non-word signs from acquiring distinctiveness through use and thereby becoming eligible for registration in relation to tobacco products; and
- c. reduce the protection flowing from registration for tobacco-related trademarks because of the nature of the product.

7.1820. The parties' differing views in respect of these questions result in part from their different interpretations of the terms of Article 15.4. We, therefore first consider the interpretation of Article 15.4, before turning to a consideration of whether the TPP measures are inconsistent with its requirements.

7.3.2.3.1 Interpretation of Article 15.4

7.1821. We recall that Article 15.4 of the TRIPS Agreement reads as follows:

The nature of the goods or services to which a trademark is to be applied shall in no case form an obstacle to registration of the trademark.

7.1822. In accordance with Article 3.2 of the DSU and the customary rules of interpretation reflected in Article 31 of the Vienna Convention⁴²⁰⁶, the terms of Article 15.4 must be given their ordinary meaning in their context and in light of the object and purpose of the treaty.⁴²⁰⁷

7.1823. We note at the outset that, on a plain reading of the provision, for a violation of Article 15.4 to exist, the following elements must be established:

- a. the existence of an "obstacle to the registration of the trademark"; and
- b. that this obstacle is formed by "the nature of the goods or services to which a trademark is to be applied".

7.1824. Article 15.4, by its express terms, relates to an obstacle to "the registration of the trademark". In order to determine whether such an "obstacle" exists, therefore, we must first address the notion of "registration of the trademark" to which such an "obstacle" would relate. In this regard, we note that the parties have different views on the meaning of the terms "trademark" and "registration of the trademark", as used in Article 15.4, and consequently on the scope of the obligation under this provision and what may constitute an "obstacle" to the "registration" of a "trademark" in violation of Article 15.4. Accordingly, we first address the meaning of the term "trademark" in Article 15.4.

⁴²⁰⁵ See para. 7.1796 above.

⁴²⁰⁶ Vienna Convention on the Law of Treaties, done at Vienna, 23 May 1969, UN Treaty Series, Vol. 1155, p. 331.

⁴²⁰⁷ See Appellate Body Report, *US – Gasoline*, p. 17, DSR 1996:I, 3, at pp. 15-16.

7.3.2.3.1.1 The meaning of "trademark" in Article 15.4

7.1825. Article 15.4 forms part of Article 15 of the TRIPS Agreement, entitled "Protectable Subject Matter".⁴²⁰⁸ This provision sets out a number of obligations for Members regarding what shall be capable of constituting a "trademark" and in relation to the "registration" of a trademark.

7.1826. All parties refer to Article 15.1 of the TRIPS Agreement as describing, or providing a definition of, what must be capable of constituting a "trademark"⁴²⁰⁹, thus offering relevant context for the purpose of interpreting Article 15.4.⁴²¹⁰ Article 15.1 reads as follows:

Any sign, or any combination of signs, capable of distinguishing the goods or services of one undertaking from those of other undertakings, shall be capable of constituting a trademark. Such signs, in particular words including personal names, letters, numerals, figurative elements and combinations of colours as well as any combination of such signs, shall be eligible for registration as trademarks. Where signs are not inherently capable of distinguishing the relevant goods or services, Members may make registrability depend on distinctiveness acquired through use. Members may require, as a condition of registration, that signs be visually perceptible.

7.1827. The first and second sentences of Article 15.1 thus define what signs Members must consider as being "capable of constituting a trademark" and set out an obligation for Members to consider such signs as "eligible for registration as trademarks".⁴²¹¹

7.1828. As described by the Appellate Body in *US – Section 211 Appropriations Act*:

Article 15.1 defines which signs or combinations of signs are *capable of* constituting a trademark. These signs include words such as personal names, letters, numerals, figurative elements and combinations of colours, as well as any combination of such signs. This definition is based on the distinctiveness of signs as such, or on their distinctiveness as acquired through use. If such signs are capable of distinguishing the goods or services of one undertaking from those of other undertakings, then they become *eligible for* registration as trademarks. To us, the title of Article 15.1 – "Protectable Subject Matter" – indicates that Article 15.1 embodies a *definition* of what can constitute a trademark. WTO Members are obliged under Article 15.1 to ensure that those signs or combinations of signs that meet the distinctiveness criteria set forth in Article 15.1 – and are, thus, *capable of constituting a trademark* – are *eligible for registration* as trademarks within their domestic legislation.⁴²¹²

7.1829. The terms "trademark" and "registration as trademarks"⁴²¹³ are also used in subsequent paragraphs of Article 15, including Article 15.4, and, indeed, elsewhere in the TRIPS Agreement. These terms must logically be given, in these other provisions, and specifically in Article 15.4, the meaning established in the first and second sentences of Article 15.1 determining the protectable subject matter.

⁴²⁰⁸ See para. 7.1776 above.

⁴²⁰⁹ Honduras's first written submission, para. 155; Dominican Republic's second written submission, paras. 44 and 47; Cuba's first written submission, para. 428 (incorporating Ukraine's first written submission, para. 147); Indonesia's first written submission, para. 186; Indonesia's second written submission, paras. 22, 58-59; Australia's response to Panel question No. 26, para. 89; and Australia's second written submission, para. 25.

⁴²¹⁰ See Honduras's first written submission, paras. 155-158; Honduras's second written submission, paras. 239 and 242; Dominican Republic's first written submission, para. 278; Dominican Republic's second written submission, paras. 44-47; Cuba's first written submission, para. 428 (incorporating by reference Ukraine's first written submission, paras. 183, 189 and 191); Indonesia's first written submission, para. 186. Australia's first written submission, para. 303; and Australia's second written submission, para. 25.

⁴²¹¹ In accordance with Article 1.1 of the TRIPS Agreement, "Members shall give effect to the provisions of this Agreement. Members may, but shall not be obliged to, implement in their law more extensive protection than is required by this Agreement, provided that such protection does not contravene the provisions of this Agreement."

⁴²¹² Appellate Body Report, *US – Section 211 Appropriations Act*, para. 154. (emphasis original; footnote omitted)

⁴²¹³ This phrase is used with slightly different formulations throughout Article 15; see our discussion in para. 7.1835 below.

7.1830. The term "trademark" must therefore be understood, in Article 15.4, as referring to those signs that are "capable of constituting a trademark" within the meaning of Article 15.1. Specifically, as described by the Appellate Body, the definition, in Article 15.1, of the signs or combinations of signs that are "capable of constituting a trademark" is based on their capacity to distinguish the relevant goods or services (or "distinctiveness", in the words of the Appellate Body) either "as such" or "as acquired through use".

7.1831. In light of the above, we conclude that the term "trademark" in Article 15.4 refers to signs or combinations of signs that meet the distinctiveness requirement set out in Article 15.1, first sentence, which Members are therefore under an obligation to consider as capable of constituting trademarks.

7.1832. We now consider the notion of "registration" of a trademark, which is also used in Article 15.4.

7.3.2.3.1.2 The meaning of "registration of the trademark" in Article 15.4

7.1833. Having established the meaning of the term "trademark" in Article 15.4, we turn to the meaning of the phrase "registration of the trademark" in Article 15.4.

7.1834. Dictionary definitions of the term "registration" include "the action of registering or recording something; the process of being registered".⁴²¹⁴ In the specific context of Article 15.4 of the TRIPS Agreement, the "registration of the trademark" therefore refers to the "action of registering or recording" certain signs or combinations of signs "as trademarks".

7.1835. In the same way as for the term "trademark", we consider that the meaning of the term "registration of the trademark" in Article 15.4 must be established with reference to the same terms as used in other paragraphs of Article 15 that also refer to the registration of trademarks. The successive paragraphs of Article 15 use slightly different formulations: Article 15.1 refers to "registration as trademarks", Article 15.2 to "registration of a trademark" and Article 15.4 to "registration of the trademark." However, these differences arise because these paragraphs refer to different aspects of registration, and not because the concepts of "trademark" or "registration" they discuss diverge. Taken together, these provisions define Members' obligations under the TRIPS Agreement with respect to the registration of trademarks. They therefore provide important context for understanding the notion of "registration of a trademark" in Article 15.4.

7.1836. The text of Article 15.1 clearly distinguishes what must be *capable of constituting a trademark*, in the first sentence, from the obligation to consider such signs as *eligible for registration* as trademarks, in the second sentence. As noted, in addition to defining which signs or combinations of signs shall be capable of constituting a trademark, Article 15.1, second sentence, further requires that such signs be eligible for "registration" as trademarks:

Such signs, in particular words including personal names, letters, numerals, figurative elements and combinations of colours as well as any combination of such signs, shall be eligible for registration as trademarks.

7.1837. As described above, Article 15.1 provides a definition of what signs must be capable of constituting a trademark and sets out an obligation for Members to consider such signs as "eligible for registration" as a trademark. The obligation to consider as "eligible for registration" under Article 15.1, second sentence, thus extends to the very same signs that Members are obliged to consider "capable of constituting a trademark" under Article 15.1, first sentence, namely those signs that fulfil the requirement of "distinctiveness" described above.

7.1838. Article 15 further defines the conditions that Members may place on the registration of signs or combinations of signs as trademarks, which provide relevant context for understanding the obligation in Article 15.4. In its third sentence, Article 15.1 thus expressly allows Members to make the registration of signs or combinations of signs that are *not* inherently capable of

⁴²¹⁴ Oxford English Dictionary online, definition of "registration", available at: <<http://www.oed.com/view/Entry/161313?redirectedFrom=registration#eid>>, accessed 2 May 2017.

distinguishing the relevant goods or services dependent on the acquisition of such distinctiveness through use. In its final sentence, Article 15.1 provides that Members may also require, as a condition of registration, that signs be visually perceptible.

7.1839. As described by the Appellate Body in *US – Section 211 Appropriations Act*:

This Article describes which trademarks are "capable of" registration. It does not say that all trademarks that are capable of registration "shall be registered". This Article states that such signs or combinations of signs "shall be *eligible* for registration" as trademarks. It does not say that they "shall be registered". To us, these are distinctions with a difference. And, as we have said, supporting these distinctions is the fact that the title of this Article speaks of subject matter as "protectable", and not of subject matter "to be protected".⁴²¹⁵

7.1840. This distinction between constituting a trademark and thus eligibility for registration, on one hand, and actual registration as a trademark to become a *registered* trademark⁴²¹⁶, on the other, is confirmed by other provisions, which further define the obligations of Members in respect of the conditions for eligibility for registration as a trademark, beyond the "distinctiveness" requirements of Article 15.1. Specifically, paragraphs 2 to 5 of Article 15 further define the obligations of Members in relation to the registration of trademarks. These paragraphs read as follows:

2. Paragraph 1 shall not be understood to prevent a Member from denying registration of a trademark on other grounds, provided that they do not derogate from the provisions of the Paris Convention (1967).

3. Members may make registrability depend on use. However, actual use of a trademark shall not be a condition for filing an application for registration. An application shall not be refused solely on the ground that intended use has not taken place before the expiry of a period of three years from the date of application.

4. The nature of the goods or services to which a trademark is to be applied shall in no case form an obstacle to registration of the trademark.

5. Members shall publish each trademark either before it is registered or promptly after it is registered and shall afford a reasonable opportunity for petitions to cancel the registration. In addition, Members may afford an opportunity for the registration of a trademark to be opposed.

7.1841. These provisions must be read together with the relevant provisions of the Paris Convention (1967) concerning the registration of trademarks that have been incorporated into the TRIPS Agreement through its Article 2.1.

7.1842. In this respect, the Appellate Body, in *US – Section 211 Appropriations Act*, provided useful clarification of the overall structure and operation of these provisions, in combination with Article 6(1) of the Paris Convention (1967), which is incorporated into the TRIPS Agreement through its Article 2.1:

Article 6(1) states the general rule, namely, that each country of the Paris Union has the right to determine the *conditions* for filing and registration of trademarks in its domestic legislation. This is a reservation of considerable discretion to the countries of the Paris Union – and now, by incorporation, the Members of the WTO – to continue, in principle, to determine for themselves the conditions for filing and registration of trademarks. Thus, in our view, the general rule under the Paris Convention (1967) is that national laws apply with respect to trademark registrations within the *territory* of each country of the Paris Union, subject to the requirements of other provisions of

⁴²¹⁵ Appellate Body Report, *US – Section 211 Appropriations Act*, para. 155. (emphasis original)

⁴²¹⁶ We note that the rights conferred in Article 16.1 are only available to the owners of *registered* trademarks.

that Convention.⁴²¹⁷ And, likewise, through incorporation, this is also now the general rule for all WTO Members under the *TRIPS Agreement*.⁴²¹⁸

7.1843. The "considerable discretion"⁴²¹⁹ provided by this general rule is limited in Article 15 of the TRIPS Agreement by setting out specific options and limitations regarding the conditions that Members may establish for the registration of trademarks in their national legislation.

7.1844. First, Article 15.1 limits Members' freedom to determine conditions for trademark registration with respect to "distinctiveness requirements":

Article 15.1 of the *TRIPS Agreement* limits the right of Members to determine the "conditions" for filing and registration of trademarks under their domestic legislation pursuant to Article 6(1) *only* as it relates to the distinctiveness requirements enunciated in Article 15.1.⁴²²⁰

7.1845. In addition, Article 15.2 confirms Members' discretion to set conditions with respect to "other grounds" – i.e. grounds other than those regulated in Article 15.1 – provided these do not derogate from the Paris Convention (1967):

To us, the reference in Article 15.2 to Article 15.1 makes it clear that "other grounds" for denial of trademark registration are grounds *different from* those already mentioned in Article 15.1, such as lack of inherent distinctiveness of signs, lack of distinctiveness acquired through use, or lack of visual perceptibility.⁴²²¹

7.1846. Article 15.3, in its first sentence, further provides an explicit example of such "other grounds" mentioned in Article 15.2, namely refusal of registration if the trademark is not used. The second and third sentences of Article 15.3 then limit the extent to which Members can exercise their discretion to require use of a trademark as a condition for registration.⁴²²²

7.1847. It is in this context that Article 15.4 provides that "registration of the trademark" may *not* be refused on the basis of the nature of the goods or services to which the trademark is to be applied. This means that for a sign that is capable of constituting a trademark and eligible for registration, the nature of the goods or services to which it is intended to be applied cannot be an obstacle to its registration.

7.1848. Article 6*quinquies* of the Paris Convention (1967), which is also incorporated by reference into the TRIPS Agreement, further establishes an obligation with respect to the registration of trademarks that have been registered in the territory of other Members.⁴²²³ As discussed in detail above⁴²²⁴, this provision limits the freedom of Members, established in Article 6 of the

⁴²¹⁷ (footnote original) The discretion of countries of the Paris Union to legislate conditions for filing and registration is not unlimited. It is subject to the international minimum standard of trademark disciplines provided for in other articles of the Paris Convention (1967). These include, for example, national treatment, as well as internationally agreed reasons for denying trademark registration, such as those provided for in Article 6*ter*. The Paris Convention (1967) limits also the legislative discretion of countries of the Union under Article 6(1) by setting out reasons that countries cannot invoke to deny trademark registration, for example in Article 6(2).

⁴²¹⁸ Appellate Body Report, *US – Section 211 Appropriations Act*, para. 132. (emphasis original)

⁴²¹⁹ Appellate Body Report, *US – Section 211 Appropriations Act*, para. 132.

⁴²²⁰ Appellate Body Report, *US – Section 211 Appropriations Act*, para. 165. (emphasis original)

⁴²²¹ Appellate Body Report, *US – Section 211 Appropriations Act*, para. 158. (emphasis original)

⁴²²² Cf. Appellate Body Report, *US – Section 211 Appropriations Act*, para. 164. We note for clarity that Article 15.3 refers to "use" as a basis for registrability of a trademark by a particular applicant, while Article 15.1, third sentence, refers to "use" as a basis for signs which are not inherently distinctive to acquire distinctiveness and thus qualify as "protectable subject matter".

⁴²²³ Article 6*quinquies* of the Paris Convention (1967) refers to "countries of the Union". Through the incorporation of this provision into the TRIPS Agreement this has now become an obligation for WTO Members. "Thus, in our view, the general rule under the Paris Convention (1967) is that national laws apply with respect to trademark registrations within the territory of each country of the Paris Union, subject to the requirements of other provisions of that Convention. And, likewise, through incorporation, this is also now the general rule for all WTO Members under the *TRIPS Agreement*." Appellate Body Report, *US – Section 211 Appropriations Act*, para. 132. (emphasis original; footnote omitted)

⁴²²⁴ See paras. 7.1758 to 7.1762 above.

Paris Convention (1967), to set conditions for the registration of trademarks by requiring, in its first paragraph, that:

A. (1) Every trademark duly registered in the country of origin shall be accepted for filing and protected as is in the other countries of the Union, subject to the reservations indicated in this Article.⁴²²⁵

7.1849. Section B of Article 6*quinquies* further provides that:

B. Trademarks covered by this Article may be neither denied registration nor invalidated except in the following cases:

1. when they are of such a nature as to infringe rights acquired by third parties in the country where protection is claimed;
2. when they are devoid of any distinctive character, or consist exclusively of signs or indications which may serve, in trade, to designate the kind, quality, quantity, intended purpose, value, place of origin, of the goods, or the time of production, or have become customary in the current language or in the bona fide and established practices of the trade of the country where protection is claimed;
3. when they are contrary to morality or public order and, in particular, of such a nature as to deceive the public. It is understood that a mark may not be considered contrary to public order for the sole reason that it does not conform to a provision of the legislation on marks, except if such provision itself relates to public order.

This provision is subject, however, to the application of Article 10*bis*.

7.1850. Article 6*quinquies* thus formulates an obligation for Members⁴²²⁶ to accept for filing and "protect as is" a trademark, where protection is claimed in one Member on the basis of a trademark that is duly registered in one of the other Members.

7.1851. Section B sets out the "reservations" referred to in Section A(1), first sentence, by listing the situations in which the Member where protection is claimed may nevertheless deny registration to "[t]rademarks covered by this Article" which it would otherwise have to accept for filing and protection. The "[t]rademarks covered by this Article" referred to in Section B are those defined in Section A(1) as "trademark[s] duly registered in the country of origin". Section B thus allows a Member to deny registration to, or invalidate, trademarks that are duly registered in the country of origin (i.e. another Member), in specific circumstances, including, *inter alia*, when they are "devoid of any distinctive character".⁴²²⁷

7.1852. Taken together, these provisions thus define Members' obligations under the TRIPS Agreement with respect to the registration of trademarks. The notion of "registration of the trademark" in Article 15.4 must therefore be understood with reference to these provisions.

7.1853. Regarding the functional context of registration of the trademark, we further note that Article 16.1, entitled "Rights Conferred", obliges Members to provide the rights described therein to the owners of *registered* trademarks. This means that the *registration* of the trademark, as governed by Article 15 in the manner described above, is a precondition for the availability of those minimum rights conferred on a trademark owner, the scope and content of which are governed by Article 16.1.

⁴²²⁵ Article 6*quinquies* A(1), first sentence.

⁴²²⁶ Obligations on Paris Union Members deriving from provisions of the Paris Convention (1967) that have been incorporated into the TRIPS Agreement by Article 2.1 have thus become obligations of WTO Members. See Appellate Body Report, *US – Section 211 Appropriations Act*, para. 132.

⁴²²⁷ Article 6*quinquies* B(2).

7.3.2.3.1.3 The meaning of "obstacle" to the registration of a trademark in Article 15.4

7.1854. As discussed above, we consider that the terms of Article 15.4 must be read in accordance with, and in the context of, the whole of Article 15, which provides a definition of what can constitute a "trademark", and what must thus be "eligible for registration" in its first paragraph.

7.1855. Articles 15.1 to 15.3, together with the relevant provisions of the Paris Convention (1967) incorporated by reference, further clarify the conditions under which Members must allow, or may deny, the registration of signs that constitute trademarks and are thus, in principle, eligible for registration. In that context, Article 15.4 provides that "[t]he nature of the goods or services to which the trademark is to be applied" may not "form an obstacle to registration of the trademark". This means that for a sign that is capable of constituting a trademark and otherwise eligible for registration, the nature of the goods or services to which it is intended to be applied cannot be an obstacle to its registration.

7.1856. We note that the ordinary meaning of the noun "obstacle" is "something that stands in the way or that obstructs progress (*lit.* and *fig.*); a hindrance, impediment, or obstruction".⁴²²⁸ The parties are in general agreement on this meaning of the term.⁴²²⁹ We also note that the object of the preposition "to" in "obstacle to" is "registration of the trademark". Also bearing in mind our above determinations of the meaning of the term "trademark" and the phrase "registration of the trademark", the phrase "obstacle to the registration of the trademark" in Article 15.4 thus refers to an impediment or hindrance to the registration of a sign, or combination of signs, that is otherwise capable of constituting a trademark, and thus eligible for registration, within the meaning of Article 15.1.

7.3.2.3.1.4 Conclusion

7.1857. Having established the meaning of the relevant terms, including the terms "trademark" and "registration of the trademark" in Article 15.4, we conclude that the obligation in Article 15.4 for the "nature of the goods or services to which the trademark is to be applied" not to form an obstacle to its registration, should be understood to mean that signs or combinations of signs that are otherwise eligible for registration as a trademark may not be denied such registration on the basis of the "nature of the goods or services" to which the trademark is to be applied.

7.1858. Applying this interpretation, we will now consider whether, as the complainants argue, the TPP measures are inconsistent with Article 15.4.

7.3.2.3.2 Application to the TPP measures

7.1859. As described in para. 7.1819 above, the complainants consider that the TPP measures are inconsistent with Article 15.4 of the TRIPS Agreement, in that they:

- a. prevent registration of signs, which are not inherently distinctive and have not yet acquired distinctiveness through use, but which are "capable of acquiring distinctiveness through use";
- b. prevent new non-inherently distinctive non-word signs from acquiring distinctiveness through use and thereby becoming eligible for registration in relation to tobacco products; and

⁴²²⁸ Oxford English Dictionary online, definition of "obstacle", available at: <<http://www.oed.com/view/Entry/129940?rskey=Bqmihq&result=1&isAdvanced=false#eid>>, accessed 2 May 2017.

⁴²²⁹ Honduras's first written submission, para. 187; Dominican Republic's first written submission, para. 276; Cuba's first written submission, para. 428 (incorporating Ukraine's first written submission, para. 186); and Indonesia's first written submission, para. 184. Australia agrees that "obstacle" means "hindrance" or "impediment" in the context of Article 2.2 of the TBT Agreement. See Australia's first written submission, para. 525.

- c. reduce the protection flowing from registration for tobacco-related trademarks because of the nature of the product.⁴²³⁰

7.1860. We consider these aspects in turn.

7.3.2.3.2.1 Whether the TPP measures are inconsistent with Article 15.4 in that they operate to prevent the registration of signs that are capable of acquiring distinctiveness through use

7.1861. The Dominican Republic argues that the ordinary meaning of the term "capable" in the phrase "capable of distinguishing the goods or services of one undertaking from those of other undertakings" in Article 15.1, first sentence, indicates that the definition of what must be capable of constituting a trademark includes signs that have not yet acquired distinctiveness through use but have "the 'capacity'" to do so in the future. Consequently, the Dominican Republic argues, the obligation in Article 15.4 not to refuse registration of trademarks on the basis of the nature of the goods extends to non-inherently distinctive signs that have not yet acquired distinctiveness but would acquire it through use in the marketplace.⁴²³¹

7.1862. The Dominican Republic argues that its interpretation is supported by the fact that Article 6*quinquies* (B)(ii) of the Paris Convention (1967) refers to "trademarks ... devoid of any distinctive character".⁴²³²

7.1863. Australia considers that the definition in Article 15.1 excludes signs that are not inherently distinctive and have not yet acquired distinctiveness through use from the scope of the term "trademark", and that the obligation in Article 15.4 therefore does not extend to such signs.⁴²³³

7.1864. We note – as the Dominican Republic does⁴²³⁴ – that the term "capable" means "able to take in, receive, contain, or hold; having room or capacity for".⁴²³⁵ In the context of Article 15.1, as discussed above, the definition contained in the first sentence refers to signs that, at that particular moment, are capable of distinguishing goods and services and that are, therefore, considered as capable of constituting a trademark. Pursuant to the second sentence, Members are obliged to consider such signs as eligible for registration as trademarks. This obligation does not, in our view, cover signs that only have *the potential to develop this capacity* in the future. Rather, as the Appellate Body's description of the "distinctiveness criteria" highlights, the existence of a capacity to distinguish goods or services at the time of assessment is the very basis for the definition of the signs that must be eligible for registration. This capacity may exist either because the signs or combinations of signs at issue have "as such" the capacity to distinguish the relevant goods or services or it may have been "acquired through use".

7.1865. In our view, this understanding is also consistent with the fact that Article 15.1, in its third sentence, expressly allows Members to make the registration of signs or combinations of signs that are *not* inherently capable of distinguishing the relevant goods or services dependent on the acquisition of such distinctiveness through use:

Where signs are not inherently capable of distinguishing the relevant goods or services, Members may make registrability depend on distinctiveness acquired through use.

⁴²³⁰ This argument is made by Cuba only, through its incorporation of Ukraine's first written submission. See Cuba's first written submission, para. 428.

⁴²³¹ Dominican Republic's second written submission, paras. 47-48. See also Honduras's second written submission, paras. 239-241.

⁴²³² Dominican Republic's second written submission, para. 49.

⁴²³³ Australia's first written submission, paras. 302-304.

⁴²³⁴ Dominican Republic's second written submission, para. 48.

⁴²³⁵ Oxford English Dictionary online, definition of "capable", available at: <<http://www.oed.com/view/Entry/27354?redirectedFrom=capable>>>, accessed 2 May 2017.

7.1866. *A contrario*, this implies that Article 15.1 does not impose on Members an obligation to make eligible for registration signs or combinations of signs that are not inherently capable of distinguishing the relevant goods and services and have not acquired this capacity through use.

7.1867. In this respect, we also note the Appellate Body's observation that "the reference in Article 15.2 to Article 15.1 makes it clear that 'other grounds' for denial of trademark registration are grounds *different from* those already mentioned in Article 15.1, such as lack of inherent distinctiveness of signs, lack of distinctiveness acquired through use...".⁴²³⁶ This description further confirms that, under Article 15.1, a "lack of distinctiveness" of the sign or combinations of signs at issue may constitute a valid ground for denial of registration as a trademark.

7.1868. We are therefore not persuaded that the use of the term "capable" in Article 15.1, first sentence, implies that the term "trademark" in Article 15.4 includes signs that are not inherently distinctive and have not yet acquired distinctiveness through use.⁴²³⁷

7.1869. We recall our finding in paragraph 7.1831 above that the term "trademark" in Article 15.4 refers to signs or combinations of signs that meet the distinctiveness requirement set out in Article 15.1, first sentence, and which Members are therefore under an obligation to consider as capable of constituting trademarks. Article 15.4 thus does not extend in scope to "signs" as such, and in particular, as discussed above, does not extend to signs that lack the capability to distinguish (even if they may be capable of subsequently acquiring distinctiveness over time and thus come to meet the standard of being capable of constituting a "trademark"). The drafters' choice to use term "trademark" and not "sign" in this provision is not, in our view, inadvertent. Rather, it reflects the intention that the obligation in Article 15.4 applies in respect of those signs that are capable of constituting a trademark, as defined in Article 15.1.

7.1870. Given the substantive distinction between a "sign" and a "trademark" in the context of Article 15, and the sequential distinction between the status of being capable of constituting a "trademark" and subsequently being registered as a trademark, there is, in our view, no circularity or terminological inconsistency – as implied by the complainants⁴²³⁸ – in Article 15.4 when it provides that the nature of the goods or services to which a trademark is to be applied cannot form an obstacle to "registration of the trademark".

7.1871. The Dominican Republic refers to Article 6*quinquies* B of the Paris Convention (1967) in support of its interpretation, observing that this provision refers to the possibility of a trademark duly registered in another Member being "devoid of any distinctive character". It is clear, however, from the nature of the obligation, the structure of this provision, and its text, as described above⁴²³⁹, that the term "trademark" in Article 6*quinquies* B refers to a trademark "duly registered in the country of origin"⁴²⁴⁰ – i.e. in a Member different from the one where protection is claimed.

⁴²³⁶ Appellate Body Report, *US – Section 211 Appropriations Act*, para. 158. (emphasis original)

⁴²³⁷ The use of the formulation "[a]ny sign ... *capable of distinguishing*", rather than "[a]ny sign ... *that distinguishes*" in Article 15.1, first sentence, may be understood against the background of the Articles' negotiating context. The defining obligation of what must be capable of constituting a trademark in the TRIPS Agreement accommodates the two main approaches to trademark registration salient at the time: (1) The *first-to-use* approach, mostly employed in common law traditions, in which registration always depended on use, and trademarks therefore already distinguished goods and services in the market at the moment of applying for registration, and (2) the *first-to-file* approach, common in civil law countries, where use was not a condition of registration, and distinctive signs could therefore be registered as trademarks even if they had never been used in the market. The formulation of the distinctiveness requirement chosen in Article 15.1, first sentence, covers both scenarios by requiring that signs are "*capable of distinguishing*" goods or services from different undertakings if they were applied to goods and services in the market at that moment. In that respect, the TRIPS Agreement maintained the neutrality of the Paris Convention (1967). See G.H.C. Bodenhausen, *Guide to the Application of the Paris Convention for the Protection of Industrial Property, as Revised at Stockholm in 1967* (WIPO, 1969), (Bodenhausen, Full text), (Exhibit DOM-79), p. 15 ("In the field of trademarks, the Convention does not prescribe whether the right to a trademark will be acquired either through registration or through use, or both.").

⁴²³⁸ See paras. 7.1797 and 7.1798 above.

⁴²³⁹ See para. 7.1848 above.

⁴²⁴⁰ See Bodenhausen, Full text, (Exhibit DOM-79), p. 114 ("*Trademarks covered by this Article*' are those trademarks which are *duly registered in the country of origin* and which, *with regard to the signs of which they are composed*, must be accepted for filing and protected, subject to the provisions now to be examined." (emphasis original)).

In contrast, the circumstances in which denial of registration or invalidation are permitted would have to be present in the Member *where protection is claimed*,⁴²⁴¹ and which is the addressee of the obligation in Article 6*quinquies*. In other words, in a situation where a trademark is duly registered in one Member, Article 6*quinquies* B(2) permits another Member to refuse its registration if it is devoid of any distinctive character, or descriptive, or a generic name⁴²⁴², *in its territory*.⁴²⁴³

7.1872. We therefore disagree with the Dominican Republic's argument that this provision supports a view that the term "trademark" in Article 15.1, first sentence, must include signs that are not inherently distinctive and have not yet acquired distinctiveness through use. On the contrary, we find that, in safeguarding the right of Members to *refuse* registration and protection on the grounds of lack of distinctiveness, even where another Member has registered a trademark in its jurisdiction, Article 6*quinquies* B(2) of the Paris Convention (1967) is fully consistent with a reading of Article 15.1 of the TRIPS Agreement, first sentence, that does not require signs that are not distinctive to be considered capable of constituting a trademark. The fact that the term "trademark" is used in this context is appropriate, in our understanding, since the term "trademark" in the context of Article 6*quinquies* B refers to a trademark already registered and recognized as such in its country of origin. Under Article 6*quinquies* B, registered trademark status in the country of origin does not systematically translate into registrability in another jurisdiction.

7.1873. In light of the above, we conclude that the obligation for Members in Article 15.1, first sentence, to consider signs that are "capable of distinguishing the goods or services of one undertaking from those of other undertakings" as being capable of constituting a trademark, does not require Members to make eligible for registration as trademarks signs that are not inherently distinctive and that have not yet acquired distinctiveness through use. As a consequence, the term "trademark" as used in Article 15.4 does not encompass signs that do not meet the "distinctiveness" requirement in Article 15.

7.1874. We therefore conclude that the TPP measures, in operating to prevent the registration of certain non-inherently distinctive signs that have not yet acquired distinctiveness through use on tobacco products, do not violate the obligation in Article 15.4.

7.3.2.3.2.2 Whether the TPP measures are inconsistent with Article 15.4 in that they prevent certain signs from acquiring distinctiveness through use

7.1875. All complainants argue that, while Australian trademark law in general permits non-distinctive signs to acquire distinctiveness through use to qualify for registration, the fact that non-word signs are prohibited from being used on tobacco products and packaging means that new non-word signs that are not inherently distinctive have no opportunity to acquire distinctiveness through use on such products and, therefore, face obstacles to registration based on the nature of the goods as tobacco products, in violation of Article 15.4.

7.1876. In support of their claim, the complainants argue that where a Member exercises the option under Article 15.1, third sentence, to make registrability of non-inherently distinctive signs depend on distinctiveness acquired through use, such a Member would violate Article 15.4, read in the light of Article 15.1, if, at the same time, it restricts the ability of a trademark applicant to use the sign on a particular good in order to acquire distinctiveness solely because of the nature of the good.^{4244, 4245}

⁴²⁴¹ See Bodenhausen, Full text, (Exhibit DOM-79), p. 115 ("The second permitted ground for refusal or invalidation of trademarks covered by the Article consists of three possibilities: it applies to any trademark which, in the country where protection is claimed, is (1) *devoid of any distinctive character*, or (2) *descriptive*, or (3) *a generic name*." (italics original; underlining added)).

⁴²⁴² See Bodenhausen, Full text, (Exhibit DOM-79), p. 115.

⁴²⁴³ Such a reading is further consistent with the territoriality of intellectual property rights and the principle of independence of protection enshrined in Article 6 of the Paris Convention (1967). See Panel report, *US – Section 211 Appropriations Act*, para. 8.79.

⁴²⁴⁴ Honduras's second written submission, para. 239. See Dominican Republic's first written submission, para. 283; Cuba's first written submission, para. 428 (incorporating Ukraine's first written submission, para. 183); and Indonesia's first written submission, paras. 188 and 190. Cf. Dominican Republic's second written submission, para. 48 (stating that Article 15.1 permits Members to condition the registration of

7.1877. Australia responds that a non-distinctive sign is not included in the term "trademark" in Article 15.4. Furthermore, Article 15.4 does not contain any obligation for Members to permit the use of such non-distinctive signs so that they may become sufficiently distinctive so as to qualify as trademarks and be eligible for registration.⁴²⁴⁶ Australia considers that the "distinctiveness" standard set in Article 15.1, first sentence, applies regardless of how distinctiveness is to be achieved, and that a sign that has not achieved distinctiveness "is simply not capable of constituting a 'trademark'".⁴²⁴⁷ If a sign indeed qualifies as a trademark, even if it is for a tobacco product, that trademark will be registered in Australia.⁴²⁴⁸

7.1878. This aspect of the claim, which is common to all complainants, relates to the consequences of the prohibition, in the TPP measures, on the use of non-word signs on tobacco retail packaging and products.⁴²⁴⁹

7.1879. We note that the TPP measures, as described above⁴²⁵⁰, prohibit the use of stylized word marks, and figurative and composite marks on tobacco retail packaging and products. The TM Act, for its part, provides that an application to register a non-inherently distinctive sign as a trademark must be rejected if the sign has not acquired distinctiveness through use before the filing date.⁴²⁵¹ The complainants observe that, as a result of the combined effect of these provisions, it will not be possible for "new" signs that are not inherently distinctive to acquire such distinctiveness through use and thus be able to be registered in relation to tobacco products.⁴²⁵² They also note that Section 28 of the TPP Act does not resolve this issue, since the legal fictions of use created by that provision do not cover the use necessary for non-inherently distinctive signs to acquire distinctiveness.⁴²⁵³

7.1880. While they acknowledge that Members may *opt* to make registrability of signs that are not inherently capable of distinguishing the relevant goods or services depend on distinctiveness acquired through use⁴²⁵⁴, the complainants consider it relevant that Australia – under its domestic law – "requires"⁴²⁵⁵ use to register non-inherently distinctive signs, and provide evidence for the

non-inherently distinctive signs upon distinctiveness acquired through use, indicating that Members can also opt to register non-inherently distinctive signs as trademarks without actual distinctiveness acquired through use).

⁴²⁴⁵ We note that Honduras formulated its argument in its first written submission as follows:

When a Member requires use to register inherently non-distinctive *signs*, but at the same time, restricts the ability of a trademark applicant to use that *trademark* on a particular good in order to acquire distinctiveness solely because of the nature of the good (in casu tobacco products), this would violate Article 15.4 of the TRIPS Agreement, in the light of Article 15.1.

Honduras's first written submission, para. 193 (emphasis added). This formulation suggests an argument that non-distinctive signs, that are yet to acquire distinctiveness through use, are themselves trademarks and their exclusion from use is therefore a violation of Article 15.4. Honduras clarified in its second written submission that its argument under Article 15.4 focuses upon whether signs can be registered as trademarks, "without the nature of the product to which they apply being an obstacle to eventual registration". Honduras's second written submission, para. 240.

⁴²⁴⁶ Australia's first written submission, paras. 302-304.

⁴²⁴⁷ Australia's second written submission, para. 25. See also first written submission, para. 303; and response to Panel question No. 27, para. 94.

⁴²⁴⁸ Australia's second written submission, para. 27.

⁴²⁴⁹ For a brief summary of the operation of the TPP measures, please see para. 7.1815 above.

⁴²⁵⁰ For a more detailed description of Section 28 of the TPP measures see section 2.1.2.5 above

⁴²⁵¹ TM Act, (Exhibit JE-6), Sections 41(2) and 41(6).

⁴²⁵² Honduras's comments on Australia's response to Panel question No. 27; Honduras's second written submission, para. 245; Dominican Republic's second written submission, para. 52; Cuba's first written submission, para. 428 (incorporating Ukraine's first written submission, para. 201); and Indonesia's first written submission, para. 200.

⁴²⁵³ Honduras's second written submission, para. 245; Cuba's first written submission, para. 428 (incorporating Ukraine's first written submission, para. 214); and Indonesia's first written submission, para. 199.

⁴²⁵⁴ Honduras's first written submission, para. 192; Dominican Republic's first written submission, para. 284; Cuba's first written submission, para. 428 (incorporating Ukraine's first written submission, para. 190); and Indonesia's first written submission, para. 188.

⁴²⁵⁵ Honduras's first written submission, paras. 192-193. See also Dominican Republic's first written submission, para. 283; Cuba's first written submission, para. 428 (incorporating Ukraine's first written submission, para. 183); and Indonesia's opening statement at the first meeting of the Panel, para. 55.

extent to which "use is a key factor for the registration of marks that are not inherently distinctive under Australian trademark law".⁴²⁵⁶

7.1881. Australia has confirmed that "non-inherently distinctive signs which have not yet acquired distinctiveness through use and which are unable to be used due to the operation of the TPP Act, will not acquire distinctiveness through use and will not be eligible for registration because they do not meet the definition of a 'trademark'". In its assessment, "[t]his result is consistent with the TRIPS Agreement, because Members are not obligated under the provisions of that Agreement to ensure that signs may be used so that they may become sufficiently distinctive so as to qualify as trademarks and be eligible for registration".⁴²⁵⁷

7.1882. Honduras submits certain correspondence relating to an unsuccessful attempt to register the word mark "PLAIN PACKAGE" as a trademark in Australia to demonstrate that non-inherently distinctive marks cannot be registered as a result of the TPP measures.⁴²⁵⁸ This correspondence, however, merely demonstrates that the Australian trademark authorities refuse registration of signs that are not inherently distinctive, in the absence of evidence that the sign has acquired distinctiveness through use. Furthermore, since the material relates to the treatment of an application for a word mark, it is of limited relevance in support for a claim that relates to non-word marks. Honduras itself concedes that, since the use of a word mark such as "PLAIN PACKAGE" on tobacco products is not prohibited by the TPP measures, the applicant could in fact use this sign on tobacco products and thus in time accumulate evidence of acquired distinctiveness for this word sign to become eligible for registration.⁴²⁵⁹

7.1883. We recall our finding that the scope of the prohibition in Article 15.4 is defined by the meaning of the terms "trademark" and "registration of a trademark", which must be read in accordance with the definitions in Article 15.1. We have established in the previous section that Members' obligation under Article 15.1 of what to consider as "capable of constituting a trademark" does not include signs that are not inherently distinctive and that have not yet acquired distinctiveness through use, and that therefore the prohibition in Article 15.4 does not extend to such signs.

7.1884. As discussed above, the first and second sentences of Article 15.1, respectively, establish an obligation for Members to consider distinctive signs as capable of constituting trademarks, and to consider such signs as eligible for registration. Article 15.1, third sentence, in contrast, provides Members with an *option* to make the registrability of signs that are not *inherently* distinctive, depend on distinctiveness acquired through use.

7.1885. We find no support in the text of Article 15.1 for the complainants' assertion that exercising the option of Article 15.1, third sentence, would modify the scope of the definition of "trademark" and thus extend the scope of the prohibition in Article 15.4, for the relevant Member, so as to include signs that are not inherently distinctive and which have not yet acquired distinctiveness through use.

7.1886. We recall that Article 15.1, first sentence, provides a definition of what must be capable of constituting a trademark by setting out the condition that signs must meet the "distinctiveness" requirement, i.e. the requirement that the signs or combinations of signs at issue be capable of distinguishing the relevant goods or services.⁴²⁶⁰ By permitting Members to make registrability dependent on distinctiveness *acquired by use*, the text of Article 15.1, third sentence, does not indicate a modification to the concept of *distinctiveness* itself, but merely points out a *particular*

⁴²⁵⁶ Honduras's first written submission, paras. 195-207. See also Dominican Republic's first written submission, paras. 284-288; Cuba's first written submission, para. 428 (incorporating arguments with respect to Article 15.4 made in the first written submissions of Honduras and the Dominican Republic, among others); Indonesia's first written submission, paras. 192-193; and Indonesia's second written submission, para. 68.

⁴²⁵⁷ Australia's response to Panel question No. 27, para. 94.

⁴²⁵⁸ Honduras's first written submission, paras. 201-203 (referring to S. Lester International Economic Law and Policy Blog, (Exhibit HND-47)). Honduras has also submitted Australia's response to this trademark application as an exhibit. See IP Australia Letter, (Exhibit HND-110).

⁴²⁵⁹ Honduras's first written submission, para. 204; and comments on Australia's response to Panel question No. 27, p. 13.

⁴²⁶⁰ See para. 7.1829 above.

manner in which the condition for constituting a trademark, namely complying with the distinctiveness criterion defined in the first sentence of Article 15.1, may be fulfilled.

7.1887. We note, in particular, that, in describing the distinctiveness on which Members may choose to make registrability depend, the third sentence of Article 15.1 employs the adjective "*acquired* through use". The term "*acquired*" means "gained; obtained or secured, esp. through concerted effort or over a period of time".⁴²⁶¹ A plain reading of the text therefore indicates that Members may make registrability depend on distinctiveness that *has been acquired*, or *obtained* through use prior to registration. This formulation does not provide support for an interpretation that would include signs that are only "*capable of acquiring distinctiveness through use*"⁴²⁶² in the future.

7.1888. As described above, the "*distinctiveness*" requirement set out in the first sentence is the basis for the definition of the "*protectable subject matter*" established in Article 15.1:

Article 15.1 defines which signs or combinations of signs are *capable of* constituting a trademark. ... This definition is based on the distinctiveness of signs as such, or on their distinctiveness as acquired through use. If such signs are capable of distinguishing the goods or services of one undertaking from those of other undertakings, then they become *eligible for* registration as trademarks.⁴²⁶³

7.1889. In light of the above, we find that the scope of the obligation under Article 15.1, first sentence, as determined in section 7.3.2.3.1.1 above, and thus the scope of the obligation under Article 15.4 with regard to "*trademarks*", are not affected or modified by a Member's domestic practice, including whether it chooses to exercise the option in Article 15.1, third sentence, to make registrability of non-inherently distinctive signs dependent on distinctiveness acquired through use.

7.1890. The complainants' argument that the prohibition on the use of non-word signs operates as an obstacle to their registration as trademarks implies that obstacles to *achieving distinctiveness through use* should be covered by the prohibition on obstacles to the *registration of the trademark*, which is established in Article 15.4.

7.1891. This would require an interpretation of the term "*obstacle*" to include not only hindrances and impediments to the act of registration of the trademark itself, but also hindrances or impediments that stand in the way of non-distinctive signs – signs that are not required to be eligible for registration as trademarks – acquiring distinctiveness through use to fulfil the criteria or other preconditions for being capable of constituting a trademark and thus subsequently becoming eligible for trademark registration.

7.1892. In assessing this question, we recall the grammatical structure of Article 15.4, namely that the object of the preposition "to" in "*obstacle to*" is "*registration of the trademark*". We note first that interpreting the term "*obstacle*" to refer, not only to the "*registration of the trademark*", but also to the use of non-distinctive signs would undermine the precise meaning of the terms and the grammatical structure used in framing the object of the prohibition in Article 15.4. We have established that the meaning of the terms "*trademark*" and "*registration of the trademark*" defines the scope of the prohibition in Article 15.4. While the terms "*trademark*" and "*registration of the trademark*" imply obligations only with respect to signs already registrable as trademarks as per Article 15.1, first sentence, the interpretation suggested by the complainants would create an obligation for Members to permit the use of signs that are not inherently distinctive and have not acquired distinctiveness, equally on all types of goods or services, in order to allow such signs to acquire distinctiveness through use.

⁴²⁶¹ Oxford English Dictionary online, definition of "*acquired*", available at:
<http://www.oed.com/view/Entry/1732?redirectedFrom=acquired#eid>, accessed 2 May 2017.

⁴²⁶² Honduras's first written submission, para. 188.

⁴²⁶³ Appellate Body Report, *US – Section 211 Appropriations Act*, para. 154. (emphasis original; footnote omitted)

7.1893. We have found⁴²⁶⁴ that Article 15 contains interrelated provisions that, together with Article 6(1) of the Paris Convention (1967), as incorporated by reference into the TRIPS Agreement, define Members' obligations in relation to the conditions for the filing and registration of trademarks. Further, we have found⁴²⁶⁵ that a Member's exercise of the option to permit registration on the basis of distinctiveness acquired through use does not modify the distinctiveness standard and thus the scope of the obligation regarding the registration of signs of Article 15.1, second sentence.

7.1894. In light of our earlier findings, it is clear to us that the object and purpose of Article 15.4, read in the context of Article 15.1, is to regulate Members' obligations regarding the registration of distinctive signs as trademarks. It is not within the object and purpose of Article 15.4 to regulate the use of signs that do not already have the capability of distinguishing goods or services in the sense of Article 15.1. In our view, therefore, interpreting Article 15.4 as obliging Members to permit use of non-distinctive signs to allow them to acquire distinctiveness irrespective of the products or services to which they are to be applied is not compatible with the language of Article 15.4, nor with its object and purpose, as read in the context of Article 15.1.

7.1895. The fact that Australia allows, under its domestic law, the registration of signs that are not inherently distinctive, provided that they have acquired distinctiveness through use, cannot imply that, under the TRIPS Agreement, the use of such signs is required to be permitted on all goods and services, irrespective of the nature of the goods and services at issue. A contrary reading would imply that, whenever a Member exercises the option of enabling registration of non-inherently distinctive signs on the basis of distinctiveness acquired through use, as Article 15.1 expressly permits it to do, it would deprive itself of the possibility of determining the conditions under which signs or combinations of signs may or may not be used in relation to specific categories of goods or services. This is what is implied by Indonesia when it argues that Members should resort to product regulation – such as banning the product – in order to regulate dangerous or addictive products.⁴²⁶⁶

7.1896. Adopting the interpretation suggested by the complainants would also lead to the illogical result that non-distinctive signs, i.e. signs that may or may not become capable of constituting a trademark through use, and with respect to which the TRIPS Agreement formulates no explicit obligation, would enjoy a right to use irrespective of the products or services to which they are to be applied, while registered trademarks, which are the central object of regulation of the TRIPS trademark provisions and to whose owners Article 16 explicitly accords exclusive rights, enjoy no such right to use.⁴²⁶⁷ Further, by this logic, the right to use an unregistered mark would lapse upon its registration, just when its distinctiveness in the marketplace has been confirmed.

7.1897. This view is further consistent with the approach widely reflected in the TRIPS Agreement and the Paris Convention (1967) that it is usually the responsibility of private parties, i.e. applicants or right holders in the context of the varying market conditions, to fulfil the criteria required for registration, protection and enforcement of IP rights.⁴²⁶⁸ Outside the scope of express obligations set out in the TRIPS Agreement, the Agreement does not in our view oblige Members to ensure that private parties are in a position to fulfil such criteria, or to refrain from regulations otherwise not inconsistent with the covered agreements that may affect the market conditions that determine how easy or difficult it is for private parties to comply with the distinctiveness requirements as a condition for trademark registration.

⁴²⁶⁴ Paras. 7.1835 to 7.1847 above.

⁴²⁶⁵ Para. 7.1889 above.

⁴²⁶⁶ Indonesia's second written submission, paras. 64-65.

⁴²⁶⁷ For discussion on rights conferred under Article 16.1 of the TRIPS Agreement and a "right to use", see paras. 7.1971-7.1978 below.

⁴²⁶⁸ This is reflected in various provisions of the Paris Convention (1967) and the TRIPS Agreement which require an "application" (e.g. Article 6 of the Paris Convention (1967), and Articles 15.3, 51, 52, and 59 of the TRIPS Agreement) or a "request" (Article 6bis of the Paris Convention (1967), and Articles 22.3, 23.2, and 46 of the TRIPS Agreement).

7.3.2.3.2.3 Whether the TPP measures are inconsistent with Article 15.4 in that they reduce the protection flowing from registration for tobacco-related trademarks because of the nature of the product

7.1898. Cuba, by incorporating Ukraine's arguments regarding Article 15.4⁴²⁶⁹, further argues that the term "registration" in Article 15.4, in the "holistic context" of Articles 15 and 16, "necessarily encompasses the rights flowing from the administrative act of registration"⁴²⁷⁰ and that the prohibition of obstacles based on the nature of the goods and services to which a trademark is to be applied therefore extends beyond the act of registration to the entire concept of trademark protection, thus establishing a general obligation "to confer protection on the same terms and conditions in relation to trademarks notwithstanding the nature of the product".⁴²⁷¹

7.1899. Cuba thus claims that Article 15.4 requires that national laws cannot establish a different system for the protection of trademarks for tobacco products as compared to other products⁴²⁷², and submits that this general obligation also applies to rights that Members make available beyond the minimum standards provided by the TRIPS Agreement in accordance with Article 1.1.⁴²⁷³ It argues that since the TPP measures prohibit the use of tobacco-related non-word trademarks, the protection of such tobacco-related trademarks is reduced in comparison to other trademarks that can continue to be used, both with respect to the minimum rights required under Article 16.1 and with respect to additional rights that Australia's TM Act makes available beyond the level required by the TRIPS Agreement.⁴²⁷⁴ It claims that, since this alleged reduction in the scope of protection is based solely on the nature of the product, this constitutes a violation of Article 15.4.⁴²⁷⁵

7.1900. Australia responds that Article 15.4 only prohibits obstacles to the registration of trademarks and does not relate to the nature of the protection that flows from registration. It argues that if Article 15.4 were intended to cover the nature of the protection afforded to trademarks as a result of registration, the drafters would have made this clear.⁴²⁷⁶

7.1901. We note that, unlike the two aspects discussed above, this aspect of Cuba's claim is not based on an allegation that the TPP measures create illegitimate obstacles to registration as such, but that the level of protection provided to registered trademarks under the TPP measures violates Article 15.4. The question raised by this argument is therefore essentially whether Article 15.4 prohibits any obstacles based on the nature of goods or services not only with respect to the specific act of *registration* of a trademark, but also contains a more general obligation for Members not to discriminate on the basis of the nature of the goods or services to which trademarks are applied with respect to the scope of *protection* they provide to registered trademarks under their national law.

7.1902. In assessing this question we first recall our preliminary observation in para. 7.1853 above that Article 15 governs the conditions under which Members may deny, or must permit, the registration of the trademark, which is the precondition for the availability of minimum rights under Article 16.1. The scope and extent of these rights, and thus the protection of the trademark, are governed by the provisions in Article 16.

7.1903. We further recall our earlier finding that the phrase "registration of the trademark" in Article 15.4 should be informed by the obligation, in Article 15.1, second sentence, to consider

⁴²⁶⁹ Cuba's first written submission, para. 428; and second written submission, para. 414.

⁴²⁷⁰ Cuba's first written submission, para. 428 (incorporating Ukraine's first written submission, para. 187).

⁴²⁷¹ Cuba's first written submission, para. 428 (incorporating Ukraine's first written submission, para. 219).

⁴²⁷² Cuba's first written submission, para. 428 (incorporating Ukraine's first written submission, para. 216).

⁴²⁷³ Cuba's first written submission, para. 428 (incorporating Ukraine's first written submission, paras. 201 and 219).

⁴²⁷⁴ Cuba's first written submission, para. 428 (incorporating Ukraine's first written submission, paras. 209-211).

⁴²⁷⁵ Cuba's first written submission, para. 428 (incorporating Ukraine's first written submission, para. 217).

⁴²⁷⁶ Australia's first written submission, para. 309 fn 500.

eligible for "registration as trademarks" signs that are capable of constituting trademarks.⁴²⁷⁷ The term "registration" means "the action of registering or recording something; the process of being registered".⁴²⁷⁸ On its face, the texts of Article 15.4 and Article 15.1, second sentence, provide no indication that the term "registration" could refer to anything other than the "action of registering" a trademark. Cuba, by reference to Ukraine's submission, does not advance any supporting argument for its claim other than the assertion that "the term 'registration' can also be read in a more substantive manner as referring to the rights flowing from registration".⁴²⁷⁹

7.1904. The context provided by Article 15, and the trademark provisions in the Paris Convention (1967) on which it builds, confirm, in our view, this ordinary meaning of "registration" in Article 15.4. As discussed above, and as reflected in the Appellate Body's assessment in *US – Section 211 Appropriations Act*, Article 15.4 is one of several provisions in Article 15 which, taken together and in conjunction with Article 6(1) of the Paris Convention (1967), as incorporated into the TRIPS Agreement, define the terms upon which Members may set conditions on the filing and registration of trademarks. Again, the use of this term in these provisions is not, in our view, inadvertent. Rather, it reflects the fact that these provisions relate to the conditions under which Members may or may not deny the act of registration of specific signs "as a trademark". This question is distinct, in our view, from the question of the extent of the rights that would flow from such registration, once granted.

7.1905. This interpretation is confirmed by the title of Article 15, "Protectable Subject Matter"⁴²⁸⁰, which can be contrasted with the scope of substantive protection afforded to a registered trademark, which is addressed separately under the heading of "Rights Conferred" in Article 16. While we agree with Cuba that registration is the "gateway to substantive protection" of a trademark, as it is the condition for the rights defined in Article 16 to be accorded to the owner of a registered trademark⁴²⁸¹, this does not imply that the obligation in Article 15.4 in relation to the conditions for "registration" of a trademark should be read to apply more generally to substantive protection of a trademark once it is registered. The terms "registration" and "protection" are not synonymous in the context of the TRIPS Agreement.

7.1906. This understanding is consistent with the underlying approach of the Paris Convention (1967). That Convention does not itself define the scope of substantive protection of a trademark, except in a few special cases.⁴²⁸² Instead, it focuses on requiring the application of the substantive domestic law of member States to all nationals from countries of the Paris Union⁴²⁸³ by requiring national treatment⁴²⁸⁴, and by limiting the grounds for refusal of procedural trademark registration for such nationals in Articles 6 and 6*quinquies* of the Paris Convention (1967), on which Article 15 of the TRIPS Agreement builds in the manner described in paragraphs 7.1841-7.1855 above. While the provisions governing the procedural step

⁴²⁷⁷ See para. 7.1852 above.

⁴²⁷⁸ Oxford English Dictionary online, definition of "registration", available at:

<<http://www.oed.com/view/Entry/161313?redirectedFrom=registration#eid>>, accessed 2 May 2017.

⁴²⁷⁹ Cuba's first written submission, para. 428 (incorporating Ukraine's first written submission, para. 187).

⁴²⁸⁰ See Appellate Body Report, *US – Section 211 Appropriations Act*, para. 155 ("[S]upporting these distinctions is the fact that the title of this Article speaks of subject matter as 'protectable', and not of subject matter 'to be protected'. In this way, the title of Article 15 expresses the notion that the subject matter covered by the provision is subject matter that *qualifies* for, but is not necessarily *entitled to*, protection." (emphasis original)).

⁴²⁸¹ Cuba's first written submission, para. 428 (incorporating Ukraine's first written submission, para. 199). See also Canada's third-party submission, para. 38.

⁴²⁸² See Bodenhausen, Full text, (Exhibit DOM-79), p. 15 ("Neither is the scope of protection of a trademark defined in the Convention, except in a few special cases.").

⁴²⁸³ Nationals of non-member States who are domiciled or who have real and effective industrial or commercial establishments in the territory of one of the countries of the Union must be treated in the same manner as nationals of the countries of the Union. Paris Convention (1967), Article 3.

⁴²⁸⁴ See Bodenhausen, Full text, (Exhibit DOM-79), p. 12 ("Under this category comes the very important basic rule of the Convention, that nationals of each member State shall, as regards the protection of industrial property, enjoy in all other member States the advantages that their respective laws grant, or may grant in the future, to nationals of these latter member States (Article 2).").

of registration are therefore relevant for the *availability* of protection⁴²⁸⁵, the scope and content of the substantive protection itself, once granted, are governed by other provisions, including Article 16 of the TRIPS Agreement and, to the extent that they offer enhanced protection within their jurisdiction, the domestic laws of WTO Members.

7.1907. We note in this regard that, while a Members' failure to provide the minimum rights required under Article 16 to the holders of all registered trademarks would constitute a violation of said provision of the TRIPS Agreement⁴²⁸⁶, more extensive trademark protection beyond the TRIPS requirements is permitted by Article 1.1 at the discretion of Members, provided that such protection does not contravene the provisions of the TRIPS Agreement.⁴²⁸⁷

7.1908. In light of the above, and recalling our earlier findings⁴²⁸⁸, we find that Article 15.4 limits the grounds for refusal of the step of registering a trademark, which Members are, as a rule, required to make available for eligible signs under Article 15.1, second sentence. Article 15.4 does not, however, stipulate an obligation that the scope and content of trademark protection that flows from such registration has to be the same notwithstanding the nature of the goods or services to which trademarks are or may be applied.

7.1909. This interpretation is confirmed by the negotiating history of Article 7 of the Paris Convention (1967), on which Article 15.4 is based.⁴²⁸⁹ Article 7 provides an identical obligation, limited to goods. Article 15.4 extends the provision to services. Article 7 of the Paris Convention (1967) reads:

The nature of the goods to which a trademark is to be applied shall in no case form an obstacle to the registration of the mark.

7.1910. Article 15.4 of the TRIPS Agreement extends the application of the rule in Article 7 of the Paris Convention (1967) to trademarks that are applied to services, in addition to those applied to goods, by the insertion of the words "or services".

7.1911. While the initial version of Article 7 in the Paris Act (1883) of the Paris Convention prohibited the nature of the goods from forming an obstacle "*au dépôt de la marque*"⁴²⁹⁰, the current wording "registration of the mark" was adopted at the 1925 Hague Revision Conference⁴²⁹¹ with the explanation that countries with examination procedures might otherwise refuse registration, even if the filing of an application was accepted.⁴²⁹² At the 1958 Lisbon Revision Conference a proposal to extend the scope of the prohibition to the renewal of trademarks, and to

⁴²⁸⁵ See C. Correa, *Trade Related Aspects of Intellectual Property Rights: A Commentary on the TRIPS Agreement* (Oxford University Press, 2007), pp. 175-176, 182, 186, 223 and 388, (Correa's Commentary on the TRIPS Agreement), (Exhibit AUS-242), p. 182.

⁴²⁸⁶ The complainants' claims under Articles 16.1 and 16.3 of the TRIPS Agreement are addressed in sections 7.3.3 and 7.3.4 below, respectively.

⁴²⁸⁷ Article 1.1, second sentence, provides that "Members may, but shall not be obliged to, implement in their law more extensive protection than is required by this Agreement, provided that such protection does not contravene the provisions of this Agreement."

⁴²⁸⁸ Paras. 7.1837, 7.1852 and 7.1856.

⁴²⁸⁹ All parties refer to Article 7 of the Paris Convention (1967), the predecessor of Article 15.4 of the TRIPS Agreement. See Honduras's first written submission, para. 186; Dominican Republic's first written submission, para. 273 fn 246; Dominican Republic's response to Panel question No. 93, para. 38; Cuba's first written submission, para. 428 (incorporating Ukraine's first written submission, para. 179); Indonesia's first written submission, para. 183; and Australia's first written submission, para. 299.

⁴²⁹⁰ The original text of this version of the Convention is in French. The relevant provision reads, in full: "*La nature du produit sur lequel la marque de fabrique ou de commerce doit être apposée ne peut, dans aucun cas, faire obstacle au dépôt de la marque.*" Paris Act (1883), Article 7. See also Bodenhausen, Full text, (Exhibit DOM-79), p. 128 (referring to this language as follows: "This Article already appeared in the original text of the Convention of 1883, although it then referred to the filing and not to the registration of a trademark. The provision was modified in this latter respect by the Revision Conference of The Hague.").

⁴²⁹¹ WIPO's communication to the Panel of 5 October 2015 in response to the Panel's request for factual information, Annex 4, Excerpts from the Records of the Hague Revision Conference (1925), Second plenary session, p. 577.

⁴²⁹² WIPO's communication to the Panel of 5 October 2015 in response to the Panel's request for factual information, Annex 4, Excerpts from the Records of the Hague Revision Conference (1925), Report of drafting committee, p. 545.

introduce a reference to an exclusive right to use the trademark, was rejected as some wished to preserve the ability to regulate trademarks for certain products differently.⁴²⁹³ Both the change from "filing" to "registration" at the Hague Conference, and the unsuccessful proposals to include "renewal" at the Lisbon Conference underline the specifically procedural meaning that Paris Union Members attached to the terms employed in the provision. The refusal to include "renewals" confirms that the current formulation of Article 7 of the Paris Convention (1967) – which has been reproduced in Article 15.4 in relevant part – has a narrow scope⁴²⁹⁴ and is restricted to the act of *registration* of the mark and not the subsequent fate of the trademark.⁴²⁹⁵

7.1912. We conclude therefore that any consequences that the restrictions on the use of certain signs on tobacco products under the TPP measures may have for the scope and content of the substantive protection accorded to affected tobacco-related trademarks do not constitute a violation of Article 15.4, which relates only to registration, and thus the availability of protection through the act of registration, which remains available for tobacco-related trademarks under the disputed measures.⁴²⁹⁶

7.3.2.3.3 Overall conclusion

7.1913. In light of the above, including our findings in paras. 7.1831, 7.1857, 7.1873, 7.1874, 7.1894, and 7.1908 above, we conclude that the complainants have not demonstrated that the TPP measures are inconsistent with Australia's obligations under Article 15.4 of the TRIPS Agreement.

7.3.3 Article 16.1 of the TRIPS Agreement

7.3.3.1 Introduction

7.1914. We will now turn to the complainants' claims relating to those provisions of the TRIPS Agreement that address rights conferred to the owner of a trademark, which are addressed in Article 16. We will first address the claims under paragraph 1 of Article 16 and then the claims under paragraph 3 of that Article.

7.1915. Paragraph 1 of Article 16 of the TRIPS Agreement, entitled "Rights Conferred" reads as follows:

The owner of a registered trademark shall have the exclusive right to prevent all third parties not having the owner's consent from using in the course of trade identical or similar signs for goods or services which are identical or similar to those in respect of which the trademark is registered where such use would result in a likelihood of confusion. In case of the use of an identical sign for identical goods or services, a likelihood of confusion shall be presumed. The rights described above shall not prejudice any existing prior rights, nor shall they affect the possibility of Members making rights available on the basis of use.

7.1916. The complainants claim that the TPP measures violate Article 16.1 because the prohibition on the use of certain tobacco-related trademarks reduces the distinctiveness of these trademarks, thus reducing the ability to demonstrate "a likelihood of confusion" with other marks, and impacting the ability of the right owner to exercise its right to prevent unauthorized use.

⁴²⁹³ WIPO's communication to the Panel of 5 October 2015 in response to the Panel's request for factual information, Annex 6, Excerpts from the Records of the Lisbon Revision Conference (1958), Report of drafting committee, pp. 694-703. See, e.g. ibid. p. 703 ("La Délégation du Danemark déclara ne pas pouvoir appuyer cette proposition, car elle désirait que l'on réservât le droit de réglementer les marques concernant les produits pharmaceutiques.").

⁴²⁹⁴ See Bodenhausen, Full text, (Exhibit DOM-79), p. 128 ("The Article under consideration has a rather narrow scope, as became clear when attempts failed at the Revision Conference of Lisbon in 1958 to give it a wider application, namely, to extend it to renewals of registrations and to the duration of the exclusive right to use the trademark.").

⁴²⁹⁵ This view is also consistent with the content of Letter from L. Baeumer, WIPO, (Exhibit AUS-235), referred to by Australia, and referenced above at fn 4066.

⁴²⁹⁶ As discussed earlier in this section, other provisions of Part II of the TRIPS Agreement address the content of the protection required to be accorded to registered trademarks.

Cuba, by reference, further argues that the TPP measures violate Article 16.1 by eroding the distinctiveness of non-inherently distinctive trademarks and thus making them liable to cancellation procedures. Indonesia, and Cuba by reference, also argue that the TPP measures violate Article 16.1 because they require the use of deceptively similar marks on identical products, thereby eroding a trademark owner's right to prevent use that is likely to result in confusion.

7.1917. Australia asks the Panel to reject these claims in their entirety.

7.3.3.2 Main arguments of the parties

7.1918. Honduras argues that the TPP measures violate Article 16.1 of the TRIPS Agreement by reducing the scope of protection of the trademark below the minimum level guaranteed under Article 16.1.⁴²⁹⁷ It argues that the scope of protection guaranteed under Article 16.1 depends on the owner's ability to use its mark and the resulting strength of the mark in the marketplace. The more intensive use is made of the mark, the stronger the mark; and the stronger the mark, the greater its scope of protection vis-à-vis unauthorized third-party uses.⁴²⁹⁸ Honduras submits that the plain packaging trademark restrictions erode the "exclusive rights" of the trademark owner that Australia undertook to protect under Article 16.1 by constraining the ability of the owners of such trademarks to prevent third parties from using similar marks on similar goods in a manner that creates a likelihood of confusion.⁴²⁹⁹

7.1919. Honduras argues that the loss of distinctiveness will eventually diminish the scope of protection and turn the original trademark into a mere paper right, without any commercial value.⁴³⁰⁰ In support, it submits that the link between use and distinctiveness/scope of protection of a trademark was explicitly acknowledged by the panel in *EC – Trademarks and Geographical Indications (Australia)*.⁴³⁰¹ It argues that as the distinctiveness of a trademark recedes, the universe of similar trademarks that a consumer could confuse with the original trademark also shrinks. This, in turn, means that the trademark owner will have fewer opportunities to exercise its right to protect its trademark against uses that cause a "likelihood of confusion". Over time, the trademark owner will not be able to protect against the encroachment of other trademarks onto its trademark's scope of protection, because these other trademarks will no longer be considered similar to its original trademark. This erosion of trademark protection will occur more quickly for trademarks that are inherently non-distinctive (e.g. single colours or combination of colours), whose distinctiveness depends entirely on use.⁴³⁰² Honduras refers to the conclusions of an expert relied upon by complainants, Professor Dinwoodie, on the importance of distinctiveness, maintained through use, for the purposes of enforcing trademark rights in different legal systems.⁴³⁰³ Honduras further argues that this view is consistent with the explanation of the test of the "confusing similarity of trademarks" in the WIPO Intellectual Property Handbook, which notes that "[i]ntensive use increases the distinctiveness of the mark".⁴³⁰⁴

7.1920. Honduras explains that its claim relates specifically to the use of similar signs on similar goods. Honduras submits that the TPP measures have the most detrimental impact on design (or image) marks and composite marks, which include design elements and colours or the combination of colours, which, absent use, will inevitably lose their distinctiveness in the eyes of consumers, and, therefore, lose the strength of their protection.⁴³⁰⁵ Honduras does not rule out that there could be a violation of this provision in respect of the use of identical signs on similar

⁴²⁹⁷ Honduras's second written submission, para. 250.

⁴²⁹⁸ Honduras's second written submission, para. 250.

⁴²⁹⁹ Honduras's first written submission, para. 217.

⁴³⁰⁰ Honduras's first written submission, para. 239.

⁴³⁰¹ Honduras's first written submission, para. 241 (referring to Panel Report, *EC – Trademarks and Geographical Indications (Australia)*, para. 7.664).

⁴³⁰² Honduras's first written submission, para. 243. See also Honduras's second written submission, para. 261.

⁴³⁰³ Honduras's first written submission, para. 244 (referring to Dinwoodie Report, (Exhibit UKR-1), paras. 61-71).

⁴³⁰⁴ Honduras's first written submission, para. 245.

⁴³⁰⁵ Honduras's response to Panel question No. 29.

goods, or other scenarios, but does not consider it necessary to base its claim under Article 16.1 on all relevant scenarios outlined in this provision.⁴³⁰⁶

7.1921. Honduras elaborates that with the introduction of the TPP Act, consumers will no longer recall the original mark, as it is no longer being used. Consequently, it becomes significantly easier for the usurper to satisfy the requirements of Section 120(2), since no confusion in the eyes of consumers can exist *a priori*.⁴³⁰⁷ Honduras contends that Section 28 of the TPP Act does not address the erosion of distinctiveness, and consequently the scope of protection, of registered tobacco-related trademarks resulting from the operation of the TPP Act, and does not regulate the maintenance of protection of tobacco-related marks vis-à-vis their potential use by third parties.⁴³⁰⁸

7.1922. Honduras elaborates that it has not argued that WTO Members cannot adopt a general regulatory measure, such as a product ban or advertisement ban, simply because that ban could have some incidental effect on the associated trademark.⁴³⁰⁹ The regulation of advertising (including of tobacco products) does not significantly affect the distinctiveness of the mark and enforcement of rights because the trademark owner is still able to use its trademark on products and thus is able to maintain the distinctiveness and reputation of the trademark in the course of trade. According to Honduras, there is no violation of Article 16 of the TRIPS Agreement in such a situation.⁴³¹⁰

7.1923. Honduras also states that it has not claimed that there is a positive right to use a trademark that results from registration.⁴³¹¹ As to the question of "whether registration of a trademark gives one a right to use that trademark, including a right to object to any regulation or restriction on the sale of the product to which the trademark is to be applied",⁴³¹² Honduras states that "[t]here is indeed no such 'absolute' right to use the trademark".⁴³¹³ Honduras accepts that Article 16.1 is triggered by certain situations in which a third party uses an identical or similar trademark on certain goods without the trademark owner's consent. The central point of Honduras's claim is that the TPP measures curtail a trademark owner's ability to assert that right. The TPP measures lead to a loss of distinctive power of the trademark. This erodes the ability of the trademark owner to assert his or her rights, and shrinks the universe of potential Article 16.1 actions that the owner can bring against the use of a similar or identical trademark by an unauthorized third party.⁴³¹⁴

7.1924. Honduras argues that Article 16 imposes an obligation on Members to guarantee a minimum level of private rights to trademark owners that allows them to successfully protect the distinctiveness and source-indicating function of their marks in the context of infringement proceedings. Although those rights are to be enforced vis-à-vis private third parties, the WTO Member's obligation under the TRIPS Agreement is to guarantee that the registered trademark owner will be able to successfully do so, if he so wishes. According to Honduras, Members violate this obligation if through their actions or omissions they fail to ensure that trademark owners can assert their rights, as is the case for Australia as a result of the TPP measures.⁴³¹⁵

7.1925. Honduras argues further that the TPP measures cannot be justified under Article 17 of the TRIPS Agreement.⁴³¹⁶ In Honduras's view, the measures at issue result in a significant diminution of rights conferred by Article 16.1, and have a broad scope of application. They cannot, therefore, be considered as "limited exceptions" within the meaning of Article 17.⁴³¹⁷ It adds that the TPP measures fail to take into account the legitimate interests of the owners of tobacco-related

⁴³⁰⁶ Honduras's second written submission, para. 251.

⁴³⁰⁷ Honduras's first written submission, para. 248.

⁴³⁰⁸ Honduras's first written submission, para. 250.

⁴³⁰⁹ Honduras's response to Panel question No. 95.

⁴³¹⁰ Honduras's response to Panel question No. 95.

⁴³¹¹ Honduras's response to Panel question No. 96.

⁴³¹² Honduras's response to Panel question No. 96.

⁴³¹³ Honduras's response to Panel question No. 96.

⁴³¹⁴ Honduras's response to Panel question No. 96.

⁴³¹⁵ Honduras's second written submission, para. 258.

⁴³¹⁶ Honduras's first written submission, para. 252.

⁴³¹⁷ Honduras's first written submission, para. 255.

trademarks, which include the use of the owner's original trademark in connection with the relevant goods.⁴³¹⁸

7.1926. The Dominican Republic argues that by severely restricting the use of trademarks in commerce, the TPP measures diminish, and in some instances remove, the ability of trademark owners to exercise the exclusive rights guaranteed by Article 16.1, including the right to prevent third parties from using similar or identical signs in a manner that creates a likelihood of confusion.⁴³¹⁹

7.1927. In its view, Article 16.1 specifies both the obligation of WTO Members – to afford an exclusive right to registered trademark owners to prevent unauthorized use – as well as a condition precedent that must be satisfied (i.e. a likelihood of confusion) to trigger a WTO Member's obligation to allow a trademark owner to prevent certain third-party uses.⁴³²⁰ It submits that with respect to the condition precedent, Article 16.1 states that the use of identical or similar signs on identical or similar goods must be such that a "likelihood of confusion" arises.⁴³²¹ It argues that severe restrictions on a trademark owner's ability to use its sign in the course of trade will, over time, disrupt and destroy the ability of the condition precedent to arise.⁴³²²

7.1928. The Dominican Republic elaborates that the ability to demonstrate confusion among consumers under Article 16.1, and thereby prevent unauthorized use, depends on the distinctiveness of a trademark. As explained in the WIPO Handbook, "highly distinctive marks ... are more likely to be confused than marks with associative meanings in relation to the goods for which they are registered". The distinctiveness of a trademark depends, in turn, on the use of the mark. Through use in commerce, consumers learn to associate the trademark with the product for which it was registered, enhancing the knowledge and distinctiveness of the mark. Thus, the WIPO IP Handbook states that: "If the infringed trademark is being used, the extent of the use can influence the test of confusing similarity".⁴³²³ The Dominican Republic submits, with reference to the panel report in *EC – Trademarks and Geographical Indications*, that "a trademark owner's use of 'its own trademark in connection with the relevant goods and services of its own and authorized undertakings' is necessary for 'preserving the distinctiveness' of the trademark 'so that it can perform' its function".⁴³²⁴ It further adds that the Full Federal Court of Australia has held that, where an element of a registered trademark has developed a strong reputation, this heightens the possibility that infringement will be found when a similar sign is used. Hence, actual use in the marketplace has a material impact on the possibility to show successfully a likelihood of confusion under Australian law.⁴³²⁵

7.1929. The Dominican Republic argues that when a trademark no longer can distinguish the goods or services with which it is associated, the ability to demonstrate a "likelihood of confusion" caused by use of similar signs on similar goods, i.e. the core right of Article 16.1 of the TRIPS Agreement, drastically diminishes or disappears. With the loss of the ability to demonstrate this condition precedent (i.e. "likelihood of confusion"), the trademark owner, in turn, loses the ability to exercise its exclusive right to prevent the use of those similar signs on similar goods.⁴³²⁶ The Dominican Republic further elaborates in its second written submission that its claims under Article 16.1 focus primarily on the following scenarios: (a) use of an identical sign on a good which is similar to that in respect of which the trademark is registered; and (b) use of a similar sign on a good which is similar to that in respect of which the trademark is registered.⁴³²⁷

⁴³¹⁸ Honduras's first written submission, para. 256. (footnote omitted)

⁴³¹⁹ Dominican Republic's first written submission, para. 295.

⁴³²⁰ Dominican Republic's first written submission, para. 299.

⁴³²¹ Dominican Republic's first written submission, para. 300.

⁴³²² Dominican Republic's first written submission, para. 300.

⁴³²³ Dominican Republic's first written submission, para. 307 (quoting WIPO IP Handbook, Full Text, (Exhibit DOM-65), para. 2.484).

⁴³²⁴ Dominican Republic's first written submission, para. 303 (quoting Panel Report, *EC – Trademarks and Geographical Indications (Australia)*, para. 7.664).

⁴³²⁵ Dominican Republic's first written submission, para. 308 (referring to *Crazy Ron v. Mobileworld*, (Exhibits DOM-72, IDN-103); and *Louis Vuitton v. Sonya*, (Exhibit DOM-73)).

⁴³²⁶ Dominican Republic's first written submission, para. 302.

⁴³²⁷ Dominican Republic's second written submission, fn 62.

7.1930. According to the Dominican Republic, a "destruction" of the rights accorded by Article 16.1 occurs through the TPP measures in the following manner:

- (1) less or no use leads to reduced distinctiveness, or a total absence of distinctiveness (which would normally lead to cancellation of the trademark, absent the "legal fictions" of the TPP Act);
- (2) with reduced or no distinctiveness, consumers no longer associate the registered trademark with the product for which it was registered; and
- (3) when consumers no longer associate a registered trademark with the trademark owner's products, it becomes difficult, if not impossible, for the trademark owner to demonstrate confusion in the case of use of an identical or similar sign on similar goods.⁴³²⁸

7.1931. In this way, the Dominican Republic argues, through Australia's own legislative conduct, the protection under Article 16.1 of trademarks on tobacco products in Australia is diminished, and possibly even lost entirely. For example, in the absence of the TPP measures, a person that owns a registered trademark for cigarettes would be able to prevent the use of a sign that is "substantially identical with, or deceptively similar to" that trademark in relation to goods "of the same description" or "closely related to" cigarettes, such as lighters or matches.⁴³²⁹ Yet, it argues, as a result of the TPP measures, the ability of owners of trademarks for tobacco products to protect their trademarks will be reduced, maybe lost, through the mechanism detailed above, in violation of Article 16.1. Thus, Australia diminishes or eliminates the protection of trademarks, preventing a trademark owner from satisfying the condition relating to confusion.⁴³³⁰

7.1932. The Dominican Republic explains that its "claims under Article 16.1 of the TRIPS Agreement relate equally to both inherently and non-inherently distinctive trademarks. Through the prohibition on use, both types of trademarks lose their ability to distinguish, such that the respective trademark owners ultimately can no longer exercise the minimum level of rights that must be accorded pursuant to Article 16.1."⁴³³¹ According to the Dominican Republic, non-inherently distinctive trademarks provide an example of how this violation may arise in practice. For those non-inherently distinctive signs for tobacco products that were registered prior to the enactment of the TPP measures and that are currently registered trademarks in Australia, the restricted use of those trademarks serves to eliminate the distinctiveness previously acquired through use, acquired distinctiveness that allowed them to be registered as trademarks in the first place.⁴³³²

7.1933. The Dominican Republic further argues that Australia has preserved the formal status of certain signs as trademarks registered for tobacco products by virtue of legal fictions made under Section 28 of the TPP Act. Yet, while these fictions maintain the formal status of the signs, they fail to maintain the substantive rights to be accorded to such trademarks.⁴³³³ It argues that if a trademark, through lack of use, can no longer serve the function of "distinguishing the goods and services of one undertaking from those of other undertakings", then the rights conferred on that trademark under Article 16.1 drastically diminish or are rendered inutile.⁴³³⁴ When such distinctiveness is eliminated, claims the Dominican Republic, the registration of such marks becomes entirely meaningless, not only because such signs cannot be used by the trademark owner in the marketplace, but also because unauthorized third-party use cannot be excluded.⁴³³⁵ It argues that "these registered trademarks are simply empty shells denuded of the functional attributes of trademarks".⁴³³⁶

⁴³²⁸ Dominican Republic's first written submission, para. 310.

⁴³²⁹ Dominican Republic's first written submission, para. 311.

⁴³³⁰ Dominican Republic's first written submission, para. 312.

⁴³³¹ Dominican Republic's response to Panel question No. 30, para. 140.

⁴³³² Dominican Republic's first written submission, para. 313.

⁴³³³ Dominican Republic's first written submission, para. 304.

⁴³³⁴ Dominican Republic's first written submission, para. 301.

⁴³³⁵ Dominican Republic's first written submission, para. 313.

⁴³³⁶ Dominican Republic's first written submission, para. 303.

7.1934. The Dominican Republic clarifies that it does not argue that Article 16.1 establishes a positive right to use⁴³³⁷ nor that Article 16.1 imposes an obligation on Members to adopt measures that ensure a mark maintains or strengthens its distinctiveness. Rather, the Dominican Republic argues that Article 16.1 imposes an obligation on Members not to adopt measures that undermine or eliminate a trademark owner's right to exclude under Article 16.1 by preventing a mark for lawfully traded goods from acquiring or maintaining distinctiveness.⁴³³⁸ It argues that "there is an obligation to refrain from engaging in regulatory conduct that *undermines* or *eliminates* the distinctiveness essential to exercise of the right to exclude".⁴³³⁹ Its arguments, the Dominican Republic explains, are about Australia's obligation to refrain from adopting restrictions on the use of trademarks that are so extreme that they ultimately deny a trademark owner the rights to which they are entitled under Article 16.1.⁴³⁴⁰ Referencing the Panel Report in *Mexico – Telecoms*, it argues that "Article 16.1 cannot be interpreted in such a manner that Members may, through their own conduct, evade their obligation to provide the exclusive rights that must be accorded pursuant to that provision".⁴³⁴¹

7.1935. The Dominican Republic also notes that, under its arguments, "the TRIPS Agreement would not interfere with the ability of a Member to regulate or ban the availability of, or trade in, a particular good or service"⁴³⁴² because, it argues, "regulation of the availability of a good or service is outside the scope of the TRIPS Agreement".⁴³⁴³ This, it explains, is also the reason why its arguments about the importance of "use" under Articles 15 and 16 are restricted to use on legally traded products.⁴³⁴⁴

7.1936. Cuba, by reference, incorporates the arguments in respect of Article 16.1 made by Honduras, the Dominican Republic, Indonesia, and Ukraine in their first written submissions, as well as the arguments made by Honduras, the Dominican Republic, and Indonesia in their second written submissions.⁴³⁴⁵ Cuba argues, by reference to Ukraine's first written submission, that the TPP measures, by preventing any opportunity to use validly registered trademarks on lawfully available products, violates Article 16.1 in two ways. First, the TPP measures eliminate the possibility of preventing the use of similar signs on similar products given the adverse impact of the measures on the strength of the mark and on the ability to demonstrate confusion that conditions the exercise of the rights under Article 16.1 of the TRIPS Agreement. Second, the TPP measures lead to the loss of distinctiveness of non-inherently distinctive signs, which in turn will lead to their invalidation and thus elimination of protection under Article 16.1.⁴³⁴⁶

7.1937. With respect to the first argument, Cuba, by reference, argues that the scope of protection of a trademark is determined by the strength of the mark, which depends on the extent of its use over time. "Marketplace strength is thus crucial in establishing infringement, and hence to the scope of protection". The stronger the mark, the greater its scope of protection.⁴³⁴⁷ Cuba argues that, by standardizing the appearance of word marks or trademarks, the TPP measures reduce the distinctiveness of the marks, thus compromising the owner's right to exercise his right of exclusion under Article 16.1.⁴³⁴⁸ Cuba, by reference, explains that after the introduction of plain packaging, the trademark's strength will become very weak given that consumers will no longer see the mark. The holistic assessment of the reputation and strength of the mark that is crucial to a likelihood of confusion and similarity analysis will be reduced to a mere registration-based formal

⁴³³⁷ Dominican Republic's response to Panel question No. 94, para. 44.

⁴³³⁸ Dominican Republic's response to Panel question No. 94, para. 47.

⁴³³⁹ Dominican Republic's response to Panel question No. 94, para. 48. (emphasis original)

⁴³⁴⁰ Dominican Republic's response to Panel question No. 96, para. 58.

⁴³⁴¹ Dominican Republic's second written submission, para. 71 (referring to Panel Report, *Mexico – Telecoms*, paras. 7.241-7.2444. (The Panel understands that, while citing the Panel Report in *Mexico – Telecoms*, the Dominican Republic was referring to paras. 7.241-7.244)).

⁴³⁴² Dominican Republic's response to Panel question No. 95, para. 51.

⁴³⁴³ Dominican Republic's response to Panel question No. 95, para. 51. (footnote omitted)

⁴³⁴⁴ Dominican Republic's response to Panel question No. 95, para. 51.

⁴³⁴⁵ See fn 4054 above. Since we have described separately the other complainants' relevant arguments, in the following section we will only summarize Ukraine's main arguments.

⁴³⁴⁶ Cuba's first written submission, para. 428 (incorporating Ukraine's first written submission, para. 278). See also Cuba's response to Panel question No. 94.

⁴³⁴⁷ Cuba's first written submission, para. 428 (incorporating Ukraine's first written submission, para. 279, which quotes Dinwoodie Report, (Exhibit UKR-1), para. 64).

⁴³⁴⁸ Cuba's response to Panel question No. 29 (annexed to its response to Panel question No. 138) and No. 96.

comparison in respect of a weak mark. The possibility of preventing use of similar signs on similar goods will thus be significantly reduced to quasi-identical signs on quasi-identical goods.⁴³⁴⁹

7.1938. Cuba, by reference, argues that the scope of the rights conferred and the specific conditions imposed by Article 16 reflect the intrinsic and direct relationship between the use of the trademark by its owner and the scope of the rights conferred. The required effective treaty interpretation of the text of Article 16 thus confirms that without a minimum opportunity to use the trademark on the good to which it is to be applied, the minimum level of guaranteed rights conferred by Article 16 is no longer guaranteed.⁴³⁵⁰ Cuba, by reference, submits that "an interpretation of the relevant provisions of the TRIPS Agreement as a whole and of Article 16 in particular to provide only a negative right to prevent third parties from using signs similar to the trademarked sign is unsustainable".⁴³⁵¹ According to Cuba, Article 16 recognizes a right to use and protects the use of trademarks.⁴³⁵²

7.1939. Cuba, by reference, concludes that the TPP measures reduce the scope of all registered trademark rights, effectively preventing owners from objecting to the use of similar signs on similar goods, in violation of the minimum level of rights to be guaranteed by Australia under Article 16.1 of the TRIPS Agreement.⁴³⁵³

7.1940. With respect to the second argument, Cuba, by reference, explains that, because non-inherently distinctive signs cannot be registered, and their registration can be invalidated for lack of distinctiveness unless they are used in a particular context⁴³⁵⁴, which the TPP measures prohibit, there is no basis for certain figurative non-inherently distinctive marks to obtain or maintain trademark status. Thus, they will automatically be "genericized".⁴³⁵⁵ It argues further that neither Section 28 of the TPP Act nor the TMA Act resolve this matter, as they do not allow non-inherently distinctive trademarks to obtain or maintain protection guaranteed under the TRIPS Agreement.⁴³⁵⁶ Therefore, the owners of trademarks that were previously protected and used, and that enjoyed the minimum level of protection guaranteed by Article 16.1, will lose or have already lost that protection.⁴³⁵⁷ Cuba contends, by reference, that "[b]y denying these minimum exclusive rights to trademark owners of non-inherently distinctive signs, Australia violates its obligation under Article 16.1 of the TRIPS Agreement".⁴³⁵⁸

7.1941. Indonesia argues that Australia has violated Article 16.1 of the TRIPS Agreement in two ways: (1) the TPP Act requires the use of deceptively similar marks on identical products as defined under Australian law, thereby eroding a trademark owner's right to prevent use that is likely to result in confusion; and (2) the TPP Act prevents validly registered marks from maintaining their distinctiveness, thereby diminishing (and, eventually, extinguishing) the ability of the owner of a validly registered mark to prevent unauthorized third-party use of similar marks on similar goods not covered by the TPP Act.⁴³⁵⁹

7.1942. With respect to the first argument, Indonesia acknowledges that prior to the implementation of plain packaging, Australia's trademark regime fulfilled Australia's obligations

⁴³⁴⁹ Cuba's first written submission, para. 428 (incorporating Ukraine's first written submission, para. 280).

⁴³⁵⁰ Cuba's first written submission, para. 428 (incorporating Ukraine's first written submission, para. 274).

⁴³⁵¹ Cuba's first written submission, para. 428 (incorporating Ukraine's first written submission, para. 228, which quotes from the Schwebel Report, (Exhibit UKR-2), para. 3).

⁴³⁵² Cuba's response to Panel question No. 99.

⁴³⁵³ Cuba's first written submission, para. 428 (incorporating Ukraine's first written submission, para. 294).

⁴³⁵⁴ Cuba's first written submission, para. 428 (incorporating Ukraine's first written submission, para. 285).

⁴³⁵⁵ Cuba's first written submission, para. 428 (incorporating Ukraine's first written submission, para. 288).

⁴³⁵⁶ Cuba's first written submission, para. 428 (incorporating Ukraine's first written submission, para. 289).

⁴³⁵⁷ Cuba's first written submission, para. 428 (incorporating Ukraine's first written submission, para. 292).

⁴³⁵⁸ Cuba's first written submission, para. 428 (incorporating Ukraine's first written submission, para. 293).

⁴³⁵⁹ Indonesia's first written submission, para. 213.

under TRIPS Article 16.1 to provide trademark owners the exclusive right to prevent unauthorized third parties from using identical or similar signs for identical or similar goods or services where such use would result in a likelihood of confusion⁴³⁶⁰ through Section 120 of the TM Act. It argues that after the implementation of the TPP measures, owners of registered trademarks relating to tobacco products "find themselves in the bizarre scenario of being *legally required* to present their trademarks in a manner that is 'deceptively similar' to those of other tobacco brands, and being hampered in their ability to *prevent* third parties from using marks that are deceptively similar to their own products".⁴³⁶¹ Indonesia further argues that "because Australia's [T]PP measures are mandatory, Australia has left trademark owners with no remedy".⁴³⁶² "Because of the mandatory nature of this measure, Australia has deprived trademark owners of the right to exclude uses of similar marks where such uses are likely to cause confusion in direct conflict with its obligation under Article 16.1 of the TRIPS Agreement."⁴³⁶³

7.1943. Indonesia argues that trademarks, including trademarked colors, designs, and images, are essential for the establishment and maintenance of brands. These non-word marks enhance the distinctiveness of a brand's trademark. This is especially true, according to Indonesia, when all products are similar or identical, as is the case with cigarettes.⁴³⁶⁴ Referring to a list of registered word marks relating to tobacco products in Australia that use the word "gold"⁴³⁶⁵, Indonesia argues that they could be easily confused with the word mark "Indonesian Gold" in the absence of any distinguishing typeface, symbols or colors. The word marks themselves are, in many cases, insufficient to differentiate one brand from another. This is especially true, claims Indonesia, under the TPP measures, where all word marks must be in a prescribed format (typeface, size, colour, etc.). "By stripping trademarks of all of their distinguishing characteristics but one, Australia has rendered meaningless the right conferred by Article 16.1. Under [the TPP measures], the owner of a tobacco-related trademark is forced to become both the perpetrator *and* victim of deceptively similar marks on identical goods. In this regard, PP distorts the very purpose of intellectual property rights."⁴³⁶⁶

7.1944. Indonesia further argues that by amending the TM Act and introducing Section 231A, "the Australian government acknowledges that plain packaging conflicts with the normal operation of trademark law and provides for the proliferation of regulations to further contravene the ordinary function of trademarks".⁴³⁶⁷

7.1945. Indonesia concludes that Australia has violated Article 16.1 of the TRIPS Agreement by undermining the ability of a trademark owner to prevent a "likelihood of confusion" with nearly identical trademarks. "If marks on identical tobacco products are required to appear in a manner that is virtually identical, as is the case under PP, it will be significantly more difficult for trademark owners to exercise their rights under Australian law to prevent use that is likely to cause confusion – a right Australia *must* guarantee to trademark owners under Article 16.1."⁴³⁶⁸

7.1946. In response to Australia's argument that the TPP measures do not require certain word marks to appear in a confusing manner because registration of these marks shows that they have been deemed capable of distinguishing the goods of the trademark applicant from the goods of other persons, Indonesia argues that "the mere fact that a trademark is registered does not mean that it can never be used in a manner that might result in a likelihood of confusion with another registered trademark. Indeed, the [TM Act] provides the Registrar with the authority to revoke the registration of a trademark if 'it is reasonable to revoke the registration, taking account of all the circumstances'. These circumstances include 'any use that has been made of the trade mark' as well as 'any past, current or proposed legal proceedings relating to the trade mark'." Thus,

⁴³⁶⁰ Indonesia's first written submission, para. 214.

⁴³⁶¹ Indonesia's first written submission, para. 214. (emphasis original)

⁴³⁶² Indonesia's second written submission, para. 93. See also Indonesia's second written submission, para. 101.

⁴³⁶³ Indonesia's second written submission, para. 101.

⁴³⁶⁴ Indonesia's first written submission, para. 216. Indonesia adds that "studies indicate that 'many smokers are unable to distinguish between similar cigarettes' in the absence of trademarks". Ibid.

⁴³⁶⁵ See Indonesia's first written submission, Table V.1.

⁴³⁶⁶ Indonesia's first written submission, para. 217.

⁴³⁶⁷ Indonesia's first written submission, para. 218.

⁴³⁶⁸ Indonesia's first written submission, para. 219. (emphasis original)

Indonesia claims, the mere fact of registration does not preclude the possibility of later revocation based on confusing use of the trademark.⁴³⁶⁹

7.1947. With respect to the second argument, Indonesia argues that "[i]n addition to requiring marks on identical products to appear deceptively similar", the TPP measures diminish the overall distinctiveness of marks over time. The strength of a trademark is inextricably linked to its ability to distinguish goods, which is a function of use. Highly distinctive marks are more easily confused with similar or identical marks on similar or identical goods, which triggers the owner's right to prevent such marks accorded by Article 16.1. It follows that less distinctive marks are less likely to be confused with other marks, meaning their owners will be less able to prevent similar or identical marks on similar or identical goods.⁴³⁷⁰ Indonesia further argues that the panel in *EC – Trademarks and Geographical Indications (Australia)* "observed [that] use of a trademark is necessary for the preservation of its distinctiveness".⁴³⁷¹

7.1948. Indonesia argues that the TPP measures will inevitably result in the loss of distinctiveness for trademarks related to tobacco products because they restrict the use of such marks in the normal course of trade. The loss of distinctiveness, claims Indonesia, will result in owners being unable to demonstrate a likelihood of confusion with increasingly similar marks on increasingly similar goods, defeating the rights guaranteed by Article 16.1.⁴³⁷² As a result, according to Indonesia, there are many related products that are not covered by the TPP measures, which can now display similar or identical marks as registered tobacco marks without the authorization of the trademark owner.⁴³⁷³

7.1949. Indonesia concludes that "[t]he gradual erosion of the strength of trademarks is an unacceptable destruction of intellectual property, and entirely contrary to the purpose of the TRIPS Agreement. The fact that marks will lose their distinctiveness as a direct result of Australia's internal law is tantamount to Australia's outright denial of rights to distinctive marks in violation of its obligations. Thus, Australia has violated Article 16.1 of the TRIPS Agreement by impairing the distinctiveness of marks and, therefore, the ability of mark owners to prevent the use of similar or identical marks on similar or identical goods."⁴³⁷⁴

7.1950. In response to Australia's argument that there is no "positive right to use", Indonesia argues that the TRIPS Agreement contemplates a minimum opportunity to use a registered trademark in connection with the relevant goods or services.⁴³⁷⁵ It adds that any derogation from that norm must be a limited exception that takes account of the legitimate interests of trademark owners and third parties (e.g. consumers) in the use of trademarks.⁴³⁷⁶ Indonesia explains that the minimum opportunity of trademark use contemplated by the TRIPS Agreement is not an unfettered right to use. However, when one considers that the value of trademarks is derived solely from private trademark owners' ability to use those marks to distinguish their goods and services in the course of trade, it is only logical that the provisions of the TRIPS Agreement relevant to trademarks would also protect trademark owners' minimum opportunity to use their marks.⁴³⁷⁷ It further claims that even in markets where no "right to use" is established, trademark use is a critical factor influencing arbitrators of infringement claims.⁴³⁷⁸ Indonesia counsels that a trademark owner's legitimate interest in using its mark, and the importance of use for the realization of the benefits conferred by trademark registration, while critical in this dispute, should not be conflated with a "positive right of use" or "absolute right of use". While Members may take a variety of regulatory actions that impact use of a trademark, whether directed toward a

⁴³⁶⁹ Indonesia's second written submission, para. 96 (quoting TM Act, (Exhibit JE-6), Sections 84(1)(b) and 84(3)(a)-84(3)(b), pp. 83-84).

⁴³⁷⁰ Indonesia's first written submission, para. 220.

⁴³⁷¹ Indonesia's second written submission, para. 90 (referring to Panel Report, *EC – Trademarks and Geographical Indications (Australia)*, para. 7.664). See also Indonesia's first written submission, para. 222.

⁴³⁷² Indonesia's first written submission, para. 222.

⁴³⁷³ Indonesia's first written submission, para. 223 (referring to ATMOS search results, (Exhibit IDN-62)).

⁴³⁷⁴ Indonesia's first written submission, para. 223.

⁴³⁷⁵ Indonesia's second written submission, para. 72.

⁴³⁷⁶ Indonesia's second written submission, para. 72 (referring to Article 17 of the TRIPS Agreement and Panel Report, *EC – Trademarks and Geographical Indications (Australia)*, para. 7.664).

⁴³⁷⁷ Indonesia's second written submission, para. 14.

⁴³⁷⁸ Indonesia's second written submission, para. 74.

trademark or the underlying goods and services, "it cannot be true", according to Indonesia, "that the rights and obligations conferred by the TRIPS Agreement are not implicated or impaired by an unjustified prohibition on the use of trademarks in connection with an entire category of products".⁴³⁷⁹

7.1951. Referring to domestic Australian trademark jurisprudence, Indonesia argues that Australian law recognizes that trademark use is an essential factor in any infringement proceeding. Therefore, if use is critical to proving trademark infringement in Australia (a market with no positive right to use a trademark), it is equally correct, according to Indonesia, to find that prohibiting use "guts" the protections afforded under Article 16.1 of the TRIPS Agreement.⁴³⁸⁰ Indonesia further argues that Section 28 of the TPP Act does not remedy the loss of distinctiveness and, therefore, the loss of protection accorded to trademarks under Article 16.1 as a result of the TPP measures⁴³⁸¹, as it deals only with maintaining trademark registrations on the Registrar that fall into disuse as a result of the TPP measures.⁴³⁸²

7.1952. Indonesia explains that it is not claiming that Members are required under Article 16.1 to take affirmative steps to ensure the distinctiveness of marks. It is the responsibility of the trademark owner to exercise its "general market freedom" to strengthen and maintain its mark through use in the marketplace. However, according to Indonesia, Article 16.1 obligates Members to refrain from taking regulatory action that impairs the ability of trademark owners to exercise their right to prevent the use of similar or identical signs on similar or identical goods or services that are likely to result in confusion. Australia's TPP measures, Indonesia argues, do exactly the opposite by severely curtailing the distinctiveness of tobacco trademarks by prohibiting use in the market, which damages the ability of trademark owners to bring successful infringement actions under Australian trademark law. Registration alone, Indonesia asserts, is insufficient to safeguard the distinctiveness of trademarks.⁴³⁸³

7.1953. Indonesia further argues that the manner and context in which trademarks are used, including their trade dress, is an important element of trademark infringement actions in Australia⁴³⁸⁴, and under Australia's "imperfect recollection" test, courts draw conclusions about what a consumer would recall about marks and compare how marks are used or intended to be used in the marketplace.⁴³⁸⁵ Indonesia argues that, while word marks may have been registered without any color or figurative elements, they are seldom used in the plain format in which they are registered⁴³⁸⁶, people often do not read words carefully or pronounce them distinctly⁴³⁸⁷, and studies have found that the effect of label design on perceived similarity is over seven times larger than the effect of brand name.⁴³⁸⁸ Indonesia argues that, therefore, it is not difficult to demonstrate that the TPP measures are likely to increase the risk of confusion. In the present dispute, the word marks that are permitted on tobacco packaging are required to be displayed in identical trade dress. Without any other distinguishing features, the word marks' ability to distinguish products is severely diminished.⁴³⁸⁹

7.1954. Australia argues that the TPP measures are not inconsistent with Article 16.1, properly interpreted.⁴³⁹⁰ Australia explains that on the basis of the ordinary meaning of the terms of Article 16.1, the right accorded to the owners of registered trademarks is a negative right – that is, the right to stop or hinder third parties from using identical or similar signs on identical or similar goods, up to and during the point of sale, where such use would cause or would be likely to

⁴³⁷⁹ Indonesia's response to Panel question No. 94, para. 16.

⁴³⁸⁰ Indonesia's second written submission, para. 89.

⁴³⁸¹ Indonesia's second written submission, para. 92.

⁴³⁸² Indonesia's second written submission, para. 92.

⁴³⁸³ Indonesia's second written submission, para. 91. See also Indonesia's response to Panel question No. 95, para. 19 ("It is clear from the text of this provision that the *Member* is not obligated to preserve or strengthen the mark. That is the sole responsibility of the trademark owner.") (emphasis original)

⁴³⁸⁴ Indonesia's second written submission, para. 97.

⁴³⁸⁵ Indonesia's second written submission, para. 97.

⁴³⁸⁶ Indonesia's second written submission, para. 100.

⁴³⁸⁷ Indonesia's second written submission, para. 97 (referring to *Tivo v. Vivo*, (Exhibit IDN-101), para. 165).

⁴³⁸⁸ Indonesia's second written submission, para. 99 (referring to Aribarg et al. 2014, (Exhibit DOM-224), p. 663).

⁴³⁸⁹ Indonesia's second written submission, para. 98.

⁴³⁹⁰ Australia's first written submission, para. 317.

cause confusion.⁴³⁹¹ It adds that this understanding of the negative nature of the right conferred in Article 16.1 is consistent with the context and object and purpose of the TRIPS Agreement⁴³⁹², prior panel and Appellate Body reports⁴³⁹³, and the views of leading commentators.⁴³⁹⁴ The right conferred under Article 16.1, claims Australia, is not a positive right to use a trademark.⁴³⁹⁵

7.1955. Australia agrees with the panel in *EC – Trademarks and Geographical Indications (Australia)* that a trademark owner has a "legitimate interest" in using its trademarks to distinguish its goods or services from those of other undertakings in the course of trade.⁴³⁹⁶ It argues that a trademark owner's "legitimate interest" in using its trademarks must be contrasted with the "rights conferred by a trademark", as set forth in Article 16 of the TRIPS Agreement. The "legitimate interests" of trademark owners cannot be raised to the level of the "rights conferred by a trademark".⁴³⁹⁷ Australia concludes that the ability to use a trademark is a general market freedom and is not a "right" that is protected under the TRIPS Agreement.⁴³⁹⁸ Australia submits that whether the complainants frame Article 16.1 as imposing a positive obligation on Members to guarantee the use of a trademark to ensure that a likelihood of confusion arises, or as a negative obligation on Members not to prevent the use of a trademark so that the likelihood of confusion may arise, their arguments cannot be reconciled with their admission that Article 16.1 obliges Members to confer only negative rights of exclusion on trademark owners.⁴³⁹⁹

7.1956. Against this background, Australia argues that the basis of the complainants' claims is that if a trademark is not used, the "likelihood of confusion" is reduced, and so the right to prevent third parties from using similar or identical trademarks on similar or identical goods is diminished.⁴⁴⁰⁰ This argument, it submits, is "implausible"⁴⁴⁰¹ since Article 16.1 does not require Members to ensure that a likelihood of confusion arises so that trademark owners will be able to prevent confusion. There is no "right of confusion" under Article 16.1, according to Australia.⁴⁴⁰²

7.1957. With respect to the argument that the principle of effective treaty interpretation means that the minimum level of rights required by Article 16 is not respected without a minimum opportunity to use a trademark, Australia submits that "[t]he principle of *effet utile* means that a treaty interpreter cannot adopt an interpretation that renders parts of the treaty *legally redundant*".⁴⁴⁰³ It claims that the substance of the right in Article 16.1 is to provide that trademark owners can prevent the unauthorized use in the course of trade of similar or identical signs where such use would result in a likelihood of confusion. This right protects the position of trademark owners in relation to other traders in the market.⁴⁴⁰⁴ Australia adds that the TPP measures operate to ensure that the protections accorded under the TM Act to owners of registered trademarks,

⁴³⁹¹ Australia's first written submission, para. 312.

⁴³⁹² Panel Report, *EC – Trademarks and Geographical Indications (Australia)*, para. 7.246.

⁴³⁹³ Panel Report, *EC – Trademarks and Geographical Indications (Australia)*, para. 7.611 fn 564

("Article 16.1 of the TRIPS Agreement only provides for a negative right to prevent all third parties from using signs in certain circumstances."). See also Appellate Body Report, *US – Section 211 Appropriations Act*, para. 186.

⁴³⁹⁴ See, e.g. Correa's Commentary on the TRIPS Agreement, (Exhibit AUS-242), p. 186 ("Article 16.1 alludes to the right to exclude the use under certain conditions. It is clearly provided for as a negative right, not as the right to use the trademark."); Carvalho 3rd edn, AUS excerpts, (Exhibit AUS-236), p. 249 ("Like all other industrial property rights dealt with by the TRIPS Agreement, trademark rights are also primarily described in a negative manner. Trade mark rights are rights to exclude, rather than to use."); and J. Malbon, C. Lawson, and M. Davison, *The WTO Agreement on Trade-Related Aspects of Intellectual Property Rights: A Commentary* (Edward Elgar, 2014), (Exhibit AUS-246), p. 294 ("There is no positive right given to the registered owner to use the trademark. Consequently, Members may impose onerous conditions on the sale of the trademark-related products which may, in effect, prevent the use of the registered trademark or severely limit its use. For example, restrictions on the sale of tobacco products could restrict the use of advertising involving the trademark for the product.").

⁴³⁹⁵ Australia's first written submission, para. 312.

⁴³⁹⁶ Australia's response to Panel question No. 99, para. 42.

⁴³⁹⁷ Australia's response to Panel question No. 99, para. 42. (footnote omitted)

⁴³⁹⁸ Australia's response to Panel question No. 90, para. 23.

⁴³⁹⁹ Australia's second written submission, para. 30.

⁴⁴⁰⁰ Australia's first written submission, para. 314.

⁴⁴⁰¹ Australia's first written submission, para. 315.

⁴⁴⁰² Australia's first written submission, para. 315. (emphasis original)

⁴⁴⁰³ Australia's response to Panel question No. 37, para. 99. (emphasis original)

⁴⁴⁰⁴ Australia's response to Panel question No. 37, para. 101.

including the right to prevent infringement, are completely preserved.⁴⁴⁰⁵ It further argues that even if some trademark owners may, as a matter of fact, exercise their rights of exclusion more often than other trademark owners, this does not mean that the legal effect of Article 16 of the TRIPS Agreement is rendered "redundant". The fact that there may be fewer opportunities for confusion as a result of the TPP measures does not render the rights under Article 16 inutile.⁴⁴⁰⁶

7.1958. With respect to the complainants argument that the TPP measures could not be justified under Article 17, Australia argues that TPP measures do not create any exceptions to the rights conferred by a trademark, which are negative rights of exclusion, and do not include a right to use a trademark. Article 17, concludes Australia, is therefore not engaged by the measure at issue.⁴⁴⁰⁷

7.1959. With respect to Indonesia's claim that the TPP measures require trademark owners to present their trademarks in a deceptively similar manner, Australia argues that "if the brand and variant names at issue have all been registered, the Registrar has determined that these word trademarks are in fact capable of distinguishing the goods of the trademark applicant from the goods of other undertakings."⁴⁴⁰⁸ Further, Indonesia fails to recognise that, if it were the case that a competitor used a word on a tobacco product that was identical or similar to an existing registered trademark such as to create a likelihood of confusion (for example, if a competitor attempted to sell cigarettes under the brand name 'Marblerow'), then the trademark owner would be able to exercise its negative rights of exclusion in accordance with Article 16.1."⁴⁴⁰⁹

7.1960. With respect to the claim that the TPP measures lead to the loss of distinctiveness of non-inherently distinctive signs, which in turn will lead to their invalidation and thus elimination of protection under Article 16.1, Australia submits that Section 28 of the TPP Act provides that the operation of the TPP Act does not prevent the registration of a trademark or the maintenance of registration. By ensuring that trademarks can be registered and remain on the register, Australia claims, the TPP measures do not have any impact on the ability of owners of registered trademarks to exercise the rights granted under the TM Act to seek relief in the event that a third party uses an identical or similar sign in the course of trade where such use creates a likelihood of confusion.⁴⁴¹⁰

7.3.3.3 Main arguments of the third parties

7.1961. Canada argues that the right conferred by Article 16.1 consists only of the trademark owner's entitlement to prevent third parties from unauthorized use of identical or similar signs on identical or similar goods or services where such use would result in a likelihood of confusion.⁴⁴¹¹ According to Canada, the negotiating history of Article 16.1 reveals that the text did not include an owner's right to use the trademark.⁴⁴¹² Canada submits that WTO Members are not obliged under Article 16.1, or elsewhere in the TRIPS Agreement, to preserve or strengthen either the trademark or the owner's ability to successfully demonstrate a "likelihood of confusion". Such an obligation would effectively make Members responsible for private interests that they cannot control, as the strength of a mark is ultimately dependent upon its user and market forces, including consumer perception.⁴⁴¹³ Adopting the complainants' interpretation, Canada argues, would mean that Members would retain little flexibility to regulate as many measures, such as banning or restricting product advertising, could have the effect of reducing the strength of the mark.⁴⁴¹⁴

7.1962. Nicaragua argues that by prohibiting the use of trademarks and permitting only certain word marks in a standardized form and font, the TPP measures "necessarily violate[] the

⁴⁴⁰⁵ Australia's first written submission, para. 318.

⁴⁴⁰⁶ Australia's response to Panel question No. 37, para. 103.

⁴⁴⁰⁷ Australia's response to Panel question No. 90, para. 43.

⁴⁴⁰⁸ (footnote original) If any person were to disagree with the decision of the Registrar to register the trademark, it can either oppose registration or seek removal from the register in accordance with the TM Act. See Australia's first written submission, Annexure D, paras. 3-7.

⁴⁴⁰⁹ Australia's second written submission, para. 31. (emphasis original)

⁴⁴¹⁰ Australia's first written submission, para. 317. See also Australia's explanation of the operation of Section 28 of the TPP Act in Australia's first written submission, paras. 267-271.

⁴⁴¹¹ Canada's third-party submission, para. 46.

⁴⁴¹² Canada's third-party submission, para. 47.

⁴⁴¹³ Canada's third-party submission, para. 48.

⁴⁴¹⁴ Canada's third-party submission, para. 49.

TRIPS Agreement on the protection of intellectual property rights, like trademarks".⁴⁴¹⁵ It submits that the rights under Article 16 "do not make sense" and are "hollow" if they are not accompanied by a meaningful opportunity to use the trademark. The principle of effective treaty interpretation, claims Nicaragua, does not support Australia's reading of this provision.⁴⁴¹⁶

7.1963. Norway argues that the plain text of Article 16.1 makes clear that the right conferred to owners of trademarks under the TRIPS Agreement is not a right to use, but an exclusive right to prevent certain uses by third parties.⁴⁴¹⁷ Acknowledging that trademark owners may have a legitimate interest in using their trademark, as confirmed by the panel in *EC – Trademarks and Geographical Indications*, Norway submits that this does not mean, however, that this interest is included in the rights set out in Article 16.1. It submits that, to the contrary, the panel in *EC – Trademarks and Geographical Indications (Australia)* stated that "[g]iven that Article 17 creates an exception to the rights conferred by a trademark, the 'legitimate interests' of the trademark owner must be something different than full enjoyment of those legal rights".⁴⁴¹⁸

7.1964. New Zealand argues that the complainants' claims that the TPP measures reduce the exclusive rights of trademark owners under Article 16.1 are misconceived. It submits that Article 16.1 does not provide a right to use the trademark in the course of trade as the owner sees fit, or provide a positive right such that a WTO Member is obliged to allow the trademark owner to use its trademark.⁴⁴¹⁹ In New Zealand's view, the Panel ought to reject the complainants' claims in relation to Article 16.1.⁴⁴²⁰

7.1965. Singapore argues that the complainants proposition that the erosion or, in some cases, loss of a trademark owner's ability to prevent the unauthorized use of certain signs because of the loss of distinctiveness that might result from the TPP measures violates Article 16.1 is untenable.⁴⁴²¹ According to Singapore, the argument is not supported by the ordinary meaning of Article 16.1⁴⁴²² and erroneously conflates the legitimate interest of owners to preserve the distinctiveness of their trademarks with the right conferred by Article 16.1.⁴⁴²³

7.3.3.4 Analysis by the Panel

7.1966. The complainants argue that a trademark owner's ability to demonstrate confusion in the market, and thus infringement, correlates with the degree of distinctiveness, or "strength" of the trademark which, they argue, is intrinsically linked to the trademark owner's ability to use it.⁴⁴²⁴ According to the complainants, the TPP measures' prohibition of certain uses of certain tobacco-related trademarks results in a reduction in the trademarks' distinctiveness, eroding the trademark owners' ability to prevent third parties from using similar or identical marks on similar goods in a manner that creates a "likelihood of confusion".⁴⁴²⁵ Honduras submits that Article 16 obliges Members to guarantee a minimum level of private rights to trademark owners that allows them to successfully protect the distinctiveness and source-indicating function of their marks in infringement proceedings.⁴⁴²⁶ The Dominican Republic, Cuba, by reference, and Indonesia argue

⁴⁴¹⁵ Nicaragua's third-party submission, para. 19.

⁴⁴¹⁶ Nicaragua's third-party submission, para. 25.

⁴⁴¹⁷ Norway's third-party submission, para. 32.

⁴⁴¹⁸ Norway's third-party submission, para. 33 (quoting *EC – Trademarks and Geographical Indications (Australia)*, para. 7.662).

⁴⁴¹⁹ New Zealand's third-party submission, para. 32.

⁴⁴²⁰ New Zealand's third-party submission, para. 33.

⁴⁴²¹ Singapore's third-party submission, para. 28.

⁴⁴²² Singapore's third-party submission, para. 29.

⁴⁴²³ Singapore's third-party submission, para. 30.

⁴⁴²⁴ See Honduras's second written submission, para. 259. See also Honduras's first written submission, paras. 171-172, 217, and 239-240; Dominican Republic's first written submission, paras. 306-307; Cuba's first written submission, para. 428 (incorporating Ukraine's first written submission, paras. 264-265); and Indonesia's first written submission, para. 220.

⁴⁴²⁵ See Honduras's first written submission, paras. 239-243; Dominican Republic's first written submission, para. 295; Cuba's first written submission, para. 428 (incorporating Ukraine's first written submission, para. 278); and Indonesia's first written submission, paras. 220 and 222.

⁴⁴²⁶ Honduras's second written submission, para. 258. See also Cuba's first written submission, para. 428 (incorporating Ukraine's first written submission, para. 294, which in turn notes Australia's "positive obligation" to protect the minimum rights conferred on trademark owners by Article 16.1); and Indonesia's response to Panel question No. 95 (asserting that Members are obligated to create a "legal or regulatory

that Article 16.1 obliges Members to refrain from regulatory conduct that undermines or eliminates the distinctiveness essential to exercising trademark rights.⁴⁴²⁷ Honduras, the Dominican Republic, and Indonesia submit that a trademark owner's interest in using the trademark is an important consideration with respect to claims under Article 16.1, but do not argue that Article 16.1 confers a "right to use".⁴⁴²⁸ Cuba argues, by reference, that the principle of effective treaty interpretation requires Members to provide a minimum opportunity to use a trademark, as otherwise the minimum rights conferred by Article 16.1 are not guaranteed.⁴⁴²⁹

7.1967. In addition, Cuba, by reference, argues that the TPP measures eliminate protection required under Article 16.1 for those non-inherently distinctive trademarks that previously acquired distinctiveness by use. The prohibition of certain uses of certain tobacco-related trademarks will, according to Cuba, cause registered non-inherently distinctive signs to lose their distinctiveness and become subject to cancellation procedures.⁴⁴³⁰

7.1968. Finally, Indonesia, and Cuba, by reference, argue that by standardizing the appearance of tobacco packaging and products, the TPP measures require the use of deceptively "similar marks" on "identical products" while depriving owners of a remedy, thereby eroding a trademark owner's right under Article 16.1 to prevent use that is likely to result in confusion.⁴⁴³¹

7.1969. We will first consider the scope of the obligation under Article 16.1 relevant to the complainants' claims and then address these three sets of arguments in turn.

7.3.3.4.1 The scope of the obligation in Article 16.1

7.1970. We recall that Article 16.1 of the TRIPS Agreement, entitled "Rights Conferred", reads:

The owner of a registered trademark shall have the exclusive right to prevent all third parties not having the owner's consent from using in the course of trade identical or similar signs for goods or services which are identical or similar to those in respect of which the trademark is registered where such use would result in a likelihood of confusion. In case of the use of an identical sign for identical goods or services, a likelihood of confusion shall be presumed. The rights described above shall not prejudice any existing prior rights, nor shall they affect the possibility of Members making rights available on the basis of use.

7.1971. The parties agree that the language in the first sentence of Article 16.1 formulates a trademark owner's "exclusive" right to prevent certain uses by third parties.⁴⁴³² Certain

regime in which a trademark owner can prevent third parties from using identical or similar signs on identical or similar goods where such use would result in a likelihood of confusion").

⁴⁴²⁷ Dominican Republic's response to Panel question No. 94, paras. 44-45 and 47-48; Dominican Republic's second written submission, para. 65; and Cuba's second written submission, para. 414 (incorporating the arguments made in the Dominican Republic's second written submission). See also Indonesia's second written submission, para. 91.

⁴⁴²⁸ Honduras's response to Panel question No. 99; Dominican Republic's response to Panel question Nos. 94 and 96; and Indonesia's response to Panel question No. 94. But see Indonesia's first written submission, paras. 71-72 and 75 (indicating that the TRIPS Agreement contemplates a "minimum opportunity to use", even if no absolute right to use exists). Cuba endorses and incorporates the claims, arguments and evidence of its other complainants (see fn 4345 above) with respect to this point. See also, however, Cuba's response to Panel question No. 99 (suggesting that Article 16 recognizes a right to use a trademark).

⁴⁴²⁹ Cuba's first written submission, para. 428 (incorporating Ukraine's first written submission, para. 274). See also Indonesia's first written submission, paras. 71-72 and 75 (indicating that the TRIPS Agreement contemplates a "minimum opportunity to use", even if no absolute right to use exists).

⁴⁴³⁰ Cuba's first written submission, para. 428 (incorporating Ukraine's first written submission, paras. 285-293).

⁴⁴³¹ Indonesia's first written submission, para. 213; and Cuba's first written submission, para. 428 (incorporating by reference Indonesia's first written submission, with respect to arguments related to its claim under Article 16.1).

⁴⁴³² Honduras's first written submission, paras. 171 and 218-229; Dominican Republic's first written submission, para. 299; Cuba's first written submission, para. 428 (incorporating Ukraine's first written submission, para. 261); Cuba's response to Panel question No. 96; Indonesia's first written submission, para. 214; and Australia's first written submission, para. 311.

complainants do not contest Australia's assertion that this exclusive right is a "negative" right⁴⁴³³, and all have indicated that they are *not* claiming that the language in the first sentence of Article 16.1 formulates a trademark owners' "positive" right to use its registered trademark.⁴⁴³⁴ However, some complainants have challenged the utility and consequences of applying a "positive" versus "negative" label to the rights associated with Article 16.1.⁴⁴³⁵ Honduras conceives of Article 16.1 as requiring Members to guarantee a minimum level of private rights that allows trademark owners to exercise the right to exclude.⁴⁴³⁶ The Dominican Republic, Cuba, by reference, and Indonesia argue that Article 16.1 obliges Members to refrain from regulatory conduct that undermines or eliminates the distinctiveness of registered trademarks.⁴⁴³⁷ According to the complainants, distinctiveness, and thus the scope of protection available under Article 16.1, is linked to use.⁴⁴³⁸ By prohibiting the use of certain tobacco-related trademarks on tobacco packaging and tobacco products, the TPP measures, argue the complainants, erode their distinctiveness, constraining trademark owners' ability to exercise their rights under Article 16.1.⁴⁴³⁹

7.1972. This argument hinges on whether a reduction in the distinctiveness of a registered trademark affects the rights that Members must provide to the trademark owner under Article 16.1. We must therefore first determine the content of those rights, and then assess whether their exercise would be affected by a reduction in distinctiveness.

7.1973. Returning, therefore, to the text of Article 16.1, we note that the ordinary meaning of the verb "prevent" is "to preclude, stop, or hinder", or "to stop, keep, or hinder (a person or thing) *from* doing something".⁴⁴⁴⁰ We note further that the object of the principal verb "to prevent" in the first sentence of Article 16.1 is "all third parties not having the owner's consent from using identical or similar signs for goods or services which are identical or similar to those in respect of which the trademark is registered where such use would result in a likelihood of confusion".

7.1974. Upon a plain reading of the text, therefore, the provision formulates an obligation on Members to provide to the owner of a registered trademark the right to "stop, or hinder" all those

⁴⁴³³ Dominican Republic's second written submission, para. 58; Dominican Republic's response to Panel question No. 94, para. 44; Indonesia's response to Panel question No. 94, para. 15; and Australia's first written submission, para. 312.

⁴⁴³⁴ Honduras's second written submission, para. 257; Honduras's response to Panel question No. 96; Dominican Republic's response to Panel question No. 94, para. 44; Dominican Republic's second written submission, para. 63; Indonesia's response to Panel question No. 94, paras. 15-16. Cuba endorses and incorporates the claims, arguments and evidence of other complainants (see fn 4345 above) with respect to this point. See also, however, Cuba's responses to Panel question Nos. 94 and 99 (stating that Article 16.1 recognizes a "right to use"); and Cuba's response to Panel question No. 96. See also Australia's first written submission, para. 312.

⁴⁴³⁵ See Honduras's second written submission, paras. 257-258; Honduras's response to Panel question No. 96; Cuba's response to Panel question No. 96; and Indonesia's response to Panel question No. 96, para. 23.

⁴⁴³⁶ Honduras's second written submission, para. 258. See also Cuba's first written submission, para. 428 (incorporating Ukraine's first written submission, para. 259, which states that "the total prohibition on the possibility to use the trademark ... eliminates the possibility of exercising the private rights conferred by Article 16 and necessarily reduces the level of protection below the minimum guaranteed level").

⁴⁴³⁷ Dominican Republic's response to Panel question No. 94, para. 48 ("there is an obligation to refrain from engaging in regulatory conduct that *undermines* or *eliminates* the distinctiveness essential to exercise of the right to exclude" (emphasis original)); Cuba's first written submission, para. 428 (incorporating Ukraine's first written submission, para. 223, which states, "[t]he minimum level of protection that Members must confer under Article 16 is to allow trademark owners to enforce their existing private rights and to maintain the distinctiveness of their trademarks"); Indonesia's second written submission, para. 91 ("Article 16.1 obligates Members to refrain from taking regulatory action that impairs the ability of trademark owners to exercise their right to prevent the use of similar or identical signs on similar or identical goods or services that are likely to result in confusion"); and Indonesia's first written submission, paras. 204 and 213.

⁴⁴³⁸ Honduras's first written submission, paras. 239-246. See also Dominican Republic's first written submission, para. 301; Cuba's first written submission, para. 428 (incorporating Ukraine's first written submission, paras. 234-235); and Indonesia's first written submission, para. 204.

⁴⁴³⁹ Honduras's first written submission, paras. 239-240; Dominican Republic's first written submission, para. 306; Cuba's first written submission, para. 428 (incorporating Ukraine's first written submission, paras. 279-284); and Indonesia's first written submission, para. 222.

⁴⁴⁴⁰ Oxford English Dictionary online, definition of "prevent", available at: <<http://www.oed.com/view/Entry/151073?rskey=CZwcU6&result=2#eid>>, accessed 2 May 2017. (emphasis original)

not having the owner's consent from using certain signs on certain goods or services, where such use would result in a likelihood of confusion.⁴⁴⁴¹ The text of the provision does not formulate any other right of the trademark owner, nor does it mention the use of the registered trademark by its owner.

7.1975. The panel in *EC – Trademarks and Geographical Indications (Australia)*, when interpreting the principles set out in Article 8 of the TRIPS Agreement, found that:

These principles reflect the fact that the agreement does not generally provide for the grant of positive rights to exploit or use certain subject matter, but rather provides for the grant of negative rights to prevent certain acts. This fundamental feature of intellectual property protection inherently grants Members freedom to pursue legitimate public policy objectives since many measures to attain those public policy objectives lie outside the scope of intellectual property rights and do not require an exception under the TRIPS Agreement.⁴⁴⁴²

7.1976. With respect to Article 16.1, in particular, the panel found that:

Article 16.1 of the TRIPS Agreement only provides for a negative right to prevent all third parties from using signs in certain circumstances.⁴⁴⁴³

7.1977. The Appellate Body in *US – Section 211 Appropriations Act* found, with respect to Article 16.1:

As we read it, Article 16 confers on the owner of a registered trademark an internationally agreed minimum level of "exclusive rights" that all WTO Members must guarantee in their domestic legislation. These exclusive rights protect the owner against infringement of the registered trademark by unauthorized third parties.⁴⁴⁴⁴

7.1978. In light of the ordinary meaning of the text and consistently with prior rulings⁴⁴⁴⁵, we agree with the parties⁴⁴⁴⁶ that Article 16.1 does not establish a trademark owner's right to use its registered trademark. Rather, Article 16.1 only provides for a registered trademark owner's right to prevent certain activities by unauthorized third parties under the conditions set out in the first sentence of Article 16.1.

7.1979. With respect to the scope of the right that Members are obliged to confer on owners of registered trademarks under Article 16.1, we note that the trademark owner must have the exclusive right to prevent:

- a. all third parties not having the owner's consent;
- b. from using in the course of trade identical or similar signs for goods or services which are identical or similar to those in respect of which the trademark is registered;
- c. where such use would result in a likelihood of confusion.

7.1980. By setting out the conditions under which the trademark owner must be able to prevent third parties' activities, the provision simultaneously defines what must, at a minimum, constitute an infringement of a registered trademark. If the activities of an unauthorized third party meet the conditions set out in the first sentence of Article 16.1, then the trademark owner must have the right under a Member's domestic law to prevent them. If the activities of that third party do not

⁴⁴⁴¹ The second sentence of Article 16.1 adds the condition that a likelihood of confusion shall be presumed in case of the use of an identical sign for identical goods or services.

⁴⁴⁴² Panel Report, *EC – Trademarks and Geographical Indications (Australia)*, para. 7.246.

⁴⁴⁴³ Panel Report, *EC – Trademarks and Geographical Indications (Australia)*, para. 7.611 fn 564.

⁴⁴⁴⁴ Appellate Body Report, *US – Section 211 Appropriations Act*, para. 186. (emphasis original; footnote omitted)

⁴⁴⁴⁵ See Appellate Body Report, *US – Section 211 Appropriations Act*, para. 186; and Panel Report, *EC – Trademarks and Geographical Indications (Australia)*, para. 7.611 fn 564.

⁴⁴⁴⁶ See fn 4428 above, noting Cuba's contradictory statements.

meet these conditions, then they lie outside the scope of the trademark owner's "right to prevent" that Members are to provide pursuant to Article 16.1. The essence of the Article 16.1 obligation is to ensure that rights are available to obtain relief against such infringing acts. It follows that, in order to show that the TPP measures violate Australia's obligation under Article 16.1, the complainants would have to demonstrate that, under Australia's domestic law⁴⁴⁴⁷, the trademark owner does not have the right to prevent third-party activities that meet the conditions set out in that provision.

7.1981. With these preliminary observations in mind, we now turn to the complainants' arguments in support of their claims that the TPP measures violate article 16.1.

7.3.3.4.2 Whether the TPP measures violate Article 16.1, because the prohibition on use of certain trademarks reduces their distinctiveness and thus the trademark owner's ability to demonstrate a likelihood of confusion

7.1982. The complainants argue that by prohibiting the use of non-word trademarks on tobacco products, the TPP measures will reduce the distinctiveness of registered non-word trademarks since consumers will no longer associate these trademarks with the products for which they were registered. This reduction of distinctiveness, they argue, will reduce the ability of the right owner to demonstrate a "likelihood of confusion", a "condition precedent" for exercising rights under Article 16.1⁴⁴⁴⁸, and thus to prevent unauthorized use of similar or identical signs on similar products⁴⁴⁴⁹ in the market.

7.1983. As expressed by Honduras, signs that would once have been considered similar to those registered tobacco-related trademarks could now be used on similar products – such as tobacco accessories like lighters, matches, cigarette cases, or humidors⁴⁴⁵⁰ – without the trademark owner being able to prevent their unauthorized use, because such use is no longer likely to cause confusion with the original mark among consumers, and, therefore, no longer constitutes an infringement of these marks.⁴⁴⁵¹ As summarized by the Dominican Republic, "[b]y severely restricting the use of trademarks in commerce, the [TPP] measures diminish, and in some instances remove, ... the right to prevent third parties from using similar or identical signs in a manner that creates a likelihood of confusion".⁴⁴⁵² Therefore, it argues, the TPP measures diminish

⁴⁴⁴⁷ Under Article 1.1 of the TRIPS Agreement, Members have the obligation to "give effect to the provisions of this Agreement".

⁴⁴⁴⁸ Dominican Republic's first written submission, para. 299; and Honduras's first written submission, para. 226. See also Cuba's first written submission, para. 428 (incorporating Ukraine's first written submission, para. 278, which notes that the ability to demonstrate confusion conditions the exercise of rights under Article 16.1). The Panel also notes Honduras's second written submission, para. 259 (referring to the "likelihood of confusion" as a "normative assessment" that must always be demonstrated by the trademark owner in the context of an infringement proceeding), and Honduras's response to Panel question No. 168 (referring to it as "a legal construct for determining the scope of protection to be afforded to trademark owners" and pointing out that "actual confusion" is not the test).

⁴⁴⁴⁹ See paras. 7.1937, 7.1918, 7.1929, 7.1936-7.1939, and 7.1947-7.1949 above. The complainants mostly focus their claims on the purported effect the above mechanism would have on the ability to show confusion in cases where identical or similar signs are used on *similar* products. Dominican Republic's first written submission, para. 310; Dominican Republic's response to Panel question No. 32; Cuba's first written submission, para. 428 (incorporating Ukraine's first written submission, paras. 263-265 and 280); and Cuba's response to Panel question No. 32 (annexed to its response to Panel question No. 138) (endorsing the response of the Dominican Republic). See also Honduras's first written submission, paras. 239 and 248-249; Honduras's response to Panel question No. 35 (indicating that its claim under Article 16.1 refers specifically to the use of similar signs on similar products, but that it does not rule out the possibility of a violation involving the use of an identical sign on a similar product or a similar sign on an identical product); Indonesia's first written submission, para. 220; and Indonesia's response to Panel question No. 29, paras. 31-33 (claiming that the TPP measures "impair the distinguishability of similar word marks on identical goods", "impair the ability of right holders from preventing the use of identical word marks on similar goods" and "create confusion between similar word marks on similar goods that is unpreventable by owners of registered trademarks").

⁴⁴⁵⁰ Indonesia's response to Panel question No. 29, para. 32 fn 28; and Honduras's first written submission, paras. 235-236 and 249. See also Dominican Republic's first written submission, para. 311; and Dominican Republic's response to Panel question No. 32, para. 148.

⁴⁴⁵¹ Honduras's response to Panel question No. 29; first written submission, paras. 234-236, 243 and 249; and second written submission, para. 260.

⁴⁴⁵² Dominican Republic's first written submission, para. 295.

or eliminate the protection of trademarks by preventing a trademark owner from satisfying the condition relating to confusion.⁴⁴⁵³

7.1984. Australia argues that, while the right owner has a legitimate interest to use its trademark, the ability to use the mark is a general market freedom and not a right protected by Article 16.1.⁴⁴⁵⁴ It argues further that Article 16.1 does not contain a "right to confusion" that would require Members to ensure that a likelihood of confusion arises so that trademark owners would be able to prevent use of similar signs.⁴⁴⁵⁵ It submits that the TPP measures are therefore not inconsistent with Article 16.1.

7.1985. With regard to the claimed impact of the TPP measures on the trademark owner's *ability to demonstrate* a "likelihood of confusion" we note that the complainants are not challenging how the criteria for trademark infringement are defined in Australia's domestic legislation, and are not arguing that the TPP measures have affected how the Australian legal system assesses whether a "likelihood of confusion" exists.⁴⁴⁵⁶ The complainants have also not claimed that the TPP measures affect the procedural or evidentiary means available to right holders in infringement procedures to demonstrate that the infringement criteria are indeed fulfilled, and they also appear to accept that, *when* these infringement criteria are fulfilled, a trademark owner is entitled to take legal action in Australia.

7.1986. Rather, they argue that the TPP measures reduce the effective scope of the right in violation of Article 16.1 in two ways: first, the diminished distinctiveness of affected trademarks reduces the universe of signs that are considered "similar" to certain registered tobacco-related trademarks⁴⁴⁵⁷; and second, the diminished distinctiveness makes it more difficult for owners of certain registered tobacco-related trademarks to establish a "likelihood of confusion" than before the introduction of the measures.⁴⁴⁵⁸ In other words, the complainants contend that under the TPP measures, the factual situation of trademark infringement set forth in the first sentence of Article 16.1, will occur less frequently and with respect to fewer signs than before, and that this constitutes a reduction of the trademark owner's right in violation of Article 16.1.⁴⁴⁵⁹

7.1987. We note therefore, for the sake of clarity, that the situation that the complainants describe as the basis for their claim is not so much a reduction in the *trademark owners' ability to demonstrate* a "likelihood of confusion", but rather a reduction of the instances in which "likelihood of confusion" would arise in the market with respect to tobacco-related trademarks whose use is affected by the TPP measures.

7.1988. In light of the above, we note at the outset of our analysis that this argument consists of two parts, namely: (i) the factual allegation that the TPP measures' prohibition of use of certain registered trademarks will result in a situation where these marks will lose their distinctiveness

⁴⁴⁵³ Dominican Republic's first written submission, para. 312.

⁴⁴⁵⁴ Australia's response to Panel question No. 90, para. 23.

⁴⁴⁵⁵ Australia's first written submission, para. 315.

⁴⁴⁵⁶ See Dominican Republic's first written submission, para. 305 (acknowledging that "[a]s a general matter, for non-tobacco trademarks, which are not affected by the [T]PP measures, Australia appears to satisfy its obligation under Article 16.1 of the *TRIPS Agreement* for registered trademarks through the *Trade Marks Act 1995*. In particular, Section 120 of the *Trade Marks Act 1995* provides ..."); and Indonesia's second written submission, para. 89 (acknowledging that "Section 120 of Australia's *Trade Mark Law 1995* implements Article 16 of the *TRIPS Agreement*"). See also Honduras's first written submission, para. 248; and Cuba's first written submission, para. 428 (incorporating Ukraine's first written submission, para. 264).

⁴⁴⁵⁷ See Honduras's first written submission, paras. 170 and 243; and second written submission, para. 260. See also Cuba's first written submission, para. 428 (incorporating Ukraine's first written submission, paras. 280-281).

⁴⁴⁵⁸ Honduras's first written submission, paras. 239 and 248-249; Dominican Republic's first written submission, para. 310; Cuba's first written submission, para. 428 (incorporating Ukraine's first written submission, paras. 263-265 and 280); and Indonesia's first written submission, para. 220.

⁴⁴⁵⁹ See Honduras's first written submission, paras. 170 and 243-244; and second written submission, para. 260. See also Honduras's second written submission, para. 263 (referring to MARQUES's *amicus curiae* submission, (Exhibit DOM/HND/IDN-1), paras. 4.5-4.6 (arguing that a "measure that prevents the mark from maintaining its scope of protection or from growing its notoriety and strength through use as intended is thus inconsistent with the rights conferred on registered trademark owners under Article 16.1 TRIPS")); and Cuba's first written submission, para. 428 (incorporating by reference Ukraine's first written submission, paras. 280-281).

and thus reduce the occurrence of situations in which right owners can show a "likelihood of confusion" between the registered trademarks and similar or identical signs on similar products; and (ii) the assertion that this factual consequence of the TPP measures reduces or eliminates the exclusive rights that the trademark owner is to enjoy under Australia's domestic law pursuant to Article 16.1.

7.1989. With regard to the first part, namely the factual allegation underlying this claim, it is helpful to review the linkage between different forms of trademark usage and the acquisition and maintenance of distinctiveness, and the consequences of reduced distinctiveness for the occurrence of "likelihood of confusion". The "use" of a trademark that is in principle relevant for the acquisition and maintenance of distinctiveness is not limited to use on packaging of a product, but rather extends to a wider range of commercial, advertising, and promotion activities. The TPP measures constrain or prohibit the use of certain registered trademarks as applied to tobacco retail packaging and products, but do not constrain other uses of trademarks, such as advertising and promotion, also relevant for acquiring and maintaining distinctiveness.⁴⁴⁶⁰ While the uses affected by the TPP measures are not normally the sole means of establishing and maintaining distinctiveness through use, in the Australian context, other measures, not at issue in these proceedings, limit or prohibit advertising and promotion of tobacco products. Any assessment of the impact of the regulation of packaging on a reduced likelihood of confusion would need to take place against this factual context.

7.1990. We also note that the connection between distinctiveness and confusion is far from straightforward for any individual trademark and situation. As is noted in a court decision cited by one of the complainants' experts, Professor Dinwoodie⁴⁴⁶¹, "[w]hether the public is likely to confuse two products is a question that is not easily answered".⁴⁴⁶² Professor Dinwoodie further notes that:

Drawing with any precision the scope of rights protected by a particular trade mark is a very difficult task. The metes and bounds of the trade mark depend upon a number of factors. Although courts have sought to objectivize and render somewhat more mechanical the process, it remains the case that the outer boundaries of protection are blurred. This is a pervasive challenge in trade mark law.⁴⁴⁶³

7.1991. We further note that, as described in more detail above,⁴⁴⁶⁴ Article 16.1 provides protection against trademark infringement, i.e. situations in which unauthorized use of "similar or identical signs" on similar or identical products would result in a "likelihood of confusion". The "similarity of signs" is relevant for the comparison between a sign used by unauthorized third parties and the registered trademark. Only if a similar or identical sign is used on goods or services which fulfil the additional criterion of being "similar or identical" to those for which the trademark is registered, does it establish use that falls within the scope of Article 16.1. It is only when such use is of a nature that it "would result in a likelihood of confusion", that infringement is established. While the "similarity of signs", therefore, describes the single dimension of comparison between two signs, the criterion of "likelihood of confusion" is more multi-faceted, depending, in addition, on the "similarity of goods and services" and on the specific nature of the use. The two criteria of "similarity of signs" and of "likelihood of confusion" are therefore not identical. In light of the above, and in the absence of further explanations from the complainants

⁴⁴⁶⁰ See, e.g. WIPO IP Handbook, Full Text, (Exhibit DOM-65), paras. 2.339-2.351.

⁴⁴⁶¹ The Dinwoodie Report, (Exhibit UKR-1), is relied upon by Honduras, the Dominican Republic, and Indonesia. See Honduras's communication to the Panel of 8 July 2015; Dominican Republic's responses to Panel questions following the first substantive meeting, para. 1; and Indonesia's communication to the Panel of 8 July 2015. Cuba has further incorporated by reference all "of the claims, arguments and evidence advanced in their first written submissions by the Dominican Republic, Honduras, Indonesia and Ukraine". See fn 4345 above.

⁴⁴⁶² Dinwoodie Report, (Exhibit UKR-1), para. 74 fn 148 (referring to US Court of Appeals, Bristol-Myers Squibb Co. v. McNeil-P.P.C., Inc., 973 F.2d 1033, 1043 (2d Cir. 1992)).

⁴⁴⁶³ Dinwoodie Report, (Exhibit UKR-1), para. 74. (footnote omitted) See also ibid. para. 76, arguing that "prohibiting the use of a trade mark will thus ensure that a certain group of third party conduct will fall beyond the scope of protection currently guaranteed to that mark under the TRIPS Agreement" while acknowledging that "[g]iven the uncertainty regarding the precise scope of protection afforded to marks, it is impossible to determine in the abstract quite which specific third party uses will now be allowed to encroach upon the mark owner's rights.").

⁴⁴⁶⁴ See paras. 7.1979-7.1980.

in this respect, it is not obvious to us how these two distinct criteria would be affected individually, and we are not convinced that their respective occurrence in the market would necessarily be affected in an identical manner by the prohibition of use of certain tobacco-related trademarks.

7.1992. An assessment of the "likelihood of confusion" in respect of a given trademark in a given situation is therefore a factual assessment that will involve a consideration of the specific circumstances at issue, including the manner in which the potential for confusion arises in the specific market at issue. Multiple factors may be involved in this assessment. Against this background, it is not self-evident how the operation of the TPP measures – which apply in an identical manner to all tobacco products – may affect the likelihood of confusion arising in respect of use of signs similar to the trademarks concerned for identical or similar goods (including those that are, themselves, subject to the requirements of the TPP measures), and how this would be assessed in a given instance.

7.1993. We are therefore not persuaded that the operation of the TPP measures would necessarily have the impact that the complainants allege on the existence of a "likelihood of confusion", or how this would be assessed in relation to a specific trademark. We note, in any event, that we will only need to examine the causality between the TPP measures and this claimed consequence if we find that such a result would indeed lead to a violation of Article 16.1. We will therefore begin our analysis with the second aspect of the argument, i.e. whether reducing the instances in which a trademark owner would be able to prevent the unauthorized use of similar or identical trademarks in the market, because such use is no longer likely to cause a "likelihood of confusion", leads to a violation of Article 16.1. We address the claimants' arguments in that regard in the next three subsections. We will return to the factual allegation underlying the argument only if necessary on the basis of that analysis.

Whether causing the instances in which "likelihood of confusion" may arise to be reduced constitutes a violation of Article 16.1

7.1994. As described above, the complainants argue that when a trademark no longer can distinguish the goods or services with which it is associated, the ability to demonstrate a "likelihood of confusion" caused by use of similar signs on similar goods "drastically diminishes or disappears"⁴⁴⁶⁵. With the loss of the ability to demonstrate "likelihood of confusion", the trademark owner, in turn, loses the ability to exercise its exclusive right to prevent the use of those similar signs on similar goods.⁴⁴⁶⁶ In essence, therefore, the complainants' argument rests on the assumption that trademark infringement with respect to tobacco-related trademarks affected by the TPP measures will occur less frequently and with respect to fewer signs than before, and that this constitutes a reduction of the trademark owner's right in violation of Article 16.1, because it reduces the range of similar signs that the trademark owner can prevent unauthorized third parties from using in the course of trade.

7.1995. Australia argues that Article 16.1 does not require Members to ensure that a "likelihood of confusion" arises in order to enable the trademark owner to prevent uses of similar signs. It argues that there is no positive right to be able to establish a likelihood of confusion under Article 16.1.⁴⁴⁶⁷ Honduras and the Dominican Republic object to this characterization of their arguments.⁴⁴⁶⁸

7.1996. In assessing whether causing the instances in which a likelihood of confusion will arise, i.e. the instances in which an infringement criterion will be fulfilled, to be reduced constitutes a violation of Article 16.1, we first recall⁴⁴⁶⁹ that the first sentence of Article 16.1 formulates an obligation for Members to confer upon owners of registered trademarks the exclusive right to prevent:

- a. all third parties not having the owner's consent;

⁴⁴⁶⁵ Dominican Republic's first written submission, para. 302.

⁴⁴⁶⁶ Dominican Republic's first written submission, para. 302.

⁴⁴⁶⁷ Australia's first written submission, para. 315.

⁴⁴⁶⁸ Honduras's second written submission, para. 259; and Dominican Republic's second written submission, para. 64.

⁴⁴⁶⁹ Paras. 7.1979 and 7.1980.

- b. from using in the course of trade identical or similar signs for goods or services which are identical or similar to those in respect of which the trademark is registered;
- c. where such use would result in a likelihood of confusion.

7.1997. On a plain reading, the first sentence of Article 16.1 obliges Members to provide the owner of a registered trademark with the "exclusive right to prevent" the occurrence of those activities that fall under the criteria subsequently laid out. The first criterion specifies the *actors* who are the object of the right to prevent as "all third parties not having the owner's consent". The second criterion specifies the *activity* of those actors that is the object of the right to prevent, as "using in the course of trade identical or similar signs for goods or services which are identical or similar to those in respect of which the trademark is registered". The third criterion specifies that the "right to prevent" extends to the specified activity by the identified actors only "where such use would result in a likelihood of confusion".

7.1998. It is clear from the structure of the text that these criteria are *cumulative*, and thus all need to be fulfilled to establish the factual circumstances in which the right owner must have the exclusive right to "stop" or "hinder". If one of these criteria is not fulfilled, the situation falls outside the scope of the "right to prevent" required by Article 16.1 and need not constitute an infringement of the registered trademark under a Member's TRIPS obligations. For instance, the right required under Article 16.1 does not extend to preventing use outside the course of trade, use on goods or services that are not similar, or use that would not result in a likelihood of confusion.

7.1999. In sum⁴⁴⁷⁰, Members comply with the obligation under Article 16.1 if their domestic legislation provides owners of registered trademarks with the exclusive right to prevent the activities by third parties that fall under these criteria. The exercise of this private right depends, in practice, on an assessment of the nature of the marketplace at the relevant time to determine whether the relevant factual circumstances exist, especially in assessing the likelihood of confusion. However, the obligation on Members to provide this right under their legal systems should be distinguished from the scope of activities undertaken by commercial actors in their domestic markets. The object of the obligation in Article 16.1 is to permit right holders to protect themselves against certain actions by third parties in the course of trade, *if* a likelihood of confusion would arise from such actions. As described above, and as correctly described by Honduras, this right arises "whenever a third-party without authorization uses the trademark on similar or identical goods and, as a result of such use, a "likelihood" of confusion between different goods or services exists".⁴⁴⁷¹ If, as the complainants' claim, the TPP measures result in situations where such 'likelihood of confusion' no longer occurs with respect to certain tobacco-related trademarks, then the circumstances foreseen in Article 16.1, and against which Members must provide protection under this provision, have not arisen.

7.2000. There is nothing in the text of the first sentence of Article 16.1 to suggest – as the complainants imply – an obligation by Members not only to provide protection where likelihood of confusion does arise but also to maintain market conditions that would enable the circumstances set out in this provision, including a likelihood of confusion, to actually occur in any particular situation. Rather, Members must ensure that in the event that these circumstances *do* arise, a right to prevent such use is provided. Members can thus comply with this obligation regardless of whether any infringement activities actually occur in the market, or whether and when right owners actually choose to exercise this exclusive and private⁴⁴⁷² right that is at their disposal. In other words, whether unauthorized third parties actually use similar or identical signs on similar goods or services in the market, and whether such use actually does or does not result in a "likelihood of confusion" among consumers, is immaterial to the assessment of whether a Member ensures that a trademark owner has at its disposal the right to prevent such acts by third parties, in compliance with Article 16.1.

⁴⁴⁷⁰ As observed in para. 7.1980 above.

⁴⁴⁷¹ Honduras's first written submission, para. 159. See also Honduras's response to Panel question No. 168 (referring to "likelihood of confusion" as "a legal construct for determining the scope of protection to be afforded to trademark owners" and pointing out that "actual confusion" is not the test).

⁴⁴⁷² The preamble of the TRIPS Agreement recognizes "that intellectual property rights are private rights". See also para. 7.1897 above.

7.2001. In light of this understanding, we are not persuaded that causing the instances in which a "likelihood of confusion" may arise to be reduced constitutes a violation of the trademark owner's right to prevent such infringements by third parties, as mandated by the text of Article 16.1, first sentence. This understanding is consistent with the purpose of the exclusive rights conferred by Article 16.1, which is to protect the right owner against infringements⁴⁴⁷³ of its registered trademarks.

7.2002. To conclude otherwise would effectively broaden the scope of Article 16.1 to encompass an additional right to protect against reduction of distinctiveness of a trademark, or even a right to protect against lesser awareness of a trademark among consumers. For the reasons discussed below, we are not persuaded that Article 16.1 gives rise to such rights.

Whether the TPP measures violate Article 16.1 by impairing the distinctiveness of tobacco-related registered trademarks

7.2003. The Dominican Republic, Cuba, by reference, and Indonesia further argue that, because of the importance of distinctiveness for the strength of a trademark and its successful enforcement in the market⁴⁴⁷⁴, Article 16.1 protects a trademark owner's ability to develop and maintain⁴⁴⁷⁵ the distinctiveness of a trademark by means additional to third-party infringement actions. Specifically, the Dominican Republic, Cuba, by reference, and Indonesia claim that Article 16.1 contains a general obligation for Members to refrain from adopting measures that would undermine or eliminate the distinctiveness of trademarks and thus impair or eliminate the possibility to exercise the right to exclude guaranteed under Article 16.1.⁴⁴⁷⁶ In support of this argument, the Dominican Republic and Indonesia reference⁴⁴⁷⁷ a finding of the panel in *EC – Trademarks and Geographical Indications (Australia)*:

The function of trademarks can be understood by reference to Article 15.1 as distinguishing goods and services of undertakings in the course of trade. Every trademark owner has a legitimate interest in preserving the distinctiveness, or capacity to distinguish, of its trademark so that it can perform that function. This includes its interest in using its own trademark in connection with the relevant goods and services of its own and authorized undertakings.⁴⁴⁷⁸

7.2004. Australia responds that "the only 'rights conferred' with respect to trademark owners are the negative rights of exclusion provided in Article 16, which protect the position of trademark owners in relation to other traders in the market", and adds that "these negative rights do not delimit the public regulatory relationship between owners of trademarks and sovereign governments".⁴⁴⁷⁹ Australia further argues that "legitimate interests" of trademark owners cannot be raised to the level of the "rights conferred by a trademark".⁴⁴⁸⁰

7.2005. We recall our finding above that Article 16.1 does not contain a right to use a trademark, and that Members comply with the obligation in Article 16.1, first sentence, by providing to the owner of a registered trademark the exclusive right to prevent trademark infringements as

⁴⁴⁷³ Appellate Body Report, *US – Section 211 Appropriations Act*, para. 186.

⁴⁴⁷⁴ Dominican Republic's first written submission, para. 311 (quoting Dinwoodie Report, (Exhibit UKR-1), para. 61); Cuba's first written submission, para. 428 (incorporating Ukraine's first written submission, para. 226, quoting Dinwoodie Report, (Exhibit UKR-1), paras. 55 and 57-58). See also Dominican Republic's first written submission, para. 310 (outlining the mechanism by which, it claims, the reduction of distinctiveness through lack of use under the TPP measures causes "the destruction of rights accorded by Article 16.1 of the TRIPS Agreement").

⁴⁴⁷⁵ Dominican Republic's response to Panel question No. 94, para. 47; Cuba's first written submission, para. 428 (incorporating by reference Ukraine's first written submission, para. 223); and Indonesia's first written submission, para. 213.

⁴⁴⁷⁶ Dominican Republic's response to Panel question No. 94, para. 48; second written submission, para. 65; Cuba's second written submission, para. 414 (incorporating by reference the arguments made by the Dominican Republic in its second written submission with respect to the claim under Article 16.1); and Indonesia's second written submission, para. 91.

⁴⁴⁷⁷ Dominican Republic's first written submission, para. 301; and Indonesia's first written submission, para. 222. See also Honduras's first written submission, para. 241.

⁴⁴⁷⁸ Panel Report, *EC – Trademarks and Geographical Indications (Australia)*, para. 7.664.

⁴⁴⁷⁹ Australia's first written submission, para. 228.

⁴⁴⁸⁰ Australia's response to Panel question No. 99, para. 42. (footnote omitted)

described by the criteria set out therein. We further recall that compliance with this obligation is independent of whether trademark infringements actually occur in the market, or whether the right owners actually choose to exercise the right to prevent available to them. Against this background, we find no indication in the text of Article 16.1, first sentence, of an obligation on Members to maintain the distinctiveness of registered trademarks, or to refrain from regulatory conduct that might negatively affect the distinctiveness of such trademarks through use. If it is the case that a trademark's distinctiveness is diminished, as a factual matter, this could mean that actionable confusion is less likely to occur. If it occurs, however, Article 16.1 rights are available, and the obligation upon Members under that provision is to make those rights available.

7.2006. This assessment is not inconsistent with the finding by the panel in *EC – Trademarks and Geographical Indications (Australia)*, that the owner's legitimate interest in preserving the distinctiveness of its trademark includes the interest in using the trademark in connection with the relevant goods and services of its own or authorized undertakings. We recall that the panel made that finding in the context of Article 17 when examining what constitutes "legitimate interests" that need to be taken into account to justify a limited exception under that provision. In that regard the panel clarified that:

Given that Article 17 creates an exception to the rights conferred by a trademark, the "legitimate interests" of the trademark owner must be something different from full enjoyment of those legal rights.⁴⁴⁸¹

7.2007. The panel found further support for its finding that "legitimate interests" are different from the enjoyment of legal rights from the text of Article 17:

This is confirmed by the use of the verb "take account of", which is less than "protect".⁴⁴⁸²

7.2008. In light of the above, we understand the finding of the panel in *EC – Trademarks and Geographical Indications (Australia)* cited by the Dominican Republic and Indonesia⁴⁴⁸³ as simply confirming that the trademark owner's interest in preserving the distinctiveness of its trademark includes its interest in using its trademark in relation to the relevant goods or services, and that these interests need to be taken into account – not *protected* as a *right* – when considering whether an exception in a Member's domestic law to the exclusive *right to prevent* conferred by Article 16.1 meets the criteria for permissible exceptions as contained in Article 17. The panel did not, as Indonesia claims, "observe[] [that] use of a trademark is necessary for the preservation of its distinctiveness".⁴⁴⁸⁴ In any event, such an observation would not establish a positive right to use that could in turn shape an expansive reading of Article 16.1. The panel's finding in *EC – Trademarks and Geographical Indications (Australia)*, therefore, does not support the Dominican Republic, Cuba, by reference, and Indonesia's argument that the trademark owner's interest in preserving the distinctiveness of a registered trademark, and its interest in using the trademark to that end, creates a general obligation under Article 16.1 for Members to refrain from adopting measures that would undermine or eliminate the distinctiveness of trademarks.

7.2009. The above assessment is further consistent with the context of Article 16 as provided by the other provisions in Part II, Section 2 of the TRIPS Agreement and, in particular, the relevance of the distinctiveness of signs in these obligations for Members. As we have elaborated in detail in section 7.3.2.3.1 above, Article 15 formulates Members' obligations with respect to the registration of trademarks.⁴⁴⁸⁵ However, the obligation in Article 15.1 to consider distinctive signs as

⁴⁴⁸¹ Panel Report, *EC – Trademarks and Geographical Indications (Australia)*, para. 7.662.

⁴⁴⁸² Panel Report, *EC – Trademarks and Geographical Indications (Australia)*, para. 7.662.

⁴⁴⁸³ Dominican Republic's first written submission, para. 301; and Indonesia's first written submission, para. 222.

⁴⁴⁸⁴ Indonesia's second written submission, para. 90. See also Dominican Republic's first written submission, para. 301; and Indonesia's first written submission, para. 222.

⁴⁴⁸⁵ We recall that Article 15.1, first sentence, provides a definition of what must be capable of constituting a trademark by setting out the condition that signs must meet the "distinctiveness" requirement, i.e. the requirement that the signs or combinations of signs at issue be capable of distinguishing the relevant goods or services. By permitting Members to make registrability dependent on distinctiveness *acquired by use*, the text of Article 15.1, third sentence, points out a *particular manner* in which the condition for constituting a

registerable does not imply that Members have the responsibility to permit non-distinctive signs to acquire or maintain distinctiveness, or create a "right to distinctiveness" for trademark owners. It is the responsibility of applicants to choose, or – if permitted⁴⁴⁸⁶ – to develop through use, signs that fulfil the condition of distinctiveness in the context of variable market conditions, in order to trigger Members' obligation to consider them for registration as trademarks under Article 15.1. We further recall our finding in that context that, outside the scope of express obligations set out in the TRIPS Agreement, the Agreement does not in our view oblige Members to ensure that private parties are in a position to fulfil the criteria under Article 15.1, or to refrain from regulations otherwise not inconsistent with the covered agreements that may affect relevant market conditions.⁴⁴⁸⁷

7.2010. The same considerations apply to our assessment of Article 16.1. A registered trademark is likely to *be* distinctive in the relevant jurisdiction, as distinctiveness is a condition for registration under Article 15.1. The decision to register a trademark is generally based on a finding under domestic law that it was (or has become) distinctive in that jurisdiction at the time of that determination. As the text of Article 16.1 refers only to "owners of the registered trademark", rights under that provision become available upon registration. It is thus clear that Article 16.1 does not relate to the acquisition of distinctiveness through use as a prerequisite for registration. As concerns registered trademarks, Article 16.1 itself does not mention distinctiveness, but identifies "likelihood of confusion" as one of the infringement criteria. As under Article 15, a Member's obligation under Article 16.1 is to provide a right for the trademark owner to prevent situations that fulfil the infringement criteria. Article 16.1 does not make Members responsible for the conditions in which those infringement criteria, such as a "likelihood of confusion", can be fulfilled, let alone obligated to refrain from regulatory conduct that might impair a trademark owner's ability to maintain the distinctiveness of a sign in order to satisfy the "likelihood of confusion" criteria.

7.2011. The focus of the trademark owner's right conferred by Article 16.1 is on preventing use by third parties that results in a "likelihood of confusion" in the market. Its formulation reflects the purpose of Article 16, which is to enable action against actual infringements by third parties where the factual criteria of Article 16.1, first sentence, are fulfilled in a given market situation. Article 16.1 can therefore protect the source-identifying function of a registered trademark against specific infringing actions by third parties. It is not intended to protect that function against waning distinctiveness due to other reasons, such as changing market conditions, inaction of the right owner, or changing consumer perception. The trademark owner's commercial interest in a market situation in which its registered trademark can be successfully used to stop as many signs as possible from being used on similar or identical goods or services, and the corresponding interest in using its trademark, including for the purpose of maintaining or further strengthening its distinctiveness, is not a *right* under Article 16.1. It is, however, recognized by the TRIPS Agreement as a *legitimate interest* that needs to be taken into account in considering the permissibility of domestic exceptions to the exclusive rights under Article 17. In Section 7.3.5 below we will also consider its relevance for assessing whether the use of a trademark in the course of trade is unjustifiably encumbered by special requirements within the meaning of Article 20.

7.2012. We note that the distinctiveness of registered trademarks, and thus the instances in which a "likelihood of confusion" with similar signs may occur in the market, may legitimately vary according to a variety of factors. In that regard, one of the complainants' experts, Professor Dinwoodie⁴⁴⁸⁸, points out that:

The scope of protection afforded a mark does not have to be static. Clearly, because it is anticipated that the distinctiveness of marks may vary over time as a result of legitimate social and market conditions, the scope of protection will inevitably vary. Likewise, a mark may lose its distinctiveness or its well-known status as a result of

trademark, namely complying with the distinctiveness criterion defined in the first sentence of Article 15.1, may be fulfilled. See para. 7.1886 above.

⁴⁴⁸⁶ "Where signs are not inherently capable of distinguishing the relevant goods or services, Members may make registrability depend on distinctiveness acquired through use." Article 15.1, third sentence.

⁴⁴⁸⁷ See para. 7.1897 above.

⁴⁴⁸⁸ For an explanation of how the complainants rely on this expert report, originally submitted by Ukraine, see fn 4461 above.

changing marketplace understandings. The TRIPS Agreement should not be read to preclude any of these evolutions.⁴⁴⁸⁹

7.2013. Indonesia has stated that it is not the obligation of a Member to preserve or strengthen the mark, but the "sole responsibility" of the trademark owner to exercise his "general market freedom" to strengthen and maintain the mark through use in the marketplace.⁴⁴⁹⁰ In our view, this responsibility also includes exercising Article 16.1 rights by taking prompt action against potentially infringing use of identical or similar marks for similar goods, which is the most direct means of defending a trademark against loss of distinctiveness against competitors' rivalrous use of signs. The complainants also accept that Members can legitimately take a variety of regulatory actions that have an "incidental" or "indirect" impact on the use of a trademark, such as product bans or advertising bans.⁴⁴⁹¹ However, the Dominican Republic, Cuba, by reference, and Indonesia argue that, with respect to measures *specifically aimed at* regulating trademarks, Members are under an obligation by virtue of Article 16.1 not to impair or eliminate the right owner's ability to "exercise the right" to exclude by reducing the distinctiveness of trademarks.⁴⁴⁹²

7.2014. We recall our above finding that a reduction in the occurrence of infringement through reduced distinctiveness would not constitute a reduction in the right to prevent such infringements required under Article 16.1. We further recall our assessment that Article 16.1 does not imply that Members have a general obligation not to undermine the distinctiveness of registered trademarks through regulatory measures. Against that background, we also find no support for a distinction in the TRIPS Agreement between regulatory measures that affect trademarks incidentally, that would be permitted, and those that do so directly, and would therefore be subject to a stricter test.

7.2015. We note in that regard that the passage from the panel report in *EC – Trademarks and Geographical Indications (Australia)* cited by the Dominican Republic in support of such a distinction does not corroborate the claimed "shared view" that "the use of intellectual property rights may be incidentally burdened by legitimate regulatory measures which 'lie outside the scope of intellectual property rights'".⁴⁴⁹³ Rather, the cited passage states that, because the TRIPS Agreement "provides for the grant of negative rights to prevent certain acts" rather than "positive rights to exploit or use", "many measures to attain ... public policy objectives lie outside

⁴⁴⁸⁹ Dinwoodie Report, (Exhibit UKR-1), para. 117. Professor Dinwoodie adds that "these are different propositions than the one being considered in this Report and in *Australia-Plain Packaging*. Here, the scope of certain trademark rights will contract, and well-known mark status be lost, not because of the operation of the market but because of national legislation seeking to effect those results." *Ibid.*

⁴⁴⁹⁰ Indonesia's second written submission, para. 91; and response to Panel question No. 95, para. 19.

⁴⁴⁹¹ Honduras's responses to Panel question Nos. 38, 40, 95, and 172; Dominican Republic's responses to Panel question Nos. 95, 96, 172, paras. 51, 59 and 197-198 respectively; Cuba's first written submission, para. 428 (incorporating Ukraine's first written submission, para. 259); Cuba's responses to Panel question Nos. 95 and 172; Indonesia's responses to Panel question Nos. 95, 172, paras. 21 and 35-36 respectively.

⁴⁴⁹² The complainants use variations of this formulation: "That is the obligation that Members violate if through their actions or omissions they fail to ensure that trademark owners can assert their rights as is the case for Australia as a result of the plain packaging measures." (Honduras's second written submission, para. 258); "[H]owever, there is an obligation to refrain from engaging in regulatory conduct that *undermines* or *eliminates* the distinctiveness essential to exercise of the right to exclude" (Dominican Republic's response to Panel question No. 94, para. 48 (emphasis original)); "However, Article 16.1 obligates Members to refrain from taking regulatory action that impairs the ability of trademark owners to exercise their right to prevent the use of similar or identical signs on similar or identical goods or services that are likely to result in confusion." (Indonesia's second written submission, para. 91); and "However, the total prohibition on the possibility to use the trademark as a mark on the product to which it is to be applied and which is lawfully available eliminates the possibility of exercising the private rights conferred by Article 16 and necessarily reduces the level of protection below the minimum guaranteed level." (Cuba's first written submission, para. 428 (incorporating Ukraine's first written submission, para. 259)).

⁴⁴⁹³ Dominican Republic's response to Panel question No. 96, para. 59 and fn 62, referring to *EC – Trademarks and Geographical Indications (Australia)*, para. 7.246:

These principles reflect the fact that the agreement does not generally provide for the grant of positive rights to exploit or use certain subject matter, but rather provides for the grant of negative rights to prevent certain acts. This fundamental feature of intellectual property protection inherently grants Members freedom to pursue legitimate public policy objectives since many measures to attain those public policy objectives lie outside the scope of intellectual property rights and do not require an exception under the TRIPS Agreement.

the scope of intellectual property rights and do not require an exception under the TRIPS Agreement".⁴⁴⁹⁴ This confirms our view that, in the absence of a positive right to use a trademark, regulatory measures that do not affect the negative right to prevent infringing uses are not prohibited by Article 16. Conversely, measures that *do* constrain the right to prevent provided in Article 16.1 *do violate* the Agreement – whether they do so incidentally or directly. However, the negative Article 16.1 right to prevent infringing uses does not extend to an entitlement to maintain or extend the distinctiveness of an individual trademark, which inevitably fluctuates according to market conditions and the impact of regulatory measures on those market conditions.

7.2016. This view is further confirmed by the context of Article 16.1. Article 19 expressly contemplates government measures that can constitute an obstacle to trademark use⁴⁴⁹⁵, and Article 20 permits certain encumbrances on trademark use by special requirements.⁴⁴⁹⁶ Neither of these provisions distinguishes between measures that affect trademark use incidentally or directly. In light of the above, we disagree with the claim that Article 16.1 contains a general obligation on Members to refrain from regulatory measures that can negatively affect distinctiveness of individual registered trademarks, whether such measures affect trademarks incidentally or directly.

7.2017. In light of our earlier findings we do not agree with the Dominican Republic that Australia is "evad[ing] [its] obligation" under Article 16.1.⁴⁴⁹⁷

7.2018. Since the TPP measures have not been found to be in violation of Article 16.1, the question raised by Honduras and Indonesia⁴⁴⁹⁸ of whether they are permissible as "limited exceptions" under Article 17 does not arise.

Whether Article 16.1 obliges Members to provide a minimum opportunity to use trademarks

7.2019. Cuba, by reference, further argues that, since *maintaining distinctiveness* is the rationale for the minimum rights conferred by Article 16,⁴⁴⁹⁹ the principle of effective treaty interpretation requires that Members must provide a minimum opportunity to use trademarks as otherwise the minimum rights required by Article 16.1 are not guaranteed.⁴⁵⁰⁰ It argues that "the principle of

⁴⁴⁹⁴ Panel Report, *EC – Trademarks and Geographical Indications (Australia)*, para. 7.246.

⁴⁴⁹⁵ Article 19.1 provides:

If use is required to maintain a registration, the registration may be cancelled only after an uninterrupted period of at least three years of non-use, unless valid reasons based on the existence of obstacles to such use are shown by the trademark owner. Circumstances arising independently of the will of the owner of the trademark which constitute an obstacle to the use of the trademark, such as import restrictions on or other government requirements for goods or services protected by the trademark, shall be recognized as valid reasons for non-use.

⁴⁴⁹⁶ Article 20, first sentence, provides:

The use of a trademark in the course of trade shall not be unjustifiably encumbered by special requirements, such as use with another trademark, use in a special form or use in a manner detrimental to its capability to distinguish the goods or services of one undertaking from those of other undertakings.

⁴⁴⁹⁷ Dominican Republic's second written submission, para. 71 (referring to Panel Report, *Mexico – Telecoms*, paras. 7.241-7.2444. (The Panel understands that, while citing the Panel Report in *Mexico – Telecoms*, the Dominican Republic was referring to paras. 7.241-7.244)).

⁴⁴⁹⁸ Honduras's first written submission, para. 252; and Indonesia's second written submission, para. 72.

⁴⁴⁹⁹ Cuba's first written submission, para. 428 (incorporating Ukraine's first written submission, para. 223). (emphasis added)

⁴⁵⁰⁰ Cuba's first written submission, para. 428 (incorporating Ukraine's first written submission, paras. 259 and 274). While only Cuba expressly invokes the principle of effective treaty interpretation, other complainants make similar arguments when highlighting the importance of use for the distinctiveness of registered trademarks. Honduras's first written submission, para. 239 ("Moreover, [...] the loss of distinctiveness (*inter alia*, because of non-use of the original tobacco-related trademark) will eventually diminish the scope of protection and turn the original trademark into a mere paper right, without any commercial value."); Dominican Republic's first written submission, para. 303 ("By severely restricting the use of registered trademarks, the [T]PP measures create a class of trademarks in Australia that, over time, is emptied of all substantive rights, including the rights guaranteed by Article 16.1 to prevent others from using similar signs on similar goods or services. Rather, these registered trademarks are simply empty shells

effective treaty interpretation ('*effet utile*') supports the conclusion that the rights conferred are not respected when the very substance of the right (i.e. distinguishing products) is impaired, such as when normal usage is no longer possible".⁴⁵⁰¹

7.2020. Australia argues that "the 'very substance' of the right in Article 16.1 is to provide that trademark owners can prevent the unauthorised use in the course of trade of similar or identical signs where such use would result in a likelihood of confusion"⁴⁵⁰² and that the TPP measures "operate[] to ensure that the protections accorded under the Trade Marks Act to owners of registered trademarks, including the right to prevent infringement, are completely preserved".⁴⁵⁰³ It adds that, "even if some trademark owners may, *as a matter of fact*, exercise their rights of exclusion more often than other trademark owners, this does not mean that the *legal* effect of Article 16 of the TRIPS Agreement is rendered 'redundant'. The fact that there may be fewer opportunities for confusion as a result of the tobacco plain packaging measure does not render the rights under Article 16 *inutile*".⁴⁵⁰⁴

7.2021. We note that Cuba does not offer, or refer to, more details as to what in its understanding is required by the principle of effective treaty interpretation. Australia refers to the Appellate Body Report in *Canada – Dairy*.⁴⁵⁰⁵

7.2022. The principle of effective treaty interpretation or *effet utile*, which has been applied in WTO dispute settlement rulings in a number of cases, guides the treaty interpreter to give a *legally operative* meaning to all applicable provisions harmoniously⁴⁵⁰⁶, in a manner that does not reduce whole clauses or paragraphs of a treaty to redundancy or inutility.⁴⁵⁰⁷

7.2023. In assessing this argument, we first note that the provisions of the TRIPS Agreement set out minimum standards⁴⁵⁰⁸ for the protection of trademarks and other IP rights, to which Members are obliged to give effect. Article 16 forms part of the seven articles contained in Section 2 of Part II of the TRIPS Agreement entitled "Trademarks", which – together with the relevant provisions of the Paris Convention (1967), as incorporated by Article 2.1 – govern Members obligations concerning trademarks.

7.2024. As set out above, Article 16.1 contains an obligation for Members to provide the owners of registered trademarks with the exclusive right to prevent use of identical or similar signs on identical or similar goods or services by unauthorized third parties, where such use would result in a likelihood of confusion.⁴⁵⁰⁹ We have further established that, while registered trademarks are likely to be distinctive – since the trademark registrar would normally have deemed that they are either inherently distinctive or have acquired distinctiveness through use in the relevant jurisdiction at the time of registration⁴⁵¹⁰ – Article 16.1 itself does not refer to distinctiveness, but merely sets out the factual criteria that constitute trademark infringement, which the trademark owner must have the right to prevent.⁴⁵¹¹ We have further noted that Members compliance with

denuded of the functional attributes of trademarks."); and Indonesia's first written submission, para. 204 ("In the absence of affirmative use of a trademark by its owner (or parties that have the owner's consent), the right to prevent third-party use that would result in a likelihood of confusion is meaningless.").

⁴⁵⁰¹ Cuba's first written submission, para. 428 (incorporating Ukraine's first written submission, para. 259).

⁴⁵⁰² Australia's response to Panel question No. 37, para. 101.

⁴⁵⁰³ Australia's first written submission, para. 318. (footnote omitted)

⁴⁵⁰⁴ Australia's response to Panel question No. 37, para. 103. (emphasis original)

⁴⁵⁰⁵ Australia's response to Panel question No. 37, para. 99.

⁴⁵⁰⁶ Appellate Body Report, *Argentina – Footwear (EC)*, para. 81.

⁴⁵⁰⁷ Appellate Body Report, *US – Gasoline*, p. 23, DSR 1996:I, 3, p. 21. See also Appellate Body Report, *Canada – Dairy*, para. 133.

⁴⁵⁰⁸ Article 1.1, first and second sentence, provides that "Members shall give effect to the provisions of this Agreement. Members may, but shall not be obliged to, implement in their law more extensive protection than is required by this Agreement, provided that such protection does not contravene the provisions of this Agreement."

⁴⁵⁰⁹ See para. 7.1978 above.

⁴⁵¹⁰ See section 7.3.2.3.2.1 relating the claims under Article 15.4.

⁴⁵¹¹ See para. 7.2010 above.

this obligation is independent of whether trademark infringement actually occurs in the market, or whether or when the right owners actually choose to exercise this right available to them.⁴⁵¹²

7.2025. While the TRIPS Agreement recognizes the right owner's legitimate interest in using the registered trademark⁴⁵¹³ we note that the legal operation of the "right to prevent" in Article 16.1 does not *per se* require use of the registered trademark itself. Article 16.1, second sentence, facilitates the application of this right – independently of use to buttress the distinctiveness of the registered mark – by establishing a presumption of likelihood of confusion in cases of so-called double identity, i.e. the use of identical signs on identical goods or services. Other TRIPS provisions permit Members to require use of the registered trademark as a condition of maintaining registration⁴⁵¹⁴, but this is not an obligation, and the requirement is conditioned on permitting a certain period of non-use before cancellation.⁴⁵¹⁵ This means that, even where Members have chosen to require use to maintain trademark registration, the rights under Article 16.1 must be available in the absence of use for a certain period of time. Article 19.1 further recognizes that Members cannot cancel trademark registrations on the grounds of non-use beyond this period if there are "valid reasons based on the existence of obstacles to such use".⁴⁵¹⁶

7.2026. The above assessment indicates, in our view, that while use of the registered trademark may be the typical scenario anticipated by the TRIPS provisions, an absence of such use does not render the right to exclude provided by Article 16.1 "legally inoperative" or redundant. As described above, the purpose of Article 16.1 is to provide the essential means for owners of registered – and thus already distinctive – trademarks to prevent infringement by unauthorized third parties.⁴⁵¹⁷ While preventing such infringements may also help defend the distinctiveness of the registered trademark, we do not agree with Cuba's claim that the right provided in Article 16.1 has as its "very substance" a general responsibility to maintain distinctiveness of the trademark.⁴⁵¹⁸ Considering that trademark distinctiveness varies according to a variety of market factors⁴⁵¹⁹ – including those beyond the control of Members' governments or trademark owners – it is not plausible to assume that Members would have taken on such a general responsibility.

7.2027. Other provisions in Section 2 of Part II address the use of registered trademarks. Among those is Article 19, which expressly contemplates that obstacles to the use of trademarks may arise independently of the will of the trademark owner, including on the basis of government requirements. Article 20 prohibits special requirements that unjustifiably encumber use of a trademark in the course of trade, which – inversely – permits the encumbrance of use of a trademark in certain circumstances.⁴⁵²⁰ We further note that the trademark owners' interest in using its trademark in relation to the relevant goods or services has been recognised as part of its legitimate interest in preserving the distinctiveness of its trademark in the context of Article 17, and which thus needs to be taken into account when assessing the legitimacy of exceptions to the exclusive rights provided by Article 16.1.⁴⁵²¹

7.2028. In adopting the trademark provisions in Section 2 of Part II, Members have therefore committed to providing a minimum right to prevent third-party infringement to owners of signs that comply with the distinctiveness requirement of Article 15.1, and that have not been refused registration by Members on any of the various grounds available to them under Article 15 and the relevant provisions incorporated from the Paris Convention (1967).⁴⁵²² Members have not taken on

⁴⁵¹² See para. 7.2005 above.

⁴⁵¹³ See para. 7.2011 above.

⁴⁵¹⁴ TRIPS Agreement, Article 19.

⁴⁵¹⁵ TRIPS Agreement, Article 19.

⁴⁵¹⁶ Such "valid reasons for non-use" are deemed to include "[c]ircumstances arising independently of the will of the owner of the trademark which constitute an obstacle to the use of the trademark, such as import restrictions on or other government requirements for goods or services protected by the trademark". Article 19.1, second sentence.

⁴⁵¹⁷ Appellate Body Report, *US – Section 211 Appropriations Act*, para. 186.

⁴⁵¹⁸ Cuba's first written submission, para. 428 (incorporating Ukraine's first written submission, para. 259).

⁴⁵¹⁹ See para. 7.2012 above.

⁴⁵²⁰ See section 7.3.5 below on Article 20.

⁴⁵²¹ See para. 7.2008 above.

⁴⁵²² For a detailed assessment of Members' obligations with respect to trademark registration contained in the provisions of the TRIPS Agreement and those incorporated from the Paris Convention (1967), see section 7.3.2.3.1.2 on the claims under Article 15.4.

a general responsibility for safeguarding the distinctiveness of signs, either before or after such signs have been registered as trademarks. The importance of use of a trademark is recognized in the TRIPS Agreement by conditioning measures that encumber such use in the context of Article 20, and by recognizing the right owner's interest in using the trademark to maintain distinctiveness as a factor in determining permissible exceptions in the context of Article 17. At the same time, it is clear that obstacles to trademark use can and do legitimately exist, and that Members retain the authority to encumber the use of trademarks under certain conditions.

7.2029. Adopting an interpretation of Article 16 that would require Members to safeguard a minimum opportunity to use the registered trademark is therefore not only without basis in the text of the provision itself, but would also create disharmony with those provisions of the trademark section that (a) expressly provide for conditions under which use can be encumbered (Article 20); and (b) address the consequences of obstacles to use (Article 19). These provisions clearly foresee potential regulatory prevention of use. Further, to read Article 16 as imposing upon Members limitations on regulations regarding trademark use could potentially render Article 20 itself, which addresses this point directly, *inutile*.

7.2030. In light of the above, we find that the obligation to give a legally operative meaning to all the provisions in Section 2 of Part II of the TRIPS Agreement harmoniously, without reducing any of them to redundancy, as required by the principle of effective treaty interpretation, does not support an interpretation of the minimum rights in Article 16 as requiring Members to provide a minimum opportunity to use a registered trademark.

Conclusion

7.2031. Recalling our findings in paras. 7.2000, 7.2010, and 7.2030 above, we therefore conclude that the possibility of a reduced occurrence of a "likelihood of confusion" in the market does not, in itself, constitute a violation of Article 16.1, because Members' compliance with the obligation to provide the right to prevent trademark infringements under Article 16.1 is independent of whether such infringements actually occur in the market. Article 16.1 does not require Members to refrain from regulatory measures that may affect the ability to maintain distinctiveness of individual trademarks or to provide a "minimum opportunity" to use a trademark to protect such distinctiveness.

7.2032. In light of these findings, and as we have indicated above⁴⁵²³, we see no need to examine further the complainants' factual allegation that the TPP measures' prohibition on the use of certain tobacco-related trademarks will in fact reduce the distinctiveness of such trademarks, and lead to a situation where a "likelihood of confusion" with respect to these trademarks is less likely to arise in the market.

7.3.3.4.3 Whether the TPP measures violate Article 16 because they make non-inherently distinctive signs subject to cancellation procedures

7.2033. Cuba, by reference, argues that the prohibition on use of non-word signs in the TPP measures causes the loss of distinctiveness of registered trademarks that consist of non-inherently distinctive signs that had previously acquired distinctiveness by use. Cuba submits that neither Section 28 of the TPP Act nor the TMA Act resolves this matter⁴⁵²⁴, and that there "is no basis for certain non-inherently distinctive marks like colors or certain shapes to obtain or maintain trademark status, and they will automatically be 'genericized'".⁴⁵²⁵ Because such trademarks can be invalidated for lack of distinctiveness, and thus owners of trademarks that were previously protected and used could lose the minimum level of protection guaranteed by Article 16, the TPP measures, according to Cuba, violate Article 16.⁴⁵²⁶

⁴⁵²³ See para. 7.1993 above.

⁴⁵²⁴ Cuba's first written submission, para. 428 (incorporating Ukraine's first written submission, paras. 289-291).

⁴⁵²⁵ Cuba's first written submission, para. 428 (incorporating Ukraine's first written submission, para. 288).

⁴⁵²⁶ Cuba's first written submission, para. 428 (incorporating Ukraine's first written submission, paras. 285 and 292-293). See para. 7.1940 above for a more detailed summary of Cuba's arguments. The

7.2034. Australia responds that Section 28 of the TPP Act provides that the operation of the TPP Act does not prevent the registration of a trademark or the maintenance of registration, and that by ensuring that trademarks can be registered and remain on the register, the TPP measures do not have any impact on the ability of owners of registered trademarks to exercise the rights granted under the TM Act to seek relief in the event that a third party uses an identical or similar sign in the course of trade where such use creates a likelihood of confusion.⁴⁵²⁷

7.2035. In assessing this argument, we note that Section 28(3) of the TPP Act sets forth provisions regarding the revocation of registered trademarks under Section 84A(1) of the TM Act. Under these procedures, the Trade Marks Registrar may revoke the registration of a trademark if the trademark should not have been registered, taking account of all the circumstances that existed when the trademark became registered.⁴⁵²⁸ Australia explains that Section 28(3) of the TPP Act ensures that the operation of the TPP Act or "the circumstance that a person is prevented, by or under this Act, from using a trade mark on or in relation to the retail packaging of tobacco products, or on tobacco products"⁴⁵²⁹ does not mean that it is "reasonable or appropriate" to revoke the registration of the trademark.⁴⁵³⁰

7.2036. We further note that Section 28(4) of the TPP Act contains provisions regarding the trademark owners' ability to oppose an application for removal of its registered trademark on the grounds of non-use under Section 100(1)(c) of the TM Act. Australia explains that Section 28(4) ensures that "if there is an application to remove a trademark from the register on the basis of non-use, an opponent to that application is taken to have rebutted the application if the opponent establishes that the registered owner would have used the trademark, but for the operation of the TPP Act".⁴⁵³¹

7.2037. While the above described operation of Section 28 of the TPP Act, in the absence of a specific challenge from the complainants, can be taken to ensure that the operation of the TPP measures does not lead to the cancellation of an existing trademark registration under these two procedures, these arguments, in our view, do not address the claim raised by Cuba. Cuba's claim does not concern revocation of registrations due to reasons *already present at the time of registration*, covered by revocation under Section 84A of the TM Act, or applications for removal of a registration *on the ground of non-use*, to which the procedures in Sections 100(1)(c) of the TM Act are relevant. Rather, Cuba's claim relates to cancellation procedures aiming to cancel registered trademarks because they have lost distinctiveness through the alleged operation of the TPP measures.

7.2038. We recall our findings above that Article 16.1 does not imply a trademark owner's right to maintain or develop distinctiveness of a trademark or constitute a general obligation for Members to refrain from taking regulatory measures that may negatively affect the distinctiveness of trademarks. With regard to the elements of this specific claim by Cuba, we further note that Article 15.5 of the TRIPS Agreement expressly provides that Members "shall provide a reasonable opportunity for petitions to cancel the registration".⁴⁵³²

complainants' arguments on whether the TPP measures violate Article 16.1 because the prohibition on use of certain trademarks reduces their distinctiveness and thus the trademark owner's ability to demonstrate a likelihood of confusion are addressed in section 7.3.3.4.2 above.

⁴⁵²⁷ See para. 7.1960 above for a more detailed summary of Australia's arguments.

⁴⁵²⁸ Section 84A(1) of the TM Act, (Exhibit JE-6), provides:

The Registrar may revoke the registration of a trade mark if he or she is satisfied that: the trade mark should not have been registered, taking account of all the circumstances that existed when the trade mark became registered (whether or not the Registrar knew then of their existence); and *it is reasonable to revoke the registration, taking account of all the circumstances.* (emphasis added)

⁴⁵²⁹ TPP Act, (Exhibits AUS-1, JE-1), Section 28(3)(b).

⁴⁵³⁰ Australia's first written submission, para. 269.

⁴⁵³¹ Australia's first written submission, para. 270.

⁴⁵³² Article 15.5 provides: "Members shall publish each trademark either before it is registered or promptly after it is registered and shall afford a reasonable opportunity for petitions to cancel the registration. In addition, Members may afford an opportunity for the registration of a trademark to be opposed."

7.2039. Cuba has not provided, or referred to, further arguments or details on how, in its view, registered trademarks that may have lost distinctiveness through the operation of the TPP measures it alleges, might be removed from the register under Australian trademark law. We also note that beyond the arguments relating to the claims already disposed of in the previous section, Cuba has also not provided any specific arguments why cancellation – a procedure that must be available under Article 15.5 – of a trademark that may have lost distinctiveness through the application of a measure otherwise not prohibited by the TRIPS Agreement would constitute a violation of Article 16.1.

7.2040. In light of our interpretation of Article 16.1 in the previous sections, we consider that Cuba has not explained how the cancellation of a registered trademark that consists of non-inherently distinctive non-word signs and that may have lost distinctiveness due to the application of the TPP measures, constitutes a violation of Article 16.1.

7.3.3.4.4 Whether the TPP measures erode a trademark owner's right to prevent use that is likely to result in confusion by requiring the use of "deceptively similar" marks on identical products

7.2041. Indonesia, and Cuba (by reference), argue that, by standardizing the appearance of tobacco packaging and products, the TPP measures require the use of deceptively "similar marks" on "identical products" while at the same time depriving owners of a remedy, thereby eroding a trademark owner's right under Article 16.1 to prevent use that is likely to result in confusion.⁴⁵³³

7.2042. Indonesia argues that non-word marks like colours, designs and images are essential for the establishment and maintenance of a brand and enhance the distinctiveness of a brand's trademark, especially when all products are similar or identical, as is the case with cigarettes.⁴⁵³⁴ Therefore, Indonesia submits, word marks themselves are, in many cases, insufficient to differentiate one brand from another in the absence of any distinguishing typeface, symbols or colors.⁴⁵³⁵ Since under the TPP measures all word marks must be presented in a prescribed format (typeface, size, colour, etc.), Indonesia argues that owners of registered trademarks relating to tobacco products are legally required by the TPP measures to present their trademarks in a manner that is "deceptively similar" to those of other tobacco brands.⁴⁵³⁶ It adds that, because Australia's TPP measures are mandatory, Australia has left trademark owners with no remedy and has thus deprived trademark owners of the right to exclude uses of similar marks where such uses are likely to cause confusion in direct conflict with its obligation under Article 16.1 of the TRIPS Agreement.⁴⁵³⁷

7.2043. Indonesia concludes that "Australia has violated Article 16.1 of the TRIPS Agreement by undermining the ability of a trademark owner to prevent a 'likelihood of confusion' with nearly identical trademarks. If marks on identical tobacco products are required to appear in a manner that is virtually identical, as is the case under [the TPP measures], it will be significantly more difficult for trademark owners to exercise their rights under Australian law to prevent use that is likely to cause confusion – a right Australia *must* guarantee to trademark owners under Article 16.1."⁴⁵³⁸

7.2044. Australia responds that if the brand and variant names at issue have all been registered, the Registrar has determined that these word trademarks are in fact capable of distinguishing the goods of the trademark applicant from the goods of other undertakings. It submits further that the negative rights of exclusion in accordance with Article 16.1 remain available under the TPP measures, and that the owner of a registered trademark could therefore continue to prevent a

⁴⁵³³ See Cuba's first written submission, para. 428 (incorporating arguments with respect to Article 16.1 made in Indonesia's first written submission); and Cuba's second written submission, para. 414 (incorporating arguments with respect to Article 16.1 made in Indonesia's second written submission).

⁴⁵³⁴ Indonesia's first written submission, para. 216. Indonesia also notes that "studies indicate that 'many smokers are unable to distinguish between similar cigarettes' in the absence of trademarks".

⁴⁵³⁵ Indonesia's first written submission, para. 217.

⁴⁵³⁶ Indonesia's first written submission, paras. 214-215.

⁴⁵³⁷ See Indonesia's second written submission, para. 93. See also paras. 7.1942-7.1945 above for a more detailed summary of Indonesia's arguments under this claim.

⁴⁵³⁸ Indonesia's first written submission, para. 219. (emphasis original)

competitor from using a word on a tobacco product that was identical or similar to an existing registered trademark such as to create a "likelihood of confusion".⁴⁵³⁹

7.2045. Indonesia replies that the mere fact that a trademark is registered does not mean that it can never be used in a manner that might result in a likelihood of confusion with another registered trademark, and thus does not preclude the possibility of later revocation based on confusing use of the trademark.⁴⁵⁴⁰

7.2046. We recall that the TPP measures prohibit the use of trademarks and other marks on tobacco packaging and tobacco products, with the exception of a brand, business, or variant name, which may appear in a prescribed location in a specified size, font, and colour.⁴⁵⁴¹ Design features of trademarks and other signs such as colours, graphic content, fanciful fonts, and symbols are prohibited. Hence virtually all aspects of the presentation and appearance of tobacco products and packaging are determined by the provisions of the TPP Act and TPP Regulations. The area of influence of tobacco companies on the appearance of the tobacco packaging and products is limited to choosing the brand and variant name. The TPP measures apply equally to owners of word trademarks as well as to companies using potentially similar words to identify their products. The TPP measures do not require the brand name and variant which tobacco companies are permitted to choose for appearance on their tobacco packaging to be registered trademarks. The TPP measures therefore do not require competitors to use a particular trademark or require or determine that the brand and variant name that one tobacco company chooses must be similar – or deceptively similar – to those of other tobacco companies. In light of these observations we do not agree with Indonesia's characterization that the TPP measures "require[] the use of deceptively similar marks on identical products".⁴⁵⁴²

7.2047. We further note that while the TPP measures create a situation where the overall appearance of tobacco packaging for tobacco products of the same type (e.g. cigarette packs) will be virtually identical, except for the brand name and variant, this prescribed similarity of appearance of competing products in the market is not the standard on which a "likelihood of confusion" is assessed in the context of trademark infringement under Article 16.1. Rather, Article 16.1 requires that right owners must be able to prevent unauthorized use of signs that are similar or identical to their registered trademarks, where such use creates a "likelihood of confusion". The assessment under Article 16.1 of whether the offending brand name or variant is similar or identical to a word trademark *as it is registered*, and causes a likelihood of confusion, is not in principle affected by the introduction of a requirement that the registered word trademark *itself* can now only be used in the same type face and on identically designed packaging as the offending sign. In other words, the fact that all brand name and variant words on tobacco products have to be used in the same typeface and on identical products does not in itself lead to the conclusion that the words themselves are similar, and that there is a likelihood of confusion between them. Against that background, we are not persuaded by Indonesia's assertions that the TPP measures would necessarily lead to a situation where there is a likelihood of confusion between "nearly identical" trademarks in violation of Article 16.1.⁴⁵⁴³

7.2048. This assessment is not changed by Indonesia's argument that word marks alone, in the absence of distinguishing typefaces, symbols, or colors, are insufficient to differentiate between otherwise identical tobacco products, and that the TPP measures, in standardizing their appearance, undermine the right of a trademark owner, under Article 16.1, to prevent use that is likely to cause confusion.⁴⁵⁴⁴ We note in this regard that the question of whether a word by itself is capable of distinguishing the tobacco products of one undertaking from those of other undertakings is determinative under Article 15.1 of whether this word can by itself be eligible for registration as a trademark for tobacco products and thus enjoy the protection required under Article 16.1.⁴⁵⁴⁵ If words without additional design features are not distinctive for tobacco products, as Indonesia seems to argue, then these signs are not eligible to become registered

⁴⁵³⁹ See para. 7.1959 above for a more detailed summary of Australia's arguments in this regard.

⁴⁵⁴⁰ Indonesia's second written submission, para. 96.

⁴⁵⁴¹ See sections 2.1.2.3.3 and 2.1.2.4 above.

⁴⁵⁴² Indonesia's first written submission, para. 213.

⁴⁵⁴³ See Indonesia's first written submission, para. 219.

⁴⁵⁴⁴ See Indonesia's first written submission, paras. 216-217 and 219.

⁴⁵⁴⁵ For a detailed assessment of the operation of the distinctiveness requirement see section 7.3.2.3.1.1 above relating to the claims under Article 15.4.

trademarks, and Members are therefore under no obligation to provide their owners with the right to prevent unauthorized use of similar or identical signs that causes a likelihood of confusion.

7.2049. We note finally that, while the TPP measures introduce mandatory design features with respect to the appearance of tobacco products and packaging, the right to prevent trademark infringements remains available to owners of registered tobacco trademarks in Australia. This means that the use as brand name or variant of words that are identical or similar to an existing registered trademark in a manner that creates a likelihood of confusion can continue to be prevented by the trademark owner. We therefore disagree that the mandatory nature of the TPP measures has left trademark owners "with no remedy"⁴⁵⁴⁶ and has thus deprived trademark owners of the right to prevent uses of similar marks where such use would result in a likelihood of confusion. Indonesia does not explain how its reference to the possibility of trademark revocation under the TM Act, which it has raised in response to Australia's arguments, is relevant to this assessment.

7.2050. Finally, we recall our observation above⁴⁵⁴⁷ that, in order to demonstrate that the TPP measures violate Australia's obligation under Article 16.1, the complainants would have to demonstrate that, under Australian national law, the trademark owner does not have the right to prevent third-party activities that meet the conditions set out in that provision. In light of the above observations, we consider that Indonesia, and Cuba, by reference, have not made a *prima facie* case that the TPP measures erode a trademark owner's right under Article 16.1 by requiring the use of deceptively similar marks on identical products and at the same time depriving owners of the remedy to prevent uses of similar signs that create a "likelihood of confusion".

7.3.3.4.5 Overall conclusion

7.2051. In light of the above, including our findings in paras. 7.2031, 7.2040 and 7.2050, we conclude that the complainants have not demonstrated that the TPP measures are inconsistent with Australia's obligations under Article 16.1 of the TRIPS Agreement.

7.3.4 Article 16.3 of the TRIPS Agreement

7.3.4.1 Introduction

7.2052. We will now turn to the claims by Cuba and Indonesia under paragraph 3 of Article 16 of the TRIPS Agreement, entitled "Rights Conferred". It reads as follows:

Article 6bis of the Paris Convention (1967) shall apply, *mutatis mutandis*, to goods or services which are not similar to those in respect of which a trademark is registered, provided that use of that trademark in relation to those goods or services would indicate a connection between those goods or services and the owner of the registered trademark and provided that the interests of the owner of the registered trademark are likely to be damaged by such use.

7.2053. Article 6bis of the Paris Convention (1967) reads as follows:

(1) The countries of the Union undertake, ex officio if their legislation so permits, or at the request of an interested party, to refuse or to cancel the registration, and to prohibit the use, of a trademark which constitutes a reproduction, an imitation, or a translation, liable to create confusion, of a mark considered by the competent authority of the country of registration or use to be well known in that country as being already the mark of a person entitled to the benefits of this Convention and used for identical or similar goods. These provisions shall also apply when the essential part of the mark constitutes a reproduction of any such well-known mark or an imitation liable to create confusion therewith.

⁴⁵⁴⁶ Indonesia's second written submission, para. 93. See also ibid. para. 101.

⁴⁵⁴⁷ See para. 7.1980 above.

(2) A period of at least five years from the date of registration shall be allowed for requesting the cancellation of such a mark. The countries of the Union may provide for a period within which the prohibition of use must be requested.

(3) No time limit shall be fixed for requesting the cancellation or the prohibition of the use of marks registered or used in bad faith.

7.2054. Cuba and Indonesia claim that the TPP measures violate Article 16.3 because they prevent existing well-known tobacco trademarks from maintaining their well-known trademark status and because they prevent other registered tobacco trademarks from attaining well-known trademark status through use.

7.2055. Australia responds that it is not obligated under Article 16.3 to grant a right to a trademark owner to use its trademark so that it may maintain or acquire well-known status and asks the Panel to reject these claims in their entirety.

7.3.4.2 Main arguments of the parties

7.2056. Cuba incorporates, by reference, the arguments in respect of Article 16.3 made by Indonesia, Ukraine, and those made by the Dominican Republic as a third party.⁴⁵⁴⁸

7.2057. Cuba argues that the TPP measures violate Article 16.3 in two independent, but related, manners. *First*, the measures remove the ability of tobacco-related trademarks that enjoyed well-known status prior to their imposition to maintain that status and continue to enjoy the rights that must be accorded by Australia pursuant to Article 16.3. *Second*, the TPP measures remove the ability of trademarks to acquire the status of a well-known mark, such that they simply cannot be accorded the protections under Article 16.3.⁴⁵⁴⁹

7.2058. Cuba argues that "use of a trademark is critically important in order to acquire and maintain the status of a well-known trademark."⁴⁵⁵⁰ In support, it cites⁴⁵⁵¹ the Joint Recommendation Concerning Provisions on the Protection of Well-Known Marks adopted by the WIPO General Assembly and the Paris Union Assembly in 1999, which provides that in determining whether a mark is a well-known mark:

[T]he competent authority shall consider information submitted to it with respect to factors from which it may be inferred that the mark is, or is not, well known, including, but not limited to, information concerning the following ... (2) the duration, extent and geographical area of any use of the mark; (3) the duration, extent and geographical area of any promotion of the mark, including advertising or publicity and the presentation, at fairs or exhibitions, of the goods and/or services to which the mark applies; (4) the duration and geographical area of any registrations, and/or any applications for registration, of the mark, to the extent that they reflect use or recognition of the mark.⁴⁵⁵²

7.2059. Therefore, it argues, the ability of a registered trademark to be "well-known", and thereby benefit from the rights that must be accorded pursuant to Article 16.3 of the TRIPS Agreement, is dependent on the use of that trademark. Absence of use can prevent a registered

⁴⁵⁴⁸ See fn 4054 above. Since Indonesia's arguments are summarized below under its own claim, we only summarize here the arguments of the Dominican Republic and Ukraine incorporated by reference by Cuba. See also Dominican Republic's first written submission, para. 316 and second written submission, para. 74.

⁴⁵⁴⁹ Cuba's first written submission, para. 428 (incorporating Dominican Republic's first written submission, para. 315).

⁴⁵⁵⁰ Cuba's first written submission, para. 428 (incorporating Dominican Republic's first written submission, para. 331 (emphasis original)). See also ibid. (incorporating Ukraine's first written submission, para. 305).

⁴⁵⁵¹ Cuba's first written submission, para. 428 (incorporating Dominican Republic's first written submission, para. 325). See also ibid.(incorporating Ukraine's first written submission, para. 305).

⁴⁵⁵² Cuba's first written submission, para. 428 (incorporating Ukraine's first written submission, para. 305, quoting WIPO Joint Recommendation, (Exhibits DOM-78, IDN-76), Article 2 (emphasis added by Ukraine)).

trademark that would have otherwise become "well-known" from achieving that status, and lack of use can result in a well-known mark losing its well-known status.⁴⁵⁵³ It submits that Australia's legislation has made it impossible for trademarks on tobacco products to satisfy the conditions necessary to acquire or maintain protection as well-known trademarks.⁴⁵⁵⁴

7.2060. Cuba explains, by reference, that with respect to the claimed loss of rights for existing well-known tobacco marks, the mechanism works in the following manner:

- (1) Lack of use of the well-known tobacco mark, or use in a special format, leads to a decrease in the knowledge of the trademark in the relevant sector of the public, within the meaning of Article 16.2 of the *TRIPS Agreement* and Section 120(4) of the *Trade Marks Act 1995*;
- (2) With reduced knowledge of the mark, the mark, over time, loses its status as a "well-known" mark under Australian law; and
- (3) With the loss of "well known" status necessarily comes the loss of the protection that must be accorded that status, pursuant to Article 16.3 of the *TRIPS Agreement*, and that had previously been accorded pursuant to Section 120(3) of the *Trade Marks Act 1995*.⁴⁵⁵⁵

7.2061. It argues further that the owner of a well-known trademark will no longer be able to demonstrate that the use of a similar sign on dissimilar goods suggests a "connection" and affects his "interests" as required by Article 16.3, if the public no longer sees the well-known sign on the relevant goods and thus cannot make the connection with the well-known sign.⁴⁵⁵⁶ Similarly, the trademark owner's interest in protecting the reputation of the mark will be impossible to demonstrate if the signs cannot be used and its reputation becomes extinct.⁴⁵⁵⁷

7.2062. Under Article 16.3 of the TRIPS Agreement, Cuba submits, WTO Members committed to protect well-known marks from "dilution" which protects against "gradual whittling away" of the identity of the mark.⁴⁵⁵⁸ Members have a positive obligation under Article 16.3 of the TRIPS Agreement to provide effective protection to trademarks in general and well-known marks in particular.⁴⁵⁵⁹

7.2063. Cuba elaborates, by reference, that with respect to the acquisition of the status of well-known mark, the mechanism works in the following manner:

- (1) Lack of use of the tobacco mark, or use in a special format, prevents knowledge of the trademark in the relevant sector of the public, within the meaning of Article 16.2 of the *TRIPS Agreement* and Section 120(4) of the *Trade Marks Act 1995*;

⁴⁵⁵³ Cuba's first written submission, para. 428 (incorporating Dominican Republic's first written submission, para. 328).

⁴⁵⁵⁴ Cuba's first written submission, para. 428 (incorporating Dominican Republic's first written submission, paras. 337 and 340). Similarly, Cuba argues that "Australia's plain packaging measure makes it impossible to demonstrate the conditions that give rise to the additional protection that Australia is required to guarantee. Thus, Australia violates the guaranteed minimum level of rights conferred on owners of well-known trademarks under Article 16.3 of the TRIPS Agreement." Ibid. (incorporating Ukraine's first written submission, para. 312).

⁴⁵⁵⁵ Cuba's first written submission, para. 428 (incorporating Dominican Republic's first written submission, para. 336 (emphasis original)). Similarly, Cuba argues that "[t]he lack of visibility and use of the once well-known trademark as a result of the plain packaging measure will therefore lead to the loss of the additional scope of protection for well-known marks against use of similar signs on dissimilar goods under Article 16.3 of the TRIPS Agreement." Ibid. (incorporating Ukraine's first written submission, para. 307).

⁴⁵⁵⁶ Cuba's first written submission, para. 428 (incorporating Ukraine's first written submission, para. 309).

⁴⁵⁵⁷ Cuba's first written submission, para. 428 (incorporating Ukraine's first written submission, para. 309).

⁴⁵⁵⁸ Dinwoodie Report, (Exhibit UKR-1), paras. 20-21.

⁴⁵⁵⁹ Cuba's first written submission, para. 428 (incorporating Ukraine's first written submission, para. 310).

- (2) Without adequate knowledge of the mark, the mark cannot acquire status as a "well-known" mark under Australian law; and
- (3) Without the "well known" status, the mark can never secure the protection that must be accorded with that status, pursuant to Article 16.3 of the *TRIPS Agreement* and Section 120(3) of the *Trade Marks Act 1995*.⁴⁵⁶⁰

7.2064. Cuba concludes, by reference, that the severe restrictions on use of registered trademarks imposed by Australia's TPP measures result in a violation of Australia's obligations under Article 16.3, because they (i) remove the "negative rights" previously accorded to marks that achieved well-known status prior to their imposition and (ii) render it impossible for any other registered trademarks on tobacco products to acquire that status going forward, and to thereby exercise the rights accorded by Article 16.3.⁴⁵⁶¹

7.2065. In response to Australia's argument that the complainants' interpretation would require Members to guarantee the use of trademarks and preclude Members from imposing legitimate regulations, Cuba clarifies, by reference, that it agrees with the characterization of Article 16.3 as conferring negative rights,⁴⁵⁶² and that it "does not argue that limitations on the sale or advertising of harmful products are prohibited by Article 16.3. Rather, [its] position is that a Member may not, through its own conduct, render Article 16.3 meaningless, with respect to trademarks on *legally traded products*, by implementing a measure making it impossible for trademark owners to have recourse to the rights that must be accorded pursuant to that provision."⁴⁵⁶³

7.2066. In response to Australia's argument that Article 16.3 is only concerned with conferring negative rights with respect to well-known marks, and not with the acquisition and maintenance of well-known status, Cuba argues, by reference, that "[b]ecause the protections that must be accorded pursuant to Article 16.3 are premised on the determination that a given trademark is "well-known" within the meaning of Article 16.2 (and Article 6bis of the Paris Convention), Members cannot take measures that would prevent trademarks on legally traded products from becoming (or remaining) well-known. Article 16.3 thus cannot be interpreted in a manner that would grant Members the ability to nullify completely the bargained-for protections for well-known marks. Had the negotiators of the TRIPS Agreement (and the Paris Convention) intended to allow governments to have unfettered discretion to prevent trademarks from becoming (or remaining) well-known, as Australia suggests, there would have been no reason to impose obligations with respect to well-known marks. Under Australia's interpretation, a Member could simply opt out of those obligations by taking measures to ensure that disfavoured marks never acquired or maintained well-known status."⁴⁵⁶⁴ This "would effectively and impermissibly allow this provision to be read out of the TRIPS Agreement, at the whim of individual Members" who would therefore be "free to divest any trademark of its well-known status, as well as prevent any other trademarks from acquiring well-known status, without implicating Article 16.3 whatsoever"⁴⁵⁶⁵

7.2067. Indonesia argues that Australia's TPP measures violate Article 16.3 because (i) they diminish the strength of well-known tobacco trademarks over time, such that they will lose their well-known distinction and special rights of exclusion accorded thereto; and (ii) they prevent

⁴⁵⁶⁰ Cuba's first written submission, para. 428 (incorporating Dominican Republic's first written submission, para. 339 (emphasis original)).

⁴⁵⁶¹ Cuba's second written submission, para. 414 (incorporating Dominican Republic's second written submission, para. 83). See also Cuba's first written submission, para. 428 (incorporating Ukraine's first written submission, para. 331).

⁴⁵⁶² Cuba's second written submission, para. 414 (incorporating Dominican Republic's second written submission, para. 83).

⁴⁵⁶³ Cuba's second written submission, para. 414 (incorporating Dominican Republic's second written submission, para. 85 (emphasis original)).

⁴⁵⁶⁴ Cuba's second written submission, para. 414 (incorporating Dominican Republic's second written submission, para. 87).

⁴⁵⁶⁵ Cuba's second written submission, para. 414 (incorporating Dominican Republic's second written submission, para. 88).

tobacco trademarks from becoming well-known and, therefore, preclude their eligibility for the rights accorded to well-known marks.⁴⁵⁶⁶

7.2068. Indonesia submits that the purpose of Article 16.3 is to preserve the commercial value of a well-known mark in connection with a particular good or service. This is often thought of as protection against dilution of well-known marks (i.e. use of a mark in a manner detrimental to its reputation). Dilution of a well-known mark usually results in "depreciation of the goodwill attached to it, even in cases where there is no likelihood of confusion".⁴⁵⁶⁷

7.2069. Indonesia submits that use is the sole means by which a tobacco mark may become well-known and by which a well-known mark may retain its special rights as a well-known mark (i.e. the ability of mark owners to prevent use that is likely to result in confusion on unrelated goods or services). "Well-known", Indonesia argues, is not a static designation. It requires continuous use over time. When a well-known mark falls into disuse, it is only a matter of time before it ceases to be well-known within the relevant sectors of the public.⁴⁵⁶⁸

7.2070. Against that background, Indonesia argues that "[i]t is common sense that a mark not well-known prior to the implementation of PP will be severely impaired in its ability to achieve well-known status in the absence of use in the Australian market. By preventing the owners of validly registered marks from qualifying for well-known status, PP violates Australia's obligation to extend protection under Article 16.3 of the TRIPS Agreement to tobacco products."⁴⁵⁶⁹

7.2071. Indonesia argues that while the TPP measures require Australia to preserve the registration of well-known marks pursuant to Section 28(3) of the TPP Act, they do not prevent a third party in the future from claiming that a trademark owner has lost the exclusive right to its mark because the mark is no longer well known. As such, plain packaging violates Article 16.3 of the TRIPS Agreement "because it fails to afford trademark owners of well-known marks a private right of action against infringement".⁴⁵⁷⁰

7.2072. Indonesia submits further that Article 27 of the Vienna Convention prevents Australia from using its own law to avoid fulfilling its obligations under the TRIPS Agreement.⁴⁵⁷¹ It argues that with the TPP measures, "Australia's actions have preempted the conditions that give rise to its obligations under Article 16.3. Such actions constitute an impermissible failure to perform its obligations under the TRIPS Agreement that cannot be justified based on Australia's internal laws."⁴⁵⁷²

7.2073. In response to Australia's arguments that Article 16.3 provides for "negative" rights only, Indonesia submits that "[w]hile it is true that the TRIPS Agreement does not expressly provide for a 'positive right of use' or an 'absolute right of use', it does contemplate a minimum opportunity to use a trademark within the bounds of Article 17 and Article 20. Indeed, Australia's own legal regime demonstrates the importance of use in the adjudication of infringement claims despite the

⁴⁵⁶⁶ Indonesia's second written submission, para. 102.

⁴⁵⁶⁷ Indonesia's first written submission, para. 229. (footnote omitted)

⁴⁵⁶⁸ Indonesia's first written submission, para. 237. See also Indonesia's first written submission, para. 228 ("Prior to the implementation of plain packaging, use was the primary means by which tobacco trademarks could become well known as advertising and POSD of tobacco products are banned.").

⁴⁵⁶⁹ Indonesia's first written submission, para. 236.

⁴⁵⁷⁰ Indonesia's first written submission, para. 238.

⁴⁵⁷¹ Indonesia's first written submission, para. 240. In support, Indonesia refers to the Appellate Body findings in *Korea – Alcoholic Beverages*, arguing that:

In that case, Korea argued that the panel erred in assessing potential competition when evaluating "directly competitive or substitutable products" within the meaning of GATT Article III:2. However, the Appellate Body found that, because Korea's actions disturbed the normal conditions of competition, the panel was correct to evaluate both current and potential market conditions. It reasoned that "{i}f reliance could be placed only on current instances of substitution, the object and purpose of Article III:2 could be defeated by the protective taxation that the provision aims to prohibit".

Ibid. para. 241 (referring to Appellate Body Report, *Korea – Alcoholic Beverages*, para. 120).

⁴⁵⁷² Indonesia's first written submission, para. 242.

fact that Australia is not a 'right to use' jurisdiction.⁴⁵⁷³ Indonesia elaborates that "the TRIPS Agreement assumes that the owners of registered trademarks will be able to use those marks in connection with their goods and services in the course of trade subject to Members implementing measures that 'provide *limited* exceptions to the rights conferred by a trademark'.⁴⁵⁷⁴ These limited exceptions, however, must (i) 'take account of the legitimate interest of the owner of the trademark'⁴⁵⁷⁵; and (ii) not create 'unjustifiable' encumbrances in the form of special requirements.⁴⁵⁷⁶ Contrary to Australia's assertions, it is clear that this interpretation would not prevent Members from implementing measures in furtherance of a legitimate public policy objective, 'provided that such measures are consistent with the provisions of {the TRIPS} Agreement'.^{4577"4578}

7.2074. Indonesia concludes that "Australia's [T]PP measures undermine the rights conferred by Article 16.3 of the TRIPS Agreement by ensuring that well-known tobacco trademarks lose their protected status, as defined by Australian jurisprudence, and by preventing other tobacco trademarks from attaining the recognition necessary to achieve the heightened level of protection accorded to well-known marks."⁴⁵⁷⁹

7.2075. Australia argues that as with Article 16.1, the rights conferred under Article 16.3 of the TRIPS Agreement (and Article 6bis of the Paris Convention) are negative rights.⁴⁵⁸⁰ This is clear from the ordinary meaning of the terms in these provisions, interpreted in their context and in light of the object and purpose of the relevant treaties. Article 6bis requires Members (*ex officio* if their legislation so permits, or at the request of an interested party) to "refuse or to cancel the registration and to prohibit the use" of an offending trademark. "The ordinary meaning of these terms ('refuse',⁴⁵⁸¹ 'cancel',⁴⁵⁸² 'prohibit'⁴⁵⁸³) makes clear that these provisions confer a negative right on owners of registered well known trademarks to prevent or stop certain actions."⁴⁵⁸⁴

7.2076. Australia submits that "Article 16.3 does *not* grant a positive right to owners of registered well known trademarks to use their trademarks, or a positive right to use a trademark to the point that it *becomes* well known."⁴⁵⁸⁵ The ability to use a trademark, including to the extent it becomes well known, is a general market freedom – it is not an intellectual property right.⁴⁵⁸⁶ Australia argues that the subject matter protected under Article 16.3 is well-known registered trademarks – not trademarks that may become well known in the future or trademarks that were once well known. Accordingly, in order to establish a *prima facie* case of violation under Article 16.3, the complainants would need to demonstrate that, in relation to *current* registered well-known

⁴⁵⁷³ Indonesia's second written submission, para. 104 (footnotes omitted). See also Indonesia's opening statement at the first meeting of the Panel, para. 44.

⁴⁵⁷⁴ (footnote original) TRIPS Agreement, Article 17 (emphasis supplied).

⁴⁵⁷⁵ (footnote original) TRIPS Agreement, Article 17.

⁴⁵⁷⁶ (footnote original) TRIPS Agreement, Article 20.

⁴⁵⁷⁷ (footnote original) TRIPS Agreement, Article 8.1.

⁴⁵⁷⁸ Indonesia's second written submission, para. 105. (emphasis added by Indonesia)

⁴⁵⁷⁹ Indonesia's second written submission, para. 106.

⁴⁵⁸⁰ See Correa Report, (Exhibit AUS-16), para. 18 ("[A]rticle 16.3 confirms and extends the protection conferred by the Paris Convention against the *use by third parties* of well-known trademarks. This right to exclude can only be transformed into a (positive) right to use enforceable *against the State* by speculative thinking." (emphasis original)).

⁴⁵⁸¹ (footnote original) The dictionary definition of "refuse" is, in relevant part, "decline acceptance or compliance; withhold permission." (*The Shorter Oxford English Dictionary*, 6th ed., L. Brown (ed.) (Oxford University Press, 2007), Vol. 2, Exhibit AUS-245, p. 2509).

⁴⁵⁸² (footnote original) The dictionary definition of "cancel" is, in relevant part, "...revoke an order or arrangements..." (*The Shorter Oxford English Dictionary*, 6th ed., L. Brown (ed.) (Oxford University Press, 2007), Vol.1, Exhibit AUS-243, p. 336).

⁴⁵⁸³ (footnote original) The dictionary definition of "prohibit" is, in relevant part, "[f]orbid (a thing) as by a command...[p]revent or hinder..." (*The Shorter Oxford English Dictionary*, 6th ed., L. Brown (ed.) (Oxford University Press, 2007), Vol. 2, Exhibit AUS-245, p. 2363).

⁴⁵⁸⁴ Australia's first written submission, para. 324. See also Australia's second written submission, para. 34.

⁴⁵⁸⁵ Australia's first written submission, para. 325 (emphasis original). See also Australia's second written submission, paras. 35-36.

⁴⁵⁸⁶ Australia's first written submission, para. 328.

trademarks, the TPP measures prevent Australia from refusing, cancelling, or prohibiting the use of a trademark in the circumstances outlined in Article 6bis of the Paris Convention.⁴⁵⁸⁷

7.2077. Australia argues that the complainants' interpretation of Article 16.3 is not supported by a good faith interpretation of the text and that "requiring Members to guarantee that all trademarks may be used so that they may eventually become 'well known' would impose an impossible burden on Members"⁴⁵⁸⁸ and prevent them from imposing regulations that limit the opportunities to become well known (for example, bans on the use of, or the advertising and promotion of, dangerous products).⁴⁵⁸⁹

7.2078. Australia further argues that nothing in the TPP measures prevent a trademark owner from availing itself of the protections that are afforded to owners of registered well-known trademarks under Article 16.3, and none of the complainants has provided any evidence to the contrary. Although the use of certain appealing signs and trademarks is prohibited under Australia's measure, this is not relevant under Article 16.3. Australia is not obligated under Article 16.3 to grant a right to a trademark owner to use its well-known trademark so that it may maintain its well-known status, nor is it obliged to grant the owner of a trademark the right to use its trademark so that it may become well known.⁴⁵⁹⁰

7.2079. Australia submits that the complainants have failed to establish a *prima facie* case under a proper interpretation of this provision.⁴⁵⁹¹

7.3.4.3 Main arguments by the third parties

7.2080. Argentina argues that "[a]s regards Articles 16.1 and 16.3, [...] as the Appellate Body has pointed out, [...] the rights conferred by those paragraphs are rights of exclusion granted to the owner of the trademark "to prevent third parties from using in the course of trade identical or similar signs", and these rights have less to do with the owner's right to use the trademark than with the right to prevent illegitimate use by someone other than the owner. Argentina recalls that the purposes of trademark registration include preventing a third party either from registering or using them, and it is to these exclusive rights to trademarks that the Articles in question refer."⁴⁵⁹² It submits that "for the purposes of determining the scope of this right of exclusion, we should be asking ourselves whether as of the entry into force of the new regime the trademarks concerned are protected as registered, as well as in the format in which their use has been permitted, for example, in respect of other products in the case of well-known trademarks."⁴⁵⁹³

7.2081. Canada argues that "Article 16.3 does not establish a right to use a mark. It follows from this that the provision also does not protect a mark's status or ability to acquire status as a 'well-known' mark. As articulated with respect to Articles 15 and 16.1 above, a finding of a right to 'use' under Article 16.1 would effectively remove the regulatory flexibility that Members purposefully negotiated and preserved under the TRIPS Agreement. It would also ignore the text of that provision, the express intent in TRIPS Articles 7 and 8.1, and the direction set out in paragraph 4 of the Doha Declaration on Public Health."⁴⁵⁹⁴

7.2082. Canada elaborates that "[i]t is clear that a Member will only violate Article 16.3 where it fails to protect registered 'well-known' trademarks from unauthorized use on dissimilar goods or services where the use by others would cause harm to the owner of such trademarks. A measure

⁴⁵⁸⁷ Australia's first written submission, para. 325. See also Australia's second written submission, paras. 35-36.

⁴⁵⁸⁸ Australia's first written submission, para. 329.

⁴⁵⁸⁹ Australia's first written submission, para. 329.

⁴⁵⁹⁰ Australia's first written submission, para. 331. See also Australia's second written submission, para. 36.

⁴⁵⁹¹ Australia's first written submission, para. 331.

⁴⁵⁹² Argentina's third-party submission, para. 26. (footnote omitted)

⁴⁵⁹³ Argentina's third-party submission, para. 27.

⁴⁵⁹⁴ Canada's third-party submission, para. 55.

that prevents or restricts the owner from using a registered 'well-known' trademark is not a measure that violates Article 16.3."⁴⁵⁹⁵

7.2083. China submits that the questions to be addressed by the Panel are (i) whether a right to use can be inferred from Article 16.3; (ii) whether the protection under Article 16.3 would extend to the acquirement and maintaining of the well-known trademark status; (iii) whether use is a necessary condition to acquire and maintain the well-known trademark status.⁴⁵⁹⁶

7.2084. The Dominican Republic's arguments that it has made as a third party pursuant to paragraph 20 of the Panel's Working Procedures have been summarized above in the context of Cuba's arguments under this claim.⁴⁵⁹⁷

7.2085. New Zealand argues that "[t]he complainants' claims under Article 16.3, just as those under Article 16.1, are misconceived. There is no obligation on a Member to provide a trademark owner with the right to use a trademark so that it acquires or maintains its status as well known. As Australia's TM Act protects well known trademarks against dilution only if they are registered, and the TPP Act ensures the owner of tobacco products can register its tobacco trademark, there is no violation of Article 16.3 of the TRIPS Agreement. For the reasons set out above, the complainants have not established a *prima facie* case of a violation of Article 16.3 of the TRIPS Agreement and therefore the Panel ought to reject the complainants' claims in relation to that provision."⁴⁵⁹⁸

7.2086. Nicaragua argues that by preventing the use of a trademark, the TPP measure so weakens the mark that it reduces the level of protection below the minimum level guaranteed by Article 16.1 and 16.3 of the TRIPS Agreement.⁴⁵⁹⁹ It disagrees that plain packaging does not affect the rights conferred by Articles 16.1 and 16.3 on trademark owners because the trademark remains registered in Australia and submits that the rights under Article 16 of the TRIPS Agreement do not make sense and are hollow if they are not accompanied by a meaningful opportunity to use the trademark.⁴⁶⁰⁰

7.2087. Singapore argues that Article 16.3 takes its reference from Article 6bis of the Paris Convention (1967), whose rights "consist of negative rights to refuse or cancel registration, or prohibit use. They do not include the right to use a registered well-known trademark. The plain packaging measure does not prevent the owner of a registered well-known mark from exercising those negative rights guaranteed by Article 16.3."⁴⁶⁰¹ Singapore elaborates that "[a]ssuming, *arguendo*, that the plain packaging measure might affect the ability of a trademark to maintain its well-known status, Article 16.3 does not impose on Members an obligation to enable an owner to maintain the well-known status of a trademark. Likewise, Article 16.3 does not oblige Members to permit the use of a trademark in order to enable it to acquire well-known status. To interpret otherwise is to ignore the ordinary meaning of Article 16.3 and Article 6bis of the Paris Convention."⁴⁶⁰²

7.3.4.4 Analysis by the Panel

7.2088. As described above, Cuba and Indonesia advance essentially two reasons for which the TPP measures are inconsistent with Australia's obligations under Article 16.3.

7.2089. First, they argue that the ability of a registered trademark to *remain* "well-known", and thereby benefit from the rights that must be accorded pursuant to Article 16.3, is dependent on the use of that trademark. As advertising and most other forms of promotion are prohibited in Australia, they argue, use on the product and packaging is the sole means by which a well-known mark may retain its special rights as a well-known mark. They submit that the TPP measures'

⁴⁵⁹⁵ Canada's third-party submission, para. 56.

⁴⁵⁹⁶ China's third-party submission, paras. 30-33.

⁴⁵⁹⁷ See para. 7.2056 and fn 4548 above.

⁴⁵⁹⁸ New Zealand's third-party submission, paras. 38-39.

⁴⁵⁹⁹ Nicaragua's third-party submission, para. 15.

⁴⁶⁰⁰ Nicaragua's third-party submission, paras. 24-25.

⁴⁶⁰¹ Singapore's third-party submission, para. 33.

⁴⁶⁰² Singapore's third-party submission, para. 34.

prohibition of certain uses of certain well-known tobacco-related trademarks will reduce knowledge of the marks and thus lead to the loss of their status as well-known trademarks, and of the associated protection under Article 16.3, that Australia therefore fails to afford the owners of such trademarks.

7.2090. Second, the complainants argue that, for the same reasons, the TPP measures' prohibition of certain uses of certain tobacco-related trademarks violates Article 16.3 because it removes the ability of such trademarks to ever *acquire* the status of well-known trademark, such that they cannot be accorded the protections under Article 16.3.

7.2091. Australia responds that it is not obligated under Article 16.3 to grant a right to a trademark owner to use its well-known trademark so that it may maintain its well-known status, or to grant the owner of a trademark the right to use its trademark so that it may become well known.

7.2092. We first examine the scope of the obligation under Article 16.3 relevant to the complainants' claims and then address the two aspects of these claims in turn.

7.3.4.4.1 Interpretation of Article 16.3

7.2093. We recall that paragraph 3 of Article 16 of the TRIPS Agreement, entitled "Rights Conferred" reads as follows:

Article 6*bis* of the Paris Convention (1967) shall apply, *mutatis mutandis*, to goods or services which are not similar to those in respect of which a trademark is registered, provided that use of that trademark in relation to those goods or services would indicate a connection between those goods or services and the owner of the registered trademark and provided that the interests of the owner of the registered trademark are likely to be damaged by such use.

7.2094. Article 6*bis* of the Paris Convention (1967) reads as follows:

(1) The countries of the Union undertake, ex officio if their legislation so permits, or at the request of an interested party, to refuse or to cancel the registration, and to prohibit the use, of a trademark which constitutes a reproduction, an imitation, or a translation, liable to create confusion, of a mark considered by the competent authority of the country of registration or use to be well known in that country as being already the mark of a person entitled to the benefits of this Convention and used for identical or similar goods. These provisions shall also apply when the essential part of the mark constitutes a reproduction of any such well-known mark or an imitation liable to create confusion therewith.

(2) A period of at least five years from the date of registration shall be allowed for requesting the cancellation of such a mark. The countries of the Union may provide for a period within which the prohibition of use must be requested.

(3) No time limit shall be fixed for requesting the cancellation or the prohibition of the use of marks registered or used in bad faith.

7.2095. We note at the outset that Article 16.3 formulates an obligation on Members⁴⁶⁰³ to apply Article 6*bis* of the Paris Convention (1967) *mutatis mutandis* to an extended set of circumstances. It is Article 6*bis*, which by virtue of its incorporation into the TRIPS Agreement by its Article 2.1, formulates in its first paragraph an obligation for Members to refuse or cancel a registration, and to prohibit the use, of a trademark which constitutes a reproduction, an imitation, or a translation liable to cause confusion with a well-known mark used for identical or similar goods. A well-known

⁴⁶⁰³ Consistent with the past WTO jurisprudence, we understand the reference in Article 6*quinquies A(1)* of the Paris Convention (1967) to the countries of the Paris Union in the context of the TRIPS Agreement to mean the Members of the WTO, and the reference to nationals of such countries to mean nationals of other WTO Members as defined in Article 1.3 of the TRIPS Agreement. See Appellate Body Report, *US – Section 211 Appropriations Act*, para. 132.

mark is defined as "a mark considered by the competent authority of the country of registration or use to be well known in that country as being already the mark of a person entitled to the benefits of this Convention". This obligation - to cancel or refuse the registration, and prohibit the use of such a conflicting mark - is to be carried out by Members either "*ex officio*, if their legislation so permits" or "at the request of an interested party".

7.2096. Article 16.3 builds on Article 6*bis* of the Paris Convention (1967) and obliges WTO Members to apply the same obligation *mutatis mutandis* to goods or services⁴⁶⁰⁴ *not similar* to those in respect of which a well-known trademark is registered. The ordinary meaning of "*mutatis mutandis*" is "with the necessary changes; with due alteration of details".⁴⁶⁰⁵ Article 16.3, therefore, contains an obligation for Members to apply the obligation in Article 6*bis*, with the necessary changes, to non-similar goods if two cumulative conditions are fulfilled: (a) use of that trademark in relation to those goods or services would indicate a connection between those goods or services and the owner of the registered trademark, and (b) the interests of the owner of the registered trademark are likely to be damaged by such use. Article 16.3, which Cuba and Indonesia claim is violated by the TPP measures, does not itself contain the definition of a well-known mark, or the basic undertaking of Members to protect well-known marks. Rather, the specific obligation formulated by Article 16.3 is for Members to *also* refuse or cancel the registration, and prohibit the use of trademarks conflicting with a well-known trademark under Article 6*bis*, if they are used on *non-similar* goods and services, in cases where the well-known trademark is registered⁴⁶⁰⁶, and the two cumulative conditions mentioned in Article 16.3 are fulfilled.

7.2097. The parties agree that the rights formulated by Article 16.3 of the TRIPS Agreement and Article 6*bis* of the Paris Convention (1967) are "negative rights", i.e. rights to *prevent* certain actions or situations.⁴⁶⁰⁷ We note first that, in contrast to the obligation in Article 16.1⁴⁶⁰⁸, the obligations in Article 6*bis*, first paragraph, Paris Convention (1967) and in Article 16.3 are not formulated as rights of trademark owners, but as undertakings by Members that are to be either carried out *ex officio*, or triggered by a request of an interested party. The operative terms in the obligation in Article 6*bis* are to "refuse or cancel", or to "prohibit" – relating to the objects of "the registration" and "the use" of a trademark, respectively. The ordinary meaning of these terms is to "decline to do something, to reject"⁴⁶⁰⁹, "to annul, repeal, render void"⁴⁶¹⁰ and "to forbid (an action, event, commodity, etc.) by a command, statute, law, or other authority; to interdict"⁴⁶¹¹, respectively. The text of Article 6*bis*, first paragraph, therefore contains an undertaking by WTO Members to decline or annul the registration, and to forbid the use, of a trademark that conflicts with a well-known trademark in the manner set out in that paragraph. Article 16.3 obliges Members to extend this obligation *mutatis mutandis* to those conflicting trademarks that are used for *non-similar* goods and services under the conditions set out in Article 16.3.

7.2098. In light of the ordinary meaning of the text of Article 6*bis* of the Paris Convention (1967) and Article 16.3, therefore, we agree with the parties⁴⁶¹² that Article 16.3 does not establish a

⁴⁶⁰⁴ Article 16.2 of the TRIPS Agreement provides for a *mutatis mutandis* application of Article 6*bis* of the Paris Convention (1967) to services.

⁴⁶⁰⁵ Oxford English Dictionary online, definition of "*mutatis mutandis*", available at: <<http://www.oed.com/view/Entry/124299?redirectedFrom=mutatis+mutandis#eid>>, accessed 2 May 2017.

⁴⁶⁰⁶ We note that the obligation in Article 6*bis* of the Paris Convention (1967) does not require the well-known trademark to be registered in the country where protection is claimed.

⁴⁶⁰⁷ Dominican Republic's second written submission, para. 83; Cuba's second written submission, para. 414 (incorporating by reference all the claims, arguments and evidence submitted in the second written submissions of the Dominican Republic, Honduras and Indonesia on Article 16.3); Indonesia's second written submission, para. 104; and Australia's first written submission, para. 324. See also Australia's second written submission, para. 34.

⁴⁶⁰⁸ See above section 7.3.3 (Article 16.1 of the TRIPS Agreement).

⁴⁶⁰⁹ Oxford English Dictionary online, definition of "refuse", available at:

<<http://www.oed.com/view/Entry/161141?rskey=5G0anZ&result=3#>>>, accessed 2 May 2017.

⁴⁶¹⁰ Oxford English Dictionary online, definition of "cancel", available at:

<<http://www.oed.com/view/Entry/26916?rskey=fuNgAO&result=2#>>>, accessed 2 May 2017.

⁴⁶¹¹ Oxford English Dictionary online, definition of "prohibit", available at:

<<http://www.oed.com/view/Entry/152255?rskey=w1i2rm&result=2#>>>, accessed 2 May 2017.

⁴⁶¹² Dominican Republic's second written submission, para. 83; Cuba's second written submission, para. 414 (incorporating by reference all the claims, arguments and evidence submitted in the second written submissions of the Dominican Republic, Honduras and Indonesia on Article 16.3); Indonesia's second written

positive right to use a well-known trademark, and only provides for an undertaking by Members to refuse or cancel a registration, and to prohibit the use, of a trademark conflicting with a registered well-known trademark that is used on non-similar goods and services where (a) use of that trademark in relation to those goods or services would indicate a connection between those goods or services and the owner of the registered trademark, and (b) the interests of the owner of the registered trademark are likely to be damaged by such use.

7.2099. Article 16.3 of the TRIPS Agreement, together with Article 6bis of the Paris Convention (1967), therefore sets out a specific dimension of protection for well-known trademarks by defining the factual circumstances that trigger Members' undertaking to refuse or cancel a registration, and to prohibit the use, of a conflicting trademark. If these factual circumstances are present, Members must react in the prescribed manner either *ex officio*, or at the request of an interested party. Therefore, in order to show that the TPP measures violate Australia's obligation under Article 16.3, Indonesia and Cuba would have to demonstrate that Australia, under its domestic law⁴⁶¹³, in this instance under the TPP measures, does not provide for the refusal or cancellation of the registration, and the prohibition of use, of a trademark that conflicts with a well-known mark where the conditions set out in Article 6bis and Article 16.3 are met.

7.2100. With these preliminary observations in mind, we turn to the arguments by the complainants.

7.3.4.4.2 Whether the TPP measures are inconsistent with Article 16.3 because they prevent the maintenance of well-known status for certain tobacco-related trademarks

7.2101. Cuba, by reference, and Indonesia argue that by prohibiting the use of well-known tobacco trademarks, or by prescribing use in a special format, the TPP measures will reduce the knowledge of these well-known trademarks in the relevant sector of the public. They argue that this will impair the ability of owners of well-known trademarks to demonstrate that use of the conflicting mark on non-similar goods and services indicates a *connection* to them, or that their interests are likely to be damaged by such use. They further argue that such reduced knowledge of a mark in the relevant market sector will lead, over time, to the loss of its status as a well-known trademark under Australian law, which in turn leads to the loss of the protection that must be accorded to that status under Article 16.3. Thus, the complainants conclude that, by pre-empting "the conditions that give rise to its obligations under Article 16.3"⁴⁶¹⁴, the TPP measures remove the ability of tobacco-related trademarks that enjoyed well-known status prior to the imposition of plain packaging to maintain that status and continue to enjoy the rights that must be accorded by Australia pursuant to Article 16.3.

7.2102. Australia argues that the ability to use a trademark, including to the extent it becomes well known, is a general market freedom, not an IP right. It also submits that the subject matter protected under Article 16.3 is well-known registered trademarks – not trademarks that may become well known in the future, or trademarks that were once well known. It argues that well-known trademark protection remains available after the introduction of the TPP measures, and that it is not obligated under Article 16.3 to grant a right to a trademark owner to use its well-known trademark so that it may maintain its well-known status. Australia submits that the complainants have not established a *prima facie* case of violation under Article 16.3, since they have not demonstrated that, in relation to *current* registered well-known trademarks, the

submission, para. 104; and Australia's first written submission, para. 324. See also Australia's second written submission, para. 34.

⁴⁶¹³ Under Article 1.1 of the TRIPS Agreement, Members have the obligation to "give effect to the provisions of this Agreement".

⁴⁶¹⁴ Indonesia's first written submission, para. 242. See also Dominican Republic's first written submission, paras. 337 and 340. Similarly, Cuba argues that "Australia's plain packaging measure makes it impossible to demonstrate the conditions that give rise to the additional protection that Australia is required to guarantee. Thus, Australia violates the guaranteed minimum level of rights conferred on owners of well-known trademarks under Article 16.3 of the TRIPS Agreement." Cuba's first written submission, para. 428 (incorporating Ukraine's first written submission, para. 312).

TPP measures prevent Australia from refusing, cancelling, or prohibiting the use of a trademark in the circumstances outlined in Article 6bis of the Paris Convention.⁴⁶¹⁵

7.2103. We note at the outset that, similar to the claim under Article 16.1 addressed in the previous section⁴⁶¹⁶, this argument consists of two parts, namely: (i) a factual allegation that the TPP measures' prohibition of use of certain well-known registered trademarks will result in a reduction of knowledge of the marks to a point where these marks no longer qualify as well-known, and (ii) the assertion that this alleged factual consequence of the TPP measures – impairment or loss of well-known status itself – constitutes a violation of Australia's obligations under Article 16.3.

7.2104. We recall that, as described above⁴⁶¹⁷, the TPP measures regulate the appearance of trademarks and "marks"⁴⁶¹⁸ on tobacco retail packaging and products in various ways. In respect of retail packaging, the TPP measures permit the use of word marks and marks that denote the brand, business or company name, or the name of the product variant, provided that they appear in the form prescribed by the TPP Regulations. They prohibit the use of stylized word marks, composite marks and figurative marks, as well as other decorative elements both on tobacco products and on their retail packaging.⁴⁶¹⁹

7.2105. With regard to the factual allegation underlying this aspect of the claim, and as a preliminary point, we refer to our discussion of the relationship between different forms of trademark usage and the acquisition and maintenance of distinctiveness under Article 16.1⁴⁶²⁰, which we consider to be also relevant here. With respect to the complainants' assumed linkage between trademark use on the packaging of a product and maintaining or acquiring the status as a well-known trademark, we note that Article 6bis of the Paris Convention (1967), first paragraph, does not expressly refer to use as part of the definition of a well-known trademark, but requires that the mark be "considered by the competent authority of the country of registration or use to be well known in that country as being already the mark of a person entitled to the benefits of this Convention".

7.2106. The wording of this provision indicates that it is the degree of knowledge – in a particular Member – of the mark as already belonging to a person or enterprise in a WTO Member⁴⁶²¹, that determines its well-known status in that Member. Article 6bis does not indicate how this degree of

⁴⁶¹⁵ Australia's first written submission, para. 325. See also Australia's second written submission, paras. 35-36.

⁴⁶¹⁶ See para. 7.1988 above.

⁴⁶¹⁷ See sections 2.1.2.3.3 and 2.1.2.4 above.

⁴⁶¹⁸ The definition of "mark" in Section 4 of the TPP Act reads as follows: "(a) includes (without limitation) any line, letters, numbers, symbol, graphic or image; but (b) (other than when referring to a trade mark) does not include a trade mark."

⁴⁶¹⁹ For the purposes of their TRIPS claims, the complainants (using somewhat different terminology) divide trademarks into the following categories: (i) word marks; (ii) figurative marks (or design (or image) marks, image marks); and (iii) composite marks (or combination marks, combined marks). We have followed the same categorization in our analysis. In general, these categories reflect general trademark practice, although terminology does vary, and views on the boundaries between them can also differ. A "word mark" is registered when the textual content as such is considered eligible for trademark protection, and it is registered and protected regardless of the font or form of its presentation. The term "Coca-Cola" is an example of such a word mark. Other trademarks may combine textual and graphic content. Hence "Coca-Cola", when presented in a distinctive stylized typeface, may also be considered distinctive on account of the additional figurative content. This is why one finds separate registrations for "Coca-Cola" as a pure word mark, and also for the textual material presented in the specific, distinctive typeface used by that firm. The Nike "swoosh" logo is an example of a purely figurative ("image" or "device") trademark (i.e. one without textual content). The "Starbucks Coffee" logo is an example of a composite mark that presents textual material together with figurative elements.

⁴⁶²⁰ See paras. 7.1989-7.1993 of the section on Article 16.1 above.

⁴⁶²¹ While Article 6bis provides that the mark must be well-known "as being already the mark of a person entitled to the benefits of this Convention", we note that in the view of *Bodenhausen*, "it will be sufficient if the mark concerned is well known *in commerce* in the country concerned as a mark belonging to a certain enterprise, without its being necessary that it also be known that such enterprise is entitled to the benefits of the Convention." See *Bodenhausen*, Full Text, (Exhibit DOM-79), p. 92 (emphasis original). We consider that, since the complainants' arguments under this claim do not relate to this nuance, it is not necessary for us to make a finding on whether the required knowledge would need to include knowledge of whether the person or enterprise is entitled to the "benefits of the Convention".

knowledge is to be obtained. We note that Article 16.2 of the TRIPS Agreement, second sentence, provides further guidance in that regard, indicating that knowledge in the relevant sector of the public, including knowledge obtained as a result of promotion of the trademark, shall be taken into account.⁴⁶²²

7.2107. While, as a factual matter, all types of use will in principle be able to contribute to such knowledge, none of these provisions identifies any particular type of use that would be a prerequisite for obtaining well-known trademark status in a particular country. In particular, it does not exclude that a trademark could be well known in a country on the basis of publicity or use on product and packaging in *other* countries, before it is registered or even used on a product or packaging in the country in which the recognition of its well-known status is sought.⁴⁶²³

7.2108. Australia has indicated that under its national law on the protection of well-known trademarks, "[i]t is possible that a trademark may be 'well known in Australia' under the *Trade Marks Act 1995* (Cth) without it having been used in Australia. For example, it may be well known in Australia on the basis of use overseas."⁴⁶²⁴

7.2109. This suggests that, if a trademark can acquire well-known trademark status in Australia without registration or use in that country, trademarks that are already well known and registered in Australia – which are the object of this aspect of the claim – may be able to maintain that status on the basis of use abroad, even if their use on products and packaging is constrained or prohibited in Australia. We are therefore not persuaded that the operation of the TPP measures would necessarily have the impact that the complainants assume on the degree of knowledge of existing well-known trademarks, or on how this would be assessed in relation to a specific trademark.

7.2110. We note, in any event, that we will only need to examine further the factual allegation that the TPP measures cause the impairment or loss of well-known trademark status if we find that such impairment or loss would indeed constitute a violation of Article 16.3. As in the previous section on Article 16.1, we will therefore first consider whether impairment, as a result of the TPP measures, of the well-known status of a trademark would constitute a violation of Article 16.3. We will return to the factual allegation underlying this argument only if necessary on the basis of that analysis.

7.2111. In addressing this question, we recall that Article 16.3, together with Article 6bis of the Paris Convention (1967) as incorporated into the TRIPS Agreement by Article 2.1, formulates an obligation on Members to refuse or cancel a registration, and to prohibit the use, of a trademark conflicting with a registered well-known trademark that is used on non-similar goods and services where (a) use of that trademark in relation to those goods or services would indicate a connection between those goods or services and the owner of the registered trademark, and (b) the interests of the owner of the registered trademark are likely to be damaged by such use.

7.2112. These provisions therefore set out the criteria under which Members have agreed to provide additional protection to trademarks – namely against use or registration of conflicting

⁴⁶²² Article 16.2, second sentence provides: "In determining whether a trademark is well-known, Members shall take account of the knowledge of the trademark in the relevant sector of the public, including knowledge in the Member concerned which has been obtained as a result of the promotion of the trademark."

⁴⁶²³ See Bodenhausen, Full Text, (Exhibit DOM-79), p. 91:

A trademark may be *well known* in a country before its registration there and, in view of the possible repercussions of publicity in other countries, even before it is *used* in such country. *Whether* a trademark is well known in a country will be determined by its competent administrative or judicial authorities. The Revision Conference of Lisbon in 1958 rejected a proposal according to which *use* of a well-known mark in the country in which its protection is claimed would *not* be necessary for such protection. This means that a member State is not *obliged* to protect well-known trademarks which have not been used on its territory, but it will be free to do so. In view of the vote taken at the Lisbon Conference, the great majority of the member States will probably adopt this attitude. (footnotes omitted; emphasis original)

⁴⁶²⁴ Australia's first written submission, Annexure D, para. 17 fn 1260 (referring to ConAgra v. McCain, (Exhibits AUS-489, CUB-89)).

marks on *non-similar* goods and services – over and above the rights provided by Article 16.1, which protects only against use on *identical or similar* goods or services. Reading Article 6bis and Article 16.3 together, these provisions establish that Members are obliged to refuse or to cancel the registration, and to prohibit the use, of a trademark used for non-similar goods or services, if:

- a. that trademark conflicts⁴⁶²⁵ with a mark considered by the competent authority of the country of registration or use to be well known in that country as being already the mark of a person entitled to the benefits of this Convention; and
- b. use of that trademark in relation to those goods or services would indicate a connection between those goods or services and the owner of the registered trademark; and
- c. the interests of the owner of the registered trademark are likely to be damaged by such use.

7.2113. It is clear from the interaction of the provisions and the structure of the text that these three criteria are *cumulative*, and thus all need to be present to establish the circumstances in which the obligation of Members is triggered, either *ex officio*, or at the request of an interested party. If these factual circumstances do not exist, it falls outside the scope of the obligation formulated by Article 16.3 and does not trigger the protection that Members have undertaken therein.

7.2114. As with Article 16.1⁴⁶²⁶, Members comply with the obligation under Article 16.3 by providing in their national legislation for the possibility of refusing or cancelling the registration, and of prohibiting the use, of a trademark where these conditions are fulfilled. Whether this protection is triggered, be it *ex officio* or at the request of an interested party, depends, in practice, on an assessment of the nature of the marketplace at the relevant time to determine whether all the factual criteria that trigger the obligation are met. The obligation on Members to provide this protection under their legal systems must be distinguished from the scope of activities undertaken by commercial actors in their domestic markets. Nothing in the text of Article 16.3 or Article 6bis suggests – as the complainants imply – an *obligation* by Members to permit or maintain the occurrence of the factual circumstances described in these provisions. Whether any individual marks actually are considered to be well known by the competent authority, and whether any use of conflicting marks on non-similar goods or services actually does or does not indicate a connection to the owner of a registered well-known trademark, is immaterial to the assessment of whether a Member ensures that, if these circumstances exist, the registration of such trademarks can be refused or cancelled, and their use prohibited, in compliance with Article 16.3.

7.2115. We note that the complainants are not challenging how the criteria for well-known trademark protection are defined in Australia's domestic legislation, and are not arguing that the TPP measures have affected how the Australian legal system assesses whether a trademark is well-known. They also appear to accept that, when the criteria are fulfilled, well-known trademark protection is available under the TM Act.⁴⁶²⁷ However, the complainants argue that reduced knowledge in the market of existing registered well-known trademarks as a consequence of the TPP measures will result in a situation in which owners of well-known trademarks will no longer be able to demonstrate that use of conflicting signs on non-similar products indicates a connection to them, or is likely to damage their interests, and in which previously well-known trademarks may no longer be considered well-known. In other words, the complainants claim that the consequence of the TPP measures we are assuming *arguendo*, namely that the factual situation triggering well-known trademark protection described by the criteria set out in Article 16.3 and Article 6bis

⁴⁶²⁵ It is not necessary, for the purpose of resolving the present disputes, to make a finding on whether the "necessary changes" implied by the *mutatis mutandis* application of Article 6bis under Article 16.3 means that the requirement "liable to create confusion" in Article 6bis is replaced by the requirement of "indicate a connection" in Article 16.3, or whether both need to be present to trigger the obligation in Article 16.3.

⁴⁶²⁶ See paras. 7.1999-7.2000 of the section on Article 16.1 above.

⁴⁶²⁷ Indonesia acknowledges that "Section 120 of Australia's Trade Mark Law 1995 implements Article 16 of the TRIPS Agreement." Indonesia's second written submission, para. 89. See also Cuba's first written submission, para. 428 (incorporating Ukraine's first written submission, paras. 299-302).

will occur less frequently and with respect to fewer signs than before, constitutes a reduction of well-known trademark protection in violation of Article 16.3.

7.2116. We recall our assessment above that Article 16.3, together with Article 6bis of the Paris Convention (1967), formulates an obligation for Members to refuse or cancel a registration and to prohibit the use of a trademark conflicting with a registered well-known trademark that is used on non-similar goods and services under certain factual conditions. We also recall that Members' compliance with this obligation is independent of the actual occurrence of these factual conditions in the market. In light of this understanding, and in line with our assessment under Article 16.1 above⁴⁶²⁸, we disagree that a reduction in the *factual occurrence* in the marketplace of the situations that would trigger well-known trademark protection constitutes a reduction in the *availability* of such protection mandated by Article 16.3 of the TRIPS Agreement and Article 6bis of the Paris Convention (1967). In other words, while Article 16.3 and Article 6bis oblige Members to protect currently well-known trademarks in the manner specified in these provisions, they do not require Members to provide such protection for trademarks that do not, or do no longer, fulfil these criteria – and not doing so is therefore not a violation of Article 16.3.

7.2117. Accepting the complainants' contrary interpretation would effectively constitute an obligation on Members to ensure means to maintain the status of existing well-known trademarks in the market, an obligation that would not only be irreconcilable with bans on marketing and advertising⁴⁶²⁹, but also potentially impossible to comply with in light of the multitude of factors that can affect the public perception – and thus knowledge of a trademark in the market.⁴⁶³⁰

7.2118. Indonesia also argues that the TRIPS Agreement contemplates a minimum opportunity to use a trademark within the bounds of Article 17 and Article 20.⁴⁶³¹ With respect to this argument we recall our finding above that the obligation to give a legally operative meaning to all the provisions in Section 2 of Part II of the TRIPS Agreement harmoniously, without reducing any of them to redundancy, as required by the principle of effective treaty interpretation, does not compel an interpretation of the minimum rights in Article 16 as requiring Members to provide a minimum opportunity to use a registered trademark.⁴⁶³² This finding equally applies to Article 16.3.

7.2119. Cuba also argues, by reference, that a Member may not, through its own conduct, render Article 16.3 meaningless, by implementing a measure making it impossible for trademark owners to have recourse to the rights that must be accorded pursuant to that provision.⁴⁶³³ In this regard we recall our previous findings⁴⁶³⁴ and consider that, in the same way that the obligation in Article 16.1, to provide a right for the trademark owner to prevent infringement, does not make Members *responsible* for maintaining the distinctiveness of individual signs as a precondition for infringement to occur⁴⁶³⁵, in the same way, the obligation in Article 16.3 to provide protection for well-known trademarks against certain uses does not make Members *responsible* for maintaining the well-known status of individual trademarks in order for that additional protection to apply.

7.2120. The trademark owner's commercial interest in a market situation in which its trademark qualifies for well-known trademark protection, and the corresponding interest in using its trademark, including for the purpose of maintaining or further strengthening the level of knowledge of the trademark in the market, is recognized by the TRIPS Agreement as a *legitimate interest* that needs to be taken into account in considering the permissibility of domestic exceptions to the exclusive rights under Article 17. In Section 7.3.5 below, we will also consider its

⁴⁶²⁸ See para. 7.2001 of the section on Article 16.1 above.

⁴⁶²⁹ Note that Cuba and Indonesia both accept that bans on advertising are not a violation of Articles 16.1 and 16.3. See Cuba's first written submission, para. 428 (incorporating Ukraine's first written submission, para. 259); Indonesia's response to Panel question No. 95, para. 21; and Indonesia's response to Panel question No. 172, paras. 35-36.

⁴⁶³⁰ See the considerations at paras. 7.2002 and 7.2026 of the section on Article 16.1 above, which we consider relevant also with respect to the variation of the level of knowledge of a trademark in the market.

⁴⁶³¹ Indonesia's second written submission, para. 104. See also Indonesia's opening statement at the first meeting of the Panel, para. 44.

⁴⁶³² See para. 7.2030 of the section on Article 16.1 above.

⁴⁶³³ Dominican Republic's second written submission, paras. 85-88.

⁴⁶³⁴ See para. 7.2116 and paras. 7.2005 -7.2011 of the section on Article 16.1 above.

⁴⁶³⁵ See para. 7.2005 of the section on Article 16.1 above.

relevance for assessing whether the use of a trademark in the course of trade is unjustifiably encumbered by special requirements within the meaning of Article 20. The interest in using the trademark is, however, not a *right* that is protected under Article 16.3.

7.2121. We therefore conclude also in the context of Article 16.3, that outside the scope of express obligations set out in the TRIPS Agreement, the Agreement does not in our view oblige Members to ensure that private parties are in position to fulfil such criteria, or to refrain from regulations otherwise not inconsistent with the covered agreements that may affect the market conditions that determine how easy or difficult it is for private parties to comply with such criteria.

7.2122. Indonesia raises the argument that Article 27 of the Vienna Convention prevents Australia from using its own law to avoid fulfilling its obligations under the TRIPS Agreement.⁴⁶³⁶ In view of our findings we are not persuaded that Australia – as suggested by Indonesia – is avoiding its treaty obligations under the TRIPS Agreement.

7.2123. Recalling our findings in paras. 7.2116, 7.2118 and 7.2121 above, we conclude that the possibility of a reduced knowledge of previously well-known trademarks in the market does not, in itself, constitute a violation of Article 16.3, because Members' compliance with the obligation to provide well-known trademark protection under Article 16.3 of the TRIPS Agreement and Article 6bis of the Paris Convention (1967) is independent of whether well-known trademarks actually exist in the market. Outside its express obligation, Article 16.3 does not require Members to refrain from taking measures that may affect the ability of right owners to maintain the well-known trademark status of individual trademarks, or to provide a "minimum opportunity" to use a trademark in the market.

7.2124. In light of these findings, we need not examine further the complainants' factual allegation that the TPP measures' prohibition on the use of certain tobacco-related trademarks will in fact reduce the knowledge of well-known trademark in the market, and lead to the impairment or loss of well-known trademark status in the manner that the complainants allege.

7.3.4.4.3 Whether the TPP measures are inconsistent with Article 16.3 in that they prevent certain tobacco-related trademarks from acquiring well-known trademark status through use

7.2125. Cuba, by reference, and Indonesia argue that since use is the sole means by which a tobacco mark may become well-known in Australia, the TPP measures' prohibition of certain uses of certain tobacco-related trademarks violates Article 16.3 because it removes the ability of such trademarks to ever acquire the status of well-known trademarks such that they cannot be accorded the protections under Article 16.3. By preventing the owners of validly registered marks from qualifying for well-known status, the TPP measures violate Australia's obligation to extend protection under Article 16.3 of the TRIPS Agreement to tobacco products.⁴⁶³⁷

7.2126. Australia responds that it is not obligated under Article 16.3 to grant a right to a trademark owner to use its well-known trademark so that it may maintain its well-known status, nor is it obliged to grant the owner of a trademark the right to use its trademark so that it may become well known.⁴⁶³⁸

7.2127. We recall Australia's indication⁴⁶³⁹ that a trademark can attain well-known trademark status in Australia on the basis of overseas use alone, without having been used in Australia at all. In this context, to the extent that the acquisition of well-known status in Australia is not dependent on use within Australia, it is not clear to us that the trademark use restrictions

⁴⁶³⁶ Indonesia's first written submission, paras. 240-241 (referring to Article 27 of the Vienna Convention; and Appellate Body Report, *Korea – Alcoholic Beverages*, para. 120).

⁴⁶³⁷ Indonesia's first written submission, para. 236.

⁴⁶³⁸ Australia's first written submission, para. 331. See also Australia's second written submission, para. 36.

⁴⁶³⁹ See paras. 7.2108- 7.2109 above.

contained in the TPP measures remove the ability of tobacco-related trademarks to acquire well-known trademark status in Australia as alleged by the complainants.⁴⁶⁴⁰

7.2128. We also recall our finding above⁴⁶⁴¹ that Article 16.3 only provides for an undertaking by Members to refuse or cancel a registration, and to prohibit the use, of a trademark conflicting with a registered well-known trademark that is used on non-similar goods and services where: (a) use of that trademark in relation to those goods or services would indicate a connection between those goods or services and the owner of the registered trademark; and (b) the interests of the owner of the registered trademark are likely to be damaged by such use. As described above, this does not amount to an obligation for Members to permit or maintain the occurrence of the factual criteria set out in these provisions,⁴⁶⁴² and the obligation in Article 16.3 to provide protection for well-known trademarks against certain uses does not require Members to maintain the well-known status of individual trademarks in order for that additional protection to apply.⁴⁶⁴³

7.2129. We further recall our finding that, outside the scope of express obligations set out in the TRIPS Agreement, the Agreement does not oblige Members to ensure that private parties are in a position to fulfil such criteria, or to refrain from regulations otherwise not inconsistent with the covered agreements that may affect the market conditions that determine how easy or difficult it is for private parties to meet such criteria. In our view, these findings apply equally in the context of the present claim. We therefore conclude that, even assuming that the operation of the TPP measures results in situations in which certain registered trademarks may be less likely to acquire well-known trademark status, this would not constitute a violation by Australia of Article 16.3.

7.3.4.4.4 Overall Conclusion

7.2130. In light of the above, including our findings in paras. 7.2123 and 7.2129 above, we conclude that Cuba and Indonesia have not demonstrated that the TPP measures are inconsistent with Australia's obligations under Article 16.3 of the TRIPS Agreement.

7.3.5 Article 20 of the TRIPS Agreement

7.2131. We will now turn to the complainants' claims under Article 20 of the TRIPS Agreement, entitled "Other Requirements". It reads as follows:

The use of a trademark in the course of trade shall not be unjustifiably encumbered by special requirements, such as use with another trademark, use in a special form or use in a manner detrimental to its capability to distinguish the goods or services of one undertaking from those of other undertakings. This will not preclude a requirement prescribing the use of the trademark identifying the undertaking producing the goods or services along with, but without linking it to, the trademark distinguishing the specific goods or services in question of that undertaking.

7.2132. Honduras, the Dominican Republic, Cuba, and Indonesia claim that the TPP measures are inconsistent with Article 20 because they impose "special requirements", which "encumber" the "use" of trademarks "in the course of trade"; furthermore, such use is encumbered "unjustifiably".

7.2133. Australia asks the Panel to reject these claims in their entirety.

7.3.5.1 Overview of the claims

7.2134. Honduras submits that the following elements need to be established in order to determine whether a measure is inconsistent with Article 20 (first sentence): (a) the measures at issue constitute special requirements, which (b) unjustifiably (c) encumber (d) the use of a

⁴⁶⁴⁰ Dominican Republic's second written submission, para. 83. See also Cuba's first written submission, para. 428 (incorporating Ukraine's first written submission, para. 331); and Indonesia's second written submission, paras. 102 and 106.

⁴⁶⁴¹ See para. 7.2098 above.

⁴⁶⁴² See para. 7.2114 above.

⁴⁶⁴³ See para. 7.2119 above.

trademark (e) in the course of trade.⁴⁶⁴⁴ In its view, the TPP measures are special requirements that encumber the use of trademarks in the course of trade. Furthermore, the measures at issue are, by their very nature, unjustifiable given that they restrict trademarks in a "particularly pervasive and severe fashion".⁴⁶⁴⁵ In the alternative, should the Panel disagree with Honduras's view that the measures at issue are unjustifiable by their very nature, Honduras considers that it is incumbent upon Australia to demonstrate that its measures are justifiable.⁴⁶⁴⁶

7.2135. The Dominican Republic submits that "[i]n terms of structure, Article 20 is formulated as a prohibition against encumbrances on the use of a trademark ('use ... shall not be ... encumbered by special requirements'), with that prohibitive aspect subject to an exception or qualification through the word 'unjustifiably'".⁴⁶⁴⁷ The prohibitive aspect of the provision establishes a presumption in favour of the unencumbered use of a trademark through special requirements. If a Member encumbers the use of a trademark through the imposition of special requirements, it triggers the obligation to ensure that any such encumbrance is justifiable.⁴⁶⁴⁸ The Dominican Republic argues that "Australia has departed from the presumption in favour of the use of trademarks". In its view, "the departure is radical and extreme, with severe encumbrances imposed on the use of all trademarks for an entire class of goods", and "Australia has no basis to avail itself of the exception or qualification it enjoys through the word 'unjustifiably'".⁴⁶⁴⁹ The Dominican Republic submits that the TPP measures do not comply with the prohibitive aspect of Article 20 because they "encumber" the "use" of a trademark "in the course of trade" through "special requirements", and that the encumbrances are "unjustifiable".⁴⁶⁵⁰

7.2136. Cuba submits that the trademark restrictions contained in Australia's TPP measures impose "special requirements" which "encumber" the "use of trademarks" "in the course of trade", and that those special requirements are "unjustifiable".⁴⁶⁵¹

7.2137. Indonesia submits that to demonstrate a violation of Article 20 of the TRIPS Agreement, complainants must show that a Member has adopted "special requirements" that "encumber" the use of a trademark "in the course of trade" without justification.⁴⁶⁵² It asserts that the TPP measures are "special requirements", falling within the illustrative list in Article 20, that "encumber the use of a trademark in the course of trade" and that they are unjustified.⁴⁶⁵³

7.2138. Australia argues that to establish a violation of Article 20, a complainant must demonstrate that the "use" of a trademark "in the course of trade" has been "unjustifiably" "encumbered by special requirements". It notes that there is no dispute that the TPP measures impose special requirements on the use of trademarks, at least in some respects. In its view, the

⁴⁶⁴⁴ Honduras's first written submission, para. 276.

⁴⁶⁴⁵ Honduras's first written submission, para. 643. Honduras adds that this is because the TPP measures (i) are a blanket restriction on the use of trademarks and (ii) defeat the core function of trademarks to distinguish the goods of different undertakings. Ibid. In its second written submission, Honduras characterizes the TPP measures as being the "ultimate encumbrance", and submits that they are unjustifiable by their very nature due to lack of individual assessment. Honduras's second written submission, paras. 269-270.

⁴⁶⁴⁶ Honduras's first written submission, paras. 643-644.

⁴⁶⁴⁷ Dominican Republic's first written submission, para. 343. (emphasis added by the Dominican Republic)

⁴⁶⁴⁸ Dominican Republic's first written submission, paras. 344-345. The Panel asked the Dominican Republic to clarify its argument on the structure of Article 20 cited above, in particular whether the term "shall not" refers to "be ... encumbered" or to "be unjustifiably encumbered", and whether this has any implications as to the substantive content of Article 20 or the burden of proof. The Dominican Republic responded that the argument in question relates to its position on the burden of proof, and does not affect the substantive content of Article 20. As to the grammatical structure of Article 20, the Dominican Republic argues that "the treaty interpreter cannot stop the process of interpretation by concluding that, from a grammatical perspective, the words 'shall not' refer to 'unjustifiably encumbered', and not 'encumbered' alone. Although this structural point is one relevant consideration in discerning the burden of proof, the treaty interpreter must also consider other elements of the text, context, and object and purpose." See Dominican Republic's response to Panel question No. 104, paras. 108 and 113.

⁴⁶⁴⁹ Dominican Republic's first written submission, para. 346.

⁴⁶⁵⁰ Dominican Republic's first written submission, paras. 347-832.

⁴⁶⁵¹ Cuba's first written submission, para. 363. See also ibid. paras. 298 and 313.

⁴⁶⁵² Indonesia's first written submission, para. 248. See also Indonesia's second written submission, para. 111.

⁴⁶⁵³ Indonesia's first written submission, paras. 249-363.

issues before the Panel are: (1) the scope of the "special requirements" at issue; (2) whether the complainants have established that those special requirements "encumber" the "use" of a trademark "in the course of trade"; and (3) to the extent that the complainants have established the existence of any such encumbrance, whether the complainants have further established that the TPP measures impose this encumbrance "unjustifiably".⁴⁶⁵⁴

7.3.5.2 Overall approach of the Panel

7.2139. We first determine our overall approach to the examination of the complainants' claims, including the allocation of burden of proof under Article 20 of the TRIPS Agreement, in respect of which the parties have different views.

7.3.5.2.1 Main arguments of the parties

7.2140. Honduras argues that "[t]he text and structure of Article 20 demonstrate that unencumbered use of a trademark is the normal default situation under the TRIPS Agreement".⁴⁶⁵⁵ According to Honduras, where a WTO Member wishes to change the default situation of unimpeded use, through special requirements that encumber the use of a trademark in the course of trade, it is incumbent upon that Member to ensure that this encumbrance is justifiable.⁴⁶⁵⁶ Honduras submits that, in exceptional circumstances and based on the assessment of each trademark on its own merits, a Member can encumber the use of an individual trademark.⁴⁶⁵⁷ It adds that "[t]he burden of showing that a measure is 'justifiable' necessarily rests with the Member deviating from the default situation under the TRIPS Agreement which, in the context of a WTO dispute, is the responding Member".⁴⁶⁵⁸ Honduras considers that this view is consistent with the ordinary meaning of the term "justifiable", which means "defensible" (i.e. "capable of giving protective defence"), because the ordinary meaning of this term suggests that it is the defendant who bears the burden of "justifying" a measure that falls within the examples of "special requirements" listed in Article 20".⁴⁶⁵⁹ Honduras adds that the negotiating history of Article 20 "indicates that the very *raison d'être* of the term 'unjustifiably' was to provide an *exceptional right* to Members, enabling them to pursue public policy objectives".⁴⁶⁶⁰ According to Honduras, it is a well-known principle of public international law and WTO law that the burden of proving an exception rests upon the Member invoking that exception.⁴⁶⁶¹ Honduras furthermore submits that, "where a measure's restrictiveness is particularly severe and pervasive", that measure must be considered unjustifiable without any further consideration of other factors. In its view, by their very nature, the TPP measures undermine the key principles of the TRIPS Agreement and, therefore, cannot be deemed as justifiable within the meaning of Article 20.⁴⁶⁶²

7.2141. The Dominican Republic argues that "[i]n terms of structure, Article 20 is formulated as a prohibition against encumbrances on the use of a trademark ('use ... shall not be ... encumbered by special requirements'), with that prohibitive aspect subject to an exception or qualification through the word 'unjustifiably'".⁴⁶⁶³ The Dominican Republic considers that the burden of proof under

⁴⁶⁵⁴ Australia's first written submission, para. 336.

⁴⁶⁵⁵ Honduras's first written submission, para. 272.

⁴⁶⁵⁶ Honduras's first written submission, para. 273.

⁴⁶⁵⁷ Honduras's first written submission, para. 317. See also Honduras's further arguments on whether the unjustifiability of requirements should be assessed in respect of individual trademarks summarized in paras. 7.2443- 7.2449 below.

⁴⁶⁵⁸ Honduras's first written submission, para. 318.

⁴⁶⁵⁹ Honduras's first written submission, para. 319 (referring to Oxford Dictionaries online, British and World English, definitions of "acquire", "by", "confusion", "course", "develop", "encumber", "identical", "justifiable", "likelihood", "nature", "necessary", "obstacle", "reasonable", "requirement", "right", "similar", and "trade", <www.oxforddictionaries.com>, accessed 29 September 2014 or 3 October 2014, (Oxford Dictionaries online, HND excerpts), (Exhibit HND-31)). (footnotes omitted)

⁴⁶⁶⁰ Honduras's first written submission, para. 320. (emphasis original)

⁴⁶⁶¹ Honduras's first written submission, para. 320 (referring to Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14, DSR 1997:I, p. 323).

⁴⁶⁶² Honduras's first written submission, para. 321. See also Honduras's further arguments on the severe nature of the restrictions summarized in para. 7.2436 below.

⁴⁶⁶³ Dominican Republic's first written submission, para. 343 (emphasis added by the Dominican Republic). In response to Panel question No. 40, Honduras and Indonesia indicate that they agree with the Dominican Republic's arguments distinguishing between "prohibitive" and "exception/qualification" elements in

Article 20 operates similarly to those under Article XX of the GATT 1994, Article XVI of the General Agreement on Trade in Services (GATS), and Article 3.1(a) of the SCM Agreement: the complainant bears the initial burden of demonstrating the prohibitive aspect of the provision (i.e. that a measure involves an encumbrance on use by special requirements); thereafter, the burden of demonstrating that the encumbrance is justifiable shifts to the respondent.⁴⁶⁶⁴ In its view, Article 2.2 of the TBT Agreement is different: a Member's right to adopt a trade-restrictive technical regulation is a "starting presumption", whereas the starting presumption under Article 20 of the TRIPS Agreement is that a trademark may be used, unencumbered by special requirements, to allow the trademark to fulfil its basic function of distinguishing goods in the marketplace.⁴⁶⁶⁵ Furthermore, a Member should not be entitled to impose the burden on other Members to prove the negative proposition that there are no grounds to justify the encumbrance it imposes.⁴⁶⁶⁶

7.2142. Cuba submits that once it is established that a measure imposes special requirements constraining trademark use, the burden of justifying those special requirements shifts to the implementing WTO Member. This allocation of the burden of proof is appropriate for several reasons: (i) encumbrances on trademark use should only be permitted in exceptional circumstances; and (ii) it is inappropriate to require a complainant to identify and refute a justification which it may be unaware of or which it may not be able to particularise.⁴⁶⁶⁷

7.2143. Cuba adds that "Article 20 is not a provision establishing an exception. ... Article 20 imposes a positive obligation not to encumber unjustifiably the use of a trademark through special requirements." This means, Cuba argues, that no requirement should be justified provisionally, but the complainant must establish that the encumbrance is disproportionate, not limited, and therefore unduly restrictive. In this sense, Article 20 combines the positive obligation of refraining from imposing special requirements with the possibility of the existence of a limited exception for a provision, but imposes the burden of proof for both on the complainant.⁴⁶⁶⁸

7.2144. Indonesia is of the view that it is the party imposing an encumbrance that must supply the justification. It submits that "[t]his view reflects an understanding that Article 20 represents a general prohibition on the use of special requirements that encumber the use of a trademark, and specifically prohibits the three types of special requirements listed in the obligation". It adds that the view is supported by decisions of prior WTO panels that a party invoking an exception or an affirmative defence bears the burden of proof. It also follows logically that the party imposing the encumbrance is the party who has access to the information and evidence that formed the basis for the justification.⁴⁶⁶⁹

7.2145. Australia submits that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence.⁴⁶⁷⁰ It argues that Article 20, in contrast to Article 17, does not concern derogations from the exclusive rights that Members are required to provide to trademark owners under Article 16. Rather, it concerns external requirements that Members impose upon the use of trademarks in furtherance of public policy. Nothing in the TRIPS Agreement requires Members to confer a general "right of use" upon trademark owners.⁴⁶⁷¹ Australia considers that Article 20 is not an exception for measures that are otherwise inconsistent with relevant provisions of the TRIPS Agreement. It further argues that the first sentence cannot be interpreted, as the Dominican Republic suggests, as establishing a prohibition that is then subject to an exception by virtue of the word "unjustifiably". Rather, the first sentence of Article 20 establishes a single, affirmative obligation: "[t]he use of a trademark in the course of trade shall not be unjustifiably encumbered by special requirements". An

Article 20 and the implications of such a distinction on the allocation of burden of proof under Article 20. See also the Dominican Republic's response to Panel question No. 104, cited in footnote 4648 above.

⁴⁶⁶⁴ Dominican Republic's first written submission, paras. 369-372.

⁴⁶⁶⁵ Dominican Republic's first written submission, para. 374 and fn 305.

⁴⁶⁶⁶ Dominican Republic's first written submission, para. 375.

⁴⁶⁶⁷ Cuba's first written submission, para. 322.

⁴⁶⁶⁸ Cuba's second written submission, paras. 102-103.

⁴⁶⁶⁹ Indonesia's first written submission, paras. 289-291 (referring to Panel Report, *Dominican Republic – Import and Sale of Cigarettes*; and Appellate Body Report, *US – Gasoline*, p. 22, DSR 1996:I, 3).

⁴⁶⁷⁰ Australia's first written submission, para. 428 (referring to Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14, DSR 1997:I, p. 323).

⁴⁶⁷¹ Australia's first written submission, para. 406.

encumbrance upon the use of a trademark in the course of trade is inconsistent with Article 20 only if that encumbrance is shown to be unjustifiable. Establishing that an encumbrance is "unjustifiable" is therefore an element of the *prima facie* case that a complainant must establish in order to prove a violation of this provision.⁴⁶⁷²

7.2146. In Australia's view, Article 20 is similar to other provisions of the covered agreements that require a complainant to establish that some threshold has been crossed (however that threshold might be defined). Article 20 does not prohibit all measures that impose encumbrances upon the use of a trademark in the course of trade, but only those measures that "unjustifiably encumber" the use of a trademark in the course of trade. Just as a complainant must demonstrate under Annex C(1)(a) of the SPS Agreement that a delay is "undue", a complainant must demonstrate under Article 20 of the TRIPS Agreement that an encumbrance is "unjustifiable".⁴⁶⁷³ A complainant's obligation to establish a *prima facie* case of unjustifiability is all the more evident where, as here, the measure at issue provides a justification for the encumbrance on the face of the measure itself.⁴⁶⁷⁴

7.3.5.2.2 Main arguments of the third parties

7.2147. Brazil submits that, if a WTO Member believes that another Member has adopted a measure inconsistent with the obligation under Article 20, it would have to adduce evidence in its favour, whereas the respondent would still need to demonstrate otherwise.⁴⁶⁷⁵

7.2148. Canada argues that the construction of Article 20 is such that it establishes an affirmative obligation on Members not to impose special requirements that unjustifiably encumber the use of a trademark. The word "unjustifiably" in the text does not create an exception (unlike Article 17 of the TRIPS Agreement or Article XX of the GATT 1994), but rather comprises a component of the obligation. Canada therefore disagrees with the complainants that the burden shifts to the defending Member to prove that a measure is "justifiable". As identified in a note by the WTO Secretariat, when "necessity tests" are included in an obligation provision, the burden of proof is on the complaining party to show that the measure at issue does not meet the necessity requirement. The same holds true in the case of Article 20 and the element of "unjustifiably". That is, the complainants must show, as part of its *prima facie* case, that the measure in question is "unjustifiable". Once that *prima facie* case is established, then it is up to the respondent to advance sufficient argument and evidence to rebut such a case.⁴⁶⁷⁶

7.2149. The European Union argues that, as regards the allocation of the burden of proof, splitting up the obligation in Article 20 seems artificial insofar as the obligation "[t]he use of a trademark in the course of trade shall not be unjustifiably encumbered by special requirements" is concerned. According to the Appellate Body, "[t]he burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence". It is thus up to the complainant to establish a *prima facie* case that the respondent has breached its obligation that "[t]he use of a trademark in the course of trade shall not be unjustifiably encumbered by special requirements".⁴⁶⁷⁷

7.2150. New Zealand submits that a complainant must show each of the following elements in order to establish a violation of Article 20: the measure at issue imposes *special requirements* on the use of trademarks; the special requirements *encumber the use of a trademark in the course of trade*; and the measure at issue imposes the encumbrance *unjustifiably*.⁴⁶⁷⁸

⁴⁶⁷² Australia's first written submission, para. 428. See also Australia's second written submission, para. 179.

⁴⁶⁷³ Australia's first written submission, paras. 429-430.

⁴⁶⁷⁴ Australia's first written submission, para. 431.

⁴⁶⁷⁵ Brazil's third-party submission, para. 34. See also *ibid.* para. 49.

⁴⁶⁷⁶ Canada's third-party submission, para. 75 (referring to Working Party on Domestic Regulation, "Necessity Tests in the WTO", Note by the Secretariat, S/WPDR/W/27/Add.1, 18 January 2011, paras. 6-7 (updating S/WPDR/W/27, 2 December 2003, and as corrected by S/WPDR/W/27/Add.1/Corr. 1, 15 February 2011)).

⁴⁶⁷⁷ The European Union's third-party submission, para. 37 (quoting Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14, DSR 1997:I, p. 323).

⁴⁶⁷⁸ New Zealand's third-party submission, para. 44. (emphasis original)

7.2151. Norway argues that the TRIPS Agreement does not provide for a right to use a trademark, and that use and exploitation of IP rights are largely left to Members to regulate domestically. Thus, "use" is not a fundamental principle of the TRIPS Agreement, and there is no "presumption of use under the TRIPS Agreement".⁴⁶⁷⁹ In light of this, Article 20 is not formulated, and does not function, as an exception to any "right of use". Moreover, contrary to what the Dominican Republic argues, Article 20 is not structured as a prohibition with an inbuilt exception.⁴⁶⁸⁰ Rather, Norway agrees with Australia's position that Article 20 is best characterized as "a single affirmative obligation" in the same way as Annex C(1)(a) of the SPS Agreement.⁴⁶⁸¹ Based on this, Norway submits that the burden of proof under Article 20 rests on the complainants, including establishing a *prima facie* case encompassing all the elements of the legal standard relating to the term "unjustifiably".⁴⁶⁸²

7.2152. Singapore submits that it is well-established that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence. In this connection, Article 20 is a provision imposing an affirmative obligation – to not unjustifiably encumber the use of a trademark by special requirement – rather than an exception that may be invoked to defend against a claim of violation. Although the standard "unjustifiably" is referred to in the Article, it does not follow, as the complainants suggest, that the burden is shifted to the respondent to justify the measure when the other elements of the claim of Article 20 violation are established. The initial burden is on the complainants to establish all the elements of the claim of Article 20 violation on a *prima facie* basis, including that the measure is an unjustifiable encumbrance. It is only when this is done that the presumption arises that what is claimed is true and the onus shifts to the respondent to rebut that presumption. A presumption does not arise if only some of the elements of the claim are established by the complainants.⁴⁶⁸³

7.2153. Turkey considers that the obligation in Article 20 is of an affirmative nature rather than exceptional one. The use of the word "unjustifiably" in Article 20 does not change the affirmative nature of the obligation. Turkey believes that the logic in Article 2.2 of the TBT Agreement can similarly apply to Article 20 of the TRIPS Agreement. The panel in *US – Clove Cigarettes* established that the burden of proof rests upon the party alleging violation of Article 2.2 of the TBT Agreement. Turkey believes that this approach sheds light on the determination of the burden of proof under Article 20 of the TRIPS Agreement.⁴⁶⁸⁴ Turkey also underlines that, as noted by the panel in *Argentina – Import Measures*, "[c]ollaboration from parties to a dispute is essential for a panel to be able to discharge its function of making 'an objective assessment of the matter before it'".⁴⁶⁸⁵

7.3.5.2.3 Analysis by the Panel

7.2154. We recall that Article 20 of the TRIPS Agreement reads as follows:

The use of a trademark in the course of trade shall not be unjustifiably encumbered by special requirements, such as use with another trademark, use in a special form or use in a manner detrimental to its capability to distinguish the goods or services of one undertaking from those of other undertakings. This will not preclude a requirement prescribing the use of the trademark identifying the undertaking producing the goods or services along with, but without linking it to, the trademark distinguishing the specific goods or services in question of that undertaking.

⁴⁶⁷⁹ Norway's third-party submission, para. 70 (quoting Honduras's first written submission, para. 316).

⁴⁶⁸⁰ Norway's third-party submission, para. 71 (referring to Dominican Republic's first written submission, para. 343).

⁴⁶⁸¹ Norway's third-party submission, para. 72 (referring to Australia's first written submission, paras. 428-430).

⁴⁶⁸² Norway's third-party submission, para. 73.

⁴⁶⁸³ Singapore's third-party submission, para. 38 (referring to Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14, DSR 1997:I, p. 323).

⁴⁶⁸⁴ Turkey's third-party submission, paras. 24-25 (referring to Panel Report, *US – Clove Cigarettes*, para. 7.381).

⁴⁶⁸⁵ Turkey's third-party submission, para. 27 (quoting Panel Reports, *Argentina – Import Measures*, para. 6.31).

7.2155. We read the two sentences of Article 20 as expressing a single obligation. The core of this obligation is expressed in its first sentence, which disallows special requirements that "unjustifiably encumber" the use of a trademark in the course of trade. This obligation is qualified by the second sentence, which identifies a type of requirement that is to be considered permissible.

7.2156. On a plain reading of its terms, the following elements would need to be established in order to find a violation of the core obligation contained in the first sentence of Article 20:

- a. the existence of "special requirements";
- b. that such special requirements "encumber" "[t]he use of a trademark in the course of trade"; and
- c. that they do so "unjustifiably".

7.2157. We shall explore all three aspects in detail further below. Before doing so, however, we address the burden of proof under Article 20.

7.2158. In line with the practice of various international tribunals, the Appellate Body has endorsed the principle that the party asserting a fact, whether complainant or respondent, is responsible for providing proof thereof. The burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence.⁴⁶⁸⁶ Likewise, the party invoking, in its defence, a provision that is an exception to the allegedly violated obligation (i.e. the respondent) bears the burden of proving that the conditions set out in the exception are met.⁴⁶⁸⁷

7.2159. As regards the required level of proof, the Appellate Body has clarified that the party bearing the burden of proof must put forward evidence sufficient to make a *prima facie* case that what is claimed is true. For the Appellate Body, a *prima facie* case is "one which, in the absence of effective refutation by the defending party, requires a panel, as a matter of law, to rule in favour of the complaining party presenting the *prima facie* case".⁴⁶⁸⁸ Once that *prima facie* case is made, the onus shifts to the other party, which will fail unless it submits sufficient evidence to disprove the claim, thus rebutting the presumption.⁴⁶⁸⁹ A panel's task therefore will be to consider all evidence on record and decide whether the complainant, as the party bearing the burden of proof, has convinced it of the validity of its claims to the point of establishing a *prima facie* case, and whether the respondent has sufficiently rebutted such a *prima facie* case.⁴⁶⁹⁰

7.2160. Precisely how much and what kind of evidence will be required to establish a presumption that what is claimed is true (i.e. what is required to establish a *prima facie* case) varies from measure to measure, provision to provision, and case to case.⁴⁶⁹¹ The Appellate Body has explained that "[a] *prima facie* case must be based on 'evidence and legal argument' put forward by the complaining party in relation to *each* of the elements of the claim". This means that a "complaining party may not simply submit evidence and expect the panel to divine from it a claim of WTO-inconsistency. Nor may a complaining party simply allege facts without relating them to its legal arguments."⁴⁶⁹²

⁴⁶⁸⁶ Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14, DSR 1997:I, 323, p. 335.

⁴⁶⁸⁷ Appellate Body Report, *US – Wool Shirts and Blouses*, pp. 15-16, DSR 1997:I, 323, p. 337.

⁴⁶⁸⁸ Appellate Body Report, *EC – Hormones*, para. 104. This was confirmed by the Appellate Body in *Japan – Agricultural Products II*, paras. 121-122; and *Japan – Apples*, para. 159.

⁴⁶⁸⁹ Appellate Body Reports, *US – Wool Shirts and Blouses*, p. 14, DSR 1997:I, 323, p. 335; *Japan – Agricultural Products II*, paras. 121-122; and Panel Report, *US – Section 301 Trade Act*, para. 7.14.

⁴⁶⁹⁰ Panel Report, *US – Section 301 Trade Act*, paras. 7.14-7.15.

⁴⁶⁹¹ Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14, DSR 1997:I, 323, p. 335. See also Appellate Body Reports, *Korea – Dairy*, paras. 143-145; and *Thailand – H-Beams*, para. 132 (noting the absence of a provision in the DSU that would require a panel to make an explicit ruling on whether the complainant has established a *prima facie* case of violation prior to examining the respondent's defense and evidence).

⁴⁶⁹² Appellate Body Report, *US – Gambling*, para. 140. (emphasis original)

7.2161. In line with these general principles of burden of proof, the parties agree that it is for the complainants to make a *prima facie* case that the TPP measures amount to special requirements that encumber the use of trademarks in the course of trade within the meaning of Article 20.⁴⁶⁹³

7.2162. However, the parties disagree as to which party bears the burden of proof in respect of whether such use is encumbered "unjustifiably". The complainants take the view that, once they have established that the TPP measures amount to special requirements that encumber the use of trademarks in the course of trade within the meaning of Article 20, the burden of proof shifts to the respondent to show that the encumbrance is justifiable.⁴⁶⁹⁴ The Dominican Republic and Indonesia consider that Article 20 establishes a general prohibition against encumbrances on the use of a trademark, which is then subject to an exception through the use of the term "unjustifiably". The Dominican Republic argues that this follows from the grammatical structure of the language in Article 20, which provides "shall not be ... encumbered".⁴⁶⁹⁵ The Dominican Republic further argues that the "prohibitive aspect" of Article 20 establishes a "presumption" in favour of unencumbered use of a trademark, triggering an obligation to ensure that any encumbrance is justifiable.⁴⁶⁹⁶ In a similar vein, Honduras argues that, if a Member wishes to change the "default situation of unimpeded use", it is incumbent upon it to ensure that this encumbrance is justifiable.⁴⁶⁹⁷

7.2163. We are not persuaded that the language of Article 20 implies that the burden should shift to the respondent to demonstrate the "justifiability" of encumbrances falling within the scope of this provision. We do not find any indication in the text, including its grammatical structure, for the existence of a "presumption" or "default situation" of unencumbered use, or for the existence of a "prohibition" and "exception" relationship between a principle of unencumbered use and an exception for "justifiable" encumbrances, as suggested by the complainants.

7.2164. Article 20, on its face, does not prohibit as a matter of principle all measures that impose encumbrances upon the use of a trademark in the course of trade. Rather, it disallows only those special requirements that "unjustifiably encumber" the use of a trademark in the course of trade.⁴⁶⁹⁸ The structure of the first sentence of Article 20 suggests that it establishes a single obligation, rather than an obligation and exception thereto: "[t]he use of a trademark in the course of trade shall not be unjustifiably encumbered by special requirements". Had the drafters intended to establish a general prohibition on encumbrances and an exception for justifiable ones, it seems to us that they could have, for example, drafted the obligation as follows: the use of a trademark in the course of trade shall not be encumbered by special requirements, unless such encumbrance is justifiable. The commitment that Members have undertaken under the terms of Article 20 is thus to not "unjustifiably encumber[] by special requirements" the use of a trademark in the course of trade. The second part of the sentence, introduced by the term "such as", identifies three examples of specific situations covered by this provision, namely "use with another trademark, use in a special form or use in a manner detrimental to its capability to distinguish the goods or services of one undertaking from those of other undertakings".⁴⁶⁹⁹

7.2165. The fact that the obligation is formulated partly through the use of the negative term "unjustifiably" (emphasis added) does not, in our view, modify this conclusion. We note in this respect that other provisions of the covered agreements resort to such "negative" formulations, without this necessarily implying a shift in the burden of proof in dispute settlement proceedings. For instance, in its first sentence, Article 2.2 of the TBT Agreement provides that: "Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade" (emphasis added). Despite the use of the term "unnecessary" in this sentence, the Appellate Body did not consider that the initial

⁴⁶⁹³ See paras. 7.2141-7.2142 and 7.2145 above; Indonesia's response to Panel question No. 40; and Honduras's response to Panel question No. 40.

⁴⁶⁹⁴ See paras. 7.2140-7.2142 and 7.2144-7.2145 above.

⁴⁶⁹⁵ See paras. 7.2141 and 7.2144 above.

⁴⁶⁹⁶ Dominican Republic's first written submission, paras. 344-345.

⁴⁶⁹⁷ See para. 7.2140 above.

⁴⁶⁹⁸ We also note that the TRIPS Agreement itself, when it seeks to establish a presumption, does so expressly. See Article 16.1 of the TRIPS Agreement and Articles 7(3), 15(2) and 15(4)(a) of the Berne Convention as incorporated into the TRIPS Agreement by means of reference in its Article 9.1.

⁴⁶⁹⁹ The immediate context provided by the second sentence of Article 20 also suggests that Article 20 establishes a single obligation, referred to as "[t]his" in the second sentence.

burden of demonstrating this element of a violation rests with the defendant.⁴⁷⁰⁰ We note that the Appellate Body has similarly considered Article 2.4 of the TBT Agreement, which contains language akin to an exception (using the phrase "except when"), as a single obligation.⁴⁷⁰¹

7.2166. Honduras also seeks support for its position from the ordinary meaning of the term "justifiable". In its view, the term means "defensible", which suggests to Honduras that the defendant bears the burden of "justifying" a measure that falls within the examples listed in Article 20.⁴⁷⁰² The Dominican Republic argues that the burden should not be on the complainant to prove the negative – that is, that there are no grounds to justify the encumbrances imposed by the respondent.⁴⁷⁰³ Cuba contends that it would be inappropriate to require a complainant to identify and refute a justification which it may be unaware of or which it may not be able to particularize.⁴⁷⁰⁴ Indonesia submits that the respondent would be in a better position to provide information and evidence that formed the basis for the justification.⁴⁷⁰⁵

7.2167. As noted above, the commitment that Members have undertaken under the terms of Article 20 is not to "unjustifiably encumber[]". While this formulation does, in our view, imply that there will be circumstances in which an "encumbrance" within the meaning of Article 20 will be "justifiable", and the respondent, as the Member having taken the measures, may be in a privileged position to explain, in response to a possible *prima facie* demonstration of violation, why a specific encumbrance is justifiable, this circumstance is not in itself dispositive of the initial allocation of the burden of proof in dispute settlement proceedings.⁴⁷⁰⁶

7.2168. We note that similar considerations have been discussed in the context of other covered agreements. In the context of the SPS Agreement, in which WTO Members undertake to comply with a number of specific obligations with respect to the adoption and application of sanitary and phytosanitary measures, the Appellate Body considered that a panel erred in allocating the burden of proof generally to the Member imposing the measures at issue.⁴⁷⁰⁷ In doing so, the Appellate Body reiterated that it was the complainant's task to present evidence and legal arguments sufficient to demonstrate a violation of the obligations contained in each specific relevant provision of the SPS Agreement.⁴⁷⁰⁸ Similarly, the second sentence of Article 2.2 of the TBT Agreement, also invoked in the present disputes, provides that "[f]or this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfil a *legitimate* objective, taking account of the risks non-fulfilment would create" (emphasis added). Notwithstanding the fact that the "legitimate objective" at issue is the objective pursued by the Member having adopted the challenged measure, the burden of establishing a *prima facie* violation on the basis of all relevant elements of the provision rests on the complaining Member. The Appellate Body confirmed this position, when it expressed concern in a subsequent dispute that "although the Panel recognized, at the outset of its analysis, that the burden of proving that an objective is *not* legitimate lay with the complainants, its reasoning at times suggests that it, instead, placed on [the respondent] the burden of proving that its objective was legitimate".⁴⁷⁰⁹

7.2169. In conclusion, in line with the general principles on burden of proof in WTO dispute settlement as confirmed by the Appellate Body on a number of occasions, the initial burden of proof is not borne by the respondent to show that any encumbrances it has adopted are justifiable. We conclude, therefore, that it is for the complainants to present a *prima facie* case that the

⁴⁷⁰⁰ Appellate Body Reports, *US – COOL*, para. 379; and *US – Tuna II (Mexico)*, para. 323. See also Panel Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 7.434. As we noted in para. 7.27 above, it is undisputed that the burden of establishing that the TPP measures are inconsistent with Article 2.2 of the TBT Agreement rests on the complainants.

⁴⁷⁰¹ See Appellate Body Report, *EC – Sardines*, paras. 274-275, also cited in Panel Report, *US – Tuna II (Mexico)*, para. 7.628. Articles 3.1 and 3.3 of the SPS Agreement have been interpreted similarly. Appellate Body Report, *EC – Hormones*, para. 104.

⁴⁷⁰² See para. 7.2140 above.

⁴⁷⁰³ See para. 7.2141 above.

⁴⁷⁰⁴ See para. 7.2142 above.

⁴⁷⁰⁵ See para. 7.2144 above.

⁴⁷⁰⁶ See Appellate Body Report, *EC – Sardines*, paras. 276-281.

⁴⁷⁰⁷ Appellate Body Report, *EC – Hormones*, para. 109 fn 71.

⁴⁷⁰⁸ Appellate Body Report, *EC – Hormones*, para. 109.

⁴⁷⁰⁹ Appellate Body Reports, *US – COOL*, para. 449. (emphasis original)

TPP measures amount to special requirements and that the use of a trademark in the course of trade is unjustifiably encumbered by these requirements.

7.2170. We are mindful that this allocation of the initial burden of proof does not address the standard of proof required to make a *prima facie* case, nor does it exhaust the respective responsibilities of the parties in the production of proof and evidence in the course of the proceedings. As observed by the Appellate Body, the application of the rules on the allocation of the burden of proof should not lead to "a mechanistic articulation of the function of the burden of proof" or to "an improper conflation of the burden and the standard of proof".⁴⁷¹⁰

7.2171. As regards the Dominican Republic's concern that the burden should not be on the complainant to prove the negative – that is, that there are no grounds to justify the encumbrances imposed by the respondent, we note that the fact that the complainants are required to make a *prima facie* case in respect of all elements of an alleged Article 20 violation does not necessarily imply that they would need to demonstrate that there are *no* grounds to justify an encumbrance. Rather, it would be for the complainants to make a *prima facie* case that the encumbrance is imposed "unjustifiably"; once that has been done, the onus would shift to the respondent to prove the contrary by submitting sufficient arguments and evidence to this effect. In line with the general principles of burden of proof discussed in paragraphs 7.2158-7.2160 above, it is for each party alleging a particular fact to present the arguments and evidence in support of that assertion. To the extent, therefore, that the respondent considers that, contrary to the complainants' assertions, any encumbrances arising under the challenged measures are not "unjustifiable", it will be incumbent upon it to present the arguments and evidence sufficient to disprove any *prima facie* case established by the complainants in this respect. In sum, the complainants have advanced the positive claim that the TPP measures are inconsistent with Article 20, and with each of its elements, and must establish this claim in its entirety, rather than establishing a claim concerning selected elements of Article 20.

7.2172. In light of these preliminary determinations, we now consider in turn:

- a. whether the TPP measures involve "special requirements" that "encumber" the use of a trademark within the meaning of Article 20; and if so,
- b. whether such requirements encumber the "use of a trademark" "in the course of trade" within the meaning of Article 20; and, if so,
- c. whether they do so "unjustifiably".

7.3.5.3 Whether the TPP measures involve "special requirements" that "encumber" the use of a trademark

7.2173. As noted above, the complainants claim that the TPP measures impose "special requirements" that "encumber" the use of trademarks in the course of trade.⁴⁷¹¹ In particular, in their view, the term "special requirements" covers prohibitions on use and the term "encumber" is broad enough to encompass any extent of restrictiveness, including prohibitions on use.⁴⁷¹²

7.2174. Australia agrees that the TPP measures impose "special requirements" on the use of trademarks, insofar as they require that any word trademark used on tobacco products and their retail packaging must appear in certain form. However, it considers that the term "special requirements" in Article 20 does not encompass those aspects of the TPP measures that prohibit the use of certain trademarks on tobacco retail packaging and products.

7.2175. We recall that the first sentence of Article 20 refers to "special requirements" that "encumber" "the use of a trademark in the course of trade". The parties base their views on the scope of Article 20, in particular whether it covers prohibitions on use, on their understanding of the terms "special requirements" and "encumber". We first summarize the parties' relevant

⁴⁷¹⁰ See Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.34.

⁴⁷¹¹ See para. 7.2132 above.

⁴⁷¹² See section 7.3.5.3.1.1 below.

arguments. We then consider, first, the meaning of the term "special requirements" and, second, the meaning of the term "encumber" in the context of Article 20, and, finally, whether the TPP measures involve "special requirements" that "encumber" the use of trademarks. We will turn to the phrase "the use of a trademark in the course of trade" in the subsequent section.

7.3.5.3.1 Meaning of the terms "special requirements" and "encumbered" in Article 20

7.3.5.3.1.1 Main arguments of the parties

7.2176. Honduras argues that the ordinary meaning of the word "requirement" is a "[a] thing that is *compulsory*", 'something that is needed or that *must* be done'.⁴⁷¹³ In WTO jurisprudence, this term has been interpreted to cover "prohibitions".⁴⁷¹⁴ The ordinary meaning of "special", Honduras continues, has been interpreted in the context of Article 13 of the TRIPS Agreement by the panel in *US – Section 110(5) Copyright Act* as meaning something that is "exceptional, distinctive or limited in its application".⁴⁷¹⁵ The "special requirements" disciplined by Article 20 are therefore "measures of a compulsory nature that are exceptional, address distinctive elements of a trademark, or are limited in their application to particular aspects of trademarks or their use".⁴⁷¹⁶

7.2177. The term "encumber" means "[to] [r]estrict or impede (someone or something) in such a way that free action or movement is difficult'; and 'to impede or hamper the function or activity''. Thus, Article 20 regulates a Member's rights to restrict, impede or hamper the function of "[t]he use of a trademark in the course of trade". Honduras adds that the key function of the use of trademarks is to differentiate and distinguish the goods of the trademark owner. This function is encumbered when the use of a trademark is restricted, impeded or hampered.⁴⁷¹⁷ Article 20 is silent as to the extent or nature of "encumbrances" that fall within its scope. The ordinary meaning of the term "encumber" is therefore broad enough to encompass any type of restriction, "ranging from a partial restriction to a total prohibition on use".⁴⁷¹⁸

7.2178. Honduras draws an analogy with the reasoning of the Appellate Body in *US – Gambling*. In that case, the United States argued that Article XVI of the GATS (entitled "Market Access") regulates only precisely defined quantitative limitations and does not extend to a general prohibition on the supply of a service.⁴⁷¹⁹ This argument was dismissed by both the panel and the Appellate Body on the grounds that the nature and effects of both types of measures are not substantially different.⁴⁷²⁰ According to Honduras, this case confirms its view that the term "encumber" in Article 20 captures complete prohibitions of a trademark as well as partial restrictions.⁴⁷²¹

7.2179. The Dominican Republic argues that a "special requirement" refers to a condition mandated by a government (the "requirement") that is "unusual" or "out of the ordinary" ("special"), either because (i) it prescribes "use" of a trademark in a manner that departs from the

⁴⁷¹³ Honduras's first written submission, para. 277 (emphasis added by Honduras) (quoting Oxford Dictionaries online, HND excerpts, (Exhibit HND-31); and Merriam-Webster Dictionary online, HND excerpts, (Exhibit HND-48)). See also Honduras's second written submission, para. 280.

⁴⁷¹⁴ Honduras's second written submission, paras. 280-281 (referring to Panel Reports, *EC – Approval of Marketing of Biotech Products; US – Continued Suspension; and Canada – Continued Suspension*). Although the cited reports interpreted "requirements" in the context of the SPS Agreement, Honduras argues that they support Honduras's understanding of the scope of the term "special requirements" under Article 20 of the TRIPS Agreement. *Ibid.* para. 281.

⁴⁷¹⁵ Honduras's first written submission, para. 278 (referring to Panel Report, *US – Section 110(5) Copyright Act*, para. 6.109).

⁴⁷¹⁶ Honduras's first written submission, paras. 278 and 282.

⁴⁷¹⁷ Honduras's first written submission, para. 283 (referring to Oxford Dictionaries online, HND excerpts, (Exhibit HND-31), definition of "encumber"; and Merriam-Webster Dictionary online, HND excerpts, (Exhibit HND-48), definition of "encumber").

⁴⁷¹⁸ Honduras's first written submission, para. 285.

⁴⁷¹⁹ Honduras's first written submission, para. 286 (referring to Appellate Body Report, *US – Gambling*, paras. 222 and 224).

⁴⁷²⁰ Honduras's first written submission, para. 286 (referring to Panel Report, *US – Gambling*, paras. 6.331-6.332; and Appellate Body Report, *US – Gambling*, paras. 232-238).

⁴⁷²¹ Honduras's first written submission, para. 286.

usual treatment of a trademark; or (ii) it applies to trademarks used in connection with a particular type of good or service; or (iii) both.⁴⁷²²

7.2180. The meaning of the verb "encumber" is to "hamper ... burden" or to "act as a ... restraint". Encumbrances, therefore, include any measures that burden, hamper, or restrain the ability to use a trademark as registered (or, if not registered, as the owner would otherwise use it).⁴⁷²³ The severity of an encumbrance must be assessed in light of the extent to which the encumbrance interferes with the ability of a trademark, as a whole, to perform its distinguishing function. An encumbrance may fall within a spectrum, ranging from an insignificant encumbrance to a total encumbrance.⁴⁷²⁴

7.2181. Cuba argues that the ordinary meaning of the term "requirement" is "[s]omething called for or demanded; a condition which must be complied with". The TPP measures contain "requirements" by imposing a set of conditions with which commercial actors involved in the manufacture and distribution of tobacco products in Australia must comply. These requirements are "special" because they affect only trademarks used on tobacco products.⁴⁷²⁵ Sections 20(1) and 26(2) of the TPP Act make it clear that Australia seeks specifically to regulate "the use of" trademarks on retail packaging, on cigar bands and on tobacco products themselves.

7.2182. The relevant ordinary meaning of the term "encumber" is "*to hamper, impede ... act as a check or restraint on*". These restrictions on the use of trademarks may properly be described as "encumbrances" since they involve "*impediments*", "*checks*" and "*restraints*" on the use and display of trademarks by trademark owners and they limit the capacity of trademarks to distinguish specific tobacco products from other tobacco products. A prohibition is also a "*restraint*" or "*impediment*" on the use of a trademark; indeed it is the most severe restraint or impediment that can be imposed on the use of a trademark.⁴⁷²⁶

7.2183. Indonesia argues that "special requirements" are "mandated requirements that: 1) apply to a limited product class; 2) apply only for a particular purpose; or 3) are distinct from those that apply generally or 'usually'".⁴⁷²⁷ The TPP measures fall within the scope of the second and third examples of the illustrative list in the first sentence of Article 20.⁴⁷²⁸

7.2184. To "encumber" means "[t]o burden with duties, obligations, or responsibilities". The special requirements with which Article 20 is concerned must impose a burden on the use of a trademark in the course of trade.⁴⁷²⁹ Where the TPP measures prevent use of trademarks all together, such measures are also encumbrances within the meaning of Article 20. In its view, they are an "encumbrance" in the most extreme form and, therefore, cannot be justified in light of the object and purpose of the TRIPS Agreement and the context of Article 20.⁴⁷³⁰

7.2185. Australia submits that the ordinary meaning of the term "use", in the context of Article 20, is to "make use of (a thing), esp. for a particular end or purpose; utilize, turn to account". It argues that, if domestic law prohibits the "use" of certain trademarks altogether, then those trademarks are not being "use[d] ... in the course of trade" and Article 20 is therefore not engaged. Moreover, each of the examples of a "special requirement" contained in the first and second sentences of Article 20 refers to "how a trademark may be used when it is used, not to whether it can be used".⁴⁷³¹

⁴⁷²² Dominican Republic's first written submission, para. 348.

⁴⁷²³ Dominican Republic's first written submission, para. 349.

⁴⁷²⁴ Dominican Republic's first written submission, paras. 351-352.

⁴⁷²⁵ Cuba's first written submission, paras. 300-301 (quoting *Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 1, (Exhibit CUB-44), p. 2541).

⁴⁷²⁶ Cuba's first written submission, para. 310 (quoting *Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 1, (Exhibit CUB-48), p. 827) (emphasis added by Cuba).

⁴⁷²⁷ Indonesia's first written submission, para. 250.

⁴⁷²⁸ Indonesia's first written submission, para. 257.

⁴⁷²⁹ Indonesia's first written submission, para. 269 (referring to *The Compact Oxford English Dictionary*, 2nd edn, J.A. Simpson and E.S.C. Weiner (eds.) (Oxford University Press, 2000), p. 512).

⁴⁷³⁰ Indonesia's first written submission, para. 277.

⁴⁷³¹ Australia's first written submission, para. 340 (referring to *Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 2, pp. 1974, 2341, 2363, 2509, 2541, 3312,

7.2186. Australia submits that the verb "encumber" is defined, in relevant part, to mean "[h]amper, impede ...; act as a check or restraint on". According to Australia, it is evident from the structure of the phrase "encumbered by special requirements" and, in particular, its use of the preposition "by", that the relevant encumbrance under the first sentence of Article 20 is the encumbrance (if any) that arises from the special requirements imposed by the measure at issue. In other words, the encumbrance is a consequence or result of the special requirements.⁴⁷³²

7.2187. Australia argues that Article 19, entitled "Requirements of Use", specifically contemplates that "government requirements" may prohibit the use of a trademark altogether. It recognizes that circumstances "independent[] of the will of the owner of trademark", including exogenous "government requirements", may prevent "the use of a trademark". According to Australia, the point of Article 19 is that any involuntary "non-use" of this type is a "valid reason" for opposing the cancellation of the registration of a trademark on the grounds of non-use. In Australia's view, this context supports the interpretation that Article 20 (entitled "Other Requirements") is concerned with special requirements imposed upon the use of a trademark when "government requirements" do not otherwise prohibit its use.⁴⁷³³

7.2188. Australia further argues that the object and purpose of the TRIPS Agreement is to ensure the adequate and effective protection of the IP rights that Members are required to confer under the Agreement. The rights that Members are required to confer under the TRIPS Agreement are negative rights of exclusion. Nothing in the TRIPS Agreement requires Members to confer a "right of use" upon owners of IP, it being understood that issues relating to the use and exploitation of IP are largely matters of domestic law. In light of the object and purpose of the TRIPS Agreement, Article 20 is best interpreted as imposing a discipline on how a Member may encumber the use of a trademark in the course of trade when its domestic laws and regulations otherwise do not prohibit the use of that trademark.⁴⁷³⁴

7.2189. In Australia's view, the implications of a contrary interpretation of Article 20 would be profound. Under the interpretation proposed by the complainants, a prohibition on tobacco advertising in print or broadcast media or a prohibition on the display of advertising and promotional material, including trademarks at the point of sale – measures that they do not challenge in these proceedings – would fall within the scope of Article 20. Given that these are tobacco control policies in common use among WTO Members, the implications of a finding that these types of measures fall within the scope of Article 20 would be deeply troubling and should be of concern to all WTO Members. "[S]uch an interpretation runs the risk of sweeping into Article 20 a wide array of public policy measures that, in Australia's view, Article 20 was never meant to address."⁴⁷³⁵

7.2190. With regard to Australia's argument that each of the examples of "special requirements" contained in Article 20 refers to how a trademark may be used when it is used, Honduras responds that the "special requirements" listed in Article 20 do not refer exclusively to restrictions, but may also refer to the ultimate restriction, namely, a total prohibition on use. Moreover, it notes that the list of "special requirements" is not exhaustive. The provision may in principle encompass other measures with a higher degree of restrictiveness.⁴⁷³⁶

7.2191. With regard to Australia's reliance on Article 19 as context to support its arguments under Article 20, Honduras takes the view that "Article 19.1 does not permit government actions

3445, and 3485, (*Shorter Oxford English Dictionary*, Vol. 2 AUS excerpts), (Exhibit AUS-245), p. 3485) (emphasis original).

⁴⁷³² Australia's first written submission, para. 347 (referring to *Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 1, pp. 22, 56, 336, 341, 470, 489, 500, 542, 827, 888, 1252, 1271, 1364, 1412, and 1799, (*Shorter Oxford English Dictionary*, Vol. 1 AUS excerpts, Part 1), (Exhibit AUS-243), p. 827). We will consider the parties' arguments on the scope of the term "in the course of trade" and relevant uses of a trademark in sections 7.3.5.4.1.1 and 7.3.5.4.2.1.

⁴⁷³³ Australia's first written submission, para. 341.

⁴⁷³⁴ Australia's first written submission, para. 342.

⁴⁷³⁵ Australia's first written submission, paras. 343 and 345.

⁴⁷³⁶ Honduras's second written submission, para. 284.

encroaching on *trademark* rights as such, but rather serves to protect trademark rights, when they are *incidentally* affected by measures regulating goods".⁴⁷³⁷

7.2192. Regarding Australia's arguments relating to the nature of rights provided under the TRIPS Agreement, Honduras responds that "[t]he fact that (negative) enforcement rights are established by other provisions of the TRIPS Agreement, such as Article 16.1, does not determine the scope of the obligation under Article 20. Article 20 is an independent provision, which does not refer to (negative) enforcement rights, but protects the distinctiveness of trademarks by disciplining a broad range of special government requirements that encumber unjustifiably the use of a trademark."⁴⁷³⁸

7.2193. In response to Australia's concerns about broader systemic implications, Honduras argues that "[a] general regulatory measure, such as an advertising ban, is not a '*special* requirement' on the use of a trademark, as it does not address distinctive elements of a trademark, and its application is not limited to a particular aspect of trademarks". The term "*special*" highlights that Article 20 is concerned with trademark requirements that "specifically" impact the conditions for the use of the trademark, by imposing requirements on the commercial use of the trademark. Requirements that incidentally affect the use of a trademark but are unrelated to the mark and its functions, such as general advertising bans, are not "*special requirements*" for the purpose of Article 20. Nor would this general measure fall under any of the examples of special requirements set out in Article 20.⁴⁷³⁹

7.2194. The Dominican Republic responds that there is no language in Article 20 that requires the treaty interpreter to ask, as a threshold matter, whether a trademark is being used. Rather, the text asks whether "[t]he use of a trademark [is being] encumbered". The Dominican Republic submits that a prohibition on the use of a trademark plainly hampers, impedes, restrains, and obstructs the act of putting a trademark to work, or employing and applying it. Furthermore, the three examples serve merely to illustrate the scope of Article 20; they do not define the provision exhaustively. It adds that "it would be an odd interpretive outcome were a Member required to justify a *weak* form of encumbrance that interfered with the ability of a trademark to fulfill its function, but at the same time was liberated from any discipline under Article 20 for a *severe* form of encumbrance that defeated a trademark's function".⁴⁷⁴⁰

7.2195. As regards Article 19, the Dominican Republic argues that Article 19 merely addresses the consequences for registration of involuntary non-use of the trademark and says nothing about the need to justify a different requirement (i.e. a requirement other than a requirement of use to maintain registration) that encumbers the use of a trademark.⁴⁷⁴¹

7.2196. As regards Australia's concern that including a prohibition on use within the scope of Article 20 would subject to scrutiny a Member's decision to ban advertising for particular products, the Dominican Republic responds that "Article 20 does not cover measures that *incidentally impact* trademarks, and 'that are otherwise *unrelated to the trademark and their function*', such as advertising bans or restrictions on the availability of a product".⁴⁷⁴² Under the text, Article 20 does not apply to every encumbrance on the use of a trademark. Rather, it applies only to those encumbrances that arise from a "*special requirement*". The term "*special requirement*" refers to measures that establish legal conditions directly regulating the trademark itself. For example, a measure that regulates a good or a service – as opposed to a trademark used on those products – does not impose a "*special requirement*" on trademarks, even if the measure has incidental effects on the use of a trademark.⁴⁷⁴³

7.2197. Cuba responds that the ordinary meaning of the term "*requirement*" includes a requirement not to do something or, in other words, includes a "*prohibition*". A "*requirement*" may

⁴⁷³⁷ Honduras's second written submission, para. 285. (emphasis original)

⁴⁷³⁸ Honduras's second written submission, para. 286.

⁴⁷³⁹ Honduras's second written submission, para. 295. (emphasis original)

⁴⁷⁴⁰ Dominican Republic's second written submission, paras. 102-106. (emphasis original)

⁴⁷⁴¹ Dominican Republic's second written submission, para. 107.

⁴⁷⁴² Dominican Republic's second written submission, para. 108 (referring to European Union's third-party submission, para. 15). (emphasis original)

⁴⁷⁴³ Dominican Republic's second written submission, para. 110.

be expressed in a positive or negative form and, therefore, includes measures prohibiting trademark use. Thus, the term "requirement" is broader than the term "prohibition", but unquestionably also includes prohibitions. "To prohibit" is nothing other than "to require, negatively" that something be done or not done. Furthermore, the TPP measures impose both negative and positive requirements through the prohibition on use of all trademarks, and by requiring, for example, the use of trade names in a specific format and typeface. Accordingly, the TPP measures establish a series of positive and negative requirements on trademark use.⁴⁷⁴⁴

7.2198. Cuba invokes as relevant context Article XI of the GATT 1994, which eliminates import "prohibitions or restrictions", and has been interpreted as referring to "limiting conditions" or requirements on importation, with prohibition being the utmost requirement of restriction or limitation.⁴⁷⁴⁵

7.2199. Cuba adds that it is not any requirement, even remotely related to trademark use in the course of trade, that would be covered by the subject matter of Article 20, as Australia wrongly suggests. The relevant trademark requirements and corresponding provisions of the TPP Act are directly and specifically related to trademark use, and impose both negative and positive "special" requirements on trademark use. Accordingly, they are sufficiently "special" to be covered by Article 20 of the TRIPS Agreement.⁴⁷⁴⁶

7.2200. Indonesia responds that Australia "creates a circular argument by claiming that a prohibition on use cannot be covered by Article 20 because there is no use in the course of trade". As regards the illustrative list of examples of "special requirements", the use of the term "such as" in Article 20 makes it clear that the specified examples are not a closed list and that a wide range of special requirements could be covered by Article 20, so long as they encumber use of a trademark in the course of trade. Indonesia maintains that there is no support in the language of Article 20 for the view that a special requirement prohibiting use in the course of trade is excluded from the scope of Article 20.⁴⁷⁴⁷

7.2201. Indonesia argues that Article 19 deals with a single circumstance relating to use of a trademark – namely, where use is required for registration, but obstacles to use beyond the control of the trademark owner (e.g. import requirements) prevent such use. For Indonesia, once Article 19 is given its proper meaning, it becomes clear that, if Article 20 does not address prohibitions on use of a trademark in the course of trade, no other provision will.⁴⁷⁴⁸

7.2202. Indonesia also considers that Australia's position that the rights to be conferred under the TRIPS Agreement are negative rights of exclusion would deliver only half the protection required and, thus, would be inconsistent with the object and purpose of the TRIPS Agreement. In Indonesia's view, Australia's interpretation would create an untenable situation where the TRIPS Agreement would allow Members total freedom to impose a prohibition on the use of a trademark without justification or explanation, but would be required to provide a justification and explanation when imposing limitations on the use of a trademark.⁴⁷⁴⁹

7.2203. Furthermore, Indonesia considers that Australia's concern that including prohibitions on use within the scope of Article 20 would undermine other widely-used tobacco control policies, such as advertising bans or product bans, is specious. Indonesia argues that there is a distinction between a general prohibition on the availability of a good and a prohibition on the use of a specific trademark or a special class of trademarks on a good that is lawfully placed on the market. Article 20 is not concerned with the application of any and all requirements that may indirectly encumber the use of trademarks. Rather, it addresses the application of "special requirements". A

⁴⁷⁴⁴ Cuba's second written submission, paras. 71-72.

⁴⁷⁴⁵ Cuba's second written submission, para. 73 (referring to Panel Report, *India – Autos*, paras. 7.269-7.270).

⁴⁷⁴⁶ Cuba's second written submission, paras. 75-77.

⁴⁷⁴⁷ Indonesia's second written submission, para. 116.

⁴⁷⁴⁸ Indonesia's second written submission, paras. 122-124.

⁴⁷⁴⁹ Indonesia's second written submission, para. 125.

general prohibition, such as on the sale of a good in a market or on advertising generally, does not satisfy the definition of a "special requirement" on the use of a trademark.⁴⁷⁵⁰

7.3.5.3.1.2 Main arguments of the third parties

7.2204. Argentina agrees with Australia's interpretation that, while Article 20 lays down certain conditions in relation to the use of a trademark, it says nothing about whether or not it can be used.⁴⁷⁵¹

7.2205. Brazil is not convinced that a prohibition on the use of trademarks would be outside the scope of Article 20. Nor does it seem appropriate, in Brazil's view, to affirm that Article 19 could serve as valid context to such interpretation. In its view, Article 19 makes reference to requirements concerning goods or services themselves (e.g. technical, sanitary), not concerning trademarks. The non-exhaustive list of examples of special requirements (introduced by the term "such as") *per se* does not exclude prohibition of use from the scope of Article 20. In light of a definition offered by the *Shorter Oxford English Dictionary*, a prohibition seems to be a form of encumbrance. Furthermore, if a prohibition of use were deemed to be beyond the scope of Article 20, then a loophole in the TRIPS Agreement could be created, whereby it would be possible to circumvent the obligation of "no-unjustifiable-encumbrance" by prohibiting the use of trademarks altogether.⁴⁷⁵²

7.2206. Canada argues that the examples of requirements listed in Article 20 relate to *how* a trademark can be used. In its view, restrictions related to *whether* a trademark can be used (e.g. prohibiting their use on goods or in advertising) or *where* a trademark can be used (e.g. designating use on specified parts of product packaging) are not "special requirements" for the purposes of Article 20. Article 20 does not expressly state that a Member is prohibited from banning or restricting the use of a trademark. The absence of such language indicates that Members sought to preserve this regulatory flexibility. Thus, "[t]aking into consideration the ordinary meaning of the words, in their context, the term 'special requirements' in Article 20 must be interpreted narrowly to mean: mandatory demands that have a limited scope of application or a limited effect⁴⁷⁵³ on how a trademark can be used."⁴⁷⁵⁴ While Canada agrees with Honduras that Article 19.1 protects trademarks when they are "incidentally" affected by measures regulating products, it is clear in Canada's view that the text does not limit the protection of trademarks to these "types" of circumstances. The text does not preclude other types of measures, such as those directly regulating the use of trademarks or products, from constituting "circumstances" that may be recognized as valid reasons for non-use of a trademark. For Canada, the narrow interpretation advanced by Honduras is not supported by the text and would untenably limit the scope of protection afforded under Article 19.1.⁴⁷⁵⁵

7.2207. China is of the view that, where the use of a trademark is prohibited, its use is "encumbered". The three special requirements mentioned in Article 20 are non-exhaustive illustrations, as indicated by the term "such as".⁴⁷⁵⁶

7.2208. The European Union considers that Article 20 applies to cases where requirements that amount to "encumbrances" are imposed by WTO Members on the use of trademarks for designated goods and services which may be commercialized. Article 20 does not apply to restrictions on commercialization of goods and services. Under the TRIPS Agreement, WTO Members have retained their sovereign right to prohibit or to impose conditions on the commercialization of designated goods and services. The word "special" is often "used with a large number of legal terms to denote particular or distinctive instances or cases of the thing, action, or person in question". In Article 20, the particularity or distinctiveness of the "requirements" must be understood to relate to the specific subject-matter of that provision. Article 20 is about use of a

⁴⁷⁵⁰ Indonesia's second written submission, paras. 126-127.

⁴⁷⁵¹ Argentina's third-party submission, para. 10.

⁴⁷⁵² Brazil's third-party submission, paras. 40-43.

⁴⁷⁵³ (footnote original) For example, the requirement may be limited in its application to, or effect on, a particular class of trademarks or category of goods.

⁴⁷⁵⁴ Canada's third-party submission, paras. 64-67.

⁴⁷⁵⁵ Canada's third-party response to Panel question No. 12, paras. 25-26.

⁴⁷⁵⁶ China's third-party submission, para. 39.

trademark. Therefore, the notion of "special requirement" does not cover requirements that affect the use of trademarks but that are otherwise unrelated to trademarks and their function (i.e. to convey information that enables the public to distinguish between the goods or services of different undertakings). For instance, an absolute restriction on advertising of tobacco products in print or broadcast media is not covered and hence would not be subject to the Article 20 test. However, measures that are specific to trademarks, including measures that specifically prohibit the use of trademarks on the labelling of products or on advertising, would amount to "special requirements".⁴⁷⁵⁷

7.2209. The European Union maintains that Article 19 of the TRIPS Agreement does not change this conclusion. Article 19 (entitled "Requirement of Use") refers in general to "import restrictions on or other government requirements for goods or services". This sentence is furthermore just an example ("such as") of an obstacle to the use of a trademark, thus indicating that there may be other obstacles to such use. The fact that Article 20 is entitled "Other Requirements" must be read in the light of the title of Article 19, and its first sentence, addressing the requirement of use of a trademark. It does not imply that the "special requirements" under Article 20 and the "other government requirements" under Article 19 are mutually exclusive concepts.⁴⁷⁵⁸ The text of Article 19 does not contain a distinction according to whether trademarks are incidentally or directly affected by measures. It may, therefore, be applicable in both constellations.⁴⁷⁵⁹

7.2210. Guatemala understands Article 19 to deal specifically with the "requirement of use" to "maintain a registration", while Article 20 addresses "other requirements", to the exclusion of the "requirement of use" addressed in Article 19. Article 20 applies provided that the requirement at issue is not a "requirement of use" to "maintain a registration". Guatemala considers that Article 20 applies to a total prohibition. Therefore, Guatemala submits that "unjustifiably encumbered" encompasses unjustifiable prohibitions or "impediments" to the use of a trademark. Guatemala is not convinced that the TRIPS Agreement allows Members total freedom to impose prohibitions but not when they impose limitations on the use of trademarks.⁴⁷⁶⁰

7.2211. Japan submits that a prohibition on use of a trademark constitutes a "special requirement" within the meaning of Article 20 since such prohibition impairs the ability of a trademark owner to distinguish its goods or services from those of other economic operators. In its view, Australia's proposed interpretation would yield outcomes that are counterintuitive. Conditions that interfere with, but do not prohibit, the use of a trademark would be allowed under Article 20 only if such restrictions were justifiable. Yet, under Australia's interpretation, a total prohibition on the use of a trademark would always be allowed without any discipline, although it would effectively deprive the trademark of value.⁴⁷⁶¹

7.2212. Malawi asserts that the TRIPS Agreement protects "the qualified minimum right to use validly registered trademarks".⁴⁷⁶² As regards Article 20, it considers that a prohibition on the use of a trademark amounts to the ultimate encumbrance.⁴⁷⁶³

7.2213. New Zealand submits that the term "special requirements" must be interpreted in accordance with the ordinary meaning to be given to the term in its context and in light of the object and purpose of the TRIPS Agreement. It notes that each of the examples in the non-exhaustive list deals with the use of a trademark.⁴⁷⁶⁴ New Zealand maintains that Honduras's suggestion that Article 19 serves to protect trademarks when they are "incidentally" affected by measures regulating goods does not have any basis within the text of the provision.⁴⁷⁶⁵

⁴⁷⁵⁷ European Union's third-party submission, paras. 13-17 (referring to Oxford English Dictionary online, definition of "special", available at:

<<http://www.oed.com/view/Entry/185972?rskey=7v9b1F&result=1#eid>>, accessed 8 April 2015).

⁴⁷⁵⁸ European Union's third-party submission, para. 18.

⁴⁷⁵⁹ European Union's third-party response to Panel question No. 12, para. 46.

⁴⁷⁶⁰ Guatemala's third-party submission, paras. 21-23.

⁴⁷⁶¹ Japan's third-party submission, paras. 12 and 14.

⁴⁷⁶² Malawi's third-party submission, para. 18.

⁴⁷⁶³ Malawi's third-party statement, para. 15.

⁴⁷⁶⁴ New Zealand's third-party submission, paras. 45 and 51.

⁴⁷⁶⁵ New Zealand's third-party response to Panel question No. 12, p. 7.

7.2214. Nicaragua argues that Article 20 confirms that "use of a trademark in the course of trade" is a matter covered by the TRIPS Agreement. The Agreement thus goes beyond treating trademarks as mere negative rights and protects the use of a trademark. Article 20 protects the distinguishing function of trademarks. Special requirements on the use of a trademark that encumber use include the special requirement not to use the trademark on the product in retail trade. General regulatory requirements that may affect the use of trademarks such as advertising restrictions are not covered by Article 20 because they are not "specific" to the use of a trademark such that they would be "special" requirements.⁴⁷⁶⁶ Nicaragua agrees with Honduras that Article 19 focuses on the protection from cancellation of a trademark registration due to non-use in the presence of a ban or restriction on the commercialization or placing on the market of a product for which the trademark is registered.⁴⁷⁶⁷

7.2215. Norway argues that, although Article 20 refers to the use of a trademark, its terms do not impose on WTO Members an obligation to provide a "right of use". Article 20 deals with government regulation and its limits if a trademark is used. Norway agrees with Australia's position that measures prohibiting the use of a trademark do not fall within the scope of Article 20. It notes that the three examples listed in Article 20 are all concerned with *how* a trademark is used. Article 19 recognizes Members' right to impose measures creating an "obstacle" to the use of a trademark. A logical consequence of the recognition in Article 19 of Members' right to prevent the use of a trademark is that the term "special requirements" in Article 20 does not refer to requirements of this kind, but rather refers to obligations imposed in situations where the use of a trademark is not prohibited.⁴⁷⁶⁸

7.2216. Oman endorses the legal arguments and factual evidence set out in Australia's submissions to the Panel.⁴⁷⁶⁹

7.2217. Singapore argues that Article 20 does not lay down an obligation to permit the use of a trademark. The application of the *ejusdem generis* rule supports the reading that a prohibition on the use of trademarks does not fall within the meaning of special requirements that encumber the use of trademarks because it is not of the same type as the special requirements that are listed. This reading is confirmed by the negotiating history of Article 20 which commentators have explained was directed at certain practices during the Uruguay Round such as requiring foreign trademarks to be used with the trademark or trade name of the local licensee. The practices discussed did not include prohibitions on the use of trademarks. For these reasons, Singapore's view is that aspects of the TPP measures that prohibit the use of "non-word" trademarks are not within the scope of Article 20.⁴⁷⁷⁰ It also considers that the second sentence of Article 19.1 does not set out exhaustively the types of situations which may constitute "obstacles to the use of trademark".⁴⁷⁷¹

7.2218. Zambia asserts that the TPP measures impose drastic "special requirements" on word marks and prohibit all other trademark use entirely and thus impose the "ultimate encumbrance" on the use of trademarks.⁴⁷⁷²

7.2219. Zimbabwe considers that the right to use is protected under international law, in particular in Articles 16 and 20 of the TRIPS Agreement. Therefore, it considers that Australia violates its obligations under the TRIPS Agreement by prohibiting the use of trademarks on tobacco products. The TPP measures impose the ultimate encumbrance by almost entirely prohibiting trademark owners from using their registered marks on lawful products.⁴⁷⁷³

⁴⁷⁶⁶ Nicaragua's third-party submission, paras. 26-27.

⁴⁷⁶⁷ Nicaragua's third-party response to Panel question No. 12, p. 9.

⁴⁷⁶⁸ Norway's third-party submission, paras. 35 and 49-51; and Norway's third-party response to Panel question No. 13, paras. 24-26.

⁴⁷⁶⁹ Oman's third-party statement, para. 4.

⁴⁷⁷⁰ Singapore's third-party submission, paras. 43-45.

⁴⁷⁷¹ Singapore's third-party response to Panel question No. 12, p. 6.

⁴⁷⁷² Zambia's third-party statement, para. 12.

⁴⁷⁷³ Zimbabwe's third-party submission, paras. 34-35.

7.3.5.3.1.3 Analysis by the Panel

7.2220. As described above, Article 20 relates to "special requirements" that "encumber" the use of a trademark, and a finding of violation of Article 20 would therefore involve in the first instance a finding that such "special requirements" exist and that they "encumber" the use a trademark. The parties have different views on the meaning of these terms in Article 20. We therefore consider this question first.

Meaning of "special requirements"

7.2221. As described above, the parties disagree on the extent to which prohibitions on the use of a trademark may constitute "special requirements" within the meaning of Article 20. We therefore consider the ordinary meaning of this term, taken in its context and in light of its object and purpose and that of the TRIPS Agreement.⁴⁷⁷⁴

7.2222. The term "requirement" refers to "[s]omething called for or demanded; a condition which must be complied with".⁴⁷⁷⁵ This term has been interpreted in the context of various other covered agreements. For instance, in the context of an analysis of Annex A(1) of the SPS Agreement, the panel in *EC – Approval and Marketing of Biotech Products* "note[d] that the term 'requirements' is broad in scope": "[f]or instance, both an authorization to market a particular product and a ban on the marketing of a particular product may be considered 'requirements', in that one is effectively a requirement to permit the marketing of a product and the other a requirement to ban the marketing of a product."⁴⁷⁷⁶ We agree with that panel that the plain meaning of the term "requirement" does not imply permitting a certain action or behaviour, to the exclusion of banning or prohibiting certain actions. We now consider the specific context in which the term is used.

7.2223. In Article 20, the specific object of the term "requirements" is the "use of a trademark in the course of trade". The term "requirements" is qualified by the adjective "special". The use of the term "special" suggests two relevant connotations. The first is "[h]aving a close or exclusive connection with a specified person, thing, or set; own, particular, individual"; "specific, individual, or particular to the specified person, thing, or set"; or "[h]aving an individual, particular, or limited application, object, or intention; affecting or concerning a single person, thing, group".⁴⁷⁷⁷ The second connotation relates to being "[e]xceptional in quality or degree; unusual; out of the ordinary".⁴⁷⁷⁸ All parties refer to the panel report in *US – Section 110(5) Copyright Act*, where the panel considered the meaning of "special cases" in Article 13 of the TRIPS Agreement, which relates to limitations and exceptions to exclusive rights in relation to copyright.⁴⁷⁷⁹ The panel explained in that context that "[t]he term 'special' connotes 'having an individual or limited application or purpose', 'containing details; precise, specific', 'exceptional in quality or degree; unusual; out of the ordinary' or 'distinctive in some way'".⁴⁷⁸⁰

7.2224. In our view, it follows from the ordinary meaning of "special" that the relevant "requirements" under Article 20 are limited in application. The "requirements" referred to must have "a close or exclusive connection" with their specific object, namely, in the context of Article 20, the "use of a trademark in the course of trade".

⁴⁷⁷⁴ See, e.g. para. 7.1822 above.

⁴⁷⁷⁵ Oxford English Dictionary online, definition of "requirement", available at:

<<http://www.oed.com/view/Entry/163260?redirectedFrom=requirement#eid>>, accessed 2 May 2017.

⁴⁷⁷⁶ Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.1334. See also Panel Reports, *US – Continued Suspension*, para. 7.433; and *Canada – Continued Suspension*, para. 7.424.

⁴⁷⁷⁷ Oxford English Dictionary online, definition of "special", available at:

<<http://www.oed.com/view/Entry/185972?rskey=j7u0X4&result=1#eid>>, accessed 2 May 2017.

⁴⁷⁷⁸ Oxford English Dictionary online, definition of "special", available at:

<<http://www.oed.com/view/Entry/185972?rskey=j7u0X4&result=1#eid>>, accessed 2 May 2017.

⁴⁷⁷⁹ Article 13 of the TRIPS Agreement, relating to copyright, provides that: "Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder."

⁴⁷⁸⁰ Panel Report, *US – Section 110(5) Copyright Act*, para. 6.109. See Honduras's first written submission, para. 278; Dominican Republic's first written submission, fn 289; Cuba's first written submission, fn 388; Indonesia's first written submission, para. 250; and Australia's first written submission, fn 529.

7.2225. Australia argues that if domestic law prohibits the "use" of certain trademarks altogether, then those trademarks are not being "use[d] ... in the course of trade" and Article 20 is therefore not engaged. In support of its position, Australia points out that each of the examples of a "special requirement" contained in the first and second sentences of Article 20 refers to how a trademark may be used when it is used, not to whether it can be used. The three specific situations identified in the first sentence are the following: use with another trademark; use in a special form; and use in a manner detrimental to its capability to distinguish the goods or services of one undertaking from those of other undertakings. The second sentence refers to the use of the trademark identifying the undertaking producing the goods or services along with, but without linking it to, the trademark distinguishing the specific goods or services in question of that undertaking, which is not precluded.

7.2226. The examples introduced by "such as" in the first sentence of Article 20 may assist our understanding of the scope of Article 20, insofar as they illustrate situations in which special requirements are imposed in relation to the use of trademarks in the course of trade that fall within the scope of Article 20.⁴⁷⁸¹ We note that the term "such as" is placed immediately after the term "special requirements", indicating that the enumeration that follows identifies examples of "special requirements".⁴⁷⁸² While these three examples appear to relate, on their face, to situations in which a trademark may be used, with certain conditions, this list, preceded by the term "such as", is illustrative. In our view, therefore, it does not imply that other types of requirements, including a requirement amounting to a *prohibition* on use, would be precluded from falling within the scope of Article 20.

7.2227. Similarly, the fact that the second sentence of Article 20 expressly identifies a specific situation, unrelated to a prohibition on the use of a trademark, as being "not precluded" carries no implication, in our view, that situations in which the use of a trademark *is* entirely prevented would not be covered by the terms of the first sentence.

7.2228. As described above, the parties have also referred to the title and text of Article 19 as relevant context in support of their respective positions. Article 19 is entitled "Requirement of Use", while Article 20 is entitled "Other Requirements". The requirement addressed by Article 19 is the requirement that may exist under domestic law that a trademark be used as a condition for maintaining its registration. The "other requirements" in the title of Article 20 evidently refer to something other than the requirement of use addressed in Article 19.

7.2229. Australia argues that the second sentence of Article 19 contemplates that "government requirements" may prohibit the use of trademarks, which in its view implies that Article 20 is concerned with "special requirements" on the use of trademarks when "government requirements" do not otherwise prohibit such use.⁴⁷⁸³ Honduras responds that the second sentence of Article 19 only envisages situations where trademarks are incidentally affected by measures regulating goods.⁴⁷⁸⁴

7.2230. The second sentence of Article 19 provides that "[c]ircumstances arising independently of the will of the owner of the trademark which constitute an obstacle to the use of the trademark, such as import restrictions on or other government requirements for goods or services protected by the trademark, shall be recognized as valid reasons for non-use". We note that it does not distinguish between government requirements that affect trademarks incidentally or directly. Furthermore, in our view, "government requirements" as referred to in the second sentence of Article 19 and "special requirements" addressed in Article 20 are not mutually exclusive notions.

⁴⁷⁸¹ We will address the parties' views on whether encumbrances that fall within the scope of the illustrative list are presumed to be unjustifiable in section 7.3.5.5.2.4 below.

⁴⁷⁸² As noted by the Dominican Republic and Canada, in the French version, the term "*telles que*" in its plural form refers to "*des prescriptions spéciales*". See Dominican Republic's response to Panel question No. 39, para. 157; and Canada's third-party submission, paras. 69-72. In the French text, the first sentence of Article 20 reads as follows: "*L'usage d'une marque de fabrique ou de commerce au cours d'opérations commerciales ne sera pas entravé de manière injustifiable par des prescriptions spéciales, telles que l'usage simultané d'une autre marque, l'usage sous une forme spéciale, ou l'usage d'une manière qui nuise à sa capacité de distinguer les produits ou les services d'une entreprise de ceux d'autres entreprises.*" The Spanish text is "*como por ejemplo*".

⁴⁷⁸³ Australia's first written submission, para. 341.

⁴⁷⁸⁴ Honduras's second written submission, para. 285.

The fact that Article 19 contemplates the existence of a government measure that prevents the use of a trademark and addresses the consequences of such measures in respect of the maintenance of registration based on use does not, as such, address whether any such measure would amount to a special requirement affecting the use of a trademark and be subject to the disciplines of Article 20. In light of these elements, we are not persuaded that Article 19 supports the proposition that the "special requirements" referred to in Article 20 are limited in scope to situations in which the use of the relevant trademark is allowed.

7.2231. The elements above suggest that the term "special requirements" refers to a condition that must be complied with, has a close connection with or specifically addresses the "use of a trademark in the course of trade", and is limited in application. This may include a requirement not to do something, in particular a prohibition on using a trademark.

7.2232. For the complainants, the relevant question is not whether a trademark is being used, but rather whether its use is being encumbered.⁴⁷⁸⁵ We agree that the relevant question, for the purposes of determining whether "special requirements" may be considered to "encumber the use of a trademark", is not whether the trademark is *being* used, but rather whether its use is being *encumbered* by the "special requirements" at issue. We now consider the meaning of the term "encumber", which also provides further relevant context for our understanding of the term "special requirements".

7.2233. Before turning to this question, we note that all parties agree, albeit for different reasons, that a general regulatory measure, such as an advertising ban, would not be covered by the disciplines under Article 20.⁴⁷⁸⁶ The complainants and some third parties come to this conclusion on the grounds that such general regulatory measures are not "*special requirements*", as they do not specifically concern the conditions on the use of a trademark; in their view, regulatory requirements that incidentally affect the use of a trademark but are unrelated to the mark and its functions, are not "special requirements" for the purposes of Article 20.⁴⁷⁸⁷ Australia and some third parties come to the same conclusion on the grounds that prohibitions on the use of trademarks are not covered under Article 20.⁴⁷⁸⁸ While we note these positions, we do not find it necessary for the purposes of the present disputes to take a position on the extent to which any particular measures not before us in these proceedings may or may not be covered by this provision. In particular, nothing in our findings should be taken as suggesting that the kind of trademark use that may be affected by measures falling within the scope of Article 20 is necessarily limited to use in the form of application of a trademark on a product presented for sale.

Meaning of "encumber"

7.2234. By the terms of Article 20, "special requirements" may give rise to a violation of that provision only if they "*encumber*" the "use of a trademark in the course of trade". The term "encumber" therefore further informs the connection that must exist between the "special requirements" at issue and the "use of a trademark", for the purposes of Article 20. Specifically, the term "encumbered" defines the type of situation in which a "special requirement" affecting the "use of a trademark in the course of trade" falls under the purview of Article 20. If "special requirements" do not "*encumber*" the "use of a trademark", no violation of this provision will arise.⁴⁷⁸⁹

⁴⁷⁸⁵ Dominican Republic's second written submission, para. 102.

⁴⁷⁸⁶ See section 7.3.5.3.1.1 above.

⁴⁷⁸⁷ Honduras's second written submission, para. 295; Dominican Republic's second written submission, paras. 108 and 110; Cuba's second written submission, paras. 75-77; Indonesia's second written submission, paras. 126-127; European Union's third-party submission, para. 16; and Nicaragua's third-party submission, para. 27.

⁴⁷⁸⁸ Australia's first written submission, paras. 343 and 345; and Canada's third-party submission, para. 64.

⁴⁷⁸⁹ Furthermore, for there to be a violation of Article 20, the use of a trademark in the course of trade must be encumbered by special requirements "unjustifiably". We will consider the meaning of the term "unjustifiably" in section 7.3.5.5.1 below.

7.2235. The verb "encumber" is defined as follows: "[r]estrict or impede (someone or something) in such a way that free action or movement is difficult"⁴⁷⁹⁰; "impede or hamper the function or activity"⁴⁷⁹¹; and "to hamper" or "to burden".⁴⁷⁹² Synonyms of this term include "hamper", "hinder", "obstruct", "limit", or "restrain".⁴⁷⁹³ Therefore, "special requirements" that would restrict or impede the use of a trademark would fall within the scope of Article 20, to the extent that they would restrict such use "in the course of trade".

7.2236. Without prejudice, at this stage of our analysis, to the meaning to be given to the phrase "in the course of trade" in Article 20, we see no basis for assuming that a "special requirement" prohibiting entirely the use of a trademark would not "hinder" or "hamper" the use of such trademark. Rather, if the use of a trademark is prohibited, it is "encumbered" to the greatest possible extent. We are therefore not persuaded that the terms of Article 20 imply that only "special requirements" that would determine *how* a trademark may be used, to the exclusion of special requirements entirely disallowing the use of a trademark, may be considered to "encumber the use" of such trademark.

7.2237. Although it relates to partially different terms in different contexts, this understanding is consistent with the approach reflected in the rulings cited above under the SPS Agreement⁴⁷⁹⁴, and in the rulings under the GATS, where a prohibition on market access was considered to amount to a quantitative limitation under Article XVI of the GATS.⁴⁷⁹⁵

7.2238. We also agree with those complainants and third parties who argue that it would be "counterintuitive" to consider that a measure that restricts the use of a trademark would be subject to the disciplines of Article 20 while a more far-reaching measure to prohibit such use would not. Specifically, such an interpretation would, in our view, defeat the very object of this provision. It would create an illogical distinction between a highly restrictive requirement that comes extremely close to an outright prohibition, which would need to be justified, and an outright prohibition of use, which under such an interpretation would require no justification.

7.2239. In our view, therefore, encumbrances arising from special requirements within the meaning of Article 20 may range from limited encumbrances, such as those resulting from the specific types of requirements mentioned in the first and second sentences of Article 20, to more extensive encumbrances, such as a prohibition on the use of a trademark in certain situations.

7.3.5.3.2 Application to the TPP measures

7.2240. As described in greater detail above⁴⁷⁹⁶, the TPP measures regulate the appearance of trademarks on tobacco retail packaging and products in various ways. In respect of retail packaging of tobacco products, the TPP measures permit the use of word marks that denote the brand, business or company name, or the name of the product variant, as long as these trademarks appear in the form prescribed by the TPP Regulations. They prohibit the use of stylized word marks, composite marks and figurative marks.⁴⁷⁹⁷ In respect of tobacco products, the TPP measures prohibit the use of all trademarks on cigarettes. In respect of cigars, they permit the use of trademarks denoting the brand, business or company name, or the name of the product

⁴⁷⁹⁰ Oxford Dictionaries online, British & World English, definition of "encumber", <<https://en.oxforddictionaries.com/definition/encumber>>, accessed 2 May 2017.

⁴⁷⁹¹ Merriam-Webster Dictionary online, definition of "encumber", available at: <<https://www.merriam-webster.com/dictionary/encumber>>, accessed 2 May 2017.

⁴⁷⁹² Oxford English Dictionary online, definition of "encumber", available at: <<http://www.oed.com/view/Entry/61832?rskey=9GoJbi&result=2&isAdvanced=false#eid>>, accessed 2 May 2017.

⁴⁷⁹³ Oxford Dictionaries online, English synonyms, synonyms of "encumber", <<https://en.oxforddictionaries.com/thesaurus/encumber>>, accessed 2 May 2017.

⁴⁷⁹⁴ Honduras's second written submission, paras. 280-281 (referring to Panel Reports, *EC – Approval of Marketing of Biotech Products; US – Continued Suspension*; and *Canada – Continued Suspension*).

⁴⁷⁹⁵ Honduras's first written submission, para. 286 (referring to Panel Report, *US – Gambling*, paras. 6.331-6.332; and Appellate Body Report, *US – Gambling*, paras. 232-238).

⁴⁷⁹⁶ See sections 2.1.2.3 and 2.1.2.4 above.

⁴⁷⁹⁷ For an explanation of the terminology used in these Reports for different types of trademarks, see fn 4095 above.

variant, as well as the country of origin, so long as these trademarks appear in the form prescribed by the TPP Regulations.

7.2241. As noted, all parties agree that the TPP measures impose "special requirements" with respect to word marks, to the extent that they permit the use of word marks but require that these appear in the form prescribed by the TPP Regulations.⁴⁷⁹⁸ These requirements have a connection with, and affect, the use of trademarks by expressly permitting their use only in a prescribed manner. The measures must be complied with and are limited in their application to the use of trademarks on tobacco products and their packaging. We find, therefore, that the requirements of the TPP measures permitting the use of word marks on tobacco retail packaging and on cigars only in the prescribed form constitute "special requirements" within the meaning of Article 20. We also note that these requirements, which prescribe the use of a word mark without any stylized elements and in a single standard font and colour, constitute "use in a special form" within the meaning of the second example of the illustrative list in the first sentence of Article 20, bearing in mind that use of a word mark generally includes use in a wide range of possible fonts, sizes, colours and placement.

7.2242. It is also not in dispute that these requirements "encumber" the use of the affected trademarks, in that they restrict the manner in which the trademarks at issue may be displayed on the relevant products and their packaging. We therefore agree with the parties that these measures affecting word marks amount to "special requirements" that "encumber" the use of trademarks.

7.2243. In our view, the prohibition on the use of stylized word marks, composite marks and figurative marks on tobacco retail packaging and products under the TPP measures also amounts to "special requirements". This prohibition must be complied with, has a close connection with and specifically addresses the use of trademarks, and is limited in application to the use of trademarks on tobacco retail packaging and products. We also note that, as regards a stylized word mark or a composite mark, these requirements only permit the use of the brand, business or company name, or the name of the product variant, which is part of that mark, and thus require "use in a special form" within the meaning of the second example of the illustrative list in the first sentence of Article 20.

7.2244. These special requirements on the use of stylized word marks, composite marks and figurative marks also "encumber" the "use" of the relevant trademarks, in that they expressly disallow, and thereby hinder and obstruct, such use on tobacco products and packaging.

7.2245. In light of the above, we find that the TPP measures, to the extent they restrict the use of word marks to certain forms prescribed by the TPP Regulations and prohibit the use of stylized word marks, composite marks, and figurative marks in the specified situations, amount to "special requirements" that "encumber" the use of a trademark within the meaning of Article 20. These determinations are without prejudice to the question of whether these special requirements encumber use "in the course of trade", or do so "unjustifiably".

7.3.5.4 Whether the special requirements in the TPP measures encumber the "use of a trademark" "in the course of trade"

7.2246. The complainants argue that the trademark-related requirements in the TPP measures encumber the use of trademarks "in the course of trade" within the meaning of Article 20. Australia considers that they do not. The divergent views of the parties in this respect are based importantly on their different interpretation of the term "in the course of trade" and their different understanding of what constitutes relevant "use" of a trademark for the purposes of Article 20.

7.2247. We therefore consider first the meaning of the term "in the course of trade", and what may be considered relevant "use" of a trademark under Article 20, before turning to a consideration of whether the TPP measures encumber "the use of a trademark in the course of trade".

⁴⁷⁹⁸ See section 7.3.5.3.1.1 above.

7.3.5.4.1 Meaning of the phrase "in the course of trade"

7.3.5.4.1.1 Main arguments of the parties

7.2248. Honduras refers to its interpretation of the phrase "in the course of trade" in the context of Article 16.1 of the TRIPS Agreement.⁴⁷⁹⁹ In that context, it argues that the phrase "in the course of trade" should be read as capturing all activities related or linked to trade. The ordinary meaning of the term "trade" is "[t]he action of buying and selling goods and services"; and "the activity or process of buying, selling, or exchanging goods or services". The term "course" means "[t]he way in which something progresses or develops". The phrase "course of trade" thus refers to the manner in which the action of buying or selling of goods unfolds, "progresses" or "develops". Put differently, the phrase "course of trade" captures all activities that have a connection with, or a bearing on, trade, including for instance, transportation, distribution, display, sale, use, as well as advertising.⁴⁸⁰⁰ Responding to Australia, Honduras argues that there is no basis in the ordinary meaning in the English, Spanish or French versions of Article 20 to suggest that the phrase "in the course of trade" refers only to the point of sale.⁴⁸⁰¹

7.2249. The Dominican Republic submits that "the course of trade" includes the succession of events undertaken in producing, supplying, distributing, selling and delivering goods and services for commercial purposes. In Article 20, the phrase refers to the use of a trademark as part of commercial activities, such as the commercial sale of goods. The trademark is applied to the packaging and the good to provide the consumer with important commercial information about the quality, characteristics, and reputation of the product. The trademark continues to provide this information to the consumer, and perform its differentiating function, after the sale has occurred. At that time, the use of the trademark is part of a continuing commercial relationship between the producer and the consumer; furthermore, the trademarks serve as a continuing guarantee of the product's quality, characteristics, and reputation in view of possible subsequent purchases.⁴⁸⁰² The Dominican Republic invokes as relevant context Articles 5C(1) and 10bis(3) of the Paris Convention.⁴⁸⁰³

7.2250. Cuba argues that the trademark restrictions affect the use of trademarks in a commercial context: trademarks are employed to distinguish tobacco products in the eyes of consumers and commercial actors and they are relevant to buying and selling decisions by such actors. Accordingly, the encumbrances and special requirements in question relate to the use of trademarks in "the course of trade".⁴⁸⁰⁴

7.2251. Indonesia argues that the phrase "in the course of trade" appeared in the final version of Article 20, that previous texts had referred to use of a trademark "in commerce", and that the two concepts are understood to be synonymous. It notes that "in the course of trade" is also used in Article 16.1 of the TRIPS Agreement.⁴⁸⁰⁵ In its view, "in the course of trade" refers to activities conducted in a commercial context as opposed to private use and does not end at the point of sale. The phrase is understood to include a range of commercial activities, including "every act or operation that is aimed at, directly or indirectly, or that results from, directly or indirectly, buying and selling products or services in a professional manner".⁴⁸⁰⁶

7.2252. Australia argues that the phrase "in the course of trade" refers to acts undertaken during the buying and selling of goods for profit. Thus, "[t]he use of a trademark in the course of trade" refers to the act of employing or applying a trademark to distinguish the goods or services of one undertaking from those of other undertakings during the sale of goods or services. In Australia's view, an encumbrance is only relevant under Article 20 insofar as it encumbers the use of a

⁴⁷⁹⁹ Honduras's first written submission, para. 287.

⁴⁸⁰⁰ Honduras's first written submission, para. 223 (referring to Oxford Dictionaries online, HND excerpts, (Exhibit HND-31), definitions of "trade" and "course"; and Merriam-Webster Dictionary online, HND excerpts, (Exhibit HND-48), definition of "trade").

⁴⁸⁰¹ Honduras's second written submission, para. 302.

⁴⁸⁰² Dominican Republic's second written submission, paras. 129 and 133.

⁴⁸⁰³ Dominican Republic's second written submission, paras. 134-138.

⁴⁸⁰⁴ Cuba's first written submission, paras. 311-312.

⁴⁸⁰⁵ Indonesia's first written submission, para. 270.

⁴⁸⁰⁶ Indonesia's second written submission, para. 144 (quoting Carvalho 3rd edn, IDN excerpts, (Exhibit IDN-106), para. 16.7).

trademark while the trademarked product remains within the course of trade, which necessarily culminates at the point of sale. Thus, insofar as a measure might affect how a trademark might be perceived by consumers or others after the point of sale, this effect would not relate to the use of a trademark "in the course of trade" and would fall outside the scope of Article 20. Such an effect would not form part of an encumbrance that can be evaluated for its consistency with Article 20.⁴⁸⁰⁷

7.2253. Australia argues that the relevant encumbrance under the first sentence of Article 20 is the encumbrance (if any) that arises from the special requirements imposed by the measure at issue. To the extent that the responding Member maintains other laws or regulations that affect how a trademark may be used to distinguish goods or services in the course of trade, the effects of those other measures must not be attributed to the particular "special requirements" that are the subject of the claim under Article 20.⁴⁸⁰⁸

7.2254. Honduras argues that, under Article 16 of the TRIPS Agreement, a trademark owner is entitled to prevent an unauthorized third party from using "in the course of trade" a confusingly similar sign on similar goods. This permits a trademark owner to object to the use of such signs in any commercial context. The rights conferred by Article 16 are clearly not limited to the point of sale. Similarly, Article 10bis(3) of the Paris Convention, which is incorporated into the TRIPS Agreement through its Article 2.1, also uses the phrase "in the course of trade" broadly.⁴⁸⁰⁹ None of the examples of "special requirements" set out in Article 20 limit the encumbering special requirements to the point of sale. Rather, they are broad examples of anything that reduces the distinctiveness of the mark.⁴⁸¹⁰ The trademark's distinctive function is not limited to the point of sale. It starts well before and continues well after the point of sale.⁴⁸¹¹ Furthermore, Honduras contends that Australia's suggestion that, after the point of sale, the trademark does not play its "neutral" distinguishing function, but that it is only used to appeal, lead, and mislead the consumer is flawed.⁴⁸¹²

7.2255. Responding to Australia, Cuba argues that there is no basis under the ordinary meaning of the words to suggest that the phrase "in the course of trade" refers only to point of sale. This phrase also appears in Article 16.1 of the TRIPS Agreement and Article 10bis(3) of the Paris Convention in its broadest commercial sense. Cuba adds that "Australia's suggestion that after the point of sale the trademark does not play its 'neutral' distinguishing function but rather is only used to attract, manipulate and mislead consumers is fundamentally erroneous ... Trademarks may have many different functions in different contexts, but their main function is and remains that of indicating the source of the product and that of differentiating products."⁴⁸¹³

7.3.5.4.1.2 Main arguments of the third parties

7.2256. Brazil argues that the expression "use of a trademark in the course of trade" in Article 20 is best understood in contrast to those uses of a trademark that are of no concern to the WTO, such as use in letterheads, promotional materials and advertisements, or even under sponsorship contracts. Read jointly with Article 15, that expression seems to restrict the scope of the provision to the situation where trademarks are applied to goods or services in order to distinguish goods and services of one undertaking from those of others. That expression is not subject to when or whether consumers actually get in direct contact with products and their trademarks.⁴⁸¹⁴

7.2257. China opines that Australia reads the phrase "in the course of trade" too narrowly. Noting that the same phrase is also used in Articles 16.1 and 24.8 of the TRIPS Agreement and

⁴⁸⁰⁷ Australia's first written submission, paras. 348-349.

⁴⁸⁰⁸ Australia's first written submission, para. 351.

⁴⁸⁰⁹ Honduras's second written submission, para. 303.

⁴⁸¹⁰ Honduras's second written submission, para. 304.

⁴⁸¹¹ Honduras's second written submission, para. 316.

⁴⁸¹² Honduras's second written submission, para. 318.

⁴⁸¹³ Cuba's second written submission, paras. 80-85.

⁴⁸¹⁴ Brazil's third-party submission, paras. 45-47.

Article 10bis(3) of the Paris Convention, China believes it is more convincingly interpreted as "in commerce or in commerce activities, in a broader sense".⁴⁸¹⁵

7.2258. The European Union considers that Australia's reading of the phrase "in the course of trade" is too narrow. For example, the European Union believes that it also encompasses the use of trademarks in advertising or catalogues. In general, the mark must be used publicly and outwardly in the context of commercial activity with a view to economic advantage for the purpose of ensuring an outlet for the goods and services which it represents. But outward use does not necessarily imply use aimed at end consumers: for instance, use "in the course of trade" also includes use of the trademark directed at intermediaries or distributors. The relevant criterion is to determine whether the relevant goods or services themselves are identified and offered on the market under the trademark. It is not necessary for the mark to be affixed to the goods themselves. A representation of the mark on packaging, catalogues, advertising material or invoices relating to the goods and services in question constitutes an instance where the mark has been put to genuine use in the course of trade. However, use in the private sphere or purely internal use within a company or a group of companies does not amount to genuine use, as opposed to public or outward use.⁴⁸¹⁶

7.2259. New Zealand submits that the phrase "use of a trademark in the course of trade" refers to the act of employing or applying a trademark to distinguish the goods or services of one undertaking from those of other undertakings during the sale of the goods or services. The "course of trade" terminates at the point of sale. The use which must be evaluated is the use of a trademark to distinguish the goods and services of one undertaking from those of other undertakings while they remain within the course of trade. The assessment of the relevant encumbrance must take into account the responding Member's other laws and regulations that affect how a trademark may be used in the course of trade.⁴⁸¹⁷

7.3.5.4.1.3 Analysis by the Panel

7.2260. As described above, Australia takes the view that the phrase "in the course of trade" refers to acts undertaken during the buying and selling of goods for profit, and that this "culminates" at the point of sale. As also described above, the complainants, in turn, consider that it more broadly covers all activities related to commercial activity.

7.2261. The ordinary meaning of the term "trade" refers to "[t]he action of buying and selling goods and services".⁴⁸¹⁸ The phrase "in the course of" means "in the process of, during the progress of".⁴⁸¹⁹ In our view, taking these terms in aggregate, the phrase "in the course of trade" is not, on its face, limited to "trade" in the sense of "buying and selling" but more broadly covers the process relating to commercial activities. The corresponding French phrase "au cours d'opérations commerciales" and Spanish phrase "el curso de operaciones comerciales" also connote a meaning that more broadly relates to commercial activities.

7.2262. We note that the phrase "in the course of trade" is used, in addition to Article 20, in two other provisions of the TRIPS Agreement that are the subject of separate claims in these proceedings, namely Article 16.1 of the TRIPS Agreement and Article 10bis(3)(3) of the Paris Convention (1967), as well as Article 24.8 of the TRIPS Agreement and Article 10bis(3)(2) of the Paris Convention (1967). The Appellate Body emphasized in *Korea – Dairy* that, "[i]n light of the interpretive principle of effectiveness, it is the *duty* of any treaty interpreter to 'read all applicable provisions of a treaty in a way that gives meaning to *all* of them, harmoniously'."⁴⁸²⁰

⁴⁸¹⁵ China's third-party submission, para. 43.

⁴⁸¹⁶ European Union's third-party submission, para. 23.

⁴⁸¹⁷ New Zealand's third-party submission, paras. 54 and 56.

⁴⁸¹⁸ Oxford Dictionaries online, HND excerpts, (Exhibit HND-31), definition of "trade".

⁴⁸¹⁹ Oxford English Dictionary online, definition of "in the course of", available at:

<<http://www.oed.com/view/Entry/43183?rskey=AUb1IV&result=1#eid8126812>>, accessed 2 May 2017.

⁴⁸²⁰ Appellate Body Report, *Korea – Dairy*, para. 81 (emphasis original). In *US – Offset Act (Byrd Amendment)*, the Appellate Body noted that "Article 32.1 of the SCM Agreement is identical in terminology and structure to Article 18.1 of the Anti-Dumping Agreement, except for the reference to subsidy instead of dumping. We endorse Canada's contention that '[t]his identical wording gives rise to a strong interpretative presumption that the two provisions set out the same obligation or prohibition.'" Appellate Body Report, *US – Offset Act (Byrd Amendment)*, para. 268.

Harmonious interpretation requires that same or similar terms in different provisions of the same agreement should be presumed to have the same or similar meaning, much as the use of different terms creates a presumption that the terms were intended to have a different meaning. We note that none of these other provisions define the notion of "course of trade" with specific reference to the "point of sale" or distinguish between "pre-" and "post-sale" situations for this purpose.⁴⁸²¹

7.2263. This implies that at least some commercial activities taking place after the retail sale are covered by the phrase "in the course of trade". In fact, both the complainants and Australia have referred to certain commercial functions that trademarks continue to serve after the completion of the act of sale. The Dominican Republic emphasizes that the trademark continues to provide commercial information about the quality, characteristics, and reputation of the product to the consumer, and perform a differentiating function, after the sale has occurred.⁴⁸²² Australia asserts that it is well established that, in addition to distinguishing the goods of one undertaking from those of another in the course of trade, trademarks serve an advertising function⁴⁸²³, which may continue after the completion of the sale.⁴⁸²⁴ We see no reason to assume that such commercial functions that trademarks may continue to serve after the retail sale would fall outside the scope of commercial activities covered by the phrase "in the course of trade".

7.2264. In light of the above, we do not find support in the language of Article 20 or its context for the assertion that "in the course of trade" culminates or terminates at the point of sale.⁴⁸²⁵

7.3.5.4.2 The relevant "use of a trademark"

7.3.5.4.2.1 Main arguments of the parties

7.2265. Australia argues that, in order to assess whether special requirements "encumber" the "use" of a trademark "in the course of trade", the "use" which must be evaluated is the use of a trademark to distinguish the goods and services of one undertaking from those of other undertakings. Insofar as special requirements encumber the "use" of a trademark for other purposes (such as to convey positive emotional associations with a product or to appeal to particular segments of consumers), those "uses" are not relevant under Article 20.⁴⁸²⁶

7.2266. Australia draws this conclusion from the definition of "protectable subject matter" set forth in Article 15.1 of the TRIPS Agreement, which provides that "[a]ny sign, or any combination of signs, capable of distinguishing the goods or services of one undertaking from those of other undertakings, shall be capable of constituting a trademark". In order to demonstrate under Article 20 that a measure encumbers the "use" of a trademark in the course of trade, a complainant must demonstrate that the measure encumbers the use of a trademark "to distinguish the goods or services of one undertaking from those of other undertakings". While trademarks may serve other functions, the ability of a sign to distinguish the commercial source of the product

⁴⁸²¹ We recall our finding in para. 7.1978 above that Article 16.1 does not establish a trademark owner's right to use its registered trademark but provides for a trademark owners' right to prevent certain activities by unauthorized parties under certain conditions, including that these activities take place "in the course of trade". We note that paragraph 2 of that Article refers to "the promotion of the trademark" as a factor to be taken into account in determining whether a trademark is well-known. In our view, this reference to "the promotion of the trademark" indicates that the drafters considered such promotion to be among the normal ways in which the owner of a trademark may wish to use its trademark in the marketplace. We see no reason why the exclusive right to prevent in paragraph 1, conditioned by the phrase "in the course of trade" would not encompass such common commercial activities mentioned in paragraph 2. In our view, this also suggests that the exclusive right to prevent conferred under Article 16.1 covers more than the act of selling and buying, and encompasses more broadly commercial activities relating to the commercialization of the goods or services in respect of which the trademark is protected. This, in turn, would support interpreting the same phrase used in Article 20 also to cover such activities.

⁴⁸²² Dominican Republic's second written submission, para. 133.

⁴⁸²³ Australia's first written submission, para. 85.

⁴⁸²⁴ Australia's first written submission, para. 358.

⁴⁸²⁵ We note that our interpretation is consistent with the common understanding of this term in trademark literature, where the term "in the course of trade" is given a broad meaning to cover commercial activities connected to buying and selling. For example, de Carvalho understands the term to include "every act or operation that is aimed at, directly or indirectly, or that results from, directly or indirectly, buying and selling products or services in a professional manner". Carvalho 3rd edn, IDN excerpts, (Exhibit IDN-106), p. 254.

⁴⁸²⁶ Australia's first written submission, para. 350.

is what makes the sign a trademark. The "source identification" function is therefore the only essential function of a trademark. Closely related to this is the function of indicating that products bearing the same trademark are manufactured under the control of the same commercial source and that, as a result, consumers may expect a consistency of experience with products bearing that trademark, sometimes referred to as the "quality" or "guarantee" function of trademarks.⁴⁸²⁷

7.2267. Australia adds that trademarks also serve to advertise and promote the trademarked products by conveying certain associations with those products, and those associations are often reinforced through other means of advertising and promotion. A tobacco trademark might be used to convey associations with exclusivity and wealth, femininity, masculinity, youthfulness or even "value for money". Each of these associations appeals to a particular segment of consumers or prospective consumers. In short, different trademarks may "appeal" to different market segments. The use of a trademark to advertise and promote the trademarked product is not a part of the distinguishing function of a trademark. The word "Marlboro", for example, is sufficient to identify the commercial source of the product and indicate that all products bearing that trademark have been manufactured under the control of a single enterprise without having to convey associations with masculinity and ruggedness. The former is distinguishing, the latter is advertising. Neither Section 2 of the TRIPS Agreement, nor Article 20 more particularly, concerns the use of trademarks to advertise and promote the trademarked product, such as by making the product more appealing to particular segments of consumers or prospective consumers.⁴⁸²⁸

7.2268. Australia asserts that the complainants have been careful throughout these proceedings not to acknowledge that trademarks are used to advertise and promote the trademarked product, even though that is a widely acknowledged function of trademarks. Australia contends that the complainants do not want to admit that trademarks are used for this purpose, as this would contradict their position that the use of trademarks on retail tobacco packaging does not serve to advertise and promote tobacco products. The complainants' assertion that trademarks serve to distinguish goods and services in "quality, characteristics, and reputation" is simply a euphemism for the use of trademarks to advertise and promote tobacco products.⁴⁸²⁹

7.2269. Australia argues that the complainants have borrowed the terms "quality", "characteristics", and "reputation" from Article 22.1 in Section 3 of the TRIPS Agreement concerning GIs. These terms do not appear anywhere in Section 2 of the TRIPS Agreement. If the drafters of the TRIPS Agreement had considered that "quality, characteristics, and reputation" were relevant to the function of a trademark under Article 15.1, they would have used these terms in that Article as they did in the case of Article 22.1. As context, the fact that these terms do not appear in Article 15.1 indicates that "quality, characteristics, and reputation" have no relevance to the distinguishing function of trademarks under Article 20.⁴⁸³⁰

7.2270. Australia argues that the complainants have failed to present any evidence that the TPP measures encumber the use of trademarks to distinguish the goods of one undertaking from those of other undertakings, which is the only relevant use of trademarks under Article 20.⁴⁸³¹

7.2271. Referring to Article 15.1, Australia adds that "[t]he complainants are confusing what is *eligible for registration* as a trademark with what is necessary to distinguish the goods or services of one undertaking from those of other undertakings. The fact that a particular figurative element, for example, is a sign that is 'capable' of distinguishing the goods or services of one undertaking from those of other undertakings' does not mean that the figurative element is *necessary* for this purpose, i.e. that the trademarked goods or services could not be distinguished in the absence of this figurative element."⁴⁸³²

⁴⁸²⁷ Australia's second written submission, paras. 86-90.

⁴⁸²⁸ Australia's second written submission, paras. 91-96.

⁴⁸²⁹ Australia's second written submission, paras. 85, 97-98 and 118.

⁴⁸³⁰ Australia's second written submission, paras. 99-102. For Australia's detailed analysis why it considers that these terms do not relate to the distinguishing function of trademarks but instead refer to the advertising and promotion functions of trademarks, see Australia's second written submission, paras. 105-117.

⁴⁸³¹ Australia's second written submission, paras. 121-130.

⁴⁸³² Australia's second written submission, paras. 129 and 130. (emphasis added by Australia)

7.2272. Honduras notes that trademarks are defined in Article 15.1 of the TRIPS Agreement as any sign capable of distinguishing the goods of one undertaking from those of other undertakings. Such signs include names, letters and figurative elements which shall be eligible for registration as a trademark, and once registered, deserve to be protected under the TRIPS Agreement. Honduras argues that the text of the provisions in Section 2 of the TRIPS Agreement does not limit protection of a trademark only to those elements that Members consider to be necessary to distinguish the products, but afford protection to all trademarks – word marks and figurative elements alike – that are capable of distinguishing products.⁴⁸³³

7.2273. In Honduras's view, Australia errs in trying to distinguish between word marks and figurative elements in terms of their "neutrally distinguishing function". There is no basis in the TRIPS Agreement or in international IP law generally for asserting that word marks distinguish products in a neutral manner whereas figurative elements do not.⁴⁸³⁴ Honduras contends that "Australia further errs in trying to distinguish between a trademark's distinguishing function (source or origin) and its quality function (real or perceived)". Honduras argues that trademarks distinguish products in terms of their quality, characteristics and reputation. Origin, quality, and other characteristics are at the heart of the distinguishing function that trademarks play in the marketplace.⁴⁸³⁵

7.2274. Honduras argues that whether or not trademarks perform any functions other than identifying and distinguishing the source of the product depends on the circumstances in the market and the manner in which the proprietor uses the mark. It contends that "depending on the product, trademarks could be used '*in advertising*'. However, that does not mean that, on tobacco products, trademarks are used *for advertising* in Australia because advertising has not been allowed for tobacco products in nearly the last 25 years. Nowadays, trademarks on tobacco products just communicate source and quality to consumers." Honduras argues that, therefore, Australia's argument that trademarks could be seen as "bridge between advertising and purchase" is incorrect. In a country like Australia where there has been no tobacco advertising for almost 25 years, no such bridge exists.⁴⁸³⁶

7.2275. The Dominican Republic argues that consumers do not distinguish goods simply – or even primarily – in terms of the commercial source. Instead, they care about the quality, characteristics, and reputation of goods and use trademarks to differentiate goods in these terms. It cites an explanation of Advocate-General Jacobs of the European Court of Justice: "The consumer is not interested in the commercial origin of goods out of idle curiosity; his interest is based on the assumption that goods of the same origin will be of the same quality." From the consumers' perspective, origin, qualities, characteristics, and reputation are inseparable.⁴⁸³⁷

7.2276. The Dominican Republic adds that Article 20 asks whether "[t]he use of a trademark" is "*encumbered*", that is, hindered or obstructed. To be relevant, the wording does not require that an encumbrance on use prevent the identification of the commercial source. In its view, this is confirmed by the third example of an encumbrance in Article 20. While Australia says that, to be relevant, a measure must *prevent* a trademark from identifying the source, the example shows that a measure that *diminishes* – is "*detrimental to*" – the distinguishing power of a trademark is an encumbrance. Furthermore, Article 20 applies to a "trademark" as defined in Article 15.1, and a "trademark" is defined in Article 15.1 to include all design features. If the use of trademark design features is hindered or obstructed in any way, there is an encumbrance.⁴⁸³⁸

7.2277. Cuba argues that, over time, the functions of trademarks have expanded beyond the initial function of the origin. In its view, Australia's arguments gloss over these essential and broader functions. Through the guarantee of quality function, the trademark acts as a signal to consumers that the goods have a high quality (especially luxury trademarks) and the trademark owner is responsible for the goods and their quality. Through the communication function,

⁴⁸³³ Honduras's opening statement at the second meeting of the Panel, para. 9.

⁴⁸³⁴ Honduras's opening statement at the second meeting of the Panel, para. 10.

⁴⁸³⁵ Honduras's opening statement at the second meeting of the Panel, para. 11.

⁴⁸³⁶ Honduras's opening statement at the second meeting of the Panel, para. 12. (emphasis original)

⁴⁸³⁷ Dominican Republic's opening statement at the second meeting of the Panel, para. 9 (referring to European Court of Justice, Case C-10/89, SA CNL-Sucal NV v. HAG GF AG (1990) ECR I, p. 3725, (Exhibit DOM-362), para. 72).

⁴⁸³⁸ Dominican Republic's second opening statement, paras. 13-14 and 16. (emphasis original)

trademarks serve as a vehicle for providing consumers with various kinds of information on the goods identified by them, including non-physical specific attributes such as tradition, values, strength, or luxury. The investment function is the use of the trademark to acquire or preserve a reputation that maintains consumer loyalty for a long period of time.⁴⁸³⁹ Cuba adds that "[c]onsumers do not pay a price substantially higher as recognition of the identity of the producer; consumers pay the premium because they subscribe to the trademark proposition communicated by a trademark".⁴⁸⁴⁰

7.2278. Indonesia argues that trademarks identify the source or maker of a product. Based on this identification, consumers associate special meaning based on past experiences with the product and determine which ones reliably satisfy their needs and which ones do not. Illustrating the functions of brands for both consumers and trademark holders, it lists the following functions for the manufacturer: means of identification, handling or tracing; means of legally protecting unique features; signal of quality level to satisfied consumers; means of endowing products with unique associations; source of competitive advantage; and source of financial returns.⁴⁸⁴¹

7.3.5.4.2.2 Analysis by the Panel

7.2279. The question before us is whether the relevant "use" of a trademark in the course of trade for the purposes of Article 20 is limited, as Australia argues, to its use for the purpose of distinguishing the goods or services of one undertaking from those of other undertakings.

7.2280. Under Article 20, Members have undertaken not to unjustifiably encumber by special requirements the "use" of a trademark in the course of trade. On its face, this language is very general and does not qualify the nature of relevant "use" or otherwise circumscribe this obligation in terms of any particular uses, i.e. any particular ways in which the trademark holder might wish to use the trademark, other than such use being "in the course of trade".

7.2281. We note that one of the three examples of special requirements identified expressly in Article 20 is "use [of a trademark] in a manner detrimental to its capability to distinguish the goods or services of one undertaking from those of other undertakings". This reference makes clear that a special requirement to use a trademark in a manner detrimental to its "distinguishing" function would fall within the purview of Article 20. However, as described above, this is one of three examples of situations in which "use ... in the course of trade" would be encumbered. If anything, therefore, this reference (introduced by the term "or") makes clear that a requirement to use a trademark "in a manner detrimental to its capability to distinguish the goods or services of one undertaking from those of another" is *not a sine qua non* condition for a finding that "use ... in the course of trade" is being encumbered within the meaning of Article 20. While the existence of such detrimental impact may therefore provide an important indication of the existence of an encumbrance, this is not a necessary condition for such a finding.

7.2282. The language of Article 20 therefore does not support a finding that the relevant "use" to be taken into consideration under Article 20 would be limited to the use of a trademark for the specific purpose of distinguishing the goods or services of one undertaking from those of other undertakings.

7.2283. In support of its position, Australia refers to the definition of protectable subject-matter in Article 15.1 as relevant context.⁴⁸⁴² We note that Article 15.1, which is part of Section 2 of the TRIPS Agreement, entitled "Trademarks", defines protectable subject-matter as being "[a]ny sign, or any combination of signs, capable of distinguishing the goods or services of one undertaking from those of other undertakings". Such signs "shall be capable of constituting a trademark", and "shall be eligible for registration as trademarks".⁴⁸⁴³ The phrase "[a]ny sign, or combination of signs, capable of distinguishing the goods or services of one undertaking from those of other

⁴⁸³⁹ Cuba's opening statement at the second meeting of the Panel, paras. 24-28.

⁴⁸⁴⁰ Cuba's opening statement at the second meeting of the Panel, para. 37.

⁴⁸⁴¹ Indonesia's first written submission, paras. 261-262.

⁴⁸⁴² Australia's second written submission, paras. 86-90.

⁴⁸⁴³ The third sentence of Article 15.1 recognizes that, where signs are not inherently capable of distinguishing the relevant goods or services, Members may make registrability depend on distinctiveness acquired through use.

"undertakings" describes the characteristics of a sign that is capable of constituting a trademark and eligible for registration as a trademark pursuant to Article 15.1 but, in our view, it does not address, or imply a limitation on, the types of uses of a protected trademark that are relevant for the purposes of Article 20.

7.2284. We note that Articles 15.3 and 19 of the TRIPS Agreement refer to situations where "use" may be required under domestic law for registering a trademark or maintaining a registration.⁴⁸⁴⁴ In our view, the reference to "use" in these provisions is comparable to that in Article 20, insofar as what is at issue in these provisions is the *fact* of use, as an objective matter. In our view, harmoniously with how the term "use" is applied under these other provisions of the TRIPS Agreement, it is appropriate to understand the term "use" also under Article 20 as referring to an objective fact of use "in the course of trade", i.e. in the course of commercial activities, rather than seeking to limit it on the basis of a notion of function or purpose of such use. In any event, functions of product differentiation and promotion of products for their tangible and intangible qualities, characteristics and reputation, may overlap in practice.

7.2285. We also note that prior rulings on other forms of IP have recognized that it is for the right holder to decide how to exploit or make use of its exclusive rights to extract economic value from those rights in the marketplace. The panel in *US – Section 110(5) Copyright Act* was called upon to interpret the term "normal exploitation" of a copyright work in the context of a general exceptions clause in Article 13 of the TRIPS Agreement. The panel explained that the "ordinary meaning of the term 'exploit' connotes 'making use of' or 'utilising for one's own ends'. We believe that 'exploitation' of musical works thus refers to the activity by which copyright owners employ the exclusive rights conferred on them to extract economic value from their rights to those works."⁴⁸⁴⁵ Similarly, the panel in *Canada – Pharmaceutical Patents* considered that "exploitation" in a general exceptions clause in Article 30 applicable to patents "refers to the commercial activity by which patent owners employ their exclusive patent rights to extract economic value from their patent. ... The normal practice of exploitation by patent owners, as with owners of any other intellectual property right, is to exclude all forms of competition that could detract significantly from the economic returns anticipated from a patent's grant of market exclusivity."⁴⁸⁴⁶ Our understanding of the term "use ... in the course of trade" in Article 20 as an essentially factual matter is consistent, in our view, with these rulings, in that it reflects the notion underlying these rulings that the manner in which the exploitation of the protected subject-matter, in this instance trademarks, takes place, and how to extract economic value from it, is essentially a matter for the right holder to decide. Moreover, the argument that the relevant "use" for the purposes of Article 20 is limited to the use of a trademark to distinguish a product from those of other undertakings makes a false dichotomy between such use and the broader promotion of a good or service associated with a trademark. As we noted in the context of our analysis of the complainants' claims under Article 16.1 of the TRIPS Agreement, the "use" of a trademark that is relevant for the acquisition and maintenance of distinctiveness is not limited to use on packaging of a product, but rather extends to a wider range of commercial, advertising and promotion activities.⁴⁸⁴⁷

7.2286. For the above reasons, we find that the relevant "use" for the purposes of Article 20 is not limited to the use of a trademark for the specific purpose of distinguishing the goods and services of one undertaking from those of other undertakings.

7.3.5.4.3 Application to the TPP measures

7.2287. We recall our determination above that relevant "use" for the purposes of determining whether the use of a trademark "in the course of trade" is being encumbered is not limited to the ability of trademarks to perform a "distinguishing" function, nor does it end at the "point of sale".

⁴⁸⁴⁴ We understand that under domestic laws, such use is generally assessed by objective evidence of use in relation to the relevant goods or services, by means of actual use in labelling and packaging, use in promotion and communications to consumers, and other use in commercial settings, rather than by reference to a more abstract standard of what was the function or intended purpose of use: for example, has the mark been applied to the relevant goods in the course of trade, and in what markets; and has it been used in advertising or other commercial settings to present and promote the goods in the relevant market.

⁴⁸⁴⁵ Panel Report, *US – Section 110(5) Copyright Act*, para. 6.165.

⁴⁸⁴⁶ Panel Report, *Canada – Pharmaceutical Patents*, paras. 7.54-7.55.

⁴⁸⁴⁷ Paragraph 7.1989 above.

7.2288. As described above⁴⁸⁴⁸, Chapter 3 of the TPP Act makes it an offence to sell, supply, purchase, package or manufacture tobacco products or packaging for retail sale that are not compliant with the plain packaging requirements. Penalties apply to manufacturers, packagers, wholesalers, distributors and retailers of tobacco products in Australia who fail to comply with the plain packaging requirements.⁴⁸⁴⁹ The provisions of the TPP Act therefore expressly regulate, *inter alia*, the acts of selling and offering for sale, as well as purchasing for purposes other than personal use. The acts regulated by the TPP measures also include various commercial transactions that precede retail sale. These requirements therefore affect the use of the trademarks "in the course of trade", even within the narrow meaning given to this term by Australia, limited to the acts of buying and selling.

7.2289. Australia explains that it maintains a comprehensive ban on the advertising and promotion of tobacco products, including extensive restrictions on how tobacco products may be marketed and displayed at the point of sale. The practical effect of these measures is that Australian consumers have no opportunity to even see tobacco packages or products in the course of trade until after they have decided which product to purchase (if any), so that the package or product will become visible only when the purchase transaction is complete (or nearly complete).⁴⁸⁵⁰ In Australia's view, therefore, the special requirements imposed by the TPP measures do not encumber the ability of trademarks to perform their distinguishing function while the products remain within the course of trade, i.e. up to the point of sale, and therefore, they do not encumber use "in the course of trade".⁴⁸⁵¹

7.2290. Australia also asserts that it is clear from the evidence and arguments presented by the complainants that their actual objections to the TPP measures relate to how trademarks on tobacco packaging and products shape the perceptions of consumers and others after the point of sale, i.e. after the course of trade is complete. Australia submits that it agrees with the complainants that trademarks on tobacco packaging and products can have these effects. In fact, Australia underlines that the rationale for the TPP measures specifically relates to these post-sale effects. As discussed above, Australia argues that any "encumbrance" that the TPP requirements impose upon the "use" of a trademark in this post-sale context lies outside the scope of the provision.⁴⁸⁵²

7.2291. We recall our findings above that "use ... in the course of trade" within the meaning of Article 20 is not limited to use "up to the point of sale" or to the use of a trademark to perform a "distinguishing function". It is undisputed that the restrictions on the use of trademarks under the TPP measures remain applicable beyond the point of sale. In particular, Section 25 of the TPP Act specifically prescribes that the retail packaging of tobacco products must not include any features designed to change the packaging after retail sale. Indeed, as described above, Australia explains that the very rationale of the TPP measures is to address the ability of trademarks (and more generally packaging) to affect the perception of consumers and others after the point of sale.

7.2292. In light of the above, and taking into account our earlier findings at paragraphs 7.2264 and 7.2286, we find that the trademark requirements of the TPP measures amount to special requirements that encumber "the use of a trademark in the course of trade".

7.3.5.5 Whether the TPP measures "unjustifiably" encumber the use of trademarks in the course of trade

7.2293. Having determined that the trademark requirements of the TPP measures amount to "special requirements" that "encumber" the "use of a trademark in the course of trade", we must now consider whether they do so "unjustifiably". For this purpose, we first consider the meaning of the term "unjustifiably".

⁴⁸⁴⁸ See section 2.1.2.6.

⁴⁸⁴⁹ TPP Bill Explanatory Memorandum, (Exhibits AUS-2, JE-7), p. 3.

⁴⁸⁵⁰ Australia's first written submission, para. 353.

⁴⁸⁵¹ See also paras. 7.2252-7.2253.

⁴⁸⁵² Australia's first written submission, para. 358. Australia emphasizes that, although it considers that these post-sale effects are outside the scope of Article 20, they are of great concern to it as a matter of public health. Australia's response to Panel question No. 103, para. 61. Australia submits that the definition of "in the course of trade" in Article 16 and in Article 20 should be given the same meaning. Australia's response to Panel Question No. 42, para. 112.

7.3.5.5.1 Meaning of the term "unjustifiably"

7.3.5.5.1.1 Main arguments of the parties

7.2294. Honduras submits that the ordinary meaning of the term "justifiable" is defined as something "[a]ble to be shown to be right or reasonable; defensible". In its view, this and related "ordinary meanings indicate that a 'justifiable' encumbrance must be *'able to be shown* to be right or reasonable', 'defensible', must be based on reasons that are 'acceptable', and shall not be 'extreme' or 'excessive' (i.e. disproportionate)".⁴⁸⁵³ In a subsequent submission, it adds that the ordinary meaning of "unjustifiably" "denotes measures that are 'necessary', 'proportionate', and 'supported by evidence'".⁴⁸⁵⁴

7.2295. Honduras responds to Australia that the ordinary meaning of the term "unjustifiably" itself indicates that in order to fall within the scope of "justifiable" encumbrances, it would not be sufficient for a special requirement to be merely "rationally connected" to its stated objective.⁴⁸⁵⁵

7.2296. Honduras further responds to Australia that the ordinary meaning of the term is only the beginning of a holistic exercise of interpretation. First, the interpretation offered by Australia is based on a reading of the term "unjustifiable" by the Appellate Body in respect of the *chapeau* of Article XX of the GATT 1994, which is an entirely different context where the term is used in combination with the terms "arbitrary" and "disguised restriction on trade". Second, the question of "arbitrary or unjustifiable" discrimination under the *chapeau* of Article XX relates to countries where the same "conditions" prevail. Third, the terms "arbitrary or unjustifiable" relate to the discrimination resulting from the application of the measure that is provisionally justified, and not to the actual trade encumbrance that is examined under the sub-paragaphs of Article XX; to the extent that any analogy with Article XX can be drawn, the reasons that can "provisionally justify" measures under the sub-paragaphs of Article XX for being "necessary" for the fulfilment of a policy objective seem to be the more relevant part of Article XX. Fourth, in contrast to Article XX of the GATT 1994, Article 20 is not an exception, but rather contains a mixture of an affirmative obligation and permissive elements. Fifth, even under the *chapeau* of Article XX, a finding of justifiable discrimination is not made merely because the measure has a "rational connection" with the objective in question; other factors play an equally important part, including whether alternative approaches were explored, or whether the particular type and extent of discrimination was actually necessary in light of the objective pursued.⁴⁸⁵⁶

7.2297. Honduras argues that the term "justifiable" must be interpreted in its *context* and in the light of the *object and purpose* of the Agreement to protect both trade interests and legitimate non-trade concerns of WTO Members, as reflected in Article 8.1 of the TRIPS Agreement and the Declaration on the TRIPS Agreement and Public Health⁴⁸⁵⁷ (Doha Declaration).⁴⁸⁵⁸

7.2298. Honduras is of the view that the absence of any indication of a possible policy objective in Article 20 argues in favour of reading "unjustifiably" as qualifying "encumbered" and as being related to the extent to which the requirement is encumbering the use of a trademark rather than the reasons for the encumbrance.⁴⁸⁵⁹ It adds that the use of the term "unjustifiably" avoids any possible misunderstanding that Article 20 would prevent the possibility of trademark-related consumer protection actions provided for under Article 10bis of the Paris Convention, for example, or justified by the reasons set out in Article 15.2 of the TRIPS Agreement and Article 6*quinquies* B of the Paris Convention. In Honduras's view, "[g]iven that, for example, Article 15.2 permits the refusal to register a trademark because it is misleading, it should be similarly permitted to prevent the use of such misleading marks or to impose special requirements to prevent that trademarks could be misleading, without first having to cancel their registration or invalidate their status as trademarks. By inserting the term 'unjustifiably' the negotiators ensured that there would be no

⁴⁸⁵³ Honduras's first written submission, para. 292 (referring to Oxford Dictionaries online, HND excerpts, (Exhibit HND-31), definitions of "justifiable", "right", and "reasonable"). (emphasis original)

⁴⁸⁵⁴ Honduras's second written submission, para. 352.

⁴⁸⁵⁵ Honduras's second written submission, para. 329.

⁴⁸⁵⁶ Honduras's second written submission, paras. 330-334.

⁴⁸⁵⁷ Declaration on the TRIPS Agreement and Public Health, adopted on 14 November 2001, WT/MIN(01)/DEC/2.

⁴⁸⁵⁸ Honduras's first written submission, para. 293.

⁴⁸⁵⁹ Honduras's second written submission, para. 336.

debate about this.⁴⁸⁶⁰ Furthermore, Honduras considers that the statement by the panel in *EC – Trademarks and Geographical Indications (Australia)* cited by Australia is irrelevant to the current dispute, since it is difficult to derive any implications from that statement that appear to relate to a specific argument made by the respondent.⁴⁸⁶¹

7.2299. Honduras submits that it "does not merely import the concept of 'necessity' (including 'less restrictiveness') into Article 20 from other provisions of the covered agreements, such as Article 2.2 of the TBT Agreement". In Honduras's view, the "unjustifiably" test appears to be broader than the "necessity test" and must be read in the context of the TRIPS Agreement. "Unjustifiably" does not imply a less stringent standard or provide broad deference to a Member's regulatory authorities, as Australia proffers. Rather, Honduras claims that it "may encompass a wide array of cumulative elements, including some elements of the 'necessity test'". This is confirmed by Article 8.1 of the TRIPS Agreement, which provides context for Article 20, and states that Members may adopt measures that are "necessary to protect public health". Honduras argues that Article 8.1 requires that, regardless of whether a particular measure is "necessary", it also must be "consistent" with the provisions of the TRIPS Agreement. "When Article 20 is read in the light of the general principles set out in Article 8.1, it becomes clear that the test of 'unjustifiably' is, in fact, more stringent than a traditional 'necessity test', as it requires the examination of factors other than 'necessity', namely the consistency of a given measure with the provisions of the TRIPS Agreement."⁴⁸⁶²

7.2300. Honduras argues that trademark holders' "legitimate interests" referred to in Article 17 of the TRIPS Agreement must inform the Panel's analysis of the consistency of the TPP measures with the requirements of Article 20, namely whether these measures are "unjustifiable".⁴⁸⁶³

7.2301. As regards the *object and purpose* of the TRIPS Agreement, Honduras does not dispute a Member's right to adopt measures that improve public health. Such measures, however, must take into account other important objectives of the WTO system, which include the promotion of world economic development and welfare, based on the principles of free markets. This objective is reflected in the TRIPS Agreement, which aims "to reduce distortions and impediments to international trade", takes into account "the need to promote effective and adequate protection of intellectual property rights", and recognises that these are private rights. In accordance with these principles, previous panels have acknowledged that "both trademark owners and consumers have a *legitimate interest* in the ability of a trademark to fulfil its key function to distinguish goods, including through use of trademarks in the course of trade".⁴⁸⁶⁴

7.2302. In light of this, Honduras argues that the interpretation of the term "unjustifiably" must strike an appropriate balance between the competing objectives of the protection of public health, on one hand, and maintaining the competitive opportunities of WTO Members or the protection of IP rights, on the other. Under the TRIPS Agreement, a Member's right to regulate public health is, therefore, limited by the obligation to protect IP rights. This is confirmed by its Article 8.1, which states that measures taken to protect public health must be "consistent with the provisions of this Agreement", and Article 7 which further refers to "balancing rights and obligations".⁴⁸⁶⁵ Articles 7 and 8 undermine, rather than support, Australia's position.⁴⁸⁶⁶

⁴⁸⁶⁰ Honduras's second written submission, para. 337.

⁴⁸⁶¹ Honduras's second written submission, paras. 342-343. Honduras refers to Panel Report, *EC – Trademarks and Geographical Indications (Australia)*, para. 7.246, which reads as follows:

[The principles set out in Article 8 of the TRIPS Agreement] reflect the fact that the agreement does not generally provide for the grant of positive rights to exploit or use certain subject matter, but rather provides for the grant of negative rights to prevent certain acts. This fundamental feature of intellectual property protection inherently grants Members freedom to pursue legitimate public policy objectives since many measures to attain those public policy objectives lie outside the scope of intellectual property rights and do not require an exception under the TRIPS Agreement.

⁴⁸⁶² Honduras's second written submission, para. 357. (emphasis original)

⁴⁸⁶³ Honduras's second written submission, para. 359.

⁴⁸⁶⁴ Honduras's first written submission, para. 294 (referring to Panel Report, *EC – Trademarks and Geographical Indications (Australia)*, paras. 7.664 and 7.675). (emphasis original)

⁴⁸⁶⁵ Honduras's first written submission, para. 295. (emphasis omitted)

⁴⁸⁶⁶ Honduras's second written submission, para. 341.

7.2303. In Honduras's view, in order to determine whether a special requirement results in an "unjustifiable" encumbrance, a WTO panel has to strike an appropriate balance between two factors. The first factor is the right to regulate to achieve a legitimate objective, such as public health. The second factor is Members' obligation to ensure the required level of IP protection. In order to strike this balance, a WTO panel must consider the two following criteria: (i) whether the measure contributes to its stated objective; and (ii) whether its objective can be achieved through a less-restrictive measure, that is, a measure that has a lesser impact on the rights of other Members.⁴⁸⁶⁷

7.2304. Honduras notes that these criteria have been applied by panels and the Appellate Body when balancing a Member's rights and obligations under various legal standards of the covered agreements, for instance, the "necessity" test under Article XX of the GATT 1994, Article XIV of the GATS and Article 2.2 of the TBT Agreement. The Appellate Body has also clarified that the extent of the contribution required for the measure to be necessary will depend on the measure's restrictiveness. In other words, the more restrictive the measure, the higher the contribution should be. Normally, a measure that is severe would require a relatively high degree of contribution to its objective, such as a "*material*" degree of contribution. If the measure at issue is found to make some contribution, the Appellate Body has considered useful to analyse less-restrictive alternatives, to determine whether the measure is the least-restrictive one among other available options. The less-restrictive alternative must: (i) be reasonably available (namely the responding Member must be capable of taking it, without undue burden, such as prohibitive costs or substantial technical difficulties); and (ii) preserve for the responding Member its right to achieve its desired level of protection with respect to the objective pursued.⁴⁸⁶⁸

7.2305. Honduras considers that, when analysing whether the restriction on the use of a particular trademark is justifiable under Article 20, the Panel should determine whether this measure: (i) makes a material contribution to the public policy objective; and (ii) constitutes the least-restrictive means to achieve this objective among other options that are reasonably available.⁴⁸⁶⁹ Honduras argues that certain measures of a pervasive and severe nature are unjustifiable within the meaning of Article 20. Such measures include (i) blanket and indiscriminate restrictions on the use of trademarks, which do not take into account the individual features of the trademarks; and (ii) measures defeating the core function of a trademark. When analysing whether such measures are justifiable, a panel need not engage in a full consideration of the above criteria.⁴⁸⁷⁰

7.2306. In Honduras's view, negotiating history confirms that there should be weighing and balancing between competing concerns. It refers to proposals by developing countries that would have reserved the unqualified right to stipulate in national laws special requirements for the use of a trademark, proposals by developed countries that sought to prohibit special requirements, and "a more balanced approach" offered by the European Communities and Japan that would have allowed the imposition of only those encumbrances on use that were not "*unjustifiabl[e]*". Honduras submits that "[t]he fact that the current text of Article 20 is based on the ... balanced approach, as opposed to a unilateral approach ... provides a strong indication that Members agreed that ... an encumbrance on *use* would be allowed only in exceptional circumstance, based on justifiable reasons".⁴⁸⁷¹

7.2307. The Dominican Republic argues that, in Article 20, the word "*unjustifiable*" provides an exception or qualification to a prohibition on encumbrances on the use of a trademark.⁴⁸⁷² Against that background, relevant dictionary meanings of the word "*justifiable*" include "[c]apable of being legally or morally justified, or shown to be just, righteous, or innocent; defensible"; as well as "supported or justified by good evidence or convincing reasoning; well-founded". To "*justify*" – as used in "*justifiable*" – means "to support the truth or value of, validate; to provide a reason for, warrant, necessitate; to prove (an action or reaction) to have been right, proper, or reasonable". In its view, based on the dictionary meaning, an "*unjustifiable*" encumbrance refers to one that is

⁴⁸⁶⁷ Honduras's first written submission, para. 296.

⁴⁸⁶⁸ Honduras's first written submission, paras. 298-300. (emphasis original)

⁴⁸⁶⁹ Honduras's first written submission, para. 301.

⁴⁸⁷⁰ Honduras's first written submission, para. 315. See also Honduras's second written submission, paras. 361-372.

⁴⁸⁷¹ Honduras's first written submission, paras. 302-306. (emphasis original)

⁴⁸⁷² See also para. 7.2135 above.

not defensible, warranted or necessary; lacks a reasoned and/or convincing basis for its imposition; and is not well-founded in the evidence.⁴⁸⁷³ In other words, "[o]n a purely literal reading, an encumbrance on the use of a trademark is 'unjustifiabl[e]' if it is not rational, reasonable, proper, defensible or warranted".⁴⁸⁷⁴

7.2308. It adds that these definitions are consistent with previous interpretations of similar terms in the covered agreements. The word "unjustifiable" has been found to mean "undue", and "go[ing] beyond what is warranted". The word "reasonable", which is one of the dictionary meanings of "justifiable", has been understood to mean "proportionate"; "sensible"; and "within the limits of reason, not greatly less or more than might be thought likely or appropriate".⁴⁸⁷⁵

7.2309. The Dominican Republic argues that the treaty interpreter cannot begin with an assumption that the word "unjustifiably" must be interpreted in opposition to the word "unnecessary" and, for that reason, exclude some elements of a necessity test. The interpretive exercise must begin with discerning the meaning of the word actually used, "unjustifiably". The mere fact that the word "unjustifiably" is not the same as the word "unnecessary" does not provide an interpretive reason to exclude the extent of the encumbrance, the extent of the contribution and alternative measures from consideration.⁴⁸⁷⁶

7.2310. As regards Australia's discussion on the WTO jurisprudence on the term "unjustifiable" in Article XX of the GATT 1994, the Dominican Republic responds that the word "unjustifiable" in the *chapeau* plays a small part in the overall justification of a measure under Article XX. By contrast, under Article 20 of the TRIPS Agreement, the word "unjustifiably" is the entire basis upon which a panel must assess the justification of a measure. In these circumstances, the interpretation of the word "unjustifiably" in Article 20 of the TRIPS Agreement cannot involve a lesser standard than the interpretation of the very same word in the *chapeau* of Article XX of the GATT 1994. The Dominican Republic contends that Australia omits to mention that the word "unjustifiable" under the *chapeau* of Article XX allows for consideration of a broad range of factors, besides the limited factors it identifies. With respect to other elements, the Dominican Republic submits that the word "unjustifiable" in the *chapeau* of Article XX involves consideration of whether reasonably available alternative measures proposed by the complainant could have avoided the discrimination.⁴⁸⁷⁷

7.2311. The Dominican Republic considers a number of factors that, in its view, must be addressed to determine whether an encumbrance is justifiable. The first is the need for individualized assessment of the tobacco trademarks subject to the measures due to the nature of a trademark.⁴⁸⁷⁸ In addition, it suggests a legal standard comprising the following four factors: (i) the *nature and extent* of the encumbrance: how much of an obstruction does the measure place on the use and function of a trademark; (ii) the purpose for which an encumbrance is imposed: what *objective* does the Member seek to achieve and do the ends warrant the resulting interference with the use of a trademark; (iii) the particular means chosen to achieve the ends: does the encumbrance, as it bears upon each element of the encumbered trademark, make a *contribution* to the ends; and (iv) the available alternatives: could an *alternative measure* have been deployed that would make an equivalent contribution, while imposing a lesser or no encumbrance on trademark use. A panel should assess these four factors through a *relational*

⁴⁸⁷³ Dominican Republic's first written submission, para. 379 (referring to Oxford English Dictionary online, definition of "justifiable", available at:

<<http://www.oed.com/view/Entry/102219?redirectedFrom=justifiable#eid>>, accessed 9 April 2014, (Exhibit DOM-85); and Oxford English Dictionary online, definition of "justify", available at:

<<http://www.oed.com/view/Entry/102219?redirectedFrom=justifiable#eid>>, accessed 9 April 2014, (Exhibit DOM-86)).

⁴⁸⁷⁴ Dominican Republic's second written submission, para. 143.

⁴⁸⁷⁵ Dominican Republic's first written submission, para. 380 (referring to Panel Reports, EC – Approval and Marketing of Biotech Products, para. 7.1495; and Dominican Republic – Import and Sale of Cigarettes, para. 7.385).

⁴⁸⁷⁶ Dominican Republic's second written submission, paras. 186, 200, 304 and 570.

⁴⁸⁷⁷ Dominican Republic's second written submission, paras. 576 and 578-579 (referring to Appellate Body Reports, EC – Seal Products, para. 5.306; US – Gasoline, pp. 26-28, DSR 1996:I, p. 3; US – Shrimp, para. 171; and Panel Reports, China – Rare Earths, para. 7.354 and fn 549). See also Dominican Republic's response to Panel question No. 108, paras. 166-167.

⁴⁸⁷⁸ Dominican Republic's first written submission, paras. 382-383. The Dominican Republic's and other parties' arguments on whether unjustifiability of the requirements should be assessed in respect of individual trademarks and their individual features are considered in section 7.3.5.5.2.2 below.

analysis that weighs and balances the relative merits of the impugned and alternative measures, reaching a holistic determination on justifiability.⁴⁸⁷⁹

7.2312. The Dominican Republic argues that "a panel must 'determine the *objective* of Article 20 and the *interests it seeks to protect* in order to carry out a meaningful analysis of whether a measure is justifiable".⁴⁸⁸⁰ The contribution of the TPP measures, and the availability of alternative measures, must be assessed against the stated objective of reducing smoking behaviour.⁴⁸⁸¹

7.2313. In its view, the interest protected under Article 20 is "[t]he use of a trademark", and the objective of the provision in protecting that interest is safeguarding, to the greatest extent possible, the ability of a trademark to fulfil its basic function of distinguishing goods or services, without prejudicing the ability of a Member to achieve other legitimate objectives. To be justifiable, government interference with the use of a trademark must be carefully calibrated to impose the least prejudice possible to the protected interest of "[t]he use of a trademark".⁴⁸⁸²

7.2314. It elaborates that the treaty text shows that "[t]he use of a trademark" is a *protected interest* under Article 20 that must be considered in assessing justifiability. As a result, the legal standard for "justifiability" must be developed in light of the role and importance of "[t]he use of a trademark", as the interest protected by the provision. "The use of a trademark" is essential to a trademark's ability to fulfil its basic treaty function of distinguishing goods or services in commerce in terms of their quality, characteristics, and reputation. Against that background, the object and purpose of Article 20 in protecting "[t]he use of a trademark" is to safeguard the ability of a trademark to fulfil its basic treaty function of distinguishing a good or service as far as possible, while permitting a Member to achieve other legitimate objectives. It adds that "[t]he object and purpose of safeguarding the ability of a trademark to fulfill its basic treaty function as far as possible unquestionably furthers the object and purpose of the TRIPS Agreement as a whole". There is no parallel to Article 20 to protect the use of other forms of IP covered by the TRIPS Agreement.⁴⁸⁸³

7.2315. The Dominican Republic responds to Australia that it considers that there is no disagreement between the parties that an encumbrance must pursue a legitimate objective in order to be justifiable, and that a panel must identify the objectives of the measure through an objective assessment of all of the available evidence.⁴⁸⁸⁴ The Dominican Republic notes that, although it agrees that Article 20 is violated if there is no rational connection between an encumbrance and a legitimate objective, it does not agree that this narrow conception exhausts the circumstances in which an encumbrance is unjustifiable.⁴⁸⁸⁵

7.2316. The Dominican Republic recalls that the panel in *EC – Trademarks and Geographical Indications (Australia)* considered that the "legitimate interests" mentioned in Article 17 of the TRIPS Agreement include the trademark owner's interest "in using its own trademark".⁴⁸⁸⁶ It invokes Article 17 as context to support its view that the trademark owner's "legitimate interests" must be taken into account in assessing "justifiability" under Article 20. It adds that the mere fact that Article 17 creates a formal exception to the rights conferred in Article 16 does not deprive Article 17 of relevance to the treaty interpreter as a source of helpful guidance in interpreting Article 20. In its view, "Article 17 of the TRIPS Agreement is relevant context for interpreting Article 20 of the TRIPS Agreement because the two provisions have similarities. Specifically, both provisions are concerned with *justifying government measures that undermine the distinctiveness of a trademark*".⁴⁸⁸⁷ In both cases, in deciding whether to permit government measures that

⁴⁸⁷⁹ Dominican Republic's first written submission, paras. 387-391. See Dominican Republic's second written submission, para. 146 (offering a slightly different formulation of the suggested legal standard). See also Dominican Republic's second written submission, paras. 289 and 293-294.

⁴⁸⁸⁰ Dominican Republic's second written submission, para. 144 (referring to the European Union's response to Panel question No. 17, para. 102) (emphasis added by the Dominican Republic). See para. 7.2362 below for a summary of the European Union's position.

⁴⁸⁸¹ Dominican Republic's second written submission, para. 288.

⁴⁸⁸² Dominican Republic's second written submission, para. 145.

⁴⁸⁸³ Dominican Republic's second written submission, paras. 157-161.

⁴⁸⁸⁴ Dominican Republic's second written submission, para. 275.

⁴⁸⁸⁵ Dominican Republic's second written submission, para. 150.

⁴⁸⁸⁶ Dominican Republic's first written submission, para. 257.

⁴⁸⁸⁷ Dominican Republic's second written submission, paras. 171-174. (emphasis original)

undermine the distinctiveness of a trademark, the treaty interpreter must take into consideration the legitimate interests of the trademark owner in using the trademark to maintain that distinctiveness.⁴⁸⁸⁸

7.2317. Cuba submits that the relevant ordinary meaning of the term "unjustifiable" is that which cannot be "shown to be just, reasonable or correct" or "defensible". The term "reasonable" was held by the panel in *Dominican Republic – Cigarettes* to refer to notions such as "proportionate", "sensible" and "within the limits of reason, not greatly less or more than might be thought likely or appropriate".⁴⁸⁸⁹

7.2318. In Cuba's view, these definitions indicate that any analysis of unjustifiability must determine whether the benefits to the implementing WTO Member warrant the burdens imposed on trademark holders. A special requirement that does not achieve the aim for which it is imposed is unjustifiable, because no benefits are realised by the implementing WTO Member to justify the burdens imposed. Furthermore, the availability of equally effective but less trademark encumbering alternative measures implies that a special requirement is unjustifiable, as the burdens imposed on trademark holders are entirely avoidable. Finally, a situation where the magnitude or character of the regulatory benefits that an implementing WTO Member realises from a special requirement cannot justify the adverse impact on trademark owners also implies that the special requirement is unjustifiable.⁴⁸⁹⁰

7.2319. Against this background, Cuba submits that a special requirement should be treated as unjustifiable if any of the following (non-exhaustive) conditions are met: (i) if the aim sought to be achieved (through the special requirement) is *illegitimate*; (ii) if the special requirement is *ineffective*, in that it fails to achieve the legitimate aim for which it is imposed; and (iii) if the special requirement is *disproportionate*, in that there are alternative measures which do not encumber the use of trademarks (or which would encumber the use of trademarks to a lesser degree) that meet the legitimate aim sought to be achieved to an equivalent (or greater) extent. Cuba accepts that Australia pursues a legitimate aim of reducing smoking prevalence. Cuba's case is that the TPP measures are unjustifiable because they are ineffective or, alternatively, because they are disproportionate.⁴⁸⁹¹

7.2320. Cuba further argues that the broad term "unjustifiably" may have many different meanings according to the context for which it is used, ranging from "undue" – a term essentially similar to "unnecessary" – to "unreasonable", "excessive", "disproportionate" and "incapable of being justified or explained". The ordinary meaning of the term is, therefore, only the beginning of a holistic exercise of interpretation. Moreover, the ordinary meaning of the term "unjustifiably", as used in the context of Article 20, is not the same as when it is used in the context of the *chapeau* of Article XX of the GATT 1994. The adverb "unjustifiably", as used in Article 20, refers to the nature and extent of the encumbrance and the disproportionate, extreme or unreasonable effect of the requirement.⁴⁸⁹² Cuba adds that "[i]n the context of the TRIPS Agreement, the justification for, that is to say, 'reason for' imposing the special requirements actually does not matter. What does matter is the extent to which intellectual and industrial property rights are affected."⁴⁸⁹³

7.2321. Cuba agrees with Australia that Article 20 is not a provision establishing an exception. Cuba argues that Article 20 imposes a positive obligation not to encumber unjustifiably the use of a trademark through special requirements. This means that no requirement should be justified provisionally, but the complainant must establish that the encumbrance is disproportionate, not limited, and therefore unduly restrictive. In this sense, Article 20 combines the positive obligation of refraining from imposing special requirements with the possibility of the existence of a limited exception for a provision, but imposes the burden of proof for both on the complainant.⁴⁸⁹⁴

⁴⁸⁸⁸ Dominican Republic's second written submission, para. 180.

⁴⁸⁸⁹ Cuba's first written submission, para. 316 (quoting *Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 1, (Exhibit CUB-45), pp. 1482 and 3445; and Panel Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 7.385).

⁴⁸⁹⁰ Cuba's first written submission, paras. 317-318.

⁴⁸⁹¹ Cuba's first written submission, paras. 319-320.

⁴⁸⁹² Cuba's second written submission, paras. 94-101.

⁴⁸⁹³ Cuba's second written submission, para. 104.

⁴⁸⁹⁴ Cuba's second written submission, para. 102-103.

7.2322. Cuba notes that Australia argues that the drafters have deliberately used the concept of "unjustifiably" in Article 20 instead of the term "unnecessarily". In Cuba's view, Australia's argument is erroneous if one takes into account its own statements that Article 8.1 of the TRIPS Agreement, the Doha Declaration, Article XX of the GATT 1994, Article 2.2 of the TBT Agreement and similar provisions allow Members to adopt measures "necessary" to protect health. Accordingly, at least, encumbrances imposed specifically on trademarks by the measure should be "necessary" and thus contribute to the fulfilment of the objective rather than being simply "rationally connected" to that objective.⁴⁸⁹⁵

7.2323. Indonesia submits that the term "unjustifiably" means "not capable of being justified". "Justified" means "[m]ade just or right; made or accounted righteous; warranted; supported by evidence". In the present tense, "justify" means "[t]o make good (an argument, statement, or opinion); to confirm or support by attestation or evidence; to corroborate, prove, verify". Thus, in Indonesia's view, Article 20 prevents WTO Members from encumbering the use of a trademark without the support of evidence, sufficient lawful reason, or a convincing rationale.⁴⁸⁹⁶ It adds that the word "unjustifiably" is an adverb modifying the verb "encumber", which means it is the encumbrance that must be justified and not the special requirements themselves.⁴⁸⁹⁷

7.2324. Indonesia argues that an analysis of "unjustifiable" requires the use of a sliding scale – measures that impose a high degree of encumbrance also impose a higher burden on the respondent to justify the measure. In its view, this interpretation is consistent with the principle of proportionality reflected in the Appellate Body's connection of "unjustifiable" with terms such as "beyond what is warranted ... ; excessive, disproportionate". These terms underscore the understanding that a measure that is "justifiable" is one that is "just", "warranted", "proportional", and "supported by evidence". Indonesia argues that "[i]t can only follow that radical and unprecedented encumbrances, such as those imposed by [the TPP measures], require more evidence to prove that the burden is 'warranted' and 'supported', whereas a minor encumbrance (i.e. use with a health warning and limitations on size or placement) could be justified with less rigorous evidence".⁴⁸⁹⁸

7.2325. Indonesia argues that the existence of a "rational connection" to a legitimate objective is not sufficient to justify an encumbrance under Article 20. It adds that there is support from the third parties for several of the elements put forward by the complainants, including the following three factors: (i) a rational connection to a legitimate objective; (ii) an assessment of the contribution arising from the special requirement; and (iii) the extent of the encumbrance. The third parties generally consider that whether a requirement is justified or not should be resolved on a case-by-case basis by "weighing and balancing" the extent of the encumbrance and the contribution it makes to the objective.

7.2326. Indonesia considers that "[t]he plain text of Article 8.1 requires that public health measures must be *both* necessary and consistent with the provision of the TRIPS Agreement".⁴⁸⁹⁹ In its view, paragraph 4 of the Doha Declaration "is consistent with the language of Article 8.1 and does not expand the level of deference to be accorded to public health measures under the TRIPS Agreement".⁴⁹⁰⁰

⁴⁸⁹⁵ Cuba's second written submission, para. 108.

⁴⁸⁹⁶ Indonesia's first written submission, paras. 287-288 (referring to Merriam-Webster Dictionary online, definition of "unjustifiably", available at: <<https://www.merriam-webster.com>>, accessed 29 September 2014; and *The Compact Oxford English Dictionary*, 2nd edn, J.A. Simpson and E.S.C. Weiner (eds.) (Oxford University Press, 2000), p. 905).

⁴⁸⁹⁷ Indonesia's first written submission, para. 286.

⁴⁸⁹⁸ Indonesia's first written submission, para. 292 (referring to Appellate Body Report, *Australia – Apples*, para. 437).

⁴⁸⁹⁹ Indonesia's second written submission, para. 40. (emphasis original)

⁴⁹⁰⁰ Indonesia's second written submission, paras. 46-47.

7.2327. Australia submits that the term "unjustifiable" is defined as "not justifiable, indefensible". The ordinary meaning of the term "justifiable", in turn, is "able to be legally or morally justified; able to be shown to be just, reasonable, or correct; defensible".⁴⁹⁰¹

7.2328. It notes that no prior panel has had occasion to consider the meaning of the term "unjustifiably" as it appears in Article 20. However, panels and the Appellate Body have considered the meaning of the term "unjustifiable" in the context of the phrase "arbitrary or unjustifiable discrimination", as it appears in Article XX of the GATT 1994 and Article XIV of the GATS. In *Brazil – Retreaded Tyres*, the Appellate Body considered that an examination of whether discrimination is "arbitrary or unjustifiable" within the meaning of Article XX of the GATT 1994 should be "directed at the cause, or rationale, of the discrimination". The Appellate Body explained that this inquiry requires a panel to examine whether the discrimination at issue has a "rational connection" to the objective that was provisionally found to justify the measure under one or more of the general exceptions contained in Article XX. The Appellate Body held that there is no "rational connection" if the rationale for discrimination "does not relate to" or "would go against" the pursuit of a legitimate objective under Article XX. In *EC – Seal Products*, the Appellate Body recently reaffirmed the interpretation of the *chapeau* to Article XX that it articulated in *Brazil – Retreaded Tyres*. The Appellate Body stated that "[o]ne of the most important factors in the assessment of arbitrary or unjustifiable discrimination is the question of whether the discrimination can be reconciled with, or is rationally related to, the policy objective with respect to which the measure has been provisionally justified under one of the subparagraphs of Article XX". The Appellate Body examined this issue as one of whether the discrimination inherent in the measure had a "rational relationship" to the objective that provisionally justified the measure under Article XX.⁴⁹⁰²

7.2329. In Australia's view, these prior Appellate Body reports are consistent with the ordinary meaning of the term "unjustifiably" and support the conclusion that the use of a trademark in the course of trade is "unjustifiably" encumbered by special requirements only if there is no "rational connection" between the imposition of the special requirements and a legitimate public policy objective. The meaning of the term "unjustifiably" in Article 20 of the TRIPS Agreement must be at least as permissive as the meaning of the term "unjustifiable" in the *chapeau* to Article XX, considering that Article XX concerns measures that have been found to violate one or more provisions of the GATT 1994. Article 20 of the TRIPS Agreement, by contrast, is not an exception to a violation. Rather, it is an affirmative obligation relating to special requirements that encumber the use of trademarks in the course of trade, and the ordinary meaning of Article 20 requires only that such encumbrances bear a rational connection to a legitimate public policy objective.⁴⁹⁰³

7.2330. Australia adds that the ordinary meaning of the term "unjustifiably" thus focuses on the rationality or reasonableness of the connection between the encumbrance imposed by a measure and the measure's legitimate public policy objective. As these definitions make clear, "unjustifiably" is not an absolute standard. There will ordinarily be more than one possible outcome that is "able to be shown to be just, reasonable, or correct", or that is "within the limits of reason". Under a rational connection standard, the relevant inquiry is whether the complainants have shown that the relationship between the encumbrance imposed by the measure and the measure's objective is not one that is within the range of rational or reasonable outcomes.⁴⁹⁰⁴

7.2331. Australia notes that, even under a legal standard of "necessity", panels and the Appellate Body have found that a measure is capable of contributing to its legitimate objectives where there is "a genuine relationship of ends and means between the objective pursued and the measure at issue". The Appellate Body has indicated that the existence of a "genuine relationship of ends and means" can be evaluated either in quantitative or qualitative terms, and that the ultimate objective of the inquiry is to determine whether the measure is "capable of making a contribution" to its objective. The Appellate Body has further indicated that, even under a legal standard of "necessity", there is no "pre-determined threshold of contribution" that the measure

⁴⁹⁰¹ Australia's first written submission, para. 365 (referring to Shorter Oxford English Dictionary, Vol. 2 AUS excerpts, (Exhibit AUS-245), p. 3445; and Shorter Oxford English Dictionary, Vol. 1 AUS excerpts, Part 1, (Exhibit AUS-243), p. 1482).

⁴⁹⁰² Australia's first written submission, paras. 366-368 (referring to Appellate Body Report, *Brazil – Retreaded Tyres*, paras. 225 and 227-228; and *EC – Seal Products*, para. 5.306).

⁴⁹⁰³ Australia's first written submission, para. 369. See also Australia's response to Panel question No. 107.

⁴⁹⁰⁴ Australia's second written submission, para. 149. (emphasis original)

must be capable of achieving in order to be found "necessary". These considerations suggest that, under a legal standard of "unjustifiability", and bearing in mind that the complainant bears the burden of proof, a complainant would need to demonstrate that an encumbrance is incapable of contributing to its objectives in order to prove that it is "unjustifiable".⁴⁹⁰⁵

7.2332. In Australia's view, the principal point of disagreement concerns the complainants' position that the term "unjustifiably" should be interpreted as functionally equivalent to a standard of necessity.⁴⁹⁰⁶ It argues that the complainants' contention that the term "unjustifiably" in Article 20 encompasses a requirement of "necessity" (such as under Article XX(d) of the GATT 1994) or a standard comparable to that prescribed by Article 2.2 of the TBT Agreement goes beyond the ordinary meaning of the term "unjustifiably". Notwithstanding the fact that the concepts of "necessity", "least trade-restrictiveness", and "reasonably available alternatives" were well known at the time of the Uruguay Round and appear in other Uruguay Round agreements, these concepts were not incorporated into Article 20 of the TRIPS Agreement. Article 20 uses the word "unjustifiably" to establish the standard by which special requirements imposed upon the use of trademarks are to be evaluated. The ordinary meaning of this term is clear and bears no resemblance to the concepts of "necessity", "least restrictiveness", and "reasonably available alternatives" that appear elsewhere in the covered agreements. Just as the use of the same or similar terms in different provisions of the covered agreements creates a presumption that the terms should be interpreted to have the same or similar meaning, the use of different terms creates a presumption that the terms were intended to have a different meaning.⁴⁹⁰⁷

7.2333. Furthermore, the term "unjustifiably" does not require a "weighing and balancing" analysis, which is the hallmark of a "necessity" analysis.⁴⁹⁰⁸ Interpreting the term "unjustifiably" to include a requirement of "least restrictiveness" would render this term functionally equivalent to a standard of "necessity". What distinguishes the term "necessary" from other standards of justification, such as "relating to", "reasonable", "undue", "unjustifiable", is the connotation that the measure at issue was the only way of achieving the Member's objective in a WTO compatible manner. The fact that Article 20 does not use the term "necessary" as the basis for its standard of justification must be given interpretative effect. In Australia's view, the complainants do not seriously contend that a requirement of "least restrictiveness" follows from the ordinary meaning of the term "unjustifiably", but rather base it on contextual arguments relating to "legitimate interests" or a "protected treaty interest" despite the absence of these terms in the text of Article 20.⁴⁹⁰⁹

7.2334. Australia contends that the complainants' descriptions of the ordinary meaning of the term "unjustifiably" do not support their assertion that this term requires an examination of "necessity" or an examination of whether the encumbrance is the "least restrictive" encumbrance possible in light of "reasonably available alternatives". Insofar as the terms "reasonable" and "undue", referred to by complainants, bear upon the interpretation of the term "unjustifiably", the ordinary meanings of these terms as interpreted by panels and the Appellate Body do not support the complainants' assertion that the term "unjustifiably" means "necessary" or "least restrictive" in light of "reasonably available alternatives".⁴⁹¹⁰

7.2335. Australia observes that, in their submissions to the Panel, the complainants have treated their analysis of whether the TPP measures are "unjustifiable" under Article 20 of the TRIPS Agreement as essentially interchangeable with their analysis of whether the measures are "more trade-restrictive than necessary" under Article 2.2 of the TBT Agreement. It argues that such an approach ignores the ordinary meaning of the term "unjustifiable" and represents an attempt by the complainants to rewrite Article 20 to say something that it does not say.⁴⁹¹¹

⁴⁹⁰⁵ Australia's second written submission, paras. 152-153 (referring to Appellate Body Report, *Brazil – Retreaded Tyres*, paras. 145 and 149; and *EC – Seal Products*, para. 5.213).

⁴⁹⁰⁶ Australia's second written submission, para. 145.

⁴⁹⁰⁷ Australia's first written submission, paras. 385, 393-394 and 408 (referring to Appellate Body Report, *US – Gasoline*, pp. 17-18, DSR 1996:I, p. 3).

⁴⁹⁰⁸ Australia's second written submission, paras. 159-162.

⁴⁹⁰⁹ Australia's second written submission, paras. 165-173.

⁴⁹¹⁰ Australia's first written submission, paras. 397 and 400.

⁴⁹¹¹ Australia's second written submission, para. 158.

7.2336. Australia argues that it is evident from the context of Article 20 that the term "unjustifiably" was not meant to impose significant constraints upon Members' sovereign right to regulate the use of trademarks in furtherance of public policy objectives (as acknowledged in the principle set forth in Article 8.1).⁴⁹¹² More specifically, it submits that the TRIPS Agreement is not generally concerned with the use of trademarks, or with the use of other types of IP. Article 20 is not an exception to rights that Members are otherwise required to confer upon trademark owners under domestic law, but a provision that relates, exceptionally, to a sovereign right that the TRIPS Agreement does not otherwise seek to constrain. Article 19, which immediately precedes Article 20, specifically contemplates that Members may regulate products in such a way as to create an obstacle to the use of a trademark, and provides that Members must not refuse to renew registration on this basis. Article 20 comes toward the end of Section 2, outside the main line of Section 2's concern with rights with respect to registration and rights of exclusion. The drafters considered that special requirements imposed upon the use of trademarks in the course of trade are permissible so long as they are not "unjustifiable". This choice is consistent with the fact that the Paris Convention – upon which Section 2 of the TRIPS Agreement is largely based – "does not contain any obligation to the effect that the use of a registered trademark must be permitted".⁴⁹¹³ To Australia, these considerations support the conclusion that an encumbrance resulting from the imposition of special requirements upon the use of a trademark is not "unjustifiable" if the encumbrance has a rational connection to a public policy objective.⁴⁹¹⁴

7.2337. Australia contends that the Dominican Republic's attempt to recast Article 20 as "a prohibition against encumbrances on the use of a trademark", which is then subject to an exception implied by the word "unjustifiably", is a complete rewriting of Article 20. There is no sense in which Article 20 establishes any sort of "prohibition" or "presumption" against encumbrances upon the use of trademarks through the imposition of special requirements.⁴⁹¹⁵

7.2338. Australia responds to the complainants' arguments on the relevance of "legitimate interests" and a "protected treaty interest" for the interpretation of Article 20.

7.2339. As regards "legitimate interests", Australia argues that the concepts of "necessity" and "least restrictiveness" cannot be inferred from Article 17 of the TRIPS Agreement, which obliges Members to "take account of the legitimate interests of the owner of the trademark". In its view, the complainants have not offered any explanation why the Panel should read the requirements of Article 17 into Article 20, which are different provisions addressing two different topics: Article 17 concerns exceptions to the rights conferred under Article 16. Article 20, by contrast, is not an exceptions provision, but rather an affirmative obligation that Members undertake in respect of encumbrances imposed upon the use of trademarks in the course of trade. The "legitimate interests of the owner of the trademark" are therefore not relevant in the context of Article 20, as they are in the context of Article 17. The absence of comparable language in Article 20 confirms that no such obligation exists. The context provided by other provisions within the same agreement can be relevant both in their similarity and their dissimilarity to the provision to be interpreted. The fact that Article 20 does not require Members to take into account "the legitimate interests of the owner of the trademark", in contrast to Article 17, strongly suggests that the drafters of the TRIPS Agreement did not consider this to be a relevant or necessary requirement in the case of measures that impose an encumbrance upon the use of a trademark. Instead, Article 20 focuses exclusively on that standard of whether any encumbrance resulting from the imposition of special requirements is "unjustifiable".⁴⁹¹⁶

7.2340. As regards a "protected treaty interest", Australia responds that the arguments based on such an interest appear to be just another way of asserting that the TRIPS Agreement has the use of trademarks as one of its paramount concerns, even though there is nothing in the Agreement to support this conclusion. The complainants seek to distinguish a "right of use", which they agree is not conferred by the TRIPS Agreement, from what they characterize as an "interest in use" and

⁴⁹¹² Australia's first written submission, para. 374.

⁴⁹¹³ Australia's first written submission, paras. 371-373 (quoting Letter from D. Latham of Lovell White Durrant, (Exhibit AUS-234)).

⁴⁹¹⁴ Australia's first written submission, para. 374.

⁴⁹¹⁵ Australia's first written submission, para. 403 (referring to Dominican Republic's first written submission, para. 343).

⁴⁹¹⁶ Australia's first written submission, paras. 404-407; and Australia's second written submission, paras. 179 and 182. See also Australia's second written submission, paras. 177-178.

the "importance of use" in allowing trademarks to "fulfil their basic function". The complainants' arguments about "interests in use" and the "importance of use" are essentially the "right of use" argument in a different guise. The complainants' argument in this respect is essentially teleological – because trademarks serve to "distinguish the goods or services of one undertaking from those of other undertakings" when they are used for this purpose, it must be the case that the TRIPS Agreement has the protection of this *telos* as one of its core objectives, and that the term "unjustifiably" must be interpreted in this light.⁴⁹¹⁷

7.2341. The first problem with this argument is that it begs the question of what "interests" the TRIPS Agreement seeks to "protect". This question is answered by examining the relevant provisions of the Agreement, not by engaging in teleological reasoning. The principal concern of the TRIPS Agreement is to ensure that all Members recognise and enforce a certain minimum standard of IP rights. In each instance, the TRIPS Agreement defines these rights in terms of rights of exclusion, and does not once refer to any "right of use". The complainants' teleological observations concerning an "interest in use" and the "importance of use" would apply to *all* forms of IP covered by the TRIPS Agreement, yet it is clear from its terms that the Agreement does not grant rights with respect to the use of IP.⁴⁹¹⁸

7.2342. The use of other forms of IP is at least equally important to allowing those forms of IP to "fulfil their basic function". Moreover, the owners of other forms of IP have at least an equally legitimate "interest" in the use of that IP. Nevertheless, the TRIPS Agreement imposes no constraints on how Members may regulate the use of other forms of IP. This confirms that the use of IP, of any type, is not a primary concern of the TRIPS Agreement and is a matter that the Agreement leaves almost entirely unconstrained.⁴⁹¹⁹

7.2343. Australia contends that the complainants' arguments about "interests" amount to an assertion that because Article 20 imposes some constraint upon the ability of Members to encumber the use of trademarks, it must be the case that the use of trademarks is a paramount concern of the TRIPS Agreement that deserves the highest levels of treaty protection, including a requirement of "least restrictiveness". But this assertion simply assumes the conclusion of the interpretative analysis. Every affirmative obligation under the covered agreements could be said to reflect a "protected treaty interest", but it does not follow that each such "interest" is equally important or that the obligation must be interpreted to impose the highest levels of protection for that "interest". The nature of the obligation that a treaty provision imposes can be determined only by interpreting the relevant treaty terms in accordance with their ordinary meaning, in their context and in light of the object and purpose of the agreement. The term "unjustifiably" in Article 20, properly interpreted, is not equivalent to a standard of "necessity" and does not impose a requirement of "least restrictiveness". The complainants' arguments about "protected treaty interests", whatever their interpretative relevance, do not support a different conclusion.⁴⁹²⁰

7.2344. Australia argues that its interpretation of the term "unjustifiably" is supported by the object and purpose of the TRIPS Agreement. In its view, the core object and purpose of the TRIPS Agreement is to ensure that all WTO Members provide a minimum level of exclusive rights to owners of IP. These exclusive rights are in the nature of "negative rights to prevent certain acts", not "positive rights to exploit or use certain subject matter". As Carvalho explains, the "fundamental and overall thrust" of the TRIPS Agreement "is about the protection of intellectual property rights, not about the freedom to exploit them in trade".⁴⁹²¹

7.2345. Australia adds that the nature of the rights that the TRIPS Agreement seeks to protect has important implications for the rights that Members retain to regulate the use and exploitation of IP, including trademarks. The panel in *EC – Trademarks and Geographical Indications (Australia)* observed that the fact that the TRIPS Agreement requires Members to confer certain negative rights of exclusion upon IP owners "inherently grants Members freedom to pursue

⁴⁹¹⁷ Australia's second written submission, para. 188.

⁴⁹¹⁸ Australia's second written submission, para. 189.

⁴⁹¹⁹ Australia's second written submission, para. 190.

⁴⁹²⁰ Australia's second written submission, paras. 192-193.

⁴⁹²¹ Australia's first written submission, para. 376 (referring to Panel Report, *EC – Trademarks and Geographical Indications (Australia)*, para. 7.246; and Carvalho 3rd edn, AUS excerpts, (Exhibit AUS-236), p. 348).

legitimate public policy objectives", since most measures that regulate the use or exploitation of IP will not interfere with the rights of exclusion that Members are required to confer. Most such measures are simply "outside the scope of intellectual property rights" and are therefore not constrained by Members' obligations under the TRIPS Agreement.⁴⁹²²

7.2346. In Australia's view, Article 8 is an express acknowledgement of the broad scope that Members retain under the TRIPS Agreement to adopt laws and regulations for public policy purposes. Article 8.1 is not an exception for public policy measures that are otherwise inconsistent with a Member's obligations under the Agreement but enunciates a fundamental principle of the Agreement that must be taken into account when interpreting and applying its remaining provisions. It recognizes that each Member retains the right to adopt measures in furtherance of public policy objectives, including measures to protect public health, as long as those measures are consistent with the Members' obligations under the Agreement.⁴⁹²³

7.2347. The Doha Declaration refers to the principles set forth in Article 8.1. Paragraph 4 of the Declaration states that the TRIPS Agreement "does not and should not prevent Members from taking measures to protect public health", and "reaffirm[s] the right of WTO Members to use, to the full, the provisions in the TRIPS Agreement, which provide flexibility for this purpose". The Declaration further states that "in applying the customary rules of interpretation of public international law, each provision of the TRIPS Agreement shall be read in the light of the object and purpose of the Agreement as expressed, in particular, in its objectives and principles", i.e. in Articles 7 and 8.⁴⁹²⁴

7.2348. A "weighing and balancing" analysis is particularly inappropriate in the case of a measure that is designed to protect public health. The Doha Declaration serves to underscore that the term "unjustifiably" in Article 20 provides Members with a wide degree of latitude to implement measures to protect public health and, unlike the term "necessary", contemplates a range of possible outcomes that are "able to be shown to be just, reasonable, or correct" or that are "within the limits of reason". In this relevant context, it is not a panel's function to "weigh and balance" the considerations, including public health considerations, that the Member took into account when crafting the measure at issue in order to substitute the panel's own assessment for that of the implementing Member. Rather, the panel's function is to evaluate whether the complaining Member has demonstrated that an encumbrance upon the use of trademarks resulting from the measure at issue is "unjustifiable".⁴⁹²⁵

7.3.5.5.1.2 Main arguments of the third parties

7.2349. Argentina agrees with Australia that the term "unjustifiably" in Article 20 should be analyzed in terms of the connection, or the lack thereof, between the encumbrance and the policy objective pursued by the measure.⁴⁹²⁶ One should also take into consideration whether the measure makes any contribution to the objectives. The possible availability of alternative measures would, however, be more akin to proof of "necessity" than of "justifiability".⁴⁹²⁷ The panel in *EC – Trademarks and Geographical Indications* pointed out that the TRIPS Agreement does not contain any provision corresponding to Article XX of the GATT 1994, and stated that a fundamental feature of IP protection grants States freedom to pursue legitimate public policy objectives since many measures to obtain those public policy objectives lie outside the scope of IP rights and do not require an exception under the TRIPS Agreement. Consequently, the interpretation of "unjustifiable encumbrance" must be made in the light of the provisions of the TRIPS Agreement, bearing in mind its object and purpose, without extrapolating the application of

⁴⁹²² Australia's first written submission, para. 379 (referring to Panel Report, *EC – Trademarks and Geographical Indications (Australia)*, para. 7.246).

⁴⁹²³ Australia's first written submission, paras. 380-381.

⁴⁹²⁴ Australia's first written submission, para. 382.

⁴⁹²⁵ Australia's second written submission, para. 163.

⁴⁹²⁶ Argentina's third-party submission, para. 10. Argentina also conceptually agrees with the comments by Brazil, Canada, China, and Japan. In this respect, Argentina in particular refers to para. 49 of Brazil's third-party submission, which is reflected in para. 7.2350 below. Argentina's third-party response to Panel question No. 17, para. 27.

⁴⁹²⁷ Argentina's third-party response to Panel question No. 19.

Article XX of the GATT 1994.⁴⁹²⁸ Bearing in mind the principles laid down in Article 8.1 of the TRIPS Agreement and the Doha Declaration, the TRIPS Agreement must be applied in a manner which supports the right of Members to protect public health⁴⁹²⁹, bearing in mind that tobacco is a unique product owing to the high risk of addiction and damage to health.⁴⁹³⁰

7.2350. Brazil submits that, in Article 20, the term "unjustifiably" is associated with the term "encumbered" and not the expression "special requirements". Therefore, what seems to be central to the analysis of consistency with Article 20 is not so much whether a measure is unjustifiable, but whether the encumbrance it poses to the use of a trademark is unjustifiable.⁴⁹³¹ The existence of a rational connection or the lack thereof between the measure at issue and a certain policy objective may not be sufficient for assessing whether a special requirement unjustifiably encumbers the use of a trademark in the course of trade. In its view, complainants would have to demonstrate that the encumbrance posed by the measure is not commensurate with the importance of the objective pursued, and the respondent would have to adduce evidence in order to prove there is a balance between the importance of the objective pursued and the encumbrance posed by its measure.⁴⁹³² The dictionary definition of the word "justifiable" conveys the idea of reasonability; consequently, if the encumbrance posed by a special requirement is demonstrated to be excessive in relation to the importance of the objective pursued, it would probably not be justifiable at the same time.⁴⁹³³

7.2351. As regards the public health context, Brazil recalls that the fourth WTO Ministerial Conference in Doha 2001 recognized that nothing in the WTO rules prevents its Members from taking measures for the protection of human life or health, at the levels they consider appropriate, provided that such measures (i) are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail; (ii) do not represent a disguised restriction on international trade; and (iii) are otherwise in accordance with the provisions of the WTO Agreements.⁴⁹³⁴ As regards the specific commitments under the TRIPS Agreement, the Ministerial Conference adopted the Doha Declaration, where it agreed that the Agreement does not and should not prevent Members from taking measures to protect public health, reaffirmed the right of Members to use, to the full, the provisions in the TRIPS Agreement, which provide flexibility for such purpose, and recognized that these flexibilities include, among others, the imperative of having each provision of the TRIPS Agreement read in the light of its object and purpose (Articles 7 and 8), when applying the customary rules of interpretation of public international law.⁴⁹³⁵

7.2352. Canada argues that, while the term "justifiable" involves something that can be defended, supported or, in essence, is reasonable, the term "necessary" signifies something "that cannot be dispensed with or done without, requisite, essential, needful". It is evident that the threshold to establish that a measure is "necessary" must be higher and more stringent than the threshold to establish that a measure is "justifiable". If Members had intended to use the word "necessary" in Article 20, they would have done so, as they did in a number of other provisions of the TRIPS Agreement. Some complainants would have the Panel collapse the two distinct concepts of "necessity" and "justifiability" together, but this would ignore a basic tenet of treaty interpretation.⁴⁹³⁶ While Australia's proposed test of requiring a complainant to establish that there is no rational connection between the requirement and a legitimate public policy objective in order to demonstrate that the requirement is "unjustifiable" would establish an extremely onerous burden to establish a violation of Article 20, the test advanced by the complainants to determine

⁴⁹²⁸ Argentina's third-party response to Panel question No. 20 (referring to Panel Report, *EC – Geographical Indications*, paras. 7.114 and 7.210); and Argentina's third-party submission, para. 8.

⁴⁹²⁹ Argentina's third-party responses to Panel question Nos. 23 and 21, respectively.

⁴⁹³⁰ Argentina's third-party response to Panel question No. 17.

⁴⁹³¹ Brazil's third-party submission, para. 48.

⁴⁹³² Brazil's third-party submission, para. 49.

⁴⁹³³ Brazil's third-party submission, para. 50 (referring to *Shorter Oxford English Dictionary*).

⁴⁹³⁴ Brazil's third-party submission, para. 18 (referring to para. 6 of the Doha Ministerial Declaration, adopted on 14 November 2001, WT/MIN(01)/DEC/1).

⁴⁹³⁵ Brazil's third-party submission, para. 19 (referring to paras. 4 and 5 of the Doha Declaration).

⁴⁹³⁶ Canada's third-party submission, paras. 77-79 and 81 (referring to Appellate Body Reports, *Korea – Dairy*, para. 81; and *Japan – Alcoholic Beverages II*, p. 17). See also Canada's third-party submission, paras. 82-83, and response to Panel question No. 20, paras. 38-41.

whether a requirement is "unjustifiable" is equally untenable as it would require the requirement to be the least trade-restrictive to achieve the objective.⁴⁹³⁷

7.2353. Canada submits that Article 8.1 does not set out rights or obligations and is not an exception for measures that may otherwise be inconsistent with the provisions of the TRIPS Agreement, but espouses the principle that Members have the right to take measures necessary to protect health.⁴⁹³⁸ The test established to determine whether a measure is "unjustifiable" under Article 20 must reflect and preserve the regulatory space to protect public health recognized in Article 8.1. To use the language in Article 8.1 to import "necessity" into the concept of "unjustifiable" so as to create an inappropriately stringent test in Article 20 would be a perverse use of Article 8.1 and at odds with its intent and purpose.⁴⁹³⁹

7.2354. Having regard for the ordinary meaning of the words, existing case law, and relevant context, including other TRIPS provisions and the Doha Declaration, Canada proposes that the elements to be examined in determining whether a special requirement is "unjustifiable" under Article 20 constitute the following: (i) is the objective of the requirement legitimate; (ii) is there a rational connection between the requirement and the legitimate objective; (iii) does the requirement contribute to the objective; and (iv) to what extent does the requirement encumber how a trademark can be used.⁴⁹⁴⁰ The exercise in determining whether a special requirement is "unjustifiable" involves weighing and balancing these factors. In other words, a panel would weigh the importance of the objective and the contribution of the requirement with the extent of the encumbrance on the use of a trademark.

7.2355. Canada emphasizes that its proposed test does not include a comparative analysis between the measure at issue and an alternative measure to determine whether an alternative measure is reasonably available, less trade-restrictive, and makes an equivalent contribution to the fulfilment of the objective. It is appropriate for a "justifiable" test to exclude such a comparative element as the ordinary meaning of that term in its context suggests that it supports a test that determines whether a measure is defensible and reasonable, not whether it is indispensable and the least trade-restrictive.⁴⁹⁴¹ In response to a Panel question, Canada adds that the "justifiable" concept in Article 20 is fundamentally concerned with the relationship between the measure and the encumbrance, rather than with how the measure compares with other possible alternatives with respect to the degree of encumbrance. It may be appropriate, however, in certain cases, to take into consideration other measures that were contemplated but rejected by the implementing Member, as this may assist in elucidating, *inter alia*, the contribution or rational connection of the measure at issue to its objective.⁴⁹⁴²

7.2356. China argues that, unlike Article 2.2 of the TBT Agreement and Article XX of the GATT 1994, Article 20 does not incorporate notions like "necessary", "least restrictiveness" and "reasonably available alternatives" but uses a broader term, "unjustifiability". In accordance with the customary rules of interpretation as embodied in Article 31 of the Vienna Convention, the text of Article 20 must not be disregarded by inserting something that has not been incorporated in that provision. Furthermore, a measure inconsistent with GATT 1994 obligations may be justified on the grounds set out in any of the items (a) through (j) of Article XX of the GATT 1994, provided that the conditions provided for in the *chapeau* of Article XX are also fulfilled, but only items (a), (b), (d), (i) and (j) establish a standard of "necessary". This appears to support the view that the standard of "justifiable" is lower than that of "necessary". If this is the case, the jurisprudence regarding the "necessary" standard under Article XX of the GATT 1994 and/or Article 2.2 of the TBT Agreement may not be simply transplanted into the "justifiable" standard under Article 20 of the TRIPS Agreement.⁴⁹⁴³

⁴⁹³⁷ Canada's third-party submission, paras. 85-86.

⁴⁹³⁸ Canada's third-party submission, para. 80.

⁴⁹³⁹ Canada's third-party response to Panel question No. 21. See also Canada's third-party submission, paras. 8 and 10-11; and Canada's third-party response to Panel question No. 23, paras. 47-48.

⁴⁹⁴⁰ Canada's third-party submission, para. 87.

⁴⁹⁴¹ Canada's third-party submission, paras. 88-89.

⁴⁹⁴² Canada's third-party response to Panel question No. 19, para. 37.

⁴⁹⁴³ China's third-party submission, para. 49.

7.2357. China adds that, unlike the "necessary" test under Article 2.2 of the TBT Agreement, the "unjustifiably" test under Article 20 of the TRIPS Agreement does not necessarily call for "comparative analysis" between the challenged measure and possible alternative measures. If the challenged measure, however, makes no, or very little, contribution to its objectives and encumbers the use of trademarks to a high degree, while other measures exist that encumber the use of trademarks to a much lower degree and make equivalent or even much greater contributions to the objectives, it would be difficult for the challenged measure to be justified.⁴⁹⁴⁴

7.2358. China suggests that the Panel, in determining whether an encumbrance imposed by the TPP measures is unjustifiable, may need to examine, in a holistic manner, various factors, including but not limited to: (i) the policy objective and its importance; (ii) the extent of the rational connection or, in other words, the contribution of the measure to the policy objective; and (iii) the extent of encumbrance imposed by the measure. Generally speaking, the more important the policy objective is, the more likely the encumbrance may be justified; the more contribution the measure makes to the policy objective, the more likely the encumbrance may be justified; and, the lower the extent of encumbrance is, the more likely the encumbrance may be justified.

7.2359. China submits that it is undisputed that the policy objective of the TPP measures, including trademark requirements therein, is to protect public health by controlling tobacco use, and that this policy objective is of great importance. It appears also to be undisputed that the trademark requirements encumber the use of tobacco trademarks in the course of trade to a high extent. Thus the Panel's examination would be expected to concentrate on the issue of the contribution of the trademark requirements to the objective of tobacco control.⁴⁹⁴⁵ As regards the public health context, China states that "the WTO Agreements recognize and accommodate societal values and interests, such as the protection of public health, public moral and environment". The preface of the WTO Agreement states that international trade relations shall be conducted "with a view to raising standards of living", which may be considered to include human health, and "with the objective of sustainable development". China also refers to the Marrakesh Declaration of 15 April 1994 as evidence of Members' desire to operate in a fairer and more open multilateral trading system "for the benefit and welfare of their peoples". Among the societal values and interests recognized and accommodated in the WTO Agreements, "protection of human life and health is 'both vital and important in the highest degree'".⁴⁹⁴⁶

7.2360. The European Union argues that Article 20 must be read in the light of the objectives and principles of the TRIPS Agreement in order to clarify its precise meaning. The provisions of the TRIPS Agreement provide a wide margin of discretion for setting up an IP regime that is capable of responding to public health concerns. Its Articles 7 and 8 are important for interpreting other provisions of the Agreement, including where measures are taken by Members to meet health objectives.⁴⁹⁴⁷ Bearing in mind the importance of the Doha Declaration, in particular of its paragraphs 4 and 5(a)⁴⁹⁴⁸, panels and the Appellate Body should give preference to interpretations on the meaning of particular provisions that are "supportive of WTO Members' right to protect public health in disputes".⁴⁹⁴⁹ It is also important that the FCTC and its implementing guidelines are accorded proper weight.⁴⁹⁵⁰

7.2361. The European Union notes that the parties' and certain other third parties' proposed tests under Article 20, which contain from two to five elements, are similar, with the key difference being a different degree of justification or, more precisely, deference.⁴⁹⁵¹ In its own view, the

⁴⁹⁴⁴ China's third-party response to Panel question No. 19, pp. 7-8. See also China's third-party submission, paras. 50, 52 and 54.

⁴⁹⁴⁵ China's third-party submission, para. 56, p. 7. See also China's third-party response to Panel question No. 17.

⁴⁹⁴⁶ China's third-party submission, paras. 5-6 (quoting Appellate Body Report, *EC – Asbestos*, para. 172).

⁴⁹⁴⁷ European Union's third-party submission, paras. 30-32.

⁴⁹⁴⁸ European Union's third-party submission, paras. 33-35. (footnote omitted)

⁴⁹⁴⁹ European Union's third-party submission, para. 35 (quoting para. 4 of the Doha Declaration).

⁴⁹⁵⁰ European Union's third-party submission, para. 36.

⁴⁹⁵¹ European Union's third-party response to Panel question No. 17, paras. 82-85. The European Union identifies five elements in the various proposed tests: (i) is the objective of the requirement legitimate? (ii) is there a rational connection between the requirement and the legitimate objective? (iii) does the requirement contribute to the objective? (iv) to what extent does the requirement encumber how a trademark can be used?

application of the test in Article 20 must necessarily involve an enquiry into whether a measure is apt to make a contribution to the fulfilment of a legitimate objective; but it must also involve a consideration of the objective of Article 20 and, consequently, of the interests or privileges that it reflects. Therefore, as contended by other third parties, it would be appropriate for the Panel to examine both the degree of contribution to the objective and the degree of the encumbrance. What the Panel should not do is to interfere with the regulating Members' decisions on the level of protection to be achieved. Therefore, it is irrelevant whether less restrictive measures may come close to the desired level of protection, but fall short of it: that can never be a basis for deeming a measure to be unjustifiable.⁴⁹⁵²

7.2362. The European Union considers that there are a number of factors that support the view that, in general terms, Article 20 provides a flexible tool of interpretation: (i) had the negotiators wanted in all instances a test of "necessity", they could have said so; (ii) the main focus in the TRIPS Agreement is on preventing third-party interference with right holders, as opposed to regulatory interference with right holders; (iii) Articles 7 and 8 are relevant context and clarify the object and purpose of the Agreement; (iv) the reasoning by the panel in *EC – Trademarks and Geographical Indications (Australia)*, with which the European Union agrees, support the view that Article 20 should be understood as capturing the full range of possible justifications;⁴⁹⁵³ (v) Article 20 does not refer to specific considerations that must be undertaken, unlike, for example, Articles 13, 17 and 30 of the TRIPS Agreement; and (vi) Article 20 was not intended to cut off the possibility for WTO Members to implement new regulatory approaches which, by definition, are yet to be tested in real conditions and which may deploy their full effects only over time.⁴⁹⁵⁴

7.2363. Noting that, as a matter of principle and in general terms, it is important to recognise in Article 20 a flexible interpretative tool, capable of capturing the full range of possible justifications, the European Union submits that, "in this particular case, given that the measure at issue is a technical regulation, we consider that the interpretation and application of Article 20 of the TRIPS Agreement should be contextually informed by Article 2.2 of the TBT Agreement". To the extent that Article 20 of the TRIPS Agreement is applicable, the encumbrance would not be justifiable if it is inconsistent with Article 2.2 of the TBT Agreement. This would avoid any conflict and questions as to how such a conflict might need to be resolved.⁴⁹⁵⁵

7.2364. Japan argues that the ordinary meaning of "unjustifiably" suggests two types of standards: "correctness" and "reasonableness". On one hand, some of the factors outlined in the tests proposed by the Dominican Republic and Honduras, such as the contribution to the end pursued, as well the relational nature of the analysis, bear resemblance to the "necessity" analysis under some of the subparagraphs of Article XX of the GATT 1994 and Article 2.2 of the TBT Agreement; such a test, however, does not appear to have any basis within the text of the TRIPS Agreement. On the other hand, Australia's proposed test may be overly permissive as it would allow Members to restrict trademarks without any effective disciplines.⁴⁹⁵⁶ In reviewing a claim under Article 20 a panel must determine whether the nature and extent of the encumbrance on the use of the trademark has a rational connection to the policy objective. In so doing, the following factors may be relevant: is the encumbrance rationally related to the stated purpose, or does it run contrary to that purpose; where the policy objective is legitimate, does the encumbrance result from a single and unbending solution applied across a wide range of situations where the problem is more or less present; and whether the encumbrance is reasonably calibrated

(v) are there possible alternatives which may be less restrictive while providing an equivalent contribution to the achievement of the objective? It notes that, while the parties seem to agree on the first two steps, they differ on the extent to which the WTO adjudicator should apply deference with respect to steps (iv) and (v).
Ibid. paras. 82-85 and 93.

⁴⁹⁵² European Union's third-party response to Panel question No. 17, paras. 89-90. See also paras. 91-92.

⁴⁹⁵³ European Union's third-party response to Panel question No. 17, paras. 97-101. The European Union cites paragraph 7.246 of the Panel report in *EC – Trademarks and Geographical Indications (Australia)*, quoted in footnote 4493 above.

⁴⁹⁵⁴ European Union's third-party response to Panel question No. 17, paras. 102-103 (referring to Appellate Body Report, *Brazil – Retreaded Tyres*, para. 151, to support the proposition that a measure's contribution may be demonstrated by quantitative projections or qualitative reasoning supported by evidence).

⁴⁹⁵⁵ European Union's third-party response to Panel question No. 17, para. 106.

⁴⁹⁵⁶ Japan's third-party submission, paras. 18-21.

to contribute to the policy objective?⁴⁹⁵⁷ Japan adds that whether there may have been a way to contribute to the stated policy objectives with a lesser degree of encumbrance on the use of a trademark is relevant to the assessment of whether the encumbrance is reasonably calibrated to the policy objective, and therefore justifiable.⁴⁹⁵⁸

7.2365. Korea takes the view that the trademark owner's "legitimate interest" to use a trademark, recognized by the panel in *EC – Trademarks and Geographical Indications* in the context of Article 17 of the TRIPS Agreement should be considered in interpreting Article 20.⁴⁹⁵⁹

7.2366. Malawi argues that "Article 8 of the TRIPS Agreement provides that Members can adopt measures 'necessary' to protect public health and only if such measures are consistent with the provisions of the TRIPS Agreement. ... [T]he plain packaging measure is neither 'necessary' because it does not contribute to its public health objective nor is it consistent with the TRIPS Agreement."⁴⁹⁶⁰

7.2367. New Zealand submits that the term "unjustifiable" is defined as "not justifiable, indefensible". The term "justifiable" is defined as "able to be legally or morally justified; able to be shown to be just, reasonable, or correct; defensible".⁴⁹⁶¹ The proper interpretation of the term "unjustifiably" in Article 20, drawing on Appellate Body's interpretation in respect of the same word in Article XX of the GATT 1994, requires there to be no rational connection between any encumbrance resulting from the special requirements imposed on the use of trademarks, on one hand, and the implementation of a legitimate public policy objective, on the other. Even though the term "unjustifiably" in Article XX of the GATT 1994 appears in conjunction with other terms, including trade-restrictiveness, which are not found in Article 20 of the TRIPS Agreement, the interpretation of that term by the Appellate Body is still useful guidance irrespective of those differences.⁴⁹⁶²

7.2368. None of the complainants' various proposed interpretations of the term "unjustifiably" are supported by the ordinary meaning of that term interpreted in its context, and in light of the object and purpose of the TRIPS Agreement. Given that the notions of "necessity" and "least trade-restrictive" were not included in Article 20, it is reasonable to draw the inference that the drafters of Article 20 did not intend to incorporate those notions. The use of different terms creates a presumption that the terms were intended to have a different meaning. Given the vast and incontrovertible difference between the term "unjustifiably" and the terminology that has been used to establish requirements of necessity and least trade-restrictiveness, it is implausible for the complainants to suggest that this was the intended meaning of the term "unjustifiably" in Article 20.⁴⁹⁶³

7.2369. The Doha Declaration refers to the principles set out in Article 8.1 of the TRIPS Agreement, and states that the TRIPS Agreement "does not and should not prevent Members from taking measures to protect public health" and "reaffirm[s] the right of WTO Members to use, to the full, the provisions in the TRIPS Agreement, which provide flexibility for this purpose".⁴⁹⁶⁴ Article 8.1 recognises that each Member retains the right to adopt measures in furtherance of public policy objectives, including measures to protect public health, provided that those measures are consistent with the Members' obligations under the TRIPS Agreement. Article 8.1 is, in essence, a policy statement rather than a general exception to the TRIPS Agreement.⁴⁹⁶⁵

⁴⁹⁵⁷ Japan's third-party submission, para. 27.

⁴⁹⁵⁸ Japan's third-party response to Panel question No. 19, p. 10.

⁴⁹⁵⁹ Korea's third-party statement at the first meeting of the Panel, para. 7.

⁴⁹⁶⁰ Malawi's third-party statement, para. 17. See also Malawi's third-party submission, para. 21.

⁴⁹⁶¹ New Zealand's third-party submission, para. 60 (referring to Shorter Oxford English Dictionary, Vol. 2 AUS excerpts, (Exhibit AUS-245), p. 3445; and Shorter Oxford English Dictionary, Vol. 1 AUS excerpts, Part 1, (Exhibit AUS-243), p. 1482).

⁴⁹⁶² New Zealand's third-party response to Panel question No. 20, p. 10. See also New Zealand's third-party submission, paras. 61-64.

⁴⁹⁶³ New Zealand's third-party submission, paras. 72-76.

⁴⁹⁶⁴ New Zealand's third-party submission, para. 69.

⁴⁹⁶⁵ New Zealand's third-party responses to Panel question Nos. 21 and 23.

7.2370. Nicaragua submits that the term "unjustifiably" can have a wide variety of meanings depending on the particular context in which it is used. The meaning of that term in Article XX of the GATT 1994 cannot be directly transposed to the term as used in the TRIPS Agreement.⁴⁹⁶⁶ The term "unjustifiably" must not be interpreted so as to allow any encumbrance that is related to a legitimate policy objective. Proportionality and suitability are the two key conditions for any encumbrance on the use of a trademark.⁴⁹⁶⁷ Proportionality requires the weighing and balancing between the encumbrance on the use of trademarks and the contribution to the legitimate policy objective. Suitability requires an examination of the way in which the encumbrance operates and whether it is appropriate and fit to achieve the objective.⁴⁹⁶⁸ Part of this analysis is whether there are available alternatives that make an equivalent contribution to the objective with a lesser degree of encumbrance on the use of trademarks.⁴⁹⁶⁹

7.2371. Nicaragua asserts that the complainants have made a *prima facie* case that the TPP measures are not suited to reduce smoking. For that reason as well, the TPP measures are an "unsuitable" and thus "unjustifiable" encumbrance on the use of a trademark.⁴⁹⁷⁰ Furthermore, the TPP measures are "unjustifiable" because they are likely to increase tobacco consumption, increase illicit trade, and have adverse health consequences, thus going against the alleged health objective.⁴⁹⁷¹

7.2372. Nicaragua argues that, while Article 8.1 confirms that "public health" is among the legitimate policy objectives, it does not mean that any measure taken in furtherance of public health is "justifiable" under Article 20. Article 8.1 itself provides that such measures need to be at least "necessary" to "protect" public health. In addition, Article 8.1 makes clear that, even when the measure is necessary to protect health, it must still be consistent with the TRIPS Agreement. This means that the term "unjustifiably" in Article 20 adds an obligation and certainly does not impose a lower standard than the necessity standard.⁴⁹⁷²

7.2373. Norway submits that the word "justified" means, *inter alia*, "reasonable" and having "adequate grounds".⁴⁹⁷³ The ordinary meaning of the word "unjustifiable", as it has been interpreted by the Appellate Body in the context of Article XX of the GATT 1994, supports the understanding that "unjustifiably" in Article 20 refers to an inquiry of whether there is a "rational connection" between the "special requirements" and the policy directive behind those requirements.⁴⁹⁷⁴

7.2374. As regards the key considerations that should guide a panel in its assessment of the term "unjustifiably", Norway argues, first, that the concept of "(un)justifiability" is different from that of "necessity". Both terms are found in the TRIPS Agreement, and the drafters' choice to use the word "unjustifiably" in Article 20, instead of "necessary", must be given meaning. Thus, the concept of "necessity", including the ancillary comparative analysis between the measure at issue and any alternative less restrictive measure, should not be part of the proper test to be applied in the assessment of "(un)justifiability" under Article 20. Secondly, the test involves the determination of the policy objective behind the special requirements, and the importance – or legitimacy – of such objective. This consideration will ensure that the underlying rationale behind the requirements is sufficiently important to justify the encumbrance. Thirdly, the assessment must include an analysis of whether there is a "rational connection" between the "special requirements" and the policy objective behind those requirements.⁴⁹⁷⁵

7.2375. Norway does not regard the degree of contribution of the measure to the policy objective and the extent of the encumbrance as key considerations for the assessment of "(un)justifiability".

⁴⁹⁶⁶ Nicaragua's third-party response to Panel question No. 20, pp. 13-14.

⁴⁹⁶⁷ Nicaragua's third-party submission, paras. 28-29.

⁴⁹⁶⁸ Nicaragua's third-party response to Panel question No. 17, p. 12.

⁴⁹⁶⁹ Nicaragua's third-party response to Panel question No. 19, p. 13.

⁴⁹⁷⁰ Nicaragua's third-party submission, para. 29.

⁴⁹⁷¹ Nicaragua's third-party submission, paras. 31-32.

⁴⁹⁷² Nicaragua's third-party response to Panel question No. 21, p.14.

⁴⁹⁷³ Norway's third-party submission, para. 56 (referring to *Collins English Dictionary*, 9th edn, (HarperCollins Publishers, 2007)).

⁴⁹⁷⁴ Norway's third-party submission, paras. 58-59 (referring to Appellate Body Report, *Brazil – Retreaded Tyres*, para. 225; and *EC – Seal Products*, para. 5.306).

⁴⁹⁷⁵ Norway's third-party response to Panel question No. 17, paras. 36-38.

Should the Panel consider the degree of contribution, it should have due regard to the broader context of comprehensive strategies implemented to fight complex health problems, such as promoting public health by reducing smoking prevalence.⁴⁹⁷⁶ Norway submits that the "inherent freedom to pursue public policy objectives" is recognized in Article 8.1, which must be understood as a fundamental principle to be taken into account when interpreting the TRIPS Agreement. This is acknowledged in the Doha Declaration, where WTO Members not only underscored that the TRIPS Agreement "does not or should not prevent Members from taking measures to protect public health", but also stated that "each provision of the TRIPS Agreement shall be read in the light of the object and purpose of the Agreement, as expressed, in particular, in its objectives and principles".⁴⁹⁷⁷

7.2376. Oman endorses the legal arguments and factual evidence set out in Australia's submissions to the Panel. In addition, it emphasizes that nothing in the TRIPS Agreement confers on trademark owners a positive right to use their trademarks. Moreover, Article 8.1 of the TRIPS Agreement contemplates Members' right to formulate and amend their regulations for the protection of public health as long as they are consistent with the TRIPS Agreement. Furthermore, the Doha Declaration explicitly recognises "WTO Members' right to protect public health" and confirms WTO Members' agreement that TRIPS "can and should be interpreted and implemented in a manner supportive of" that right.⁴⁹⁷⁸

7.2377. Singapore submits that it would be appropriate to adopt an interpretation of the term "unjustifiably" in Article 20 that is similar to the interpretation of the term "unjustifiable" in the *chapeau* of Article XX of the GATT 1994. The necessity standard should not be used to determine the justifiability of the measure under Article 20.⁴⁹⁷⁹ A measure is not unjustifiable if it bears a rational connection to a legitimate objective. The following factors have to be considered in order to determine the issue: (i) the importance of the interest sought to be protected; (ii) the extent of the encumbrance; and (iii) the degree of contribution of the measure to the policy objective. If the objective of a measure is legitimate, then the assessment of whether the measure bears a rational connection to the objective would involve weighing and balancing the three above-mentioned factors.⁴⁹⁸⁰ The existence of an alternative measure that results in a lesser degree of encumbrance on the use of trademarks is not a relevant consideration for the reason that the test of unjustifiability is not the same as the necessity test in the sense of Article XX of the GATT 1994 or Article 2.2 of the TBT Agreement.⁴⁹⁸¹

7.2378. Singapore argues that the trademark rights conferred by the TRIPS Agreement are negative rights of exclusion and not positive rights of use. As acknowledged by Article 19, the TRIPS Agreement does not prevent Members from imposing government regulations that may prevent the owner of a trademark from using a trademark that is duly registered. In light of these two points, the standard for assessing the justifiability or lack thereof of a measure under Article 20 should be less onerous than that which governs exceptions to the rights conferred by the TRIPS Agreement.⁴⁹⁸² Article 8.1, which recognizes and affirms the sovereign right of Members to adopt public health measures, should be read in conjunction with paragraph 4 of the Doha Declaration, which states that the Agreement can and should be interpreted and implemented in a manner supportive of WTO Members' right to protect public health. The Doha Declaration constitutes a subsequent agreement within the meaning of Article 31(3)(a) of the Vienna Convention. Thus, the term "unjustifiably" in Article 20 should be interpreted in a manner which supports WTO Members' right to protect public health.⁴⁹⁸³

7.2379. South Africa argues that the term "unjustifiably" refers to measures that do not have a reasoned basis, i.e. that do not have a rational connection to a particular legitimate objective. This should be determined on a case-by-case basis. The "justifiability" of a measure entails defending

⁴⁹⁷⁶ Norway's third-party responses to Panel question Nos. 17 (para. 39) and 22 (para. 49) (referring to Appellate Body Report, *Brazil – Retreaded Tyres*, para. 151).

⁴⁹⁷⁷ Norway's third-party submission, para. 64.

⁴⁹⁷⁸ Oman's third-party statement, paras. 4 and 15-16.

⁴⁹⁷⁹ Singapore's third-party response to Panel question No. 20, p. 12; and Singapore's third-party submission, paras. 52-53 (referring to Appellate Body Report, *Brazil – Retreaded Tyres*, paras. 226-227).

⁴⁹⁸⁰ Singapore's third-party response to Panel question No. 17, p. 10.

⁴⁹⁸¹ Singapore's third-party response to Panel question No. 19, p.11.

⁴⁹⁸² Singapore's third-party submission, paras. 47-49.

⁴⁹⁸³ Singapore's third-party response to Panel question No. 21, p. 13.

or convincingly explaining the rationale for such a measure – not whether the measure in itself will be effective.⁴⁹⁸⁴ It follows from the proper interpretation of the term "unjustifiably" that no "necessity" or "least trade-restrictive" standard is present in Article 20. The term "unjustifiably" does not have the same meaning as "necessary" and should not be interpreted to impose a standard similar to the analysis required under Article 2.2 of the TBT Agreement, including its notions of "least restrictiveness" and "reasonably available alternatives".⁴⁹⁸⁵

7.2380. It adds that Article 8.1 of the TRIPS Agreement does not confer any rights in respect of trademarks and merely restates general principles to be applied to the Agreement, which does not prevent Members from introducing measures designed to protect public health. The use of the term "necessary" contained in Article 8.1 should be understood as a relevant consideration in informing the rational of the relevant measures, but does not magically change the use of the term "unjustifiably" in Article 20.⁴⁹⁸⁶

7.2381. Chinese Taipei submits that, in assessing "(un)justifiability" of an encumbrance on use under Article 20, the key factors should include but not be limited to the following: (i) legitimacy of the objectives; (ii) importance of the objectives (e.g. whether they are of public interest); (iii) whether there is a rational connection between the measures and the objectives; (iv) the extent to which the measures contribute to the objectives; and (v) the extent to which the use of a trademark is encumbered by the measures. As regards the fourth factor, proper weight should be accorded to evidence-based international guidelines such as the FCTC and its implementing guidelines, in particular those for the implementation of its Articles 11 and 13, which recommend that parties consider plain packaging. In the present disputes, those consensus recommendations made by the specialized international organization "demonstrate a *prima facie* case of the substantial contribution of the guidelines to the objectives of the [FCTC]".⁴⁹⁸⁷

7.2382. In the Chinese Taipei's view, since Article 20 of the TRIPS Agreement and the *chapeau* of Article XX of the GATT 1994 are structurally different, there is little value in referencing the interpretation of the term "unjustifiable" in the *chapeau* of Article XX of the GATT 1994 for the purpose of explaining the term "unjustifiably" in Article 20 of the TRIPS Agreement.

7.2383. It adds that Article 8.1 of the TRIPS Agreement shows that the Agreement recognizes the importance of public health and supports measures adopted by WTO Members for the purpose of safeguarding public interest. It serves as a guiding principle for the interpretation of Article 20 and other TRIPS provisions. Article 20 determines whether a specific measure would unjustifiably encumber the use of a trademark; the term "necessary" in Article 8.1 does not refer to a factor for assessing whether such an encumbrance should be considered justifiable under Article 20.⁴⁹⁸⁸

7.2384. Thailand submits that it is a well-established rule that a treaty should be interpreted in light of its object and purpose. Article 7 of the TRIPS Agreement refers to "social and economic welfare" and "a balance of rights and obligations" as objectives of the Agreement. The Agreement must be interpreted so as to enable WTO Members to implement the TRIPS obligations in a manner that maintains the overall balance between the protection of private rights and the sovereign rights to pursue socio-economic interests for the public in general.⁴⁹⁸⁹

7.2385. It argues that Article 8.1 of the TRIPS Agreement is an interpretative guidance which affirms that WTO Members may exercise their rights to adopt measures necessary to address public health concerns. Such measures are presumed to be TRIPS-consistent unless the complainants discharge a burden of proving otherwise. The Panel needs to be cautious not to assert higher standards of protection than the minimum standards explicitly required by the TRIPS Agreement. Any interpretation made out of any unclear TRIPS provision should be

⁴⁹⁸⁴ South Africa's third-party responses to Panel question Nos. 17 (p. 8) and 19 (p. 9).

⁴⁹⁸⁵ South Africa's third-party statement, para. 3.8.

⁴⁹⁸⁶ South Africa's third-party response to Panel question No. 23, p. 10.

⁴⁹⁸⁷ Chinese Taipei's third-party response to Panel question No. 17, pp. 2-3.

⁴⁹⁸⁸ Chinese Taipei's third-party responses to Panel question Nos. 20-21, pp. 4-5.

⁴⁹⁸⁹ Thailand's third-party statement, para. 4; and Thailand's third-party submission, para. 9.

supportive of public health so as to avoid possible conflicts between IP rights and public interests to the greatest extent possible.⁴⁹⁹⁰

7.2386. Thailand considers that the Doha Declaration arguably constitutes a "Ministerial Decision" within the meaning of Article IX:1 of the WTO Agreement, providing interpretative guidance on the TRIPS Agreement in the area of public health. As a result, the Doha Declaration is indispensable for interpreting TRIPS provisions in this dispute. In addition, Thailand believes that the Doha Declaration also reflects a "subsequent agreement" within the meaning of Article 31.3(a) of the Vienna Convention that states a common understanding regarding the right of WTO Members to address public health concerns, while reaffirming that the TRIPS Agreement is meant to be interpreted in a manner supportive of such right. Pursuant to Article 31.3(a) of the Convention, therefore, the Panel has to take the Doha Declaration into account for the purposes of treaty interpretation.⁴⁹⁹¹

7.2387. As regards the implications of the Doha Declaration, Thailand considers that, pursuant to the first part of its paragraph 4, in cases of ambiguity or where more than one interpretation is possible, the Panel should attach greater importance to the interpretation that causes the least interferences with the exercise of WTO Members' right to protect public health. The second part of paragraph 4 reaffirms the right of WTO Members to use flexibilities contained in the TRIPS Agreement for the purposes of public health protection. Furthermore, paragraph 5(a) suggests that the interpretation of the Agreement in the light of the object and purpose set out in Articles 7 and 8 is one of the flexibilities that may be used by WTO Members "to the full". As a result, in discharging the duty of legal interpretation, the Panel should read the TRIPS Agreement in a manner that gives sufficient flexibility to accommodate the public health needs of WTO Members, in accordance with the objectives and principles of the TRIPS Agreement.⁴⁹⁹²

7.2388. Turkey argues that it is self-evident from the wording of the first sentence of Article 20 that there are instances where the use of a trademark in the course of trade can be restricted "justifiably". For Turkey, a justifiable restriction can only arise as a result of a regulation to fulfil a legitimate policy objective. Article 8.1 informs the interpreter that policy objectives mentioned therein, such as protection of public health, are legitimate policy objectives to be taken into account when evaluating whether a measure is "justifiable" or "unjustifiable" within the meaning of Article 20. Moreover, Turkey thinks that if a measure is confirmed to be "necessary" to protect public health under Article 8.1, this may be an indication that the said measure can be regarded as not "unjustifiably encumbering" the use of a trademark under Article 20.⁴⁹⁹³

7.2389. Uruguay submits that the term "unjustifiably" must be interpreted in accordance with its ordinary and literal meaning. In this regard, it agrees with Australia's arguments.⁴⁹⁹⁴ Article 19.1 of the TRIPS Agreement reaffirms the principle that the use of a trademark may be regulated by the State.⁴⁹⁹⁵ It follows from its Article 7 that the protection and enforcement of IP must promote social and economic welfare, and not the contrary. Tobacco control policies promote social and economic welfare in the face of a public health problem, which consumes substantial resources in the form of health treatments and premature deaths and is highly cost-intensive for the society as a whole. For that reason, they also represent sound economic policy.⁴⁹⁹⁶

7.2390. In Uruguay's view, it is essential to bear in mind the scope of the rights granted to the owner by virtue of IP provisions. IP protections include the right to exclude others from the performance of specific commercial acts regarding subject-matter protected as a trademark, but do not confer the right to perform any commercial act relating to protected subject-matter. The principle set forth in Article 8 of the TRIPS Agreement is not in the nature of an exception, but one that enables Members to adopt measures necessary to protect public health, provided that such

⁴⁹⁹⁰ Thailand's third-party submission, para. 14.

⁴⁹⁹¹ Thailand's third-party submission, paras. 17-19 (referring to Appellate Body Report, *US – Clove Cigarettes*, para. 267).

⁴⁹⁹² Thailand's third-party submission, paras. 20-22.

⁴⁹⁹³ Turkey's third-party submission, para. 17; and Turkey's third-party responses to Panel question Nos. 21 and 23, pp. 1-2.

⁴⁹⁹⁴ Uruguay's third-party submission, para. 53 (referring to Australia's first written submission, paras. 395 and 408).

⁴⁹⁹⁵ Uruguay's third-party submission, para. 51.

⁴⁹⁹⁶ Uruguay's third-party submission, para. 57.

measures are consistent with the TRIPS Agreement. Although the TPP Act has an economic and commercial impact, its main objective is to protect public health.⁴⁹⁹⁷

7.2391. The Doha Declaration, including its paragraph 4, reaffirms and ratifies the principle that Members have the right to protect public health; it also reaffirms that this principle is incorporated in the multilateral system and in the TRIPS Agreement. It is therefore a reaffirmation of the legitimacy of the objective pursued by the measure.⁴⁹⁹⁸ Moreover, Uruguay considers that the protection of public health falls within the sovereign competence of States and that each Member has the right and obligation to legislate on the basis of the public interest in pursuit of a legitimate public health goal. At the same time, in the area of humanitarian law, States commit themselves to serve as the primary guarantors of the right to life and health, understood as being necessary for the development of a fair and just society. Within the WTO system, this right is recognized under the TRIPS Agreement, the TBT Agreement and the GATT 1994. It is also recognized in other international law bodies, such as the FCTC, and in the domestic legislation of many member States.⁴⁹⁹⁹

7.2392. Zimbabwe considers that the right to use a trademark is protected under international law, in particular in Articles 16 and 20 of the TRIPS Agreement, as explained in the expert report by Professor Dinwoodie. Australia is entitled, like all Members, to enact limited exceptions to the rights conferred by a trademark under Article 17 of the TRIPS Agreement, provided that such limited exceptions take account of the legitimate interests of the owner of the trademark and of third parties. These legitimate interests include the right to use the mark and to preserve the mark's distinctiveness. Prohibiting the use of trademarks or highly regulating the use of word marks cannot be considered a "limited" exception. Moreover, Article 8 of the TRIPS Agreement provides that Members may adopt measures necessary to protect public health provided that such measures are consistent with the TRIPS Agreement. The Australian measures are neither "necessary" as they do not contribute to reducing smoking rates nor consistent with the TRIPS Agreement because they violate, *inter alia*, Article 20. Thus, the illegality of the Australian measures cannot be exonerated by reference to Articles 8 or 17 of the TRIPS Agreement.⁵⁰⁰⁰

7.3.5.5.1.3 Analysis by the Panel

7.2393. In accordance with the applicable rules of interpretation, we must determine the ordinary meaning to be given to the term "unjustifiably" in Article 20, in its context and in the light of the object and purpose of the provision and the Agreement.⁵⁰⁰¹

7.2394. The term "unjustifiably" is an adverbial form of the term "unjustifiable" and refers to something that is done in an unjustifiable manner. This is also reflected in the French text of Article 20, which uses the term "de manière injustifiable".⁵⁰⁰² The term ""unjustifiable" means "[n]ot justifiable, indefensible".⁵⁰⁰³ The term "justifiable" in turn means "[a]ble to be legally or morally justified; able to be shown to be just, reasonable, or correct; defensible"⁵⁰⁰⁴ and the adverb "justifiably" means "[i]n a justifiable manner; with justification".⁵⁰⁰⁵ The term "justification", in turn, means "a good reason" or, specifically in the legal context, "[t]he showing or maintaining in court of sufficient reason for having committed the act to be answered for".⁵⁰⁰⁶

7.2395. The term "unjustifiably" therefore refers to the ability to provide a "justification" or "good reason" for the relevant action or situation that is reasonable in the sense that it provides

⁴⁹⁹⁷ Uruguay's third-party submission, paras. 45 and 49.

⁴⁹⁹⁸ Uruguay's third-party submission, para. 47.

⁴⁹⁹⁹ Uruguay's third-party submission, para. 106.

⁵⁰⁰⁰ Zimbabwe's third-party submission, paras. 34 and 41-42 (referring to G. Dinwoodie, "Compatibility of Restrictions on the Use of Trade Marks with the TRIPS Agreement", 13 July 2014, (Dinwoodie Report), (Exhibit UKR-1)).

⁵⁰⁰¹ See para. 7.1822 above.

⁵⁰⁰² The Spanish text is "injustificablemente".

⁵⁰⁰³ Shorter Oxford English Dictionary, Vol. 2 AUS excerpts, (Exhibit AUS-245), p. 3445.

⁵⁰⁰⁴ Shorter Oxford English Dictionary, Vol. 1 AUS excerpts, Part 1, (Exhibit AUS-243), p. 1482.

⁵⁰⁰⁵ Oxford English Dictionary online, definition of "justifiably", available at:

<<http://www.oed.com/view/Entry/102221?redirectedFrom=justifiably#eid>>, accessed 2 May 2017.

⁵⁰⁰⁶ Oxford English Dictionary online, definition of "justification", available at:

<<http://www.oed.com/view/Entry/102224?redirectedFrom=justification&>>, accessed 2 May 2017.

sufficient support for that action or situation. In Article 20, the term "unjustifiably" qualifies the verb "encumbered". The above definitions therefore suggest that the term "unjustifiably", as used in Article 20, connotes a situation where the use of a trademark is encumbered by special requirements in a manner that lacks a justification or reason that is sufficient to support the resulting encumbrance.

7.2396. This in turn implies that there may be circumstances in which good reasons exist that sufficiently support the application of encumbrances on the use of a trademark in a reasonable manner. We will now consider the types of reasons that may provide the basis for such encumbrances.

7.2397. Article 20 does not expressly identify the types of reasons that may form the basis for the "justifiability" of an encumbrance. We find useful general guidance in this respect in the context provided by other provisions of the TRIPS Agreement.

7.2398. We first note that the first recital of the preamble to the TRIPS Agreement expresses a key objective of the TRIPS Agreement, namely to "reduce distortions and impediments to international trade" and takes into account the need, on one hand, "to promote effective and adequate protection of intellectual property rights" and, on the other, "to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade".

7.2399. We also consider that Article 7 entitled "Objectives" and Article 8 entitled "Principles" provide relevant context.

7.2400. Article 7, entitled "Objectives", provides that:

The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.

7.2401. Article 8, entitled "Principles", provides in its first paragraph that:

Members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement.

7.2402. Articles 7 and 8, together with the preamble of the TRIPS Agreement, set out general goals and principles underlying the TRIPS Agreement, which are to be borne in mind when specific provisions of the Agreement are being interpreted in their context and in light of the object and purpose of the Agreement. As the panel in *Canada – Pharmaceutical Patents* observed in interpreting the terms of Article 30 of the TRIPS Agreement, "[b]oth the goals and the limitations stated in Articles 7 and 8.1 must obviously be borne in mind when doing so as well as those of other provisions of the TRIPS Agreement which indicate its object and purposes".⁵⁰⁰⁷

7.2403. Article 7 reflects the intention of establishing and maintaining a balance between the societal objectives mentioned therein. Article 8.1, for its part, makes clear that the provisions of the TRIPS Agreement are not intended to prevent the adoption, by Members, of laws and regulations pursuing certain legitimate objectives, specifically, measures "necessary to protect public health and nutrition" and "promote the public interest in sectors of vital importance to their socio-economic and technological development", provided that such measures are consistent with the provisions of the Agreement.

7.2404. Article 8 offers, in our view, useful contextual guidance for the interpretation of the term "unjustifiably" in Article 20. Specifically, the principles reflected in Article 8.1 express the intention

⁵⁰⁰⁷ Panel Report, *Canada – Pharmaceutical Patents*, para. 7.26.

of drafters of the TRIPS Agreement to preserve the ability for WTO Members to pursue certain legitimate societal interests, at the same time as it confirms their recognition that certain measures adopted by WTO Members for such purposes may have an impact on IP rights, and requires that such measures be "consistent with the provisions of the [TRIPS] Agreement".

7.2405. Read against this broader context, we understand the requirement under Article 20 that the use of trademarks in the course of trade not be "unjustifiably" encumbered as reflecting a recognition that there may be legitimate reasons for which a Member may encumber such use. The term "unjustifiably" defines, in the specific context of encumbrances in respect of the use of trademarks, the applicable standard for the permissibility of such encumbrances.

7.2406. The specific objectives expressly identified in Article 8.1 do not, in our view, necessarily exhaust the scope of what may constitute a valid basis for the "justifiability" of encumbrances on the use of trademarks under Article 20. However, their identification in Article 8.1 may shed light on the types of recognized "societal interests" that may provide a basis for the justification of measures under the specific terms of Article 20, and unquestionably identify public health as such a recognized societal interest.⁵⁰⁰⁸

7.2407. We note in this respect that the Doha Declaration, adopted by Ministers on 14 November 2001, provides that, "[i]n applying the customary rules of interpretation of public international law, each provision of the TRIPS Agreement shall be read in the light of the object and purpose of the Agreement as expressed, in particular, in its objectives and principles".⁵⁰⁰⁹

7.2408. While this statement was made in the specific context of a re-affirmation by Members of the flexibilities provided in the TRIPS Agreement in relation to measures taken for the protection of public health, we note that paragraph 5 of the Doha Declaration is formulated in general terms, inviting the interpreter of the TRIPS Agreement to read "each provision of the TRIPS Agreement" in the light of the object and purpose of the Agreement, as expressed in particular in its objectives and principles. As described above, Articles 7 and 8 have central relevance in establishing the objectives and principles that, according to the Doha Declaration, express the object and purpose of the TRIPS Agreement relevant to its interpretation.

7.2409. This paragraph of the Doha Declaration may, in our view, be considered to constitute a "subsequent agreement" of WTO Members within the meaning of Article 31(3)(a) of the Vienna Convention. As the Appellate Body has clarified:

Based on the text of Article 31(3)(a) of the *Vienna Convention*, we consider that a decision adopted by Members may qualify as a "subsequent agreement between the parties" regarding the interpretation of a covered agreement or the application of its provisions if: (i) the decision is, in a temporal sense, adopted subsequent to the relevant covered agreement; and (ii) the terms and content of the decision express an *agreement* between Members on the *interpretation or application* of a provision of WTO law.⁵⁰¹⁰

⁵⁰⁰⁸ Cf. Appellate Body Reports, *US – COOL*, para. 370; and *US – Tuna II (Mexico)*, para. 313 (discussing legitimate objectives in the context of Article 2.2 of the TBT Agreement).

⁵⁰⁰⁹ Doha Declaration, para. 5.

⁵⁰¹⁰ Appellate Body Report, *US – Clove Cigarettes*, para. 262 (emphasis original). See also Panel Reports, *US – Corrosion Resistant Steel Sunset Review*, para. 7.27 fn 39 (noting that "Ministers recognized the need for the consistent resolution of disputes arising from anti-dumping and countervailing duty measures" in the Declaration on Dispute Settlement Pursuant to the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 or Part V of the Agreement on Subsidies and Countervailing Measures (Declaration on Dispute Settlement Pursuant to Article VI of the GATT 1994 or Part V of the SCM Agreement), and applying similar interpretative analysis to address analogous issues under the Anti-dumping Agreement); *US – Softwood Lumber VI*, para. 7.18 (referring to the Declaration on Dispute Settlement Pursuant to Article VI of the GATT 1994 or Part V of the SCM Agreement); *US – Countervailing Duty Investigation on DRAMS*, para. 7.351 (referring to the Declaration on Dispute Settlement Pursuant to Article VI of the GATT 1994 or Part V of the SCM Agreement); *US – Countervailing Measures on Certain EC Products (Article 21.5 – EC)*, para. 7.81 (referring to the Declaration on Dispute Settlement Pursuant to Article VI of the GATT 1994 or Part V of the SCM Agreement); *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*, para. 7.58 fn 45 (referring to the Declaration on Dispute Settlement Pursuant to Article VI of the

7.2410. In this instance, the instrument at issue is a "declaration", rather than a "decision". However, the Doha Declaration was adopted by a consensus decision of WTO Members, at the highest level, on 14 November 2001 on the occasion of the Fourth Ministerial Conference of the WTO, subsequent to the adoption of the WTO Agreement, Annex 1C of which comprises the TRIPS Agreement. The terms and contents of the decision adopting the Doha Declaration express, in our view, an agreement between Members on the approach to be followed in interpreting the provisions of the TRIPS Agreement. This agreement, rather than reflecting a particular interpretation of a specific provision of the TRIPS Agreement, confirms the manner in which "each provision" of the Agreement must be interpreted, and thus "bears specifically"⁵⁰¹¹ on the interpretation of each provision of the TRIPS Agreement.

7.2411. The guidance provided by the Doha Declaration is consistent, as the Declaration itself suggests, with the applicable rules of interpretation, which require a treaty interpreter to take account of the context and object and purpose of the treaty being interpreted, and confirms in our view that Articles 7 and 8 of the TRIPS Agreement provide important context for the interpretation of Article 20.

7.2412. The parties have discussed extensively the implications of the use of the term "unjustifiably" in Article 20 on the nature and extent of the relationship that must exist between, on one hand, encumbrances on the use of trademarks resulting from the special requirements at issue and, on the other, the reasons for which these special requirements were adopted, or, in other words, how it should be determined whether these reasons are sufficient to support, and provide a justification for, the encumbrance resulting from the special requirements.⁵⁰¹²

7.2413. In addition to seeking to establish the ordinary meaning of the term "unjustifiably" in Article 20, the parties have sought guidance in this respect from the interpretation of the term "unjustifiable" in other provisions of the covered agreements, or by contrasting the term "unjustifiably" to the terms "unnecessarily" or "necessary" and related terms in other provisions of the covered agreements.

7.2414. In this respect, Australia responds to the complainants' views on the meaning of and relationship between these terms that, as the use of the same or similar terms in different provisions of the covered agreements creates a presumption that the terms should be interpreted to have the same or similar meaning⁵⁰¹³, the use of different terms creates a presumption that the terms were intended to have a different meaning. It contrasts the ordinary meaning of "unjustifiably" with the meaning of "necessary".⁵⁰¹⁴ The Dominican Republic responds, in turn, that the treaty interpreter cannot begin with an assumption that the word "unjustifiably" must be interpreted in *opposition* to the word "unnecessary"; rather, the interpretive exercise must begin with discerning the meaning of the word actually used, i.e. "unjustifiably".⁵⁰¹⁵

7.2415. We consider that we must discern the proper meaning of the term "unjustifiably" as it is used in Article 20, rather than determine its meaning primarily in opposition to any other term. At the same time, we also consider that the use of identical or different terms in different provisions of the covered agreements may provide relevant context and shed light on the meaning to be

GATT 1994 or Part V of the SCM Agreement); and *Japan – DRAMs (Korea)*, para. 7.354 (referring to the Declaration on Dispute Settlement Pursuant to Article VI of the GATT 1994 or Part V of the SCM Agreement).

⁵⁰¹¹ This term was used by the Appellate Body in *US – Tuna II (Mexico)*, para. 372 (referring to Appellate Body Report, *US – Clove Cigarettes*, para. 265, in turn quoting Appellate Body Reports, *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)*, para. 390).

⁵⁰¹² See section 7.3.5.5.1.1 above.

⁵⁰¹³ Cuba argues that the term "unjustifiably" may have many different meanings depending on the context in which it is used and that the ordinary meaning is only the beginning of a holistic exercise of interpretation. See Cuba's second written submission, para. 95. In this regard, we note that no party has asserted that, in the present case, a special meaning should be given to that term. See Article 33.4 of the Vienna Convention. Therefore, as we interpret that term in its context and in the light of the object and purpose of the TRIPS Agreement, we are to remain within a range of interpretations that fit the ordinary meaning. See Article 31.1 of the Vienna Convention.

⁵⁰¹⁴ Australia's first written submission, paras. 384-400. In Australia's view, the terms connote different degrees of connection between special requirements and legitimate objectives. *Ibid.* Furthermore, the ordinary meaning of "unjustifiably" implies that there will ordinarily be more than one possible outcome that is "able to be shown to be just, reasonable, or correct", or that is "within the limits of reason".

⁵⁰¹⁵ Dominican Republic's second written submission, para. 186.

given to each of them in their respective contexts. Thus, the use of different terms within a covered agreement has been interpreted as implying a deliberate choice designed to convey different meanings:

The implication arises that the choice and use of different words in different places in the *SPS Agreement* are deliberate, and that the different words are designed to convey different meanings. A treaty interpreter is not entitled to assume that such usage was merely inadvertent on the part of the Members who negotiated and wrote that Agreement.⁵⁰¹⁶

7.2416. Conversely, the use of the same term in different contexts does not necessarily imply a complete identity of meanings. The Appellate Body has thus found that the word "necessary" "refers to a range of degrees of necessity, depending on the context in which it is used".⁵⁰¹⁷

7.2417. The Appellate Body has also underlined the importance of giving meaning to the use of different terms, in various paragraphs of Article XX of the GATT 1994, to express "the degree of connection or relationship between the measure under appraisal and the state interest or policy sought to be promoted or realized":

Applying the basic principle of interpretation that the words of a treaty, like the *General Agreement*, are to be given their ordinary meaning, in their context and in the light of the treaty's object and purpose, the Appellate Body observes that the Panel Report failed to take adequate account of the words actually used by Article XX in its several paragraphs. In enumerating the various categories of governmental acts, laws or regulations which WTO Members may carry out or promulgate in pursuit of differing legitimate state policies or interests outside the realm of trade liberalization, Article XX uses different terms in respect of different categories:

"necessary" - in paragraphs (a), (b) and (d); "essential" - in paragraph (j);

"relating to" - in paragraphs (c), (e) and (g); "for the protection of" - in paragraph (f);

"in pursuance of" - in paragraph (h); and "involving" - in paragraph (i).

It does not seem reasonable to suppose that the WTO Members intended to require, in respect of each and every category, the same kind or degree of connection or relationship between the measure under appraisal and the state interest or policy sought to be promoted or realized.⁵⁰¹⁸

7.2418. In Article 20 of the TRIPS Agreement, the "kind or degree of connection or relationship between the measure under appraisal and the state interest or policy sought to be promoted or realized", as the Appellate Body puts it, is expressed through the use of the term "unjustifiably". That is, WTO Members have determined, in respect specifically of special requirements that encumber the use of trademarks, that such special requirements must not "unjustifiably" encumber such use.

7.2419. We note that the term "necessary", by contrast, is used in a number of other provisions of the TRIPS Agreement, namely in Articles 3.2, 8.1, 27.2, 39.3, 43.2, 50.5 and 73(b), as well as

⁵⁰¹⁶ Appellate Body Report, *EC – Hormones*, para. 164. However, we note also that this does not exclude the possibility that the use of the same term in a different context, even within the same provision of a covered agreement, may have a different meaning within each context. See, e.g. Appellate Body Reports, *Japan – Alcoholic Beverages II*, p. 21, DSR 1996:I, 97, p. 114; and *EC – Asbestos*, paras. 88-89 (interpreting the term "like" in the context of paragraphs 2 and 4 of Article III of the GATT 1994, and comparing the term to an "accordion" whose meaning stretches and squeezes differently in different contexts).

⁵⁰¹⁷ Appellate Body Report, *US – COOL*, para. 374 fn 745 (referring to Appellate Body Report, *Korea – Various Measures on Beef*, para. 161). The Appellate Body further noted that "[a]t one end of this continuum lies 'necessary' understood as 'indispensable'; at the other end, is 'necessary' taken to mean as 'making a contribution to'". Appellate Body Report, *US – Tuna II (Mexico)*, para. 318 fn 642 (quoting Appellate Body Report, *Korea – Various Measures on Beef*, para. 161).

⁵⁰¹⁸ Appellate Body Report, *US – Gasoline*, pp. 17-18, DSR 1996:I, 3, p. 16.

Article 11(3) of the Paris Convention (1967) and Article 17 of the Berne Convention (1971) as incorporated by reference into the TRIPS Agreement. The term is also used in paragraphs 1 and 3 of Article 31bis of the TRIPS Agreement, as well as in paragraphs 1(a) and 2(b)(i) of the Annex to the TRIPS Agreement.⁵⁰¹⁹ The term "unnecessarily" is used in Article 41.2 of the TRIPS Agreement. In our view, this context supports the implication of a deliberate choice of a distinct term "unjustifiably" in Article 20. We do not consider, therefore, that the term "unjustifiably" in Article 20 of the TRIPS Agreement should be assumed to be synonymous with "unnecessarily".

7.2420. At the same time, we do not consider that the term "unjustifiably" as used in Article 20 should be assumed to have exactly the same meaning as the term "unjustifiable" as used in the *chapeau* of Article XX of the GATT 1994. Australia argues that the Appellate Body's interpretations of the terms "arbitrary or unjustifiable" in Article XX of the GATT 1994 in *Brazil – Retreaded Tyres* and *EC – Seal Products* support the view that, in the context of Article 20 of the TRIPS Agreement, the use of a trademark is "unjustifiably" encumbered only if there is no rational connection between the imposition of the special requirements and a legitimate public policy objective.⁵⁰²⁰

7.2421. The findings in *Brazil – Retreaded Tyres* relied upon by Australia do not, in our view, support its interpretation of the terms "arbitrary and unjustifiable" in Article XX of the GATT 1994. The rulings referred to by Australia clarify that, under Article XX of the GATT 1994, in a situation where there is *no* rational connection between the objective of the measure to be justified and a discrimination arising from the measure, such discrimination should be found to be "unjustifiable". This ruling supports the view that, in the context of Article XX of the GATT 1994, the existence of a "rational connection" between the discrimination to be justified and the objective of the measure is a *necessary* condition for such discrimination not to be considered "unjustifiable". It does not, however, logically follow that, wherever some degree of rational connection does exist, this would always be *sufficient* to justify the discrimination at issue under the *chapeau* of Article XX.

7.2422. We therefore do not find support in these rulings for the notion that, in the context of Article 20 of the TRIPS Agreement, the term "unjustifiably" should be understood to require *only* the existence of some rational connection between encumbrances imposed on the use of a trademark and the reason for which they are imposed. As discussed above, the use of the term "unjustifiably" conveys a requirement that encumbrances on the use of a trademark resulting from special requirements be capable of being explained, and that a justification or reason should exist that sufficiently supports the encumbrance resulting from the action or measure at issue. To that extent, we agree that in both provisions, this term reflects an expectation of some degree of "rational connection" between the action to be explained (in Article XX of the GATT 1994, discrimination, and in Article 20 of the TRIPS Agreement, an encumbrance on the use of a trademark) and the reasons for its adoption.⁵⁰²¹ However, this does not imply, in our view, that the existence of *any* rational connection, no matter how tenuous, would always sufficiently support the imposition of such encumbrance permissible under Article 20.

7.2423. We must take due account also of the action that is to be justified, i.e. the encumbrance on the use of a trademark in the course of trade resulting from the special requirements.

7.2424. In this respect, the Dominican Republic argues that "[t]he use of a trademark" is the protected interest under Article 20 and that the objective of this provision is to safeguard "to the greatest extent possible" the ability of a trademark to fulfil its basic function of distinguishing goods and services.⁵⁰²² The Dominican Republic and Honduras also refer to Article 17 of the TRIPS Agreement, and the concept of "legitimate interests" of trademark owners in that provision, as relevant context.⁵⁰²³

⁵⁰¹⁹ See the Protocol Amending the TRIPS Agreement, done on 6 December 2005 in document WT/L/641. The amendment entered into force on 23 January 2017.

⁵⁰²⁰ See the summary of Australia's arguments in paras. 7.2328 and 7.2329.

⁵⁰²¹ See, e.g. Panel Report, *Russia – Pigs (EU)*, para. 7.1321 (noting that "[i]n a number of cases, the Appellate Body has explained that an analysis of whether discrimination is arbitrary or unjustifiable within the meaning of the *chapeau* of Article XX 'should focus on the cause of the discrimination, or the rationale put forward to explain its existence'." (footnote omitted)).

⁵⁰²² Dominican Republic's second written submission, para. 145.

⁵⁰²³ Dominican Republic's first written submission, para. 257; and Honduras's second written submission, para. 359.

7.2425. Article 17, entitled "Exceptions", reads: "Members may provide limited exceptions to the rights conferred by a trademark, such as fair use of descriptive terms, provided that such exceptions take account of the legitimate interests of the owner of the trademark and of third parties."

7.2426. As the panel in *EC – Trademarks and Geographical Indications* noted, Article 17 "expressly permits Members to provide limited exceptions to the rights conferred by a trademark".⁵⁰²⁴ That panel distinguished the "legitimate interests" of the trademark owner from the "rights conferred by a trademark" and agreed with the panel in *Canada – Pharmaceutical Patents* that, "[t]o make sense of the term 'legitimate interests' in this context, that term must be defined in the way that it is often used in legal discourse – as a normative claim calling for protection of interests that are 'justifiable' in the sense that they are supported by relevant public policies or other social norms".⁵⁰²⁵

7.2427. Article 20 does not address the granting by WTO Members of "exceptions to the rights conferred" by a trademark. Nor does it expressly refer to a concept of "legitimate interest" of the trademark owner that should be taken into account. Nonetheless, we agree that Article 17 may provide relevant context for the interpretation of Article 20, insofar as it can inform our understanding of the nature and extent of relevant interests of trademark owners that are recognized as "legitimate" by the TRIPS Agreement. In particular, we note that the panel in *EC – Trademarks and Geographical Indications* found that, "[e]very trademark owner has a legitimate interest in preserving the distinctiveness, or capacity to distinguish, of its trademark so that it can perform that function. This includes its interest in using its own trademark in connection with the relevant goods and services of its own and authorized undertakings."⁵⁰²⁶

7.2428. This context confirms, in our view, that in assessing whether encumbrances on the use of a trademark are "unjustifiable" within the meaning of Article 20, we must take due account of the legitimate interest of the trademark owner in using its trademark "in the course of trade" and how this is affected by the encumbrances to be justified. As also expressed by the panel in *EC – Trademarks and Geographical Indications*, this interest reflects the function of trademarks in the marketplace, which benefits trademark owners as well as consumers.⁵⁰²⁷ Accordingly, an assessment of the unjustifiability of encumbrances under Article 20 should involve a consideration of the nature and extent of the encumbrance on such use, including the extent to which the relevant trademarks are prevented from serving their intended function in the marketplace.

7.2429. Overall, therefore, as we understand it, Article 20 reflects the balance intended by the drafters of the TRIPS Agreement between the existence of a legitimate interest of trademark owners in using their trademarks in the marketplace, and the right of WTO Members to adopt measures for the protection of certain societal interests that may adversely affect such use.

7.2430. In light of the above, we find that a determination of whether the use of a trademark in the course of trade is being "unjustifiably" encumbered by special requirements should involve a consideration of the following factors:

- a. the nature and extent of the encumbrance resulting from the special requirements, bearing in mind the legitimate interest of the trademark owner in using its trademark in the course of trade and thereby allowing the trademark to fulfil its intended function;

⁵⁰²⁴ Panel Report, *EC – Trademarks and Geographical Indications (Australia)*, para. 7.647.

⁵⁰²⁵ Panel Report, *EC – Trademarks and Geographical Indications (Australia)*, paras. 7.662-7.663

(quoting Panel Report, *Canada – Pharmaceutical Patents*, para. 7.69).

⁵⁰²⁶ Panel Report, *EC – Trademarks and Geographical Indications (Australia)*, para. 7.664.

⁵⁰²⁷ The panel in *EC – Trademarks and Geographical Indications* also noted that Article 17 "not only refers to the legitimate interests of third parties but treats them on par with those of the right holder". It added that the function of a trademark to distinguish goods and services of undertakings in the course of trade "is served not only for the owner, but also for consumers. Accordingly, the relevant third parties include consumers. Consumers have a legitimate interest in being able to distinguish the goods and services of one undertaking from those of another, and to avoid confusion." Panel Reports, *EC – Trademarks and Geographical Indications (US)*, paras. 7.649 and 7.676; and *EC – Trademarks and Geographical Indications (Australia)*, paras. 7.649 and 7.675.

- b. the reasons for which the special requirements are applied, including any societal interests they are intended to safeguard; and
- c. whether these reasons provide sufficient support for the resulting encumbrance.

7.2431. We do not find it necessary, at this stage of our analysis, to determine further, in the abstract, how exactly the different interests at issue should be "weighed and balanced" in order to reach a conclusion as to whether an encumbrance on the use of a trademark should be found to be "unjustifiable" in a given case. Rather, this assessment will, in our view, need to be carried out on a case-by-case basis, in the light of the particular circumstances of the case.

7.3.5.5.2 Whether the TPP measures are *per se* unjustifiable

7.2432. In the previous Section, we established our understanding of the standard of review for the consideration of whether special requirements "unjustifiably" encumber the use of trademarks in the course of trade. Before applying this standard of review to the TPP measures, we first consider the complainants' claims that the TPP measures are *per se* unjustifiable.

7.2433. The complainants invoke various reasons for which they consider the TPP measures to be *per se* unjustifiable. In general, the complainants consider that the TPP measures by their very nature cannot be deemed as justifiable within the meaning of Article 20 and that the Panel therefore does not need to engage in a detailed consideration of the extent to which the measures contribute (or not) to their stated objectives. They argue that the Panel would need to engage in a detailed consideration of arguments and evidence in this respect only if it were to disagree that the measures by their very nature are unjustifiable.

7.2434. First, Honduras and Indonesia argue that a prohibition on the use of stylized word marks, composite marks, and figurative marks rises to a level of restrictiveness that cannot be justified. Second, Honduras, the Dominican Republic, Cuba and Indonesia argue that the TPP measures are unjustifiable since Australia did not assess the justifiability of the requirements in respect of individual trademarks and their individual features. Third, Indonesia argues that the TPP measures unjustifiably encumber the use of trademarks in the course of trade because Australia had failed to follow its own process in adopting them and, therefore, failed to develop the very justification required by Article 20 for the encumbrances on tobacco trademarks imposed by its TPP measures. Fourth, Cuba argues, taking a somewhat different approach, that the trademark restrictions in the TPP measures fall within the illustrative list of measures in the first sentence of Article 20 and, therefore, are "presumptively invalid".

7.2435. We now take up each of these claims in turn.

7.3.5.5.2.1 The extreme nature of the encumbrance

Main arguments of the parties

7.2436. Honduras asserts that, "where a measure's restrictiveness is particularly severe and pervasive", that measure must be considered unjustifiable without any further consideration of other factors. In its view, by their very nature, the TPP measures undermine the key principles of the TRIPS Agreement and, therefore, cannot be deemed as justifiable within the meaning of Article 20.⁵⁰²⁸ More specifically, it argues that the TPP trademark restrictions eviscerate the substance of the trademark protection stipulated in the TRIPS Agreement. By prohibiting the use of all tobacco-related trademarks, other than those prescribed by the TPP Act, the measures at issue directly preclude these trademarks from fulfilling their core function, which is to distinguish the goods of different undertakings. In light of this, the TPP trademark restrictions are measures that restrict trademarks in a particularly pervasive and severe fashion. Honduras considers that

⁵⁰²⁸ Honduras's first written submission, para. 321.

this category of measures is by its very nature unjustifiable and, consequently, inconsistent with Article 20.⁵⁰²⁹

7.2437. Indonesia argues that, where the TPP measures prevent the use of trademarks, "they are an 'encumbrance' in the most extreme form and, therefore, cannot be justified in light of the object and purpose of TRIPS and the context of Article 20".⁵⁰³⁰ In its view, "[t]he [T]PP requirements impose such extreme burdens on the use of tobacco trademarks that they result in the devaluation of such property. There is no basis in the text or object and purpose of TRIPS for an interpretation that such an action is justifiable under any circumstance. For this reason no further analysis is necessary and the Panel should find Australia's [TPP] measures are inconsistent with Article 20 to the extent they prohibit the use of tobacco trademarks."⁵⁰³¹

7.2438. Australia responds that Honduras's and Indonesia's claims are based on the false premise that the TRIPS Agreement confers to a trademark holder a "right to use". It adds that, "[w]ithin the context of Article 20, a measure that prohibits the use of certain types of registered trademarks – assuming that such prohibitions fall within the scope of Article 20 at all – has no *a priori* status among the types of special requirements that a Member might impose upon the use of a trademark in the course of trade". It concludes that under Article 20, Members may impose special requirements upon the use of a trademark in the course of trade – including, to the extent they are encompassed by Article 20, a prohibition on the use of trademarks – as long as the resulting encumbrance is not unjustifiable.⁵⁰³²

Analysis by the Panel

7.2439. We recall that, in Section 7.3.5.3 above, we considered whether the TPP measures fall within the scope of Article 20, to the extent that they prohibit the use of certain trademarks on tobacco retail packaging and products. We found in this context that the TPP measures, including the prohibitions they impose on the use of stylized word marks, composite marks, and figurative marks, amount to "special requirements" within the meaning of Article 20, and that they "encumber" the use of a trademark in the course of trade.⁵⁰³³

7.2440. Honduras and Indonesia consider that these prohibitions rise to a level of "restrictiveness" that cannot be justified under any circumstances, and that the Panel should, therefore, consider them *per se* unjustifiable.

7.2441. We note that, under the terms of Article 20, Members have committed not to "unjustifiably encumber[] by special requirements" the use of a trademark in the course of trade. The language used in that provision does not disallow any particular type of "special requirements". Rather, it makes the adoption of such requirements subject to the condition that they do not "unjustifiably encumber[]" the use of trademarks. As described in Section 7.3.5.1.3 above, a consideration of whether the use of a trademark is "unjustifiably encumbered" will normally involve a consideration of various elements, including the nature and extent of the encumbrance arising from the special requirements at issue, the reasons for which these requirements are applied, and whether these reasons sufficiently support them. While a prohibition on use of a trademark by nature involves a high degree of encumbrance on such use, we see no basis for assuming that a particular threshold or degree of encumbrance would be inherently "unjustifiable" under this provision. Rather, we consider that this must in all cases be assessed in light of the circumstances in accordance with the standard of review that we have identified above. This reasoning is comparable, *mutatis mutandis*, with the reasoning by the Appellate Body in *Brazil – Retreaded Tyres* in the context of Article XX(b) of the GATT 1994: "As the Panel recognized, an import ban is 'by design as trade-restrictive as can be'. We agree with the Panel that there may be circumstances where such a measure can nevertheless be necessary, within the

⁵⁰²⁹ Honduras's first written submission, paras. 335-336. In this context, Honduras also argues that the TPP measures constitute an indiscriminate restriction on all trademarks on tobacco products and packaging, and do not apply selectively to those specific features of individual trademarks. See *ibid.* para. 334. We will examine Honduras's, the Dominican Republic's, Cuba's and Indonesia's claims that the TPP measures are unjustifiable due to the lack of individual assessment in section 7.3.5.2.2 below.

⁵⁰³⁰ Indonesia's first written submission, para. 277.

⁵⁰³¹ Indonesia's first written submission, para. 284.

⁵⁰³² Australia's first written submission, paras. 417-418.

⁵⁰³³ See para. 7.2245 above.

meaning of Article XX(b).⁵⁰³⁴ Similarly, while recognizing that a prohibition on the use of a trademark involves a very high degree of encumbrance, we do not consider that this renders it by nature incapable of justification under Article 20.

7.2442. We therefore conclude that special requirements that involve a high degree of encumbrance, such as those in the TPP measures that prohibit the use of stylized word marks, composite marks, and figurative marks, are not *per se* unjustifiable. Rather, as discussed above, we must apply to them the same standard of review, which we have established in Section 7.3.5.5.1.3 above, as to other special requirements contained in the TPP measures.

7.3.5.5.2.2 Whether the unjustifiability of requirements should be assessed in respect of individual trademarks and features

Main arguments of the parties

7.2443. Honduras argues that restrictions imposed on the use of a trademark in the course of trade should apply to individual trademarks, as opposed to a whole class of trademarks, and must have a limited nature.⁵⁰³⁵ Trademark protection under the TRIPS Agreement is based upon the protection of individual trademarks, and "any restriction on trademarks must only address the specific features of the trademark that undermine a Members' policy objective".⁵⁰³⁶

7.2444. It adds that "[t]his is precisely why the term '*a trademark*' is used in its singular form in Article 20 as well as most other provisions of the Agreement".⁵⁰³⁷ In its second written submission, Honduras reasserts that "[t]he use of the singular confirms the individual trademark approach that is so characteristic of all of the provisions of Section 2. It is not merely a 'drafting convention', but rather the reflection of the individual approach that applies to the creation, maintenance, enforcement and use of trademarks".⁵⁰³⁸

7.2445. In its view, this approach to regulating each trademark on its own merits under the TRIPS Agreement follows from the fact that trademark rights, in terms of trademark acquisition, registration, maintenance and enforcement, are acquired on an individual basis.⁵⁰³⁹ It elaborates this by stating that "[t]he distinctiveness of a trademark, as well as eligibility of a trademark for protection, registration, and cancellation, is always assessed on an *individual* basis. The TRIPS Agreement thus presumes that each and every trademark will be treated on its own *individual* merits."⁵⁰⁴⁰

7.2446. In its rebuttal, Honduras elaborates that "[c]learly, Members can impose general criteria that trademarks must meet in order to be allowed to be used. The point made by Honduras is that trademarks are examined and approved on an individual basis and exist as individual trademarks". Considering the context of Section 2 and Article 15.2 of the TRIPS Agreement, and Article 6*quinquies* B of the Paris Convention, Article 20 requires a similar individualized, or at least non-class based analysis of trademarks when a Member seeks to justify a special requirement encumbering the use of the trademark for reasons of public policy.⁵⁰⁴¹

7.2447. Honduras seeks further contextual support from Article 6*quinquies* of the Paris Convention. It reasons that this provision requires Members to register and protect trademarks without interfering with their original format; trademark protection, in turn, includes the ability to use a trademark in the course of trade. In its view, the provision, therefore, implies that deviations from the *telle quelle* rule in respect of use are allowed only in exceptional cases and will depend on the individual nature of each particular trademark.⁵⁰⁴²

⁵⁰³⁴ Appellate Body Report, *Brazil – Retreaded Tyres*, paras. 150–151.

⁵⁰³⁵ Honduras's first written submission, para. 289.

⁵⁰³⁶ Honduras's first written submission, para. 309.

⁵⁰³⁷ Honduras's first written submission, para. 289 (emphasis added by Honduras).

⁵⁰³⁸ Honduras's second written submission, para. 370.

⁵⁰³⁹ Honduras's first written submission, para. 289.

⁵⁰⁴⁰ Honduras's first written submission, para. 309. (emphasis original)

⁵⁰⁴¹ Honduras's second written submission, para. 362.

⁵⁰⁴² Honduras's first written submission, para. 290.

7.2448. Honduras also seeks contextual support from Article 17 of the TRIPS Agreement. In its view, Article 17 confirms that exceptions to the rights conferred on trademark owners under the TRIPS Agreement must have a "limited" nature and take into account the legitimate interests of the trademark owner, including use. "In other words, a measure that has a wide scope of application, covering, in an indiscriminate manner, a broad range of trademarks, cannot be regarded as a limited exception. This measure will, therefore, be inconsistent with the basic principle of the TRIPS Agreement that restrictions on the *use* of trademarks must apply to *individual* trademarks and have a *limited* nature."⁵⁰⁴³

7.2449. Honduras clarifies that it "does not believe that Article 17 requires, necessarily, in each and every situation, that a measure must be addressed at individual trademarks. ... Rather, what matters is that the scope of the exception be 'limited'". Referring to the panel report in *EC – Trademarks and Geographical Indications (Australia)*, Honduras argues that, although the panel suggested that limitations under Article 17 do not necessarily have to affect individual trademarks, it clarified that when the exception to trademark rights covers entire categories of trademarks, the extent to which trademark rights are being affected must be quantitatively or qualitatively limited, and must not constitute a blanket ban or another type of indiscriminate restriction.⁵⁰⁴⁴ In Honduras's view, "the term 'limited exceptions' in Article 17 supports its argument that, under Article 20, encumbrances on the use of trademarks in the course of trade must have a 'limited' nature – the encumbrance may not apply to a broad range of trademarks in an indiscriminate manner".⁵⁰⁴⁵

7.2450. The Dominican Republic argues that trademarks and trademark protection are individualized in terms of the content, acquisition, enjoyment, and enforcement of rights. As a result, if a Member seeks to encumber the use of a trademark through special requirements, it must take appropriate account of the individual characteristics of each of the affected trademarks. In the case of special requirements that directly distort the appearance and visual content of a trademark, a Member must give individual consideration to the features of the trademark to be changed, to determine whether changing those features is warranted by the contribution the change will make to the regulatory objective being pursued.⁵⁰⁴⁶ It adds that "Australia was required, under Article 20, to give individual consideration to the supposedly offending features of each such trademark, to assess whether any features of that specific trademark warranted encumbrance".⁵⁰⁴⁷ Individual consideration would have ensured that, for any encumbered trademarks, Australia "prohibited *solely those specific design features* – if any – that are actually demonstrated to be problematic, while allowing other design features to continue to be used unencumbered".⁵⁰⁴⁸

7.2451. In its view, the text of Article 20 itself supports the view that the individual merits of a trademark should be taken into account in assessing justifiability because the subject-matter of the justifiability analysis is "a trademark" in the singular.⁵⁰⁴⁹

7.2452. The Dominican Republic further argues that, since the subject-matter of Article 20 is defined by the word "trademark", the assessment of justifiability must take into account the nature of trademarks and trademark protection. It argues that a trademark is registered on the basis of its specific features, after a process of individual application by the owner, and individual assessment and approval by the Member. A trademark is also protected against infringement and revocation through an individualized process that considers its specific features.⁵⁰⁵⁰

7.2453. Referring to Article 15.1, it explains that each trademark is a sign composed of letters, numerals, colours, and/or other figurative elements, and/or a unique combination thereof. Every trademark is, therefore, different from every other trademark. A sign is registered, in the first

⁵⁰⁴³ Honduras's first written submission, para. 291. (emphasis original)

⁵⁰⁴⁴ Honduras's response to Panel question No. 91 (referring to Panel Report, *EC – Trademarks and Geographical Indications (Australia)*, paras. 7.650 and 7.654-7.657). See also Honduras's second written submission, para. 367.

⁵⁰⁴⁵ Honduras's response to Panel question No. 91, p.7.

⁵⁰⁴⁶ Dominican Republic's first written submission, para. 394.

⁵⁰⁴⁷ Dominican Republic's first written submission, para. 400.

⁵⁰⁴⁸ Dominican Republic's first written submission, para. 403. (emphasis original)

⁵⁰⁴⁹ Dominican Republic's first written submission, para. 386.

⁵⁰⁵⁰ Dominican Republic's response to Panel question No. 108, paras. 127-128.

place, as a trademark on the basis of its features, after a process of individual application by the owner and individual assessment of the features by the Member, culminating in a conclusion that the sign is sufficiently unique and distinctive.⁵⁰⁵¹

7.2454. It argues that a trademark is protected against infringement through an individualized process that considers its features. Under Article 16.1 of the TRIPS Agreement, for example, a trademark owner's ability to prevent the use of third-party signs depends, among other factors, on an individualized assessment of the degree of similarity between the trademark and the third-party sign. This assessment establishes whether the features of the third-party sign are "identical or similar" to the features of the trademark.⁵⁰⁵²

7.2455. Furthermore, a registered trademark is also protected against invalidation through an individualized process that considers its features. Article 6*quinquies* B of the Paris Convention provides an exhaustive list of the permitted grounds for the denial or invalidation of the registration of trademarks subject to that provision. Under this provision, in considering invalidation, an authority must undertake an individual assessment that examines each trademark "on its individual merits".⁵⁰⁵³

7.2456. As to the relevance of these provisions, the Dominican Republic argues that "[a]lthough Articles 6*quinquies* B and C of the *Paris Convention* regulate the *registration* of trademarks, and Article 20 of the *TRIPS Agreement* regulates the *use* of a trademark, these differences do not mean that the former provisions have no contextual relevance for the interpretation of the latter. ... [A] provision is relevant context if it has 'some pertinence' for the interpretation of another provision."⁵⁰⁵⁴ "If a Member is required to consider the unique features of a trademark when making a decision on registration relating to those features (e.g., they are misleading), it is 'unjustifiable' for the Member to ignore those same features when it makes a similarly (or even more) far-reaching decision on use that is also related to those features (e.g., they are misleading)."⁵⁰⁵⁵

7.2457. The Dominican Republic further argues that "[i]f a Member currently maintains the registration of a trademark – and has not, based 'on its individual merits', invalidated the trademark on the grounds that it is misleading or is otherwise contrary to morality – the Member cannot, under Article 20, deny use of the trademark because of its features, unless it also considers the trademark 'on its individual merits'".⁵⁰⁵⁶ It adds that this is precisely what Australia has done, since it "has not denied or invalidated the registration of any of the trademarks subject to the [T]PP requirements on the grounds that they are misleading or, instead, otherwise contrary to public morals (e.g., they induce consumers to engage in harmful behaviour)".⁵⁰⁵⁷

7.2458. In its view, it also follows from the word "unjustifiably" that the unique features of individual trademarks have to be assessed. To respect the basic meaning of the word "justifiable", as reflected in the synonyms "rational, reasonable, proper, defensible or warranted", a Member cannot ignore such features in deciding whether and how to encumber this trademark.⁵⁰⁵⁸

7.2459. The Dominican Republic notes that, in its first written submission, Australia argued that "[i]f the justification for the imposition of special requirements upon the use of a trademark relates to a group of trademarks as a class, nothing in Article 20 requires that justification to be restated by reference to individual trademarks falling within that class". The Dominican Republic agrees that, if the decision to encumber use of a trademark relates to considerations common to all trademarks in a class, and is unrelated to a particular trademark's features, individual assessment

⁵⁰⁵¹ Dominican Republic's second written submission, paras. 211-212.

⁵⁰⁵² Dominican Republic's second written submission, para. 213.

⁵⁰⁵³ Dominican Republic's second written submission, para. 214 (referring to Bodenhausen, Full text, (Exhibit DOM-79), pp. 115-116).

⁵⁰⁵⁴ Dominican Republic's second written submission, para. 219 (referring to Appellate Body Reports, *China - Auto Parts*, para. 151). (emphasis original)

⁵⁰⁵⁵ Dominican Republic's second written submission, para. 221. See also ibid. para. 257.

⁵⁰⁵⁶ Dominican Republic's second written submission, para. 222. (footnote omitted)

⁵⁰⁵⁷ Dominican Republic's second written submission, para. 223.

⁵⁰⁵⁸ Dominican Republic's second written submission, paras. 224-226. See also ibid. para. 247.

is not required.⁵⁰⁵⁹ It further contends that "Australia does *not* exclude that an individual assessment is required under Article 20 in situations where an encumbrance relates to considerations that *vary from individual trademark to individual trademark* – and are not common to 'a group of trademarks as a class'".⁵⁰⁶⁰

7.2460. The Dominican Republic considers that Article 17 is relevant context for Article 20. It notes that Australia recalls a statement by the panel in *EC – Trademarks and Geographical Indications* that "nothing in the text of Article 17 indicates that a case-by-case analysis is required under the TRIPS Agreement". The Dominican Republic, however, argues that the panel's finding in that dispute supports its position.⁵⁰⁶¹ In particular, it argues that the panel's decision turned on the fact that the European Union had required an individual assessment of the trademark and the GI at the time of the GI's registration, which obviated the need for further individual assessment later.⁵⁰⁶² It adds that "[t]hus, under Article 17, individual assessment of the features of a trademark may be required in some circumstances. The same is also true under Article 20: although individual assessment is not always required, it may be required depending on the circumstances."⁵⁰⁶³

7.2461. The Dominican Republic indicates that it agrees with the panel in *EC – Trademarks and Geographical Indications (Australia)* that a trademark owner has a "legitimate interest" in using its trademark, which must be taken into account in interpreting Article 20. In particular, in its view, the importance of the legitimate interest in "use" is relevant in considering the nature of trademarks and trademark protection, including the need to undertake an individual assessment of encumbrances imposed due to concerns about the specific features of a trademark.⁵⁰⁶⁴ The Dominican Republic emphasizes that its argument has nothing to do with a right to use but results from an interpretation of the text of Article 20.⁵⁰⁶⁵

7.2462. The Dominican Republic argues that Australia should have separately considered each individual design feature of a trademark such as the typeface, size, colour, background colour and figurative "tick" shape, particularly when coupled with a 75% graphical health warning.⁵⁰⁶⁶ For example, a Member must assess the *typeface* of the brand name to establish if the particular typeface has the alleged harmful effects (i.e. it causes people to smoke by misleading them or appealing to them). Another example is that it has to consider the *capitalization of lettering* and whether any differences in the format of the lettering cause people to smoke. Moreover, if the encumbrance aims at a particular use (e.g. on retail packaging), it must also consider the *context in which the use will occur*; the features of a trademark, such as the typeface and capitalization, must be considered in light of the fact that the dominant image on a pack is the health warning.⁵⁰⁶⁷

7.2463. The Dominican Republic "agrees that, if the decision to encumber use of a trademark relates to considerations common to all trademarks in a class, and is unrelated to a particular trademark's features, individual assessment is not required".⁵⁰⁶⁸ It argues that Australia's failure to conduct individual assessment, nonetheless, renders the TPP measures unjustifiable.⁵⁰⁶⁹ First, "[i]t is not 'justifiable' – rational, reasonable, proper, defensible or warranted – for a regulator to draw conclusions about the alleged effects of the *design features of a trademark* from the *characteristics of the product* to which the trademark is applied. Thus, the fact that trademarks are all applied to a particular product, even a harmful product, does not allow the regulator to *assume* that all of the

⁵⁰⁵⁹ Dominican Republic's second written submission, para. 233 (quoting Australia's first written submission, para. 411) (emphasis added by the Dominican Republic omitted). See also Dominican Republic's response to Panel question No. 108, paras. 133-134.

⁵⁰⁶⁰ Dominican Republic's second written submission, para. 234. (emphasis original)

⁵⁰⁶¹ Dominican Republic's second written submission, para. 260 (referring to Australia's first written submission, para. 411, in turn referring to Panel Report, *EC – Trademarks and Geographical Indications (US)*, para. 7.672).

⁵⁰⁶² Dominican Republic's second written submission, para. 261.

⁵⁰⁶³ Dominican Republic's second written submission, para. 262.

⁵⁰⁶⁴ Dominican Republic's response to Panel question No. 99, paras. 65-69 (referring to Panel Report, *EC – Trademarks and Geographical Indications (Australia)*, para. 7.664).

⁵⁰⁶⁵ Dominican Republic's second written submission, para. 264.

⁵⁰⁶⁶ Dominican Republic's first written submission, paras. 406-407.

⁵⁰⁶⁷ Dominican Republic's second written submission, paras. 227, 228 and 230.

⁵⁰⁶⁸ Dominican Republic's second written submission, para. 233.

⁵⁰⁶⁹ Dominican Republic's second written submission, para. 235.

design features of all those trademarks have harmful effects on consumers (e.g. they are misleading or appealing).⁵⁰⁷⁰ Secondly, it is not justifiable to encumber the use of all design features of all trademarks because of the possibility that design features might be appealing or misleading.⁵⁰⁷¹

7.2464. Cuba argues that the encumbrances are "unjustifiable" because plain packaging is not based on an individual assessment of the trademark.⁵⁰⁷²

7.2465. Indonesia considers that each type of special requirement and its related encumbrance must be evaluated and "justified" independently.⁵⁰⁷³

7.2466. Indonesia argues that it would be inappropriate to use evidence that may support one type of encumbrance (i.e. a limitation on the use of certain colours) to justify the imposition of a different type of encumbrance (mandating a certain typeface) or a range of encumbrances across the board.⁵⁰⁷⁴ It submits that "Australia has assumed that *any* trademark element located *anywhere* has the effect of persuading people to smoke when they otherwise would not".⁵⁰⁷⁵

7.2467. The Panel asked Indonesia's views on the extent to which the effect of different types of requirements, such as those relating to colour or font, can be distinguished from the overall effect of the TPP measures; and, to the extent that the evidence may not distinguish between such elements, what implications would this have for the assessment of the justifiability of such measures under Article 20. In response, Indonesia argued that the fact that "Australia assumed that every element of every trademark that is used on a tobacco product or its packaging is 'guilty' of inducing people to smoke or misleading consumers" is sufficient for the Panel to find inconsistency with Article 20. Therefore, "[i]t is not necessary for the Panel to attempt to find in the post-implementation data an indication of which elements Australia should have regulated and which it should not have".⁵⁰⁷⁶

7.2468. Australia responds that the fact that trademarks are ordinarily acquired, registered, and enforced on an individual basis is simply a consequence of the fact that trademarks must be capable of distinguishing between products in the course of trade. It does not follow that any justification for the imposition of special requirements upon the use of a trademark must likewise be framed by reference to the characteristics of individual trademarks. Article 20 is not concerned with the registration of individual trademarks, but rather with special requirements that are imposed upon the use of trademarks. If the justification for the imposition of special requirements upon the use of a trademark relates to a group of trademarks as a class, nothing in Article 20 requires that justification to be restated by reference to individual trademarks falling within that class.⁵⁰⁷⁷

7.2469. In its second written submission, it sums up that nothing in Article 20 implies that any sort of "individualised assessment" is required, under any circumstance. On the contrary, Article 20 is plainly concerned with public policy measures that are likely to affect an entire category of trademarks that implicate the public policy concern. Whether or not a measure covered by Article 20 is "unjustifiable" will depend upon the rationale of the measure as it relates to the affected category of trademarks as a whole.⁵⁰⁷⁸

7.2470. Australia argues that the complainants have not presented any interpretative basis for their assertion that the test for "unjustifiably" requires Members to perform an individualised assessment of trademarks.⁵⁰⁷⁹ As regards the Dominican Republic's interpretation of Article 20

⁵⁰⁷⁰ Dominican Republic's second written submission, para. 238 (emphasis original). See also *ibid.* paras. 236-239.

⁵⁰⁷¹ Dominican Republic's second written submission, paras. 240-255.

⁵⁰⁷² Cuba's second written submission, para. 68.

⁵⁰⁷³ Indonesia's first written submission, para. 293.

⁵⁰⁷⁴ Indonesia's first written submission, para. 293.

⁵⁰⁷⁵ Indonesia's first written submission, para. 316. (emphasis original)

⁵⁰⁷⁶ Indonesia's response to Panel question No. 106, para. 31.

⁵⁰⁷⁷ Australia's first written submission, paras. 410-411. See also Australia's second written submission, para. 202.

⁵⁰⁷⁸ Australia's second written submission, para. 204.

⁵⁰⁷⁹ Australia's second written submission, paras. 201 and 287.

building on the "legitimate interests" of trademark owners and WTO Members, Australia responds that this term is absent from Article 20, and that the complainants have not offered any explanation for why the context provided by Article 17 would require the Panel to read the requirements of that provisions into Article 20.⁵⁰⁸⁰ It adds that "[t]he Dominican Republic does not contend that the requirements of an 'individual assessment' (at least in some cases) follows from the ordinary meaning of the term 'unjustifiably', and it has not identified anything in the context of Article 20 or in the object and purpose of the TRIPS Agreement that would support this asserted requirement".⁵⁰⁸¹

7.2471. As regards the complainants' arguments relating to the use of the term "a trademark" in the singular in the first sentence of Article 20, Australia responds that they seek to impart interpretative significance to what is nothing more than a drafting convention. Australia adds that Article 17 of the TRIPS Agreement also refers to "a trademark" in the singular, and yet the panel in *EC – Trademarks and Geographical Indications (US)* held that nothing in the text of Article 17 requires exceptions to the rights conferred by a trademark to be crafted on an individual basis. In its view, there is no reason for which a different conclusion would apply in the case of Article 20.⁵⁰⁸² It adds that the justification for the imposition of special requirements upon the use of a trademark in the course of trade will often (if not ordinarily) relate to a class of trademarks as a whole, such as pharmaceutical products and products that are inherently hazardous to human health (such as tobacco).⁵⁰⁸³

7.2472. In respect of the complainants' contextual arguments relating to Article 17, Australia notes that the panel in *EC – Trademarks and Geographical Indications (US)* found that any exception to the rights conferred under Article 16 need not "take account of the legitimate interests of the owner of the trademark" on an individual basis. The panel observed that, even though the regulation at issue required a case-by-case analysis of the GI at the time of registration, "nothing in the text of Article 17 indicates that a case-by-case analysis is a requirement under the TRIPS Agreement". In its view, the panel's conclusion applies *a fortiori* to the interpretation of Article 20, which, unlike Article 17, does not concern exceptions to rights that are conferred under the TRIPS Agreement. Rather, Article 20 is a provision that concerns special requirements that Members impose upon the use of a trademark in furtherance of public policy objectives, and the justification for such requirements will often relate to a class of trademarks as a whole.^{5084, 5085}

7.2473. Australia argues that the complainants also seek support for their position from their overarching contention that the TRIPS Agreement establishes a "right to use". In particular, it refers to Honduras's contextual arguments relating to Article 6*quinquies* of the Paris Convention. Australia responds that "the TRIPS Agreement does not establish a 'right of use' that would somehow compel an 'individual assessment' of particular trademarks when imposing special requirements upon the use of a class of trademarks".⁵⁰⁸⁶

⁵⁰⁸⁰ Australia's second written submission, paras. 173, and 179 (referring to Dominican Republic's response to Panel question No. 99, para. 69). See para. 7.2461 above for a summary of the Dominican Republic's position.

⁵⁰⁸¹ Australia's second written submission, para. 201.

⁵⁰⁸² Australia's first written submission, para. 413.

⁵⁰⁸³ Australia's first written submission, para. 414.

⁵⁰⁸⁴ Australia's first written submission, para. 411 (quoting Panel Report, *EC – Trademarks and Geographical Indications (US)*, para. 7.672); and Australia's second written submission, para. 202 (quoting Panel Report, *EC – Trademarks and Geographical Indications (US)*, para. 7.672).

⁵⁰⁸⁵ Australia adds that, "even if a measure were concerned with the 'specific features' of trademarks, it does not follow that the measure is 'unjustifiable' in the absence of an 'individualised assessment' of each trademark that is affected by the measure. The rationale for a measure that is subject to Article 20 could relate to an entire category of trademarks that possess some feature that relates to the objective of the measure. For example, if the objective of the measure were to improve the legibility of pharmaceutical product packaging for the benefit of the elderly or people with impaired vision, a measure might require trademarks for pharmaceutical products registered in a cursive typeface to be rendered in a non-cursive typeface on the product package. The rationale for this measure would relate to the entire category of trademarks that are registered in a cursive typeface. No 'individualised assessment' of the 'specific features' of each trademark within this category would be required." Australia's second written submission, para. 203. (emphasis original)

⁵⁰⁸⁶ Australia's first written submission, para. 412.

7.2474. Australia draws attention to "the troubling implications" of what it sees as "extreme evidentiary approach to public health policymaking", and questions the plausibility of individualized assessments of each element of each trademark for each of the many hundreds of tobacco and cigar packages that were on the market in Australia prior to the implementation of tobacco plain packaging.⁵⁰⁸⁷

7.2475. As regards the TPP measures in particular, Australia argues that, whether or not the complainants' "individualised assessment" argument has any legal basis, it is premised on either a misunderstanding or a mischaracterisation of the measures' objectives and the manner in which they operate. It explains that "[t]he premise of the tobacco plain packaging measure is not that 'specific features' of particular trademarks increase the appeal of tobacco products, detract from the effectiveness of GHWs, or mislead consumers as to the harms of tobacco use ... the premise of the tobacco plain packaging measure is that prescribing a standardised, plain appearance for tobacco packages and products will minimise the ability of tobacco packages and products to have any of these effects." It argues that, in line with the FCTC Guidelines, "a standardised, plain appearance for tobacco packages is designed to eliminate the opportunity for tobacco companies to use the package as a medium for advertising and promoting the product" and to convey any positive associations.⁵⁰⁸⁸ Australia adds that "[t]he package design eliminates the ability of tobacco companies to use figurative design elements to increase the appeal of the package or to create any sort of positive association with the product, whether it is one of masculinity, femininity, youthfulness, purity, value for money, or any other association that a tobacco company might want to attach to its product".⁵⁰⁸⁹

7.2476. Apart from preventing tobacco companies from using the package to increase the appeal of tobacco products, Australia argues that the plain appearance of the pack serves other important purposes: limit the ability of the pack to distract from and reduce the noticeability of GHWs; prevent tobacco companies from using different colours to create misleading perception of the harmful effects of tobacco use or to exploit certain positive associations with particular colours; and, more broadly, to denormalize tobacco, which is a uniquely hazardous product, i.e. the only lawful consumer product that kills its users when used as intended.⁵⁰⁹⁰

7.2477. In sum, Australia explains that "the tobacco plain packaging measure is not concerned with the 'specific features' of particular trademarks".⁵⁰⁹¹

7.2478. Australia further contends that the Dominican Republic concedes that no "individualised assessment" is required unless the measure concerns the "specific features" of particular trademarks.⁵⁰⁹² The complainants' "individualised assessment" argument is therefore moot by their own admission.⁵⁰⁹³

⁵⁰⁸⁷ Australia's closing statement at the second meeting of the Panel, paras. 2-16.

⁵⁰⁸⁸ Australia's second written submission, para. 291. Australia cites para. 16 of the Article 13 FCTC Guidelines (Tobacco advertising, promotion and sponsorship), which provide as follows:

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

Ibid. para. 290 (emphasis added by Australia). See also Article 13 FCTC Guidelines, FCTC/COP/3(12), (Exhibit JE-21), Annex, para. 16.

⁵⁰⁸⁹ Australia's second written submission, para. 292. (emphasis original)

⁵⁰⁹⁰ Australia's second written submission, para. 293.

⁵⁰⁹¹ Australia's second written submission, para. 294.

⁵⁰⁹² Australia's second written submission, para. 295 (referring to the Dominican Republic's response to Panel question No. 108, paras. 133-134). The Dominican Republic's arguments on this point are summarized in para. 7.2459 above.

⁵⁰⁹³ Australia's opening statement at the Panel's second meeting, para. 126.

Main arguments of the third parties

7.2479. The Panel invited the third parties to comment on the extent to which an assessment of "justifiability" of the TPP measures should be individualized, e.g. trademark by trademark, or requirement by requirement.⁵⁰⁹⁴

7.2480. Argentina responds that it understands that the assessment of the justifiability of the TPP measures should not be made "requirement by requirement" but comprehensively, taking account of the requirements as a whole and their overall contribution to the aim pursued, which in the case of the TPP measures is the protection of public health by convincing people to drop the habit of smoking and discouraging them from taking up smoking.⁵⁰⁹⁵

7.2481. Brazil is not convinced that the term "special requirements" under Article 20 would be restricted to requirements specifically applicable to individual trademarks. The TRIPS Agreement uses the terms "a trademark" or "the owner of a registered trademark" when establishing definitions, rights conferred, exceptions, the term of protection, and requirements and conditions of licensing (Articles 15-21); this, however, does not mean that horizontal requirements affecting trademarks in general would fall outside its scope. Thus, the term "special requirements" in Article 20 may also refer to requirements applicable to a group of related trademarks, not just to an individual trademark. Consequently, the fact that a measure at issue is horizontal does not seem to be in itself proof of violation of Article 20.⁵⁰⁹⁶

7.2482. Canada responds that the text of Article 20 does not necessitate that each trademark affected nor each requirement affecting the trademark be assessed individually to determine whether the measure in issue is "justifiable". Specifically, Article 20 does not require that a measure that impacts on a category of trademarks (e.g. trademarks used on a specified group of products) be considered "justifiable" only where it has taken into account the individual characteristics of each affected trademark. The plain meaning of the word "justifiable" in its context supports this interpretation. That is, if the special requirement is found to encumber the use of a category of trademarks, then the justification for that requirement would logically relate to any and all trademarks that fall within that category. The use of the singular "a trademark" is a drafting convention, like that used in Article 17, and does not, *ipso facto*, suggest that all special requirements must be justified by reference to each individual trademark affected. Further, Canada considers that where a complainant has challenged individual "special requirements" under Article 20, then it may be appropriate for a panel to conduct a separate analysis of each individual requirement to determine their consistency with the provision. However, where a complainant challenges a measure that has various constituent requirements, then a panel may draw conclusions as to the "justifiability" of the measure as a whole on the basis of an integrated analysis of these requirements.⁵⁰⁹⁷

7.2483. The European Union considers that an assessment of "justifiability" pursuant to Article 20 does not require an individual, case-by-case analysis, particularly in situations such as in the present case, where the factors or concerns underlying the encumbrance on the use of trademarks are common to all trademarks. It finds support for this in the panel report in *EC – Trademarks and Geographical Indications (US)*. The European Union continues, "Article 17 of the TRIPS Agreement refers explicitly to 'the legitimate interests of trademark owners'. If not even Article 17 requires a case-by-case analysis then even less so Article 20 of the TRIPS Agreement which does not contain such an explicit reference to 'the legitimate interests of trademark owners'".⁵⁰⁹⁸

7.2484. Japan understands that, of the three specific objectives of the measures contained in subsection 3(2) of the TPP Act, the first one appears to relate to discouraging consumers from smoking irrespective of whether they are fully informed of the harmful effect of tobacco products, while the second and third objectives appear intended to prevent consumers' misunderstanding about the health risk of tobacco products. In its view, it would assist the analysis of whether the

⁵⁰⁹⁴ Panel question No. 18.

⁵⁰⁹⁵ Argentina's third-party response to Panel question No. 18.

⁵⁰⁹⁶ Brazil's third-party submission, paras. 36-39.

⁵⁰⁹⁷ Canada's third-party response to Panel question No. 18, paras. 31-33.

⁵⁰⁹⁸ European Union's third-party response to Panel question No. 18 (referring to Panel Report, *EC – Trademarks and Geographical Indications (US)*, para. 7.672).

measures are reasonably calibrated to contribute to its policy objectives, if Australia were to explain, in respect of the first objective, which aspect(s) of trademarks used on tobacco products are the ones that make tobacco products appeal to consumers and why restrictions on the other aspects of the trademark are warranted; and, in respect of the latter two objectives, which aspects of trademarks give rise to consumers' misunderstanding about the harmful effects.⁵⁰⁹⁹

7.2485. New Zealand argues that Article 20 does not require an assessment of the "justifiability" of Australia's plain packaging requirements. Rather, it requires that the complainants demonstrate that Australia's measures impose an encumbrance unjustifiably. If the complainants demonstrate a *prima facie* case, Australia is then required to demonstrate that its measures are not unjustifiable. Article 20 is not concerned with the registration of individual trademarks, but rather with special requirements that are imposed upon the use of trademarks. If the justification for the imposition of special requirements upon the use of a trademark relates to a group of trademarks as a class, nothing in Article 20 requires that justification to be restated by reference to individual trademarks falling within that class. New Zealand notes that the panel in *EC – Trademarks and Geographical Indications (US)* found that any exception under Article 17 to the rights conferred under Article 16 need not "take account of the legitimate interests of the owner of the trademark" on an individual basis, and considers that these conclusions are also applicable to the present disputes.⁵¹⁰⁰

7.2486. Nicaragua considers that any measure imposing specific requirements that seeks to restrict or prohibit trademark rights must be based on an individualized assessment of the particular trademark in question in order to determine whether that trademark, or any element of that mark, raises concerns that warrant the limitation of that trademark right.⁵¹⁰¹

7.2487. Norway argues that the complainants' view, to a large degree, seems to be founded on the fact that trademark rights, in terms of trademark acquisition, registration, maintenance and enforcement, are acquired on an individual basis. It counters that the reason why trademarks are normally acquired, registered and enforced individually is that they must be capable of distinguishing between goods in the course of trade; this, however, is not a basis for requiring an individualized assessment of "justifiability" in the context of Article 20. The use of the term "a trademark" in the singular does not change this: the use of the singular form in most of the provisions of the Agreement speaks in favour of this being a way of drafting, rather than an interpretative factor. The singular form is also used in Article 17; in this regard, the panel in *EC – Trademarks and Geographical Indications (US)* noted that "nothing in the text of Article 17 indicates that a case-by-case analysis is a requirement under the TRIPS Agreement". In light of this, Norway submits that there is no basis in Article 20 to require an individualized assessment of "justifiability" in cases where the special requirements at issue apply to a group of trademarks.⁵¹⁰²

7.2488. Singapore is of the view that an individualized assessment of trademarks is not required by the terms of the TRIPS Agreement. If no such requirement is found in respect of Article 17 of the TRIPS Agreement, which governs exceptions to rights conferred by a trademark, *a fortiori* such requirement cannot apply in respect of the use of a trademark, which is not a right conferred under the TRIPS Agreement.⁵¹⁰³

7.2489. South Africa argues that the justifiability of a measure must be assessed in its entirety, as a whole. There may be different factors that inform the justifiability of a measure; however the measure as a whole and the objective of such a measure should be examined as one single process.⁵¹⁰⁴

⁵⁰⁹⁹ Japan's third-party submission, paras. 30-32.

⁵¹⁰⁰ New Zealand's third-party response to Panel question No. 18, pp. 8-9 (referring to Panel Report, *EC – Trademarks and Geographical Indications (US)*, para. 7.672).

⁵¹⁰¹ Nicaragua's third-party response to Panel question No. 18, p. 13.

⁵¹⁰² Norway's third-party response to Panel question No. 18, paras. 40-42 (quoting Honduras's first written submission, para. 289; and Panel Report, *EC – Trademarks and Geographical Indications (US)*, para. 7.672).

⁵¹⁰³ Singapore's third-party response to Panel question No. 18, p. 11 (referring to Panel Report, *EC – Trademarks and Geographical Indications (US)*, para. 7.672).

⁵¹⁰⁴ South Africa's third-party response to Panel question No. 18, p. 8.

7.2490. Zambia fails to see any justification for the TPP measures, in light of, *inter alia*, the failure of the measures to consider each trademark individually.⁵¹⁰⁵

7.2491. Zimbabwe argues that Australia imposes a ban on trademarks without examining whether individual marks are a cause for increase in smoking rates or prevent existing smokers from quitting. In its view, this is contrary to the principle of "product independence" as reflected in Article 15.4 of the TRIPS Agreement.⁵¹⁰⁶

Analysis by the Panel

7.2492. The question before us here is whether Article 20 requires the "unjustifiability" of any "special requirements" imposed on the use of trademarks to be assessed, in all cases, in relation to each individual trademark and its specific features and whether, as a result, the encumbrances imposed by the TPP measures are *per se* "unjustifiable" in that they do not involve such an individual assessment but rather apply to all trademarks on tobacco products without distinction.

7.2493. In accordance with the applicable rules of interpretation, we first consider the text of Article 20.⁵¹⁰⁷ We note that this text, both in its first and second sentences, is silent on whether any special requirements it refers to concern the use of individual trademarks or a class of trademarks, or use of trademarks in particular situations. The text merely provides that such special requirements shall not unjustifiably encumber the use of "a trademark" in the course of trade.

7.2494. As described above, the parties disagree on the implications of the use of the term "a trademark" in the singular in the first sentence of Article 20. We agree with Australia and a number of third parties that the use of this term in the singular is a drafting convention used in many provisions of the TRIPS Agreement, and we are therefore not persuaded that it implies, as such, that the justifiability of any special requirements must be assessed in respect of each individual trademark.⁵¹⁰⁸

7.2495. Many provisions of the TRIPS Agreement setting out minimum rights and permissible exceptions similarly use the singular form to establish the general level of protection that applies to all protected subject-matter. For example, certain provisions that determine the scope for permissible exceptions to the rights granted to right holders under the respective sections of Part II of the Agreement also use the singular form: Article 13, which is applicable to copyright, refers to "the work" and "the right holder"; Article 17, applicable to trademarks, refers to "a trademark"; and Article 30, applicable to patents, refers to "a patent". Previous panels have applied those provisions to measures that affected a range of protected subject-matter rather than individual works, trademarks or patents, suggesting that the use of the singular was not considered material in delineating the consistency of those domestic measures with the provisions in question. In *US – Section 110(5) Copyright Act*, the panel found that certain domestic limitations to the rights to communicate works to the public met the requirements of Article 13 of the TRIPS Agreement and thus were consistent with Articles 11bis(1)(iii) and 11(1)(ii) of the Berne Convention (1971) as incorporated into the TRIPS Agreement by Article 9.1 of that Agreement.⁵¹⁰⁹ In *EC – Trademarks and Geographical Indications*, the panel found a domestic regulation that provided a particular regime of coexistence between GIs and prior trademarks to be inconsistent with Article 16.1 of the TRIPS Agreement but justified by Article 17.⁵¹¹⁰ In *Canada – Pharmaceutical Patents*, the panel found that a domestic exception to exclusive rights allowing the production of patented inventions for the purposes of regulatory review satisfied the conditions of Article 30, and thus was not inconsistent with Article 28.1 of the TRIPS Agreement.⁵¹¹¹

⁵¹⁰⁵ Zambia's third-party statement, para. 13.

⁵¹⁰⁶ Zimbabwe's third-party submission, para. 35.

⁵¹⁰⁷ The text of Article 20 is reproduced in paragraph 7.2131 above.

⁵¹⁰⁸ We note that the term "the trademark" is also in the singular in the second sentence of Article 20, which allows Members to prescribe a requirement that the trademark identifying the undertaking producing the goods or services is used along the trademark distinguishing those goods or services.

⁵¹⁰⁹ Panel Report, *US – Section 110(5) Copyright Act*, para. 7.1(a).

⁵¹¹⁰ Panel Reports, *EC – Trademarks and Geographical Indications (Australia)*, para. 7.686; and *EC – Trademarks and Geographical Indications (US)*, para. 7.688.

⁵¹¹¹ Panel Report, *Canada – Pharmaceutical Patents*, para. 7.84.

7.2496. In light of the above, we do not find support in the text or immediate context of Article 20 for the complainants' assertion that special requirements that encumber the use of trademarks could only be "justifiable" on the basis of an assessment of individual trademarks and their specific features.

7.2497. The complainants emphasize that trademarks are acquired, registered, maintained, invalidated and enforced on an individual basis. Australia agrees, but responds that this is a consequence of the fact that trademarks must be distinctive and it does not follow that any special requirements upon the use of trademarks must similarly be formulated and justified in respect of each individual trademark.

7.2498. We note that the definition in Article 15.1 of the TRIPS Agreement of what can constitute a trademark refers to any sign, or any combination of signs, that is "capable of distinguishing the goods or services of one undertaking from those of other undertakings". We agree with the complainants that it is in the nature of trademark protection that decisions on eligibility for protection, registration and invalidation are taken in respect of individual trademarks. This is reflected in Article 15, as well as under Articles 6 and 6*quinquies* of the Paris Convention (1967). The enforcement of the rights conferred under Article 16.1 of the TRIPS Agreement requires a consideration of whether a third party's use of a sign that is identical or similar to a registered trademark is likely to cause confusion. This assessment by its very nature involves comparing the third-party sign and the registered trademark in question. However, it does not follow from this, in our view, that special requirements under Article 20 would always need to be formulated and assessed in respect of individual trademarks, not least because these requirements govern the use of trademarks and have no bearing on their eligibility for registration nor on specific decisions whether to register an individual trademark. Similarly, we see no basis for transposing the rules on the *registration or invalidation* of individual trademarks applicable in the situations covered under Article 6*quinquies*, to the interpretation of Article 20, which does not relate to the registration or invalidation of trademarks but to their use.⁵¹¹²

7.2499. Any special requirements on the *use* of trademarks, rather, should be considered under the terms of Article 20. As we have already noted, the obligation under Article 20 is that such requirements shall not be imposed "unjustifiably". This text is silent on whether such requirements concern the use of individual trademarks, a class of trademarks, or use of trademarks in particular situations. We see no reason to assume that WTO Members may not choose to address the use of trademarks in a general manner, within the constraints of Article 20 and other relevant provisions of the TRIPS Agreement.

7.2500. Both the Dominican Republic and Australia cite the panel report in *EC – Trademarks and Geographical Indications (US)* in support of their respective positions. The relevant passage reads as follows:

The Panel observes that Articles 7(4) and 14(3) of the Regulation do require a case-by-case analysis at the time of a decision on GI registration and, even though

⁵¹¹² With reference to Sections B and C of Article 6*quinquies* of the Paris Convention (1967), the Dominican Republic argues that, if a Member has not invalidated a specific trademark on the grounds that it is misleading or is otherwise contrary to morality, it cannot, under Article 20, deny the use of that trademark because of its features, unless it also considers that trademark on its individual merits. Dominican Republic's second written submission, paras. 214-223. As the Appellate Body has explained, "Article 6*quinquies* A(1) provides an alternative way of obtaining protection of that trademark in other countries of the Paris Union". Appellate Body Report, *US – Section 211 Appropriations Act*, para. 134. Article 6*quinquies*, Section B provides that those trademarks that are covered by that Article may be neither denied registration nor invalidated except in certain specified cases, including when they are contrary to morality or public order and, in particular, of such a nature as to deceive the public. As we have noted, it is in the nature of trademark protection that decisions on the registration or invalidation are taken in respect of a particular trademark, including in situations covered by Article 6*quinquies*. Honduras observes that, under Article 6*quinquies* of the Paris Convention, Members are required to register and protect trademarks "*telle quelle*" under certain circumstances. It argues that this includes the ability to *use* a trademark, and that, therefore, deviations from the "*telle quelle*" rule in respect of use will depend on the individual nature of each particular trademark. See para. 7.2447 above. In section 7.3 above, we found that the "*telle quelle*" rule under Article 6*quinquies* does not relate to the ability to *use* a trademark. Therefore, it also does not follow from Article 6*quinquies* that, under Article 20, whether special requirements on use have been imposed "unjustifiably" necessarily has to be assessed in respect of each individual trademark.

they do not require a case-by-case analysis at the time of subsequent use, nothing in the text of Article 17 indicates that a case-by-case analysis is a requirement under the TRIPS Agreement.⁵¹¹³

7.2501. As described above, Australia considers that the panel's conclusion applies *a fortiori* to the interpretation of Article 20. For the Dominican Republic, it implies that, under Article 20, individual assessment is not always required but may be required depending on the circumstances. In the course of the proceedings, Honduras clarified that it does not believe that Article 17 necessarily requires that a measure must address individual trademarks; rather, what matters is that the scope of the exception be "limited"; in its view, this supports its argument that under Article 20 encumbrances must have a "limited" nature.

7.2502. We note that, in the discussion preceding the cited paragraph above, the panel in *EC – Trademarks and Geographical Indications (US)* explained how the legitimate interests of the owner of a prior trademark are taken into account when a subsequent GI is registered under the relevant EC regulation. The same panel held that Article 17 does not require case-by-case analysis in respect of exceptions to the rights conferred under Article 16 and that the number of trademarks or trademark owners affected by an exception is not determinative in considering whether an exception is "limited" for the purposes of Article 17.⁵¹¹⁴ This interpretation is consistent with prior interpretations of similar general exceptions clauses contained in Articles 13 and 30.⁵¹¹⁵

7.2503. We note that, in prior rulings on Article 17⁵¹¹⁶, the term "limited" has not been understood to require that exceptions to the rights conferred be applied in respect of individual trademarks. The fact that the term "limited" in Article 17 does not imply that Members are necessarily required to formulate exceptions to the rights conferred in respect of individual trademarks supports the view that, similarly, Members are not necessarily required to formulate any special requirements under Article 20 in respect of individual trademarks. We further note that the term "limited" is used in Article 17 to qualify permissible exceptions to the rights conferred under Article 16, while the distinct term "unjustifiably" is used in Article 20 to qualify special requirements that may be imposed on the use of trademarks.

7.2504. This view is also consistent with our understanding that Article 20 reflects the balance intended by the drafters of the TRIPS Agreement between the existence of a legitimate interest of trademark owners in using their trademarks in the marketplace, and the right of WTO Members to adopt measures for the protection of certain societal interests that may adversely affect such use⁵¹¹⁷, including for public health reasons.

7.2505. In light of the above, we find that Article 20 does not require the unjustifiability of special requirements under Article 20 to be in all cases assessed by a Member in respect of individual trademarks and their specific features. The extent to which an assessment of the unjustifiability of specific encumbrances will require an assessment on the basis of individual trademarks and their specific features will depend on the circumstances of the case. In particular, when a Member applies such requirements to a class of trademarks or to some specific types of situations rather than to the specific features of particular trademarks, an assessment of unjustifiability of such requirements may need to focus on their overall rationale as it relates to the reason for adopting them.

7.2506. This interpretation is confirmed, in our view, by the negotiating history of Article 20, which provides some indication of the types of measures that Article 20 was designed to address. The first two examples in the illustrative list, namely "use with another trademark" and "use in a special form" already appeared in early proposals of GATT Contracting Parties.⁵¹¹⁸ One such proposal included examples of the relevant policies applied by a number of countries at that time,

⁵¹¹³ Panel Report, *EC – Trademarks and Geographical Indications (US)*, para. 7.672.

⁵¹¹⁴ See Panel Report, *EC – Trademarks and Geographical Indications (US)*, paras. 7.650 and 7.654.

⁵¹¹⁵ See Panel Reports, *US – Section 110(5) Copyright Act* (with respect to Article 13); and *Canada – Pharmaceutical Patents* (with respect to Article 30).

⁵¹¹⁶ Panel Report, *EC – Trademarks and Geographical Indications (Australia)*, paras. 7.644-7.686.

⁵¹¹⁷ See para. 7.2429 above.

⁵¹¹⁸ See, e.g. the suggestions by the United States, Switzerland, and India in GATT documents

MTN.GNG/NG11/W/14/Rev.1, p. 6; MTN.GNG/NG11/W/73, Article 217; and MTN.GNG/NG11/W/37, para. 42(iv), respectively.

namely the requirement to display the generic name on a drug in conjunction with a brand name, and the use of a foreign trademark in conjunction with a domestic trademark.⁵¹¹⁹ Both practices concern policies applied to entire categories of trademarks.

7.2507. In the circumstances of the present case, we note Australia's explanation that the removal of stylized fonts, logos, emblems and other branding imagery from trademarks on tobacco packaging and products is intended to prevent the use of such imagery to communicate specific messages to targeted demographic groups or to convey any positive associations. It further explains that the TPP measures are not concerned with the specific features of particular trademarks; rather, their premise is that prescribing a standardized, plain appearance for tobacco packages and products is intended to minimize the ability of tobacco packages and products to increase the appeal of tobacco products, detract from the effectiveness of graphic health warnings, or mislead consumers as to the harms of tobacco use. We consider that this approach is not, *per se*, unjustifiable. Rather, as described above, to the extent that the requirements at issue relate to an entire class of marks or signs, an assessment of their unjustifiability is best approached in terms of the extent to which this is supported by the reasons for their adoption. We will therefore consider further whether this is the case in respect of the TPP measures, as part of our analysis in the section 7.3.5.5.3.4 below.

7.2508. In light of the above, we find that the complainants have not demonstrated that the trademark requirements of the TPP measures are *per se* inconsistent with Australia's obligations under Article 20 on the grounds that they do not provide for individual assessment of trademarks and their specific features.

7.3.5.5.2.3 Compliance with domestic regulatory procedures

Main arguments of the parties

7.2509. Indonesia argues the TPP measures unjustifiably encumber the use of trademarks in the course of trade because Australia had failed to follow its own process in adopting plain packaging. More specifically, it asserts that one of the definitions for "justified" is "to show sufficient lawful reason for an act done". It adds that the definition of "lawful" is "being in harmony with the law".⁵¹²⁰ It alleges that Australia failed to follow its established regulatory procedures during the passage of its TPP measures. This regulatory process was designed to determine, *inter alia*, whether the proposed TPP Regulations were "justified". Indonesia alleges that Australia had to bypass its regulatory process because the Government could not convince its own OBPR that the TPP measures were justified. By circumventing this process, Australia failed to develop the very justification required by Article 20 for the encumbrances on tobacco trademarks imposed by its TPP measures.⁵¹²¹

7.2510. Australia responds that it fully adhered to its own internal administrative and legislative processes in developing the TPP measures. It adds that, in any event, it is legally irrelevant to the interpretation and application of Article 20 whether Australia did or did not adhere to its own internal processes. In its view, the evaluation of whether special requirements imposed upon the use of a trademark are "unjustifiable" turns on the objective rationale for those special requirements, not on any question of adherence to domestic law.⁵¹²²

⁵¹¹⁹ India's proposal in GATT document MTN.GNG/NG11/W/37, para. 42(iv).

⁵¹²⁰ Indonesia's first written submission, para. 295 (referring to Merriam-Webster online, definition of "lawful", <<https://www.merriam-webster.com>>, accessed 29 September 2014).

⁵¹²¹ Indonesia's first written submission, para. 295-302 (referring to Howell Report, (Exhibit UKR-4)).

⁵¹²² Australia's first written submission, para. 423 and Part II.G.1. In footnote 603 to its first written submission, Australia explains that the Australian regulatory impact analysis process allows for a PIR in the circumstances where, for one reason or another, a RIS is not completed in relation to a regulatory proposal, and must commence within one to two years of implementation. The PIR is a similar process to that of a RIS. Australia adds that, consistent with Australian regulatory best practice, the PIR process for the TPP measures commenced by 1 December 2014. It states that "[t]hus, Indonesia is simply incorrect when it argues that the adoption of the tobacco plain packaging measure was not 'lawful' or 'in harmony with law'".

Analysis of the Panel

7.2511. In Section 7.3.5.1.3 above, we established the standard of review for assessing whether special requirements "unjustifiably" encumber the use of a trademark within the meaning of Article 20. We do not exclude the possibility that the manner in which a measure was prepared and adopted may inform the assessment of the unjustifiability of specific "special requirements" under that standard. However, in our view, Article 20 does not impose any specific independent obligation on Members as to how they should design their domestic legislative procedures or how those procedures should operate. A Member's compliance with its own domestic regulatory procedures does not, in itself, determine whether a Member has complied with its obligations under Article 20.

7.2512. We therefore do not consider it necessary to examine further Indonesia's arguments that Australia's alleged lack of compliance with its own domestic regulatory procedures in the process leading to the adoption of the TPP measures would, in and of itself, render the TPP measures inconsistent with Article 20.

7.2513. We note that, in section 2.1.2.9 above, we described the Australian regulatory impact analysis process and how the Australian Government carried it out in relation to the TPP measures, including by completing a PIR of tobacco plain packaging in February 2016.

7.3.5.2.4 Whether encumbrances falling within the scope of the listed examples in the first sentence of Article 20 are presumed to be "unjustifiabl[e]"

Main arguments of the parties

7.2514. Cuba argues in its first written submission that the trademark restrictions in the TPP measures fall within the illustrative list of measures in the first sentence of Article 20 and, therefore, are "presumptively invalid".⁵¹²³ In other words, that sentence lists measures which are to be presumed to violate Article 20. In Cuba's view, this is implied by the use of the term "such as" immediately after the term "unjustifiably encumbered by special requirements" and a comma. The listing that follows the comma is a listing of special requirements that involve unjustifiable encumbrances.⁵¹²⁴

7.2515. Cuba argues that this position is supported by the text of Article 20, the context and the drafting history.⁵¹²⁵ In particular, it argues that, since the second sentence of Article 20 provides that a subset of the listed measures is permissible, the appropriate inference is that the first sentence provides that the listed measures are impermissible.⁵¹²⁶ In its view, the drafting history indicates that each of the measures listed in the first sentence were subject of demands for proscription from participants in the Uruguay Round negotiations regardless of whether or not they could pass a test of justifiability; the eventual inclusion of the listing in the first sentence suggest that the negotiators were able to reach consensus that this set of measures should be proscribed or at least presumed to be proscribed.⁵¹²⁷

7.2516. In light of this, Cuba submits that "once a measure falls within the scope of the illustrative list then it is presumptively unjustifiable. In other words, unless the reviewing panel has a very high degree of confidence that the measure achieves a legitimate objective in a proportionate manner, it must rule that it violates Article 20 of the TRIPS Agreement."⁵¹²⁸

7.2517. Australia responds that "[t]he three examples provided in the first sentence of Article 20 are merely illustrations of what might constitute 'special requirements', not illustrations of special requirements that are unjustifiable or 'presumptively unjustifiable'. This is evident from the

⁵¹²³ Cuba's first written submission, paras. 323-325.

⁵¹²⁴ Cuba's first written submission, para. 326.

⁵¹²⁵ Cuba's first written submission, paras. 328-330.

⁵¹²⁶ Cuba's first written submission, para. 329.

⁵¹²⁷ Cuba's first written submission, para. 330.

⁵¹²⁸ Cuba's first written submission, para. 331.

placement of these three examples immediately after 'special requirements', introduced by 'such as'.⁵¹²⁹

7.2518. In advance of its first meeting with the parties, the Panel requested all complainants to clarify whether they consider that the situations introduced by the terms "such as" in Article 20 constitute "special requirements on use", or "encumbrances" or "unjustifiable encumbrances".⁵¹³⁰

7.2519. Honduras responds that it considers that the three situations introduced by the term "such as" in Article 20 are examples of "special requirements", which is clear from the fact that these three situations follow immediately the terms "such as", the ordinary meaning of which is "of a kind or character to be indicated or suggested". In its view, the text, context and negotiating history of Article 20 do not suggest that a "special requirement" is by definition "unjustifiable" within the meaning of this provision.⁵¹³¹

7.2520. The Dominican Republic likewise considers that the illustrative list of examples that follows the term "such as" does not list examples of measures that necessarily involve unjustifiable encumbrances. It argues, *inter alia*, that although there is some ambiguity in the English and Spanish versions of the text, the French text suggests that the three examples involve "special requirements": the French version indicates that the examples are "special requirements", since the term "*telles que*" (or "such as") is inscribed in the plural and accords with the term "*prescriptions spéciales*" (or "special requirements").⁵¹³²

7.2521. Indonesia understands that the illustrative list of special requirements provides examples of measures that "encumber use in the course of trade".⁵¹³³

7.2522. Cuba "refers the Panel to the reply given by Honduras, which Cuba endorses inasmuch as it considers that the examples introduced by 'such as' are examples of special requirements that encumber the use of trademarks".⁵¹³⁴

Main arguments of the third parties

7.2523. Canada takes the view that the listed examples are not examples of "unjustifiable" special requirements that encumber the use of a trademark; rather, the obligation establishes that the listed requirements, like other similar requirements, must not "unjustifiably" burden the use of a trademark. Requirements that "justifiably" encumber how a trademark may be used do not violate Article 20.⁵¹³⁵ This interpretation is substantiated by the French text.⁵¹³⁶ Furthermore, it is supported by the negotiating history: the word "unjustifiably" was inserted into the text (initially in square brackets) after a general consensus had been achieved on the list of "special requirements" to be included. In its view, this demonstrates that the requirements in the list were not considered to be "unjustifiable", and that the term was included to provide Members with the opportunity to justify any potential offending measure.⁵¹³⁷

7.2524. Singapore discusses Cuba's arguments relating to the text of Article 20, the context and the drafting history.⁵¹³⁸ In particular, it argues that it would be erroneous to infer from the fact that the second sentence of Article 20 refers to requirements that are permissible that the three examples listed in the first sentence are therefore presumptively unjustified. Instead, one can only say definitively that a justification is not required in respect of a measure falling within the second sentence of Article 20.⁵¹³⁹ Commenting on the negotiating history, Singapore notes that the eventual outcome of Article 20 was a compromise among countries that demanded the proscription of certain measures regardless of whether or not they could pass a test of

⁵¹²⁹ Australia's first written submission, para. 422.

⁵¹³⁰ Panel question No. 39.

⁵¹³¹ Honduras's response to Panel question No. 39, p. 17.

⁵¹³² Dominican Republic's response to Panel question No. 39, paras. 156-157 and 164.

⁵¹³³ Indonesia's response to Panel question No. 39, para. 44.

⁵¹³⁴ Cuba's response to Panel question No. 39 (annexed to its response to Panel question No. 138).

⁵¹³⁵ Canada's third-party submission, para. 69.

⁵¹³⁶ Canada's third-party submission, paras. 71-72.

⁵¹³⁷ Canada's third-party submission, para. 73.

⁵¹³⁸ Singapore's third-party submission, paras. 39-42.

⁵¹³⁹ Singapore's third-party submission, para. 40.

justifiability, those that wished to leave the matter of use of trademarks to national legislation, and others that proposed to proscribe certain special requirements unless they are not unjustifiable.⁵¹⁴⁰ Singapore submits that, in light of the negotiating history, the interpretation that best reflects the intention of the drafters is one where the examples listed in the first sentence of Article 20 are encumbrances that are not allowed if they are unjustifiable, while the example contained in the second sentence of Article 20 is permitted because it is deemed justifiable.⁵¹⁴¹

Analysis of the Panel

7.2525. As noted earlier, the term "such as" is placed immediately after the term "special requirements", indicating that the enumeration that follows identifies examples of "special requirements". As noted by both the Dominican Republic and Canada, in the French version, the term "*telles que*" in its plural form refers to "*des prescriptions spéciales*".⁵¹⁴²

7.2526. We therefore find that the situations identified in this list are illustrations of special requirements, rather than examples of encumbrances that are presumptively "unjustifiable". Special requirements falling within the scope of one of the three examples are therefore subject to the same obligation as other special requirements, namely that they shall not unjustifiably encumber the use of a trademark in the course of trade.

7.2527. This interpretation is confirmed, in our view, by the negotiating history of Article 20.⁵¹⁴³ The draft text proposals introduced during the first half of 1990 fell into three categories: they would have either prohibited special requirements that encumber the use of trademarks, allowed them provided that such use was not encumbered "unjustifiably", or left the regulation of any conditions for the use of trademarks entirely for domestic regulation.⁵¹⁴⁴ These draft texts formed the basis for the subsequent drafts.⁵¹⁴⁵ The negotiators eventually settled on the second formulation that disallows only those special requirements that "unjustifiably" encumber the use of a trademark in the course of trade.⁵¹⁴⁶

7.2528. In light of the above, and of our earlier finding in paragraph 7.2526, we do not consider it necessary to examine further, for the purposes of addressing Cuba's claim of *per se* violation, whether the special requirements that are part of the TPP measures fall within the scope of the illustrative list in the first sentence of Article 20.

⁵¹⁴⁰ Singapore's third-party submission, para. 41.

⁵¹⁴¹ Singapore's third-party submission, para. 42.

⁵¹⁴² In the French text, the first sentence of Article 20 reads as follows: "L'usage d'une marque de fabrique ou de commerce au cours d'opérations commerciales ne sera pas entravé de manière injustifiable par des prescriptions spéciales, telles que l'usage simultané d'une autre marque, l'usage sous une forme spéciale, ou l'usage d'une manière qui nuise à sa capacité de distinguer les produits ou les services d'une entreprise de ceux d'autres entreprises." The Spanish text is "como por ejemplo".

⁵¹⁴³ We note that Cuba and Honduras, as well as Canada and Singapore, discuss the negotiating history of Article 20 to shed light on the role of the three examples. While Cuba explains that each of the measures listed in the first sentence of Article 20 were discussed by the negotiators, Singapore notes that the eventual outcome was a compromise between three categories of proposals by the GATT 1994 Contracting Parties.

⁵¹⁴⁴ Proposals by the European Communities, the United States, Switzerland, and Japan, and a group of twelve countries, namely Argentina, Brazil, Chile, China, Colombia, Cuba, Egypt, India, Nigeria, Peru, Tanzania, and Uruguay, circulated in GATT documents MTN.GNG/NG11/W/68 (European Communities), MTN.GNG/NG11/W/70 (United States), MTN.GNG/NG11/W/73 and Corr.1 (Switzerland), MTN.GNG/NG11/W/74 (Japan) and MTN.GNG/NG11/W/71 (Argentina, Brazil, Chile, China, Colombia, Cuba, Egypt, India, Nigeria, Peru, Tanzania, and Uruguay). Proposals relating to special requirements made at earlier stages of the negotiations can be found in GATT documents MTN.GNG/NG11/W/14 and Rev.1 (United States), and MTN.GNG/NG11/W/35 and Corr.1 (Australia), MTN.GNG/NG11/W/37 (India), MTN.GNG/NG11/W/38 and Add.1 (Switzerland), MTN.GNG/NG11/W/47 (Canada), and MTN.GNG/NG11/W/51 (Hong Kong).

⁵¹⁴⁵ GATT documents MTN.GNG/NG11/W/76 and MTN.TNC/W/35/Rev.1.

⁵¹⁴⁶ See p. 65 of the December 1991 Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, GATT document MTN.TNC/W/FA, known as the "Dunkel draft". There were no further changes to the text of Article 20 before the adoption the TRIPS Agreement as part of the Uruguay Round results.

7.3.5.5.3 Application to the TPP measures

7.3.5.5.3.1 Introduction

7.2529. We recall our finding in paragraph 7.2430 that a determination of whether the use of a trademark in the course of trade is being "unjustifiably" encumbered by special requirements should involve a consideration of the following factors:

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

7.2530. We also noted that the manner in which the different interests at issue should be "weighed and balanced" in order to reach a conclusion as to whether an encumbrance should be found to be "unjustifiable" needs to be determined on a case-by-case basis, in the light of the particular circumstances of the case.

7.2531. We first consider the nature and extent of the encumbrances resulting from the trademark requirements of the TPP measures, and then the reasons for which these special requirements are applied. We will then consider whether these reasons provide sufficient support for the resulting encumbrances, taking into account the manner in which the special requirements relate to the reasons for which they are applied, including whether they can and do contribute towards the societal interests they are intended to safeguard. In this context, we will weigh and balance the different interests at issue to reach a conclusion as to whether the encumbrances resulting from the TPP measures should be found to "unjustifiably" encumber the use of trademarks in the course of trade.

7.3.5.5.3.2 Nature and extent of the encumbrance resulting from the TPP measures

7.2532. As outlined above, we now turn to whether the trademark-related special requirements in the TPP measures "unjustifiably" encumber the use of a trademark in the course of trade. We first consider the nature and extent of the encumbrances on the use of trademarks resulting from these requirements.

7.2533. We recall our finding above that Article 16.1 of the TRIPS Agreement provides for a registered trademark owner's right to prevent certain activities by unauthorized third parties under the conditions set out in the first sentence of Article 16.1.⁵¹⁴⁷ In addition, Members have undertaken, under Article 20, not to unjustifiably encumber by special requirements the use of a trademark in the course of trade. In paragraph 7.2286 above, we found that the relevant "use" for the purposes of Article 20 is not limited to the use of a trademark for the specific purpose of distinguishing the goods and services of one undertaking from those of other undertakings. In the following, we consider the implications that these constraints have in the marketplace, both on a trademark's ability to distinguish goods and services in the course of trade and on a trademark owner's ability to extract economic value from the use of its trademark.

7.2534. The focus of our analysis at this stage is on the nature and extent of the encumbrances on the use of a trademark in the marketplace, to enable us to properly weigh the impact of these constraints against the reasons for which the special requirements are applied, and to consider whether these reasons provide sufficient support for the resulting encumbrances.

⁵¹⁴⁷ Para. 7.1978 above.

Main arguments of the parties⁵¹⁴⁸

7.2535. Honduras argues that "[t]rademarks are an essential element of commercial life. It is impossible to conceive of a sophisticated economy that does not feature the systematic use of trademarks by commercial operators."⁵¹⁴⁹ It adds that the use of a trademark forms an essential part of the legal rights and obligations under Articles 15 to 21, as well as the policies and norms underpinning these legal rights and obligations. From a commercial perspective, a merchant will expend time and financial resources into creating a trademark only if it can subsequently use the trademark and earn profits from that use.⁵¹⁵⁰ Similarly, from a legal perspective, the concept of "use" pervades the TRIPS legal framework governing trademarks.⁵¹⁵¹

7.2536. Honduras adds that "the core function of trademarks – namely distinguishing goods and services of the trademark owner – as well as the trademark protection under the TRIPS Agreement depends on the actual use of the trademark in the course of trade".⁵¹⁵² It adds that origin, quality and other characteristics are at the heart of the distinguishing function that any trademark plays in the marketplace.⁵¹⁵³

7.2537. The Dominican Republic argues that, in a market economy, competition requires perceptible differences between competing goods and services, such as differences in price, quality and availability. For consumer goods, branding plays a critical role in promoting difference in the marketplace. Consumers are usually willing to pay a premium for this guarantee of the quality, characteristics and reputation of the product.⁵¹⁵⁴ By distinguishing goods and services in the marketplace, and by signalling quality, characteristics, and reputation to consumers, trademarks create valuable competitive opportunities for producers and exporting countries.⁵¹⁵⁵ The Dominican Republic contends that it cannot accept Australia's efforts to prevent its producers from continuing to compete by using trademarks and GIs to signal the premium quality, characteristics, and reputation of their products.⁵¹⁵⁶

7.2538. The Dominican Republic adds that differentiation through trademarks enables competitive opportunities by facilitating the development of consumer loyalty, and thereby sustaining market share and supporting price premiums.⁵¹⁵⁷ TRIPS provisions on trademarks promote competitive opportunities by requiring Members to protect the ability of goods and service suppliers to distinguish their products from those of other suppliers.⁵¹⁵⁸ In order to serve the function of distinguishing goods or services, a sign must be used in connection with those goods or services.⁵¹⁵⁹ Without the ability to use trademarks in commerce, the benefits that warrant the international protection of trademarks disappear.⁵¹⁶⁰ Article 20, in particular, serves a critical role in the TRIPS Agreement, acting as a crucial element in the trademark regime as a whole, by seeking to ensure that, in principle at least, trademarks can perform their basic function of distinguishing goods or services through use in commerce.⁵¹⁶¹ The TPP measures impose a severe

⁵¹⁴⁸ The parties have not provided arguments that specifically address the "nature and extent" of the encumbrance on the use of a trademark, under the exact heading used in this section, which reflects the test for determining whether the use of a trademark in the course of trade is being "unjustifiably" encumbered by special requirements we have clarified above. Nonetheless, the parties have extensively discussed the implications of the trademark requirements of the TPP measures on the use of trademarks in the course of trade. We also note that some of the arguments exchanged on this issue overlap with their discussion of the trade-restrictiveness of the TPP measures under Article 2.2 of the TBT Agreement.

⁵¹⁴⁹ Honduras's first written submission, para. 143.

⁵¹⁵⁰ Honduras's first written submission, paras. 166-167.

⁵¹⁵¹ Honduras's first written submission, para. 168. We have considered the related arguments concerning the legal interpretation of the relevant provisions of the TRIPS Agreement in the context of those particular provisions.

⁵¹⁵² Honduras's first written submission, para. 272.

⁵¹⁵³ Honduras's response to Panel question No. 167, p. 21.

⁵¹⁵⁴ Dominican Republic's first written submission, paras. 10-12.

⁵¹⁵⁵ Dominican Republic's first written submission, para. 16.

⁵¹⁵⁶ Dominican Republic's first written submission, para. 22.

⁵¹⁵⁷ Dominican Republic's first written submission, para. 209.

⁵¹⁵⁸ Dominican Republic's first written submission, para. 220.

⁵¹⁵⁹ Dominican Republic's first written submission, para. 225.

⁵¹⁶⁰ Dominican Republic's first written submission, para. 243.

⁵¹⁶¹ Dominican Republic's first written submission, para. 344.

encumbrance, through special requirements, on word marks, composite marks and figurative marks.⁵¹⁶²

7.2539. Cuba underlines "the essential role that trademarks play in any economy, developed or developing, capitalist or socialist, in enabling consumers to make informed choices when they purchase goods or services and in creating incentives for suppliers to invest in quality". By creating consumer uncertainty, the TPP measures reduce the willingness of consumers to reward the Cuban industry's investments in quality by paying a premium for Cuban products.⁵¹⁶³

7.2540. Indonesia argues that, as the definition of "trademark" in Article 15.1 of the TRIPS Agreement reflects, the principal function of a trademark is to differentiate the goods and services of one company from those of another. The distinguishing function of trademarks gives customers a shorthand way of identifying products and their associated quality. It also promotes competition in the marketplace by providing a means for consumers to differentiate between products and by giving trademark owners an incentive to maintain the quality that consumers expect from their products. The removal of distinctive brand packaging from cigarettes reduces the willingness of consumers to pay for premium cigarette brands.⁵¹⁶⁴ A trademark owner's ability to use its trademark underlies the ability to differentiate products and promote competition in the marketplace. Therefore, use has become a cornerstone of trademark protection.⁵¹⁶⁵ It asserts that "[t]he intent of [the TPP measures] is to destroy even a legally registered trademark's ability to convey meaningful information to consumers about a legal product".⁵¹⁶⁶

7.2541. Australia responds that the TPP measures ensure that tobacco manufacturers can continue to distinguish their products from those of other manufacturers in the course of trade by allowing them to use company, brand and variant names on tobacco retail packaging. In addition, Section 28 of the TPP Act and other features of Australian law ensure that the inability of tobacco manufacturers to use certain types of trademarks (such as figurative trademarks) on tobacco products and packaging does not impair their rights under Australian law in respect of the registration and enforcement of such trademarks.⁵¹⁶⁷

7.2542. Australia argues that the TPP measures restrict the ability of trademarks (as well as other signs and branding elements) to serve a promotional function by prohibiting the use of non-standardized fonts, colours and logos on the retail packaging of tobacco products.⁵¹⁶⁸ The use of logos, emblems or other branding imagery on packaging can communicate specific messages to targeted demographic groups.⁵¹⁶⁹ In line with the Article 13 FCTC Guidelines, the measures are designed to eliminate the opportunity to use the package as a medium for advertising and promoting, and to convey any positive associations.⁵¹⁷⁰ Furthermore, the TPP measures lead to a greater noticeability of health warnings, largely because the visual interference and competition of brand images are greatly reduced.⁵¹⁷¹ The elimination of design features also contributes to reducing the ability of the pack to mislead consumers.⁵¹⁷²

7.2543. Australia argues that closely related to the distinguishing function ("source identification" function) is the function of indicating that products bearing the same trademark are manufactured under the control of the same commercial source and that, as a result, consumers may expect a consistency of experience with products bearing that trademark (sometimes referred to as the "quality" or "guarantee" function of trademarks).⁵¹⁷³ But the use of a trademark to advertise and promote the trademarked product is not part of the distinguishing function of a trademark.⁵¹⁷⁴

⁵¹⁶² Dominican Republic's second written submission, paras. 111-127 and 201-204.

⁵¹⁶³ Cuba's first written submission, paras. 333 and 337.

⁵¹⁶⁴ Indonesia's first written submission, paras. 132-136.

⁵¹⁶⁵ Indonesia's first written submission, para. 137.

⁵¹⁶⁶ Indonesia's first written submission, para. 267.

⁵¹⁶⁷ Australia's first written submission, para. 5.

⁵¹⁶⁸ Australia's first written submission, para. 86.

⁵¹⁶⁹ Australia's first written submission, para. 89.

⁵¹⁷⁰ Australia's second written submission, paras. 291-292.

⁵¹⁷¹ Australia's first written submission, para. 176.

⁵¹⁷² Australia's first written submission, paras. 187-200.

⁵¹⁷³ Australia's second written submission, para. 90.

⁵¹⁷⁴ Australia's second written submission, para. 95.

7.2544. In Australia's view, the complainants' assertion that trademarks serve to distinguish goods and services in commerce in terms of the "quality, characteristics, and reputation" of the product is a euphemism that the complainants have seized upon in order to describe the use of trademarks to advertise and promote tobacco products.⁵¹⁷⁵ As regards "quality", the TPP measures permit tobacco companies to use trademarked brand and variant names on retail tobacco packaging, thus allowing consumers to expect a consistency of experience with tobacco products bearing those trademarks, but curtail the use of trademarks to create "artificial" perceptions.⁵¹⁷⁶ As regards "characteristics", the TPP measures do not impede the use of trademarks to convey information about the actual characteristics of tobacco products, but reduce the opportunities for tobacco companies to use figurative elements, colours, stylized typefaces, and other design elements to associate their products with particular social or attitudinal "characteristics" (masculinity, femininity, etc.) or with other positive associations that are not actual characteristics of the product (such as purity, cleanliness, or healthiness).⁵¹⁷⁷ As regards "reputation", it is only through repeated use of the trademarked product that consumers may come to expect a particular experience with products bearing that trademark; Australia considers that the complainants are likely referring to the use of trademarks to impart a particular social or attitudinal "reputation" to tobacco products, as in "this cigarette has the reputation of being smoked by men", or "this cigarette has the reputation of being smoked by cool kids".⁵¹⁷⁸

7.2545. Australia asserts that the complainants have presented no evidence that any special requirements imposed by the TPP measures encumber the use of trademarks to distinguish the tobacco products of one undertaking from those of other undertakings. Rather, the TPP measures allow tobacco companies to use brand and variant names on retail tobacco packaging in order to distinguish their products from those of other undertakings.⁵¹⁷⁹

7.2546. In response to the Panel's question on whether there is any empirical evidence on consumers being unable to distinguish the goods of one undertaking from those of other undertakings with respect to the commercial source of those goods, Honduras submits that it is not aware of any empirical study following the implementation of the TPP measures showing that, as a result of the measures, consumers would have been unable to distinguish the goods of one undertaking from those of other undertakings with respect to the commercial source of those goods. It, however, underscores that such quantitative data would not in any way assist the Panel in the resolution of the claims under the TRIPS Agreement in the present disputes, because there is no specific requirement for the level of "actual confusion" among consumers or a specific "sufficiency" level for distinguishing products that is required by the TRIPS Agreement.⁵¹⁸⁰

7.2547. Honduras argues that whether or not trademarks perform functions other than identifying and distinguishing the source of the product depends on the circumstances in the market and the manner in which the proprietor uses the mark. "Certainly, depending on the product, trademarks could be used '*in* advertising'. However, that does not mean that, on tobacco products, trademarks are used *for* advertising in Australia because advertising has not been allowed for tobacco products in nearly the last 25 years. Nowadays, trademarks on tobacco products just communicate source and quality to consumers."⁵¹⁸¹

7.2548. Cuba responds that it does not have empirical evidence showing that, as a result of the TPP measures, consumers have been unable to distinguish the goods of one undertaking from those of other undertakings with respect to the commercial source of those goods. It, however, as also indicated by Honduras in its reply, considers this to be irrelevant to the present case.⁵¹⁸²

7.2549. As regards the role of a trademark, Cuba argues that consumers do not pay a higher price for Cuban cigars as recognition of the identity of the producer; consumers pay the premium because they subscribe to the trademark proposition communicated by a trademark. The manufacturers of prestige and luxury goods would not commit very substantial funds to marketing

⁵¹⁷⁵ Australia's second written submission, paras. 98 and 118.

⁵¹⁷⁶ Australia's second written submission, paras. 105-108.

⁵¹⁷⁷ Australia's second written submission, paras. 109-114.

⁵¹⁷⁸ Australia's second written submission, paras. 115-117.

⁵¹⁷⁹ Australia's second written submission, para. 121.

⁵¹⁸⁰ Honduras's response to Panel question No. 168, p. 22.

⁵¹⁸¹ Honduras's opening statement at the second meeting of the Panel, para. 12. (emphasis original)

⁵¹⁸² Cuba's response to Panel question No. 168, p. 11.

and global promotion of their trademarks if they would simply serve to identify a producer. For high-end luxury goods, trademarks are a means to signal status and prestige, a guarantee of quality, and a fundamental means of product differentiation.⁵¹⁸³

7.2550. Indonesia responds that, since the legal standard under the TRIPS Agreement does not require evidence of actual confusion in order to make out a claim of "likelihood of confusion" or "deceptive similarity", it has not expended its limited resources collecting evidence on whether consumers have been unable to distinguish the goods as a result of the TPP measures. In its view, the question before the Panel is not whether there is evidence of actual confusion in the Australian market but (i) whether there is a likelihood of confusion given that consumers have imperfect recollections and cigarette packs are now stripped of all distinguishing features; and (ii) whether the trademark owner of a figurative or stylized mark can protect itself against infringement with no minimum opportunity to use the mark.⁵¹⁸⁴

7.2551. Indonesia argues that the commercial source is only one indicator of the quality, characteristics, and reputation of a product, and is not always sufficient to prevent confusion. In its view, the evidence in the Australian market shows that word marks on tobacco products do not adequately distinguish quality, characteristics, and reputation. Specifically, the TPP measures have led to downtrading from higher- to low-priced tobacco products, which shows that the distinctions between brands have weakened, consumer loyalty has lessened, and switching between brands has increased.⁵¹⁸⁵

7.2552. The Dominican Republic argues that the distinguishing function of a trademark reflects a spectrum, where each additional distinguishing feature enhances the distinguishing power of the trademark on the spectrum. Correspondingly, interference with each additional feature lessens that distinguishing power. As regards figurative and composite marks, each trademark design feature is a distinct means by which consumers differentiate the relevant good. Trademark design features are potent visual cues that can be readily recognized by consumers. A distinctive typeface of a word mark makes an incremental contribution to distinguishing one competing good from another. The removal of these differentiating features means that the relevant quality, characteristics, and reputation are not adequately communicated to consumers, as they would be absent the TPP measures. The Dominican Republic claims that the evidence in the Australian market shows that the word marks on tobacco products do not adequately distinguish commercial source, quality, characteristics, and reputation. Specifically, the TPP measures have led to downtrading from higher- to low-priced tobacco products, which shows that the distinctions between brands have weakened, consumer loyalty has lessened, and switching between brands has increased.⁵¹⁸⁶

7.2553. The Dominican Republic adds that the TPP measures are designed, structured, and implemented to eliminate the opportunity for producers to differentiate their products using design features, such as trademarks, as well as the pack shape, size, opening mechanism, and compositional material. This differentiation engenders consumer loyalty and, in turn, increases consumers' willingness to pay. Consumers' perceptions of the quality of competing brands are based on a combination of (i) functional benefits and (ii) intangible benefits that consumers derive from each brand. The disproportionate impact on the perceived intangible benefits of premium products translates into reduced loyalty and a reduced willingness to pay for the premium products.⁵¹⁸⁷ Professor Steenkamp, an expert for the Dominican Republic and Honduras, explains in his rebuttal report:

Brand logo, font, color, and other brand-related packaging elements are important channels through which consumer quality perceptions are built and sustained (Richardson et al. 1994, Stokes 1985, Wells et al. 2007). Aribarg et al. (2014) argue that brand packaging is crucial to build and maintain positive and unique associations, as a means to differentiate the brand from competitor product offerings. ... Under PP,

⁵¹⁸³ Cuba's opening statement at the second meeting of the Panel, paras. 37-38.

⁵¹⁸⁴ Indonesia's response to Panel question No. 168, paras. 32 and 34.

⁵¹⁸⁵ Indonesia's response to Panel question No. 167, paras. 29 and 31.

⁵¹⁸⁶ Dominican Republic's responses to Panel question Nos. 167 and 168, paras. 173, 181, 184, and

185.

⁵¹⁸⁷ Dominican Republic's second written submission, paras. 933-936.

brand-specific elements are eliminated, thereby reducing the contribution of branding to the intangible benefits for both premium and value brands.

Consumers' perceptions of the quality of different brands are based on a mix of the functional benefits (e.g., taste, flavor, etc.) and intangible benefits delivered by that brand. Consumers of premium brands generally perceive greater functional benefits and intangible benefits for premium brands than for value brands. Often, the differences in intangible benefits are greater between premium and value brands than the differences in functional benefits (Park and Srinivasan 1994), and 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 for value brands.⁵¹⁸⁸

7.2554. The Dominican Republic explains that Professor Steenkamp dedicated a portion of his second rebuttal report to elaborating on the meaning of the term "intangible benefits".⁵¹⁸⁹ He defines the concept of "intangible benefits" as follows:

[T]he concept of "intangible benefit", as I have used it, relates to the benefit that comes from a consumer being able to rely, with a high degree of certainty, on the fact that the product they are purchasing has certain expected qualities and/or characteristics. In that case, the "intangible benefit" arises from the assurance – increased certainty – that a consumer derives about the product's quality and characteristics from the distinguishing design features, such as branding and trademarks.⁵¹⁹⁰

7.2555. Australia responds that the article to which Professor Steenkamp refers, Park and Srinivasan 1994, discusses the intangible benefits that products derive from brands. Based on the discussion in that article, there are two components to the intangible value that brands provide, namely (i) favourably biased attribute perception through which a consumer perceives the attributes of the product more favourably than an objective measurement of those attributes would suggest; and (ii) the non-attribute based component capturing brand associations unrelated to product attributes (e.g. the masculine image conveyed by the Marlboro Man).⁵¹⁹¹ Australia considers Professor Steenkamp's definition of "intangible benefits" in his second rebuttal report to be inconsistent with his earlier published views and the use of the term more generally in marketing literature.⁵¹⁹² In Australia's view, it is clear from the context that when Professor Steenkamp accepted in his rebuttal report that removing brand-specific elements from packaging reduced the contribution of branding to the intangible benefits of both premium and value brands, he was referring to all of the non-tangible features with which brands can imbue

⁵¹⁸⁸ Steenkamp Rebuttal Report, (Exhibit DOM/HND-14), paras. 92-93.

⁵¹⁸⁹ Dominican Republic's response to Panel question No. 169, para. 187.

⁵¹⁹⁰ Steenkamp Second Rebuttal Report, (Exhibit DOM/HND-19), para. 45. Professor Steenkamp summarizes his views by explaining that "premium brands provide 'intangible benefits' to consumers, by offering an assurance that the product being purchased has the tangible qualities and characteristics expected by the consumer. In other words, these intangible benefits are the assurance that the brand will deliver on the promised tangible benefits and characteristics based on the brand's reputation. Accordingly, intangible benefits reduce consumer uncertainty with respect to product choice, and these benefits are conveyed to consumers by the brand's name, logo, font and stylistic elements." Ibid. para. 6.

⁵¹⁹¹ Australia's comments on responses to Panel question No. 169, para. 146 (referring to Park and Srinivasan 1994, (Exhibit AUS-619), p. 272).

⁵¹⁹² Australia's comments on responses to Panel question No. 169, paras. 145-153. Australia quotes from Kumar and Steenkamp, *Private Label Strategy*, (Exhibit AUS-601), p. 99:

Manufacturer brands offer something intangible that most private labels do not (yet) offer. They allow consumers to identify with the values imbued in the brand, and help consumers express who they are and how these brands fit into their lifestyle and self-concept. Brand imagery refers to the personalized social-emotional bond the consumer has with a brand. What does the brand stand for, and does that appeal to me ... For example, brands like Marlboro, Harley-Davidson, Jack Daniels, and Levi's glamorize American ideals of the West, strength and masculinity.

products and which are attractive to consumers.⁵¹⁹³ Australia maintains that it is precisely these intangible benefits that the TPP measures are aimed at curtailing.⁵¹⁹⁴

Analysis by the Panel

7.2556. We recall that, as described above, in respect of retail packaging of tobacco products, the TPP measures permit the use of word marks that denote the brand, business or company name, or the name of the product variant, so long as these trademarks appear in the form prescribed by the TPP Regulations, but prohibit the use of stylized word marks, composite marks and figurative marks. In respect of tobacco products, the TPP measures prohibit the use of all trademarks on cigarettes, and, in respect of cigars, permit the use of trademarks denoting the brand, business or company name, or the name of the product variant, as well as the country of origin, so long as these trademarks appear in the form prescribed by the TPP Regulations.⁵¹⁹⁵

7.2557. The complainants emphasize the far-reaching nature of the TPP measures' prohibitions on the use on tobacco retail packaging and products of figurative trademarks, as well as of the figurative and stylized elements of composite and word marks. We agree that such prohibitions are far-reaching. Figurative elements, combinations of colours, and combinations of signs, form part of the definition of the protectable subject-matter under Article 15.1. Their inclusion in this definition suggests that the drafters of the TRIPS Agreement considered that it is possible to use such non-word trademark content to distinguish the goods of one undertaking from those of other undertakings. The TPP measures eliminate the possibility of applying figurative trademarks, or figurative or stylized elements of composite and word marks to tobacco retail packaging and products, to distinguish the goods of one undertaking in this manner from those of other undertakings.

7.2558. The TPP measures thus prevent any non-word components of the relevant trademarks, such as fonts, size, colours and placement of the trademark on the product, as well as all other distinctive visual content, from contributing to distinguishing the products in the marketplace. As described above⁵¹⁹⁶, in the complainants' view, the removal of figurative elements has undermined the ability of trademarks to signal tobacco products' quality, characteristics and reputation to consumers. The Dominican Republic distinguishes between functional (or tangible) benefits and intangible benefits that consumers derive from each brand. It argues that the TPP measures have a disproportionate impact on the perceived intangible benefits of premium products. The complainants further emphasize that, by eliminating the opportunity to differentiate tobacco products by using design features, the TPP measures result in reduced consumer loyalty and willingness to pay for premium products, which leads to downtrading in the Australian market.

7.2559. Australia, however, considers that the operation of the TPP trademark requirements should be viewed as a whole. It argues that the TPP measures ensure that tobacco manufacturers can continue to distinguish their products from those of other manufacturers in the course of trade by allowing them to use company, brand and variant names on tobacco retail packaging. Taking the permissive and prohibitive aspects of the measures together, Australia claims that the TPP measures have not affected tobacco companies' ability to use trademarks to distinguish their products in the course of trade. It emphasizes that the prohibition on the use of figurative and stylistic elements is merely intended to prevent the use of such elements for promotional purposes and to convey any positive associations, as well as to improve the noticeability of health warnings and to reduce the ability of the pack to mislead consumers.⁵¹⁹⁷

7.2560. We recall that the Panel in *EC – Trademarks and Geographical Indications* explained that:

The function of trademarks can be understood by reference to Article 15.1 as distinguishing goods and services of undertakings in the course of trade. Every trademark owner has a legitimate interest in preserving the distinctiveness, or capacity to distinguish, of its trademark so that it can perform that function. This

⁵¹⁹³ Australia's comments on responses to Panel question No. 169, para. 154.

⁵¹⁹⁴ Australia's comments on responses to Panel question No. 169, para. 153.

⁵¹⁹⁵ For further details, see sections 2.1.2.3.3 and 2.1.2.4 above.

⁵¹⁹⁶ See section "Main arguments of the parties" within section 7.3.5.5.3.2 above.

⁵¹⁹⁷ See section "Main arguments of the parties" within section 7.3.5.5.3.2 above.

includes its interest in using its own trademark in connection with the relevant goods and services of its own and authorized undertakings. Taking account of that legitimate interest will also take account of the trademark owner's interest in the economic value of its mark arising from the reputation that it enjoys and the quality that it denotes.⁵¹⁹⁸

7.2561. Although this passage concerns the panel's analysis of "the legitimate interests of the owner of the trademark" in Article 17, it provides useful contextual guidance as regards the legitimacy of concerns about constraints on the use of trademarks also for the purposes of Article 20. Furthermore, we recognize the importance of use of trademarks so that they can serve to distinguish products in the marketplace.

7.2562. Recognizing the legitimacy of the trademark owner's interest in using its trademark for various purposes, including to identify the source of the product and communicate benefits of the product, whether functional or intangible, we need to consider the impact of the TPP measures on the right holder's ability to use trademarks for these various purposes. We also recognize that the impact of these measures may vary between the different purposes for which the right holder may wish to use its trademark.

7.2563. As discussed in section 7.3.5.4.2 above, we consider that the relevant "use ... in the course of trade" under Article 20 is not limited to a particular function of trademarks. We recall in particular our finding in paragraph 7.2286 that such "use" is not limited to the use of a trademark to distinguish the goods and services of one undertaking from those of other undertakings. Article 20 does not distinguish between different functions that trademarks may serve in the marketplace. We therefore need not take a view on how to characterize these functions. As described above, a consideration of the relevant "use" for the purposes of Article 20 should be based on the "fact" of use in the course of trade. In our view, it would be inappropriate to conflate actual trademark use with the different functions served by such use.⁵¹⁹⁹ In the following, we will focus on the implications of the TPP trademark requirements on a trademark's ability to distinguish goods and services of undertakings in the course of trade and on the ways in which a trademark owner might wish to use its trademark in the marketplace, as well as how these requirements affect consumers.

7.2564. We first note that the TPP measures allow undertakings to use word marks that denote the brand, business or company name, or the name of the product variant on retail packaging of tobacco products for the purposes of distinguishing their tobacco products from those of other undertakings. The complainants have not sought to demonstrate that consumers have in fact been unable to distinguish the commercial source of tobacco products of one undertaking from those of other undertakings (i.e. the identity of the source or maker of the product) as a result of the TPP trademark requirements. However, as described above, they argue that the removal of figurative elements has undermined the ability of trademarks to signal individual tobacco products' quality, characteristics and reputation to consumers.

7.2565. Australia considers that the "quality function" is closely related to the "source identification function", and argues that the TPP measures do not impair the communication of the product's quality, characteristics and reputation as regards the consistency of experience and actual characteristics. Australia explains that the TPP measures are intended precisely to reduce the opportunities to signal artificial perceptions and attitudinal characteristics or reputations, which Australia characterizes as an "advertising function".

⁵¹⁹⁸ Panel Report, EC – *Trademarks and Geographical Indications (US)*, para. 7.664.

⁵¹⁹⁹ We note that the application of a trademark to the relevant goods can and often does serve multiple functions – hence one form of use which serves to distinguish the goods of one undertaking from those of another undertaking can also signal other attributes about the very same goods. Indeed, one undertaking's products can be distinguished from another undertaking's in part because of the intangible aspects of a brand, which include various aspects of reputation, quality, and other distinctive characteristics: this applies to word marks and the effect of their associations for the public, as well as to figurative marks or composite marks. It is, therefore, important to distinguish the empirical fact of trademark usage – for instance, the application of the mark to products that are offered to the public for sale – from the range of overlapping functions which such trademark usage can serve.

7.2566. We recall our earlier findings that branded packaging can act as an advertising or promotion tool in relation to tobacco products, and that this has in fact been considered to be the case by tobacco companies operating in the Australian market, even in the presence of significant restrictions on advertising in the period leading to the entry into force of the TPP measures. This is particularly the case in a regulatory context such as Australia's, where all other forms of advertising and promotion for tobacco products are prohibited.⁵²⁰⁰ The important role played by trademarks in branding and marketing of products has also been acknowledged. Trademarks have thus been described as "the legal anchor for the use of the commercial functions of brands".⁵²⁰¹

7.2567. The role played in this context by colours and other design features, the use of which is prohibited by the TPP measures, has also been acknowledged. We recall our findings in section 7.2.5.3.5.2 above that the evidence before us, in particular statements emanating from the tobacco industry itself, indicates that a key purpose of the use of branding on tobacco products, including packaging, is to generate certain positive perceptions in relation to the product in the eyes of the consumer, including, as described above, to "generate the optimal level of modernity, youthful image and appeal" among consumers.⁵²⁰² Indeed, as explained by Australia, the very purpose of the TPP measures, including their trademark aspects, is to prevent such design features from creating positive product perceptions and thus to discourage the use of tobacco products by consumers. By the same token, the TPP measures prevent these trademark features from being used by trademark owners in the marketplace as a means of product promotion or differentiation.

7.2568. We note in particular the various expert reports submitted by the complainants describing in detail the expected impact of the TPP measures on the ability to maintain or create product and brand differentiation in respect of tobacco products. Professor Winer explains that a brand and its trademarked markers "embrace a set of values and attributes (both tangible and intangible) which meaningfully and appropriately differentiate products which are otherwise very similar".⁵²⁰³ He submits that the benefits that a strong brand provides to the firm that owns it include greater customer loyalty, higher margins and ease of international expansion.⁵²⁰⁴ He adds that the value of a strong brand is especially high for a product like cigarettes, where brands are key sources of differentiation among what are otherwise largely similar products⁵²⁰⁵, and that trademarked packaging is the only remaining communication vehicle for cigarette manufacturers in Australia, where advertising and promotional opportunities have been progressively reduced.⁵²⁰⁶ Professor Neven explains that package design, including the use of trademarks and logos on cigarette packs, is a form of product design, which permits producers to distinguish their offerings from competing brands and enhance the commercial value of their brand.⁵²⁰⁷ He submits that plain packaging is likely to have harmful effect on producers' brand equity and profits and on the possibility of entry into the Australian market.⁵²⁰⁸ Professor Steenkamp explains that "[b]rand logo, font, color, and other brand-related packaging elements are important channels through which consumer quality perceptions are built and sustained", and that "brand packaging is crucial to build and maintain positive and unique associations, as a means to differentiate the brand from competitor product offerings". He adds that, under the TPP measures, "brand-specific elements are eliminated, thereby reducing the contribution of branding to the intangible benefits for both premium and value brands".⁵²⁰⁹

7.2569. We note that by disallowing the use of design features of trademarks, the TPP measures prevent a trademark owner from using such features to convey any messages about the product, whether functional or intangible, and deriving any economic value from the use of such features. Therefore, the TPP measures prevent a trademark owner from extracting economic value from any

⁵²⁰⁰ See "Tobacco packaging as a form of promotion or advertising" within section 7.2.5.3.5.2, particularly paras. 7.659 and 7.663 above.

⁵²⁰¹ WIPO Brands Report, (Exhibit DOM-56), p. 22.

⁵²⁰² See para. 7.660 above.

⁵²⁰³ Winer Report, (Exhibit UKR-9), para. 14 (referring to J.M. Murphy, *Brand Strategy 2* (Cambridge, United Kingdom: Director Books 1990)).

⁵²⁰⁴ Winer Report, (Exhibit UKR-9), para. 22.

⁵²⁰⁵ Winer Report, (Exhibit UKR-9), para. 27.

⁵²⁰⁶ Winer Report, (Exhibit UKR-9), para. 49.

⁵²⁰⁷ Neven Report, (Exhibit UKR-3) (SCI), p. 19.

⁵²⁰⁸ Neven Report, (Exhibit UKR-3) (SCI), p. 41.

⁵²⁰⁹ Steenkamp Rebuttal Report, (Exhibit DOM/HND-14), paras. 92-93.

design features of its trademark through its use in the course of trade. In principle, therefore, the TPP measures' prohibitions on the use of figurative trademarks on tobacco retail packaging and products, as well as of the figurative and stylized elements of composite and word marks, are far-reaching in terms of the trademark owner's expected possibilities to extract economic value from the use of such features.

7.2570. The practical implications of those prohibitions are partly mitigated by the fact that the TPP measures allow tobacco manufacturers to use word trademarks, including brand and variant names, to distinguish their products from each other. As described above, the complainants have not sought to demonstrate that, as a result of the encumbrances resulting from the trademark-related requirements of the TPP measures, consumers have in fact been unable to distinguish tobacco products of one undertaking from those of other undertakings.⁵²¹⁰

7.2571. As regards the ability of the owners of the affected trademarks to otherwise extract economic value from those trademarks, however, the complainants argue that the trademark requirements of the TPP measures, by restricting the opportunity for product differentiation, increase price competition and adversely impact in particular premium brands.⁵²¹¹ In the context of our analysis of the complainants' claims under Article 2.2 of the TBT Agreement, we have analysed the evidence before us on the impact of the reduced differentiation on prices and downward substitution.

7.2572. As regards price competition, the empirical evidence before us, submitted by both Australia and the complainants, shows that the net of taxes price of tobacco products has increased since the introduction of the TPP measures, over the period for which data is available to us.⁵²¹² Moreover, evidence before us also suggests that brands in the higher priced segments generally maintained or increased their pricing premiums over brands in the lower-priced segments in the first year following the implementation of plain packaging, and have not exhibited a marked drop.⁵²¹³ Evidence submitted to the Panel, including data provided by the complainants also clearly demonstrates that the total value of the retail market increased, rather than decreased, over the period Q4 2009 to Q3 2013, despite the reduction in the consumption of tobacco products in the Australian market.⁵²¹⁴ Overall, the empirical evidence before us relating to cigarette prices, to the total value of the retail market and to the total value and volume of cigarette imports does not validate the complainants' argument that the TPP measures will lead to an increase in price competition and a fall in prices, and consequently to a decrease in the sales value of tobacco products and the total value of imports.⁵²¹⁵ While the complainants have not demonstrated that the TPP measures have reduced the value of imported tobacco products on the Australian market, it cannot be excluded that this may happen in the future, either as a result of the effect of the measure on consumption only or as a result of this effect combined with a fall in prices.⁵²¹⁶

7.2573. As regards downward substitution, we found that there is some evidence, albeit limited, that, together with enlarged GHWs introduced on the same date, the TPP measures appear to have had a negative impact on the ratio of higher- to low-priced cigarette wholesale sales. To the extent there are reasons to expect the TPP measures, in particular the removal of figurative features on

⁵²¹⁰ Honduras thus observes that there has not been an empirical study assessing whether consumers have been unable to distinguish the commercial source of tobacco products of one undertaking from that of other undertakings following the implementation of the TPP measures, but considers that such quantitative data would not assist the Panel in resolving the claims under the TRIPS Agreement in these proceedings. See the responses by Honduras, the Dominican Republic, Cuba, and Indonesia to Panel question No. 168, which are reflected in paragraphs 7.2546, 7.2552, 7.2548, and 7.2550 respectively. For related discussion, see fn 5496. We note that some of the evidence before us suggests that the potential impact of plain packaging on brand recall, i.e. the ability to recognize a brand, was considered in some of the plain packaging studies and concluded that "for young smokers at least, plain packaging would not affect brand recall". Stirling Review, (Exhibits AUS-140, HND-130, CUB-59), section 4.6.3, p. 82.

⁵²¹¹ See "Main arguments of the parties" within section 7.3.5.5.3.2 above.

⁵²¹² The time period covered by each data set provided to the Panel varies by source. The largest data set of relevance to this topic covers the period from January 2000 to September 2015. See Appendix E, para. 12 fn 14 and Figure E.5.

⁵²¹³ See para. 7.1215 above.

⁵²¹⁴ See para. 7.1216 above.

⁵²¹⁵ See para. 7.1218 above.

⁵²¹⁶ See para. 7.1225 above.

tobacco products and their retail packaging, to have a stronger impact on the appeal of tobacco products for premium cigarettes, it is reasonable to expect that the reduction in the ratio of higher- to low-priced cigarette wholesale sales observed since the entry into force of the TPP measures results at least in part from the intended operation of the TPP measures and their effect on the consumption of tobacco products more generally. This could be the case where an important part of the value of premium products relies on the contribution of branding in building and maintaining positive and unique associations as a means to differentiate them from competing products.⁵²¹⁷ We are not persuaded, however, that this decrease in the consumption and imports of premium tobacco products is exclusively the result of "downdrading" as the complainants describe it, i.e. a transfer of consumption/imports from premium to non-premium products. First, given that the overall consumption of tobacco products has decreased, at least some part of the decrease in the consumption of premium tobacco products has not been substituted with the consumption of non-premium products. Second, and more generally, as discussed in Appendix E, it appears that the higher- and lower-priced segments of the market have evolved on the basis of distinct trends, even before the implementation of the TPP measures.⁵²¹⁸

7.2574. Finally, we note that Section 28 of the TPP Act is intended to preserve a trademark owner's ability to protect a trademark, and to register and maintain registration of a trademark.⁵²¹⁹ The TMA Act is intended to enable the Australian Government, if necessary, to quickly remedy any unintended interaction between the TPP Act and the TM Act.⁵²²⁰ As regards the complainants' arguments regarding the implications of the TPP measures in respect of other provisions of the TRIPS Agreement they have invoked, we consider them in the context of our analysis relating to those provisions.

7.3.5.5.3.3 The reasons for the adoption of the TPP measures

7.2575. We now turn to a consideration of the reasons for which the special requirements under the TPP measures are applied, including any societal interests they are intended to safeguard, so as to enable us to consider whether these reasons provide sufficient support for the resulting encumbrances on the use of trademarks in the course of trade.

Main arguments of the parties

7.2576. Australia argues that tobacco use is the world's leading cause of preventable morbidity and mortality, and has been classified as a global epidemic under the FCTC. Tobacco use is responsible for the deaths of nearly 6,000,000 people annually, including 600,000 non-smokers exposed to second-hand smoke. There is no safe level of tobacco use or safe level of exposure to second-hand or environmental tobacco smoke. Tobacco use harms nearly every organ in the body.⁵²²¹

7.2577. Australia submits that nicotine is the chemical in tobacco that causes addiction. All tobacco products contain substantial amounts of nicotine; cigarettes are particularly effective in delivering nicotine. The addictive properties of nicotine are critical in the transition of smokers from experimentation to sustained smoking and to the maintenance of smoking for the majority of smokers who wish to quit. Statistics indicate that 95% of all quit attempts are unsuccessful, such is the grip of nicotine addiction.⁵²²²

7.2578. Australia notes that tobacco is "a unique, highly addictive, and deadly product", and "the only legal consumer product that kills half of its long-term users when used exactly as intended by the manufacturer, and up to two in every three Australian smokers". Authoritative scientific opinion has concluded that smoking causes many forms of cancer (lung, larynx, lip, tongue, mouth, pharynx, oesophagus, pancreas, bladder, kidney, cervix, stomach and acute myeloid leukaemia, liver cancer, and urinary tract cancer), stroke, peripheral vascular disease, chronic obstructive pulmonary disease, several serious cardiovascular diseases, many kinds of respiratory

⁵²¹⁷ See para. 7.1196 above.

⁵²¹⁸ See para. 7.1197 above.

⁵²¹⁹ For further information, see section 2.1.2.5 above.

⁵²²⁰ For further information, see section 2.1.2.8 above.

⁵²²¹ Australia's first written submission, para. 23.

⁵²²² Australia's first written submission, paras. 24-27.

diseases and impairments and other types of disease. There is also authoritative scientific opinion that involuntary inhalation of tobacco ("passive smoking") "causes premature death and disease in children and in adults who do not smoke" including lung cancer, coronary heart disease and Sudden Infant Death Syndrome (SIDS). Smoke from cigars, like the smoke from cigarettes, contains toxic and cancer causing chemicals harmful to both smokers and non-smokers. However, the amounts of these substances found in cigar smoke are much higher. Cigar smoking is causally linked to cancer, cardiovascular disease and chronic lung disease.⁵²²³

7.2579. Australia explains that the WHO estimates that if current trends continue, the annual death toll worldwide from tobacco use could rise to more than 8,000,000 by 2030. This global tobacco epidemic affects all WTO Members. Australia notes that in their *amici* submission, the WHO and FCTC Secretariat outline the extensive health, social, environmental, and economic consequences of tobacco consumption and exposure, and make clear that these consequences "have a particularly acute impact on developing countries". Tobacco use is the only common risk factor across all four major non-communicable diseases (cardiovascular diseases, cancers, chronic respiratory diseases and diabetes). The burden of death and diseases from non-communicable diseases is most heavily concentrated in the world's poorest countries. Tobacco related illness has a significant impact on the poor and economically vulnerable and places increasing social and economic strain on governments forced to spend greater amounts to help address the burden of disease that tobacco use causes. So serious is the effect of tobacco consumption on developing countries, that the United Nations has highlighted the implementation of the FCTC as a sustainable development goal for the post-2015 development agenda.⁵²²⁴

7.2580. In Australia, tobacco use remains one of the leading causes of preventable disease and premature death. Estimates of the annual mortality attributable to smoking in Australia since 2000 have "ranged from about 15,000 deaths to about 20,000 with the differences reflecting methodology". As many as two in three Australian smokers will die prematurely from smoking-related diseases. The harmful consequences of tobacco use are disproportionately felt by disadvantaged communities, and smokers in Australia are twice as likely as non-smokers to have been diagnosed or treated for a mental illness. Smoking is responsible for 12.1% of the total burden of disease and 20% of deaths among Aboriginal and Torres Strait Islander peoples. Although rates of smoking prevalence in Australia continue to decline, the social and economic costs of tobacco consumption in Australia, estimated at AUD 31.5 billion in 2004, are expected to continue to rise, as the disease and health effects caused by tobacco consumption can take many years to manifest.⁵²²⁵

7.2581. Australia states that, in giving effect to its obligations under the FCTC, the Australian Government introduced the TPP measures to improve the public health of Australian citizens. It adds that "[t]his decision was made in the context of the comprehensive range of Australian tobacco control measures, including advertising and promotional bans, excise measures, graphic health warnings, and investments in anti-smoking initiatives".⁵²²⁶

7.2582. Honduras claims that this dispute "is not about whether smoking is dangerous or whether it affects the health of many people in Australia and around the world – it is and it does". Honduras explains that it has itself implemented comprehensive tobacco regulation measures and shares Australia's goal of reducing smoking prevalence and tobacco consumption.⁵²²⁷ It adds that "[a]ll WTO Members can, and must, promote their health objectives within the framework of legal commitments accepted at the end of the Uruguay Round".⁵²²⁸ It emphasizes that Honduras is, and will remain, a very active party to the FCTC and fully supports the FCTC's call as set out in its paragraph 4.3 "to establish and implement effective tobacco control programmes, taking into consideration local culture, as well as social, economic, political and legal factors".⁵²²⁹ In Honduras's view, "[t]he issue before the panel is whether the simple invocation of the protection of

⁵²²³ Australia's first written submission, paras. 1 and 28-30.

⁵²²⁴ Australia's first written submission, paras. 31-33 (quoting WHO/FCTC *amici curiae* brief, (Exhibit AUS-42 (revised)), para. 5).

⁵²²⁵ Australia's first written submission, paras. 34-35. See also *ibid.* para. 1; and Australia's opening statement at the first meeting of the Panel, paras. 2-7.

⁵²²⁶ Australia's opening statement at the first meeting of the Panel, para. 8.

⁵²²⁷ Honduras's first written submission, paras. 1-2. (emphasis original)

⁵²²⁸ Honduras's opening statement at the first meeting of the Panel, para. 2.

⁵²²⁹ Honduras's closing statement at the second meeting of the Panel, para. 3.

public health, without more, provides a sufficient basis for a Member to disregard its binding multilateral commitments".⁵²³⁰

7.2583. The Dominican Republic underscores that it shares Australia's objective of reducing tobacco prevalence. It adds that "[t]he need for effective tobacco control is ... not in question. ... [T]he health consequences and attendant social costs of tobacco consumption are considerable, and it is every government's right – and obligation – to adopt tobacco control measures that promote public health." It notes that "[I]ike Australia, the Dominican Republic attaches great importance to the regulatory ends of tobacco control. However, the ends pursued are not on their own sufficient to justify interference with protected trade and IP interests."⁵²³¹ It adds that "[t]he Dominican Republic does not challenge any WTO Members' right to take *effective* public health measures. Nor do we claim that the economic development of the Dominican Republic should come at the expense of another government's promotion of public health."⁵²³²

7.2584. Cuba explains that one of the primary objectives of the policy of the State and Government of Cuba is the constant raising of the health level and quality of life of the Cuban people, which is irrefutably expressed in its Constitution, the Public Health Act and in numerous provisions that are part of its legal system. The importance the Cuban Government attaches to public health is undeniable. The constant improvement of its health indicators is a permanent objective of the Cuban public health policy. It argues that "every country has the sovereign right and the primary responsibility to implement measures aimed at preserving the health of its population, but ... while doing so it must comply with the commitments multilaterally undertaken, in addition to adequately consider[ing] the socio-economic implications that those measures have for small and vulnerable developing economies, before being implemented".⁵²³³

7.2585. Indonesia argues that the WTO provides wide latitude to its Members to pursue legitimate public policy objectives such as smoking prevention. As a result, none of the complainants are challenging Australia's right to restrict the advertising of tobacco products, labelling requirements, point-of-sale restrictions, mandatory health warnings, and the numerous other measures taken by Australia to reduce the consumption of tobacco products and lower smoking prevalence rates within its borders.⁵²³⁴ It emphasizes that "[n]o one, certainly not the Government of Indonesia...denies the tragic effects of smoking. As Australia has reminded the Panel on many occasions, tobacco use is 'the world's leading cause of preventable morbidity and mortality, causing the deaths of nearly 6,000,000 people annually'.⁵²³⁵ It adds that "[t]he harm caused by tobacco use is something all nations should address. However, just because tobacco use is bad does not mean every form of tobacco control is good." In its view, the TPP measures "do not work and certainly do not justify Australia's drastic departure from the decades-long protection of trademarks and intellectual property".⁵²³⁶

Analysis by the Panel

7.2586. We recall that, in the context of our analysis of the complainants' claims under Article 2.2 of the TBT Agreement, we concluded that we understand that the objective pursued by Australia through the TPP measures is to improve public health by reducing the use of, and exposure to, tobacco products.⁵²³⁷ The TPP trademark requirements are an integral part of the overall TPP measures, which also include the standardization of other elements of packaging and tobacco product appearance. Our analysis in the context of Article 2.2 of the TBT Agreement covered both the trademark-related and other requirements of the TPP measures. It is, therefore, relevant also for determining the underlying policy concern being addressed through the trademark requirements of the TPP measures, for the purposes of Article 20 of the TRIPS Agreement. Accordingly, we understand that, for the purposes of Article 20, the reason for which Australia

⁵²³⁰ Honduras's opening statement at the first meeting of the Panel, para. 2.

⁵²³¹ Dominican Republic's first written submission, paras. 138-139 and 143.

⁵²³² Dominican Republic's opening statement at the first meeting of the Panel, para. 4. (emphasis original)

⁵²³³ Cuba's opening statement at the second meeting of the Panel, paras. 2-4.

⁵²³⁴ Indonesia's first written submission, para. 6.

⁵²³⁵ Indonesia's second written submission, para. 2 (referring to Australia's opening statement at the first meeting of the Panel, para. 3).

⁵²³⁶ Indonesia's second written submission, paras. 2-3. (footnotes omitted)

⁵²³⁷ See para. 7.232 above.

applies the trademark requirements, as an integral part of the TPP measures, is to improve public health by reducing the use of, and exposure to, tobacco products.

7.2587. We note that the parties are in agreement about the importance of public health as a policy concern. They, furthermore, agree on the importance of effective tobacco control measures to reduce the public health burden resulting from tobacco use. We also recall that the Appellate Body has recognized the preservation of human life and health as a value that is "both vital and important in the highest degree".⁵²³⁸

7.2588. As regards the TRIPS Agreement in particular, we noted earlier that its Article 8.1 sheds light on the types of societal interests that may provide a basis for the justification of measures under the specific terms of Article 20, and expressly recognizes public health as such a societal interest.⁵²³⁹ Paragraph 5 of the Doha Declaration invites us to read "each provision of the TRIPS Agreement" in the light of the object and purpose of the Agreement, as expressed in particular in its objectives and principles, which includes Article 8.⁵²⁴⁰ WTO Members have further emphasized the importance of public health as a legitimate policy concern in paragraph 4 of the Doha Declaration.⁵²⁴¹

7.2589. We further note Australia's explanation that the decision to introduce the TPP measures was made in the context of a comprehensive range of tobacco control measures, including advertising and promotional bans, excise taxes, GHGs, and investments in anti-smoking initiatives. We also note the reference made, in the TPP Act and its Explanatory Memorandum, to Australia's intention of giving effect to certain obligations under the FCTC through the adoption of the TPP measures, as well as Australia's explanations of how the TPP measures reflect the Article 11 and Article 13 FCTC Guidelines.⁵²⁴² As regards the public health objectives of the FCTC, we note that the preamble of the FCTC recognizes that "the spread of the tobacco epidemic is a global problem with serious consequences for public health that calls for the widest possible international cooperation and the participation of all countries in an effective, appropriate and comprehensive international response".⁵²⁴³

7.3.5.5.3.4 Whether the reasons for the application of the trademark requirements of the TPP measures provide sufficient support for the resulting encumbrance

7.2590. Having identified the nature and extent of the encumbrances on the use of trademarks arising from the trademark requirements of the TPP measures, and the reasons for which these requirements are being applied, we now consider whether these reasons provide sufficient support for the resulting encumbrances.

7.2591. For that purpose, we need to assess the public health concerns that underlie the TPP trademark requirements against their implications on the use of trademarks in the course of trade, taking into account the nature and extent of the encumbrances at issue that we have described above.

7.2592. We first note that it is undisputed that the grounds on which the special requirements on the use of trademarks in the course of trade under the TPP measures are applied address an

⁵²³⁸ Appellate Body Report, EC – Asbestos, para. 172.

⁵²³⁹ See para. 7.2406 above.

⁵²⁴⁰ See para. 7.2408 above.

⁵²⁴¹ Paragraph 4 of the Doha Declaration reads as follows:

We agree that the TRIPS Agreement does not and should not prevent Members from taking measures to protect public health. Accordingly, while reiterating our commitment to the TRIPS Agreement, we affirm that the Agreement can and should be interpreted and implemented in a manner supportive of WTO Members' right to protect public health and, in particular, to promote access to medicines for all.

In this connection, we reaffirm the right of WTO Members to use, to the full, the provisions in the TRIPS Agreement, which provide flexibility for this purpose.

⁵²⁴² Australia's first written submission, paras. 140-141. See also TPP Bill Explanatory Memorandum, (Exhibits AUS-2, JE-7), p. 2.

⁵²⁴³ FCTC, (Exhibits AUS-44, JE-19), preamble, second recital.

exceptionally grave domestic and global health problem involving a high level of preventable morbidity and mortality. The fact that these special requirements, as part of the overall TPP measures and in combination with other tobacco-control measures maintained by Australia, are capable of contributing, and do in fact contribute, to Australia's objective of improving public health by reducing the use of, and exposure to, tobacco products, suggests that the reasons for which these special requirements are applied provide sufficient support for the application of the resulting encumbrances on the use of trademarks.

7.2593. Specifically, we recall our findings above, on the basis of the evidence before us, that the removal of design features on retail packaging and cigarettes is apt to reduce the appeal of tobacco products and increase the effectiveness of GHWs. It is integral to this approach that the use of certain figurative features and signs, including those that are protectable subject-matter as trademarks, is restricted as part of the overall standardization of retail packaging and the products themselves (cigarettes and cigars). This overall design of the TPP measures, of which the trademark-related requirements are an integral part, provides support for the conclusion that the reasons for their adoption sufficiently supports these requirements, and that they are therefore not applied "unjustifiably".

7.2594. We further observe that the uniformity of these features is also an integral part of the approach underlying the TPP measures, including its trademark-related requirements. We recall that, in the context of analyzing the alternative measures proposed by the complainants under Article 2.2 TBT, we observed that any pre-vetting mechanism would involve the introduction of administrative discretion and the possibility of permitting tobacco packaging elements that would have impacts that are contrary to the TPP measures' objective.⁵²⁴⁴ A pre-vetting mechanism would introduce a possibility, which does not exist under the TPP measures, of differentiation and packaging elements that could lead to greater consumer appeal, likelihood to mislead, or distraction from GHWs. To the extent that such a possibility materialized under a pre-vetting mechanism, we considered that this would lead to a lesser degree of contribution than that made by the TPP measures.⁵²⁴⁵ These observations support Australia's premise for standardized packaging as described above. By design, the TPP trademark requirements are therefore not intended to address individual trademarks and their specific features, but to contribute, as an integral part of the TPP measures, to an overall standardization of tobacco packaging and product appearance. The complainants have not demonstrated that such standardization of features within the overall design of the TPP measures would be unjustifiable. In light of this context, we are not persuaded that the absence of an individualized assessment of individual trademarks or trademark features, in itself, renders the encumbrances on the use of trademarks resulting from the TPP measures "unjustifiable" under Article 20.

7.2595. We recall that the Article 11 FCTC Guidelines provide that the Parties to the FCTC "should consider adopting measures to restrict or prohibit the use of logos, colours, brand images or promotional information on packaging other than brand names and product names displayed in a standard colour and font style (plain packaging)".⁵²⁴⁶ Similarly, the Article 13 FCTC Guidelines recommend that the Parties to the FCTC "consider adopting plain packaging requirements to eliminate the effects of advertising or promotion on packaging".⁵²⁴⁷ The Guidelines elaborate on the standard features of plain packaging as including nothing other than a brand or product name, without any logos or other features, in a prescribed font style and size.⁵²⁴⁸

⁵²⁴⁴ See para. 7.1680 above.

⁵²⁴⁵ See para. 7.1680 above.

⁵²⁴⁶ Article 11 FCTC Guidelines, FCTC/COP/3(10), (Exhibit JE-20), Annex, para. 46. This paragraph further provides that such restriction or prohibition "may increase the noticeability and effectiveness of health warnings and messages, prevent the package from detracting attention from them, and address industry package design techniques that may suggest that some products are less harmful than others". Ibid.

⁵²⁴⁷ Article 13 FCTC Guidelines, FCTC/COP/3(12), (Exhibit JE-21), Annex, "Recommendation" following para. 17.

⁵²⁴⁸ Para. 16 of the Article 13 FCTC Guidelines provides as follows:

The effect of advertising or promotion on packaging can be eliminated by requiring plain packaging: black and white or two other contrasting colours, as prescribed by national authorities; nothing other than a brand name, a product name and/or manufacturer's name, contact details and the quantity of product in the packaging, without any logos or other features

7.2596. We note the reference made in the TPP Act and its Explanatory Memorandum to Australia's intention of giving effect to certain obligations under the FCTC through the adoption of the TPP measures.⁵²⁴⁹ In our view, the importance of the public health reasons for which the trademark-related special requirements under the TPP measures are applied is further underscored by the fact that Australia pursues its domestic public health objective in line with its commitments under the FCTC, which "was developed in response to the globalization of the tobacco epidemic"⁵²⁵⁰ and has been ratified by 180 countries.⁵²⁵¹

7.2597. Honduras, the Dominican Republic, and Cuba argue that the legal standard for assessing whether special requirements "unjustifiably" encumber the use of a trademark in the course of trade should include a consideration of whether "an alternative measure could have been deployed that would make an equivalent contribution, while imposing a lesser or no encumbrance on trademark use".⁵²⁵² Australia contends that the ordinary meaning of the term "unjustifiably" does not support the complainants' assertion that the term requires an examination of whether the encumbrance is the "least restrictive" encumbrance possible in light of "reasonably available alternatives".⁵²⁵³ We recall our finding in paragraph 7.2430 that a determination of whether the use of a trademark in the course of trade is being "unjustifiably" encumbered by special requirements should involve a consideration of (i) the nature and extent of the encumbrance resulting from the special requirements, (ii) the reasons for which the special requirements are applied, including any societal interests they are intended to safeguard; and (iii) whether these reasons provide sufficient support for the resulting encumbrance.

7.2598. In our view, the term "unjustifiably" in Article 20 provides a degree of latitude to a Member to choose an intervention to address a policy objective, which may have some impact on the use of trademarks in the course of trade, as long as the reasons sufficiently support any resulting encumbrance. This, however, does not mean that the availability of an alternative measure that involves a lesser or no encumbrance on the use of trademarks could not inform an assessment of whether the reasons for which the special requirements are applied sufficiently support the resulting encumbrance. We do not exclude the possibility that the availability of an alternative measure could, in the circumstances of a particular case, call into question the reasons a respondent would have given for the adoption of a measure challenged under Article 20. This might be the case in particular if a readily available alternative would lead to at least equivalent outcomes in terms of the policy objective of the challenged measure, thus calling into question whether the stated reasons sufficiently support any encumbrances on the use of trademarks resulting from the measure.

7.2599. Honduras, the Dominican Republic, and Cuba refer, in the context of their claims under Article 20 of the TRIPS Agreement, to the same four measures as under Article 2.2 of the TBT Agreement, as potentially constituting valid alternatives to the trademark requirements of the TPP measures.⁵²⁵⁴ These are (i) an increase in taxation of tobacco products; (ii) an increase in the

apart from health warnings, tax stamps and other government-mandated information or markings; prescribed font style and size; and standardized shape, size and materials. There should be no advertising or promotion inside or attached to the package or on individual cigarettes or other tobacco products.

Article 13 FCTC Guidelines, FCTC/COP/3(10), (Exhibit JE-21), Annex, para. 16.

⁵²⁴⁹ TPP Act, (Exhibits AUS-1, JE-1), Section 3(1)(b); and TPP Bill Explanatory Memorandum, (Exhibits AUS-2, JE-7), p. 2.

⁵²⁵⁰ FCTC, (Exhibits AUS-44, JE-19), foreword.

⁵²⁵¹ See also para. 2.97 and fn 908 above.

⁵²⁵² Dominican Republic's first written submission, para. 390 (emphasis omitted). Honduras argues that the TPP measures "are more trademark-restrictive than necessary, given that ... less-trademark-restrictive alternatives are available to Australia that provide an at least equivalent effect". Honduras's second written submission, para. 320 (emphasis added). Cuba argues that a special requirement should be treated as unjustifiable if "there are alternative measures which do not encumber the use of trademarks (or which would encumber the use of trademarks to a lesser degree) that meet the legitimate aim sought to be achieved an equivalent (or greater) extent". Cuba's first written submission, para. 319.

⁵²⁵³ Australia's first written submission, para. 397.

⁵²⁵⁴ Honduras's first written submission, paras. 565-642; Dominican Republic's first written submission, paras. 736-832; and Cuba's first written submission, paras. 356-362. The complainants submit that the Panel's consideration of less-restrictive alternatives proposed by them is required only if, following its assessment of the evidence in this case, it determines that the TPP restrictions make a contribution to achieving Australia's

minimum legal purchase age for tobacco products; (iii) an improvement of anti-smoking social marketing campaigns; and (iv) the creation of a pre-vetting mechanism for tobacco packaging. Three of these alternatives would not involve any encumbrances on the use of trademarks, while a pre-vetting mechanism would also involve encumbrances on the use of trademarks.

7.2600. We recall that we analysed these alternatives in detail in section 7.2.5.6 above in the context of Article 2.2 of the TBT Agreement. In that context, we found, *inter alia*, that none of these alternative measures would be apt to make a contribution to Australia's objective equivalent to that of the TPP measures. In our view, this analysis is also relevant for our consideration of whether the availability of such measures calls into question the justifiability of the trademark-related requirements under the TPP measures for the purposes of the claims under Article 20 of the TRIPS Agreement.

7.2601. In light of these earlier findings under Article 2.2 of the TBT Agreement, we conclude for the purposes of our analysis under Article 20 of the TRIPS Agreement that the complainants have not shown that any of the proposed alternative measures alone or in combination would be manifestly better in contributing towards Australia's public health objective, operating in a manner comparable to the TPP measures as an integral part of Australia's comprehensive tobacco control policies and at the level desired by Australia. In light of our analysis under Article 2.2 of the TBT Agreement, we are not persuaded that the proposed alternatives call into question the sufficiency of the reasons Australia has given to the TPP trademark restrictions, bearing in mind the contribution that the TPP measures, including their trademark-related requirements, make, as part of its comprehensive tobacco control policies, to Australia's objective of improving public health.

7.2602. One of the proposed alternative measures, the creation of a pre-vetting mechanism, would involve an assessment of individual elements of individual trademarks.⁵²⁵⁵ As discussed above, the complainants consider that Article 20 requires such individual assessment of trademarks and their features.⁵²⁵⁶ They also argue that, even if the Panel were to disagree, pre-vetting would represent a less restrictive way to achieve the same results as the TPP measures.⁵²⁵⁷

7.2603. We recall our finding in paragraph 7.2505 that Article 20 does not require the unjustifiability of special requirements under Article 20 to be in all cases assessed in respect of individual trademarks and their specific features. As regards the TPP measures in particular, we found in paragraph 7.2594 above that the complainants have not demonstrated that the trademark requirements of the TPP measures are inconsistent with Australia's obligations under Article 20 on the grounds that they do not provide for individual assessment of trademarks and their specific features. In the context of our analysis, we observed that the TPP trademark requirements are not designed to address individual trademarks and their specific features, but to contribute, as an integral part of the TPP measures, to the overall policy of standardizing packaging and product appearance.⁵²⁵⁸ This, in turn, is intended to contribute to the TPP measures' objective of improving public health by reducing the use of, and exposure, to tobacco products. We further recall that, in the context of our analysis of the claims under Article 2.2 of the TBT Agreement, we described the potential shortcomings of a pre-vetting mechanism that would introduce the possibility of a lesser fulfilment of Australia's objective in a manner that would prevent Australia from pursuing its legitimate public health objective at the levels it considers appropriate.⁵²⁵⁹ Since we have found that Australia is not required to conduct individual assessment of trademarks and their features in the circumstances of the present case, we do not consider that the availability of a pre-vetting mechanism, which in essence amounts to a

objective. See Honduras's first written submission, para. 566; Dominican Republic's first written submission, para. 737; and Cuba's first written submission, para. 356.

⁵²⁵⁵ Dominican Republic's first written submission, para. 799.

⁵²⁵⁶ See section "Main arguments of the parties" within section 7.3.5.5.2.2 above.

⁵²⁵⁷ Honduras's first written submission, para. 625; Dominican Republic's first written submission, para. 801; and Cuba's first written submission, para. 358.

⁵²⁵⁸ See para. 7.2594 above.

⁵²⁵⁹ See section 7.2.5.6.5.5 above. As regards the claims under Article 2.2 of the TBT Agreement, we found in para. 7.1715 above that the complainants have not demonstrated that their proposed alternative measure of pre-vetting mechanism for tobacco packaging would make an equivalent contribution to Australia's objective, taking into account the nature of the objective and the risks non-fulfilment would create.

particular method of conducting such an assessment, would call into question whether the stated public health reasons for the special requirements on the use of trademarks sufficiently support the encumbrances resulting from the TPP trademark restrictions.

7.2604. Overall, we are not persuaded that the complainants have demonstrated that Australia has acted beyond the bounds of the latitude available to it under Article 20 to choose an appropriate policy intervention to address its public health concerns in relation to tobacco products, in imposing certain special requirements under the TPP measures that encumber the use of trademarks in the course of trade. While recognizing that trademarks have substantial economic value and that the special requirements are far-reaching in terms of the trademark owners' possibilities to extract economic value from the use of figurative or stylized features of trademarks, we note that the TPP measures, including their trademark restrictions, are an integral part of Australia's comprehensive tobacco control policies, and designed to complement the pre-existing measures. As noted above, the fact that the special requirements, as part of the overall TPP measures and in combination with other tobacco-control measures maintained by Australia, are capable of contributing, and do in fact contribute, to Australia's objective of improving public health by reducing the use of, and exposure to, tobacco products, suggests that the reasons for which these special requirements are applied provide sufficient support for the application of the resulting encumbrances on the use of trademarks. We further note that Australia, while having been the first country to implement tobacco plain packaging, has pursued its relevant domestic public health objective in line with the emerging multilateral public health policies in the area of tobacco control as reflected in the FCTC and the work under its auspices, including the Article 11 and Article 13 FCTC Guidelines.

7.2605. In light of the above, we conclude that the complainants have not demonstrated that the trademark-related requirements of the TPP measures unjustifiably encumber the use of trademarks in the course of trade within the meaning of Article 20 of the TRIPS Agreement.

7.3.5.6 Overall conclusion

7.2606. In light of the above, we find that the complainants have not demonstrated that the TPP measures are inconsistent with Australia's obligations under Article 20 of the TRIPS Agreement.

7.3.6 Article 10bis of the Paris Convention (1967), as incorporated by Article 2.1 of the TRIPS Agreement

7.3.6.1 Introduction

7.2607. We will now address the complainants' claims under Article 2.1 of the TRIPS Agreement in conjunction with Article 10bis of the Paris Convention (1967), paragraphs 1, 3(1) and 3(3), which concerns repression of unfair competition.

7.2608. Paragraph 1 of Article 2 of the TRIPS Agreement, entitled "Intellectual Property Conventions", reads as follows:

In respect of Parts II, III and IV of this Agreement, Members shall comply with Articles 1 through 12, and Article 19, of the Paris Convention (1967).

7.2609. Article 10bis of the Paris Convention (1967) reads as follows:

- (1) The countries of the Union are bound to assure to nationals of such countries effective protection against unfair competition.
- (2) Any act of competition contrary to honest practices in industrial or commercial matters constitutes an act of unfair competition.
- (3) The following in particular shall be prohibited:

1. all acts of such a nature as to create confusion by any means whatever with the establishment, the goods, or the industrial or commercial activities, of a competitor;
2. false allegations in the course of trade of such a nature as to discredit the establishment, the goods, or the industrial or commercial activities, of a competitor;
3. indications or allegations the use of which in the course of trade is liable to mislead the public as to the nature, the manufacturing process, the characteristics, the suitability for their purpose, or the quantity, of the goods.

7.2610. The complainants claim that the TPP measures are inconsistent with Article 2.1 of the TRIPS Agreement in conjunction with Article 10bis of the Paris Convention (1967).

7.2611. Australia asks the Panel to reject these claims in their entirety.

7.2612. The parties disagree on whether Article 10bis of the Paris Convention (1967), as incorporated into the TRIPS Agreement by means of a reference in its Article 2.1, covers both the requirements within the TPP measures that affect the use of trademarks, GIs and other categories of IP rights on tobacco retail packaging and products ("trademark requirements") and the requirements that concern other physical features of tobacco retail packaging and products ("format requirements"). We will, therefore, first consider the scope of the incorporation of Article 10bis of the Paris Convention (1967) through Article 2.1 of the TRIPS Agreement.

7.2613. We will then consider the interpretation of Article 10bis of the Paris Convention (1967), before addressing the complainants' claims that the TPP measures are inconsistent with Australia's obligations under paragraphs 1, 3(1) and 3(3) of Article 10bis of the Paris Convention (1967) as incorporated into the TRIPS Agreement.

7.3.6.2 Scope of incorporation of Article 10bis of the Paris Convention (1967) through Article 2.1 of the TRIPS Agreement

7.2614. The complainants consider that Article 10bis, as incorporated into the TRIPS Agreement by reference through its Article 2.1, applies to both the trademark requirements and the format requirements of the TPP measures.⁵²⁶⁰ Australia considers, however, "if Article 10bis could be applied to the tobacco plain packaging measure (contrary to Australia's view), it would apply only in respect of the 'trademark requirements' that are the subject of Parts II, III and IV of the TRIPS Agreement".⁵²⁶¹

7.2615. We therefore first consider the scope of Article 10bis of the Paris Convention (1967) in conjunction with Article 2.1 of the TRIPS Agreement.

7.3.6.2.1 Main arguments of the parties

7.2616. As regards the terms "[i]n respect of Parts II, III and IV of this Agreement" in Article 2.1 of the TRIPS Agreement, Honduras and Cuba (by reference to Honduras's response) note that Part II covers seven areas of IP rights, and that its Article 15.1 refers to any "signs" that are capable of distinguishing products. They submit that broad reference to "any signs" protects words, logos, colour combinations, as well as distinctive shapes, forms etc. Therefore, a form could be a trademark. "The format requirements have an actual or potential bearing on several categories of intellectual property rights covered in Part II, namely: trademarks, industrial designs and patents.

⁵²⁶⁰ Honduras's response to Panel question No. 16; Dominican Republic's response to Panel question No. 16; Cuba's response to Panel question No. 16 (annexed to its response to Panel question No. 138) (endorsing Honduras's response to the question); and Indonesia's response to Panel question No. 16.

⁵²⁶¹ Australia's response to Panel question No. 16.

For example, cigarette packaging, including a cardboard package with a flip-top lid, has been the subject of trademark, industrial design and patent registrations in Australia.⁵²⁶²

7.2617. The Dominican Republic and Indonesia take the view that the reference in Article 2.1 to certain parts of the TRIPS Agreement does not limit WTO Members' obligations under the incorporated articles of the Paris Convention to the particular forms of IP listed in Part II of the TRIPS Agreement. The Dominican Republic argues that there is nothing in the text of Article 10bis of the Paris Convention itself that would limit its scope to covering acts of unfair competition that arise through the use of trademarks or restrictions thereof, or through limitations on any other specific form of IP, and adds that "Article 10bis does not specifically reference any particular form of intellectual property, but instead relates to protection against 'unfair competition' (which, itself, is a type of intellectual property right) in any form".⁵²⁶³

7.2618. Australia considers that Article 10bis is incorporated into the TRIPS Agreement "[i]n respect of Parts II, III and IV" of that Agreement. Parts II, III and IV of the TRIPS Agreement are concerned with various aspects of the IP rights defined in the Agreement. It argues that "if Article 10bis could be applied to the tobacco plain packaging measure (contrary to Australia's view), it would apply only in respect of the 'trademark requirements' that are the subject of Parts II, III and IV of the TRIPS Agreement".⁵²⁶⁴

7.3.6.2.2 Analysis by the Panel

7.2619. We recall that paragraph 1 of Article 2 of the TRIPS Agreement provides that :

In respect of Parts II, III and IV of this Agreement, Members shall comply with Articles 1 through 12, and Article 19, of the Paris Convention (1967). (emphasis added)

7.2620. It is undisputed, in these proceedings, that the incorporation resulting from Article 2.1 of the TRIPS Agreement includes Article 10bis of the Paris Convention (1967). However, the parties have different views on the scope of this incorporation, and how this affects the application of this provision to their claims in relation to the TPP measures.

7.2621. As described above, the Dominican Republic and Indonesia consider that the reference in Article 2.1 to Parts II, III and IV of the TRIPS Agreement does not limit WTO Members' obligations in respect of the incorporated articles of the Paris Convention (1967). Honduras and Cuba argue that Part II of the TRIPS Agreement, referred to in Article 2.1, covers seven areas of IP rights, and that the TPP format requirements have an actual or potential bearing on several categories of IP rights covered in Part II. Australia, in turn, takes the view that, to the extent that this provision applies to the TPP measures, Article 2.1 of the TRIPS Agreement read in conjunction with Article 10bis of the Paris Convention (1967) could only be applied to the TPP "trademark requirements" that are the subject of Parts II, III and IV of the TRIPS Agreement.

7.2622. In support of their position, the Dominican Republic and Indonesia refer to the Appellate Body Report in *US – Section 211 Appropriations Act*. In that case, the question before the panel and the Appellate Body was the extent to which the incorporation of certain provisions of the Paris Convention (1967) through Article 2.1 covers trade names, which are protected under Article 8 of the Paris Convention (1967). Article 8 of the Paris Convention (1967) provides that "[a] trade name shall be protected in all the countries of the Union without the obligation of filing or registration, whether or not it forms part of a trademark". Trade names are not identified as a

⁵²⁶² Honduras's response to Panel question No. 16. Cuba indicates that it agrees with Honduras's reply. See Cuba's response to Panel question No. 16 (annexed to its response to Panel question No. 138).

⁵²⁶³ Dominican Republic's response to Panel question No. 16; and Indonesia's response to Panel question No. 16. In support of their position, the Dominican Republic and Indonesia refer to Appellate Body Report, *US – Section 211 Appropriations Act*, paras. 320-341. Like Honduras, they note that certain format features, such as shapes, can be registrable as trademarks, or potentially protectable as industrial designs, patents or other forms of intellectual property rights. See Dominican Republic's response to Panel question No. 16, para. 78; and Indonesia's response to Panel question No. 16, para. 13.

⁵²⁶⁴ Australia's response to Panel question No. 16.

protectable subject-matter in Part II of the TRIPS Agreement under a separate section title, or otherwise referred to in the text of Parts II, III and IV.

7.2623. The panel in that case interpreted the terms "[i]n respect of" in Article 2.1 to mean that "Members have to comply with Articles 1 through 12 and 19 of the Paris Convention (1967) 'in respect of' what is covered by those parts of the TRIPS Agreement identified therein".⁵²⁶⁵ The panel concluded that Article 8 of the Paris Convention (1967) is relevant as part of the TRIPS Agreement to the extent that it may affect the protection of the categories of IP covered by the Agreement.⁵²⁶⁶ It further found that, as trade names are not a category of IP covered by the TRIPS Agreement, Members have no obligation under the TRIPS Agreement to protect them.⁵²⁶⁷ The Appellate Body reversed this finding and found that WTO Members have an obligation under the TRIPS Agreement to provide protection to trade names, through the incorporation of Article 8 of the Paris Convention (1967).⁵²⁶⁸ In the view of the Appellate Body, the panel's interpretation of Article 1.2 "fails to take into account that the phrase 'the subject of Sections 1 through 7 of Part II' deals not only with the categories of intellectual property indicated in each section *title*, but with other *subjects* as well".⁵²⁶⁹ It disagreed with the Panel's view that the words "in respect of" in Article 2.1 had the effect of "conditioning" the scope of Members' obligations under the articles of the Paris Convention (1967) incorporated into the TRIPS Agreement, with the result that trade names were not covered.⁵²⁷⁰ The Appellate Body found that Article 2.1 explicitly incorporates Article 8 of the Paris Convention (1967) into the TRIPS Agreement, and that, as Article 8 of the Paris Convention (1967) covers *only* the protection of trade names, "[t]o adopt the Panel's approach would be to deprive Article 8 of the Paris Convention (1967), as incorporated into the TRIPS Agreement by virtue of Article 2.1 of that Agreement, of any and all meaning and effect."⁵²⁷¹

7.2624. The Appellate Body's ruling in *US – Section 211 Appropriations Act* was limited to whether trade names are covered by the TRIPS Agreement. The extent to which other subject-matter covered by Articles 1 through 12 of the Paris Convention (1967) but not expressly addressed in Parts II, III or IV of the TRIPS Agreement is covered by the incorporation under Article 2.1 of the TRIPS Agreement has not yet been clarified. In this regard, we note that Article 10bis of the Paris Convention (1967) has been addressed in WTO dispute settlement rulings only once before, in *EC – Trademarks and Geographical Indications*. The panel in those proceedings considered that Australia, as the complainant "has not clearly explained the fundamental premise of its claims" and concluded that Australia had not made a *prima facie* case.⁵²⁷² The panel added that its finding "does not imply any view as to whether and in what respects Articles 10bis and 10ter of the Paris Convention (1967) are incorporated by Article 2.1 of the TRIPS Agreement."⁵²⁷³

7.2625. As described above, Australia takes the view that, to the extent that Article 10bis of the Paris Convention (1967) could be applied to the TPP measures, it would apply only in respect of the "trademark requirements" that are the subject of Parts II, III and IV of the TRIPS Agreement. This suggests a reading of the words "[i]n respect of Parts II, III and IV of this Agreement" in Article 2.1 of the TRIPS Agreement that limits the application of Article 10bis of the

⁵²⁶⁵ Panel Report, *US – Section 211 Appropriations Act*, para. 8.30.

⁵²⁶⁶ Panel Report, *US – Section 211 Appropriations Act*, para. 8.41. The panel found that the categories of intellectual property covered by the TRIPS Agreement are those referred to in its Article 1.2. *Ibid.* para. 8.41. See also *Ibid.* paras. 8.25 and 8.27.

⁵²⁶⁷ Panel Report, *US – Section 211 Appropriations Act*, para. 8.41.

⁵²⁶⁸ Appellate Body Report, *US – Section 211 Appropriations Act*, para. 341.

⁵²⁶⁹ Appellate Body Report, *US – Section 211 Appropriations Act*, para. 335 (emphasis original). The Appellate Body understood that the panel interpreted the second sub-clause of Article 1.2 as if that phrase read "intellectual property means those categories of intellectual property appearing in the *titles* of Sections 1 through 7 of Part II". *Ibid.* para. 335.

⁵²⁷⁰ Appellate Body Report, *US – Section 211 Appropriations Act*, para. 337. While the Appellate Body rejected the panel's reading of the term "in respect of" in Article 2.1 of the TRIPS Agreement, it did not provide any other meaning to that term.

⁵²⁷¹ Appellate Body Report, *US – Section 211 Appropriations Act*, para. 338. The panel analysed the negotiating history of the TRIPS Agreement and was of the view that it confirmed its view. Panel Report, *US – Section 211 Appropriations Act*, paras. 8.31-8.40. The Appellate Body did not see the negotiating history as in any way decisive to the issue before it. Appellate Body Report, *US – Section 211 Appropriations Act*, paras. 339-340.

⁵²⁷² See Panel Report, *EC – Trademarks and Geographical Indications (Australia)*, paras. 7.719-7.728.

⁵²⁷³ Panel Report, *EC – Trademarks and Geographical Indications (Australia)*, para. 7.728 fn 629.

Paris Convention (1967) as incorporated into the TRIPS Agreement to those acts of unfair competition that relate to the categories of IP rights covered by those Parts of the Agreement, such as trademarks.

7.2626. The question before us, therefore, is as to how the terms "[i]n respect of Parts II, III and IV of this Agreement" in Article 2.1 of the TRIPS Agreement affect the scope of the requirement, established through Article 2.1 of the TRIPS Agreement, for WTO Members to comply with Article 10bis of the Paris Convention (1967) and assure effective protection against unfair competition as provided for in that provision.⁵²⁷⁴

7.2627. The term "in respect of" is defined as "as regards, as relates to; with reference to".⁵²⁷⁵ The ordinary meaning of this term, together with the grammatical structure of Article 2.1, therefore suggests that Members shall comply with the identified provisions of the Paris Convention (1967) as those Paris Convention provisions relate to Parts II, III and IV of the TRIPS Agreement. We understand this reference to relate to the subjects addressed in Parts II, III and IV, namely standards of protection, domestic enforcement, and acquisition and maintenance of IP rights.⁵²⁷⁶ The phrase "[i]n respect of Parts II, III and IV of this Agreement" thus makes clear that the articles of the Paris Convention (1967) incorporated by reference may have a bearing not only on standards concerning the availability, scope and use of IP rights (Part II), but also on enforcement of IP rights (Part III), and the acquisition and maintenance of IP rights (Part IV). The articles of the Paris Convention (1967), in turn, concern the protection of industrial property.⁵²⁷⁷

7.2628. We note the Appellate Body's determination, in *US – Section 211 Appropriations Act*, that the words "in respect of" in Article 2.1 do *not* have the effect of "conditioning" the scope of Members' obligations under the articles of the Paris Convention (1967) incorporated into the TRIPS Agreement, and its conclusion that, accordingly, WTO Members have an obligation under the TRIPS Agreement to provide protection to trade names in accordance with Article 8 of the Paris Convention (1967)⁵²⁷⁸, notwithstanding the fact that these are not a specific category of IP expressly identified or addressed in Parts II, III or IV of the TRIPS Agreement. This reasoning suggests that the incorporation of the obligations of WTO Members in respect of unfair competition pursuant to Article 10bis should likewise not be assumed to be "conditioned" in such a manner that it would be limited in scope to those types of subject-matter expressly identified in Parts II, III or IV of the TRIPS Agreement.

7.2629. We further note that, while the provisions of Part II of the TRIPS Agreement do not specifically regulate acts of unfair competition, they expressly refer to the provisions of Article 10bis of the Paris Convention (1967) in addressing certain types of subject-matter addressed in Part II. Specifically, Article 22.2(b) provides that "[i]n respect of geographical indications, Members shall provide the legal means for interested parties to prevent: ... any use which constitutes an act of unfair competition within the meaning of Article 10bis of the

⁵²⁷⁴ We note that this question is without prejudice to the distinct question of the scope of Article 10bis of the Paris Convention (1967), outside of its incorporation by reference in the TRIPS Agreement. We further note that Article 2.2 of the TRIPS Agreement provides that "[n]othing in Parts I to IV of this Agreement shall derogate from existing obligations that Members may have to each other under the Paris Convention ...".

⁵²⁷⁵ Oxford English Dictionary online, definition of "in respect of", available at: <<http://www.oed.com/view/Entry/163779?redirectedFrom=in+respect+of#eid177413195>>, accessed 2 May 2017.

⁵²⁷⁶ These topics are reflected in the titles of Parts II, III and IV, namely "Standards Concerning the Availability, Scope and Use of Intellectual Property Rights"; "Enforcement of Intellectual Property Rights"; and "Acquisition and Maintenance of Intellectual Property Rights and Related *Inter Partes* Procedures", respectively.

⁵²⁷⁷ Intellectual property rights are customarily divided into two categories, namely copyright and industrial property. The Paris Convention (1967), the full name of which is the Paris Convention for the Protection of Industrial Property, concerns the protection of industrial property. Its Article 1(1) reads as follows: "The countries to which this Convention applies constitute a Union for the protection of industrial property." Its Article 1(2) defines the notion of "industrial property" as follows: "The protection of industrial property has as its object patents, utility models, industrial designs, trademarks, service marks, trade names, indications of source or appellations of origin, and the repression of unfair competition." Similarly to Parts II, III and IV of the TRIPS Agreement, the substantive provisions of the Paris Convention (1967) deal with the standards of protection, enforcement, and acquisition and maintenance of industrial property rights, although the provisions on standards of protection and domestic enforcement are less extensive than those of the TRIPS Agreement.

⁵²⁷⁸ Appellate Body Report, *US – Section 211 Appropriations Act*, para. 341.

Paris Convention (1967)".⁵²⁷⁹ As regards the protection of undisclosed information, Article 39.1 provides that "[i]n the course of ensuring effective protection against unfair competition as provided in Article 10bis of the Paris Convention (1967), Members shall protect undisclosed information in accordance with paragraph 2 and data submitted to governments or governmental agencies in accordance with paragraph 3." This context, in particular the reference in Article 39.1 to "[i]n the course of ensuring effective protection against unfair competition as provided in Article 10bis", confirms that the obligation to provide effective protection against unfair competition pursuant to Article 10bis of the Paris Convention (1967) is intended to be incorporated through Article 2.1 of the TRIPS Agreement. In addition, Article 4 of the Treaty on Intellectual Property in Respect of Integrated Circuits (1989), as incorporated into the TRIPS Agreement by means of a reference in its Article 35, recognizes unfair competition among various legal forms of protection through which Members are free to implement their obligations to provide protection to layout-designs of integrated circuits.

7.2630. We further note that the text of Article 10bis of the Paris Convention (1967) itself makes no distinction between acts of unfair competition that would relate to trademarks, GIs or other specific categories of IP and other acts of unfair competition. Article 10bis of the Paris Convention (1967) lacks such a distinction, and requires that parties to the Paris Convention ensure effective protection against unfair competition, without further qualification. This suggests that the scope of that provision is not inherently limited to the types of subject-matter identified and addressed in Parts II, III and IV of the TRIPS Agreement, and the provisions contained therein, but encompasses the repression of unfair competition as an object of the protection of industrial property.

7.2631. In light of the above, we find that, pursuant to the second sub-clause of Article 2.1 of the TRIPS Agreement, Members are required to comply with Article 10bis of the Paris Convention (1967), and that the term "in respect of" in the first sub-clause of Article 2.1 does not have the effect of conditioning the scope of the incorporation of the obligation under Article 10bis to cover only those acts of unfair competition that relate to the types of subject-matter addressed in Parts II, III or IV of the TRIPS Agreement.

7.2632. We further observe that the challenged measures in this case, the TPP measures, include features that may be seen as relating to various categories of IP addressed in Part II of the TRIPS Agreement. Specifically, it is undisputed that they affect the use of trademarks and GIs, and they may also affect other categories of IP, such as industrial designs and patents.⁵²⁸⁰ In light of this also, we find it appropriate not to limit our consideration of how the TPP measures relate to the protection against unfair competition to how they relate to any particular subject-matter addressed in Part II, III or IV of the TRIPS Agreement.

7.2633. With these initial determinations in mind, we first consider the interpretation of Article 10bis, to inform our assessment of the complainants' claims that the TPP measures are inconsistent with Australia's obligations under paragraphs 1⁵²⁸¹, 3(1)⁵²⁸², and 3(3)⁵²⁸³ of Article 10bis of the Paris Convention (1967) as incorporated into the TRIPS Agreement.

7.3.6.3 Interpretation of Article 10bis of the Paris Convention (1967), as incorporated through Article 2.1 of the TRIPS Agreement

7.3.6.3.1 Main arguments of the parties

7.2634. Honduras argues that the central obligation under Article 10bis is for Members to provide "effective protection against unfair competition". According to Honduras, it follows from the term "effective protection" that WTO Members must enact legally binding *substantive* rules that prohibit

⁵²⁷⁹ The term "in respect of" is also used in the *chapeau* of Article 22.2, which is the basis for separate claims in these proceedings. See section 7.3.7 below.

⁵²⁸⁰ Honduras submits that, for example, cigarette packaging, including a cardboard package with a flip-top lid, has been the subject of trademark, industrial design and patent registrations in Australia. Honduras's response to Panel question No. 16.

⁵²⁸¹ Claims raised by Honduras, the Dominican Republic, and Cuba.

⁵²⁸² Claims raised by Cuba and Indonesia.

⁵²⁸³ Claims raised by Honduras, the Dominican Republic, Cuba, and Indonesia.

acts of unfair competition and provide *effective administrative* or judicial avenues through which the prohibition on acts of unfair competition can be enforced.⁵²⁸⁴ Honduras submits that "intent" is not a constitutive element of an act of unfair competition covered by Article 10bis.⁵²⁸⁵

7.2635. Honduras submits that the term "competition" is generally defined as action "[s]triving for custom between rival traders in the same commodity" or "the effort of two or more parties acting independently to secure the business of a third party by offering the most favorable terms".⁵²⁸⁶ Honduras refers to the finding by the panel in *Mexico – Telecoms* that "the word 'competition', in its economic sense, is ... defined as 'rivalry in the market, striving for custom between those who have the same commodities to dispose of'.⁵²⁸⁷ Honduras argues that the ordinary meaning of the term "unfair" is "not equitable, unjust, not according to the rules",⁵²⁸⁸ such that "[u]nfair competition" is, therefore, competition that is 'not equitable' or 'unjust'. According to Honduras, the ordinary meaning of the terms in Article 10bis(1) and 10bis(2) suggests that Article 10bis requires a WTO Member to ensure, with regard to all aspects of competition, that rival traders in the same commodity can strive for custom in circumstances that are "equitable" and "legitimate".⁵²⁸⁹

7.2636. Honduras notes that Article 10bis(2) defines an act of unfair competition as "[a]ny act of competition contrary to honest practices in industrial or commercial matters".⁵²⁹⁰ It interprets the term "honest" as "acquired by fair means; legitimate",⁵²⁹¹ and the terms "fair" and "honest" "competition" as requiring that a market participant be permitted to choose whether to compete on the basis of price or product differentiation.⁵²⁹² Thus, Honduras maintains, constraining the ability to convey product differentiation through trademarks, imagery, colour and the product design features constitutes "unfair competition".⁵²⁹³ According to Honduras, the inability to distinguish goods will not be "fair" to competitors who have invested time and resources into ensuring notoriety for their product through consistent superior product quality and marketing efforts. Further, competition in such circumstances will not be "honest" because some economic operators will be able to pretend that their inferior products are as good as other producers' superior products. Honduras contends that Articles 10bis(3)(1) and 10bis(3)(3) provide two *per se* examples of "unfair competition", and both suggest that product differentiation is an integral part of "fair competition".⁵²⁹⁴

7.2637. Honduras argues that Article 10bis(1) requires Members to assure protection against all acts of unfair competition whereas Article 10bis(3) sets out specific examples of acts of unfair competition. These examples are merely indicative and therefore do not exhaust the full universe of acts that may constitute acts of unfair competition. Consequently, a measure that is inconsistent with one of the subparagraphs of Article 10bis(3) would by definition be inconsistent with Article 10bis(1), and that it would be possible for a measure to be inconsistent with Article 10bis(1) without being inconsistent with any of the subparagraphs of Article 10bis(3).⁵²⁹⁵ Honduras adds that Article 10bis could address acts other than those covered by the definition of unfair competition in Article 10bis(2). In Honduras's view, "Article 10bis(2) provides examples of two types of acts that would constitute an act of unfair competition. It does not provide that these

⁵²⁸⁴ Honduras's first written submission, paras. 654-655. (emphasis original)

⁵²⁸⁵ Honduras's second written submission, para. 390 (referring to Bodenhausen, HND excerpts, (Exhibit HND-39), p. 145). See also Honduras's response to Panel question No. 19.

⁵²⁸⁶ Honduras's first written submission, para. 662 (referring to New Shorter Oxford English Dictionary, HND excerpts, (Exhibit HND-89), p. 459; and Merriam-Webster Dictionary online, HND excerpts, (Exhibit HND-48), respectively).

⁵²⁸⁷ Honduras's first written submission, para. 663 (referring to Panel Report, *Mexico – Telecoms*, para. 7.230).

⁵²⁸⁸ Honduras's first written submission, para. 669 (referring to New Shorter Oxford English Dictionary, HND excerpts, (Exhibit HND-89), p. 3482).

⁵²⁸⁹ Honduras's first written submission, para. 669.

⁵²⁹⁰ Honduras's first written submission, para. 671.

⁵²⁹¹ Honduras's first written submission, para. 672 (referring to New Shorter Oxford English Dictionary, HND excerpts, (Exhibit HND-89), p. 1255).

⁵²⁹² Honduras's first written submission, paras. 661-668 and 673 (referring to Steenkamp Report, (Exhibit DOM/HND-5), paras. 18 and 61, among other sources).

⁵²⁹³ Honduras's first written submission, para. 676.

⁵²⁹⁴ Honduras's first written submission, paras. 673-675.

⁵²⁹⁵ Honduras's response to Panel question No. 15.

two acts would constitute the whole universe of unfair competition.⁵²⁹⁶ Honduras adds that, even if Article 10bis(2) is considered as an exhaustive definition of "unfair competition", Australia's actions are covered by that definition.⁵²⁹⁷ Honduras further submits that, while the "normal" situation that Article 10bis disciplines is that of firms engaging in acts of commercial dishonesty, Article 10bis also disciplines regulatory action of WTO Members. It adds that "[t]his is the key point of disagreement between Honduras and Australia (and Singapore)".⁵²⁹⁸

7.2638. Honduras argues that the terms "fair" and "honest" competition require that market conditions do not favour one group of competitors to the detriment of another group of competitors such that, to the extent that one competitor engages in acts that structurally skew competition against one or several other competitors, such behaviour would violate the requirement of "fair" and "honest" competition. Honduras adds that, likewise, *governmental regulation* that skews the conditions of competition in favour of some competitors, and to the detriment of other competitors, is also "unjust" and "not equitable".⁵²⁹⁹ Honduras adds that the precise meaning of the term "fair" must be understood in the context of the provision in which it is included.⁵³⁰⁰ According to Honduras, for the purpose of WTO law, the context of the "fair competition" rules of Article 10bis of the Paris Convention (1967) is the protection of industrial property as defined by Article (1)(1) of the Paris Convention (1967). Therefore, any asymmetrical impact on different market participants that result from measures that regulate or restrict the use of IP rights is a relevant factor in deciding whether competition is "unfair".⁵³⁰¹

7.2639. In particular, Honduras maintains that Article 10bis prohibits WTO Members from enacting domestic laws that would encourage or require private economic operators to act in a manner amounting to "unfair competition" because where a Member "encourages or requires, through its laws and regulations, an individual or an entity to commit an act of unfair competition, that Member cannot be said to be 'assur[ing] ... effective protection' *against* such acts".⁵³⁰² According to Honduras, exempting a WTO Member's regulatory actions from the scope of Article 10bis would allow domestic regulation to define the concept of "unfair competition", and render the disciplines of Article 10bis meaningless.⁵³⁰³ According to Honduras, the standard for "honest[y]" is to be judged both against the norms prevailing in a given WTO Member as well as against a more universally accepted, international standard.⁵³⁰⁴

7.2640. Honduras clarifies that it "does not argue that a *government's laws or regulations* constitute acts of 'unfair competition"'; "[t]he acts of unfair competition remain those of private parties."⁵³⁰⁵ Honduras adds that the *typical* scenario envisaged under Article 10bis is that of unfair competitive acts undertaken by private economic operators without governmental regulation, but submits that Article 10bis also covers action by private economic operators undertaken pursuant to governmental action that *compels* acts of unfair competition.⁵³⁰⁶

7.2641. Honduras refers to the panel report in *Mexico – Telecoms*, which addressed the so-called "Reference Paper" on telecommunications services, Section 1.1 of which requires WTO Members to "maintain[]" "appropriate measures ... for the purpose of preventing suppliers who, alone or together, are a major supplier from engaging in or continuing anti-competitive practices". The panel found that "[t]here is no reason to suppose, and no language to suggest, that the desired outcome ... – preventing major suppliers from engaging in anti-competitive practices – should depend entirely on whether a Member's own laws made such practices legal". In Honduras's view,

⁵²⁹⁶ Honduras's response to Panel question No. 18.

⁵²⁹⁷ Honduras's response to Panel question No. 18.

⁵²⁹⁸ Honduras's response to Panel question No. 17.

⁵²⁹⁹ Honduras's first written submission, paras. 677-678 (emphasis original). See also *ibid.* para. 670.

⁵³⁰⁰ Honduras's first written submission, para. 670 (referring to Panel Report, *US – Zeroing (EC)*, para. 7.260).

⁵³⁰¹ Honduras's first written submission, para. 670.

⁵³⁰² Honduras's first written submission, para. 657. (emphasis original)

⁵³⁰³ Honduras's first written submission, paras. 658-660 (referring to Panel Report, *Mexico – Telecoms*, paras. 7.243-7.244). See also Honduras's second written submission, para. 392.

⁵³⁰⁴ Honduras's first written submission, para. 669 (referring to Bodenhausen, HND excerpts, (Exhibit HND-39), p. 144).

⁵³⁰⁵ Honduras's second written submission, para. 391. (emphasis original)

⁵³⁰⁶ Honduras's second written submission, paras. 393-394. (emphasis original)

the same logic applies to Article 10bis, which, therefore, must be interpreted as, *inter alia*, constraining the regulatory powers of WTO Members.⁵³⁰⁷

7.2642. Honduras elaborates that, although in its view Article 10bis constrains a government's regulatory power, it does not argue that Article 10bis requires "unlimited" competition, free from any and all governmental intervention. However, legitimate regulation may only have an *incidental* impact on competition, in the sense that it may not render competition "unfair", and "inequitable".⁵³⁰⁸ Honduras emphasizes that its interpretation of Article 10bis leaves the government with sufficient margin of discretion to regulate competition, and means that not every governmental regulation that may have an asymmetrical impact on different producers and their product offerings results in "unfair" competition.⁵³⁰⁹ Honduras submits that, for instance, a general advertising ban would not violate Article 10bis, because its asymmetrical effect on competition is only incidental, as compared to legislation that deliberately and *ex ante* seeks to achieve an asymmetrical impact.⁵³¹⁰

7.2643. The Dominican Republic notes that the phrase "unfair competition" includes the term "competition". Thus, Article 10bis applies to acts that have a bearing on "rivalry in the market" and on the process of "striving for custom" between competitors.⁵³¹¹ According to the Dominican Republic, Article 10bis requires WTO Members to guarantee protection against "unfair" acts of competition. An act is "unfair" if it is "[n]ot fair or equitable; unjust".⁵³¹² Article 10bis(2) defines "unfair" acts of competition as those "contrary to honest practices in industrial or commercial matters". The term "honest", in the context of describing an action like a "practice", is something "done with or expressive of truthfulness, fairness, or integrity of character or intention; free from deceit; genuine, sincere".⁵³¹³ The Dominican Republic understands that an "act of competition" that is "contrary to honest practices" is therefore an act with a bearing upon the relationship between competitors in the marketplace performed in a manner that is unfair, unjust, or that lacks integrity.⁵³¹⁴ The intent of the person engaging in the act is not necessary for a finding of unfair competition.⁵³¹⁵

7.2644. The Dominican Republic argues that the obligation under Article 10bis(1) to *assure effective protection* against unfair competition is materially different from the obligation under Article 10bis(3) to *prohibit* the three specified forms of unfair competition. Thus, even if a Member prohibits as a matter of law the private acts of unfair competition listed in Article 10bis(3), it may nevertheless fail to meet its obligations under Article 10bis(1) if it does not provide the requisite *effective protection* against unfair competition. For example, if violations of the prohibition result in only nominal penalties with no deterrent value, then the Member may not be providing "effective"

⁵³⁰⁷ Honduras's first written submission, paras. 659-660 (referring to Panel Report, *Mexico – Telecoms*, paras. 7.243-7.244). Honduras also draws guidance from past rulings on the treatment of imported and domestic products under Article III:2 and III:4 of the GATT 1994 as well as under Article 2.1 of the TBT Agreement. See Honduras's first written submission, paras. 679-680. See also Honduras's response to Panel question Nos. 17 and 19.

⁵³⁰⁸ Honduras's first written submission, para. 681. (emphasis original)

⁵³⁰⁹ Honduras's first written submission, para. 695.

⁵³¹⁰ Honduras's second written submission, paras. 395-396.

⁵³¹¹ Dominican Republic's first written submission, paras. 842-843 (referring to Panel Report, *Mexico – Telecoms*, para. 7.230, which in turn quotes the definition of the term "competition" in *The Shorter Oxford English Dictionary*, 3rd edn (Clarendon Press, 1990), Vol. II, p. 382). See also Dominican Republic's second written submission, paras. 730-731; and response to Panel question No. 22.

⁵³¹² Dominican Republic's first written submission, para. 845 (quoting Oxford English Dictionary online, definition of "un'fair, adj.", available at:

<<http://www.oed.com/view/Entry/213174?rskey=IGEAyx&result=1&isAdvanced=false#eid>>, accessed 9 April 2014, (Exhibit DOM-143)). See also Dominican Republic's second written submission, para. 732.

⁵³¹³ Dominican Republic's first written submission, para. 845 (quoting Oxford English Dictionary online, definition of "honest, adj. and adv.", available at:

<<http://www.oed.com/view/Entry/88149?rskey=Tq7xuH&result=1&isAdvanced=false#eid>>, accessed 9 April 2014, (Exhibit DOM-145)).

⁵³¹⁴ Dominican Republic's first written submission, para. 845.

⁵³¹⁵ Dominican Republic's first written submission, para. 846 (referring to Bodenhausen, Full text, (Exhibit DOM-79), p. 145 among others). See also the Dominican Republic's response to Panel question No. 19; and second written submission, paras. 737-742.

protection.⁵³¹⁶ The Dominican Republic adds that both paragraphs 1 and 3 of Article 10bis are susceptible of breach by either an act or an omission by a Member.⁵³¹⁷

7.2645. As regards the object and purpose of Article 10bis, the Dominican Republic claims that according to WIPO, protection against unfair competition serves a three-fold purpose: (1) the protection of competitors; (2) the protection of consumers; and (3) safeguarding competition in the public interest, and these objectives play an important role in determining "unfairness" in the marketplace.⁵³¹⁸ The Dominican Republic adds that the examples in Article 10bis(3) also confirm WIPO's analysis that protection against unfair competition aims to protect competitors, consumers, and safeguard competition in the public interest.⁵³¹⁹

7.2646. Cuba argues that the overarching obligation under Article 10bis(1) is to ensure effective protection against unfair competition, and the content of this overarching obligation is informed by the remaining provisions of Article 10bis.⁵³²⁰ Cuba agrees with Honduras that Article 10bis(3) sets out specific examples of acts of unfair competition, and that a measure that is inconsistent with one of the subparagraphs of Article 10bis(3) is therefore also inconsistent with Article 10bis(1). Cuba endorses Honduras's argument that, since the examples in Article 10bis(3) are merely indicative and do not exhaust the full universe of acts that may constitute acts of unfair competition, it is possible for a measure to be inconsistent with Article 10bis(1) but not fall within the specific examples in Article 10bis(3).⁵³²¹

7.2647. Indonesia argues that under Article 10bis, WTO Members have a general obligation to provide "effective protection against unfair competition". Article 10bis(3) provides examples of three acts that must be prohibited, as the minimum protection to be granted by all Members. As the WIPO IP Handbook notes, these examples must not be seen as exhaustive, but rather as the minimum protection that has to be granted by all member States. Thus, Indonesia maintains, to protect against unfair competition, WTO Members must at a minimum ensure effective protection against the three kinds of acts described in Article 10bis(3).⁵³²² Indonesia reads paragraph 1 as creating a broader obligation than paragraph 3 that is also inclusive of the obligations found in paragraph 3 of Article 10bis. Consequently, if a measure is inconsistent with Article 10bis(3), it is also necessarily inconsistent with Article 10bis(1); a measure can, however, be inconsistent with Article 10bis(1) without being inconsistent with any of the subparagraphs of Article 10bis(3).⁵³²³

7.2648. According to Indonesia, Article 10bis(3)(1) refers to acts likely to cause confusion. It requires neither confusion to have actually occurred⁵³²⁴, nor an intent to confuse. Similarly, sub-paragraph (3) does not require that untrue information be given to consumers or proof that consumers have actually been misled about "the nature, the manufacturing process, the characteristics, the suitability for their purpose, or the quantity, of the goods".⁵³²⁵

7.2649. Indonesia adds that the purpose of Article 10bis is to protect and promote fair competition in international trade by protecting competitors and consumers, and safeguarding competition in the public interest.⁵³²⁶

⁵³¹⁶ Dominican Republic's response to Panel question No. 15, para. 77. (emphasis original)

⁵³¹⁷ Dominican Republic's second written submission, para. 727. See also Dominican Republic's response to Panel question No. 15(a).

⁵³¹⁸ Dominican Republic's first written submission, para. 839 (quoting WIPO Protection Against Unfair Competition, (Exhibits AUS-536, DOM-139), para. 33).

⁵³¹⁹ Dominican Republic's first written submission, paras. 847-850.

⁵³²⁰ Cuba's first written submission, para. 381.

⁵³²¹ Cuba's response to Panel question No. 15 (annexed to its response to Panel question No. 138) (endorsing Honduras's response to Panel question No. 15).

⁵³²² Indonesia's first written submission, para. 154 (referring to WIPO IP Handbook, IDN excerpts, (Exhibit IDN-43), para. 2.762).

⁵³²³ Indonesia's response to Panel question No. 15.

⁵³²⁴ See Indonesia's response to Panel question No. 168.

⁵³²⁵ Indonesia's first written submission, paras. 156-157.

⁵³²⁶ Indonesia's first written submission, para. 159 (referring to Wadlow, Law of Passing-Off, IDN excerpts, (Exhibit IDN-60), p. 9; and WIPO IP Handbook, IDN excerpts, (Exhibit IDN-43), para. 2.773). The Panel notes that the paragraphs cited from the WIPO IP Handbook are not included in the excerpts provided as

7.2650. Australia argues that Article 10bis(1) requires Members to assure "effective protection against unfair competition". "Unfair competition" is defined in Article 10bis(2) as "[a]ny act of competition contrary to honest practices in industrial or commercial matters". The ordinary meaning of the term "act" is "a thing done; a deed"; "the process of doing". The use of the term "act" in Article 10bis(2) thus indicates that the relevant conduct is particular or specific in nature – i.e. a particular "thing done" or "deed" of competition. This is confirmed by the illustrative examples of unfair competition in Article 10bis(3) – each of which concerns *particular "acts"*.⁵³²⁷

7.2651. Australia observes that the "acts" prohibited in Article 10bis(2) are "any act[s] of competition contrary to honest practices in industrial or commercial matters". The ordinary meaning of the term "competition" is the "action of competing or contending with others" or "striving for custom between rival traders in the same commodity".⁵³²⁸

7.2652. Australia further describes the ordinary meaning of the term "honest" as, in relevant part, "straightforward; free from fraud" or "truthful".⁵³²⁹ In Article 10bis(2), Australia argues, this term is used in connection with "practices in industrial or commercial matters", rather than in isolation. While there is no single international standard for what constitutes an act of competition contrary to "honest" commercial practices, the illustrative examples in Article 10bis(3) indicate that Article 10bis is concerned with acts that are "dishonest" in the sense of being not "truthful", and each of subparagraphs (1) to (3) is an example of a *false* or *misleading* representation. Thus, by its terms, Article 10bis requires Members to assure effective protection against "particular deeds" of "dishonest" or "untruthful" commercial "rivalry" – i.e. acts that are intended to benefit a market actor by influencing consumers on the basis of false or misleading representations.⁵³³⁰

7.2653. Australia considers that a failure to prohibit the acts described in Article 10bis(3) would constitute a breach of the obligation in Article 10bis(1). It adds that if a measure prevented a Member from assuring effective protection against conduct that met the definition of "unfair competition" in Article 10bis(2) ("[a]ny act of competition contrary to honest practices in industrial or commercial matters" – i.e. acts of commercial dishonesty involving misrepresentation), and was of the same nature and scope as the illustrative examples in Article 10bis(3), such a measure would be inconsistent with the obligation in Article 10bis(1) even if the relevant conduct did not specifically come within the subparagraphs of Article 10bis(3).⁵³³¹

7.2654. Australia argues that there is no single international standard for what constitutes an act of competition contrary to "honest" commercial practices. It adds that such acts may include a "competitor's misrepresentation, fraud threats, defamation, disparagement, enticement of employees, betrayal of confidential information, and commercial bribery, among others".⁵³³² Australia adds that Article 10bis requires Members to discipline the conduct of market actors in relation to rival competitors and potential consumers. According to Australia, Members have discretion in implementing this obligation, including in determining the range of acts constituting unfair competition, provided that the definition in Article 10bis(2) and the specific examples set out in Article 10bis(3) are given effect.⁵³³³

Exhibit IDN-43. The referenced paragraphs were submitted by the Dominican Republic in WIPO IP Handbook, Full Text, (Exhibit DOM-65).

⁵³²⁷ Australia's first written submission, paras. 445-447 (referring to Shorter Oxford English Dictionary, Vol. 1 AUS excerpts, Part 1, (Exhibit AUS-243), p. 22).

⁵³²⁸ Australia's first written submission, para. 447 (referring to Shorter Oxford English Dictionary, Vol. 1 AUS excerpts, Part 1, (Exhibit AUS-243), p. 470). Australia adds that the latter meaning of "competition" was endorsed by the panel in Panel Report, *Mexico – Telecoms*, para. 7.230, as well as by Honduras in its first written submission, para. 663 and the Dominican Republic in its first written submission, para. 842.

⁵³²⁹ Australia's first written submission, para. 447 (referring to Shorter Oxford English Dictionary, Vol. 1 AUS excerpts, Part 1, (Exhibit AUS-243), p. 1271).

⁵³³⁰ Australia's first written submission, paras. 448-449.

⁵³³¹ Australia's response to Panel question No. 15.

⁵³³² Australia's first written submission, para. 448 and fn 623 (referring to Correa's Commentary on the TRIPS Agreement, (Exhibit AUS-242), p. 388).

⁵³³³ Australia's first written submission, fn 625 (referring to Bodenhausen, (Exhibits HND-39, DOM-79, IDN-61), p. 144).

7.3.6.3.2 Main arguments of the third parties

7.2655. Canada argues that the ordinary meaning of the terms "act" and "competition" in the context of Article 10bis suggests that the phrase "act of competition" is concerned solely with the commercial behaviour of actors competing in the market. A State's role in the market is typically as a regulating or governing body directing the relationship between competing actors, *not* as a market actor itself competing for a market share. Where a Member is regulating the market or its private actors, such measures do not constitute "acts of competition" and fall outside the scope of the definition of "unfair competition" under Article 10bis. Moreover, the definition of unfair competition in Article 10bis is linked to an *act* of competition. The text does not state that an act bearing on competition constitutes unfair competition and there is nothing to support an expansion of the scope of Article 10bis to capture regulatory measures that are not, themselves, *acts of competition*.⁵³³⁴

7.2656. Canada adds that the complainants' argument that a Member cannot legally require the behaviour it has undertaken to prevent and protect against follows from their assertions that a Member's regulatory flexibility is only constrained by the obligations it actually undertakes. In the case of Article 10bis, the obligation is to protect against unfair competition, which is defined as certain *acts of competition*. If a Member's measure fails to constitute such an act, then Article 10bis does not apply and the Member consequently retains its regulatory flexibility in this regard.⁵³³⁵

7.2657. China notes that the key contention appears to be the definition of "unfair competition" within the scope of Article 10bis of the Paris Convention and Article 22.2(b) of the TRIPS Agreement. In China's view, the TPP measures do not appear to be an act of unfair competition within the meaning of the above provisions. First, noting that an act of unfair competition is defined under Article 10bis(2) as any act "contrary to honest practices in industrial or commercial matters", China contends that "[i]t appears difficult to characterize the acts that are taken by competitors to comply with the legal requirements as acts 'contrary to honest'".⁵³³⁶ Second, China maintains that Article 10bis(3) provides that three categories of acts "shall be prohibited" in particular, and the TPP measures do not fall within the scope of the second or third category of acts, i.e. false allegations and misleading indications or allegations, or within the scope of the first category which clearly refers to acts of "a competitor".⁵³³⁷

7.2658. New Zealand agrees with Australia's interpretation of, and arguments in relation to, Article 10bis.⁵³³⁸

7.2659. Singapore argues that state practice on unfair competition reveals the absence of a single international standard of what constitutes an act of "unfair competition", and a variety of approaches to implementing the standard.⁵³³⁹ However, certain acts shall be considered to constitute unfair competition, as set out in Article 10bis(3). By its terms, Article 10bis proscribes acts of commercial dishonesty involving misrepresentation. However, the complainants' reading that by not allowing competitors to differentiate their products in the marketplace, the TPP measures violate Article 10bis(1) is at odds with the notion of what constitutes an act of unfair competition. In addition, it would effectively place an unduly onerous burden on governments to ensure that any regulation must impact all persons equally.⁵³⁴⁰ Singapore submits that

⁵³³⁴ Canada's third-party submission, paras. 24-25.

⁵³³⁵ Canada's third-party submission, para. 26.

⁵³³⁶ China's third-party submission, para. 61.

⁵³³⁷ China adds that, alternatively, if the Panel were to interpret the meaning of "unfair competition" as compassing regulatory measures of a government and/or its impact on the market, it would need to carefully assess the detailed facts of the dispute, including a range of legal mechanisms provided by Australia, so as to determine whether the TPP measures compel market actors to engage in acts of unfair competition or whether Australia fails to assure an effective protection against unfair competition due to the TPP measures. China's third-party submission, paras. 57-62.

⁵³³⁸ New Zealand's third-party submission, para. 14.

⁵³³⁹ Singapore's third-party submission, para. 15 (referring to WIPO Protection Against Unfair Competition, (Exhibits AUS-536, DOM-139), paras. 23-26).

⁵³⁴⁰ Singapore adds that such assertion, for instance, would call into question the lawfulness of restrictions on tobacco advertising on the basis that the ban could be said to skew the conditions of competition in favour of market incumbents. Singapore's third-party submission, paras. 15-17.

Article 10bis is not directed at market conditions as such, but at *acts of commercial dishonesty involving misrepresentation*.⁵³⁴¹

7.2660. As regards the specific claims made under Article 10bis(3)(1) and (3)(3) – that, by preventing producers from distinguishing their tobacco products, the TPP measures compel acts which cause the very confusion and misleading indications that Australia is obliged to prevent – Singapore notes that the complainants have submitted no empirical evidence that the measures have indeed led to confusion or have misleading effect in the Australian market. In contrast, Singapore submits that the use of brand, business or company names with variant names on tobacco packaging (which is allowed, and which themselves may be trademarks) in a uniform and consistent manner on all packaging enables consumers to easily focus on, and compare, the words only that are used, thus enabling consumers to clearly distinguish the tobacco products of one undertaking from another. For the above reasons, Singapore does not consider there to be a violation of Article 2.1 of the TRIPS Agreement incorporating Article 10bis of the Paris Convention.⁵³⁴²

7.2661. Uruguay maintains that the Panel should reject the complainants' claims under Article 2.1 of the TRIPS Agreement incorporating Article 10bis of the Paris Convention.⁵³⁴³

7.3.6.3.3 Analysis by the Panel

7.2662. We recall that, under Article 2.1 of the TRIPS Agreement, "[i]n respect of Parts II, III and IV of the Agreement, Members shall comply with Article 1 through 12, and Article 19, of the Paris Convention (1967)". We recall that Article 10bis of the Paris Convention (1967) reads as follows:

- (1) The countries of the Union are bound to assure to nationals of such countries effective protection against unfair competition.
- (2) Any act of competition contrary to honest practices in industrial or commercial matters constitutes an act of unfair competition.
- (3) The following in particular shall be prohibited:
 - 1. all acts of such a nature as to create confusion by any means whatever with the establishment, the goods, or the industrial or commercial activities, of a competitor;
 - 2. false allegations in the course of trade of such a nature as to discredit the establishment, the goods, or the industrial or commercial activities, of a competitor;
 - 3. indications or allegations the use of which in the course of trade is liable to mislead the public as to the nature, the manufacturing process, the characteristics, the suitability for their purpose, or the quantity, of the goods.

7.2663. Paragraph 1 of Article 10bis, as incorporated into the TRIPS Agreement by means of a reference in its Article 2.1, thus requires Members⁵³⁴⁴ to assure to nationals of Members effective protection against unfair competition. While paragraph 1 requires that such protection is "effective", it does not determine the means by which Members are to assure such protection or elaborate on the meaning of unfair competition.

⁵³⁴¹ Singapore's third-party submission, para. 61.

⁵³⁴² Singapore's third-party submission, paras. 18-20.

⁵³⁴³ Uruguay's third-party submission, para. 107.

⁵³⁴⁴ We understand the reference in Article 10bis(1) of the Paris Convention (1967) to the countries of the Paris Union in the context of the TRIPS Agreement to mean the Members of the WTO, and the reference to nationals of such countries to nationals of other WTO Members as defined in Article 1.3 of the TRIPS Agreement. See Appellate Body Report, *US – Section 211 Appropriations Act*, para. 132.

7.2664. "[A]n act of unfair competition" is defined in paragraph 2 of Article 10bis as being "[a]ny act of *competition* contrary to *honest practices* in industrial or commercial matters" (emphasis added). The term "competition" in the context of commerce is defined as "rivalry in the market, striving for custom between those who have the same commodities to dispose of".⁵³⁴⁵ This is also how the panel in *Mexico – Telecoms* understood this term "in its relevant economic sense".⁵³⁴⁶

7.2665. The noun "act" means "something done or effected; a deed".⁵³⁴⁷ The term "act of competition", in the context of "industrial or commercial matters", suggests something that is done by a market actor to compete against other actors in the market.

7.2666. The ordinary meaning of the adjective "honest" in conjunction with an action such as "practice" is "done with or expressive of truthfulness, fairness, or integrity of character or intention; free from deceit; genuine, sincere".⁵³⁴⁸ As regards the term "practice", the Appellate Body considered as relevant the following definitions: "'habitual doing or carrying out of something; usual or customary action or performance'; 'custom; a habit; a habitual action'; 'action of doing something; performance, operation; method of action or working'."⁵³⁴⁹ How commercial matters are habitually carried out is likely to vary from market to market and change over time. Taken together, these definitions suggest that an "act of competition" is contrary to "honest practices" if it is done in a manner that is contrary to what would usually or customarily be regarded as truthful, fair and free from deceit within a certain market.

7.2667. Accordingly, we understand the definition of "an act of unfair competition" in paragraph 2 as referring to something that is done by a market actor to compete against other actors in the market in a manner that is contrary to what would usually or customarily be regarded as truthful, fair and free from deceit within a certain market.

7.2668. The *chapeau* of paragraph 3 provides that "[t]he following *in particular* shall be prohibited" (emphasis added). The relevant definition of "*in particular*" is "[a]s one distinguished from others of a number".⁵³⁵⁰ We understand that paragraph 3 is linked to paragraph 2 of Article 10bis in that the acts from which the acts listed in paragraph 3 are distinguished are other acts of unfair competition, as defined in paragraph 2.⁵³⁵¹ Therefore, we understand that the types of acts listed in paragraph 3 are instances of "act[s] of competition contrary to honest practices in industrial or commercial matters", and that there may be other types of dishonest commercial practices that meet the definition in paragraph 2, which more broadly refers to "[a]ny act of competition contrary to honest practices in industrial or commercial matters" (emphasis added). Furthermore, the *chapeau* of paragraph 3 is worded as a binding obligation in respect of the types of acts listed under its subparagraphs, providing that "[t]he following *in particular* shall be

⁵³⁴⁵ Oxford English Dictionary online, definition of "competition", available at:

<<http://www.oed.com/view/Entry/37578?rskey=pnBSr9&result=1#eid>>, accessed 2 May 2017.

⁵³⁴⁶ Panel Report, *Mexico – Telecoms*, para. 7.230 (footnote omitted). Honduras (first written submission, para. 663), the Dominican Republic (first written submission, para. 842), and Australia (first written submission, para. 447 and fn 620) refer to this definition of the term "competition".

⁵³⁴⁷ Oxford English Dictionary online, definition of "act, n.", available at:

<<http://www.oed.com/view/Entry/1888?rskey=krCUvx&result=4&isAdvanced=false#eid>>, accessed 2 May 2017.

⁵³⁴⁸ Oxford English Dictionary online, definition of "honest", available at:

<<http://www.oed.com/view/Entry/88149?rskey=Q1K9kO&result=1&isAdvanced=false#eid>>, accessed 2 May 2017.

⁵³⁴⁹ Appellate Body Report, *US – Carbon Steel (India)*, para. 4.90 fn 682 (referring to Shorter Oxford English Dictionary, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 2, p. 2311).

⁵³⁵⁰ Oxford English Dictionary online, definition of "in particular", available at:

<<http://www.oed.com/view/Entry/138260?redirectedFrom=%22in+particular%22#eid31581166>>, accessed 2 May 2017.

⁵³⁵¹ In *India – Agricultural Products*, the Appellate Body found that the term "in particular" in the first sentence of Article 6.2 of the SPS Agreement "underscores the link between" Article 6.2 and the more general obligation in Article 6.1 of the SPS Agreement and, together with other considerations, "indicate[s] that, together, Articles 6.1 and 6.2 accord prominence to the content of Article 6.2 as one particular way through which a Member can ensure that its SPS measures are 'adapted', as required by Article 6.1." Appellate Body Report, *India – Agricultural Products*, para. 5.133.

prohibited" (emphasis added). In other words, paragraph 3 requires Members to prohibit the types of dishonest commercial practices mentioned in its subparagraphs.⁵³⁵²

7.2669. Overall, therefore, paragraph 1, read together with paragraphs 2 and 3, requires that a Member, in the process of assuring effective protection against acts of unfair competition, within the meaning of paragraph 2, has to prohibit the types of practices in industrial and commercial matters that fall under paragraph 3. Pursuant to paragraph 1, protection against such acts must be "effective". Paragraph 1, however, is silent as to the standard to be applied to determine which industrial and commercial practices – beyond those covered by paragraph 3 – should be considered dishonest in a particular Member, against which that Member consequently must assure effective protection.

7.2670. We note that the parties share the view that it would be possible for a measure to be inconsistent with paragraph 1 without being inconsistent with any of the sub-paraphraphs of paragraph 3. Indonesia reads paragraph 1 as creating a broader obligation than paragraph 3, and characterizes the examples in paragraph 3 as establishing "minimum protection". Australia takes the view that a measure could be inconsistent with paragraph 1, even if the relevant conduct does not specifically fall under any of the sub-paraphraphs of paragraph 3, provided that such conduct is "of the same nature and scope" as the acts listed in paragraph 3. We will now turn to these questions.⁵³⁵³

7.2671. As we determined above, we understand "an act of unfair competition" in paragraph 2 as referring to something that is done by a market actor to compete against other actors in the market, in a manner that is contrary to what would usually or customarily be regarded as truthful, fair and free from deceit within a certain market. How industrial and commercial matters are usually or customarily carried out differs from market to market, as do the perceptions of and the standards for determining what constitutes "honest" commercial practices. In this regard, we observe that there may be some diversity in how domestic legal systems approach the repression of unfair competition and what types of acts they cover. A WIPO commentary, provided to the Panel by the WIPO Secretariat in response to the Panel's request for information, notes that, while most countries with special laws on unfair competition have adopted definitions that are the same or similar to the one used in Article 10bis(2), using terms such as "honest trade practices", perceptions of notions such as "honest practices" vary:

It is true that describing unfair competition as acts contrary to "honest trade practices", "good faith" and so on does not make for clear-cut, universally accepted standards of behavior, since the meaning of the terms used is rather fluid. The standard of "fairness" or "honesty" in competition is no more than a reflection of the sociological, economic, moral and ethical concepts of a society, and may therefore differ from country to country (and sometimes even within a country). That standard is also liable to change with time.⁵³⁵⁴

7.2672. We read this passage as illustrative also for the purposes of understanding the definition of an act of unfair competition contained in Article 10bis(2). In our view, the reference in that definition to "honest practices" does not suggest that a single "clear-cut, universally accepted standard of behaviour" applies in determining whether a commercial practice is "honest". Rather, it suggests that this assessment should be made in light of what constitutes "honest practices" in the relevant market.

7.2673. In this respect, the notion of "honest practices" resembles another notion referred to in the WTO agreements, namely "public morals". The panel in *US – Gambling*, in interpreting Article XIV(a) of the GATS, found that "the term 'public morals' denotes standards of right and

⁵³⁵² We address the interpretation of the terms used in sub-paraphraphs (3)(1) and (3)(3) of Article 10bis of the Paris Convention (1967) in the context of the claims raised under those sub-paraphraphs. See paras. 7.2714, 7.2750, 7.2753 below.

⁵³⁵³ Honduras's response to Panel question No. 15; Dominican Republic's response to Panel question No. 15, paras. 72-76; Cuba's response to Panel question No. 15 (endorsing Honduras's response to question); Indonesia's response to Panel question No. 15; and Australia's response to Panel question No. 15.

⁵³⁵⁴ Response by WIPO to the Panel's request for factual information, letter dated 5 October 2015, Annex 8, International Bureau of WIPO, *Protection Against Unfair Competition: Analysis of the Present World Situation*, World Intellectual Property Organization (Geneva, 1994), paras. 28-29.

wrong conduct maintained by or on behalf of a community or nation".⁵³⁵⁵ It also noted that "the content of these concepts for Members can vary in time and space, depending upon a range of factors, including prevailing social, cultural, ethical and religious values".⁵³⁵⁶ Similarly, the panel in *China – Publications and Audiovisual Products*, in interpreting Article XX(a) of the GATT 1994, noted that "the content and scope of the concept of 'public morals' can vary from Member to Member, as they are influenced by each Member's prevailing social, cultural, ethical and religious values".⁵³⁵⁷

7.2674. The context provided by other provisions of the TRIPS Agreement referring to morality point in a similar direction. Article 6*quinquies* of the Paris Convention (1967), as incorporated into the TRIPS Agreement, allows a Member to deny or invalidate, under certain circumstances, a trademark that is "contrary to morality or public order". As Bodenhausen notes, the grounds for refusal or invalidation of a trademark exist when such a trademark is contrary to morality or public order "as considered in the country where protection is claimed".⁵³⁵⁸ Article 27.2 of the TRIPS Agreement allows Members to exclude from patentability inventions "the prevention *within their territory* of the commercial exploitation of which is necessary to protect *ordre public* or *morality*" (emphasis added), suggesting that the necessity of preventing commercial exploitation on the grounds of morality is to be considered in respect of a particular territory.

7.2675. Therefore, the notion of "honest practices" as used in the definition of an act of unfair competition in Article 10*bis*(2) should be interpreted with reference to standards of honest conduct habitually applied and maintained in the domestic market at issue. What is to be considered as the market concerned needs to be determined based on the circumstances of a particular case. We note in this respect that the fact that what is considered to constitute an "honest practice" may vary from Member to Member does not render the obligation discretionary. If certain acts objectively fall within what is considered, within the domestic market at issue, "contrary to honest practices in industrial or commercial matters", then they will constitute an act of unfair competition subject to the obligation in Article 10*bis*.⁵³⁵⁹

7.2676. This understanding is confirmed by the preparatory works of the Paris Convention (1967). The original 1883 Paris Convention did not address unfair competition. The first mention of it was included in Article 10*bis* of the 1900 Brussels Act⁵³⁶⁰, and the current wording was introduced at

⁵³⁵⁵ Panel Report, *US – Gambling*, para. 6.465. This interpretation was not questioned by the Appellate Body. Appellate Body Report, *US – Gambling*, para. 299.

⁵³⁵⁶ Panel Report, *US – Gambling*, para. 6.461.

⁵³⁵⁷ Panel Report, *China – Publications and Audiovisual Products*, para. 7.763.

⁵³⁵⁸ As regards the related concept of "public order", Bodenhausen adds that "[a] mark contrary to public order would be a mark contrary to the basic legal or social concepts of the country concerned". Bodenhausen, Full text, (Exhibit DOM-79), p. 116. We note that all parties to the present disputes have relied on the Guide to the Paris Convention in various parts of their submissions.

⁵³⁵⁹ We also note that the Guide to the Paris Convention by Bodenhausen refers to notions of honesty not only as prevailing in a Member's jurisdiction but also as established in international trade: "[a]ny act of competition will have to be considered unfair if it is contrary to honest practices in industrial or commercial matters. This criterion is not limited to honest practices existing in the country where protection against unfair competition is sought. The judicial or administrative authorities of such country will therefore also have to take into account honest practices established in international trade." Bodenhausen, Full text, (Exhibit DOM-79), p. 144. In the circumstances of a particular case, honest practices established in international trade, if discernible, should therefore also inform the meaning of "[a]ny act of competition contrary to honest practices in industrial or commercial matters" under paragraph 2 of Article 10*bis*.

⁵³⁶⁰ Article 10*bis* of the 1900 Brussels Act provides that "[n]ationals of the Convention (Articles 2 and 3) shall enjoy, in all the States of Union, the protection granted to nationals against unfair competition". This provision, in a somewhat modified form, is now contained in paragraph 1 of Article 10*bis*. The 1911 Washington Conference introduced the wording "assure ... effective protection" and the 1925 Hague Act substituted "are bound" for "undertake". The definition of an act of unfair competition was inserted into its paragraph 2 in the 1925 Hague Act, and remains unchanged. The 1925 Hague Conference also inserted paragraph 3 with two sub-paragraphs containing the two examples that in essence correspond to the present sub-paragraphs 1 and 2. The third sub-paragraph with a further example was inserted into the 1958 Lisbon Act and remains unchanged. See Response by WIPO to the Panel's request for factual information, letter dated 5 October 2015, Excerpts from the records of diplomatic conferences adopting, revising and amending Articles 6*bis*, 6*quinquies*, 7 and 10*bis* of the Paris Convention (1967). The extracts from the 1900, 1911 and 1925 Acts of the Paris Convention are from the English translations of those acts as contained in *The Paris Convention for the Protection of Industrial Property from 1883 to 1983* (WIPO, 1983).

the 1925 Hague Revision Conference.⁵³⁶¹ The Drafting Committee introduced the final text with, *inter alia*, the following comments:

*[O]n a jugé utile, en renforçant l'obligation prise par les pays contractants à Washington, d'établir le principe qu'il fallait atteindre la concurrence déloyale sous toutes ses formes et de donner seulement comme un exemple minimum les deux groupes de faits qu'on était unanimes à ranger parmi les actes de concurrence déloyale.*⁵³⁶²

7.2677. The aforementioned WIPO commentary further confirms that the three practices listed in paragraph 3 that "in particular" have to be prohibited "must not be seen as exhaustive, but rather as the minimum protection that has to be granted by all member States".⁵³⁶³

7.2678. These elements confirm that the practices enumerated in paragraph 3 of Article 10bis are examples of dishonest practices and constitute an internationally agreed minimum as regards the types of dishonest practices that countries of the Paris Union are to prohibit. This does not detract from the fact that paragraph 2 sets the scope of the definition of "an act of unfair competition" as including "[a]ny" act of competition contrary to honest practices in commercial matters. The countries of the Union are, therefore, bound to provide effective protection against any acts of unfair competition falling within the definition in paragraph 2. This must comprise – at a minimum – the categories of practices mentioned in paragraph 3. The preparatory works cited above make it clear that, while the negotiators did not endeavour to specify other specific categories of practices against which all countries would be bound to assure effective protection, they had the intention of addressing unfair competition "*sous toutes ses formes*" ("in all of its forms"), and that the specific situations identified in paragraph 3 were provided "*seulement comme un exemple minimum*" ("only as a minimum example").

7.2679. Accordingly, WTO Members are required not only to prohibit the three specific types of acts identified in paragraph 3 of Article 10bis, but also to provide effective protection against all acts falling more generally within the scope of its paragraph 2. While a Member is required to prohibit the types of dishonest practices in industrial and commercial matters enumerated in its paragraph 3, the scope of other practices in industrial and commercial matters against which it is bound to assure effective protection needs to be considered in the context of the legal systems and conceptions of what constitutes an act contrary to what would usually or customarily be regarded as truthful, fair and free from deceit within the domestic market at issue.⁵³⁶⁴

7.2680. We further note that, as observed by the Dominican Republic and Indonesia, protection against unfair competition serves to protect competitors as well as consumers, together with the public interest. We agree with the analysis in the WIPO commentary, to which the Dominican Republic refers, that when determining "honesty" in business dealings, all these factors have to be

⁵³⁶¹ The report of the Fourth Sub-Committee of the 1925 Hague Conference characterized the above-mentioned modification of paragraph 1 as having "*d'un effet plutôt moral*". This was not considered sufficient, and there remained efforts, *inter alia*, to "*prévoir certaines espèces qui dans tous les cas devraient former l'objet de la protection conventionnelle*." Response by WIPO to the Panel's request for factual information, letter dated 5 October 2015, Annex 4, Excerpts from the Records of the Hague Revision Conference (1925), Report of the Fourth Sub-Committee, p. 472. The records are only available in French.

⁵³⁶² Response by WIPO to the Panel's request for factual information, letter dated 5 October 2015, Annex 4, Excerpts from the Records of the Hague Revision Conference (1925), Report of the Drafting Committee, p. 547.

⁵³⁶³ Response by WIPO to the Panel's request for factual information, letter dated 5 October 2015, Annex 8, International Bureau of WIPO, *Protection against Unfair Competition: Analysis of the Present World Situation*, World Intellectual Property Organization (Geneva, 1994), para. 21. Indonesia referred to a similar statement in the WIPO IP Handbook, IDN excerpts, (Exhibit IDN-43), para. 2.762. See Indonesia's first written submission, para. 154. Bodenhausen, commenting on paragraph 1 of Article 10bis of the Paris Convention (1967), explains that "[i]n giving effective protection against unfair competition, *each country may itself determine which acts come under this category*, provided, however, that paragraphs (2) and (3) of the Article under consideration are complied with". Bodenhausen, Full text, (Exhibit DOM-79), p. 144. (emphasis added)

⁵³⁶⁴ Our conclusion is without prejudice to the scope of obligations resulting from the references in Articles 22.2(b) and 39.1 of the TRIPS Agreement to Article 10bis of the Paris Convention (1967).

taken into account.⁵³⁶⁵ This approach is consistent with Article 7 of the TRIPS Agreement, entitled "Objectives", which reflects the intention of establishing and maintaining a balance between the societal objectives mentioned therein. Consequently, a determination of what amounts to an act that is contrary to honest practices in commercial matters may, depending on the circumstances, reflect a balancing of these interests.

7.2681. We further note that this interpretation is consistent with the relevant context in the TRIPS Agreement, into which Article 10bis is incorporated by means of the reference in its Article 2.1. In this regard, we note that the second and third sentences of Article 1.1 of the TRIPS Agreement provide that "Members may, but shall not be obliged to, implement in their law more extensive protection than is required by this Agreement, provided that such protection does not contravene the provisions of this Agreement", and "Members shall be free to determine the appropriate method of implementing the provisions of this Agreement within their own legal system and practice."

7.2682. The second sentence of Article 1.1 makes it clear that the TRIPS Agreement is a minimum standards agreement. As the panel in *China – Intellectual Property Rights* noted, it "clarifies that the provisions of the Agreement are minimum standards only, in that it gives Members the freedom to implement a higher standard, subject to a condition".⁵³⁶⁶ Furthermore, the third sentence clarifies that the TRIPS Agreement is not intended to harmonize laws between Members. As the Appellate Body noted in *India – Patents*, "Members, therefore, are free to determine how best to meet their obligations under the TRIPS Agreement within the context of their own legal systems".⁵³⁶⁷ We also note that the third sentence of Article 1.1 of the TRIPS Agreement leaves it to that Member to choose the appropriate methods within its own legal system and practice to repress any such dishonest practice.

7.2683. In response to a question from the Panel, Honduras, Cuba, and Indonesia argue that Article 10bis could cover more than "acts of unfair competition" as defined in its paragraph 2 because Article 10bis(1) requires effective protection against "unfair competition".⁵³⁶⁸

7.2684. Article 10bis(2) defines the term "act of unfair competition", whereas Article 10bis(1) requires effective protection against "unfair competition". We do not, however, read the omission of the word "act" from paragraph 1 as extending the scope of Article 10bis beyond acts of unfair competition as defined in paragraph 2. As described above, the term "competition" refers, in the relevant economic sense, to "[r]ivalry in the market, striving for custom between those who have the same commodities to dispose of."⁵³⁶⁹ This definition entails that competition is a process between market actors. By referring to competition, Article 10bis(1) thus requires effective protection against unfair competition between market actors. This is underscored by the three subparagraphs of Article 10bis(3) which are each based on the assumption that unfair competition involves an action of market actors. Subparagraphs 1 and 2 of Article 10bis(3) both refer to something being done to a "competitor", which implies that a competing market operator is involved in what amounts to unfair competition. Likewise, subparagraph 3 of Article 10bis(3) regulates the use of certain types of "indications or allegations ... in the course of trade", implying that unfair competition relates to actions undertaken by actors operating on the market. We also do not have any indication from the preparatory work of Article 10bis and its subsequent

⁵³⁶⁵ Response by WIPO to the Panel's request for factual information, letter dated 5 October 2015, Annex 8, International Bureau of WIPO, *Protection against Unfair Competition: Analysis of the Present World Situation*, World Intellectual Property Organization (Geneva, 1994), paras. 33-37. See also WIPO Protection Against Unfair Competition, (Exhibits AUS-536, DOM-139).

⁵³⁶⁶ Panel Report, *China – Intellectual Property Rights*, para. 7.513. The condition referred to by the panel is contained in the third sub-clause of the second sentence of Article 1.1, namely that such more extensive protection may not contravene the provisions of the TRIPS Agreement. For example, generally such protection has to be made available to nationals of other Members without discrimination, consistently with Articles 3-5.

⁵³⁶⁷ Appellate Body Report, *India – Patents (US)*, para. 59.

⁵³⁶⁸ Honduras's response to Panel question No. 18; Cuba's response to Panel question No. 18 (annexed to its response to Panel question No. 138); and Indonesia's response to Panel question No. 18.

⁵³⁶⁹ Oxford English Dictionary online, definition of "competition", available at:

<<http://www.oed.com/view/Entry/37578?rskey=b0X7t0&result=1&isAdvanced=false#eid>>, accessed 2 May 2017.

amendments⁵³⁷⁰ that would suggest any intention by negotiators to address unfair competition in relation to anything other than business competition involving market actors.⁵³⁷¹

7.3.6.4 Whether the TPP measures are inconsistent with Article 10bis of the Paris Convention (1967), as incorporated in the TRIPS Agreement

7.3.6.4.1 Introduction

7.2685. We now turn to the claims by Honduras, the Dominican Republic, Cuba and Indonesia that the TPP measures are inconsistent with Article 10bis.

7.2686. Honduras claims that the TPP measures are inconsistent with:

- a. Article 10bis(1) because the plain packaging trademark restrictions give rise to a situation of "unfair competition" by *ex ante* and systematically skewing the conditions of competition to the detriment of high-end products and producers and to the advantage of lower-end products and producers⁵³⁷²; and
- b. Article 10bis(3)(3) because the TPP measures require producers to make "indications or allegations" that all tobacco products have the same physical properties and characteristics.⁵³⁷³

7.2687. The Dominican Republic claims that the TPP measures are inconsistent with:

- a. Article 10bis(1) because the TPP measures compel acts that amount to unfair competition⁵³⁷⁴; and
- b. Article 10bis(3)(3) because the TPP measures compel acts that are liable to mislead the public as to the characteristics of tobacco products.⁵³⁷⁵

7.2688. Cuba claims that the TPP measures are inconsistent with Article 10bis, because a competitive environment in which rival manufacturers are required to present their goods to consumers in a visually undifferentiated manner results in unfair competition.⁵³⁷⁶ In particular, they are inconsistent with:

- a. Article 10bis(1), because the TPP measures require competitors to carry out acts that constitute unfair competition⁵³⁷⁷; and
- b. Article 10bis(3)(1) because the TPP measures create confusion⁵³⁷⁸; and
- c. Article 10bis(3)(3) because the TPP measures are liable to mislead consumers.⁵³⁷⁹

7.2689. Indonesia claims that the TPP measures are inconsistent with:

- a. Article 10bis(3)(1) because the TPP measures are likely to create confusion⁵³⁸⁰; and

⁵³⁷⁰ Response by WIPO to the Panel's request for factual information, letter dated 5 October 2015, Excerpts from the records of various diplomatic conferences adopting, revising and amending Articles 6bis, 6*quinquies*, 7 and 10bis of the Paris Convention.

⁵³⁷¹ This is without prejudice to the question – not raised in the present proceedings – whether and under what circumstances other entities, like consumer associations, might be considered to *act as* competing market operators, or be accorded rights or obligations under the national unfair competition laws of Members.

⁵³⁷² Honduras's first written submission, paras. 20 and 938.

⁵³⁷³ Honduras's first written submission, paras. 20 and 938.

⁵³⁷⁴ Dominican Republic's first written submission, section VI.I.2.

⁵³⁷⁵ Dominican Republic's first written submission, section VI.I.2.

⁵³⁷⁶ Cuba's first written submission, para. 382.

⁵³⁷⁷ Cuba's first written submission, para. 383; and Cuba's second written submission, para. 145.

⁵³⁷⁸ Cuba's second written submission, paras. 137 and 145.

⁵³⁷⁹ Cuba's second written submission, paras. 137 and 145.

b. Article 10bis(3)(3) because the TPP measures are liable to mislead consumers.⁵³⁸¹

7.2690. The complainants' arguments concerning Article 10bis relate to two aspects. Cuba argues that the TPP measures themselves constitute an act of unfair competition on the grounds that they create unfair conditions for competition. In addition, the complainants argue that the TPP measures compel market actors to engage in the types of acts of unfair competition against which Australia is obliged to assure effective protection pursuant to paragraph 1, or to prohibit under paragraph 3(1) or 3(2). In the following, we will first address whether the TPP measures themselves constitute acts of unfair competition, and then whether they require market actors to engage in acts of unfair competition of the type that Australia is required to provide protection against under Article 10bis, as incorporated through Article 2.1.

7.2691. As regards the order of analysis of the second set of claims, we recall that, in our general interpretative analysis of Article 10bis, we found that the types of acts listed in paragraph 3 are instances of acts of unfair competition, as defined in paragraph 2.⁵³⁸² Pursuant to paragraph 3, WTO Members are required to prohibit the three specific types of acts identified in that paragraph. Pursuant to paragraph 1, they are also to provide effective protection against all other acts falling more generally within the scope of the definition of an act of unfair competition in paragraph 2.⁵³⁸³ We, therefore, consider it appropriate to first address the arguments that relate to the specific types of acts of unfair competition identified in paragraphs 3(1) and 3(3), which Australia is obliged to prohibit, and then the arguments that relate to other acts of unfair competition falling more generally within the scope of paragraph 2 against which Australia is obliged to assure effective protection pursuant to paragraph 1.

7.2692. We will, accordingly, address in turn:

- a. the allegation by Cuba and Indonesia that the TPP measures compel acts inconsistent with paragraph 3(1) of Article 10bis;
- b. the allegation by Honduras, the Dominican Republic, Cuba, and Indonesia that the TPP measures compel acts that are inconsistent with paragraph 3(3) of Article 10bis; and
- c. the allegation by Honduras, the Dominican Republic and Cuba that the TPP measures compel acts of unfair competition inconsistent with paragraph 1 of Article 10bis.

7.3.6.4.2 Whether the TPP measures themselves constitute an act of unfair competition

7.2693. Cuba argues that the "competitive environment" resulting from the application of the TPP measures – where rival manufacturers are required to present their goods in a visually undifferentiated manner – leads to "a situation of 'unfair competition'".⁵³⁸⁴

7.2694. Honduras initially argued, as regards its claim under Article 10bis(1), that a *governmental regulation* that skews the conditions of competition in favour of some competitors and to the detriment of other competitors is "unjust" and "not equitable", i.e. unfair, and that Article 10bis constrains a government's regulatory power in this regard to the extent that regulation has more than "incidental" impact on competition in that it renders competition unfair.⁵³⁸⁵ As regards its claim under Article 10bis(3)(3), Honduras initially contended that the TPP measures are inconsistent with paragraph 3(3) on the grounds that they give rise to misleading indications and allegations. In its view, this results in unfair competition because consumers are being misled about the true nature of tobacco products and because the TPP measures have an asymmetrical impact on competitors.⁵³⁸⁶ Honduras later clarified that it does not argue that a government's laws

⁵³⁸⁰ Indonesia's first written submission, section V.2.b.

⁵³⁸¹ Indonesia's first written submission, section V.2.c

⁵³⁸² See para. 7.2668 above.

⁵³⁸³ See para. 7.2679 above.

⁵³⁸⁴ Cuba's first written submission, para. 382; and second written submission, para. 138.

⁵³⁸⁵ Honduras's first written submission, paras. 677-681.

⁵³⁸⁶ Honduras's first written submission, paras. 718-734.

or regulations constitute acts of unfair competition. Rather, the acts of unfair competition are those of private parties.⁵³⁸⁷

7.2695. The Dominican Republic explains that it is not arguing that the TPP measures are themselves "acts" of unfair competition but rather the particular acts of unfair competition at issue are private acts of producers.⁵³⁸⁸

7.2696. As regards its claim under Article 10bis(3)(1), Indonesia initially contended that "PP is an act of 'such a nature as to create confusion' among competitors' tobacco products"⁵³⁸⁹ because the required uniformity of packaging and presentation of tobacco products allegedly, *inter alia*, drove manufacturers to compete on price, limited competitive opportunities resulting in downtrading, and encouraged illicit trade.⁵³⁹⁰ Later in the proceedings, Indonesia clarified that "[t]he 'acts of unfair competition' are *not* regulatory acts by Australia. The relevant acts of unfair competition are the private acts by competitors in the market place when they present their competing products in virtually identical packaging."⁵³⁹¹

7.2697. Australia responds that an act of unfair competition does not encompass the regulatory environment in which such acts take place.⁵³⁹²

7.2698. We recall that an act of unfair competition is defined in paragraph 2 of Article 10bis as "[a]ny act of competition contrary to honest practices in industrial or commercial matters". We also recall our understanding in paragraph 7.2665 that the terms "competition", and "act of competition", which are part of the definition, suggest, in the context of "industrial or commercial matters", that the term "act of competition" refers to something that is done by a market actor to compete against other actors in the market. In our view, therefore, laws and other instruments that a Member adopts to regulate the market, or the overall regulatory environment within which the market operates do not *per se* amount to "acts of unfair competition".⁵³⁹³

7.2699. We, therefore, find that the TPP measures in themselves do not constitute an act of competition within the meaning of Article 10bis(2), and therefore also do not constitute an act of *unfair* competition against which a Member is bound to assure effective protection under Article 10bis(1), including by prohibiting all acts of unfair competition of such a nature as to create confusion within the meaning of Article 10bis(3)(1) or by prohibiting indications or allegations, the use of which in the course of trade is liable to mislead the public within the meaning of Article 10bis(3)(3).

7.3.6.4.3 Whether the TPP measures require market actors to engage in acts of unfair competition against which Australia is obliged to assure protection

7.2700. As described above, all complainants argue that the TPP measures compel market actors to engage in the types of acts of unfair competition against which Australia is obliged to assure effective protection pursuant to paragraph 1 (Honduras, the Dominican Republic and Cuba), or to prohibit under paragraph 3, namely acts of unfair competition that create confusion within the meaning of paragraph 3(1) (Cuba and Indonesia), or acts of unfair competition that amount to misleading indications or allegations within the meaning of paragraph 3(3) (Honduras, the Dominican Republic, Cuba, and Indonesia).

7.2701. We will therefore first consider whether the TPP measures compel market actors to engage in any acts of unfair competition that Australia is obliged to prohibit in accordance with paragraphs 3(1) or 3(3) of Article 10bis, and then whether they compel other acts of unfair

⁵³⁸⁷ Honduras's second written submission, para. 391.

⁵³⁸⁸ Dominican Republic's second written submission, para. 749.

⁵³⁸⁹ Indonesia's first written submission, para. 167.

⁵³⁹⁰ Indonesia's first written submission, paras. 163 and 168-177.

⁵³⁹¹ Indonesia's second written submission, para. 57.

⁵³⁹² See Australia's first written submission, paras. 445-450 and the summary of arguments above.

⁵³⁹³ This is without prejudice to the question of whether, and under what circumstances, a Member itself can be considered to *act as* a competing market operator, or be accorded rights or obligations under the national unfair competition laws of Members, an issue not raised in the present proceedings.

competition contrary to paragraph 1.⁵³⁹⁴ If we find that the TPP measures do compel market actors to engage in acts of unfair competition that Australia is obliged to prohibit under paragraphs 3(1) or 3(3), or against which Australia is bound to assure effective protection pursuant to paragraph 1, we will consider whether, in compelling these acts, Australia fails to prohibit such acts within the meaning of paragraphs 3(1) and 3(3) or assure "effective protection" against such acts within the meaning of paragraph 1, in violation of Article 10bis.

7.3.6.4.3.1 Article 10bis(3)(1)

7.2702. We now turn to whether, as alleged by Cuba and Indonesia, the TPP measures compel acts of such a nature as to create confusion within the meaning of Article 10bis(3)(1).⁵³⁹⁵

Main arguments of the parties

7.2703. Cuba contends that the TPP measures, by eliminating all distinctive elements of tobacco packaging with the exception of the brand and variant name, which may only be printed in the prescribed typeface and size, mandates acts that deliberately create confusion, in violation of Article 10bis(3)(1).⁵³⁹⁶

7.2704. Indonesia argues that, as a result of the TPP measures, the packaging of tobacco products and the products themselves are stripped of any distinctiveness and each manufacturer's tobacco product looks essentially the same as its competitors.⁵³⁹⁷ It submits that this required uniformity constitutes an act of "such a nature as to create confusion" among the tobacco product offerings of different competitors.⁵³⁹⁸ Without the distinctive elements of a normally branded tobacco product, it is difficult for competitors to distinguish their brands and for consumers to discern one brand from another. The permitted use of the brand name on packaging is insufficient to prevent confusion among tobacco products, as there are a number of similar variations of brand and variant names that are already registered in Australia. In this regard, the TPP measures mandate private acts "of such a nature as to create confusion" in the minds of consumers.⁵³⁹⁹

7.2705. Indonesia further argues that the confusion among brands created by the TPP measures frustrates the purpose of Article 10bis(3)(1) to protect competitors, especially those in the mid-priced and premium segment of the market, against unfair competition. Denied the means to distinguish their products from competitors, manufacturers have no incentive to compete on quality and are driven to compete on price. The evidence of increased downtrading from premium brands to low-price brands shows that the TPP measures are limiting competitive opportunities for producers of premium products. Downtrading harms competitors in the mid-priced and premium segment of the market that have invested in developing higher quality products. Indonesia contends that, "[i]n short, Australia's [T]PP measures rob tobacco product manufacturers of the ability to distinguish their products based on quality and therefore 'commoditize' the tobacco market".⁵⁴⁰⁰ Indonesia adds that "Australia sought to ensure that manufacturers *cannot* compete on the basis of consumer perceptions of quality. And in fact, a stated goal of [T]PP was 'shattering the image of cigarettes as an ordinary consumer item'."⁵⁴⁰¹

7.2706. The confusion among tobacco product brands created by the TPP measures further harms competitors and the public by encouraging illicit trade in tobacco products. Manufacturers of legal tobacco products are forced to compete against illicit, lower-priced products. Indonesia argues that "[t]his is exactly the kind of unfair competition that Australia is obligated to protect against under

⁵³⁹⁴ See the discussion of the order of analysis in para. 7.2691 above.

⁵³⁹⁵ Australia describes the way in which it gives effect to its obligation under Article 10bis to assure effective protection against unfair competition in its first written submission, paras. 458-459. For a summary, see paras. 7.2780-7.2781 above.

⁵³⁹⁶ Cuba's second written submission, paras. 137-138, 141 and 145. See also Cuba's first written submission, paras. 385 and 383.

⁵³⁹⁷ Indonesia's first written submission, para. 162.

⁵³⁹⁸ Indonesia's first written submission, para. 163.

⁵³⁹⁹ Indonesia's first written submission, paras. 165-167; and second written submission, para. 49.

⁵⁴⁰⁰ Indonesia's first written submission, paras. 168-174.

⁵⁴⁰¹ Indonesia's first written submission, para. 174 (emphasis original) (referring to NPHT Technical Report 2, (Exhibits AUS-52, JE-12), p. vi).

Article 10bis".⁵⁴⁰² Indonesia submits that "Australia has failed to provide effective protection against unfair competition by increasing the competitive opportunities for illicit tobacco products". It explains that "[b]y lowering the cost and difficulty of creating counterfeit tobacco packs, creating economies of scale for counterfeit production, and requiring the appearance of tobacco packaging to remain static over time, Australia's plain packaging measures offer significant competitive advantage to manufacturers of illicit tobacco products to the detriment of legal products".⁵⁴⁰³

7.2707. Indonesia argues that the TPP measures affect the legal mechanism available to trademark owners, because they make it more difficult to demonstrate that allegedly infringing marks are causing confusion. By eroding the distinctiveness of trademarks over time through non-use and by requiring that trademarks appear in an identical format, the TPP measures diminish the ability of trademark owners to successfully prosecute trademark infringement actions. Thus, by the operation of its TPP measures, Australia fails to provide effective protection against acts of unfair competition in violation of Article 10bis.⁵⁴⁰⁴

7.2708. Indonesia stated that "PP is an act of 'such a nature as to create confusion' among competitors' tobacco products".⁵⁴⁰⁵ It clarified that the relevant "acts of unfair competition" are *not* regulatory acts by Australia but the private acts by competitors in the marketplace presenting their competing products in virtually identical packaging.⁵⁴⁰⁶

7.2709. Indonesia submits that Australia compels the action that it is required to prohibit under Article 10bis(3)(1). It has created confusion among competitors by mandating that tobacco manufacturers sell products that are uniform in appearance and in packaging and that look almost identical to those of their competitors.⁵⁴⁰⁷ In this regard, the TPP measures mandate private acts "of such a nature as to create confusion" in the minds of consumers.⁵⁴⁰⁸

7.2710. Indonesia refers to Article 27 of the Vienna Convention, which provides that a party to an international treaty "may not invoke the provisions of its internal law as justification for its failure to perform a treaty". It adds that, in *Mexico – Telecoms*, the panel found that Mexico had violated its WTO obligations by requiring anti-competitive practices that it was obligated to prevent under its GATS commitments.⁵⁴⁰⁹

7.2711. Australia argues that, by its terms, Article 10bis(3)(1) prohibits acts that "mix up" the establishment, goods or commercial activities of a market actor with those of a rival competitor.⁵⁴¹⁰ In order to establish a violation of Article 10bis(3)(1), the complainants would need to demonstrate that Australia has failed to prohibit acts that create confusion between the goods of one market actor and those of a rival competitor.⁵⁴¹¹ Australia contends that Indonesia has not even attempted to demonstrate that Australia has failed to prohibit such acts.⁵⁴¹²

7.2712. Australia contends that the TPP measures are not themselves an "act of competition", nor do they compel "acts of competition". Furthermore, even if they did compel such acts, Indonesia has failed to demonstrate that the TPP measures compel acts that "create confusion" between the goods of one market actor and those of a rival competitor as to the proper commercial source of the goods.⁵⁴¹³ Indonesia has neither demonstrated that the measures have created confusion between competing tobacco products nor advanced arguments or evidence to establish how

⁵⁴⁰² Indonesia's first written submission, paras. 175-177 (referring to KPMG Report 2013, (Exhibits HND-67, DOM-98, IDN-41), which reports an increase in illicit trade from 2012 to 2013).

⁵⁴⁰³ Indonesia's response to Panel question No. 23, paras. 25-27 (referring to CMZ Report, (Exhibit DOM/HND-2), paras. 58-61 and 79-84 and fn 91).

⁵⁴⁰⁴ Indonesia's second written submission, para. 54.

⁵⁴⁰⁵ Indonesia's first written submission, para. 167.

⁵⁴⁰⁶ Indonesia's second written submission, para. 57 (emphasis original). See also ibid. paras. 48-49.

⁵⁴⁰⁷ Indonesia's first written submission, para. 178.

⁵⁴⁰⁸ Indonesia's second written submission, para. 49.

⁵⁴⁰⁹ Indonesia's first written submission, para. 178 (referring to Panel Report, *Mexico – Telecoms*, paras. 7.262 and 7.266).

⁵⁴¹⁰ Australia's first written submission, para. 461 (referring to the definition of "confuse" in Shorter Oxford English Dictionary, Vol. 1, AUS excerpts, Part 1, (Exhibit AUS-243), p. 489).

⁵⁴¹¹ Australia's first written submission, para. 462.

⁵⁴¹² Australia's second written submission, para. 47.

⁵⁴¹³ Australia's second written submission, para. 48.

Australia's measure *could* create confusion between competing tobacco products within the context of Australia's dark market. Indonesia has also failed to explain how, post-purchase, the packaging and appearance of tobacco products create confusion between the goods of one tobacco producer and those of a rival competitor. Because the TPP measures apply to all tobacco products for retail sale in Australia, it is implausible that consumers could be confused about whether *all* tobacco products in Australia are those of a single market actor on the basis of their standardized packaging and appearance. This is especially so when the measures permit the packaging of each tobacco product to clearly identify its particular brand, business or company name and any variant name. Indonesia has thus failed to establish a *prima facie* case of violation of Article 10bis(3)(1) of the Paris Convention.⁵⁴¹⁴

Analysis by the Panel

7.2713. Article 10bis(3) identifies certain types of acts of unfair competition, which in particular shall be prohibited. Its sub-paragraph (1) relates to "all acts of such a nature as to create confusion by any means whatever with the establishment, the goods, or the industrial or commercial activities, of a competitor". (emphasis added)

7.2714. The focus of paragraph 3(1) is therefore on those acts that are of such a nature as to create confusion about a *competitor's* products, establishment, or industrial or commercial activities.⁵⁴¹⁵ A definition of "confusion" is "[t]he confounding or mistaking of one for another; failure to distinguish".⁵⁴¹⁶ The ordinary meaning of "confusion" thus suggests that paragraph 3(1) refers to situations where an act of unfair competition is of such a nature that it results in confusion in the sense of mistaking between products or failure to distinguish between them. A definition of "of nature" is "of the type, form, or character of; similar to, like; equivalent to, classifiable as".⁵⁴¹⁷ The ordinary meaning of "of such a nature" suggests that an act of unfair competition may fall under paragraph 3(1) if it is "of the type" of acts of unfair competition that result in confusion within the meaning of paragraph 3(1). It follows from the phrase "of such nature" that it is not determinative whether an act of that type was committed in good faith.

7.2715. We recall that, as described in greater detail above, the TPP measures prohibit the use of stylized word marks, composite marks and figurative marks and other decorative elements, both on tobacco retail packaging and tobacco products, and standardize the appearance of retail packaging. However, they permit the use of word marks and marks that denote the brand, business or company name, or the name of the product variant on tobacco retail packaging, so long as these trademarks appear in the form prescribed by the TPP Regulations.⁵⁴¹⁸

7.2716. Indonesia first contended that the TPP measures were an act of such a nature as to create confusion, within the meaning of paragraph 3(1), because the required uniformity of packaging and presentation of tobacco products allegedly, *inter alia*, drove manufacturers to compete on price, limited competitive opportunities resulting in downtrading, and encouraged illicit trade.⁵⁴¹⁹ It added that "the confusion among brands created by the TPP measures frustrates the purpose of Article 10bis(3)(1) to protect competitors", resulting in a situation where tobacco manufacturers have no incentive to compete on quality and are driven to compete on price, because consumers have no basis other than price upon which to make purchasing decisions absent the "information channel" that fully branded packaging provides.⁵⁴²⁰ In the course of the

⁵⁴¹⁴ Australia's first written submission, paras. 463-467. See also Australia's second written submission, para. 50. For the main arguments of the third parties, see section 7.3.6.3.2 above.

⁵⁴¹⁵ The WIPO commentary describes State practice by explaining that "[t]he test for the *basic type of confusion* is whether the similar mark so resembles the protected mark that it is liable to confuse a substantial number of average consumers as to the *commercial source* of the goods or services". Response by WIPO to the Panel's request for factual information, letter dated 5 October 2015, Annex 8, International Bureau of WIPO, *Protection Against Unfair Competition: Analysis of the Present World Situation*, World Intellectual Property Organization (Geneva, 1994), para. 45. (emphasis original)

⁵⁴¹⁶ Oxford English Dictionary online, definition of "confusion", available at:

<<http://www.oed.com/view/Entry/39014?redirectedFrom=confusion#eid>>, accessed 2 May 2017.

⁵⁴¹⁷ Oxford English Dictionary online, definition of "of (also in) the nature of", available at:

<<http://www.oed.com/view/Entry/125353?redirectedFrom=of+nature#eid34910817>>, accessed 2 May 2017.

⁵⁴¹⁸ For further details, see sections 2.1.2.3.3 and 2.1.2.4 above.

⁵⁴¹⁹ Indonesia's first written submission, paras. 162-177.

⁵⁴²⁰ Indonesia's first written submission, para. 168.

proceedings, it clarified that the acts of unfair competition at issue are not regulatory acts by Australia, but private acts by competitors in the marketplace when they present their competing products in virtually identical packaging.⁵⁴²¹ In this regard, we recall our finding in para. 7.2699 that the TPP measures in themselves do not constitute an act of unfair competition.

7.2717. Indonesia also argues that the TPP measures erode the distinctiveness of trademarks over time, thus making it more difficult for trademark owners to demonstrate that allegedly infringing marks are causing confusion.⁵⁴²² In our view, this alleged impact of the regulatory environment relates to the operation of the TPP measures themselves as a regulatory intervention.⁵⁴²³ In light of our finding in para. 7.2699 that the TPP measures in themselves do not constitute an act of unfair competition, we do not consider such alleged impact to amount to an act of unfair competition within the meaning of Article 10bis, including its paragraph 3(1).

7.2718. As regards private acts by competitors allegedly compelled by the TPP measures, Indonesia and Cuba argue that Australia has created confusion among competitors by mandating that tobacco manufacturers sell products that are uniform in appearance and in packaging and that look almost identical to that of their competitors.⁵⁴²⁴ Indonesia elaborates that word marks themselves, particularly when presented in an identical format, are insufficient to differentiate one brand from another, and adds that retail packaging is otherwise stripped of all distinguishing characteristics. It submits that, in this regard, the TPP measures mandate private acts "of such a nature as to create confusion" in the minds of consumers.⁵⁴²⁵

7.2719. Australia responds that, since the TPP measures apply to all tobacco products for retail sale, it is implausible that consumers could be confused about whether all tobacco products in Australia are those of a single market actor on the basis of their standardized packaging and appearance.⁵⁴²⁶

7.2720. We are not persuaded that Cuba and Indonesia have demonstrated that compliance by market actors with the TPP measures would constitute an act of unfair competition of such a nature as to create confusion in the minds of consumers within the meaning of paragraph 3(1), or that the use, under the circumstances of the TPP measures, of a brand, business or company name and variant name in a standard format on retail packaging would not allow consumers to distinguish the commercial source or the products themselves and thus create confusion about the establishment of competitors or the goods at issue and their associated qualities.

7.2721. We first note that *all* competitors on the Australian market have to comply with the same requirements on standardized retail packaging and presentation of tobacco products, and they do so within the context of Australia's longstanding comprehensive tobacco control policies and an environment of public education on the overall purpose of those policies.⁵⁴²⁷ To the extent that the confusion at issue would arise from the fact that a consumer would mistakenly assume that all competing products have identical characteristics or source because their external appearance is very similar, we are not persuaded that this would be the case where this similarity results from a well-publicized regulatory intervention within a comprehensive tobacco control policy and does not reflect a commercial choice by market actors to portray the products as having identical characteristics.

⁵⁴²¹ Indonesia's second written submission, para. 57.

⁵⁴²² Indonesia's second written submission, para. 54. Indonesia makes this argument in the context of its claim under Article 10bis of the Paris Convention (1967). It refers to its arguments in the context of its claims under Articles 16.1 and 16.3 of the TRIPS Agreement for further explanations. *Ibid.* We recall that we have addressed the latter arguments in the context of our analysis of its claims under Articles 16.1 and 16.3 of the TRIPS Agreement.

⁵⁴²³ As we noted above, Indonesia clarified that, for the purposes of its claims, the relevant acts of unfair competition are the private acts by competitors in the marketplace. Indonesia's second written submission, para. 57.

⁵⁴²⁴ Indonesia's first written submission, para. 178. See also Cuba's second written submission, para. 137.

⁵⁴²⁵ Indonesia's second written submission, para. 49.

⁵⁴²⁶ Australia's first written submission, paras. 463-467. See also Australia's second written submission, para. 50.

⁵⁴²⁷ See also the information in sections 2.1.1 and 2.2 above.

7.2722. We also note that consumers can rely on the information permitted by the TPP measures through the brand, variant name and country of origin of the product, which remains available and can be verified through inspection at the purchase point, to distinguish competing tobacco products from each other. To the extent that particular characteristics are in fact associated with tobacco products bearing a specific brand and variant name, the consumer would be in a position to rely on the use of these designations, to distinguish these products from competing products on the market and to associate specific perceived characteristics of different products with these distinct brands.

7.2723. In light of the above, we are not persuaded that the complainants have demonstrated that consumers would be confused about the establishment, the goods, or the industrial or commercial activities of a competitor, as a result of the requirement to present tobacco products for retail sale in a standardized form under the TPP measures. As a consequence, we are also not persuaded that compliance by market actors with the requirements of the TPP measures constitutes an act of unfair competition of such a nature as to create confusion in the minds of consumers, within the meaning of paragraph 3(1) of Article 10bis.⁵⁴²⁸

7.2724. We therefore find that Cuba and Indonesia have not demonstrated that the TPP measures compel market actors to engage in acts of unfair competition of such a nature as to create confusion within the meaning of paragraph 3(1). We therefore also find that they have not demonstrated that Australia, in maintaining these measures, fails to prohibit such acts, in violation of Article 10bis, paragraph 3(1).

7.3.6.4.3.2 Article 10bis(3)(3)

7.2725. We now turn to whether the TPP measures compel market actors to engage in acts which amount to misleading indications or allegations within the meaning of Article 10bis(3)(3), as alleged by Honduras, the Dominican Republic, Cuba, and Indonesia.

Main arguments of the parties

7.2726. Honduras submits that Article 10bis(3) sets out specific examples of acts of unfair competition. A measure that is inconsistent with one of the subparagraphs of Article 10bis(3) is by definition also inconsistent with Article 10bis(1). As Article 10bis(1) encompasses a broader universe of possible violations than Article 10bis(3), it is possible, however, for a measure to be inconsistent with Article 10bis(1) but not to fall within the specific examples in Article 10bis(3).⁵⁴²⁹

7.2727. Honduras explains that this provision focuses on the trader making allegations about its own products. The provision seeks to protect consumers and the broader public from being misled about the features or aspects of a product. Because Article 10bis(3)(3) defines a *per se* example of "unfair competition", it is not necessary to show that the misleading indications have had an adverse effect on competitors; rather, the existence of the misleading indication is, in and of itself, sufficient to demonstrate the existence of "unfair competition" because the corresponding impact on competitors is irrebuttably presumed.⁵⁴³⁰

7.2728. Honduras submits that the terms "indication" or "allegation" are broad and cover any form of statement, assertion or indication that communicates any category of information about a product (good), either in an absolute sense or in relation to other goods in the market. They also cover omissions when these omissions create a particular impression in the mind of the consumer. Given their broad definition, they can also encompass impressions communicated through a product's design.⁵⁴³¹

⁵⁴²⁸ We also recall that the acts listed in paragraph 3(1) are examples of acts of unfair competition as defined in paragraph 2. In this regard, we are not persuaded that the very act of putting onto the market products that comply with the regulatory requirements under the TPP measures would amount to an act of competition contrary to honest commercial practices. In this regard, we refer to our discussion in para. 7.2792 below.

⁵⁴²⁹ Honduras's response to Panel question No. 15.

⁵⁴³⁰ Honduras's first written submission, paras. 701-702.

⁵⁴³¹ Honduras's first written submission, paras. 707-708 and 711.

7.2729. The ordinary meaning of "mislead" is to "[l]ead astray in action or conduct; cause to have an incorrect impression or belief"; and "lead or guide in the wrong direction".⁵⁴³² The words "liable to cause" imply that no proof of actual "mislead[ing]" is required, as long as the indication or allegation has the *potential* to mislead.⁵⁴³³

7.2730. The ordinary meaning of "course of trade" is in the process when trade is conducted. This encompasses each and every part of the process or activities through which a product is conveyed from the producer to the consumer, including aspects of post-sale activities relating to an already purchased unit of the product.⁵⁴³⁴ Honduras contends that Australia does not provide any textual basis for its argument that the term "course of trade" ends at the point of sale.⁵⁴³⁵ Indications or allegations that are made "in any commercial context" are covered by Article 10bis and need not be visible at the retail point of sale in order to be liable to mislead the public.⁵⁴³⁶

7.2731. Honduras submits that "[t]he design of packaging, including the information or symbols and signs that are omitted, constitute 'indications or allegations'".⁵⁴³⁷ Under the TPP measures – both the trademark restrictions and the formatting requirements – consumers are misled by uniform packaging into believing that all tobacco products are similar or same, and of similar or same quality. This belief is incorrect, because not all products are of the same or similar quality.⁵⁴³⁸ There are demonstrable differences in the quality, taste, composition and other physical properties of tobacco products.⁵⁴³⁹ As a result, consumers and the broader public are being "misled" and there is "unfair competition" within the meaning of Article 10bis(3)(3).⁵⁴⁴⁰ Honduras asserts that Australia's suggestion that as long as the brand name appears on the pack the consumer cannot be misled is in error. The brand name is deprived of its normal context and figurative elements that gives it the recognition in the eyes of the consumer.⁵⁴⁴¹

7.2732. Honduras further argues that, because consumers are misled into thinking that all tobacco products are essentially the same, they increasingly turn to price as an important or even sole criterion driving their purchasing choice. As a result, producers and offerors of higher-quality product are disproportionately disadvantaged by the TPP measures. This asymmetrical impact on competitors also gives rise to "unfair competition" within the meaning of Article 10bis(3)(3).⁵⁴⁴²

7.2733. The Dominican Republic considers that Article 10bis(3) gives three specific examples of acts encompassed by the broader concept of "unfair competition" addressed in Article 10bis(1). A measure that is inconsistent with Article 10bis(3) is necessarily also inconsistent with Article 10bis(1). It is possible for a measure to be inconsistent with Article 10bis(1) without simultaneously being inconsistent with any of the subparagraphs of Article 10bis(3).⁵⁴⁴³

7.2734. The Dominican Republic argues that the three goals of the protection against unfair competition, namely protecting consumers, competitors, and the public interest, are all apparent in Article 10bis(3)(3). The explicit purpose is to protect consumers from making decisions on the basis of misleading information, to their benefit and the benefit of the marketplace and public interest.⁵⁴⁴⁴ The requirement to present competing tobacco products in virtually identical packaging, with sticks of virtually identical appearance, is liable to mislead the public as to the "nature", "the manufacturing process" and "characteristics" of different cigars and cigarettes, within the meaning of Article 10bis(3)(3), despite the fact that the brand and variant names

⁵⁴³² Honduras's first written submission, para. 712 (referring to New Shorter Oxford English Dictionary, HND Excerpts, (Exhibit HND-89), p. 1791).

⁵⁴³³ Honduras's first written submission, para. 714. (emphasis original)

⁵⁴³⁴ Honduras's first written submission, paras. 715-716.

⁵⁴³⁵ Honduras's second written submission, para. 411.

⁵⁴³⁶ Honduras's response to Panel question No. 20; and second written submission, paras. 411-414.

⁵⁴³⁷ Honduras's first written submission, para. 721.

⁵⁴³⁸ Honduras's first written submission, para. 719.

⁵⁴³⁹ Honduras's response to Panel question No. 20.

⁵⁴⁴⁰ Honduras's first written submission, paras. 724, 726 and 729-730.

⁵⁴⁴¹ Honduras's response to Panel question No. 20. See also Honduras's response to Panel question No. 87.

⁵⁴⁴² Honduras's first written submission, paras. 731-733.

⁵⁴⁴³ Dominican Republic's response to Panel question No. 15.

⁵⁴⁴⁴ Dominican Republic's first written submission, paras. 847 and 850. See also Dominican Republic's second written submission, para. 734.

remain on packages. The TPP measures, by intention, force every tobacco product to look like the "lowest quality" products, regardless of their actual quality. Were producers to conspire to mislead consumers in this way by presenting competing tobacco products in virtually identical packaging, with sticks of virtually identical appearance, Australia would be obliged to prevent such a conspiracy. By compelling conduct that it is required to prohibit, Australia violates Article 10bis(3)(3).⁵⁴⁴⁵

7.2735. In response to Australia, the Dominican Republic argues that the phrase "in the course of trade" in Article 10bis(3)(3) refers to commercial activities generally, and is not limited temporally such that it culminates at the point of sale. Even on Australia's narrow definition of "in the course of trade", the factual circumstances surrounding the purchase of tobacco products in Australia do not remove the TPP measures from view. Where point-of-sale bans are in operation the packaging is still visible to the consumer before the purchase is completed.⁵⁴⁴⁶

7.2736. In its view, the term "the goods" in Article 10bis(3)(3) encompasses both the goods of the entity making the indication/allegation at issue, and the goods of a competitor.⁵⁴⁴⁷

7.2737. Cuba argues that the TPP measures are targeted precisely at creating the erroneous impression that all tobacco products are equal in their characteristics and taste because they are all equally harmful to health. They thus require indications that mislead the public as to the nature and characteristics of goods, in violation of Article 10bis(3)(3).⁵⁴⁴⁸

7.2738. Cuba contends that Australia's narrow reading of the phrase "in the course of trade" is not supported by international trademark practice, and that the protections of Article 10bis continue to apply after the point of sale.⁵⁴⁴⁹

7.2739. Cuba understands Australia to suggest that the complainants have turned Article 10bis into a provision that prevents Members from imposing measures that affect "any aspect of competition", including a general prohibition on advertising, and responds that Article 10bis protects against "extreme" measures, such as a prohibition on the use of marks and trademarks on tobacco products and their retail packaging. There is also no direct link between a general prohibition on advertising, applicable equally to all producers, and unfair competition. Cuba contends that Australia has misrepresented the complainants' arguments, which do not allege a positive right to use trademarks.⁵⁴⁵⁰

7.2740. Indonesia argues that the TPP measures are likely to mislead consumers in violation of Article 10bis(3)(3). Without the information channel provided by trademarks and other packaging and product designs, consumers in Australia are led to believe incorrectly that the different brands of tobacco products all share the same quality, characteristics, and reputation.⁵⁴⁵¹ Yet there are significant differences in quality among tobacco products, including in the tobacco found in cigarettes sold in Australia.⁵⁴⁵² Manufacturers use their packaging to communicate these differences in quality and differentiate their products.⁵⁴⁵³

7.2741. When every package and every product on the market looks indistinguishable from the next, it is likely to have a misleading effect on consumers. In fact, as it adopted the TPP measures, Australia commissioned research to "identify a pack colour that was the least appealing, contained

⁵⁴⁴⁵ Dominican Republic's first written submission, paras. 876-880 (referring to Panel Report, *Mexico – Telecoms*, paras. 7.241-7.244). See also Dominican Republic's response to Panel question No. 20, paras. 124-125.

⁵⁴⁴⁶ Dominican Republic's second written submission, paras. 743 and 754-757; and response to Panel question No. 20.

⁵⁴⁴⁷ Dominican Republic's second written submission, paras. 744-745.

⁵⁴⁴⁸ Cuba's second written submission, paras. 137, 141 and 145.

⁵⁴⁴⁹ Cuba's second written submission, para. 148.

⁵⁴⁵⁰ Cuba's second written submission, paras. 146-147.

⁵⁴⁵¹ Indonesia's first written submission, paras. 179-180 (referring to Parr et al. 2011a, (Exhibits AUS-117, JE-24(49)), p. 9); and second written submission, para. 50.

⁵⁴⁵² Indonesia's second written submission, para. 51. See also Indonesia's first written submission, paras. 171-172.

⁵⁴⁵³ Indonesia's second written submission, para. 51. See also Indonesia's first written submission, paras. 158 and 171.

cigarettes that were lowest quality, was perceived to be most harmful to health and perceived as being the hardest to quit". Indonesia argues that "PP thus seeks to convey the message that every brand is the worst quality regardless of its actual quality".⁵⁴⁵⁴

7.2742. In response to Australia, Indonesia submits that the phrase "in the course of trade" as used in sub-paragraph (3) should be construed broadly. Trademarks convey information to the public long before they reach the point of sale, and do not cease to provide information to consumers once the underlying goods are purchased. WIPO's IP Handbook describes the phrase as "every act or operation that is aimed at, directly or indirectly, or that results from, directly or indirectly, buying and selling products or services in a professional manner". Indonesia argues that, even this definition may be too restrictive, as trademarks used in connection with charitable institutions are protectable under Article 10bis.⁵⁴⁵⁵

7.2743. Indonesia submits that Australia compels conduct that it has a duty to prohibit. In particular, through the TPP measures, Australia mandates trademark prohibitions and restrictions in the course of trade that are liable to mislead the public about the characteristics of tobacco products, contrary to its obligation under Article 10bis(3)(3) to prohibit such conduct.⁵⁴⁵⁶

7.2744. Australia notes that, in contrast to Article 10bis(3)(1) and Article 10bis(3)(2), Article 10bis(3)(3) does not contain the words "of a competitor" and prohibits market actors from making misleading claims or assertions with respect to their own goods – i.e. claims or assertions by a market actor that entice consumers to buy that actor's goods on false grounds.⁵⁴⁵⁷ In its view, by its terms, Article 10bis(3)(3) requires Members to prohibit a market actor from "mak[ing] known" or making "claims" or "assertions" about "the nature, the manufacturing process, the characteristics, the suitability for their purpose, or the quantity" of the actor's own goods that – when used in connection with the buying or selling of those goods – would "lead astray" the public to purchase the goods on false grounds.⁵⁴⁵⁸

7.2745. Australia submits that to establish a violation of Article 10bis(3)(3), the complainants would need to demonstrate that it has failed to prohibit market actors from enticing consumers with indications or allegations about certain features of their goods during the buying or selling of those goods, which are liable to mislead the public.⁵⁴⁵⁹ The complainants have not demonstrated that Australia fails to prohibit such acts of unfair competition.⁵⁴⁶⁰ Nor have they demonstrated that the TPP measures are themselves an "act of competition" or that they compel "acts of competition".⁵⁴⁶¹

7.2746. Australia contends that none of the complainants explains how the alleged "misleading" of consumers occurs "in the course of trade", when the latter term is understood to refer to acts undertaken in connection with the buying and selling of goods for profit, which culminates at the point of sale.⁵⁴⁶² Australia adds that, even if the alleged acts of competition compelled by the TPP measures were "in the course of trade", the complainants have failed to demonstrate that the measures compel tobacco companies to "mislead" consumers via "indications" or "allegations" as to the "nature, manufacturing process, characteristics, suitability for purpose, or quantity" of their

⁵⁴⁵⁴ Indonesia's first written submission, paras. 179-180 (referring to Parr et al. 2011a, (Exhibits AUS-117, JE-24(49)), p. 9); and second written submission, para. 50.

⁵⁴⁵⁵ Indonesia's response to Panel question No. 20 (quoting WIPO IP Handbook, IDN excerpts, (Exhibit IDN-43), para. 2.872). The Panel notes that the cited paragraph is not included in the excerpts provided as Exhibit IDN-43. The referenced paragraphs were submitted by the Dominican Republic in WIPO IP Handbook, Full Text, (Exhibit DOM-65).

⁵⁴⁵⁶ Indonesia's first written submission, para. 181. Also in respect of this claim, Indonesia refers to Article 27 of the Vienna Convention and argues that Australia cannot avoid its international treaty obligations by invoking the requirements of its domestic law.

⁵⁴⁵⁷ Australia's first written submission, para. 470 (referring to WIPO, Introduction to Intellectual Property, (Exhibit UKR-80), para. 12.65; and WIPO Protection Against Unfair Competition, (Exhibits AUS-536, DOM-139), para. 64).

⁵⁴⁵⁸ Australia's first written submission, para. 471.

⁵⁴⁵⁹ Australia's first written submission, para. 472.

⁵⁴⁶⁰ Australia's second written submission, para. 53. For Australia's description of legal mechanisms through which affected parties can prevent or obtain redress for false or misleading allegation, see para. 7.2780 below.

⁵⁴⁶¹ Australia's second written submission, para. 53.

⁵⁴⁶² Australia's first written submission, paras. 469, 311 and 473-475.

goods. The complainants have failed to provide a compelling explanation for how preventing tobacco companies from using certain signs, trademarks and GIs constitutes an "indication" or "allegation" within the ordinary meaning of these terms.

7.2747. Australia agrees with the complainants that an "omission" could potentially constitute a misleading "indication" or "allegation". There can, however, only be deception in relation to an omission if the public, in the absence of express information, expects a certain characteristic to be present.⁵⁴⁶³ The complainants have presented no evidence to suggest that in the absence of certain signs, trademarks and GIs on tobacco products and their packaging, consumers have certain false affirmative expectations about the "nature, manufacturing process, characteristics, suitability for purpose, or quantity of those goods". The complainants have not explained, for example, how the *absence* of gold lettering, pink background, or italic script on tobacco product packaging would lead a consumer to have a false expectation about the objective information listed in Article 10bis(3)(3) in relation to the underlying product.⁵⁴⁶⁴

7.2748. Australia contends that the complainants have failed to identify any aspect of the standardized packaging of tobacco products under Australia's measure that constitutes a positive indication or allegation about the "nature, manufacturing process, characteristics, suitability for purpose, or quantity" of tobacco products that is false and could *mislead* consumers. Australia adds that, by standardizing the packaging, the measure *removes* the ability of signs and trademarks to increase the appeal of tobacco products, distract from GHWs and mislead consumers as to the harms of smoking.^{5465, 5466}

Analysis by the Panel

7.2749. As discussed above, paragraph 3 of Article 10bis lists certain types of acts of unfair competition that are in particular to be prohibited. Its sub-paragraph (3) concerns "indications or allegations the use of which in the course of trade is liable to mislead the public as to the nature, the manufacturing process, the characteristics, the suitability for their purpose, or the quantity, of the goods".

7.2750. Whereas sub-paragraphs 3(1) and 3(2) of Article 10bis concern confusion with or false allegations about the goods of a *competitor*, sub-paragraph 3(3) does not expressly refer to the goods of a competitor. This implies that the focus under this sub-paragraph includes indications and allegations that a market participant makes about its own goods.⁵⁴⁶⁷ The ordinary meaning of "mislead" is to "*deceive by giving incorrect information or a false impression*".⁵⁴⁶⁸ It follows from the term "liable" that the provision covers deceptive allegations that have either misled the public or are likely to do so. The term "public" in turn implies a situation where such deceptive allegations are directed at the consumer.

⁵⁴⁶³ Australia's second written submission, para. 57 (referring to WIPO IP Handbook, HND excerpts, (Exhibit HND-40), para. 2.817).

⁵⁴⁶⁴ Australia's second written submission, para. 57.

⁵⁴⁶⁵ Australia's second written submission, para. 58. Australia adds in footnote 79 that the complainants have also largely ignored the fact that the TPP measures allow a large range of information about tobacco products to be presented on tobacco packaging, including brand, business, company and variant names. Further, "variant name" is defined broadly in Subsection 4(1) of the TPP Act as:

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

TPP Act, (Exhibits AUS-1, JE-1).

⁵⁴⁶⁶ For main arguments of the third parties, see section 7.3.6.3.2 above.

⁵⁴⁶⁷ This is without prejudice to the question of whether sub-paragraph 3(3) also covers indications and allegations made about competitors' goods.

⁵⁴⁶⁸ Oxford English Dictionary online, definition of "mislead", available at:

<<http://www.oed.com/view/Entry/119742?redirectedFrom=mislead#eid>>, accessed 2 May 2017. (emphasis added)

7.2751. Honduras and the Dominican Republic consider that paragraph 3(3) of Article 10*bis* covers omissions.⁵⁴⁶⁹ Honduras argues that it covers omissions when these omissions create a particular impression in the mind of the consumer.⁵⁴⁷⁰ Australia agrees with the complainants that an "omission" could potentially constitute a misleading "indication" or "allegation"; in its view, however, there can only be deception in relation to an omission "if the public, in the absence of express information, expects a certain characteristic to be present".⁵⁴⁷¹

7.2752. We agree with the parties that an omission of certain information may amount to a deceptive indication or allegation, where such omission, in the course of trade, is liable to mislead the consumer, in the sense of deceiving him or her by giving incorrect information or a false impression. In that respect, we agree with Australia that deception could arise if the public, in the absence of express information, expects a certain characteristic to be present.

7.2753. The parties' views differ on the meaning of the term "in the course of trade" in subparagraph 3(3) of Article 10*bis*. Australia considers that it refers to acts undertaken in connection with the buying and selling of goods for profit and culminates at the point of sale. The complainants offer broader definitions and disagree that there is any temporal limitation to this phrase.⁵⁴⁷² We recall that this term is used, in addition to Article 10*bis*(3)(3) of the Paris Convention (1967), in two other provisions of the TRIPS Agreement that are the subject of separate claims in these proceedings, namely Articles 16.1 and 20, as well as in Article 24.8 of the TRIPS Agreement and Article 10*bis*(3)(2) of the Paris Convention (1967). As we noted in our analysis of these terms under Article 20 of the TRIPS Agreement, harmonious interpretation requires that same or similar terms in different provisions of the same agreement should be presumed to have the same or similar meaning, much as the use of different terms creates a presumption that the terms were intended to have a different meaning. For the reasons identified in that context, we do not find support in the text or context of Article 10*bis*(3)(3) for Australia's assertion that "in the course of trade" culminates or terminates at the point of sale.⁵⁴⁷³

7.2754. As described above, Honduras initially contended that the TPP measures are inconsistent with paragraph 3(3) on the grounds that they give rise to misleading indications and allegations because consumers are being misled about the true nature of tobacco products and the TPP measures have an asymmetrical impact on competitors.⁵⁴⁷⁴ Later in the proceedings, Honduras clarified that it does not argue that a government's laws or regulations constitute acts of unfair competition as such. Rather, the acts of unfair competition at issue are those of private parties.⁵⁴⁷⁵ In this regard, we recall our finding in paragraph 7.2699 above that the TPP measures in themselves do not constitute an act of unfair competition.

7.2755. As regards acts amounting to misleading indications within the meaning of paragraph 3(3), the complainants argue that the use of standardized packaging and product appearance as required by the TPP measures, including the omission of symbols and signs, wrongly signals to consumers that all tobacco products have the same nature, manufacturing process and characteristics, or are of similar or same quality. Honduras elaborates that the removal of brand imagery, as well as the imposition of a uniform packaging design and stick requirements, will induce the consumers to erroneously believe that all cigarettes are essentially the same and that there are no quality differences between them.⁵⁴⁷⁶ The Dominican Republic adds that producers would not be permitted to conspire to mislead consumers in this way by presenting competing tobacco products in virtually identical packaging, with sticks of virtually

⁵⁴⁶⁹ Honduras's first written submission, para. 708; Dominican Republic's response to Panel question No. 15; and Dominican Republic's second written submission, para. 727 (asserting that both Article 10*bis*(1) and (3) are susceptible of breach by either an act or an omission).

⁵⁴⁷⁰ Honduras's first written submission, para. 708.

⁵⁴⁷¹ Australia's second written submission, para. 57 (referring to WIPO IP Handbook, HND excerpts, (Exhibit HND-40), para. 2.817).

⁵⁴⁷² See, e.g. Honduras's first written submission, paras. 715-716; Dominican Republic's second written submission, paras. 743 and 754-757; Cuba's second written submission, para. 148; and Indonesia's response to Panel question No. 20.

⁵⁴⁷³ For the analysis of the term "in the course of trade" in the context of Article 20 of the TRIPS Agreement, see section 7.3.5.4.1.3 above.

⁵⁴⁷⁴ Honduras's first written submission, paras. 718-734.

⁵⁴⁷⁵ Honduras's second written submission, para. 391.

⁵⁴⁷⁶ Honduras's first written submission, para. 724.

identical appearance. Cuba also relates the effect of the TPP measures to the common law claim of "passing off". Indonesia elaborates that, without the information channel provided by trademarks and other packaging and product designs, consumers in Australia are led to believe incorrectly that the different brands of tobacco products all share the same characteristics.

7.2756. In the Dominican Republic's view, the three goals of protection against unfair competition (i.e. the protection of competitors; the protection of consumers; and safeguarding competition in the public interest⁵⁴⁷⁷) are apparent in Article 10bis(3)(3), the explicit purpose of which is to protect consumers from making decisions on the basis of misleading information.⁵⁴⁷⁸ The Dominican Republic argues that, in the absence of branding signals on the packaging, consumers increasingly make purchases based on the price of the products rather than their qualities, reputation, and characteristics. The Dominican Republic further argues that the TPP measures require tobacco producers to indicate to consumers, through their packaging, that every brand is, in fact, "the least appealing" and with the "lowest quality", regardless of their actual quality.⁵⁴⁷⁹ Indonesia argues that Australia sought, *inter alia*, to identify a pack colour that was the least appealing, and that "PP thus seeks to convey the message that every brand is the worst quality regardless of its actual quality".⁵⁴⁸⁰

7.2757. Australia responds that the complainants have failed to provide any evidence that in the absence of certain signs, trademarks and GIs on tobacco products and their packaging, consumers have certain false affirmative expectations about the "nature, manufacturing process, characteristics, suitability for purpose, or quantity of those goods"; nor have they identified any aspect of the standardized packaging and product appearance that constitutes an indication or allegation that could mislead consumers about such properties of those goods. Australia further observes that, by standardizing the packaging, the TPP measures remove the ability of signs and trademarks to increase the appeal of tobacco products, distract from GHWs and mislead consumers as to the harms of smoking.⁵⁴⁸¹ Australia further explains that the design of the TPP legislation was informed by the research by GfK Bluemoon, which carried out a number of phases of market testing on GHWs and tobacco plain packaging to determine the most effective form of tobacco plain packaging, and "sought to identify one plain packaging design (colour, font type, font size) that would minimise appeal and attractiveness, whilst maximising perceived harm and the noticeability of the graphic health warnings".⁵⁴⁸²

7.2758. We understand the complainants to claim that the use of uniform packaging and appearance of tobacco products for commercial use in compliance with the TPP measures amounts to use of indications or allegations that are, within the meaning of paragraph 3(3), liable to mislead the public as to the nature, manufacturing process and characteristics of different tobacco products on the market. In particular, the complainants consider that, without design branding and

⁵⁴⁷⁷ Dominican Republic's first written submission, paras. 839 and 847 (referring to WIPO Protection Against Unfair Competition, (Exhibit DOM-139), para. 33). The WIPO commentary elaborates that the purpose of unfair competition law is to ensure fair and undistorted competition in the interest of *all concerned*. One party who is always concerned is the *honest businessman*, and a businessman's standard of behavior logically serves as a starting point. Certain practices may be generally accepted within a branch of business but nevertheless considered improper by other market participants. In such cases, there has to be some *ethical correction* of the actual standards of behaviour. Ethical standards dictate in particular that the interests of consumers must not be unnecessarily impaired. One example given is the enticement of the consumer into harmful behaviour. Furthermore, there may be practices that at first sight are not prejudicial either to other businessmen or to consumers, but nevertheless may have unwanted effects on the *economy at large*. The WIPO commentary concludes that "[w]hen determining 'honesty' in business dealings, all these factors have to be taken into account. In practice, the concept of unfair competition has increasingly become a *balancing of interests*." See Response by WIPO to the Panel's request for factual information, letter dated 5 October 2015, Annex 8, International Bureau of WIPO, *Protection Against Unfair Competition: Analysis of the Present World Situation*, World Intellectual Property Organization (Geneva, 1994), paras. 33-37. Similarly, Indonesia argues that Article 10bis protects competitors and consumers, and safeguards competition in the public interest. Indonesia's first written submission, para. 159 (referring to WIPO IP Handbook, IDN excerpts, (Exhibit IDN-43), para. 2.773).

⁵⁴⁷⁸ Dominican Republic's first written submission, para. 850.

⁵⁴⁷⁹ Dominican Republic's first written submission, para. 861.

⁵⁴⁸⁰ Indonesia's first written submission, paras. 179-180 (referring to Parr et al. 2011a, (Exhibits AUS-117, JE-24(49)), p. 9).

⁵⁴⁸¹ Australia's second written submission, paras. 57-58.

⁵⁴⁸² Australia's first written submission, paras. 118-119 and fn 185.

packaging features, a tobacco manufacturer is not able to adequately communicate the differences in the characteristics of its products, which leads to a perception of quality convergence among consumers.⁵⁴⁸³

7.2759. As we found above⁵⁴⁸⁴, we do not exclude that an *omission* of information may amount to an indication or allegation that is liable to mislead, where such omission, in the course of trade, deceives the consumer by giving incorrect information or a false impression. However, we are not persuaded that the complainants have demonstrated that the absence of brand imagery on tobacco retail packaging or products in compliance with the TPP measures amounts to such a situation. In particular, we are not persuaded that the absence of brand imagery would mislead consumers by way of giving incorrect information or false impressions, or by creating any particular incorrect expectations in the minds of consumers about the nature, manufacturing process or characteristics of the product, be they similar to or different from the characteristics of other corresponding products on the market.

7.2760. We first note that *all* competitors on the Australian market are required to comply with the same requirements on standardized tobacco packaging, and do so within a longstanding overall policy context and an environment of public education around the issue.⁵⁴⁸⁵ We are not persuaded that the overall similarity of the external appearance of products and their packaging resulting from these requirements would be liable to mislead consumers to erroneously believe that all competing products have identical characteristics or source, where this similarity results from a well-publicized regulatory intervention and does not reflect a commercial choice by market actors.

7.2761. We also note that the TPP measures allow the use of word marks and marks that denote the brand, business or a company name, or the name of the product variant, on tobacco retail packaging, provided that they appear in the form prescribed by the TPP Regulations. This information is not, as such, liable to create false impressions or provide incorrect information to consumers. To the extent that consumers expect certain characteristics of tobacco products that are correctly communicated to them by an association with the identification of the commercial source – referred to as the guarantee function of trademarks in the context of trademark law – the TPP measures allow these to be communicated through the use of the brand and variant names.

7.2762. The complainants have also not identified specific allegations or statements required by the TPP measures that would mislead the consumer as to particular characteristics or qualities of tobacco products. Rather, they argue that the inability to use distinctive design features other than the brand and variant names leads to misleading consumers into thinking that all tobacco products have the same characteristics, and are unattractive.

7.2763. We also recall that the TPP measures restrict the use of branding design features in order to *reduce* the ability of the retail packaging of tobacco products, through these features, to mislead consumers about the harmful effects of smoking or using tobacco products.⁵⁴⁸⁶ At the same time, the measures allow the use of brand and variant names, which enable the consumer to identify the product at issue and associate it with a particular source. The measures thus operate in a manner that reflects both the consumer's interest in not being misled concerning the harmful effects of smoking, which are undisputed, and the consumer's interest in not being misled about the product's characteristics. Also against this context, we are not persuaded that the uniformity of the

⁵⁴⁸³ We recall that, in the context of its claim under Article 20 of the TRIPS Agreement, the Dominican Republic argues that consumers' perceptions of the quality of competing brands are based on a combination of "functional benefits" and "intangible benefits" that they derive from each brand, and that the TPP measures' disproportionate impact on the perceived intangible benefits of premium products translates into reduced loyalty and a reduced willingness to pay for the premium products. In that context, Australia explains that the TPP measures ensure that tobacco manufacturers can continue to distinguish their products from those of other manufacturers in the course of trade by allowing them to use company, brand and variant names on tobacco retail packaging, including communicating product characteristics associated with the commercial source. Australia argues that it is precisely the "intangible benefits" referred to by the Dominican Republic that the TPP measures are aimed at curtailing. See section "Main arguments of the parties" within section 7.3.5.5.3.2 above.

⁵⁴⁸⁴ See para. 7.2752 above.

⁵⁴⁸⁵ See para. 7.2721 above.

⁵⁴⁸⁶ TPP Act, (Exhibits AUS-1, JE-1), Section 3.2(c).

appearance of tobacco retail packaging and products resulting from the TPP measures, including the removal of distinctive design features other than brand and variant names, has the effect of misleading consumers.⁵⁴⁸⁷

7.2764. We further note that Honduras, the Dominican Republic, Cuba, and Indonesia have not sought to demonstrate that consumers have in fact been unable to distinguish the commercial source of tobacco products of one undertaking from those of other undertakings (i.e. the identity of the source or maker of the product) or have been misled as to their characteristics as a result of the TPP measures.⁵⁴⁸⁸

7.2765. In light of the above, we find that Honduras, the Dominican Republic, Cuba, and Indonesia have not demonstrated that the TPP measures compel market actors to engage in acts amounting to misleading indications or allegations within the meaning of Article 10bis(3)(3). We, therefore, also find that Honduras, the Dominican Republic, Cuba, and Indonesia have not demonstrated that Australia, in maintaining these measures, fails to prohibit such acts, in violation of Article 10bis, paragraph 3(3).

7.3.6.4.3.3 Article 10bis(1)

7.2766. We now turn to whether the TPP measures, as alleged by Honduras, the Dominican Republic, and Cuba compel market actors to engage in acts of unfair competition, apart from those situations already discussed in the context of the complainants' claims under Article 10bis(3)(1) and 10bis(3)(3), against which a Member is bound to assure effective protection pursuant to Article 10bis(1).

Main arguments of the parties

7.2767. Honduras argues that the TPP measures are inconsistent with Article 10bis(1) because they skew the conditions of competition to the advantage of producers providing low-price products and to the disadvantage of producers providing high-price products. This is because both the TPP trademark restrictions as well as the formatting restrictions oblige manufacturers of tobacco products to compete in the Australian market in a manner that eliminates the possibility of achieving or maintaining product differentiation, and this systematically affects premium products and their producers more than lower quality products and producers. This direct, and profoundly

⁵⁴⁸⁷ We also recall that the acts listed in paragraph 3(3) are examples of acts of unfair competition as defined in paragraph 2. In this regard, we are not persuaded that the very act of putting onto the market products that comply with the regulatory requirements under the TPP measures would amount to an act of competition contrary to honest commercial practices. In this regard, we refer to our discussion in para. 7.2792 below.

⁵⁴⁸⁸ See the responses by Honduras, the Dominican Republic, Cuba, and Indonesia to Panel Question No. 168, which are reflected in paragraphs 7.2546, 7.2552, 7.2548, and 7.2550 respectively. In their replies, Honduras, Cuba, and Indonesia argue that any such evidence would not be relevant to the resolution of the complainants' claims under the TRIPS Agreement, because there is no specific requirement regarding the level of "actual confusion" or "sufficiency" for distinguishing products. As we noted in paragraph 7.2750 above, it follows from the term "liable" in Article 10bis(3)(3) that the provision covers deceptive allegations that have either misled the public or are likely to do so. We also noted in paragraph 7.2761 that, to the extent that consumers expect certain characteristics of tobacco products that are correctly communicated to them by an association with the identification of the commercial source, the TPP measures allow these to be communicated through the use of the brand and variant names. In this regard, the lack of such evidence is one consideration in our overall assessment of whether the complainants have demonstrated that the TPP measures require market actors to engage in acts amounting to misleading indications or allegations within the meaning of Article 10bis(3)(3). Honduras thus observes that there has not been an empirical study assessing whether consumers have been unable to distinguish the commercial source of tobacco products of one undertaking from that of other undertakings following the implementation of the TPP measures, but considers that such quantitative data would not assist the Panel in resolving the claims under the TRIPS Agreement in these proceedings. The Dominican Republic and Indonesia further argue that evidence shows that word marks on tobacco products do not adequately distinguish commercial source, quality, characteristics and reputation, leading to downtrading. In this regard, we refer to our discussion on the evidence on the effect of the TPP measures on price competition and downward substitution in paragraphs 7.2572 and 7.2573 above.

asymmetrical, impact of Australia's TPP measures on the competitive dynamics in the market constitutes "unfair competition" in the Australian market.⁵⁴⁸⁹

7.2768. Honduras elaborates that the TPP measures bring about unfair competition in the tobacco market in two steps. First, the TPP measures remove branding from packaging, a key instrument for achieving brand differentiation. Branded packaging draws the attention of consumers in cluttered markets, and acts as a cue of quality. The TPP measures oblige producers of tobacco products to strip the packaging of their products of all brand imagery and distinctive fonts, while the physical appearance of the tobacco products is standardized through formatting requirements. As a result, "premium and value brands will look identical (apart from the name)" and "the consumer will lose signals of quality".⁵⁴⁹⁰

7.2769. Second, reduced product differentiation results in a competitive disadvantage for premium brands, which are asymmetrically impacted as compared to lower-end brands, creating unfair competition.⁵⁴⁹¹ Australian market data confirms that significant "downtrading" or "downward substitution" has taken place.⁵⁴⁹² "In this manner, the [TPP measures] systematically distort the conditions of competition to the detriment of a specific category of competitors. Producers of high-end brands are no longer able to operate in circumstances of 'fair' and 'legitimate' competition."⁵⁴⁹³ Honduras adds that the "unfairness" of the conditions of competition lies at the heart of the TPP measures, whose objectively discernible intent and design is to eliminate the key function of an IP right, and is not merely an incidental effect of a good-faith effort to regulate competition.⁵⁴⁹⁴

7.2770. The Dominican Republic considers that the acts of "unfair competition" at issue are the private acts of producers that present tobacco products in a virtually identical packaging to the packaging of competing tobacco products. The Dominican Republic does not argue that the TPP measures are themselves "acts" of unfair competition, or direct its claims at "market conditions as such". Rather, through the TPP measures, Australia compels private acts of unfair competition and, thereby, fails to assure effective protection against such unfair competition, as evidenced, for example, by market conditions.⁵⁴⁹⁵ A WTO Member cannot compel the very acts of unfair competition that it must seek to prevent.⁵⁴⁹⁶ A Member's domestic law provides no excuse for violations of its WTO obligations.⁵⁴⁹⁷

7.2771. Under Article 10bis(1), the Dominican Republic argues that "[b]y establishing a regime in the marketplace whereby competing products are presented in a virtually identical manner, Australia is mandating 'act[s] of competition contrary to honest practices in industrial or commercial matters' within the meaning of Article 10bis of the *Paris Convention*".⁵⁴⁹⁸

7.2772. As regards the TPP measures' impact on consumers, the Dominican Republic argues that the requirement that producers present all tobacco products in virtually identical packaging deprives consumers of the visual signals that are used by all consumers to distinguish among competing brands in terms of their qualities, reputation, and characteristics. In the absence of branding signals on the packaging, consumers increasingly make purchases based on price differences. This leads to convergence in the perceived qualities and characteristics of competing brands. The TPP measures require tobacco producers to indicate to consumers, through their packaging, that every brand is, in fact, "the least appealing" and with the "lowest quality",

⁵⁴⁸⁹ Honduras's first written submission, para. 682.

⁵⁴⁹⁰ Honduras's first written submission, paras. 684, 687, and 689 (referring to Steenkamp Report, (Exhibit DOM/HND-5), paras. 48-54 and 63-64).

⁵⁴⁹¹ Honduras's first written submission, para. 687.

⁵⁴⁹² Honduras's first written submission, paras. 691-692 (referring to Steenkamp Report, (Exhibit DOM/HND-5), paras. 55-60; and IPE Report, (Exhibit DOM-100)).

⁵⁴⁹³ Honduras's first written submission, para. 694. (emphasis original)

⁵⁴⁹⁴ Honduras's first written submission, paras. 696 and 698.

⁵⁴⁹⁵ Dominican Republic's second written submission, paras. 736 and 749; and response to Panel question No. 17. See also Dominican Republic's first written submission, para. 841 (defining the terms "assure", "effective", and "protection", as used in paragraph 1 of Article 10bis); second written submission, para. 729; and response to Panel question No. 15, para. 77.

⁵⁴⁹⁶ Dominican Republic's first written submission, paras. 853 and 873.

⁵⁴⁹⁷ Dominican Republic's closing statement at the second meeting of the Panel, para. 22.

⁵⁴⁹⁸ Dominican Republic's first written submission, para. 856.

regardless of their actual quality. The TPP measures also prevent the communication to the consumers of the pronounced quality differences in the cigarette and cigar markets. Thus, in the Dominican Republic's view, the requirement to present competing tobacco products in virtually identical packaging, with sticks of virtually identical appearance, misleads consumers with respect to the qualities, reputation, and characteristics of the competing brands.⁵⁴⁹⁹

7.2773. The TPP measures deprive competing tobacco producers from competing for sales in the Australian marketplace based on differences in the nature, manufacturing process, or characteristics of their products, because they are deprived of the possibility to signal these differences due to the virtually identical presentation of tobacco products. The Dominican Republic argues that the requirements are particularly unfair to high-end producers that previously used branding to signal the enhanced qualities, reputation, and characteristics of their products, and asserts that the empirical evidence on downtrading shows that depriving producers of these signals immediately distorts the competitive landscape, with a significant shift from the high-end to the low-end.⁵⁵⁰⁰ With respect to the public interest, the TPP measures preclude fair competition in the market based on the nature, characteristics, or manufacturing processes of the goods, thereby harming the fabric of the competitive structure in the market.⁵⁵⁰¹

7.2774. Cuba submits that a competitive environment in which rival manufacturers are required to present their goods to consumers in a visually undifferentiated manner results in a situation of "unfair competition".⁵⁵⁰² In its view, the competitive situation in Australia is "unfair" for four reasons.

7.2775. First, it is indistinguishable from the situation where one producer copies the "get up" of a rival producer, i.e. the general appearance or presentation of a product. The only difference is that, in the latter case, a situation of "passing off" arises as a result of voluntary decisions by economic actors while, in the former case, the adoption of a uniform "get up" is mandated by the Australian Government.⁵⁵⁰³

7.2776. Second, the competitive situation is unfair because producers cannot clearly communicate material information to consumers about their products. Outcomes in such a competitive environment are arbitrary because they do not fully reflect consumer preferences or producer efforts to develop and maintain quality.⁵⁵⁰⁴

7.2777. Third, the competitive situation is unfair because it seeks to create an erroneous belief among consumers that different products are similar. The resulting situation harms producers of premium products, and is particularly unfair to beneficiaries of GIs, such as Cuban producers of LHM cigars, because social, economic, and cultural investments over a long period of time will go unrewarded.⁵⁵⁰⁵

7.2778. Fourth, the competitive situation is unfair because the TPP measures compromise the ability of Cuban producers to protect themselves against counterfeit trade by prohibiting the use of a number of specific safeguards and security features that Cuba has implemented to ensure the authenticity of its exports. By preventing the use of these safeguards, the TPP measures make it easier for counterfeiters to repackage fake or non-Cuban cigars as authentic Cuban cigars and thereby divert trade away from Cuba.⁵⁵⁰⁶

⁵⁴⁹⁹ Dominican Republic's first written submission, paras. 858-869 (referring to Steenkamp Report, (Exhibit DOM/HND-5), among other sources).

⁵⁵⁰⁰ Dominican Republic's first written submission, paras. 870-871 (referring to IPE Report, (Exhibit DOM-100), Chapter 5).

⁵⁵⁰¹ Dominican Republic's first written submission, para. 872.

⁵⁵⁰² Cuba's first written submission, para. 382. (emphasis omitted)

⁵⁵⁰³ Cuba's first written submission, para. 383. In support of its position, Cuba refers to Panel Report, *Mexico – Telecoms*, para. 7.243. Cuba's first written submission, fn 428.

⁵⁵⁰⁴ Cuba's first written submission, para. 384.

⁵⁵⁰⁵ Cuba's first written submission, para. 385.

⁵⁵⁰⁶ Cuba's first written submission, para. 386. Cuba explains that it requires that each box of Habanos cigars: (1) has a Habanos GI sticker affixed to it; (2) bears an ink stamp indicating the factory as well as the month and year of production; and (3) is sealed with a Cuban Government Warranty Seal. The Cuban Government Warranty Seal is printed on synthetic, highly adhesive paper that self-destructs if tampered with

7.2779. Cuba submits that "[t]his situation of unfair competition has arisen because Australia requires private actors to conduct themselves in the manner prescribed by the TPP measures". Accordingly, Australia has failed to comply with its obligation under Article 10bis to protect Cuban tobacco producers from unfair competition.⁵⁵⁰⁷

7.2780. Australia responds that, in order to establish a *prima facie* case of violation of Article 10bis, the complainants would need to demonstrate that Australia has failed to assure effective protection *against* acts of competition by market actors that are intended to benefit such market actors by influencing consumers on the basis of false or misleading representations. The complainants have failed to do so.⁵⁵⁰⁸ Australia submits that:

[It] gives effect to its obligations under Article 10bis, properly interpreted, by providing a range of legal mechanisms through which affected parties can prevent or obtain redress for false or misleading representations, including:

- a right of enforcement against trademark infringement;⁵⁵⁰⁹
- a general prohibition with respect to conduct in trade or commerce that is misleading or deceptive or is likely to mislead or deceive;⁵⁵¹⁰
- a prohibition with respect to false or misleading representations in connection with the supply, possible supply or promotion of goods (including statements concerning the place of origin of goods);⁵⁵¹¹
- a prohibition with respect to imports of goods bearing false or misleading trade descriptions (including in relation to the country or place in which the goods were made or produced);⁵⁵¹² and
- common law protection for the reputation of a business through the tort of "passing off", which can provide additional protection against misrepresentations.^{5513, 5514}

7.2781. Australia's submits that the TPP measures do not interfere with the ability of interested parties to prevent or obtain redress for false or misleading representations through these legal avenues.⁵⁵¹⁵

7.2782. Australia argues that the complainants attempt to expand the meaning of any "act of competition" in Article 10bis(2) to encompass the *regulatory environment* in which such acts take place. Furthermore, despite the fact that Article 10bis(2) explicitly defines what is "unfair" for the purposes of Article 10bis, the complainants' focus their arguments on the ordinary meaning of the term "unfair" rather than the ordinary meaning of the term "honest".⁵⁵¹⁶ By redefining "unfair competition" in this manner, Australia argues, the complainants' seek to read into Article 10bis(1) a positive right to use trademarks to advertise and promote products, on the basis that "competition" in the absence of such use is "unfair", and to transform Article 10bis(1) from a provision that requires Members to proscribe particular acts of dishonest commercial rivalry into

and includes several security features. Ibid. See also Cuba's opening statement at the second meeting of the Panel, paras. 17-18; and Cuba's response to Panel question No. 168.

⁵⁵⁰⁷ Cuba's first written submission, para. 388.

⁵⁵⁰⁸ Australia's first written submission, para. 450.

⁵⁵⁰⁹ (footnote original) *Trade Marks Act 1995*, (Cth), Exhibit AUS-244, Sections 20, 120(1) and 170. See also Annexure D: Protection of Trademarks and Geographical Indications in Australia.

⁵⁵¹⁰ (footnote original) *Competition and Consumer Act 2010* (Cth), Exhibit AUS-127, Section 18. See also Annexure D: Protection of Trademarks and Geographical Indications in Australia.

⁵⁵¹¹ (footnote original) *Competition and Consumer Act 2010* (Cth), Exhibit AUS-127, Subsection 29(1).

See also Annexure D: Protection of Trademarks and Geographical Indications in Australia.

⁵⁵¹² (footnote original) *Commerce Trade Descriptions Act 1905* (Cth), Exhibit AUS-248, Section 9.

⁵⁵¹³ (footnote original) See Annexure D: Protection of Trademarks and Geographical Indications in Australia.

⁵⁵¹⁴ Australia's first written submission, para. 458.

⁵⁵¹⁵ Australia's first written submission, para. 459.

⁵⁵¹⁶ Australia's first written submission, para. 453.

one that prevents Members from imposing measures that affect any "aspect of competition", such as measures that restrict the use of trademarks or result in "any asymmetrical impact on different market participants". By departing from the meaning of "unfair competition" in Article 10bis(2), the complainants are ignoring the plain text of Article 10bis.⁵⁵¹⁷

7.2783. Australia adds that, although the complainants later in the proceedings appear to agree that regulations that affect *general competitive conditions* do not fall within the scope of Article 10bis, they continue to assert that evidence of general competitive conditions in the Australian market, such as alleged downtrading effects and alleged increases in illicit trade, is *indicative* of the existence of dishonest commercial practices, rendering the measure inconsistent with Article 10bis(1). In relation to these assertions, the complainants have not demonstrated: (i) that there is any causal link between these alleged effects and tobacco plain packaging; and, crucially, (ii) that these effects have been caused by "acts of competition" compelled by the measure that are "contrary to honest practices". With respect to this last point, the complainants have not demonstrated that the measure compels private actors to engage in acts of competition – that is, acts of "striving for custom" between rivals or attempts to increase market share by "offering the most favourable terms" – or that these acts of competition are "dishonest" or "untruthful". The complainants have presented no evidence that consumers will confuse the goods of one tobacco manufacturer with the goods of another as a result of the TPP measures, and the complainants' contention that tobacco plain packaging will mislead consumers in relation to the objective characteristics of tobacco products is pure speculation. Australia contends that "[t]he complainants are simply asking the Panel to *assume* that there is some form of general forced commercial dishonesty arising from the tobacco plain packaging measure, and that these dishonest acts are the cause of any alleged brand switching or increases in illicit trade".⁵⁵¹⁸

7.2784. Australia notes that the complainants argue that the TPP measures violate Article 10bis by *compelling* market actors to engage in acts of "unfair competition", relying on the panel report in *Mexico – Telecoms*. Australia responds that *Mexico – Telecoms* is inapplicable to the present dispute.⁵⁵¹⁹ The TPP measures in no way compel "act[s]" of "unfair competition" within the meaning of Article 10bis of the Paris Convention.⁵⁵²⁰

7.2785. It adds that, even if government regulations that compel private actors to engage in acts of competition could fall within the scope of Article 10bis, the complainants have failed to demonstrate that the TPP measures in fact do so. The regulatory environment for the sale of tobacco products in Australia is shaped by a range of public health measures that "compel" relevant market actors to comply with specific requirements in the course of manufacturing, advertising and selling their tobacco products. However, none of them – including the TPP measures – compels market actors to engage in acts of "competition". Rather, the plain packaging design achieves its public health objectives by eliminating the ability of *all* tobacco companies to use figurative design elements to increase the appeal of the package or to create any positive association with the product. At the same time, the measures allow consumers to

⁵⁵¹⁷ Australia's first written submission, paras. 454-457 (referring to Honduras's first written submission, paras. 669 and 670). See also Australia's second written submission, para. 39.

⁵⁵¹⁸ Australia's second written submission, paras. 60-62.

⁵⁵¹⁹ In *Mexico – Telecoms*, Mexico was found to have legally required the conduct it was specifically obligated to prevent. See, e.g. Panel Report, *Mexico – Telecoms*, para. 7.262.

⁵⁵²⁰ Australia's first written submission, paras. 451-452; and Australia's second written submission, para. 40. Australia explains that the panel's analysis in *Mexico – Telecoms* must be understood against the backdrop of the telecommunications industry, which has a long history of state-owned and/or state-regulated monopolies (as in the case of Mexico). The fact that the Federal Telecommunications Commission required Telmex (the dominant Mexican supplier) and other Mexican suppliers to engage in a price-fixing arrangement was clearly contrary to Mexico's commitment in its Reference Paper to maintain appropriate measures to "prevent" major suppliers "from engaging in or continuing anti-competitive practices". This specific context was explicitly acknowledged by the panel, which noted that the measures at issue were "exceptional" and that its findings were "limited to the interpretation of Mexico's GATS obligations under Section 1 of its Reference Paper, with respect to the United States, and with respect to the very specific anti-competitive measures in the relevant market for telecommunications". Panel Report, *Mexico – Telecoms*, paras. 7.267-7.268. Unlike Mexico's Reference Paper, Article 10bis is not concerned with the government's role as a regulator. It is concerned with the government's role as a provider of legal protections against acts of unfair competition in the marketplace. The introduction of a general public health measure like the TPP measures in no way engages this latter role of government and thus in no way falls within the scope of Article 10bis. Australia's second written submission, fn 54.

continue to distinguish between different offerings in the market by reference to the brand and variant names on the packaging.⁵⁵²¹

7.2786. Furthermore, Australia considers that the complainants have failed to demonstrate that any alleged "acts of competition" compelled by the TPP measures are acts of *unfair* competition within the meaning of Article 10bis(2) – that is, acts of competition that are "dishonest" or "untruthful".^{5522, 5523}

Analysis by the Panel

7.2787. Article 10bis(1) requires Members to assure to nationals of Members effective protection against unfair competition. An act of unfair competition is defined in paragraph 2 as being "[a]ny act of competition contrary to honest practices in industrial or commercial matters".

7.2788. As we found in paragraph 7.2667 above, we understand the definition in paragraph 2 as referring to something that is done by a market actor to compete against other actors in the market in a manner that is contrary to what would usually or customarily be regarded as truthful, fair and free from deceit within a certain market. In the present disputes, the market at issue is the Australian market.

7.2789. We also recall our conclusion in paragraph 7.2679 above that, while a Member has to prohibit the types of dishonest practices enumerated in paragraph 3 of Article 10bis, the scope of other practices in industrial and commercial matters against which it is bound to assure effective protection pursuant to its paragraph 1 needs to be considered within the legal system and conceptions of what constitutes an act contrary to what would usually or customarily be regarded as truthful, fair and free from deceit within the domestic market at issue, in this case the Australian market.

7.2790. We recall that Cuba argues that a "competitive environment" as such – in the present case an environment where rival manufacturers are required to present their goods in a visually undifferentiated manner – may result "in a situation of 'unfair competition'". We also recall that, in respect of Article 10bis(1), Honduras initially argued that governmental regulation that skews the conditions of competition in favour of some competitors, and to the detriment of other competitors, is "unjust" and "not equitable", i.e. unfair. It elaborated that Article 10bis constrains a government's regulatory power in this regard to the extent that regulation has more than "incidental" impact on competition in the sense that it renders competition unfair. Later in the proceedings, Honduras clarified that it does not argue that a government's laws or regulations constitute acts of unfair competition, rather the acts of unfair competition are those of private parties. In this regard, we refer to our finding in paragraph 7.2699 above that the TPP measures in themselves do not constitute an act of unfair competition.

7.2791. Honduras argues that the TPP restrictions oblige manufacturers of tobacco products to compete in the Australian market in a manner that eliminates the possibility of achieving or maintaining product differentiation, which it argues constitutes acts of competition contrary to honest practices in industrial or commercial matters.⁵⁵²⁴ The Dominican Republic argues that "the particular acts of 'unfair competition' at issue in this dispute are the private acts of producers that present tobacco products in a virtually identical packaging to the packaging of competing tobacco products", which mislead consumers with respect to the qualities, reputation, and characteristics of the competing brands. Through the mandated presentation, producers of tobacco products are giving misleading indications that their own brand does not differ from all competing brands on the market.⁵⁵²⁵ Cuba refers to the requirement that private actors conduct themselves in the manner prescribed under the TPP measures.⁵⁵²⁶

⁵⁵²¹ Australia's second written submission, paras. 41-43.

⁵⁵²² Australia's second written submission, paras. 41 and 44.

⁵⁵²³ For the main arguments of the third parties, see section 7.3.6.3.2 above.

⁵⁵²⁴ Honduras's first written submission, para. 682.

⁵⁵²⁵ Dominican Republic's second written submission, paras. 749-751.

⁵⁵²⁶ Cuba's first written submission, para. 382.

7.2792. We understand the complainants to argue that, by selling its products in compliance with the TPP measures in a standardized packaging and product presentation, a market actor is compelled to engage in an act of unfair competition within the meaning of the definition contained in paragraph 2. We recall that the obligation under Article 10bis(1) is to provide effective protection against acts of competition that are "contrary to honest practices in industrial and commercial matters". We are not persuaded that an act to sell products in compliance with the regulatory requirements under the TPP measures constitutes such an act or that, in the context of the Australian market, such an act would be contrary to what would usually or customarily be regarded as truthful, fair and free from deceit within the Australian market.⁵⁵²⁷ Specifically, where the similarities between the retail packaging result exclusively from a regulatory intervention that is equally applicable to all products on the market, we are not persuaded that actions taken by market actors in order to comply with these requirements may be considered to constitute "acts of competition", to the extent that they do not reflect actions of market actors to compete against each other in the marketplace.⁵⁵²⁸

7.2793. Honduras, the Dominican Republic and Cuba also argue that the TPP requirements deprive competing tobacco producers of the possibility to communicate product differences, due to the virtually identical presentation of tobacco products. In their view, these requirements are particularly unfair to high-end producers that previously used branding to signal the enhanced quality, reputation, and characteristics of their products. Honduras and the Dominican Republic add that empirical evidence on "downdrading" shows that depriving producers of these signals immediately distorts the competitive landscape, with a significant shift from the high-end to the low-end.⁵⁵²⁹ In this respect, we recall our determinations above that there is some evidence, albeit limited, that together with enlarged GHW introduced on the same date, the TPP measures appear to have had a negative impact on the ratio of higher- to low-priced cigarette wholesale sales.⁵⁵³⁰ However, we are not persuaded that this, in itself, demonstrates that an "unfair" impact arises for premium products as a result of the operation of the measures. To the extent that there are reasons to expect the TPP measures, in particular the removal of figurative features on tobacco products and their retail packaging, to have a stronger impact on the appeal of tobacco products for premium cigarettes, it is reasonable to expect that the reduction in the ratio of higher- to low-priced cigarette wholesale sales observed since the entry into force of the TPP measures results at least in part from the intended operation of the TPP measures and their effect on the consumption of tobacco products more generally. This could be the case in particular where an important part of the value of premium products relies on the contribution of branding in building and maintaining positive and unique associations as a means to differentiate them from competing products.⁵⁵³¹ We are therefore not persuaded that this effect in itself, in the circumstances of this case, is of such a nature as to reflect "unfair" treatment for premium products, and in particular amount to an act of unfair competition by a market actor.

7.2794. Bearing in mind the possibilities permitted by the TPP measures to differentiate the tobacco products in the market with the use of brand, company and variant names, we do not consider that the obligation to assure effective protection against unfair competition pursuant to Article 10bis(1) can be construed as requiring Australia to permit competing tobacco producers to use branding to signal such additional qualities. In particular, as described above, we are not persuaded that the complainants have demonstrated that the measures are liable to create confusion in the consumer's mind or mislead consumers as to the origin or characteristics of the products. In this respect, we also recall that the standardized packaging and product appearance mandated by the TPP measures, including the prohibition on the use of figurative and stylistic elements of trademarks, is specifically intended to *reduce* the ability of the pack to mislead consumers in respect of the harmful effects of tobacco products.⁵⁵³² This is, pursuant to Section 3(2) of the TPP Act, intended to contribute to the improvement of public health.⁵⁵³³

⁵⁵²⁷ See our discussion of the meaning of the term "honest practices" in para. 7.2666 above.

⁵⁵²⁸ See our discussion of the meaning of the term "act of competition" in para. 7.2665 above.

⁵⁵²⁹ Dominican Republic's first written submission, paras. 870-871 (referring to IPE Report, (Exhibit DOM-100), Chapter 5).

⁵⁵³⁰ Para. 7.1196 above.

⁵⁵³¹ Para. 7.1196 above. For further details, see section 7.2.5.4.2.3 above.

⁵⁵³² TPP Act, (Exhibits AUS-1, JE-1), Section 3(2)(c).

⁵⁵³³ We recall that, in the context of our analysis of the complainants' claims under Article 2.2 of the TBT Agreement and Article 20 of the TRIPS Agreement, we concluded that we understand the objective

7.2795. In light of the above, we find that Honduras, the Dominican Republic and Cuba have not demonstrated that the TPP measures require market actors to engage in such acts of unfair competition against which Australia is bound to assure effective protection pursuant to paragraph 1 of Article 10bis. We therefore conclude that they have not demonstrated that the TPP measures are inconsistent with Article 10bis(1).⁵⁵³⁴

7.3.6.4.4 Overall conclusion

7.2796. In light of the above, we find that the complainants have not demonstrated that the TPP measures are inconsistent with Australia's obligations under Article 2.1 of the TRIPS Agreement in conjunction with Article 10bis of the Paris Convention (1967).

7.3.7 Article 22.2(b) of the TRIPS Agreement

7.3.7.1 Introduction

7.2797. We will now turn to the complainants' claims relating to the provisions of the TRIPS Agreement that concern the protection of GIs, which are addressed in Section 3 of Part II of the Agreement, in Articles 22 to 24. We will first address the claims under Article 22.2(b), and then turn to the claims under Article 24.3.

7.2798. Article 22.2(b) of the TRIPS Agreement, which forms part of Article 22 entitled "Protection of Geographical Indications", reads as follows:

2. In respect of geographical indications, Members shall provide the legal means for interested parties to prevent:

...

(b) any use which constitutes an act of unfair competition within the meaning of Article 10bis of the Paris Convention (1967).

7.2799. Honduras, the Dominican Republic, Cuba (by reference)⁵⁵³⁵, and Indonesia (by reference)⁵⁵³⁶ claim that the TPP measures are inconsistent with Article 22.2(b) of the TRIPS Agreement.

pursued by Australia through the TPP measures to be to improve public health by reducing the use of, and exposure to, tobacco products.

⁵⁵³⁴ As regards alleged acts of such a nature as to create confusion or which involve indications or allegation liable to mislead the public within the meaning of paragraphs 3(1) and 3(3) of Article 10bis, we recall that Honduras, the Dominican Republic, Cuba, and Indonesia have made additional arguments in the context of their claims under those paragraphs, which we have addressed above.

⁵⁵³⁵ See fn 4054 above. It should be noted that Ukraine did not make a claim under Article 22.2(b), and that Indonesia, in turn, supports the arguments presented by the Dominican Republic and Ukraine. On 14 October 2015, the Panel requested Cuba to respond to the questions the Panel had addressed to Cuba on 11 May 2015 (Panel question No. 138, referring to the relevant questions among Panel questions 1-84). Cuba responded to these questions on 28 October 2015 at the outset of the Panel's second meeting with the parties. It responded to Panel question No. 55 that "[i]n light of paragraph 9 of the Panel's Working Procedures, Cuba incorporates by reference and relies on the arguments and evidence set out at paragraphs 772-782 and 785-786 of the first written submission of Honduras and at paragraphs 418-423 of the second written submission of Honduras". As to the question of which paragraphs of Article 10bis of the Paris Convention are relevant to its claim under Article 22.2(b) of the TRIPS Agreement, Cuba responded that it endorses the replies of both Honduras and the Dominican Republic. Cuba's response to Panel question No. 50 (annexed to its response to Panel question No. 138). As to its other responses relating to Article 22.2(b), Cuba either provides its own responses (Panel question Nos. 44, 56, 109, 173 and 178), endorses the responses of Honduras (Panel question No. 52) or the Dominican Republic (Panel question No. 45) or the responses of both Honduras and Dominican Republic (Panel question Nos. 47, 49 and 50).

⁵⁵³⁶ In its first written submission, Indonesia indicates that it "supports the arguments presented by the Dominican Republic and the Ukraine with respect to ... Articles 22.2(b) and 24.3 ...". Indonesia's first written submission, para. 462. In response to a question from the Panel, it clarifies that the reference to Ukraine, which has not made any claims under Article 22.2(b), was a typographical error. Instead, "Indonesia supports the claims of the Dominican Republic, Honduras and Cuba". Indonesia's response to Panel question No. 57. It

7.2800. Australia asks the Panel to reject these claims in their entirety.

7.3.7.2 Main arguments of the parties

7.2801. Honduras submits that Australia contravenes Article 22.2(b) because it fails to provide the legal means for interested parties to prevent use, with respect to GIs, constituting an act of unfair competition under Article 10bis(3)(3) of the Paris Convention.⁵⁵³⁷

7.2802. Honduras considers crucial the use of the words "any" and "[i]n respect of". Article 22.2(b) requires that an interested party should have the legal means to prevent any set of circumstances involving any kind of use related to GIs that would result in unfair competition. In Honduras's view, Article 22.2(b) does not require that the unfair circumstances result from the use "of" a GI, e.g. the use of an existing GI owned by another party. Where the drafters of the TRIPS Agreement wished to refer to the "use of" some IP right, they did so explicitly.⁵⁵³⁸ Honduras adds that the reference in Article 22.2(b) to use "[i]n respect of" GIs must mean something different than use "of" GIs. In Honduras's view, the term "[i]n respect of" denotes a broader range of use. Hence, any circumstance relating to the use "[i]n respect of" GIs that has a bearing on competition and results in unfair competition within the meaning of Article 10bis of the Paris Convention (1967) must be subject to legal remedies that interested parties can pursue in a WTO Members' legal system.⁵⁵³⁹

7.2803. Recalling its interpretation of the concept of unfair competition under its claim concerning Article 10bis of the Paris Convention (1967), Honduras adds that Article 10bis – and the requirement of fair competition enshrined therein – is violated when competing commercial operators are unable to differentiate their product offering in the marketplace, this impact is asymmetrical in that it produces greater effects on some than on other competitors, and this outcome is an intended objective of the measure rather than an incidental effect.⁵⁵⁴⁰

7.2804. As regards Australia's argument that Article 22.2(b) concerns the prevention of certain acts by a third party rather than government regulatory measures, Honduras refers to its arguments relating to its claim under Article 10bis of the Paris Convention (1967).⁵⁵⁴¹

7.2805. Honduras submits that Article 22.2(b) requires WTO Members to provide the legal means for interested parties to prevent certain acts, which logically also prevents WTO Members from mandating those acts through their domestic laws.⁵⁵⁴² In this respect, Honduras refers to its arguments concerning Article 10bis of the Paris Convention (1967).⁵⁵⁴³

7.2806. As regards use which constitutes an act of unfair competition under Article 10bis(3)(3) that Australia has, in Honduras's view, failed to prevent, Honduras makes the following main arguments.⁵⁵⁴⁴

7.2807. First, Honduras argues that Australia mandates essentially uniform packaging of tobacco products and does not permit the owner of a GI to place its GI on the tobacco packaging. Hence, Australia is regulating the use of GIs in such a manner that a GI – other than the country of origin

should be noted that Cuba, in turn, endorses the arguments by the Dominican Republic, Honduras, Indonesia and Ukraine under Article 22.2(b). In response to questions from the Panel, Indonesia clarifies that it supports the legal claims raised by other complainants "without raising any additional facts or arguments with respect to GIs". Indonesia's response to Panel question Nos. 43-52.

⁵⁵³⁷ Honduras's first written submission, para. 938; and closing statement at the second meeting of the Panel, para. 13. In response to a question from the Panel, it elaborates that "Honduras's claim under Article 22.2(b) is that the plain packaging measures violate Article 22.2(b) because they give rise to 'unfair competition' in respect of geographical indications in particular within the meaning of Article 10bis(1) ((as clarified by Article 10bis(2)) and 10bis(3)(iii)." Honduras's response to Panel question No. 50.

⁵⁵³⁸ Honduras's first written submission, para. 775.

⁵⁵³⁹ Honduras's first written submission, paras. 776-777.

⁵⁵⁴⁰ Honduras's first written submission, para. 779.

⁵⁵⁴¹ Honduras's second written submission, para. 422.

⁵⁵⁴² Honduras's first written submission, para. 778.

⁵⁵⁴³ Honduras's first written submission, para. 778.

⁵⁵⁴⁴ Honduras's first written submission, sub-heading preceding paras. 780-786.

– cannot be used.⁵⁵⁴⁵ In response to Australia's description of how the TPP measures operate in relation to GIs⁵⁵⁴⁶, Honduras argues that the range of "indications" potentially eligible for GI protection is thus much larger than what Australia permits to be affixed on a plain package. For instance, a GI that is not part of a brand or variant name, or that is a combination of pictorial and textual elements, cannot be displayed on the package. According to Honduras, it is no saving grace for Australia's measure that it provides for the residual possibility to display a small potential subset of GIs, while it rules out most others.⁵⁵⁴⁷

7.2808. Second, Honduras argues that these severe limitations on the use of GIs result in an inability for the owners to communicate through their GIs differences in quality, taste and other physical characteristics to their consumers and to the broader public. Therefore, consumers of tobacco products will gain the erroneous impression that all tobacco products from all geographical origins are the same and have the same characteristics. This perception, and its resulting impact on competition, is not "fair", because it goes to the detriment of owners of existing GIs who have invested time and resources into establishing their GIs.⁵⁵⁴⁸

7.2809. Third, Honduras argues that this perception is unfair towards *future* owners of potential GIs, because they will be unable to develop and establish GIs in the Australian market, thereby exploiting their potential competitive advantage. In particular, Honduras has in recent years been exploring the potential of certain of its GIs, such as for instance "Copán". However, the TPP measures eliminate the possibility of establishing such a GI. According to Honduras, this amounts to a denial of conditions of fair competition and skews, *ex ante*, the conditions of competition in favour of producers that have not developed and that either do not intend to, or are structurally unable to, develop and use GIs.⁵⁵⁴⁹

7.2810. Honduras adds that Article 22.2(b) disciplines, through Article 10bis of the Paris Convention, not only the act of using an existing GI, but also the *ability* to use any word or sign or trade dress that has a bearing on the acquisition, existence or maintenance of a GI.⁵⁵⁵⁰

7.2811. In response to Australia's contention that the complainants' claims are based on reading a "right to use" into Article 22.2(b) where no such right exists⁵⁵⁵¹, Honduras clarifies that it is not postulating a "right to use".⁵⁵⁵² Rather, its argument is based on an analysis of the text of Article 22.2(b) and Article 10bis.⁵⁵⁵³ The restrictions that Australia has imposed "[i]n respect of" GIs – namely, limiting the way these GIs can be displayed and mandating a uniform trade dress – not only fail to prevent, but indeed mandate a situation in which the combined effect of acts by private actors gives rise to conditions of unfair competition. The uniform appearance of all packages "[i]n respect of" GIs results in "indications or allegations" that convey to consumers of tobacco product the erroneous impression that all tobacco products from all geographical origins are the same and have the same characteristics.⁵⁵⁵⁴ This perception, and its resulting impact on competition, is not "fair", because it goes to the detriment of owners of existing GIs who have invested time and resources into establishing them and future owners of potential GIs who will be unable to develop and establish GIs in the Australian market.⁵⁵⁵⁵

7.2812. The Dominican Republic explains that differentiation through trademarks and GIs enables competitive opportunities by facilitating the development of consumer loyalty, and thereby sustaining market share and supporting price premiums. Interference with the use of trademarks and GIs distorts the conditions of competition to the disadvantage of branded goods, in particular

⁵⁵⁴⁵ Honduras's first written submission, para. 781.

⁵⁵⁴⁶ Australia's first written submission, para. 483.

⁵⁵⁴⁷ Honduras's second written submission, para. 418.

⁵⁵⁴⁸ Honduras's first written submission, para. 782. See also Honduras's second written submission, paras. 416 and 420.

⁵⁵⁴⁹ Honduras's first written submission, paras. 782-784. See also Honduras's second written submission, para. 420.

⁵⁵⁵⁰ Honduras's response to Panel question No. 49.

⁵⁵⁵¹ Australia's first written submission, paras. 484-485.

⁵⁵⁵² Honduras's second written submission, para. 419.

⁵⁵⁵³ Honduras's second written submission, para. 421.

⁵⁵⁵⁴ Honduras's second written submission, para. 419.

⁵⁵⁵⁵ Honduras's second written submission, para. 420.

premium branded goods.⁵⁵⁵⁶ The Dominican Republic submits that, although the TPP measures allow the display of a brand and variant name on retail packaging for tobacco products in a prescribed format, they prohibit the use of any aspect of a trademark or GI that involves design features. Yet, it is these design features that are regarded as "more effective and efficient communicators of brand values than the corresponding words".⁵⁵⁵⁷ As with trademarks, GIs are used in commerce to distinguish certain goods from other goods, although the basis of such distinction is limited to the geographical origin of the goods, and the qualities that derive from that origin.⁵⁵⁵⁸ Without the ability to use trademarks or GIs in commerce, the benefits that warrant the international protection of trademarks and GIs disappear.⁵⁵⁵⁹

7.2813. The Dominican Republic submits that the ordinary meaning of "indication" in the definition of a GI in Article 22.1 is something that indicates or suggests, such as a *sign*. Thus, it is clear that GIs, as defined in Article 22.1, may encompass words as well as design elements.⁵⁵⁶⁰

7.2814. As regards Article 22.2(b), the Dominican Republic submits that the phrase "[i]n respect of" means "as regards", "as relates to", "with reference to", "by reason of", "because of", or "on account of".⁵⁵⁶¹ As for "any use", according to the Dominican Republic, this phrase is not restricted to use of any particular type of indication or sign. Thus, the potentially problematic use disciplined by Article 22.2(b) is use of *any* indication or sign (whether or not that sign or indication is itself a GI) in relation to, or by reason of, GIs, not simply due to uses of GIs themselves, as Australia contends.⁵⁵⁶²

7.2815. Concerning the relationship of Article 22.2(b) of the TRIPS Agreement with Article 10bis of the Paris Convention (1967), as incorporated into the TRIPS Agreement, the Dominican Republic argues that while the obligations under Article 10bis are the assurance of effective protection against unfair competition (Article 10bis(1)) and the prohibition of three specified forms of unfair competition (Article 10bis(3)), the *chapeau* of Article 22.2 establishes the further requirement with respect to GIs to provide "the legal means for interested parties" to prevent unfair competition, i.e. to make available a private right of action. According to the Dominican Republic, no such private right of action is specified in Article 10bis itself.⁵⁵⁶³

7.2816. The Dominican Republic explains that its analysis on Article 22.2(b) relies in large part on its closely-related analysis with respect to Article 10bis(1) and 10bis(3)(3) of the Paris Convention.⁵⁵⁶⁴ In particular, the Dominican Republic recalls that, for the purposes of Article 10bis, an act may constitute an act of unfair competition regardless of whether the "unfair" act is done voluntarily, or whether it is mandated by law.⁵⁵⁶⁵

7.2817. The Dominican Republic submits that acts of "competition contrary to honest practices" with respect to GIs can be acts that mislead as to the geographical origin of a good, or encompass the use of signs that are liable to mislead the public as to the "characteristics" or "nature" of a good that are associated with a GI.⁵⁵⁶⁶ The Dominican Republic adds that pursuant to Article 22.2(b), where a GI applies in relation to a good, WTO Members are, therefore, bound to provide interested parties with the legal means to prevent private actors from engaging in acts of unfair competition related to the origin of the good. Such acts of unfair competition include acts

⁵⁵⁵⁶ Dominican Republic's first written submission, paras. 208-211.

⁵⁵⁵⁷ Dominican Republic's first written submission, para. 212 (quoting Winer Report, (Exhibit UKR-9), para. 16).

⁵⁵⁵⁸ Dominican Republic's first written submission, para. 226.

⁵⁵⁵⁹ Dominican Republic's first written submission, para. 243.

⁵⁵⁶⁰ Dominican Republic's first written submission, para. 889.

⁵⁵⁶¹ Dominican Republic's second written submission, para. 774 (referring to Oxford English Dictionary online, definition of "respect, n.", available at:

<<http://www.oed.com/view/Entry/163779?rskey=uWPnla&result=1&isAdvanced=false&print>>, accessed 9 September 2015, (Exhibit DOM-331)).

⁵⁵⁶² Dominican Republic's second written submission, para. 774.

⁵⁵⁶³ Dominican Republic's response to Panel question No. 49.

⁵⁵⁶⁴ Dominican Republic's first written submission, para. 881.

⁵⁵⁶⁵ Dominican Republic's second written submission, para. 762. See also Dominican Republic's first written submission, para. 903.

⁵⁵⁶⁶ Dominican Republic's first written submission, para. 894. See also the Dominican Republic's second written submission, para. 762.

that diminish consumers' understanding regarding the qualities, reputation, or other characteristics expected from a good with the protected origin.⁵⁵⁶⁷

7.2818. Referring to a GI from the Dominican Republic, the Dominican Republic contends that the inability to use and develop the "Cigarro Dominicano" GI in the Australian market makes it impossible for consumers to learn to link that sign with the reputation for high-quality cigars that the Dominican Republic is known for around the world.⁵⁵⁶⁸ The Dominican Republic adds that other producers suffer from unfair competition in the marketplace due to their inability to use their GIs, and the resulting loss in ability to communicate the quality differences that derive from that geographical origin.⁵⁵⁶⁹

7.2819. The Dominican Republic explains that paragraphs 2 and 3 of Article 10bis of the Paris Convention are both relevant to its claim under Article 22.2(b) of the TRIPS Agreement. Article 22.2(b) refers to "any use which constitutes an act of unfair competition within the meaning of Article 10bis of the Paris Convention (1967)". By cross-referencing "act[s] of unfair competition" within the meaning of Article 10bis, generally, Article 22.2(b) implicates Article 10bis(2), which encompasses acts of competition that constitute acts of unfair competition, as well as Article 10bis(3), which identifies particular types of acts of unfair competition. For the purposes of the Dominican Republic's specific claims under Article 22.2(b), Article 10bis(3)(3) describes the particular type of acts of unfair competition implicated by the TPP measures.⁵⁵⁷⁰

7.2820. The Dominican Republic argues that, by banning the display of GIs on tobacco packaging and products, Australia compels acts that amount to unfair competition. By compelling conduct that Australia is required to prohibit, the TPP measures violate Australia's obligations under Article 22.2(b) of the TRIPS Agreement, in conjunction with Article 10bis of the Paris Convention (1967).⁵⁵⁷¹ The Dominican Republic adds that, in its view, when a Member compels producers to present products without the use of GIs, it is mandating "act[s] of competition contrary to honest practices in industrial or commercial matters" within the meaning of Article 10bis of the Paris Convention (1967).⁵⁵⁷² According to the Dominican Republic, such actions are particularly "unfair" because they serve to harm one class of producers (those who have developed GIs) to the benefit of a different class of producers (those who have not).⁵⁵⁷³ The Dominican Republic contends that the compulsory presentation of cigars without GIs serves to mislead consumers because they generally will be led to believe erroneously that geographical origin of the product makes no difference to the quality or characteristics of the products.⁵⁵⁷⁴ Furthermore, competitors will be unable to command a price premium for premium products that would otherwise be labelled with GIs.⁵⁵⁷⁵

7.2821. The Dominican Republic submits that, through the mandated use of plain packaging and the prohibition on use of GIs, competitors are compelled to use "indications or allegations ... which in the course of trade [are] liable to mislead the public as to the nature ... [or] characteristics" of the tobacco products, within the meaning of Article 10bis(3)(3) of the Paris Convention (1967). As

⁵⁵⁶⁷ Dominican Republic's first written submission, para. 895. See also the Dominican Republic's second written submission, para. 763.

⁵⁵⁶⁸ Dominican Republic's first written submission, para. 885.

⁵⁵⁶⁹ Dominican Republic's first written submission, para. 886.

⁵⁵⁷⁰ Dominican Republic's response to Panel question No. 50, paras. 223-224. The Dominican Republic argues, in other words, that "when a Member compels producers to present products without the use of GIs, it is mandating 'act[s] of competition contrary to honest practices in industrial or commercial matters', within the meaning of Article 10bis of the Paris Convention. The compulsory presentation of cigars without GIs serves to mislead consumers." Dominican Republic's response to Panel question No. 177, para. 215 (emphasis original). See also Dominican Republic's second written submission, para. 779.

⁵⁵⁷¹ Dominican Republic's first written submission, para. 912.

⁵⁵⁷² Dominican Republic's first written submission, para. 903.

⁵⁵⁷³ Dominican Republic's first written submission, para. 904.

⁵⁵⁷⁴ Dominican Republic's first written submission, para. 905. See also the Dominican Republic's first written submission, para. 883; and second written submission, para. 778.

⁵⁵⁷⁵ Dominican Republic's first written submission, para. 908. See also Dominican Republic's second written submission, paras. 778-779.

such, Australia fails to "provide the legal means for interested parties" to prevent uses of designations or presentations on packaging that constitute such an act of unfair competition.⁵⁵⁷⁶

7.2822. Responding to Australia's argument that the TPP measures do not prohibit the use of GIs, the Dominican Republic responds that the limited exceptions to the prohibition on the use of GIs do not undermine the Dominican Republic's arguments, which concern the unfair competition resulting from the restrictions on the use of GIs under the TPP measures, not a ban on the use of GIs.⁵⁵⁷⁷ The Dominican Republic adds that the mandatory use of country names on tobacco products actually exacerbates the violation of Article 22.2(b).⁵⁵⁷⁸ By requiring all cigar producers to identify their products with respect only to the country of manufacture, and not the additional elements associated with GIs, the TPP measures mandate the use of indications that are, *inter alia*, liable to mislead as to the different characteristics of different products coming from the same country.⁵⁵⁷⁹

7.2823. In response to Australia, the Dominican Republic clarifies that it does not assert that Article 22.2(b) establishes a right to use GIs. Rather, Article 22.2(b) provides interested parties with a right, with respect to GIs, to prevent uses by third parties that constitute acts of unfair competition.⁵⁵⁸⁰

7.2824. Cuba endorses and incorporates by reference the arguments by Honduras and the Dominican Republic.⁵⁵⁸¹

7.2825. Cuba submits that its claim under Article 22.2(b) "covers GIs in general, as well as the specific 'Habanos' geographical indication". In its view, the distinction between GIs in general and specific GIs is irrelevant in the context of Article 22.2(b).⁵⁵⁸² It argues that, like the Cuban Class 34 trademarks and the Habanos GI, the Cuban Government Warranty Seal is protected under trademark and unfair competition laws in export markets. It submits that the seal contains "graphic elements or indirect geographical indications" such as the graphic representation of the Cuban national shield and the image of the Cuban tobacco fields in which the Cuban national tree, the royal palm, may be seen. Cuba considers that the seal "qualifies as a geographical indication as its function is to guarantee authenticity and Cuban origin". For these reasons, Cuba considers that its claim under Article 22.2(b) also covers the Cuban Government Warranty Seal.⁵⁵⁸³

7.2826. Cuba submits that Sections 20(1) and 20(2) of the TPP Act impose a general prohibition on the display of all "marks" and "trade marks" on retail packaging unless they fall under the three exceptions under Section 20(3) that concern (i) a "brand, business or company name" and a "variant name" (as defined in Section 4(1) of the TPP Act); (ii) "the relevant legislative requirements"; or (iii) "any other trade mark or mark permitted by the regulations". The effect of the requirements regarding the display of "brand, business, company" and "variant" names, as set out in Sections 20(3)(a) and 21 of the TPP Act and Division 2.4 of the TPP Regulations, is that trademarks may only be displayed on the retail packaging of tobacco products to the extent that they comply with these requirements about typeface, font, case, colour and placement and maximum size. Section 21(4) of the TPP Act states that all "relevant legislative requirements", other than health warnings, must comply with the TPP Regulations. As to "other trade mark[s] or mark[s] permitted by the regulations", Division 2.3 of the TPP Regulations allows for the display of

⁵⁵⁷⁶ Dominican Republic's second written submission, para. 780. See also Dominican Republic's first written submission, paras. 906 and 912.

⁵⁵⁷⁷ Dominican Republic's second written submission, para. 768 (responding to an argument made in Australia's first written submission, para. 483). See also Dominican Republic's response to Panel question No. 47.

⁵⁵⁷⁸ Dominican Republic's second written submission, paras. 769 and 779.

⁵⁵⁷⁹ Dominican Republic's second written submission, para. 770. See also Dominican Republic's response to Panel question No. 54, para. 240.

⁵⁵⁸⁰ Dominican Republic's second written submission, para. 771 (responding to an argument made in Australia's first written submission, para. 484).

⁵⁵⁸¹ For details, see fn 5535 above.

⁵⁵⁸² Cuba's response to Panel question No. 45 (annexed to its response to Panel question No. 138).

⁵⁵⁸³ Cuba's response to Panel question No. 56 (annexed to its response to Panel question No. 138). Cuba provided this response on 28 October 2015 in response to Panel question No. 138 of 14 October 2015 requesting Cuba to respond to the questions the Panel had addressed to it on 11 May 2015. In response to Panel question No. 87, Cuba submits that the Cuban Government Warranty Seal is also a trademark.

eight categories of information.⁵⁵⁸⁴ With respect to cigars, the TPP Regulations require that only a single cigar band may be placed on cigars, mandate the use of a uniform colour on cigar bands, and allow the display of (i) a brand, business or company name, (ii) a variant name and (iii) the country of origin information, on cigar bands; an alphanumeric code can be retained on the cigar band as well. The TPP measures require that these signs and information are presented in a uniform typeface, font, colour and placement, and be within a maximum size on the cigar band.⁵⁵⁸⁵

7.2827. Cuba argues that the Habanos GI does not fall within the terms of the exception set out in Section 20(3)(a) of the TPP Act (for brand, business, company or variant names) because GIs are different from "brand names" as they designate a geographic origin rather than a particular source of supply. Even if the text "Habanos D.O.P" were to be accepted as a brand name, Cuban exporters would not be permitted to use another brand name such as "Cohiba" or "Partagas" together with it on the retail packaging. In effect, the only relevant information about Cuban LHM cigars that can be included on retail packaging is a statement that the cigars are "Made in Cuba"⁵⁵⁸⁶ and a statement to the effect that the package contains handmade cigars.

7.2828. Cuba further argues that there is a substantial difference between the information conveyed to consumers by the Habanos GI relative to the information conveyed by the company name Habanos S.A. Not all cigars exported by Habanos S.A. may be included in the Habanos GI, which is reserved for the best Cuban cigars that meet strict quality standards.⁵⁵⁸⁷ Even if it were possible to mention "Habanos S.A." on the packaging, which Cuba asserts is not the case⁵⁵⁸⁸, this wording would cover a much broader category than that of the cigars that can be included in the Habanos GI. The same applies to the wording "Made in Cuba", which would be applicable to all Cuban cigars. The text that currently appears on cigars with plain packaging in Australia (i.e. a reference to the Pacific Cigar Company, "made in Cuba" and "hand-made") cannot convey the same origin and quality information as the Habanos GI. Instead, the combination of these terms refers to a much wider group of cigars than those that may be included in the Habanos GI.⁵⁵⁸⁹

7.2829. Indonesia supports the arguments raised by other complainants.⁵⁵⁹⁰ Responding to Uruguay's argument that Article 7 of the TRIPS Agreement is relevant for the interpretation of Article 22.2(b) and that the protection and enforcement of IP must promote social and economic welfare, and not the contrary⁵⁵⁹¹, Indonesia adds that there are several issues relating to social and economic welfare at stake in this dispute. Indonesia argues that the economic implications of allowing Australia to compel a generic market based on the lowest standard of scrutiny available in WTO dispute settlement – a mere "rational connection" to a legitimate objective – would have broad negative consequences for the economic welfare of WTO Members, including least-developed countries.⁵⁵⁹²

7.2830. Australia argues that the ordinary meaning of the term "prevent" is "stop, hinder, avoid" or "forestall or thwart".⁵⁵⁹³ The ordinary meaning of the term "use" is "make use of (a thing), esp.

⁵⁵⁸⁴ Cuba's first written submission, paras. 51-54 and fn 32.

⁵⁵⁸⁵ Cuba's first written submission, para. 64.

⁵⁵⁸⁶ Cuba's first written submission, paras. 68-71. Cuba adds that the Habanos GI does not fall within the terms of the exceptions set out in Sections 20(3)(b) and 20(3)(c) of the TPP Act, since there are no legislative requirements mandating that GIs be displayed and the TPP Regulations do not separately allow for the display of GIs. Likewise, Cuba argues that the Cuban Government Warranty Seal falls outside the limited list of exceptions set out in Section 20(3) of the TPP Act because the seal is not a brand, business, company or variant name, there is no legislative requirement that the seal be used on retail packaging of tobacco products, and the TPP Regulations do not separately allow for the use of the seal on retail packaging. The use of the seal on retail packaging is also banned on the basis that it amounts to a prohibited onsert.

⁵⁵⁸⁷ Cuba's response to Panel question No. 189.

⁵⁵⁸⁸ Cuba stresses that, instead of the company name "Habanos S.A.", the company name that appears on plain packaging in Australia is "Pacific Cigar Company", which appears as the company responsible for placing the product on the Australian market (which, in Cuba's opinion, must be domiciled in Australia in accordance with the applicable Australian law). Cuba's response to Panel question No. 189.

⁵⁵⁸⁹ Cuba's response to Panel question No. 189.

⁵⁵⁹⁰ Indonesia's response to Panel question Nos. 43-52. For further details, see fn 5536 above.

⁵⁵⁹¹ Uruguay's third-party submission, para. 57.

⁵⁵⁹² Indonesia's response to Panel question No. 109.

⁵⁵⁹³ Australia's first written submission, para. 479 (referring to Shorter Oxford English Dictionary, Vol. 2 AUS excerpts, (Exhibit AUS-245), p. 2341).

for a particular end or purpose; utilize, turn to account".⁵⁵⁹⁴ Australia adds that the subject matter that is "prevent[ed]" from "use" in Article 22.2(b) is "geographical indications", as is evident from the context provided by Article 22.2 itself – i.e. "[i]n respect of geographical indications".⁵⁵⁹⁵ Australia refers to the panel decision in *EC – Trademarks and Geographical Indications (Australia)*, which rejected the contention that "the obligation under Article 22.2 of the TRIPS Agreement... is not limited to actions to protect GIs, but extends to any situation that concerns GIs".⁵⁵⁹⁶ Australia submits that, by its terms, Article 22.2(b) obliges Members to provide the legal means for interested parties to "stop" or "forestall" any "act of using" a GI that constitutes "an act of unfair competition" under Article 10bis of the Paris Convention.⁵⁵⁹⁷

7.2831. As regards the relevance of the interpretation of Article 10bis of the Paris Convention (1967) to the understanding of Article 22.2(b), Australia refers to its arguments addressing the complainants' claims under Article 10bis in conjunction with Article 2.1 of the TRIPS Agreement. Specifically, Australia recalls that it has demonstrated that "unfair competition" refers to "any act of competition that is contrary to honest practices in industrial or commercial matters", and covers conduct that is intended to benefit a market actor by influencing consumers on the basis of false or dishonest representations.⁵⁵⁹⁸

7.2832. In Australia's view, Article 22.2(b) therefore requires Members to provide the legal means for interested parties to prevent third parties from falsely or dishonestly using a GI to influence consumers to purchase goods that are not in fact identified by that GI.⁵⁵⁹⁹ According to Australia, the protection provided under Article 22.2(b) is negative in nature, consistent with the understanding that the TRIPS Agreement does not generally provide for the grant of positive rights to exploit or use certain subject matter, but rather provides for the grant of negative rights to prevent certain acts.⁵⁶⁰⁰ Therefore, in order to establish a *prima facie* case of violation of Article 22.2(b), the complainants would need to demonstrate that Australia has failed to provide the legal means for interested parties to prevent the false or dishonest use of a GI by a third party.⁵⁶⁰¹

7.2833. As regards how the TPP measures operate in relation to GIs, Australia explains that the measures permit the use of GIs on the packaging of tobacco products, and on the bands of individual cigars, if such indications are: (i) part of the brand or variant name of the product; or (ii) the country of origin of the product. In addition, GIs are permitted on tobacco product packaging if they are the place of packaging. Thus, Australia maintains, contrary to the complainants' assertions, the TPP measures do not have the effect of banning the display of GIs on tobacco packaging and products.⁵⁶⁰²

7.2834. Australia argues that the complainants' claims under Article 22.2(b) are once again based on reading a "right of use" into a TRIPS Agreement provision where no such right exists.⁵⁶⁰³

⁵⁵⁹⁴ Australia's first written submission, para. 479 (referring to Shorter Oxford English Dictionary, Vol. 2 AUS excerpts, (Exhibit AUS-245), p. 3485).

⁵⁵⁹⁵ Australia adds that "[t]his understanding is also consistent with the broader context of the provision. For example, Article 22.4 clarifies that the protection under Articles 22.1, 22.2, and 22.3 is 'applicable against a geographical indication which, while literally true, would nevertheless constitute a false representation to the public'." Australia's first written submission, para. 479. (emphasis original)

⁵⁵⁹⁶ Australia's response to Panel question No. 175 (quoting from Panel Report, *EC – Trademarks and Geographical Indications (Australia)*, para. 7.712: "read in context, the obligation in Article 22.2 to provide certain legal means 'in respect of' GIs, is an obligation to provide for the protection of GIs. Australia's claim does not appear to concern the protection of GIs, but rather the protection of other subject matter against the protection of GIs. Therefore, it does not disclose a cause of action under Article 22.2." (The Panel understands that the quoted material originates from para. 7.714 of Panel Report, *EC – Trademarks and Geographical Indications (Australia)*)).

⁵⁵⁹⁷ Australia's first written submission, para. 480.

⁵⁵⁹⁸ Australia's first written submission, para. 480 (referring to para. 499 of that submission).

⁵⁵⁹⁹ Australia's first written submission, para. 481.

⁵⁶⁰⁰ Australia's first written submission, para. 481 (referring to Panel Report, *EC – Trademarks and Geographical Indications*, para. 7.246, and further adding that this interpretation of Article 22.2(b) is consistent with observations of WIPO, and the views of respected commentators).

⁵⁶⁰¹ Australia's first written submission, para. 482.

⁵⁶⁰² Australia's first written submission, para. 483 (referring to the Dominican Republic's first written submission, para. 912). See also Australia's response to Panel question No. 59.

⁵⁶⁰³ Australia's first written submission, para. 484.

According to Australia, the complainants are attempting to insert into Article 22.2(b) a positive right for interested parties to use GIs to advertise and promote their tobacco products to consumers and to the broader public, on the basis that not using a GI in this manner results in competition that is "unfair".⁵⁶⁰⁴ Australia recalls that, in addressing the complainants' claims under Article 10bis of the Paris Convention (1967), it has already established that the complainants' claims of "unfairness" fall outside the definition of "unfair competition" within the meaning of Article 10bis.⁵⁶⁰⁵

7.2835. Australia further argues that the complainants contend that Article 22.2(b) prohibits Members from imposing restrictions on this alleged positive "right of use".⁵⁶⁰⁶ In Australia's view, the complainants' arguments are wholly unsupported by the text of Article 22.2(b).⁵⁶⁰⁷ According to Australia, Honduras and the Dominican Republic fundamentally ignore the negative nature of the protection provided by Article 22.2(b), and the fact that such protection is provided to *interested parties* to prevent false or dishonest use of GIs by *third parties*. A Member's refusal to allow the unfettered use of GIs by interested parties is not a violation of this provision.⁵⁶⁰⁸

7.2836. Australia submits that it has demonstrated that it meets its obligations under Article 22.2(b) of the TRIPS Agreement, properly interpreted, in responding to the complainants' claims under Article 10bis of the Paris Convention (1967) in conjunction with Article 2.1 of the TRIPS Agreement.⁵⁶⁰⁹ Australia argues that the legal mechanisms through which affected parties can prevent or obtain redress for acts of unfair competition in Australia provide the legal means for interested parties to prevent the false or dishonest use of GIs by third parties. The operation of these legal mechanisms is in no way affected by the TPP measures.⁵⁶¹⁰ Australia adds that even if Article 22.2(b) were interpreted to require that Members provide the legal means to prevent the use of signs and indications (and not just GIs), the legal mechanisms through which Australia protects against unfair competition are not restricted to GIs and would also cover the use of other signs and indications. Australia's TPP measures do not interfere with the ability of interested parties to prevent or obtain redress for false or misleading representations through these legal avenues.⁵⁶¹¹

7.3.7.3 Main arguments of the third parties

7.2837. China argues that the TPP measures do not appear to be in violation of Article 22.2(b). First, what shall be prevented under Article 22.2(b) is any use which constitutes an act of unfair competition within the meaning of Article 10bis of the Paris Convention (1967). To the extent the TPP measures are not an act of unfair competition within the meaning of Article 10bis, they do not fall within the scope of Article 22.2(b). Second, Article 22.2(b) requires Members to provide "the legal means for interested parties" to prevent "any use" that constitutes an act of unfair competition. To the extent the interested parties have legal means under the Australian law to prevent or obtain redress for the false, dishonest or illegal use of GIs by third parties, and that the operation of these mechanisms is not affected by the TPP measures, the complainants have failed to establish a *prima facie* case that Australia acts inconsistently with Article 22.2(b).⁵⁶¹²

7.2838. New Zealand indicates that it agrees with Australia's interpretation of, and arguments in relation to, Article 22.2(b), and requests the Panel to reject the complainants' relevant claims.⁵⁶¹³

7.2839. Singapore argues that, in the present context, the question is whether Australia has provided the legal means to prevent the proscribed acts under Article 22.2(b). If a GI owner is able to prevent the proscribed acts through recourse to the legal means provided by Australia

⁵⁶⁰⁴ Australia's first written submission, para. 484.

⁵⁶⁰⁵ Australia's first written submission, para. 484 fn 677 (referring to paras. 454-457 of that submission).

⁵⁶⁰⁶ Australia's first written submission, para. 484.

⁵⁶⁰⁷ Australia's first written submission, para. 485.

⁵⁶⁰⁸ Australia's first written submission, para. 485.

⁵⁶⁰⁹ Australia's first written submission, para. 486 (referring to para. 458 of that submission).

⁵⁶¹⁰ Australia's first written submission, para. 487.

⁵⁶¹¹ Australia's response to Panel question No. 175, para. 140. See also Australia's response to Panel question No. 178.

⁵⁶¹² China's third-party submission, para. 63.

⁵⁶¹³ New Zealand's third-party submission, paras. 14-15 and 124.

within its legal system and practice, there is no violation of Article 22.2(b).⁵⁶¹⁴ Noting Honduras's assertion that the obligation to provide the legal means to prevent certain acts must, by logical extension, also prevent Members from mandating those acts through their domestic laws, Singapore submits that, even assuming, *arguendo*, that such an inference could be made, the TPP measures do not mandate acts of unfair competition for the same reasons Singapore mentioned in respect of the claims brought under Article 10bis of the Paris Convention (1967) in conjunction with Article 2.1 of the TRIPS Agreement.⁵⁶¹⁵ First, in relation to the allegation that the TPP measures are unfair because of the asymmetrical impact of the measures on some competitors in the market compared to others arising from the inability to differentiate one's product in the marketplace, Singapore submits that Article 10bis is not directed at market conditions as such, but acts of commercial dishonesty involving misrepresentation.⁵⁶¹⁶ Second, the TPP measures do not compel acts that mislead consumers as to the nature or characteristics of tobacco products.⁵⁶¹⁷ Referring to Australia's explanation of how the TPP measures operate in relation to GIs, Singapore notes that the ability to distinguish the tobacco products of different undertakings is not extinguished by the TPP measures through the use of brand, business or company names with variant names on the packaging. In this case, Singapore notes, Australia has also pointed out that the TPP measures permit the use of GIs on the packaging of tobacco products, and on the bands of individual cigars, if such indications are: (i) part of the brand or variant name of the product; or (ii) the country of origin of the product; in addition, GIs are permitted on tobacco product packaging if they are the place of packaging.⁵⁶¹⁸

7.2840. Uruguay argues that the right conferred under Article 22.2(b) is defined as a negative right to protect GIs against use by third parties. According to Uruguay, the limitations are based on a measure of general public health policy recognized in the WTO Agreements and recommended by the FCTC.⁵⁶¹⁹

7.2841. Uruguay adds that Article 7 of the TRIPS Agreement is relevant for the interpretation of Article 22.2(b). In its view, Article 7 means that the protection and enforcement of IP must promote social and economic welfare, and not the contrary. Tobacco control policies promote social and economic welfare in the face of a public health problem which consumes substantial resources in the form of health treatments and premature deaths and is highly cost-intensive for society as a whole. For that reason, they also represent sound economic policy.⁵⁶²⁰

7.2842. Zimbabwe argues that, in violation of Article 22.2(b), the TPP measures do not provide any means to prevent the use of GIs.⁵⁶²¹ Zimbabwe adds that GIs are important indicators of the geographical origin of goods and the quality, reputation or characteristics essentially attributable to their origin. Further, similarly to trademarks, GIs are important for allowing consumers to distinguish products. Zimbabwe argues that the TPP measures prevent the use of a word GI other than the name of the country at the expense of producers and consumers.⁵⁶²²

7.3.7.4 Analysis by the Panel

7.2843. We recall that Article 22.2(b) of the TRIPS Agreement, which forms part of Article 22 entitled "Protection of Geographical Indications", reads as follows:

2. In respect of geographical indications, Members shall provide the legal means for interested parties to prevent:

...

⁵⁶¹⁴ Singapore's third-party submission, para. 60.

⁵⁶¹⁵ Singapore's third-party submission, para. 60.

⁵⁶¹⁶ Singapore's third-party submission, para. 61.

⁵⁶¹⁷ Singapore's third-party submission, para. 62.

⁵⁶¹⁸ Singapore's third-party submission, para. 62 (referring to Australia's first written submission, para. 483).

⁵⁶¹⁹ Uruguay's third-party submission, para. 56.

⁵⁶²⁰ Uruguay's third-party submission, para. 57.

⁵⁶²¹ Zimbabwe's third-party submission, para. 43.

⁵⁶²² Zimbabwe's third-party submission, para. 43.

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- (b) any use which constitutes an act of unfair competition within the meaning of Article 10bis of the Paris Convention (1967).

7.2844. The *chapeau* of paragraph 2 of Article 22 establishes an obligation that applies "[i]n respect of geographical indications" (emphasis added). The ordinary meaning of the term "in respect of" is "as regards, as relates to; with reference to".⁵⁶²³ In Article 22.2, this reference points expressly and exclusively to one particular category of IP, namely "geographical indications", the protection of which is the sole object of Article 22 of the TRIPS Agreement. Article 22.1 defines "geographical indications", for the purposes of the TRIPS Agreement, as:

[I]ndications which identify a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin.

7.2845. As regards the scope of the obligation under Article 22.2 within Part II of the Agreement, the panel in *EC – Trademarks and Geographical Indications (Australia)* accordingly found that, "read in the context, the obligation in Article 22.2 to provide certain legal means 'in respect of' GIs, is an obligation to provide for the protection of GIs".⁵⁶²⁴

7.2846. The *chapeau* of Article 22.2 requires Members to provide, in respect of GIs, "the legal means for interested parties to prevent" (emphasis added) certain uses of GIs that are specified in sub-paragraphs (a) and (b). Sub-paragraph (b) of Article 22.2, in particular, requires Members to provide, in respect of GIs, the legal means for interested parties to prevent "any use which constitutes an act of unfair competition within the meaning of Article 10bis of the Paris Convention (1967)".

7.2847. We recall that paragraph 2 of Article 10bis of the Paris Convention (1967) defines an act of unfair competition as "[a]ny act of competition contrary to honest practices in industrial or commercial matters". The wording of this definition is sufficiently broad to encompass dishonest practices in industrial and commercial matters that relate to GIs.

7.2848. As regards the types of uses in respect of GIs that may constitute an act of unfair competition, we refer to our general interpretative analysis of Article 10bis of the Paris Convention (1967), as incorporated through Article 2.1 of the TRIPS Agreement.⁵⁶²⁵ We recall that we concluded that Article 10bis, as incorporated into the TRIPS Agreement, requires a Member to assure effective protection against unfair competition. We also found that, while a Member is required to prohibit the types of acts of unfair competition enumerated in paragraph 3 of Article 10bis, the scope of practices in industrial and commercial practices against which a Member is bound to assure effective protection needs to be considered in the context of the legal system and conceptions of what constitutes an act contrary to what would usually or customarily be regarded as truthful, fair and free from deceit, within the domestic market at issue.⁵⁶²⁶

7.2849. While Article 10bis requires Members to assure effective protection against unfair competition, it is silent on the specific legal means Members may choose to assure such effective protection, except for requiring the prohibition of the particular acts of unfair competition identified in its paragraph 3.⁵⁶²⁷ As noted⁵⁶²⁸, Article 10bis has to be also read in the context of Article 1.1 of

⁵⁶²³ Oxford English Dictionary online, definition of "in respect of", available at: <<http://www.oed.com/view/Entry/163779?redirectedFrom=in+respect+of#eid177413195>>, accessed 2 May 2017.

⁵⁶²⁴ Panel Report, *EC – Trademarks and Geographical Indications (Australia)*, para. 7.714 (footnote omitted). See also fn 5596 above. We note that the parties have nuanced somewhat differently their respective understandings of the meaning of the term "in respect of". See the summaries of the main arguments of Honduras, the Dominican Republic and Australia in paras. 7.2802, 7.2813, and 7.2830 above.

⁵⁶²⁵ See section 7.3.6.3.3 above.

⁵⁶²⁶ See para. 7.2679 above. In this regard, we note that Honduras and the Dominican Republic build their claims relating to sub-paragraph (b) of Article 22.2 on their arguments relating to their separate claims under Article 10bis of the Paris Convention (1967). Australia also refers to its arguments responding to those claims relating to Article 10bis.

⁵⁶²⁷ Paragraph 1 of Article 10bis requires that the protection is "effective", and Article 10ter(1) of the Paris Convention (1967) adds that "[t]he countries of the Union undertake to assure to nationals of the other

the TRIPS Agreement, which provides that "Members shall be free to determine the appropriate method of implementing the provisions of this Agreement within their own legal system and practice". This leaves it to each Member to choose the appropriate methods within its own legal system and practice to repress any such dishonest practices. The *chapeau* of Article 22.2 of the TRIPS Agreement, read together with its sub-paragraph (b), however, requires Members specifically to provide, in respect of GIs, "*the legal means for interested parties to prevent*" any use which constitutes an act of unfair competition within the meaning of Article 10bis. As the Dominican Republic points out, Article 10bis, itself, does not specifically require a Member, when implementing its provisions, to provide such private right of action for interested parties under its domestic law. In addition, the terms "any use" clarify that the obligation relates specifically to the prevention of certain *uses* of GIs, namely all those that would constitute an act of unfair competition.

7.2850. With this general understanding of the obligation under Article 22.2(b) in mind, we consider the complainants' arguments that the TPP measures are inconsistent with this provision.

7.2851. Their claims concern the impact of the TPP measures in respect of GIs on all tobacco products.⁵⁶²⁹ As a preliminary matter, we therefore first consider how the TPP measures operate in relation to the use of GIs on tobacco products and their retail packaging.

7.2852. As described above⁵⁶³⁰, trademarks and GIs are currently protected in Australia under the TM Act. Under the TM Act, a sign that constitutes a GI may be eligible for registration as a trademark.⁵⁶³¹ To the extent that GIs are registered as trademarks in Australia, they are generally registered as certification trademarks. Collective trademarks may also provide protection for signs that are GIs in Australia. In the same way as with other registered trademarks, an owner of a registered certification or collective trademark is able to pursue infringement action against unauthorized use of a sign by third parties. Australia also maintains protection with respect to trademarks and GIs under other areas of Australian law, including under general consumer protection measures addressing misleading representations. The CCA establishes a general prohibition on misleading or deceptive conduct in trade or commerce. Under the CTD Act, Australia also prohibits the importation of any good bearing a false trade description. Australia further maintains common law protection for the reputation of a business through the tort of "passing off", which can provide additional protection against misrepresentations. Neither trademarks nor GIs are protected *per se* under this tort, but they may be probative with respect to the existence of, and damage to, a trader's reputation in the relevant market.⁵⁶³²

7.2853. As also described above⁵⁶³³, the TPP measures regulate the appearance of trademarks and marks⁵⁶³⁴ on tobacco products and their retail packaging. As regards how the TPP measures operate in relation to GIs, Australia submits that the measures permit the use of GIs on the packaging of tobacco products, and on the bands of individual cigars, if such indications are: (i) part of the brand or variant name of the product; or (ii) the country of origin of the product. In addition, GIs are permitted on tobacco product packaging if they are the place of packaging.⁵⁶³⁵ A

countries of the Union *appropriate legal remedies* effectively to repress all the acts referred to in Articles 9, 10 and 10bis". (emphasis added)

⁵⁶²⁸ See paras. 7.2681-7.2682 above.

⁵⁶²⁹ Honduras's response to Panel question No. 44; Dominican Republic's response to Panel question No. 44; and Indonesia's response to Panel question No. 44. Honduras and the Dominican Republic add that, as a matter of commercial reality, GIs are more likely to be relevant for LHM cigars than for other tobacco products. Cuba submits that it has focused its claims on LHM cigars.

⁵⁶³⁰ See section 2.3 above.

⁵⁶³¹ For example, the GI "Habanos" was registered as a trademark in Australia from 16 April 2010. See para. 7.2944 below.

⁵⁶³² For further details, see section 2.3 above.

⁵⁶³³ See sections 2.1.2.3.3 and 2.1.2.4 above.

⁵⁶³⁴ The definition of "mark" in Section 4 of the TPP Act reads as follows: "(a) includes (without limitation) any line, letters, numbers, symbol, graphic or image; but (b) (other than when referring to a trade mark) does not include a trade mark". TPP Act, (Exhibits AUS-1, JE-1)

⁵⁶³⁵ Australia's first written submission, para. 483. Australia adds that TPP Regulation 2.3.1(c) permits a "trade description" statement on primary and secondary packaging and TPP Regulation 2.3.4 mandates the form of such a statement. See TPP Regulations, (Exhibits AUS-3, JE-2), Regulations 2.3.1 and 2.3.4. A "trade description" is required to appear on imported products pursuant to the CI Regulations and must include the name of the country in which the product was made or produced and a true description of the product. See CI

GI is not otherwise permitted on the packaging.⁵⁶³⁶ Honduras submits that the TPP measures prohibit the display of a GI consisting of a non-word sign; or a GI consisting entirely of a non-topographical term (that is not also the brand or variant name) or a topographical name other than the country of origin (and that is not also the brand or variant name).⁵⁶³⁷ The Dominican Republic understands that the TPP measures prohibit the display on tobacco packaging and products of any indications other than words (i.e. figurative GIs), and any words that qualify as GIs to the extent that they (i) do not constitute part of the brand or variety name, and (ii) consist of something other than a country. They also curtail the use of GIs which consist of both words and images (similar to "composite" trademarks) by disallowing the use of such images; and curtail the use of words that qualify as GIs and that can be used as brand or variant names or simply constitute the name of the country due to the TPP requirements on the format.⁵⁶³⁸ Cuba and Indonesia endorse the above explanations by Honduras and the Dominican Republic.⁵⁶³⁹

7.2854. We understand that the parties agree that the TPP measures prohibit the use of any stylized or figurative elements contained in a GI or figurative signs constituting a GI on tobacco retail packaging and products. We also understand that they agree that the TPP measures permit the use of a word constituting a GI on tobacco retail packaging and on cigar bands to the extent that it is part of the brand, business or company name, or the variant name of the tobacco product⁵⁶⁴⁰, provided that it appears in the form prescribed by the TPP Regulations. We note that neither Section 4 nor Section 20(3) of the TPP Act defines the term "brand name".⁵⁶⁴¹ In particular, on its face, in permitting the use of "the brand name", the TPP Act does not differentiate between brand names that are composed either of a single or multiple words, or on the basis of whether or not such a word or words are protected as a trademark, a GI or both, or not protected under any form of IP rights in Australia. We further note that the definition of a "variant name" in Section 4(1) of the TPP Act is narrow and most GIs are unlikely to fall under it.⁵⁶⁴² Where a GI is the same as the name of the country of origin of the product, its use is also permitted, in the form prescribed by the TPP measures, on the tobacco retail packaging⁵⁶⁴³ and on cigar bands.⁵⁶⁴⁴

Regulations, (Exhibits AUS-251, DOM-155, CUB-1), Regulations 7 and 8. See also CTD Act, (Exhibit AUS-248); and Australia's first written submission, para. 483 fn 675. Australia notes that the use of country names on tobacco products is a requirement contained in other legislation which predates the introduction of the TPP measures, and that the TPP measures simply mandate the form in which such information appears. Australia's comments on the Dominican Republic's response to Panel question Nos. 174 and 177.

⁵⁶³⁶ Australia's response to Panel question No. 59.

⁵⁶³⁷ Honduras's response to Panel question No. 47.

⁵⁶³⁸ Dominican Republic's response to Panel question No. 47.

⁵⁶³⁹ Cuba's and Indonesia's responses to Panel question No. 47. Cuba nonetheless argues that the display of the specific GI "Habanos" is prohibited. For discussion, see para. 7.2855 below.

⁵⁶⁴⁰ Section 20(3)(a) of the TPP Act, (Exhibits AUS-1, JE-1) and Regulation 3.2.1(3)(a) of the TPP Regulations, (Exhibits AUS-3, JE-2).

⁵⁶⁴¹ While the TPP Act does not define the term "brand name", we note that the CI Regulations provide that "[i]n these regulations, unless the contrary intention appears: ... **brand** includes any mark, device, name, word, letter, numeral or symbol and any combination consisting of two or more of those things". CI Regulations, (Exhibits AUS-251, DOM-155, CUB-1), Section 5(1). (emphasis original)

⁵⁶⁴² Section 4(1) of the TPP Act defines "variant name" name as follows: "variant name for a tobacco product means the name used to distinguish that kind of tobacco product from other tobacco products that are supplied under the same brand, business or company name, by reference to one or more of the following: (a) containing or not containing menthol; (b) being otherwise differently flavoured; (c) purporting to differ in strength; (d) having or not having filter tips or imitation cork tips; (e) being of different length or mass."

⁵⁶⁴³ The TPP Act permits the appearance on the retail packaging of tobacco products of "the relevant legislative requirements" (Section 20(3)(b)), provided they comply with any requirements prescribed by the regulations (Section 21(4)). Section 4 of the TPP Act defines "relevant legislative requirement" to include "a trade description", which in turn is defined to mean "any trade description that is required to appear on the retail packaging of tobacco products by regulations made under the *Commerce (Trade Descriptions) Act 1905*". TPP Act, (Exhibits AUS-1, JE-1). See also Regulations 2.3.1(c) and 2.3.4 of the TPP Regulations, (Exhibits AUS-3, JE-2). The CI Regulations, which, by their own terms, were "made under the *Commerce (Trade Descriptions) Act 1905*", require that "the trade description shall contain, in prominent and legible characters: (i) the name of the country in which the goods were made or produced". This requirement applies specifically to "cigars, cigarettes, manufactured tobacco, cigarette papers and cigarette tubes", prohibiting the importation of such products into Australia "unless there is applied to those goods a trade description in accordance with these regulations". CI Regulations, (Exhibits AUS-251, DOM-155, CUB-1), cover page and Regulations 8(c)(i) and 7(1)(n). See also CTD Act (Exhibit AUS-248), Section 7(1).

⁵⁶⁴⁴ TPP Regulations, (Exhibits AUS-3, JE-2), Regulation 3.2.1(3)(b).

7.2855. Cuba specifies that, with regard to the products covered by its claim under Article 22.2(b), it considers that the TPP measures in some cases prohibit and in others curtail the use of GIs depending on the type of the GI. Cuba, however, asserts that, in the specific case of the GI "Habanos", there is a total prohibition.⁵⁶⁴⁵ Cuba submits that this is because the GI "Habanos" does not fall within the permitted uses of trademarks and marks under Section 20(3)(a) of the TPP Act as a brand, business, company or variant name, because GIs are different from "brand names" as they designate a geographic origin rather than a particular source of supply.⁵⁶⁴⁶ Cuba adds that, even if the text "Habanos D.O.P" were to be accepted as a brand name, Cuban exporters would not be permitted to use it with another brand name such as "Cohiba" or "Partagas".⁵⁶⁴⁷ Honduras adds that, to the extent that a GI is entirely or only partially "co-extensive" with the brand or variant name, its display may be curtailed.⁵⁶⁴⁸

7.2856. We note that it is not in dispute that the TPP measures prohibit the display of the label for the "Habanos" GI with its figurative elements as depicted in Figure 20 below.⁵⁶⁴⁹ We are not persuaded, however, that Cuba has established that the TPP measures prohibit the use of the word "Habanos" to the extent it is part of the brand name.⁵⁶⁵⁰ As we noted above, neither Section 4 nor Section 20(3) of the TPP Act defines the term "brand name"⁵⁶⁵¹ and, on its face, the TPP Act does not determine what word or words a competitor may choose as its brand name. In this regard, the parties have not established how they believe the TPP measures restrict a competitor's freedom to choose which name to use as a brand name for its products, and the implications they may have in situations where a word consisting of a GI is used entirely or partially in conjunction with another word used as a brand name. In particular, we do not have evidence before us that the term "brand name" should be interpreted under Australian domestic law to exclude a combination of words. We note in this respect that while the TPP Act does not define the term "brand name", the *Commerce (Imports) Regulations 1940* (Cth) (CI Regulations) provide that "[i]n these regulations, unless the contrary intention appears: ... *brand* includes any mark, device, name, word, letter, numeral or symbol and any combination consisting of two or more of those things".⁵⁶⁵²

⁵⁶⁴⁵ Cuba's response to Panel question No. 47 (annexed to its response to Panel question No. 138).

⁵⁶⁴⁶ Cuba's first written submission, paras. 68-71. We note that "Habanos" is registered as a composite trademark in Australia. See Cuba's first written submission, Annex 1, Part 1, item 19. See also para. 7.2944 below. Cuba does not contest that words contained in composite trademarks can be used as brand names under the TPP measures. See, e.g. Cuba's first written submission, para. 307.

⁵⁶⁴⁷ Cuba's first written submission, paras. 68-71. We note that in its response to Panel question No. 44, Cuba refers to "Cohiba" as an example of the Cuban tobacco manufacturers' GIs. Cuba, however, does not contest that "Cohiba" can be used as a brand name under the TPP measures. In its response to Panel question Nos. 87 and 167 and in paragraph 31 of its comments on Australia's response to Panel question Nos. 166, 170 and 204, Cuba refers to "Cohiba" as a trademark. Cuba lists "Cohiba" and "Partagas" as Cuban Class 34 trademarks in its first written submission, Annex 1, Part 1, item 6 and items 32 and 33, respectively.

⁵⁶⁴⁸ Honduras's response to Panel question No. 47.

⁵⁶⁴⁹ We note some variability in the use of the terminology by the parties. Cuba also claims that the TPP measures violate Article IX:4 of the GATT 1994 because "they prohibit the use of the *Habanos GI*". Cuba's first written submission, para. 427 (emphasis added). In that context, Cuba explains that "[t]he *Habanos GI* is a 'label' or 'inscription'". Cuba's first written submission, para. 420 (emphasis added). In its response, Australia explains that it understands that Cuba argues that "'*Habanos*' label can no longer be affixed". Australia's first written submission, para. 744 (emphasis added). In that context, Australia refers interchangeably to "the prohibition on the use of the '*Habanos*' label'" (Australia's first written submission, para. 753; and Australia's second written submission, para. 581) (emphasis added); "the removal of the mark '*Habanos*'" (Australia's second written submission, para. 594.) (emphasis added); and "the prohibition on the use of the mark '*Habanos*'", (Australia's second written submission, para. 588). It clarifies that "[t]he mark '*Habanos*' is prohibited from use on tobacco packaging if it is not part of the brand, business or company name, or variant name of the product". Australia's second written submission, fn 644. We understand that these references by Australia to the prohibition of the "label" or "mark" "*Habanos*" refer to the composite "*Habanos*" GI, or the *Habanos* label, including its figurative elements, as presented in Figure 20 below, thus not contradicting Australia's position that the TPP measures do not prohibit the use of the word "*Habanos*" if it is part of the brand name.

⁵⁶⁵⁰ Cuba also questions whether or not the company name "Habanos S.A." can be displayed on tobacco packaging and products. It adds that, even if it were possible to mention that company name, it would cover a broader category of cigars than the *Habanos* GI. Cuba's response to Panel question No. 189.

⁵⁶⁵¹ See para. 7.2854 above.

⁵⁶⁵² CI Regulations, (Exhibits AUS-251, DOM-155, CUB-1), Section 5(1). (italics original; bolding omitted)

7.3.7.4.1 Whether the TPP measures amount to unfair competition by creating unfair conditions of competition in respect of GIs

7.2857. In the context of its claim under Article 22.2(b) of the TRIPS Agreement, Honduras referred to its interpretation of the concept of unfair competition under its separate claims concerning Article 10bis, as incorporated into the TRIPS Agreement, and argued that Article 10bis may be violated as a result of a government regulation having an asymmetrical impact on competitors and that Australia violated its obligations under Article 22.2(b) because, *inter alia*, the TPP measures skewed the conditions of competition.⁵⁶⁵³ Honduras, however, clarified that it does not argue that a government's laws or regulations constitute acts of unfair competition but rather that the relevant acts of unfair competition remain those of private parties.⁵⁶⁵⁴

7.2858. In this regard, we recall that, in the context of our analysis under Article 10bis of the Paris Convention (1967), as incorporated through Article 2.1 of the TRIPS Agreement, we determined that an act of unfair competition is defined in Article 10bis(2) as "[a]ny act of competition contrary to honest practices in industrial or commercial matters". As explained, we understand the terms "competition" and "act of competition", in the context of "industrial or commercial matters", to refer to something that is done by a market actor to compete against other actors in the market.⁵⁶⁵⁵ The term "act of competition", therefore does not, in our view, include laws and other instruments that a Member adopts to regulate the market, or the overall regulatory environment within which the market operates.⁵⁶⁵⁶ We also found, as a result, that the TPP measures in themselves do not constitute an act of unfair competition within the meaning of Article 10bis of the Paris Convention (1967).⁵⁶⁵⁷ Consistent with that finding, we also find that the phrase "an act of unfair competition within the meaning of Article 10bis of the Paris Convention (1967)" in Article 22.2(b) of the TRIPS Agreement does not include laws and other instruments that a Member adopts to regulate the market, or the overall regulatory environment within which the market operates. The TPP measures in themselves, therefore, do not constitute "an act of unfair competition" as referred to in Article 22.2(b).

7.2859. Honduras also argued that Australia fails to provide the legal means for interested parties to prevent use which constitutes an act of unfair competition under Article 10bis(3)(3), *inter alia* because, pursuant to the TPP measures, existing GIs cannot be used and future owners of potential GIs are unable to develop and establish GIs.⁵⁶⁵⁸ Likewise, the Dominican Republic argued that producers suffer from unfair competition in the marketplace due their inability to use their GIs.⁵⁶⁵⁹ Australia responded that the protection provided under Article 22.2(b) is negative in nature, and does not provide for the grant of a positive right to use a GI.⁵⁶⁶⁰ In response, the Dominican Republic clarified that it does not assert that Article 22.2(b) establishes a right to use GIs; rather, Article 22.2(b) provides interested parties with a right, with respect to GIs, to prevent uses by third parties that constitute acts of unfair competition.⁵⁶⁶¹ Likewise, Honduras clarified that it is not postulating a "right to use". It rather argues that the uniform appearance of packages required under the TPP measures conveys to consumers an erroneous impression that all tobacco products from all geographical origins are the same and have the same characteristics⁵⁶⁶², and that this perception, and its resulting impact on competition, is not "fair", because it goes to the detriment of owners of existing GIs who have invested time and resources into establishing them and future owners of potential GIs who will be unable to develop and establish GIs in the Australian market.⁵⁶⁶³

⁵⁶⁵³ See paras. 7.2802-7.2804 above.

⁵⁶⁵⁴ Honduras's second written submission, para. 391.

⁵⁶⁵⁵ See para. 7.2665 above.

⁵⁶⁵⁶ See para. 7.2698 above. This is without prejudice to the question of under what circumstances a Member itself can be considered to compete as a market actor in the market, an issue that has not been raised under the present disputes.

⁵⁶⁵⁷ See para. 7.2699 above.

⁵⁶⁵⁸ Honduras's first written submission, paras. 781-782.

⁵⁶⁵⁹ Dominican Republic's first written submission, para. 886.

⁵⁶⁶⁰ Australia's first written submission, para. 481.

⁵⁶⁶¹ Dominican Republic's second written submission, para. 771.

⁵⁶⁶² Honduras's second written submission, para. 419.

⁵⁶⁶³ See paras. 7.2807-7.2811 above.

7.2860. We agree with the parties that Article 22.2(b) obliges Members to provide, in respect of GIs, the legal means for interested parties to prevent uses by third parties that constitute acts of unfair competition. We recall that the *chapeau* of Article 22.2 requires Members to provide, in respect of GIs, "the legal means for interested parties to prevent" (emphasis added) certain uses of GIs that are specified in sub-paragraphs (a) and (b). The ordinary meaning of the verb "prevent" is "to preclude, stop, or hinder", or "to stop, keep, or hinder (a person or thing) from doing something".⁵⁶⁶⁴ Members are, consequently, obliged to provide, pursuant to Article 22.2(b), legal means for interested parties to "prevent", i.e. stop or hinder, in respect of GIs, any use which constitutes an act of unfair competition within the meaning of Article 10bis of the Paris Convention (1967). Therefore, Article 22.2(b) does not confer on interested parties a positive right or entitlement to use GIs.

7.2861. As noted above, Honduras argues that the TPP measures result in a perception, and a related impact on competition, to the detriment of owners of existing and potential future GIs, which is not "fair".⁵⁶⁶⁵ This argument focuses on the TPP measures themselves as a regulatory intervention, and whether the resulting regulatory environment can be seen as unfair, rather than on acts of competition carried out by market actors. As described above, Honduras clarified however that it does not argue that a government's laws or regulations constitute acts of unfair competition. Rather, the relevant acts of unfair competition remain those of private parties.⁵⁶⁶⁶ We recall our finding above that the TPP measures in themselves do not constitute an "act of unfair competition", as referred to in Article 22.2(b).⁵⁶⁶⁷ Accordingly, we do not consider further whether the TPP measures themselves as a regulatory intervention, or the regulatory environment resulting from the restrictions that the measures impose on the use of GIs and their figurative elements, are "fair".

7.3.7.4.2 Whether the TPP measures compel acts by market participants in respect of GIs that constitute acts of unfair competition that Australia is obliged to prohibit

7.2862. The complainants argue that the TPP measures compel market participants to engage in the types of acts of unfair competition listed in Article 10bis(3)(3) of the Paris Convention (1967).⁵⁶⁶⁸ They allege that Australia, in doing so, violates its obligations under Article 22.2(b) of the TRIPS Agreement, in conjunction with Article 10bis of the Paris Convention (1967). We note that the complainants' arguments that Australia fails to provide, pursuant to Article 22.2(b), legal means for interested parties to prevent any use which constitutes a type of an act of unfair competition listed in Article 10bis(3)(3) parallel their arguments under their claims under Article 10bis(3)(3) itself, except that the arguments focus specifically on any use in respect of GIs which constitutes an act of unfair competition.

7.2863. We will first consider whether the TPP measures compel market actors to engage, in respect of GIs, in any acts of unfair competition within the meaning of Article 10bis of the Paris Convention (1967), in relation to which Australia is obliged, pursuant to Article 22.2(b) of the TRIPS Agreement, to provide the legal means for interested parties to prevent. If we find that the TPP measures do compel market actors to engage, in respect of GIs, in such acts of unfair competition, we will then consider whether, in compelling these acts, Australia fails to provide the legal means for interested parties to prevent such acts, in violation of Article 22.2(b).

7.2864. Honduras argues that the TPP restrictions on the use of GIs, namely the restrictions on how they can be displayed and the uniform trade dress – not only fail to prevent but mandate a situation in which the combined effect of acts by private actors gives rise to conditions of unfair

⁵⁶⁶⁴ Oxford English Dictionary online, definition of "prevent", available at: <<http://www.oed.com/view/Entry/151073?rskey=CZwcU6&result=2#eid>>, accessed 2 May 2017. (emphasis original)

⁵⁶⁶⁵ Honduras's second written submission, para. 420.

⁵⁶⁶⁶ Honduras's second written submission, para. 391.

⁵⁶⁶⁷ See para. 7.2699 above.

⁵⁶⁶⁸ We note that Honduras and the Dominican Republic are not challenging the pre-existing legal means through which Australia has implemented its obligations under Article 10bis. Australia has summarized the way it gives effect to its obligations under Article 10bis in its first written submission, paras. 458-459. See also paras. 2.89-2.93 above describing general consumer protection measures addressing misleading representations in Australia.

competition.⁵⁶⁶⁹ The Dominican Republic argues that, through the mandated use of plain packaging and the prohibition on use of GIs, competitors are compelled to use indications that are liable to mislead the public as to the nature or characteristics of the tobacco products.⁵⁶⁷⁰ In the Dominican Republic's view, consumers generally will be led to believe erroneously that geographical origin of the product makes no difference to the quality or characteristics of the products, and competitors will be unable to command a price premium for premium products that would otherwise be labelled with GIs.⁵⁶⁷¹ The Dominican Republic adds that the limited exceptions to the prohibition on the use of GIs do not undermine its arguments, which concern the unfair competition resulting from the restrictions on the use of GIs under the TPP measures.⁵⁶⁷² Australia responds that the complainants' arguments are unsupported by the text of Article 22.2(b), and ignore both the negative nature of the protection provided by Article 22.2(b) and the fact that such protection is provided to interested parties to prevent false or dishonest use of GIs by third parties; a Member's refusal to allow the unfettered use of GIs by interested parties is not a violation of this provision.⁵⁶⁷³

7.2865. We understand that, in essence, the complainants claim that the act of selling a tobacco product in compliance with the TPP measures amounts to an act of unfair competition under Article 10bis of the Paris Convention (1967), in particular a misleading indication or allegation within the meaning of its paragraph 3(3), in that a market actor, by selling such a product in compliance with the TPP restrictions on the use of GIs as part of the uniform packaging and product presentation required by the TPP measures, will make, at least in some cases, an indication or allegation that is liable to mislead the public as to the geographical origin of that product or the product characteristics attributable to that geographical origin.

7.2866. The complainants have not identified any specific indications or allegations required by the TPP measures in respect of GIs that would be liable to mislead the public within the meaning of Article 10bis(3)(3). As we found in the context of our analysis under Article 10bis(3)(3)⁵⁶⁷⁴, we do not exclude that an *omission* of information may amount to an indication or allegation that is liable to mislead, where such omission, in the course of trade, deceives the consumer by giving incorrect information or a false impression. However, we are not persuaded that the complainants have demonstrated that the absence of a GI or its figurative elements on tobacco retail packaging or products as a result of the TPP measures would amount to an indication or allegation liable to mislead consumers within the meaning of Article 10bis(3)(3). In particular, we are not persuaded that this absence would mislead consumers by way of giving incorrect information or false impressions, or by creating any particular incorrect expectations in the minds of consumers about the nature, manufacturing process or characteristics of the product, be they similar to or different from the characteristics of other similar products on the market.

7.2867. We recall in this respect that, as described above⁵⁶⁷⁵, the TPP measures permit the use of a term constituting a GI on tobacco retail packaging and cigar bands to the extent it is part of the brand, business or company name, provided that the GI appears in the form prescribed by the TPP Regulations. The use of a GI as a brand name, or as a business or company name, within the TPP restrictions thus allows competitors to identify the geographical origin of the tobacco product, which also enables consumers to associate it with a given quality, reputation or other characteristics that is essentially attributable to its geographical origin. Furthermore, the complainants have not sought to demonstrate that consumers, as a result of the TPP restrictions on the use of GIs, have in fact been misled, or have been unable to identify the geographical origin of the good, including characteristics essentially attributable to that origin.

7.2868. We also note that *all* competitors on the Australian market are required to comply with the same requirements on standardized tobacco packaging, and do so within a longstanding

⁵⁶⁶⁹ Honduras's second written submission, para. 419.

⁵⁶⁷⁰ Dominican Republic's second written submission, para. 780.

⁵⁶⁷¹ Dominican Republic's first written submission, para. 908. See also Dominican Republic's second written submission, paras. 778-779.

⁵⁶⁷² Dominican Republic's second written submission, para. 768. See also Dominican Republic's response to Panel question No. 47.

⁵⁶⁷³ Australia's first written submission, paras. 484-485.

⁵⁶⁷⁴ See para. 7.2752 above.

⁵⁶⁷⁵ See para. 7.2854 above.

overall policy context and an environment of public education around the issue.⁵⁶⁷⁶ We are not persuaded that the similarity of the external appearance of products and their packaging would be liable to mislead consumer to erroneously believe that all competing tobacco products have identical characteristics or origin, where this similarity results from a well-publicized regulatory intervention and does not reflect a commercial choice by market actors to portray the products as having identical characteristics. The limitations placed on display and physical access to these products suggests, also, that, when deciding on a purchase, consumers would normally refer to other sources of information about the product and not rely entirely on the packaging or the band applied to the product itself.

7.2869. In light of the above, we are not persuaded that the complainants have demonstrated that the public would be liable to be misled about product characteristics within the meaning of Article 10bis(3)(3) in respect of GIs as a result of the requirement to present tobacco products for retail sale in a standardized form under the TPP measures. As a consequence, we are also not persuaded that actions undertaken by market actors in order to comply with the regulatory requirements of the TPP measures constitute acts of unfair competition amounting to indications or allegations the use of which is liable to mislead the public within the meaning of Article 10bis(3)(3) in respect of GIs.⁵⁶⁷⁷

7.2870. We, therefore, find that the complainants have not demonstrated that the TPP measures compel market actors to engage in acts of unfair competition that would amount to misleading indications or allegations within the meaning of paragraph 3(3) of Article 10bis of the Paris Convention (1967) in respect of GIs.⁵⁶⁷⁸ We, therefore, also find that the complainants have not demonstrated that Australia, in maintaining these measures, fails to provide the legal means for interested parties to prevent such acts in respect of GIs, in violation of Article 22.2(b) of the TRIPS Agreement.

7.2871. We note that the parties have presented arguments concerning the scope of the definition of a GI contained in Article 22.1 of the TRIPS Agreement, including Cuba's argument that the Cuban Government Warranty Seal qualifies as a GI. Given our findings in paragraphs 7.2860 and 7.2870 above, we do not find it necessary to address the parties' arguments concerning the scope of the definition of a GI and whether the Cuban Government Warranty Seal is protected as a GI in Australia.

7.3.7.5 Conclusion

7.2872. In light of the above, we find that the complainants have not demonstrated that the TPP measures are inconsistent with Australia's obligations under Article 22.2(b) of the TRIPS Agreement.

7.3.8 Article 24.3 of the TRIPS Agreement

7.2873. We will now turn to the complainants' claims under Article 24.3 of the TRIPS Agreement. It reads as follows:

⁵⁶⁷⁶ See para. 7.2721 above.

⁵⁶⁷⁷ As we also observed in para. 7.2763 above in the context of Article 10bis(3)(3), one of the objects of the TPP measures is to remove branding design features to reduce the ability of the retail packaging of tobacco products, through these features, to mislead consumers about the harmful effects of smoking or using tobacco products. At the same time, the measures allow the use of brand and variant names and the country of origin which allow the consumer to identify the product at issue and associate it with a particular origin. The measures thus operate in a manner that reflects both the consumer's interest in not being misled concerning the harmful effects of smoking, which are undisputed, and the consumer's interest in not being misled about the product's characteristics. Also against this context, we are not persuaded that the uniformity of the appearance of tobacco retail packaging and products as a result of the TPP measures, including the removal of distinctive design features other than brand and variant names, has the effect of misleading consumers in respect of GIs.

⁵⁶⁷⁸ We also recall that the acts listed in paragraph 3(3) are examples of acts of unfair competition as defined in paragraph 2 of Article 10bis. In this regard, as discussed in para. 7.2792 above, we are not persuaded that the very act of putting onto the market products that comply with the regulatory requirements under the TPP measures would amount to an act of competition contrary to honest commercial practices.

In implementing this Section, a Member shall not diminish the protection of geographical indications that existed in that Member immediately prior to the date of entry into force of the WTO Agreement.⁵⁶⁷⁹

7.2874. Honduras, the Dominican Republic, Cuba, and Indonesia (by reference)⁵⁶⁸⁰ claim that the TPP measures are inconsistent with Article 24.3 of the TRIPS Agreement. More specifically, Honduras and the Dominican Republic argue that the TPP measures are inconsistent with Article 24.3 because they diminish the protection afforded to GIs that existed in Australia immediately prior to 1 January 1995.⁵⁶⁸¹ Cuba argues that the TPP measures are inconsistent with Article 24.3 because they diminish the level of protection Australia accorded to the "Habanos" GI by eliminating the ability of Cuban exporters to affix that GI on exports of LHM cigars as of 1 December 2012.⁵⁶⁸²

7.2875. Australia asks the Panel to reject these claims in their entirety.

7.3.8.1 Main arguments of the parties

7.2876. Honduras argues that the definition of a GI contained in Article 22.1 of the TRIPS Agreement is not restricted to words and can, in principle, include anything identifying a good as originating in a particular territory, region or locality. Thus, the term "indication" includes design elements, logos, symbols, images, and possibly colours. Even a word that is not *a priori* a topographical name can constitute a GI. Whether a given sign or word functions as a GI is a question of national law and consumer perception. The continued use of GIs, and the consequent reinforcement in the eyes of the consumer, is essential for effective protection.⁵⁶⁸³

7.2877. Honduras submits that Article 24.3 is a standstill provision, the purpose of which is to prevent WTO Members from reducing the level of protection they afforded to GIs prior to the date of entry into force of the WTO Agreement, where that level exceeds the minimum standard of protection under the TRIPS Agreement.⁵⁶⁸⁴

7.2878. Honduras argues that the meaning of the introductory phrase "[i]n implementing this Section" is that "any measure that impacts upon GIs or the system of GI protection affects the 'implementation' of Section 3 on the protection of geographical indications".⁵⁶⁸⁵ Honduras adds that the precise meaning of this phrase was clarified by the panel in *EC – Trademarks and Geographical Indications*.⁵⁶⁸⁶

7.2879. Honduras argues that the term "protection" refers to the "defence" or the "support", "assistance" or the act of "keeping safe" that WTO Members provide to GIs under their domestic laws.⁵⁶⁸⁷ In Honduras's view, footnote 3 to the TRIPS Agreement provides context for understanding the term "protection" in Article 24.3. Honduras argues that, under footnote 3, "the term 'protection' includes matters affecting the 'availability', 'acquisition' and 'maintenance' of intellectual property rights. In other words, the use of geographical terms when developing a GI,

⁵⁶⁷⁹ The term "this Section" refers to Section 3, entitled "Geographical Indications".

⁵⁶⁸⁰ In its first written submission, Indonesia indicates that it "supports the arguments presented by the Dominican Republic and the Ukraine with respect to ... Articles 22.2(b) and 24.3" Indonesia's first written submission, para. 462. In response to a question from the Panel, it clarifies that the reference to Ukraine, which has not made any claims under Article 24.3, was a typographical error. Instead, "Indonesia supports the claims of the Dominican Republic, Honduras and Cuba". Indonesia's response to Panel question No. 57. In response to questions from the Panel, Indonesia clarifies that it supports the legal claims raised by other complainants "without raising any additional facts or arguments with respect to GIs". Indonesia's response to Panel question Nos. 43-52.

⁵⁶⁸¹ Honduras's first written submission, para. 938; and closing statement at the second meeting of the Panel, para. 15. See also Dominican Republic's first written submission, para. 932.

⁵⁶⁸² Cuba's first written submission, para. 365.

⁵⁶⁸³ Honduras's first written submission, paras. 740-743.

⁵⁶⁸⁴ Honduras's first written submission, para. 738.

⁵⁶⁸⁵ Honduras's second written submission, para. 430.

⁵⁶⁸⁶ Honduras's response to Panel question No. 180 (referring to Panel Report, *EC – Trademarks and Geographical Indications (Australia)*, paras. 7.631-7.632).

⁵⁶⁸⁷ Honduras's first written submission, para. 759.

as well as the continued use of that geographical indication once it has been established, is part of the 'protection' granted by the regulator to geographical indications."⁵⁶⁸⁸

7.2880. According to Honduras, it follows from the phrase "that existed in that Member immediately prior to the date of entry into force of the WTO Agreement", and its French and the Spanish versions, that what WTO Members are precluded from diminishing is the level of protection of GIs as a whole, and not merely the protection of specific GIs. In this regard, Honduras disagrees with the conclusions of the panel in *EC – Trademarks and Geographical Indications (Australia)* that Article 24.3 requires WTO Members not to roll back the protection of the individual GIs that existed prior to 1995, rather than the system of protection as a whole.⁵⁶⁸⁹

7.2881. In support of its position, Honduras argues that the phrase "that existed" is grammatically linked to the term "protection" and not to the term "geographical indications". Second, according to Honduras, where the drafters wanted to refer to "individual geographical indications" they did so explicitly, for instance, Article 24.4 refers to "a particular geographical indication of another Member identifying wines and spirits". Third, Honduras contends that the "broader policy-based reasoning" of the panel in *EC – Trademarks and Geographical Indications (Australia)* is flawed.⁵⁶⁹⁰ In this regard, Honduras argues that the combined effect of the minimum standards of protection for GIs as well as the stand-still obligation "implies precisely that Members do *not* have an automatic or unconditional right to 'implement[] the same minimum standards of protection as other Members'".⁵⁶⁹¹ Honduras adds that it sees nothing *a priori* objectionable in policy terms to require a Member to continue the level of GI protection that existed prior to 1995, where that standard was above and beyond the minimum standard required by the TRIPS Agreement.⁵⁶⁹² Fourth, as regards the reference by the panel in *EC – Trademarks and Geographical Indications* to the use of the term "system" in Article 14.4 of the TRIPS Agreement, Honduras argues that the "system" mentioned in Article 14.4 "denotes a *qualitatively different normative framework or mechanism* to safeguard the rights of an IP holder", likewise, the "system" referred to in Article 27.3(b) is "a qualitatively different alternative 'system'" contrasted with the standard patent system.⁵⁶⁹³ Finally, the ruling of that panel "would also have the highly questionable effect of privileging geographical indications from developed countries".⁵⁶⁹⁴

7.2882. Honduras submits that Australia protects GIs (other than those for wines) through its general legislation on misleading and deceptive business practices. Honduras notes that, in a document filed with the TRIPS Council in 1999, "Australia described the legal means for interested parties under then existing Australian law *to prevent* misleading use as to the place of origin of a good", and adds that "[t]his statement suggests that, prior to January 1995, Australian law protected geographical indications *by permitting* their owners to" use and maintain already established GIs on their products; use a word or non-word indication so as to develop GIs by placing these indications on the product; avail themselves of legal remedies against misleading use by other producers of designations that suggested that the good originated in a different place; and obtain a so-called certification mark.⁵⁶⁹⁵

7.2883. Honduras contends that the TPP measures have diminished the above-mentioned protection that existed immediately prior to the entry into force of the WTO Agreement on 1 January 1995 because it is no longer possible for the owner/beneficiary of a GI (i) to use, develop, and maintain a word GI other than the name of a country; (ii) to use, develop, and maintain a non-word GI; and (iii) to attach to a tobacco product a registered certification trademark that contains a GI.⁵⁶⁹⁶

⁵⁶⁸⁸ Honduras's first written submission, para. 760.

⁵⁶⁸⁹ Honduras's first written submission, paras. 744-746.

⁵⁶⁹⁰ Honduras's second written submission, paras. 434-435. In this regard, Honduras refers to Panel Report, *EC – Trademarks and Geographical Indications (Australia)*, paras. 7.634 and 7.635. See also Honduras's first written submission, paras. 747-755.

⁵⁶⁹¹ Honduras's first written submission, para. 752.

⁵⁶⁹² Honduras's first written submission, para. 755.

⁵⁶⁹³ Honduras's first written submission, para. 756. (emphasis original)

⁵⁶⁹⁴ Honduras's first written submission, para. 757.

⁵⁶⁹⁵ Honduras's first written submission, paras. 765-767. (emphasis added)

⁵⁶⁹⁶ Honduras's first written submission, paras. 768-771.

7.2884. Responding to Australia's argument that there was no protected "right to use" under Australian law in relation to GIs prior to 1 January 1995, Honduras contends that Australia bases its argument on a distortion of Honduras's argument, alleging that Honduras claims a "right to use" a trademark or a GI.⁵⁶⁹⁷ Honduras adds that "Australia builds up a strawman and then proceeds to knock it down. The question is not whether a 'right to use' a GI existed before 1995. The question is what the term '*protection*' in Article 24.3 means and what type and degree of '*protection*' was offered to GIs under Australian law before 1995." Honduras adds that "[i]n the light of footnote 3 of the TRIPS Agreement, the term '*protection*' should be read as including the ability to use distinctive marks in order to achieve GI status. In addition, the term '*protection*' refers to the ability to effectively enforce the rights to prevent misleading or other use of indications that reduce the strength of the intellectual property right."⁵⁶⁹⁸ Honduras contends that Australia does not deny that, before 1995, a GI could be used on tobacco products both in word and non-word form. Indeed, the ability to use GIs was thus part of the system of protection of GIs prior to 1995. This ability to use GIs is no longer available for tobacco-related GIs since 1 December 2012.⁵⁶⁹⁹ Honduras adds that, since 1 December 2012, however, the level of protection has been reduced below the pre-1995 level because no new GIs can be developed and because existing GIs cannot be maintained at the level of strength determined by the GI holder. Hence, the enforcement power of the GI holder today is thus far less than it was before 1995.⁵⁷⁰⁰

7.2885. Furthermore, Honduras notes that Australia relies on the fact that GIs can also be protected as trademarks. Honduras contends that "Australia fails to acknowledge that Section 20 [of the TM Act] provides for the exclusive right 'to use the trade mark', including a trademark containing a GI. That right 'to use the trade mark' existed under domestic law before 1995 and also formed part of the system of protection for GIs. That right no longer is protected for tobacco-related GIs today, in violation of Article 24.3 of the TRIPS Agreement."⁵⁷⁰¹

7.2886. The Dominican Republic submits that Article 24.3 is a stand-still provision that constrains the right of a Member to reduce the protection of GIs that existed in that Member prior to the date that the WTO Agreement entered into force, i.e. 1 January 1995.⁵⁷⁰²

7.2887. The Dominican Republic argues that the introductory phrase "[i]n implementing this Section" refers to any act or omission that affects the implementation of a provision in Section 3, which encompasses Articles 22 to 24 of the TRIPS Agreement, as well as additional protections for GIs. In its view, this covers the means by which a Member gives full effect to such provisions, as well as any acts or omissions by which a Member fails to do so, wholly or partially.⁵⁷⁰³ The Dominican Republic adds that, in *EC – Trademarks and Geographical Indications*, the European Communities argued that Article 24.3 provided an exception to its obligations under Article 16.1 with respect to trademarks, to the extent that there was a conflict between Article 16.1 and the obligation to maintain the level of GI protection that existed at the time of entry into force of the WTO Agreement. In response, the United States argued that Article 24.3 does not create an exception from the obligation of implementing sections of the TRIPS Agreement other than Section 3. It was in this context that the panel, noting that Article 16.1 was part of Section 2, found that Article 24.3 "does not apply to measures adopted to implement provisions outside Section 3".⁵⁷⁰⁴

7.2888. The Dominican Republic argues that, in this context, the term "*protection*" refers to the safeguarding of GIs. In its view, footnote 3 of the TRIPS Agreement, which forms part of the context, provides that the word "*protection*" includes "matters affecting the acquisition, scope, maintenance and enforcement of intellectual property rights". It argues that, thus, a Member is prohibited from reducing or lessening the scope of GI rights, and also the ability of interested

⁵⁶⁹⁷ Honduras's second written submission, para. 436.

⁵⁶⁹⁸ Honduras's second written submission, para. 437.

⁵⁶⁹⁹ Honduras's second written submission, para. 438.

⁵⁷⁰⁰ Honduras's second written submission, para. 439.

⁵⁷⁰¹ Honduras's second written submission, para. 440. (footnote omitted)

⁵⁷⁰² Dominican Republic's first written submission, para. 914.

⁵⁷⁰³ Dominican Republic's second written submission, para. 798.

⁵⁷⁰⁴ Dominican Republic's response to Panel question No. 51, para. 232 (referring to Panel Reports, *EC – Trademarks and Geographical Indications (US)*, para. 7.632; and *EC – Trademarks and Geographical Indications (Australia)*, para. 7.632).

parties to acquire, maintain, and enforce GI rights, in the domestic legal system of that Member, relative to the situation immediately prior to 1 January 1995.⁵⁷⁰⁵

7.2889. It adds that the meaning of the term "protection" must be understood in view of the context of Article 22 of the TRIPS Agreement. Referring to the definition of a GI in Article 22.1, it argues that in order for consumers to learn to link between (a) the indication, (b) the GI, and (c) the "given quality, reputation or other characteristic" that is "essentially attributable" to that origin, those producers must sufficiently use those indications in relation to the associated goods. The ability of producers to establish and maintain the links between (a), (b), and (c), such that an indication can fulfil the definition of a GI, is essential to the protection of GIs in terms of the acquisition, scope, maintenance, and enforcement of those rights. If the ability to use is diminished or removed, the protection afforded to indications is equally diminished. The Dominican Republic adds that "[t]o be clear, [it] is not arguing that Article 22.1 of the *TRIPS Agreement*, itself, requires that all Members provide interested parties with an affirmative right to establish or maintain, through use, geographical indications in their territory". Instead, the Dominican Republic argues that the phrase "protection of geographical indications that existed" in Article 24.3 grandfathered a Member's level of protection of GIs, prior to 1 January 1995, including the scope of, maintenance of, enforcement of, and ability to acquire, GIs through the use of those indications. Restrictions or prohibitions on the use of GIs on products "diminish[es]" such "protection" of GIs. Thus, under the proper interpretation of Article 24.3, all GIs, regardless of whether they existed prior to 1995, must be accorded at least the level of protection that existed in the Member's legal system prior to the entry into force of the WTO Agreement. The Dominican Republic adds that "[t]his could include, where applicable in a given Member prior to 1995, the ability of indications to become geographical indications in the first place (i.e., acquisition), and to maintain and enforce their status as geographical indications, through use".⁵⁷⁰⁶

7.2890. In its view, the phrase "protection of geographical indications" refers to the overall level of GI protection that "existed" under the Member's legal system prior to 1995. While there is some ambiguity in the English text of the provision, the equally authentic French and Spanish versions remove such ambiguity. Specifically, the verb "existed", when viewed in the authentic French and Spanish version of the TRIPS Agreement, is in the singular, which accords with the singular word "protection", as opposed to the plural "geographical indications". Hence, the obligation applies to the level of "protection" that existed in the domestic legal system prior to 1 January 1995, and not to the protection of individual "geographic indications" that existed prior to that date.⁵⁷⁰⁷ It adds that when the drafters of the Agreement intended to cover only individual GIs, as opposed to systems of protection, they knew how to make that clear.⁵⁷⁰⁸ In its view, it is sensible and logical that the drafters would not want Members to use the implementation of the TRIPS Agreement obligations on GIs as a means for lowering the overall level of GI protection.⁵⁷⁰⁹ Furthermore, the Dominican Republic contends that an interpretation of Article 24.3 that would focus on grandfathering individual GIs, rather than the overall level of GI protection in a given Member, would benefit GIs from developed countries, to the disadvantage of GIs from developing countries;⁵⁷¹⁰ this would lead to discriminatory treatment of GIs from certain countries as compared to GIs from other countries, which would be a *de facto* violation of the MFN treatment under Article 4 of the TRIPS Agreement.⁵⁷¹¹

7.2891. The Dominican Republic submits that, prior to 1995, GIs in Australia could be used freely by interested parties on tobacco products, including on the packages and on the sticks, in order to acquire, maintain, and, ultimately, to enforce GIs. There were no specific restrictions on such use in Australia. Furthermore, interested parties could prevent the use by others of signs that misled the public as to the geographical origin of the goods, by either instituting proceedings for passing off, or pursuant to the provisions of Part V of Australia's Trade Practices Act 1974. Moreover, in

⁵⁷⁰⁵ Dominican Republic's first written submission, paras. 916-917.

⁵⁷⁰⁶ Dominican Republic's first written submission, paras. 919-922. (emphasis original; footnotes omitted)

⁵⁷⁰⁷ Dominican Republic's first written submission, para. 918. (footnotes omitted)

⁵⁷⁰⁸ Dominican Republic's second written submission, para. 791.

⁵⁷⁰⁹ Dominican Republic's second written submission, para. 793.

⁵⁷¹⁰ Dominican Republic's second written submission, para. 795.

⁵⁷¹¹ Dominican Republic's second written submission, para. 796.

certain situations, interested parties could also protect GIs in Australia, prior to 1995, through registration as a certification mark.⁵⁷¹²

7.2892. The Dominican Republic contends that the TPP measures have significantly diminished the protection of GIs by preventing the use of GIs on tobacco packages or sticks (subject to a small exception for country names on cigar bands and the side of cigarette packages). Specifically, prior to 1 January 1995 (and prior to implementation of the TPP Act), tobacco producers could develop and maintain GIs (including, but not limited to, those protected as certification marks) in Australia by using them on their packaging and sticks. But, under the TPP measures, such use is prohibited or, in the case of the name of the country of origin, severely restricted. The Dominican Republic submits that, by allowing unlimited use of GIs, within the meaning of Article 22.1, on tobacco products prior to 1995, Australia had provided a level of protection that allowed for indications to acquire, maintain, and, ultimately to enforce, their status as a GI. By contrast, when Australia prohibited and severely restricted use of GIs on tobacco products through the TPP measures (subject to a small exception), it severely diminished such "protection", as interested parties are no longer able to use indications in a manner that will allow for indications to acquire, maintain, or enforce their status as GIs.⁵⁷¹³

7.2893. Commenting on Australia's argument that "[n]either now, nor at the time of entry into force of the TRIPS Agreement, was a right to use a geographical indication protected under Australian law",⁵⁷¹⁴ the Dominican Republic submits that "[w]hile Australia appears to be correct that, at the time of entry into force of the *TRIPS Agreement*, there was no formal 'right to use' geographical indications codified in Australian law, this does not provide a defense to Australia's violation of Article 24.3 of the *TRIPS Agreement*". It adds that "Australia, however, appears to argue that 'protection' in the context of Article 24.3 is limited to something that is a formal 'protected legal right' in a Member, and that Article 24.3 cannot include protection that may arise or develop through less formal means, including market freedoms". The Dominican Republic adds that "[w]hether that use was legally guaranteed, or simply permitted, in Australia makes no difference for purposes of Article 24.3, as such use was the means by which GIs on tobacco products were previously acquired or maintained, and consequently enjoyed a higher level of 'protection'.⁵⁷¹⁵ The Dominican Republic contends that Australia draws a "false distinction" between market freedom and right of use, and argues that "[i]t is immaterial whether such GI protection was enabled through a 'right of use' or through a 'market freedom'".⁵⁷¹⁶

7.2894. Cuba claims that Australia has failed to comply with Article 24.3 because it has diminished the level of protection that it accords to the Habanos GI.⁵⁷¹⁷ It argues that the Habanos GI meets the definition of a GI in Article 22.1 of the TRIPS Agreement.⁵⁷¹⁸ This definition does not limit protection of GIs only to verbal or word elements or designations but also to images or any other GIs which "identify good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin". These can be signs such as the Habanos designation of origin and design, the Cuban Government Warranty Seal⁵⁷¹⁹, and the Cuban tobacco manufacturers' GIs, including Cohiba⁵⁷²⁰, Hoyo de Monterrey, Cabanas, Cuaba, San Cristobal de la Habana, whose graphic or word elements constitute indicators of origin and communicate the singularity and characteristics of the good due to that origin.⁵⁷²¹

⁵⁷¹² Dominican Republic's first written submission, paras. 925-927.

⁵⁷¹³ Dominican Republic's first written submission, paras. 928-930. See also Dominican Republic's second written submission, paras. 807-808.

⁵⁷¹⁴ Australia's first written submission, para. 502.

⁵⁷¹⁵ Dominican Republic's response to Panel question No. 48.

⁵⁷¹⁶ Dominican Republic's second written submission, paras. 804-805.

⁵⁷¹⁷ Cuba's first written submission, paras. 365 and 378.

⁵⁷¹⁸ Cuba's first written submission, para. 366.

⁵⁷¹⁹ In response to Panel question No. 87, Cuba submits that the Cuban Government Warranty Seal is also a trademark.

⁵⁷²⁰ In its response to Panel question Nos. 87 and 167 and in paragraph 31 of its comments on Australia's response to Panel question Nos. 166, 170 and 204, Cuba refers to "Cohiba" as a trademark. In its response to Panel question No. 44, Cuba refers to "the Indian Head image of the Cohiba trademark" as an example of "graphic elements or indirect geographical indications".

⁵⁷²¹ Cuba's response to Panel question No. 44 (annexed to its response to Panel question No. 138).

7.2895. Cuba argues that the ordinary meaning of the words "[i]n implementing this Section" in the three official languages of the WTO confirms that any measure affecting the implementation or application of the protection of GIs falls within the scope of Article 24.3.⁵⁷²²

7.2896. Cuba argues that "[t]he ability to utilise a geographical indication within the territory of the WTO Member is a necessary component of the analysis of whether it is '*protected*' within that territory". It further argues that, in assessing the "protection" of a particular GI within a jurisdiction one must consider both the question of whether holders of the GI can prevent unauthorised use by third parties as well as the question of whether the GI can be used to designate protected products within that jurisdiction. Cuba contends that "it would be incongruous to contend that a geographical indication is protected within the territory of a WTO Member if it is not, and cannot be used within that territory by holders or beneficiaries of the geographic indication." Cuba adds that its conclusion is consistent with the ordinary meaning of the term "protect", and supported by footnote 3 in the TRIPS Agreement, which indicates that "matters affecting the use of intellectual property" are relevant to any assessment of the level of "protection" of IP rights.⁵⁷²³ Cuba submits that "[g]enerally speaking, protection means 'right to use' a geographical name".⁵⁷²⁴

7.2897. Cuba argues that "Article 24.3 requires a standstill with respect to any and all legal mechanisms for the protection of GIs prior to 1995".⁵⁷²⁵

7.2898. Cuba submits that "[t]he factual position with respect to the Habanos GI is that immediately prior to 1 January 1995, Cuban exporters were able to use that geographical indication in its original form on the packaging of LHM Cigars sold in the Australian market. But, following the full implementation of the [T]PP Measures on 1 December 2012, Cuban exporters are no longer able to use that geographical indication (in its original form or even in a modified form) on boxes of LHM Cigars sold in the Australian market."⁵⁷²⁶

7.2899. Cuba argues that this implies that Australia has diminished the level of protection that it provides to the Habanos GI in comparison to the level that was provided within its territory prior to 1 January 1995. It adds that, prior to 1 January 1995, the Habanos GI benefited from the common law "freedom to use any word or device in association with the provision of goods or services".⁵⁷²⁷

7.2900. Cuba further elaborates that "Habanos" has built a reputation that is entitled to the common law protection against passing off in Australia, and argues that the inability to use the Habanos GI for LHM cigars because of the TPP measures will inevitably weaken the reputation of the Habanos GI in Australia and thereby lead to a reduction or limitation of the scope for effective legal action against passing off in the event of any improper or fraudulent appropriation of the Habanos GI by a third party for other products. Over time, the Habanos GI will lose its reputation and thus the protection under common law. Consequently, the TPP measures will inevitably diminish the protection enjoyed by the Habanos GI prior to 1 January 1995, and thus violate Article 24.3 of the TRIPS Agreement.⁵⁷²⁸

7.2901. Cuba concludes that Australia has diminished the level of protection that it accords to the Habanos GI by eliminating the ability of Cuban exporters to affix the Habanos GI on exports of LHM cigars.⁵⁷²⁹ It adds that, with regard to Article 24.3, the TPP measures reduce the protection of the GIs associated with Cuban premium cigars by preventing the use of identifiers of the product with the geographical origin that attributes to it specific characteristics and qualities, through the exclusion of graphic elements or indirect GIs, such as the graphic representation of the Cuban national shield or the royal palm of which the Cuban Government Warranty Seal is comprised, or

⁵⁷²² Cuba's response to Panel question No. 179.

⁵⁷²³ Cuba's first written submission, paras. 370-372. (emphasis original)

⁵⁷²⁴ Cuba's first written submission, para. 373 (referring to Audier Protection of GIs, (Exhibit CUB-49), p. 7).

⁵⁷²⁵ Cuba's response to Panel question No. 46 (annexed to its response to Panel question No. 138).

⁵⁷²⁶ Cuba's first written submission, para. 374. See also ibid. paras. 368-369 (referring to paras. 66-71).

⁵⁷²⁷ Cuba's first written submission, paras. 375-376 (referring to JTI v. Commonwealth, (Exhibits AUS-500, CUB-50), paras. 76-77 (per Gumnow J)).

⁵⁷²⁸ Cuba's response to Panel question Nos. 43 and 44 (annexed to its response to Panel question No. 138).

⁵⁷²⁹ Cuba's first written submission, para. 378.

the image of the Pinar del Rio tobacco fields in the Vegas Robaina trademark, or the Indian Head image of the Cohiba trademark, all of which was possible even prior to the entry into force of the TRIPS Agreement.⁵⁷³⁰

7.2902. Australia submits that the definition of a GI in Article 22.1 of the TRIPS Agreement is not in dispute in the current proceedings. In particular, it does not contest Honduras's position that a "non-topographical" name may be capable of meeting that definition. This is, however, not a relevant consideration, since Australia's argument that the complainants' claims under Article 24.3 must fail is not dependant on whether or not relevant GIs are "topographical".⁵⁷³¹

7.2903. Australia argues that the scope of Article 24.3 is limited by the introductory phrase "[i]n implementing this Section". As noted by the panel in *EC – Trademarks and Geographical Indications (Australia)*, this means that Article 24.3 "does not apply to measures adopted to implement provisions outside Section 3".⁵⁷³² In its view, a measure adopted to implement Part II, Section 3 of the TRIPS Agreement would be a measure that "provide[s] the legal means for interested parties to prevent" the use of a GI in the manner described in Article 22. At the time of entry into force of the TRIPS Agreement, under Australian law, GIs were primarily protected against acts of misleading conduct or unfair competition through statutory and common law consumer protections laws. In order to implement the TRIPS Agreement, Australia enacted the TM Act, Section 61 of which specifically implements Australia's obligations with respect to GIs, to the extent not already conferred under existing law. Unlike Section 61 of the TM Act, the purpose of the TPP measures is not to "provide the legal means for interested parties to prevent" the use of a GI in the circumstances described in Article 22 of the TRIPS Agreement. Accordingly, Australia submits that Article 24.3 is inapplicable in relation to the TPP measures.⁵⁷³³

7.2904. Even if the Panel were to conclude that Article 24.3 were applicable, however, Australia argues that the complainants have failed to demonstrate that the level of protection for *individual GIs* has been diminished by virtue of the TPP measures. It notes that the panel in *EC – Trademarks and Geographical Indications (Australia)* explained that the reference in the provision to "the protection of geographical indications that existed in that Member immediately prior to the date of entry into force of the WTO Agreement" must be understood as a reference to the state of protection of *individual GIs* prior to 1 January 1995.⁵⁷³⁴

7.2905. Australia argues that the protections which cannot be "diminished" for the purposes of Article 24.3 are those that "existed in that Member immediately prior" to 1 January 1995. These protections may be greater than the minimum level of protection that Members are required to provide to GIs under the TRIPS Agreement. Australia agrees that if a Member were protecting a right to use an individual GI prior to 1 January 1995, then that Member would not be permitted to diminish the protection for that GI by prohibiting its use when implementing Part II, Section 3 of the TRIPS Agreement. It adds that the complainants have, however, failed to demonstrate that these are the circumstances confronting the Panel in relation to the complainants' claims under Article 24.3.⁵⁷³⁵

7.2906. Australia notes that only Cuba has identified a specific GI, "Habanos" (registered trademark 1356832), and alleged that the level of protection provided with respect to that GI has been diminished by the TPP measures. Australia responds that "[t]he geographical indication 'Habanos' was registered as a trademark in Australia from 16 April 2010, and thus was not 'protected' in the Australian market as a trademark under the Trade Marks Act prior to that date".⁵⁷³⁶

7.2907. It continues that, to the extent that "Habanos" had a reputation in Australia before 1995, it would have been protected against acts of misleading conduct or unfair competition under

⁵⁷³⁰ Cuba's response to Panel question No. 44 (annexed to its response to Panel question No. 138).

⁵⁷³¹ Australia's response to Panel question No. 58.

⁵⁷³² Australia's first written submission, para. 489 (referring to Panel Report, *EC – Trademarks and Geographical Indications, (Australia)*, para. 7.632).

⁵⁷³³ Australia's first written submission, para. 493.

⁵⁷³⁴ Australia's first written submission, paras. 494 and 490 (referring to Panel Report, *EC – Trademarks and Geographical Indications (Australia)*, para. 7.636).

⁵⁷³⁵ Australia's response to Panel question No. 43.

⁵⁷³⁶ Australia's first written submission, para. 494.

common law through the tort of passing off and through statutory consumer protections. Such statutory and common law protections have not been diminished by the implementation of the TPP measures.⁵⁷³⁷ It adds that "[t]o the extent that Cuba is able to prove that 'Habanos' was entitled to any common law or statutory protections in Australia prior to 1 January 1995, such statutory and common law protections have not been diminished by the implementation of the tobacco plain packaging measure".⁵⁷³⁸ Accordingly, Australia asserts that there is no basis for Cuba's claim that the TPP measures have diminished Australia's "protection" of the GI "Habanos" from that which existed prior to 1 January 1995.⁵⁷³⁹

7.2908. Australia argues that neither the Dominican Republic nor Honduras alleges that the level of protection for individual GIs has been diminished by virtue of the TPP measures. This is because the complainants disagree with the panel in *EC – Trademarks and Geographical Indications (Australia)* that such a demonstration is required. Rather, the complainants maintain that the proper analysis under Article 24.3 is in relation to a "system of protection in a Member", and not individual GIs. Australia argues that, for the reasons articulated by the panel in *EC – Trademarks and Geographical Indications (Australia)*, the complainants' interpretation of Article 24.3 is flawed. A standstill provision that applies only to the specific GIs that were protected in a Member prior to the entry into force of the TRIPS Agreement is different in both purpose and effect to a provision that applies to a Member's entire system of protection. Precluding the diminution of protection provided to existing GIs serves the purpose of protecting existing property rights and ensuring that the minimum standards introduced by the TRIPS Agreement do not have the unintended consequence of removing protections already provided by a national system in respect of such GIs. In contrast, a standstill provision that pertains to an entire system of protection would have the effect of creating a two-tiered system of protection for GIs, wherein those Members that previously provided a system of protection for GIs would be required in perpetuity to maintain a higher level of protection than the minimum standards provided in the TRIPS Agreement. Australia submits that this cannot have been the intention of the drafters.⁵⁷⁴⁰

7.2909. Even if the Panel were to agree with the complainants that the reference to "the protection of geographical indications" in Article 24.3 is a reference to a Member's "system of protection", Australia maintains that the complainants have still failed to establish a *prima facie* case under their own interpretation of the scope of Article 24.3. In order to substantiate their allegation that, in prohibiting the use of GIs on the packaging of tobacco products, Australia has diminished the level of protection provided to GIs, the complainants would need to demonstrate that prior to 1 January 1995, there was a protected "right of use" under Australian law in relation to GIs. Australia asserts that the complainants have failed to do so, because no such "right of use" was protected prior to the entry into force of the TRIPS Agreement.⁵⁷⁴¹

7.2910. Australia argues that "[t]he complainants confuse the *ability* to use a geographical indication under Australian law with the *right* to use a geographical indication under Australian law". Australia notes that, for example, the Dominican Republic argues that "[p]rior to 1995, GIs in Australia could be used freely by interested parties on tobacco products, including on the sticks, in order to acquire, maintain, and, ultimately, to enforce GIs". Australia contends that what the Dominican Republic is referring to is a general market freedom, not a protected legal right.⁵⁷⁴²

7.2911. Australia explains that under Australian law, GIs are primarily protected through the trademarks system, as well as through statutory and common law consumer protection laws. Neither now, nor at the time of entry into force of the TRIPS Agreement, was a right to use a GI protected under Australian law. "Rather, under the [TM Act], if a GI was registered as a trademark, then the owner of the GI had negative rights to *prevent* certain uses and to obtain remedies in respect of infringement."⁵⁷⁴³ These rights continued to exist in Australia following the

⁵⁷³⁷ Australia's first written submission, para. 494.

⁵⁷³⁸ Australia's second written submission, para. 71. (footnotes omitted)

⁵⁷³⁹ Australia's first written submission, para. 494.

⁵⁷⁴⁰ Australia's first written submission, paras. 496-497.

⁵⁷⁴¹ Australia's first written submission, paras. 499-500 (referring to Annexure D of Australia's first written submission).

⁵⁷⁴² Australia's first written submission, para. 501 (referring to the Dominican Republic's first written submission, para. 925). (emphasis original; footnote omitted)

⁵⁷⁴³ (footnote original) *Trade Marks Act 1995* (Cth), Exhibit AUS-244, Section 20 and Part 12, Subsections 120-130.

adoption of the TRIPS Agreement, consistent with the requirements in Article 22, and these rights continue to exist today following the introduction of the [TPP measures].⁵⁷⁴⁴ Australia argues that, in light of the fact that the protection provided to GIs under Australian law prior to 1 January 1995 did not include the protection of a "right to use" a GI, Article 24.3 is not relevant to the Panel's consideration of Australia's TPP measures.

7.2912. Responding to Honduras⁵⁷⁴⁵, Australia explains that GIs may be accorded statutory protection through the protection afforded to certification trademarks under the TM Act. Sections 171 and 20(1) of that Act grant the owners of registered trademarks and certification trademarks respectively *exclusivity of use*, which is enforced through the right to pursue enforcement action against infringement by third parties. These rights are *negative rights of exclusion*—a registered trademark owner or registered certification trademark owner is *not* granted a right to use its trademark in Australia. The ability to use a trademark is a market freedom, not a protected right in Australia. In *JTI v. Commonwealth* the High Court of Australia recently affirmed that the nature of the rights granted in Australia to owners of trademarks (under both common law and statute) are *negative rights of exclusion*. For example, Justice Crennan held: "[t]he exclusive right to use the mark is a negative right to exclude others from using it". These negative rights to restrain infringement are reflected in the first and every subsequent piece of Australian legislation that provides for the registration of trademarks.⁵⁷⁴⁶

7.3.8.2 Main arguments by the third parties

7.2913. Argentina argues that a grammatical analysis of Article 24.3 of the Spanish version of the TRIPS Agreement reveals that the purpose of the obligation not to diminish protection is "*la protección de las indicaciones geográficas que existía en él inmediatamente antes de la fecha de entrada en vigor del acuerdo sobre la OMC*". In this analysis, "*protección*" is the nucleus and "*de las indicaciones geográficas ...*", the indirect modifier. Consequently, Argentina disagrees with Australia and believes that the purpose of the obligation not to diminish protection concerns the protection of GIs in general. Argentina understands that the English version of the Agreement may leave some room for "ambiguity" in that the relative subordinate clause "that existed" could refer either to "the protection of geographical indications" or "geographical indications" taken individually. However, the Spanish text leaves no room for doubt: if the intention had been to refer to "geographical indications" the text would read "*que existían*" rather than "*que existía*", thereby clearly pointing to the general state of protection of GIs as the object of the obligation not to diminish protection. This interpretation is corroborated by the French version of the Article.⁵⁷⁴⁷

7.2914. It is Argentina's understanding that regardless of the legal framework establishing the protection – whether it is what Australia calls "general market freedom" or the system of protection of GIs under the TM Act, Article 24.3 of the TRIPS Agreement establishes an obligation not to diminish the protection of GIs as from the date mentioned therein.⁵⁷⁴⁸

7.2915. China argues that Article 24.3 concerns the pre-existing higher protection level of GIs in that Member. Assuming that the protection of GIs under Section 3, Part II of the TRIPS Agreement refers only to negative rights, i.e. rights to prevent third parties' illegal use of GIs, it does not necessarily follow that the pre-existing protection of GIs in a Member is limited to negative rights. To the extent that the pre-existing protection in a Member includes the right to use GIs, the Member is not permitted to diminish the protection by prohibiting the use of GIs.⁵⁷⁴⁹

7.2916. New Zealand indicates that it agrees with Australia's interpretation of, and arguments in relation to Article 24.3, and requests the Panel to reject the complainants under it.⁵⁷⁵⁰

⁵⁷⁴⁴ Australia's first written submission, para. 502. (emphasis original)

⁵⁷⁴⁵ See para. 7.2885 above.

⁵⁷⁴⁶ Australia's response to Panel question No. 184 (referring to *JTI v. Commonwealth*, (Exhibits AUS-500, CUB-50), pp. 728-729, para. 248). For further information about the nature of the rights granted under the Trade Marks Act, Australia refers to section D of Annexure D to Australia's first written submission.

⁵⁷⁴⁷ Argentina's third-party submission, paras. 29-31.

⁵⁷⁴⁸ Argentina's third-party submission, para. 34.

⁵⁷⁴⁹ China's third-party submission, para. 66.

⁵⁷⁵⁰ New Zealand's third-party submission, paras. 14-15 and 124.

7.2917. Singapore argues that Article 24.3 is only breached when a GI in existence in Australia prior to 1 January 1995 now enjoys lesser protection in Australia than before that date. Only Cuba has identified a specific GI, "Habanos", allegedly receiving diminished protection as a result of the adoption of the TPP measures; and even then, the "Habanos" trademark was registered in Australia from 16 April 2010, well after the 1 January 1995 cut-off date mentioned in Article 24.3. By failing to demonstrate the existence prior to 1 January 1995 of a GI in Australia, the complainants have failed to satisfy the temporal requirement of Article 24.3.

7.2918. It adds that, if Article 24.3 were to be held to apply to the level of protection of GIs that existed in a Member prior to 1 January 1995, then the inquiry must necessarily turn to the protection that existed in Australia at the relevant time. To the extent that no such right of use existed under Australian law prior to 1 January 1995, the protection of GIs in Australia has not been diminished by the TPP measures and there would be no violation of Article 24.3.⁵⁷⁵¹

7.2919. Uruguay argues that it is not aware of a GI for cigarettes whose use is actually being affected. The impact on GIs on other tobacco products is almost irrelevant and it has not been shown that they have been affected. The TPP measures do not prevent the use of GIs. The limitations are based on a measure of general public health policy recognized in the WTO Agreements and recommended by the FCTC.⁵⁷⁵²

7.2920. Zimbabwe argues that, in violation of Article 24.3, the TPP measures diminish the protection of GIs that existed in Australia before the entry into force of the WTO Agreement. It contends that the TPP measures prevent the use of a word GI other than the name of the country at the expense of producers and consumers.⁵⁷⁵³

7.3.8.3 Analysis by the Panel

7.2921. We start our analysis by assessing the scope of Article 24.3 in light of two interpretative issues raised by the parties. The first issue is the meaning of the introductory phrase "[i]n implementing this Section", in light of Australia's argument that the TPP measures are not covered by the obligation under Article 24.3 on the grounds that they were not adopted for the purpose of providing the legal means for interested parties to prevent certain acts in respect of GIs. The second issue is whether the obligation under Article 24.3 concerns the protection of individual GIs or the system of protection of GIs. We will then turn to the parties' arguments concerning Australia's domestic law and whether the protection provided under it, to the extent it is relevant for the claims under Article 24.3, has been diminished as a result of the TPP measures.

7.3.8.3.1 Whether the TPP measures are covered by Article 24.3

7.2922. We recall that Article 24.3 of the TRIPS Agreement reads as follows:

In implementing this Section, a Member shall not diminish the protection of geographical indications that existed in that Member immediately prior to the date of entry into force of the WTO Agreement.

7.2923. As described above, in Australia's view, Article 24.3 only covers a measure that "provide[s] the legal means for interested parties to prevent" the use of a GI in the manner described in Article 22; therefore, the obligation does not cover the TPP measures since they were not adopted for that purpose. In the complainants' view, the phrase covers any measure that affects the protection of GIs.

7.2924. Article 24.3 appears in Section 3 of Part II of the TRIPS Agreement, entitled "Geographical Indications", which comprises Articles 22-24. By its express terms, the obligation in Article 24.3 relates to the implementation of "this Section". This reference is therefore not limited to measures that implement the specific obligation to "provide the legal means for interested

⁵⁷⁵¹ Singapore's third-party submission, paras. 65-66.

⁵⁷⁵² Uruguay's third-party submission, paras. 56-57; and third-party statement, para. 18.

⁵⁷⁵³ Zimbabwe's third-party submission, para. 43.

parties to prevent" the use of a GI within the meaning of Article 22.2. Rather, it relates to the implementation of the provisions of Section 3 of Part II as a whole, namely Articles 22 to 24.

7.2925. The relevant findings in the panel reports in *EC – Trademarks and Geographical Indications* referred to by the parties are consistent with this conclusion. That panel found that the scope of the obligation under Article 24.3 is limited by the introductory phrase "[i]n implementing this Section"⁵⁷⁵⁴ and that Article 24.3 does not apply to measures adopted to implement provisions outside Section 3.⁵⁷⁵⁵ Specifically, the question addressed by that panel in relation to the scope of the obligation in Article 24.3 was whether Article 24.3 imposes an exception to the obligation to provide trademark rights under Article 16.1.⁵⁷⁵⁶ The panel's interpretation cited above must be understood in that context, namely indicating that Article 24.3 does not apply to measures to implement the provisions of sections of Part II of the TRIPS Agreement other than Section 3; in particular, Article 24.3 does not provide limitations to the rights conferred to the owner of a registered trademark pursuant to Article 16, which is contained in Section 2 of the Agreement. That panel's findings, therefore, do not support Australia's position that Article 24.3 only covers a measure that provides the legal means for interested parties to prevent the use of a GI within the meaning of Article 22.2, to the exclusion of measures that implement other provisions of Section 3 of the TRIPS Agreement.

7.2926. In light of the above, we find that the obligation in Article 24.3 applies to a measure that implements any of the provisions of Section 3 of Part II of the TRIPS Agreement. Accordingly, its application is not limited to measures that implement the obligation to provide the legal means for interested parties to prevent the use of a GI within the meaning of Article 22.2. We, therefore, do not exclude the applicability of Article 24.3 to the TPP measures on the grounds that those measures were not adopted for the purpose of implementing the obligation under Article 22.2.

7.3.8.3.2 Whether the obligation concerns individual GIs or the system of protection

7.2927. The parties agree that, as determined by the panel in *EC – Trademarks and Geographical Indications*, the wording "shall not diminish" indicates that Article 24.3 of the TRIPS Agreement is a standstill provision, and that it is mandatory.⁵⁷⁵⁷ They, however, disagree on whether the obligation under Article 24.3 refers to the system of protection of GIs under the domestic law of Australia immediately prior to 1 January 1995 or to the protection of individual GIs that were protected under Australia's domestic law at that time.

7.2928. As described above, the complainants argue that the obligation concerns the system of protection, while Australia considers that it concerns the protection of individual GIs. In support of its position, Australia refers to the findings of the panel in *EC – Trademarks and Geographical Indications*. Honduras and the Dominican Republic disagree with those findings.

⁵⁷⁵⁴ Panel Reports, *EC – Trademarks and Geographical Indications (US)*, para. 7.632; and *EC – Trademarks and Geographical Indications (Australia)*, para. 7.632.

⁵⁷⁵⁵ Panel Reports, *EC – Trademarks and Geographical Indications (US)*, para. 7.632; and *EC – Trademarks and Geographical Indications (Australia)*, para. 7.632.

⁵⁷⁵⁶ Panel Report, *EC – Trademarks and Geographical Indications (US)*, para. 7.627. In that dispute, the United States and Australia claimed, *inter alia*, that EC Council Regulation (EEC) No. 2081/92 of 14 July 1992 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs ("Regulation") was inconsistent with Article 16.1 of the TRIPS Agreement because it did not ensure that a trademark owner may prevent uses of GIs which would result in a likelihood of confusion with a prior trademark. The Regulation provided for "coexistence" between a GI registered under it and a prior trademark, allowing such GI and the prior trademark to be used concurrently to a certain extent. The European Communities argued that Article 24.3 of the TRIPS Agreement required it to maintain such coexistence. It is in this context that the panel determined that the scope of the obligation under Article 24.3 does not extend to measures adopted to implement provisions other than those in Section 3 of Part II. The panel also found that, although the Regulation allowed the registration of a GI even when it conflicted with the prior trademark, the Regulation was sufficiently constrained to qualify as a "limited exception" to trademark rights. The panel concluded that "with respect to the coexistence of GIs with prior trademarks, the Regulation is inconsistent with Article 16.1 of the TRIPS Agreement but, on the basis of the evidence presented to the Panel, this was justified by Article 17 of the TRIPS Agreement".

⁵⁷⁵⁷ Panel Reports, *EC – Trademarks and Geographical Indications (US)*, para. 7.633; and *EC – Trademarks and Geographical Indications (Australia)*, para. 7.633.

7.2929. In that dispute, the United States⁵⁷⁵⁸ and Australia⁵⁷⁵⁹ took the view that Article 24.3 applies to individual GIs, while the European Communities considered that it applies to the general level of protection. The relevant part of the panel's analysis reads as follows:

Turning to the ordinary meaning of the terms used in the rest of the provision, the principal verb is "shall not diminish". This indicates that this is a standstill provision, and that it is mandatory. The parties do not agree on the meaning of the object of that verb, which is the phrase "the protection of geographical indications" as qualified by the final relative clause. In the English version of the text, that phrase could refer either to "the protection of GIs" as a whole, or to "the protection" of individual GIs. In the French and Spanish versions, which are equally authentic, the verb "existed" in the relative clause is in the singular, which indicates that the "protection of geographical indications" must be interpreted as a whole. It is unclear in all three versions whether this refers to the legal framework or system of protection in a Member that existed immediately prior to 1 January 1995, or to the state of GI protection in a Member that existed at that time in terms of the individual rights which were protected.

If Article 24.3 referred to a system of protection in a Member, this would have two important consequences. First, as a mandatory provision, it would prevent a Member which had a system that granted a higher level of protection than that provided for in the TRIPS Agreement from implementing the same minimum standards of protection as other Members, even if it wished to do so. For example, in the European Communities, Article 14 of the Regulation entered into force in 1993 but was amended in April 2003 in respect of trademark rights acquired through use. To the extent that those amendments diminished the general level of protection of GIs under the European Communities' system, they would be inconsistent with Article 24.3 on its own view.

Second, a standstill provision for a system of protection would exclude from the scope of Section 3 not only individual rights already in force under that system as at the date of entry into force of the WTO Agreement, but also rights subsequently granted under that system in perpetuity. This would be a sweeping exclusion which would grow, rather than diminish, in importance, as an increasing number of GIs were protected under the prior legislation. The Panel is reluctant to find such an exclusion in the absence of any clear language to that effect, and none has been drawn to its attention. In this respect, it can be noted that the TRIPS Agreement *does* contain an exclusion for a type of system (in respect of phonograms) in Article 14.4 but it is optional, it clearly refers to a "system" and it is subject to a proviso against abuse. Article 24.3 contains none of these features.

For these reasons, the Panel interprets the phrase "the protection of geographical indications that existed in that Member immediately prior to the date of entry into force of the WTO Agreement" to mean the state of protection of GIs immediately prior to 1 January 1995, in terms of the individual GIs which were protected at that point in time.⁵⁷⁶⁰

7.2930. Honduras, the Dominican Republic, and Cuba disagree with these conclusions.

7.2931. With respect to the text of Article 24.3, while recognizing that there is some ambiguity in the English text of the provision, Honduras and the Dominican Republic argue that the equally authentic French and Spanish versions remove such ambiguity. In that regard, we agree with the above analysis of the panel in *EC – Trademarks and Geographical Indications*, which concluded that it remains unclear in all three language versions whether "protection of geographical indications" refers to the legal framework or system of protection in a Member that existed

⁵⁷⁵⁸ Panel Report, *EC – Trademarks and Geographical Indications (US)*, para. 7.627.

⁵⁷⁵⁹ Panel Report, *EC – Trademarks and Geographical Indications (Australia)*, para. 7.627.

⁵⁷⁶⁰ Panel Reports, *EC – Trademarks and Geographical Indications*, paras. 7.633-7.636. (emphasis original; footnotes omitted)

immediately prior to 1 January 1995, or to the state of GI protection in a Member that existed at that time in respect of the individual rights which were protected.

7.2932. As regards the context, Honduras and the Dominican Republic argue that when the drafters wanted to refer to individual GIs they did so explicitly; for instance, Article 24.4 refers to "a particular geographical indication".⁵⁷⁶¹ Honduras adds that the use of the term "system" in Articles 14.4 and 27.3(b) does not provide contrary contextual guidance since, in its view, the term in both cases refers to qualitatively different normative frameworks.⁵⁷⁶² We are not persuaded, however, that it necessarily follows from the absence of an express reference to the protection of "individual" GIs in Article 24.3 that it must be interpreted to refer to a "system" of protection of GIs. Like the panel in *EC – Trademarks and Geographical Indications*⁵⁷⁶³, we note that when the TRIPS Agreement excludes a type of system in Article 14.4, it uses the term "system". Another standstill provision in Article 65.5 required a Member that was availing itself of certain transitional periods to ensure that "any changes in its laws, regulations and practice ... [did] not result in a lesser degree of consistency with the provisions of this Agreement". The consistency of any changes in a Members' laws, regulations and practice with the provisions of the TRIPS Agreement would normally relate to the level of protection available under such laws, regulations and practice rather than the protection of an individual copyright work, patent, trademark, GI, or other object of IP protection.

7.2933. As regards the object and purpose of this provision, we agree with Australia that the purpose of Article 24.3, as a standstill provision, is to ensure that, in giving effect to its obligations under Section 3 to provide protection for GIs, a Member does not undermine pre-existing property rights in specific GIs that were protected in a Member prior to the entry into force of the TRIPS Agreement.⁵⁷⁶⁴ This is also consistent with the purpose of the subsequent paragraphs 4 to 8 of Article 24, which are intended to safeguard the continued exploitation, in certain circumstances, of specific prior GIs, trademarks, customary terms and persons' names. We understand that the purpose of all of these paragraphs is to preserve interests in such pre-existing specific subject-matter, including property rights and interests in their continued exploitation. This purpose suggests to us that, read in context, the obligation under Article 24.3 should be understood to relate to the preservation of specific protected interests that were already in existence at the time of entry into force of the TRIPS Agreement.

7.2934. Such a reading is also consistent with a harmonious interpretation of the various parts of the TRIPS Agreement taken as a whole.⁵⁷⁶⁵ In particular, we must seek an interpretation that reconciles a Member's obligations in respect of GIs under Section 3 with those in respect of trademarks under Section 2 of Part II, as well as any other provisions of the TRIPS Agreement.

7.2935. In this respect, we note that the situation discussed by the panel in *EC – Trademarks and Geographical Indications* in its findings cited above draws attention to a potential conflict between Sections 2 and 3 in a situation where bringing a Member's pre-existing system of protection of GIs into compliance with its trademark obligations under Section 2 would require diminishing the protection of GIs under that system. As described by that panel, an interpretation of Article 24.3 as referring to a pre-existing protection system for GIs as a whole – rather than to the pre-existing protection of individual pre-existing GIs – could effectively prevent that Member from complying with its trademark obligations under Section 2. If over time, interested parties sought protection for an increasing number of GIs under such prior system of that Member, the conflict with that Member's obligation to protect prior trademarks would be exacerbated. In contrast, by preserving the protection of those individual GIs that were already protected before the entry into force of the TRIPS Agreement, the interpretation adopted by the panel in *EC – Trademarks and Geographical Indications* avoids potential conflict with a Member's other obligations under that Agreement while being in keeping with the purpose of paragraph 3 and the subsequent paragraphs of Article 24, which we see as intended to safeguard interests in pre-existing subject matter, including prior property rights and interests in their continued exploitation.

⁵⁷⁶¹ Honduras's first written submission, para. 749. See also Dominican Republic's second written submission, para. 791.

⁵⁷⁶² Honduras's first written submission, para. 756.

⁵⁷⁶³ Panel Reports, *EC – Trademarks and Geographical Indications*, para. 7.635.

⁵⁷⁶⁴ Australia's first written submission, para. 496.

⁵⁷⁶⁵ Appellate Body Report, *Korea – Dairy*, para. 81. See also, in respect of the TRIPS Agreement, Panel Report, *US – Section 110(5) Copyright Act*, fn 49.

7.2936. In light of the above, we find that the phrase "the protection of geographical indications that existed in that Member immediately prior to the date of entry into force of the WTO Agreement" means the state of protection of GIs immediately prior to 1 January 1995 in terms of the individual GIs which were protected at that point in time in a particular Member.

7.3.8.3.3 Whether Australia has diminished the protection of GIs through the TPP measures

7.2937. We now turn to whether, in adopting the TPP measures, Australia has diminished the protection of GIs that existed in Australia immediately prior to 1 January 1995.

7.2938. As described above, the complainants claim that the TPP restrictions on the use of GIs on tobacco products and packaging have diminished such protection. We understand that the complainants are not asserting that, pursuant to Article 22 of the TRIPS Agreement, Members would be required to provide a right to use a GI.⁵⁷⁶⁶ Rather, the claim is that the protection of GIs under Australia's domestic law immediately prior to 1 January 1995 entailed the right or ability to use a GI, and that it is this element of domestic protection that has been diminished as a result of the restrictions on the use of GIs that results from the TPP measures. Australia agrees that, if a Member was protecting a right to use with respect to an individual GI under its domestic law prior to 1 January 1995, that Member would not be permitted to diminish the protection of that GI by prohibiting its use when implementing Section 3 of the TRIPS Agreement. Australia contests, however, the proposition that any such right to use existed under its domestic law at that point of time.⁵⁷⁶⁷

7.2939. To address the complainants' claims, we need to consider the protection of GIs as it existed under Australian law prior to 1 January 1995, and whether this has been diminished as a result of the operation of the TPP measures in relation to GIs. To inform this assessment, we first describe the basis for the protection of GIs in Australia and the operation of the TPP measures in relation to GIs.

7.2940. As described in greater detail above⁵⁷⁶⁸, trademarks and GIs are currently protected in Australia under the TM Act. Australia explains that it adopted the TM Act to implement its obligations under the TRIPS Agreement, and that its Section 61 specifically implements the obligations with respect to GIs to the extent not already conferred under existing law.⁵⁷⁶⁹ Under the TM Act, a sign that constitutes a GI may be eligible for registration as a trademark. To the extent that GIs are registered as trademarks in Australia, they are generally registered as certification trademarks. Collective trademarks may also provide protection for signs that are GIs in Australia. In the same way as with other registered trademarks, an owner of a registered certification or collective trademark is able to pursue infringement action against unauthorized use of a sign by third parties. Australia also maintains protection with respect to trademarks and GIs under other areas of Australian law, including under general consumer protection measures addressing misleading representations. The CCA establishes a general prohibition on misleading or deceptive conduct in trade or commerce. Under the CTD Act, Australia also prohibits the importation of any good bearing a false trade description. Australia further maintains common law protection for the reputation of a business through the tort of "passing off", which can provide additional protection against misrepresentations. Neither trademarks nor GIs are protected *per se*.

⁵⁷⁶⁶ See Honduras's second written submission, paras. 419 and 421; and Dominican Republic's second written submission, para. 771. Although Cuba argues that whether a GI can be utilized is a necessary component of the analysis of whether it is protected in a Member (Cuba's first written submission, para. 370), in the context of its claim under Article 22.2(b) it specifically incorporates Honduras's argument that it is not postulating a right to use a GI. See Cuba's response to Panel question No. 55 (annexed to its response to Panel question No. 138) (incorporating Honduras's arguments in its second written submission, paras. 419 and 421). In this respect, we recall our finding in para. 7.2860 above that, under Article 22.2(b), the obligation on Members is to provide legal means for interested parties to prevent, in respect of GIs, any use which constitutes an act of unfair competition; it does not confer on interested parties a positive right or entitlement to use GIs.

⁵⁷⁶⁷ Australia's response to Panel question No. 43.

⁵⁷⁶⁸ See section 2.3 above.

⁵⁷⁶⁹ Australia's first written submission, para. 493.

under this tort, but they may be probative with respect to the existence of, and damage to, a trader's reputation in the relevant market.⁵⁷⁷⁰

7.2941. We recall that, as described above⁵⁷⁷¹, the TPP measures regulate the appearance of trademarks and marks⁵⁷⁷² on tobacco retail packaging and products. The TPP measures prohibit the use on tobacco retail packaging and products of any stylized or figurative elements contained in a GI or figurative signs constituting a GI. They permit the use of a word constituting a GI on tobacco retail packaging and on cigar bands to the extent it is part of the brand, business or company name, or the name of the product variant⁵⁷⁷³, provided that it appears in the form prescribed by the TPP Regulations. We note that neither Section 4 nor Section 20(3) of the TPP Act defines the term "brand"⁵⁷⁷⁴; in particular, on its face, in permitting the use of "the brand", the TPP Act does not differentiate between brands that are composed of a single or multiple words, or on the basis of whether or not such a word or words are protected as a trademark, a GI or both, or not protected under any form of IP rights in Australia. We further note that the definition of a "variant name" in Section 4(1) of the TPP Act is narrow and most GIs are unlikely to fall under it.⁵⁷⁷⁵ Where a GI is the same as the country of origin of the product, its use is also permitted, in the form prescribed by the TPP measures, on tobacco retail packaging⁵⁷⁷⁶ and on cigar bands.⁵⁷⁷⁷

7.2942. We recall our finding above that the phrase "the protection of geographical indications that existed in that Member immediately prior to the date of entry into force of the WTO Agreement" in Article 24.3 refers to the state of protection of GIs immediately prior to 1 January 1995 in respect of individual GIs which were protected at that point in time in a particular Member.

7.2943. As Australia points out⁵⁷⁷⁸, only Cuba has identified a specific GI, namely "Habanos", that it claims was protected in Australia immediately before 1 January 1995. Cuba explains that "Habanos" identifies handmade cigars originating in Cuba that have been produced according to specific standards, and the quality and reputation of which is attributable to their geographic origin.⁵⁷⁷⁹ Cuba argues that "Habanos" benefited from the protection that was available for GIs in Australia at that time and that, since then, its protection has been diminished as a result of the TPP measures, and that Australia has thus failed to comply with Article 24.3.⁵⁷⁸⁰ We therefore

⁵⁷⁷⁰ For further details, see section 2.3 above.

⁵⁷⁷¹ See sections 2.1.2.3.3 and 2.1.2.4 above. See also our discussion in paras. 7.2854-7.2856 above.

⁵⁷⁷² The definition of "mark" in Section 4 of the TPP Act reads as follows: "(a) includes (without limitation) any line, letters, numbers, symbol, graphic or image; but (b) (other than when referring to a trade mark) does not include a trade mark". TPP Act, (Exhibits AUS-1, JE-1).

⁵⁷⁷³ TPP Act, (Exhibits AUS-1, JE-1), Section 20(3)(a); and TPP Regulations, (Exhibits AUS-3, JE-2), Regulation 3.2.1(3)(a).

⁵⁷⁷⁴ While the TPP Act does not define the term "brand name", we note that the CI Regulations provide that "[i]n these regulations, unless the contrary intention appears: ... **brand** includes any mark, device, name, word, letter, numeral or symbol and any combination consisting of two or more of those things".

CI Regulations, (Exhibits AUS-251, DOM-155, CUB-1), Section 5(1). (emphasis original)

⁵⁷⁷⁵ See fn 5642 above for the definition of a "variant name" as contained in the TPP Act, (Exhibits AUS-1, JE-1), Section 4(1).

⁵⁷⁷⁶ TPP Regulations (Exhibits AUS-3, JE-2), Regulations 2.3.1(c) and 2.3.4.

⁵⁷⁷⁷ TPP Regulations (Exhibits AUS-3, JE-2), Regulation 3.2.1(3)(b).

⁵⁷⁷⁸ Australia's first written submission, para. 494.

⁵⁷⁷⁹ Cuba's first written submission, para. 367.

⁵⁷⁸⁰ Cuba claims that Australia has failed to comply with Article 24.3 because it has diminished the level of protection of the "Habanos" GI. Cuba's first written submission, paras. 365 and 378. In response to Panel question No. 44, Cuba argues that the definition of a GI in Article 22.1 covers, in addition to "Habanos", the Cuban Government Warranty Seal and the Cuban tobacco manufacturers' GIs, including "Cohiba" "Hoyo de Monterrey", "Cabanas", "Cuaba", and "San Cristobal de Habana". It also refers to graphic elements, such as the graphic representation of the Cuban national shield, the royal palm, etc., of which the Cuban Government Warranty Seal is comprised, the image of the Pinar del Rio tobacco fields in the Vegas Robaina trademark, and the Indian Head image of the Cohiba trademark. It, however, does not advance a claim that such GIs existed in Australia on 1 January 1995. In its response to Panel question No. 46, Cuba only refers to the GI "Habanos". Cuba lists "Cohiba" "Cuaba", "Hoyo de Monterrey" and "San Cristobal de la Habana" as Cuban Class 34 trademarks in its first written submission, Annex 1, Part 1, items 6; 7 and 8; 20; and 44, respectively.

In response to Panel question No. 46, seeking clarification of any individual GIs that the complainants consider relevant to their claims under Article 24.3, Honduras, the Dominican Republic and Indonesia (by reference to its response to Panel question No. 44) confirm that their claims under this provision concern the overall level of GI protection rather than the protection of specific GIs.

consider whether the protection that "Habanos" enjoys as a GI in Australia has been diminished since 1 January 1995.

7.2944. Australia submits that the GI "Habanos" was registered as a trademark in Australia from 16 April 2010 (registered trademark 1356832) and, therefore, was not protected as a trademark under the TM Act prior to that date.⁵⁷⁸¹ Cuba does not contest that date of registration of the GI "Habanos" as a trademark.⁵⁷⁸² To the extent that "Habanos" was not protected as a trademark in Australia prior to 1 January 1995, Article 24.3 does not apply to the protection that "Habanos" currently enjoys in Australia pursuant to its registration as a trademark from 16 April 2010.⁵⁷⁸³

7.2945. Australia adds that, to the extent that Cuba is able to prove that "Habanos" was entitled to any common law or statutory protections in Australia prior to 1 January 1995, such statutory and common law protections have not been diminished by the implementation of the TPP measures.⁵⁷⁸⁴

7.2946. Cuba's claim in relation to the GI "Habanos" raises two questions. The first is whether the protection that any GI (including, to the extent that it was protected at the time, "Habanos") could have enjoyed under statutory or common law immediately before 1 January 1995 has been diminished as a result of the TPP measures. This assessment would involve establishing, insofar as necessary, what the protection was at that time and what it is at the present time under Australia's relevant domestic law, and comparing the two. The second question is whether we have adequate evidence before us to conclude that "Habanos" was in fact protected in Australia as a GI immediately before that date and, thus, entitled to benefit from that protection.

7.2947. We first consider whether the protection enjoyed by GIs under statutory or common law in Australia immediately before 1 January 1995 has diminished as a result of the TPP measures, assuming *arguendo* that "Habanos" was protected as a GI under these instruments. If we conclude that the protection of GIs has been diminished under such statutory and common law protections, we will then address the second question of whether "Habanos" was in fact protected in Australia as a GI at that time.

7.2948. We recall that the claims of Honduras, the Dominican Republic and Indonesia under Article 24.3 concern the overall level of GI protection rather than the protection of any specific GIs. They, however, overlap with Cuba's claim concerning the GI "Habanos", to the extent that the success of this claim hinges on whether the overall level of GI protection under the statutory and common law protections in Australia (and as a result, the protection provided to "Habanos" under

⁵⁷⁸¹ Australia's first written submission, para. 494.

⁵⁷⁸² Cuba refers to the same registration of "Habanos" as a composite trademark in its first written submission, Annex 1, Part 1, item 19.

⁵⁷⁸³ We note that, although Honduras has not identified any specific GI that was protected as a trademark in Australia prior to 1995, it advances arguments concerning the protection of GIs as trademarks in Australia. Honduras contends that Section 20 of Australia's TM Act provides an exclusive right to use a trademark, including one containing a GI, and that this right to use has been diminished for tobacco-related GIs. Honduras's second written submission, para. 440. Australia responds that Sections 171 and 20(1) of the TM Act grant the owners of registered trademarks and certification trademarks, respectively, exclusivity of use, which is enforced through the right to pursue enforcement action against infringement by third parties. Australia explains, with reference to a ruling by the High Court of Australia in *JTI v. Commonwealth*, that the nature of the rights granted in Australia to owners of trademarks under both common law and statute are negative rights of exclusion. Australia's response to Panel question No. 184. We note that the panel in *US – Zeroing (EC)*, recalling that prior panels and the Appellate Body have treated questions relating to the content and interpretation of domestic law as questions of fact, noted that "[o]ne aspect of this is the need for an international tribunal to take account of decisions of domestic courts on the meaning of municipal law". Panel Report, *US – Zeroing (EC)*, para. 7.53. In the present disputes, Honduras has not demonstrated that, contrary to Australia's explanations and the recent decision of the High Court of Australia, an owner of a trademark would have had a positive right to use its trademark in Australia before 1 January 1995. We also note that a complainant, namely Indonesia, refers to Australia as "a market with no positive right to use a trademark". Indonesia's second written submission, para. 89. In light of the above, we, therefore, note that, even if the complainants had identified a GI that was protected as a trademark in Australia prior to 1 January 1995, the TPP measures could not have diminished their protection in violation with Article 24.3 in respect of a right to use a trademark which Honduras has not shown to have existed under Australia's law prior to 1 January 1995.

⁵⁷⁸⁴ Australia's second written submission, para. 71.

these instruments) has been diminished as a result of the TPP measures.⁵⁷⁸⁵ In examining Cuba's claim, we will, therefore, take into consideration the arguments of all complainants concerning the overall GI protection under Australia's statutory and common law protections, prior to 1 January 1995, as well as Australia's responses.

7.2949. Cuba argues that "the ability to utilise" a GI is a necessary component of the analysis of whether that GI is "protected"⁵⁷⁸⁶, and that "protection means 'right to use' a geographical name".⁵⁷⁸⁷ It asserts that, immediately prior to 1 January 1995, Cuban exporters were able to use the GI "Habanos" in its original form on the packaging of LHM cigars sold in the Australian market but, as a result of the TPP measures, they are no longer able to use that GI (in its original form or in a modified form) on boxes of LHM cigars sold in the Australian market. Cuba claims that, prior to 1995, the GI "Habanos" benefited from the common law freedom to use any word or device in association with the provision of goods or services.⁵⁷⁸⁸ Australia responds that any statutory and common law protections to which GI "Habanos" might have been entitled prior to that date have not been diminished by the implementation of the TPP measures. In particular, neither now, nor at that time, was a right to use a GI protected under Australian law. In Australia's view, the complainants confuse the ability to use a GI under Australian law with the right to use a GI under Australian law.⁵⁷⁸⁹ It adds that, in *JTI v. Commonwealth*, the High Court of Australia recently affirmed that the nature of the rights granted in Australia to owners of trademarks (under both common law and statute) are *negative* rights of exclusion.⁵⁷⁹⁰

7.2950. Australia adopted its TM Act of 1995 to implement its obligations under the TRIPS Agreement with respect to GIs to the extent not already conferred under existing law.⁵⁷⁹¹ Prior to 1995, GIs already benefited from statutory consumer protection law and common law remedies. We understand that these legal remedies have the effect of addressing various forms of misleading representations that can include misuse of GIs.⁵⁷⁹² Since these laws and legal remedies variously aim at the suppression of misleading representations, from a consumer perspective, and preventing the misappropriation of a trader's goodwill, we understand that they do not stipulate how terms can or should be used legitimately as a condition of protection against misuse. Cuba has not identified any particular statutory law under which, prior to 1995, the interested party in the GI "Habanos" would have had a legally recognized right or entitlement to use that GI. Rather, we understand Cuba to assert that such right arose under the common law, since it recognizes "freedom to use any word or device in association with the provision of goods or services".⁵⁷⁹³ Cuba, however, has not explained how such freedom to use any word or device would amount to a legally protected right or entitlement to use such a word or device free from any restrictions found in other applicable laws. Cuba has, therefore, not demonstrated that, under the statutory or common law protections available prior to 1995, interested parties would have had, in respect of

⁵⁷⁸⁵ We note that, normally, the protection available to an individual GI under domestic law is afforded by means of an overall system of protection of GIs that includes a determination of the scope of the rights afforded to protected GIs, and the nature and extent of exceptions to those rights. To the extent that an individual GI was protected at any stage under such a general system of protection, any diminution of the state of protection afforded to such an individual GI would generally flow from a broader adjustment to the overall system of protection. Therefore, in practice, the question of whether the protection of an individual GI has been diminished normally depends on whether the protection afforded to GIs under such legal system has been diminished.

⁵⁷⁸⁶ Cuba's first written submission, para. 370.

⁵⁷⁸⁷ Cuba's first written submission, para. 373 (referring to Audier, Protection of GIs, (Exhibit CUB-49), p. 7). In the cited passage, Audier describes the protection of geographical names in France and the EC by stating that "[g]enerally speaking, protection means 'right to use' a geographical name with the consequence that sometimes it is forbidden to use it".

⁵⁷⁸⁸ Cuba's first written submission, paras. 374-376.

⁵⁷⁸⁹ Australia's first written submission, para. 501.

⁵⁷⁹⁰ Australia's response to Panel question No. 184, para. 166 (referring to *JTI v. Commonwealth*, (Exhibits AUS-500, CUB-50), para. 248 (Crennan J)).

⁵⁷⁹¹ Australia's first written submission, para. 493.

⁵⁷⁹² See paras. 2.89-2.93 above.

⁵⁷⁹³ Cuba's first written submission, para. 376 (referring to from *JTI v. Commonwealth*, (Exhibits AUS-500, CUB-50), para. 76 (Gummow J)). We note that the phrase cited by Cuba is preceded by the phrase "absent some prohibitions elsewhere in the common law or in statute". In paragraph 76 of that judgement, Judge Gummow notes with approval the proposition contained in the oral submission by the Queensland Solicitor-General that "absent some prohibitions elsewhere in the common law or in statute, there was at common law a freedom to use any word or device in association with the provision of goods or services". The Solicitor-General further submitted that "that common law freedom was not proprietary in nature".

GI, a legally protected right to use their GI. Even assuming, *arguendo*, that the remedies under such statutory or common law protections against misleading representations would have been available in respect of the GI "Habanos" immediately before 1 January 1995, Cuba has not demonstrated that Cuban exporters would have had a legally protected right in Australia to use the GI "Habanos" in its original form on the packaging of LHM cigars at that time. Even if Cuban exporters could have used, at that time, the GI "Habanos" in the marketplace without contravening applicable laws, that capacity cannot be conflated with a positive, legally recognized right to use the GI under Australian law.⁵⁷⁹⁴

7.2951. Honduras submits that the question is not whether a "*right to use*" a GI existed under Australia's domestic law prior to 1995.⁵⁷⁹⁵ It argues, instead, that the term "protection" in Article 24.3 should be read in the light of footnote 3 of the TRIPS Agreement to include, *inter alia*, the *ability to use* distinctive marks in order to achieve GI status, and the ability to effectively enforce the rights to prevent misleading or other use of indications that reduce the strength of IP rights.⁵⁷⁹⁶ It adds that the ability to use GIs was part of the system of protection of GIs prior to 1995.⁵⁷⁹⁷ It contends that "[s]ince 1 December 2012, however, the level of protection has been reduced below the pre-1995 level because no new GIs can be developed and because existing GIs cannot be maintained at the level of strength determined by the GI holder".⁵⁷⁹⁸

7.2952. We recall that we found in paragraph 7.2950 that Cuba has not demonstrated that, under the statutory or common law protections applicable to GIs in Australia prior to 1995, interested parties would have had, in respect of GIs, a legally protected right to use their GIs. In our view, Honduras has not adequately explained how an ability to use a GI would amount to a protected right, and has not demonstrated that, under such statutory or common law protections applicable to GIs prior to 1995, interested parties would have had, in respect of GIs, a legally protected ability to use their GIs, which would thus fall under the term "protection" within the meaning of Article 24.3 of the TRIPS Agreement.

7.2953. We further note that Honduras also argues that, in the light of footnote 3 of the TRIPS Agreement, the term "protection" in Article 24.3 should be read as including the ability to use distinctive marks in order to achieve GI status.⁵⁷⁹⁹ We note that, by its own terms, footnote 3 defines the term "protection" for the purposes of the national and MFN treatment obligations under Articles 3 and 4 of the TRIPS Agreement.⁵⁸⁰⁰ In our view, this definition, which is relevant for the purpose of interpreting the scope of the international obligations under the TRIPS Agreement, does not provide guidance on the factual assessment of the state of Australia's domestic law as it existed prior to the entry into force of the WTO Agreement. It, therefore, does not support construing an ability to use a GI in the Australian market as a legally protected right under Australian law.

7.2954. The Dominican Republic argues that Australia draws a "false distinction" between a market freedom and a right to use. It submits that, immediately before the entry into force of the TRIPS Agreement, there was no "formal 'right to use'" GIs under Australian law. However, it argues that this does not provide a defence to Australia's alleged violation of Article 24.3. The Dominican Republic contends that it is immaterial whether such GI protection was enabled through

⁵⁷⁹⁴ Put another way, the scope of legal protection afforded to GIs in Australia under the applicable laws and legal remedies at the relevant time cannot be construed as a legal right to make use of a GI in any particular way.

⁵⁷⁹⁵ Honduras's second written submission, para. 437. Honduras initially argued that, prior to 1 January 1995, Australian law protected GIs by permitting their owners to use them. Honduras's first written submission, para. 767.

⁵⁷⁹⁶ Honduras's second written submission, para. 437.

⁵⁷⁹⁷ Honduras's second written submission, para. 438.

⁵⁷⁹⁸ Honduras's second written submission, para. 439.

⁵⁷⁹⁹ Honduras's second written submission, para. 437.

⁵⁸⁰⁰ Footnote 3 to the TRIPS Agreement reads as follows: "For the purposes of Articles 3 and 4, 'protection' shall include matters affecting the availability, acquisition, scope, maintenance and enforcement of intellectual property rights as well as those matters affecting the use of intellectual property rights specifically addressed in this Agreement." The panel in *Indonesia – Autos* explained that "[a]s is made clear by the footnote to Article 3 of the TRIPS Agreement, the national treatment rule set out in that Article does not apply to use of intellectual property rights generally but only to 'those matters affecting the use of intellectual property rights specifically addressed in this Agreement'". Panel Report, *Indonesia – Autos*, para. 14.275.

a "right of use" or through a "market freedom".⁵⁸⁰¹ The Dominican Republic has not, however, demonstrated that the general market freedoms to which it refers, within which market actors who held GIs operated within the Australian market prior to 1995, amounted to legally protected rights or entitlements under Australian law at that time.⁵⁸⁰²

7.2955. Cuba advances a further argument relating to Australia's common law protection against passing off. Cuba submits that "Habanos" has built a reputation that is entitled to the common law protection against passing off. Cuba argues that "the inability to use the Habanos GI for LHM cigars" will over time weaken the reputation of the Habanos GI in Australia and thereby lead to a reduction or limitation of the scope for effective legal action against passing off. Cuba contends that the TPP measures will thus inevitably diminish the protection the GI "Habanos" enjoyed prior to 1 January 1995, and thus violate Article 24.3 of the TRIPS Agreement.⁵⁸⁰³ Australia retorts that no aspects of the TPP measures, including the prohibitive aspects of the measures, interfere with the operation of the common law action of passing off. Australia adds that governments are not obliged to create or permit the market conditions which give rise to an action for passing off.⁵⁸⁰⁴

7.2956. We understand that Cuba is not arguing that Australia's common law action of passing off as such would have been systematically weakened as a result of the TPP measures. Rather, it argues that "the inability to use the Habanos GI for LHM cigars" "inevitably" weakens the reputation of the GI "Habanos", thus making it more difficult to take action against passing off for that specific GI. We recall that the obligation of each Member under Article 24.3 is to not diminish "the protection of geographical indications that existed in that Member immediately prior to the date of entry into force of the WTO Agreement", which we found in paragraph 7.2936 to refer to the state of protection of GIs immediately prior to 1 January 1995 in terms of the individual GIs which were protected at that point in time in a particular Member. To the extent that "Habanos" was protected as a GI in Australia prior to 1995, it would have benefited from statutory consumer protection law and common law remedies addressing various forms of misleading representations, which may include misuse of GIs.⁵⁸⁰⁵ The complainants have not shown that such protection would have been diminished, in general or specifically in respect of "Habanos". In particular, assuming that such legal remedies were available to "Habanos" GI prior to 1995, Cuba has not demonstrated that these remedies entailed a legally protected entitlement to use "Habanos" GI for the purposes of maintaining the strength of its protection against passing off. We understand that the way in which an interested party uses its GI within the applicable market regulations to maintain the reputation of that GI is not part of the legal protection that Australia provides under that domestic legal instrument and, consequently, not covered by the term "protection" in Article 24.3. We find, therefore, that Australia is not obliged, pursuant to Article 24.3, to create, permit or maintain the market conditions which may give rise to an action for passing off.

7.2957. In light of the evidence before us, we find that the complainants have not demonstrated that the protection that GIs enjoyed under the Australian law, including under general consumer protection measures addressing misleading representations or the common law tort of passing off, immediately before 1 January 1995 has been diminished as a result of the TPP measures.

7.2958. In light of this finding, we do not consider it necessary to address the question of whether we have adequate evidence before us to conclude that "Habanos" was protected as a GI in Australia immediately before 1 January 1995 within the meaning of Article 24.3.

⁵⁸⁰¹ Dominican Republic's second written submission, paras. 804-805; and response to Panel question No. 48.

⁵⁸⁰² We note that the TRIPS Agreement itself makes a distinction between IP regulations and other areas of regulation. As noted by the panel in *EC – Trademarks and Geographical Indications*, the principles in Article 8 of the TRIPS Agreement "reflect the fact that the TRIPS Agreement does not generally provide for the grant of positive rights to exploit or use certain subject matter, but rather provides for the grant of negative rights to prevent certain acts. This fundamental feature of intellectual property protection inherently grants Members freedom to pursue legitimate public policy objectives since many measures to attain those public policy objectives lie outside the scope of intellectual property rights and do not require an exception under the TRIPS Agreement." Panel Reports, *EC – Trademarks and Geographical Indications* (US), para. 7.210; and *EC – Trademarks and Geographical Indications* (Australia), para. 7.246.

⁵⁸⁰³ Cuba's response to Panel question No. 43 (annexed to its response to Panel question No. 138).

⁵⁸⁰⁴ Australia's response to Panel question No. 185.

⁵⁸⁰⁵ See paras. 2.89-2.93 above.

7.3.8.4 Conclusion

7.2959. In light of the above analysis, we find that the complainants have not demonstrated that the TPP measures are inconsistent with Australia's obligations under Article 24.3 of the TRIPS Agreement.

7.4 Article IX:4 of the GATT 1994

7.2960. Article IX:4 of the GATT 1994 provides that:

The laws and regulations of Members relating to the marking of imported products shall be such as to permit compliance without seriously damaging the products, or materially reducing their value, or unreasonably increasing their cost.⁵⁸⁰⁶

7.2961. Cuba, the sole complainant bringing this claim, argues that the TPP measures violate Article IX:4 of the GATT 1994. Australia rejects Cuba's claim and maintains that the TPP measures are not inconsistent with Article IX:4, and would, in any event, be justified by Article XX(b) of the GATT 1994.

7.4.1 Main arguments of the parties⁵⁸⁰⁷

7.2962. Based on the ordinary meaning of the terms "mark" and "origin", Cuba argues that the TPP measures, insofar as they limit the use of the Habanos GI (and GIs more generally), are measures that affect "marks" and, by extension, the "marking" of tobacco products.⁵⁸⁰⁸ Cuba adds that tobacco products produced in Australia are not associated with any GIs, thus the restraints imposed by Australia on the display of GIs on tobacco product packaging can only apply to imported products. Accordingly, Cuba maintains, Australia's prohibition on the display of GIs is a measure which relates exclusively to the marking of "imported products" and, therefore, falls within the scope of Article IX:4 of the GATT 1994.⁵⁸⁰⁹ According to Cuba, the TPP measures violate Article IX:4 of the GATT 1994 because they materially reduce the value of Cuban LHM cigars by prohibiting the Habanos GI and the Cuban Government Warranty Seal⁵⁸¹⁰ from being affixed on the packaging of tobacco products from Cuba.⁵⁸¹¹

7.2963. Cuba does not dispute that the TPP measures allow the country of origin (e.g. "Made in Cuba") to be indicated on Cuban LHM cigars.⁵⁸¹² Its claim relates to what it describes as a prohibition of the Habanos GI and the Cuban Government Warranty Seal under the TPP measures. According to Cuba, the assumption that GIs are, as a general matter, associated with price premiums has been endorsed in academic research and by authoritative bodies such as the Food and Agriculture Organization of the United Nations (FAO). By the same token, Cuba argues, a

⁵⁸⁰⁶ Pursuant to paragraph 1(a) of the GATT 1994:

The General Agreement on Tariffs and Trade 1994 ("GATT 1994") shall consist of: (a) the provisions in the General Agreement on Tariffs and Trade, dated 30 October 1947, annexed to the Final Act Adopted at the Conclusion of the Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment (excluding the Protocol of Provisional Application), as rectified, amended or modified by the terms of legal instruments which have entered into force before the date of entry into force of the WTO Agreement.

Paragraph 2(a) of the GATT 1994 includes the following Explanatory Note: "The references to 'contracting party' in the provisions of GATT 1994 shall be deemed to read 'Member'."

⁵⁸⁰⁷ The parties' more detailed arguments are available in their executive summaries in Annex B.

⁵⁸⁰⁸ Cuba's first written submission, para. 420.

⁵⁸⁰⁹ Cuba's first written submission, para. 421.

⁵⁸¹⁰ Cuba's response to Panel question No. 79 (annexed to its response to Panel question No. 138).

⁵⁸¹¹ Cuba's first written submission, para. 419; and Cuba's response to Panel question No. 138.

⁵⁸¹² According to Cuba, "[i]n effect, the only relevant information about Cuban LHM Cigars that can be included on retail packaging is a statement that the cigars are 'Made in Cuba' and a statement to the effect that the package contains handmade cigars. Further information cannot be conveyed to the consumer." Cuba's first written submission, para. 71 (footnotes omitted) (referring to CI Regulations, (Exhibits AUS-251, DOM-155, CUB-1), Regulation 8(c)(i), read with TPP Regulations, (Exhibits AUS-3, JE-2), Regulation 2.3.4, and CI Regulations, (Exhibits AUS-251, DOM-155, CUB-1), Regulation 8(c)(ii) (requiring a "true description")). See also Cuba's response to Panel question No. 189.

prohibition on the display of an existing GI limits the ability of exporters to charge a price premium and is likely to reduce the value of affected products compared to what they would otherwise be.⁵⁸¹³ Cuba adds that Australia's prohibition on the display of the Habanos GI and the Cuban Government Warranty Seal⁵⁸¹⁴ will inevitably give rise to consumer uncertainty about the authenticity of the products that they are purchasing⁵⁸¹⁵, and such consumer uncertainty is likely to be particularly acute in circumstances where a GI that has been used for decades is abruptly removed from the market.⁵⁸¹⁶ According to Cuba, it follows that the effect of prohibiting the display of the Habanos GI and the Cuban Government Warranty Seal⁵⁸¹⁷ will be to reduce the value of Cuban LHM cigars (relative to the value that they would enjoy if the Habanos GI could be displayed on the retail packaging of Cuban LHM cigars).⁵⁸¹⁸

7.2964. Australia argues that Cuba's claim is "without merit"⁵⁸¹⁹ for three reasons. First, Cuba has failed to demonstrate that Article IX of the GATT 1994 applies to marking of products generally. In particular, Cuba has failed to demonstrate that origin marking refers to "something narrower" than the country of origin, such as the "factory or region of origin".⁵⁸²⁰ Second, Cuba has failed to show that Article IX applies also to prohibitions on the use of certain markings, and not just to requirements to affix marks of origin on imported products.⁵⁸²¹ Third, Cuba has not demonstrated that the value of Cuban LHM cigars has been "materially reduced" as a result of the TPP measures.⁵⁸²² Australia adds that Article IX does not create a right for a Member to apply a particular marking to a product just because the Member considers that the mark will allow it to increase the price it charges for the product.⁵⁸²³ Australia submits that Cuba's argument, if accepted, would result in Article IX:4 of the GATT 1994 creating a "right to use" for GIs. In circumstances where the TRIPS Agreement does not confer such a "right of use", it is untenable that Article IX:4, which does not even mention GIs, creates such a right. In particular, if all GIs confer a price premium, as Cuba contends, then any prohibition on the use of a GI would, according to Cuba, reduce the value of the product and fall afoul of Article IX:4.⁵⁸²⁴

7.2965. Australia adds that, although Cuba states that its claim under Article IX:4 also extends to the Cuban Government Warranty Seal, it has not made any arguments or provided any evidence to substantiate this claim, and has not made a *prima facie* case in relation to it.⁵⁸²⁵ According to Australia, Cuba provides no evidence or arguments to demonstrate that the inability to use the Cuban Government Warranty Seal, and in particular the images on that seal, have led to a material reduction in the value of the Cuban LHM cigars. All of Cuba's arguments relate to its inability to use the mark "Habanos" and the alleged impact of this on the value of its LHM cigars. The only mention of the Cuban Government Warranty Seal in the context of Article IX:4 is a response to a Panel question, in which Cuba simply states that its claim extends to the Seal.⁵⁸²⁶ Australia adds that Cuba does not explain why the Cuban Government Warranty Seal falls within the disciplines of Article IX:4, apart from stating that the seal contains "indirect GIs" ("*indicaciones geograficas indirectas*") in the form of images of the Cuban coat of arms, Cuban tobacco fields and the national tree of Cuba, the royal palm. According to Australia, the marking "Cuba", which is included in the Cuban Government Warranty Seal, is permitted on plain packaged cigars and does not appear to be the subject of Cuba's complaint. Rather, Cuba's complaint appears to be that certain pictures, such as palm trees, are no longer permitted on its packages. However, it is clear that the disciplines of Article IX do not extend to pictorial markings simply because they may be symbols of a particular country.⁵⁸²⁷

⁵⁸¹³ Cuba's first written submission, para. 423.

⁵⁸¹⁴ Cuba's response to Panel question No. 79 (annexed to its response to Panel question No. 138).

⁵⁸¹⁵ Cuba's first written submission, para. 425.

⁵⁸¹⁶ Cuba's first written submission, para. 426.

⁵⁸¹⁷ Cuba's response to Panel question No. 79 (annexed to its response to Panel question No. 138).

⁵⁸¹⁸ Cuba's first written submission, para. 426.

⁵⁸¹⁹ Australia's second written submission, para. 573.

⁵⁸²⁰ Australia's first written submission, paras. 750-752.

⁵⁸²¹ Australia's first written submission, paras. 745-749.

⁵⁸²² Australia's second written submission, paras. 579-585.

⁵⁸²³ Australia's first written submission, para. 749.

⁵⁸²⁴ Australia's second written submission, para. 582.

⁵⁸²⁵ Australia's comments on complainants' responses to Panel question Nos. 192, 194 and 195, and fn 315.

⁵⁸²⁶ Australia's comments on Cuba's responses to Panel question Nos. 187-191 and 193.

⁵⁸²⁷ Australia's comments on Cuba's responses to Panel question Nos. 187-191 and 193.

7.2966. Should the Panel rule that Cuba has nonetheless proven a violation of Article IX:4 of the GATT 1994, Australia argues that the TPP measures are justified by the exception under Article XX(b) of the GATT 1994 because they are necessary to protect human life or health.⁵⁸²⁸ In support of this conditional defence, Australia references its arguments under Article 2.2 of the TBT Agreement.⁵⁸²⁹

7.2967. Cuba contests that its Article IX:4 claim would be "without merit"⁵⁸³⁰ or that the TPP measures would ultimately be justified by the exception under Article XX(b) of the GATT 1994⁵⁸³¹, as advanced by Australia. In this regard, Cuba references its arguments under Article 2.2 of the TBT Agreement, pointing out that the burden of proof under Article XX(b) lies with Australia despite the similarity between the legal standards under the two provisions.⁵⁸³²

7.4.2 Main arguments of the third parties⁵⁸³³

7.2968. Canada submits that Cuba mischaracterizes the nature of the obligation under Article IX:4.⁵⁸³⁴ It is only marks of origin, not the universe of markings on goods, which are disciplined by Article IX:4.⁵⁸³⁵ According to Canada, the phrase "permit compliance" in Article IX:4 is the essential, operating element of the provision. It illustrates the purpose of Article IX:4, which is to discipline how compliance with a marking requirement may be prescribed.⁵⁸³⁶ As Article IX:4 does not discipline whether or to what extent Members may require such markings on imported products⁵⁸³⁷, according to Canada, a prohibition or restriction on the use of a mark of origin does not violate Article IX:4.⁵⁸³⁸

7.2969. China argues that Members do not have unlimited discretion to adopt public health measures. Public health measures that may be inconsistent with provisions of the GATT 1994, such as Article IX:4, may be justified under Article XX(b) of the GATT 1994, according to China.⁵⁸³⁹

7.2970. Addressing the concurrent application of the TBT and TRIPS Agreements, the European Union argues that origin marking is something not expressly mentioned in the definition of a technical regulation in the TBT Agreement, whereas origin marking and issues of origin are specifically regulated by Article IX of the GATT and by the Agreement on Rules of Origin, respectively.⁵⁸⁴⁰

7.2971. New Zealand requests that the Panel reject Cuba's claim under Article IX:4 of the GATT.⁵⁸⁴¹

7.4.3 Analysis of the Panel

7.2972. Cuba's claim under Article IX:4 of the GATT 1994 relates to the treatment, under the TPP measures, of two specific signs: (i) the sign that Cuba describes as the Habanos GI; and (ii) the Cuban Government Warranty Seal. Cuba argues that the TPP measures, insofar as they limit the use of these signs, affect the "marking of imported products" within the meaning of Article IX:4, and "materially reduce the value" of Cuban LHM cigars, in violation of Article IX:4.

7.2973. We find it useful first to explore what the two specific signs invoked by Cuba consist of, and to clarify the manner in which the TPP measures affect the use of these signs.⁵⁸⁴²

⁵⁸²⁸ Australia's first written submission, paras. 754-760.

⁵⁸²⁹ Australia's first written submission, paras. 754-761, in particular paras. 757-758.

⁵⁸³⁰ Cuba's second written submission, paras. 396-400.

⁵⁸³¹ Cuba's second written submission, paras. 401-413.

⁵⁸³² Cuba's response to Panel question No. 132.

⁵⁸³³ The executive summaries of the third parties' arguments are contained in Annex C.

⁵⁸³⁴ Canada's third-party submission, para. 103.

⁵⁸³⁵ Canada's third-party submission, para. 104.

⁵⁸³⁶ Canada's third-party submission, para. 105.

⁵⁸³⁷ Canada's third-party submission, para. 105.

⁵⁸³⁸ Canada's third-party submission, para. 108.

⁵⁸³⁹ China's third-party submission, para. 7.

⁵⁸⁴⁰ European Union's third-party submission, para. 44.

⁵⁸⁴¹ New Zealand's third-party submission, para. 124.

7.4.3.1 The Habanos sign and the Cuban Government Warranty Seal

7.2974. Cuba describes the Habanos sign as follows:

As a result of Cuba's efforts to protect and promote its cigar industry and exports, the term "*Habanos*" has become known worldwide to describe large, high-quality hand-made cigars of Cuban provenance. The term itself originates from the name of the city of Havana (or *Habana*, in Spanish), from which Cuban cigars have been exported for centuries. "*Habano*" (or "*habanos*" in plural) means simply from *Habana*.⁵⁸⁴³

7.2975. In relation to this, the following sign is registered as a composite trademark in Australia:

Figure 18: The Habanos composite trademark registered in Australia



Source: Cuba's first written submission, Annex 1, Part 1, Item No. 19.

7.2976. In addition, Cuba indicates that on 27 December 1967, under the "Lisbon Agreement for the International Registration of Appellations of Origin" (Lisbon Agreement), it registered the term "Habanos Denominacion de Origen Protegida (D.O.P.)".⁵⁸⁴⁴ Cuba refers to this as the "Habanos GI".⁵⁸⁴⁵

7.2977. Further, as Cuba explains, in 1994, Corporación Habanos S.A. began applying, to the upper corners of its LHM cigar boxes, "the Habanos GI, in label form", displaying a coloured composite mark consisting of the word "Habanos" and an image of chevrons forming a leaf⁵⁸⁴⁶, i.e. a label containing the above-mentioned Habanos composite trademark registered in Australia:

Figure 19: The Habanos label applied to the upper corners of Cuban LHM cigar boxes starting in 1994



Source: Cuba's first written submission, Annex 1, Part 2, para. 5.

7.2978. Cuba adds that in 2004, this label was modified as shown below in Figure 20⁵⁸⁴⁷, i.e. into a label containing both the above composite trademark and the term "Denominación de Origen Protegida (D.O.P.)" registered under the Lisbon Agreement:

⁵⁸⁴² In doing so, we make no determination on whether, and if so, how what Cuba describes as the "Habanos GI" is protected as a GI in Australia, and will refer to it as the "Habanos sign". We also make no determination as to whether the Cuban Government Warranty Seal is protected as a GI in Australia.

⁵⁸⁴³ Cuba's first written submission, Annex 1, Part 2, para. 1.

⁵⁸⁴⁴ Cuba's first written submission, Annex 1, Part 2, para. 3.

⁵⁸⁴⁵ Cuba's first written submission, Annex 1, Part 2, para. 3.

⁵⁸⁴⁶ Cuba's first written submission, Annex 1, Part 2, para. 5.

⁵⁸⁴⁷ Cuba's first written submission, Annex 1, Part 2, para. 6.

Figure 20: The Habanos label applied to the upper corners of Cuban LHM cigar boxes since 2004



Source: Cuba's first written submission, para. 67, Illustration 4.

7.2979. Cuba references this label as "the Habanos GI label"⁵⁸⁴⁸, and defines it also as the "Habanos GI".⁵⁸⁴⁹

7.2980. In response to a question by the Panel, Cuba confirmed that its claim also relates to the Cuban Government Warranty Seal, insofar as its use is also prohibited by the TPP measures.⁵⁸⁵⁰ The Cuban Government Warranty Seal is depicted in the following figure:

Figure 21: The Cuban Government warranty seal



Source: Cuba's first written submission, para. 67, Illustration 3.

7.2981. Cuba describes the function of the Cuban Government Warranty Seal as being to guarantee authenticity and Cuban origin.⁵⁸⁵¹ In particular:

This Seal provides a guarantee of provenance and authenticity for consumers, as well as allowing tracking and source identification for Cuban exporters. It contains graphic elements or indirect geographical indications such as the graphic representation of the Cuban national shield and the image of the Cuban tobacco fields in which the Cuban national tree, the royal palm, may be seen.⁵⁸⁵²

7.2982. Cuba adds that the Cuban Government Warranty Seal is affixed in Cuba to boxes of original Cuban cigars, and incorporates security functions such as a hologram and a unique barcode for the tracing and tracking of each individual cigar box. As the Cuban Government Warranty Seal has a self-destructing function and the Seal cannot be re-affixed once broken, it can indicate to customers whether an attempt has been made to open the box prior to retail sale. In other words, an unbroken Cuban Government Warranty Seal guarantees that the box to which it is

⁵⁸⁴⁸ Cuba's first written submission, Annex 1, Part 2, para. 6.

⁵⁸⁴⁹ Cuba's first written submission, para. 68 and Illustration 4. As noted, Cuba refers to the registration of the term "Habanos" under the Lisbon Agreement also as "Habanos GI".

⁵⁸⁵⁰ Cuba's response to Panel question No. 79 (annexed to its response to Panel question No. 138).

⁵⁸⁵¹ Cuba's response to Panel question No. 56 (annexed to its response to Panel question No. 138).

⁵⁸⁵² Cuba's responses to Panel question No. 56 (annexed to its response to Panel question No. 138) and No. 79.

affixed has not been opened or has not been tampered with at any time between leaving the manufacturer in Cuba until the time it reaches the consumer at the point of sale.⁵⁸⁵³

7.2983. Cuba claims in general terms that the Cuban Government Warranty Seal is "protected under trademark and unfair competition laws in export markets".⁵⁸⁵⁴ However, Cuba provides no further indication as to whether the Cuban Government Warranty Seal is protected in Australia as a trademark, GI or otherwise.

7.4.3.2 The impact of the TPP measures on the use of the Habanos sign and the Cuban Government Warranty Seal

7.2984. Cuba argues that, as a result of the TPP measures, Cuban cigar exporters cannot affix either what it describes as the "Habanos GI"⁵⁸⁵⁵, or the Cuban Government Warranty Seal on their cigar boxes sold in Australia.⁵⁸⁵⁶ Cuba adds that the only relevant information about Cuban LHM cigars that can be included on retail packaging is a statement that the cigars are "Made in Cuba" and a statement to the effect that the package contains handmade cigars.⁵⁸⁵⁷

7.2985. We understand that, as a result of the TPP measures, the Habanos sign and the Cuban Government Warranty Seal cannot appear in their above-described composite form on boxes of Cuban cigars or on cigars sold in Australia. The TPP Act prohibits all marks⁵⁸⁵⁸ and trademarks on tobacco products⁵⁸⁵⁹ and packaging⁵⁸⁶⁰, and the exceptions from this general prohibition do not cover composite signs.⁵⁸⁶¹ Nor can the Habanos sign or the Cuban Government Warranty Seal be affixed as physical labels on Cuban cigar boxes, given the prohibition of onserts on tobacco packaging and the limited exceptions to such prohibition.⁵⁸⁶²

7.2986. As for the non-figurative, word elements of the Habanos sign and the Cuban Government Warranty Seal, we refer to our earlier analysis under Article 22.2(b) of the TRIPS Agreement. We noted that, while the TPP Act does not define the term "brand name", the CI Regulations provide that "[i]n these regulations, unless the contrary intention appears: ... *brand* includes any mark, device, name, word, letter, numeral or symbol and any combination consisting of two or more of those things".⁵⁸⁶³ We concluded that we are not persuaded that Cuba has established that the TPP measures prohibit the use of the word "Habanos", to the extent that it may be part of the brand name.⁵⁸⁶⁴ For the same reasons, we find that Cuba has not established that other word elements of what Cuba describes as the "Habanos GI", e.g. "D.O.P.", or of the Cuban Government Warranty Seal, e.g. the word "Cuba", may not appear as part of the brand name.

7.2987. We further note that it is undisputed that an indication of the country of origin of tobacco products covered by the TPP measures is "a requirement contained in other legislation which

⁵⁸⁵³ Cuba's response to Panel question No. 173.

⁵⁸⁵⁴ Cuba's first written submission, para. 21; Cuba's second written submission, para. 23; and Cuba's response to Panel question No. 56 (annexed to its response to Panel question No. 138).

⁵⁸⁵⁵ See paras. 7.2976, 7.2978 and 7.2979 above.

⁵⁸⁵⁶ Cuba's first written submission, paras. 66-70.

⁵⁸⁵⁷ Cuba's first written submission, para. 71 (referring to CI Regulations, (Exhibits AUS-251, DOM-155, CUB-1), Regulation 8(c)(i), read with TPP Regulations, (Exhibits AUS-3, JE-2), Regulation 2.3.4, and CI Regulations, (Exhibits AUS-251, DOM-155, CUB-1), Regulation 8(c)(ii) (requiring a "true description")).

⁵⁸⁵⁸ The TPP Act defines "mark" as a concept that "(a) includes (without limitation) any line, letters, numbers, symbol, graphic or image; but (b) (other than when referring to a trade mark) does not include a trade mark". TPP Act, (Exhibits AUS-1, JE-1), Section 4(1), definition of "mark".

⁵⁸⁵⁹ See TPP Act, (Exhibits AUS-1, JE-1), Section 26.

⁵⁸⁶⁰ See TPP Act, (Exhibits AUS-1, JE-1), Sections 20(1)-(2).

⁵⁸⁶¹ See TPP Act, (Exhibits AUS-1, JE-1), Sections 20(3) and 21(1). See TPP Regulations, (Exhibits AUS-3, JE-2), Divisions 2.3, 2.4 and 3.2.

⁵⁸⁶² The TPP Act defines onsert as "any thing affixed or otherwise attached to packaging (within the ordinary meaning of the word), but does not include the lining of a cigarette pack if the lining complies with the requirements of this Act." TPP Act, (Exhibits AUS-1, JE-1), Section 4(1), definition of "onsert". According to the TPP Act, "[t]he retail packaging of tobacco products (within the meaning of any of paragraphs (a) to (d) of the definition of retail packaging) must not have any inserts or onserts, other than as permitted by the regulations." TPP Act, (Exhibits AUS-1, JE-1), Section 23. See also TPP Regulations, (Exhibits AUS-3, JE-2), Division 2.6.

⁵⁸⁶³ CI Regulations, (Exhibits AUS-251, DOM-155, CUB-1), Section 5(1).

⁵⁸⁶⁴ See para. 7.2856 above.

predates the introduction of the tobacco plain packaging measure", and "[t]he tobacco plain packaging measure simply mandates the form in which such information appears".⁵⁸⁶⁵

7.2988. As described by Australia, "TPP Regulation 2.3.1(c) permits a 'trade description' statement on primary and secondary packaging and TPP Regulation 2.3.4 mandates the form of such a statement."⁵⁸⁶⁶ For the purposes of tobacco plain packaging, the TPP Act defines a "trade description" as "any trade description that is required to appear on the retail packaging of tobacco products by regulations made under the *Commerce (Trade Descriptions) Act 1905*".⁵⁸⁶⁷ In turn, Australia's CI Regulations, which were, by their own terms, "made under the *Commerce (Trade Descriptions) Act 1905*"⁵⁸⁶⁸, require that "the trade description shall contain, in prominent and legible characters: (i) the name of the country in which the goods were made or produced."⁵⁸⁶⁹ Under the CI Regulations, this requirement applies specifically to "cigars, cigarettes, manufactured tobacco, cigarette papers and cigarette tubes", prohibiting the importation of such products into Australia "unless there is applied to those goods a trade description in accordance with these regulations."⁵⁸⁷⁰

7.2989. "[A] trade description" is encompassed in the TPP Act's definition of "relevant legislative requirement"⁵⁸⁷¹, which "may appear on the retail packaging of tobacco products"⁵⁸⁷², provided it "compl[ies] with any requirements prescribed by the [TPP R]egulations".⁵⁸⁷³ The TPP Regulations stipulate that such legislative requirement, in turn, may not be obscured by other elements appearing on retail packaging of tobacco products.⁵⁸⁷⁴

7.2990. In short, the TPP Act allows for, and circumscribes, the manner in which the indication of the country of origin, e.g. in the form "Made in Cuba", may be present on tobacco retail packaging (along with brand and variant names). Likewise, as regards cigars, the TPP Regulations stipulate that the name of the country in which the cigar was made or produced may appear on the cigar band once, in a specific font and colour.⁵⁸⁷⁵

7.2991. Having clarified the operation of the TPP measures in respect of the signs that are the object of Cuba's claim as well as concerning the indication "Made in Cuba", we turn to its claim that the TPP measures violate Article IX:4 of the GATT 1994.

7.2992. Article IX:4 reads:

The laws and regulations of Members relating to the marking of imported products shall be such as to permit compliance without seriously damaging the products, or materially reducing their value, or unreasonably increasing their cost.

7.2993. In relevant part, the text of Article IX:4 has two main components:

⁵⁸⁶⁵ Australia's comments on the Dominican Republic's responses to Panel question Nos. 174 and 177. In particular, according to Australia, "[a] 'trade description' is required to appear on imported products pursuant to the *Commerce (Imports) Regulations 1940* (Cth) and must include the name of the country in which the product was made or produced and a true description of the product (see *Commerce (Imports) Regulations 1940* (Cth), Exhibit AUS-251, Regulations 7 and 8). See also *Commerce Trade Descriptions Act 1905* (Cth), Exhibit AUS-248." Australia's first written submission, para. 483 fn 675.

⁵⁸⁶⁶ Australia's first written submission, para. 483 fn 675 (referring to TPP Regulations, (Exhibits AUS-3, JE-2), Regulations 2.3.1 and 2.3.4).

⁵⁸⁶⁷ TPP Act, (Exhibits AUS-1, JE-1), Section 4(1).

⁵⁸⁶⁸ CI Regulations, (Exhibits AUS-251, DOM-155, CUB-1), cover page.

⁵⁸⁶⁹ CI Regulations, (Exhibits AUS-251, DOM-155, CUB-1), Regulation 8(c)(i).

⁵⁸⁷⁰ CI Regulations, (Exhibits AUS-251, DOM-155, CUB-1), Regulation 7(1)(n). See also CTD Act, (Exhibit AUS-248), Section 7(1).

⁵⁸⁷¹ TPP Act, (Exhibits AUS-1, JE-1), Section 4(1).

⁵⁸⁷² TPP Act, (Exhibits AUS-1, JE-1), Section 20(3)(b).

⁵⁸⁷³ TPP Act, (Exhibits AUS-1, JE-1), Section 21(4).

⁵⁸⁷⁴ See TPP Regulations, (Exhibits AUS-3, JE-2), Regulations 2.3.1(5)(a), 2.4.2(3)(d), 2.4.3(1)(a), 2.4.4(2)(a), and 2.6.3(3).

⁵⁸⁷⁵ TPP Regulations, (Exhibits AUS-3, JE-2), Regulations 3.2.1(3)(b) and 3.2.1(5).

- a. "[t]he laws and regulations of Members relating to the marking of imported products", which identifies the scope of the obligation, namely the types of measures and signs covered by this provision; and
- b. "shall be such as to permit compliance without ... materially reducing the[] value [of imported products]", which spells out the specific obligation under Article IX:4 that Cuba invokes in its claim.

7.2994. Accordingly, we assess (i) whether the TPP measures constitute "laws and regulations of Members relating to the marking of imported products" and are covered by the scope of Article IX:4, and, if so, (ii) whether the TPP measures are "such as to permit compliance without ... materially reducing the[] value [of imported products]", i.e. of Cuban LHM cigars.

7.4.3.3 Whether the TPP measures constitute "laws and regulations ... relating to the marking of imported products"

7.2995. Article IX:4 governs "[t]he laws and regulations of Members relating to the marking of imported products". We first explore the meaning of this term, in accordance with customary rules of treaty interpretation. In light of this interpretation, we assess whether the TPP measures fall within the scope of this phrase.

7.4.3.3.1 The phrase "[t]he laws and regulations of Members relating to the marking of imported products" in Article IX:4

7.2996. We explore the meaning of the term "[t]he laws and regulations of Members relating to the marking of imported products" contained in Article IX:4 of the GATT 1994 in accordance with applicable rules of interpretation. We consider in that context a Decision on Marks of Origin adopted by the GATT CONTRACTING PARTIES in 1958, as well as, as relevant, negotiating history of Article IX:4 as a supplementary means of interpretation.

7.4.3.3.1.1 General rule of interpretation

7.2997. We start interpreting the phrase "[t]he laws and regulations of Members relating to the marking of imported products" by establishing its ordinary meaning:

- a. The term "laws and regulations" has been interpreted as "cover[ing] rules that form part of the domestic legal system of a WTO Member, including rules deriving from international agreements that have been incorporated into the domestic legal system of a WTO Member or have direct effect according to that WTO Member's legal system".⁵⁸⁷⁶
- b. The term "relating to" is defined as "hav[ing] some connection with, be[ing] connected to".⁵⁸⁷⁷
- c. The term "marking" is defined as "[t]he action of putting a mark, marker, token, indicator, etc., on something. In extended use: the action of distinguishing, identifying, or giving emphasis to something", and also as "[a] mark or pattern of marks".⁵⁸⁷⁸

⁵⁸⁷⁶ Appellate Body Report, *Mexico – Taxes on Soft Drinks*, para. 79 (concerning the meaning of "laws and regulations" in Article XX(d) of the GATT 1994).

⁵⁸⁷⁷ Appellate Body Reports, *China – Raw Materials*, para. 355 (concerning the dictionary definition of "relat[e] to" in Article XX(g) of the GATT 1994).

⁵⁸⁷⁸ Oxford English Dictionary online, definition of "marking, n.", available at: <<http://www.oed.com/view/Entry/114193?rskey=N3MVZI&result=1&isAdvanced=false#eid>>, accessed 2 May 2017. In this regard, we note our earlier finding that the TPP measures deal with symbols and marking, and thus lay down product characteristics, within the sense of Annex 1.1 to the TBT Agreement. See para. 7.158 above. We consider this to be a distinct matter from the scope of Article IX:4 of the GATT 1994. We note in this regard that the TBT Agreement is intended to provide disciplines in respect of technical regulations, standards and related conformity assessment procedures in general. Annex 1 of the TBT Agreement contains definitions for both "technical regulation" and "standard", both of which make clear that *inter alia*, "labelling and marking requirements" are covered by these provisions.

- d. The verb "import" is defined as "[t]o bring in or cause to be brought in (a commodity, merchandise, goods, etc.) from another country or territory for use or resale in the domestic market."⁵⁸⁷⁹
- e. The dictionary meaning of the term "product" was established as referring generally to "a thing produced", whereas "in a trade sense" it has been defined as "an article or substance that is manufactured or refined for sale (more recently also applied to services)".⁵⁸⁸⁰ We consider that in the context of the GATT 1994, which is the very first agreement contained in Annex 1A to the WTO Agreement entitled Multilateral Agreements on Trade in Goods, the term "product" is synonymous with "goods". The Ad Note to Article XVII:2 of the GATT 1994 defines "goods" as "limited to products as understood in commercial practice, and is not intended to include the purchase or sale of services."

7.2998. Accordingly, the phrase "[t]he laws and regulations of a Member relating to the marking of imported products" refers to rules of a WTO Member's domestic legal system connected to the action of putting a mark on goods introduced into the territory of such Member from another country or WTO Member.

7.2999. The phrase "[t]he laws and regulations of Members relating to the marking of imported products" must be understood in its specific context. We note in this respect that Article IX:4 is part of Article IX of the GATT 1994, entitled "Marks of Origin". This term is not defined in either the GATT 1994 or any other part of the WTO Agreement.⁵⁸⁸¹ Relevant dictionary definitions of the noun "mark" are "[a] sign, a token, an indication"⁵⁸⁸², and "[a] device, stamp, brand, label, inscription, etc., on an article, animal, etc., identifying it or its holder, or indicating ownership, origin, quality, etc."⁵⁸⁸³ In turn, the dictionary definition of the word "origin" is "[t]hat from which anything originates, or is derived; source of being or existence; starting point."⁵⁸⁸⁴ Thus, the ordinary meaning of "mark of origin" encompasses a sign, a token, an indication, a device, a stamp, a brand, a label, or an inscription on a product identifying from where such product originates. This context informs the scope of Article IX:4 of the GATT 1994, by circumscribing it to the laws and regulations of a Member relating to certain types of marking of imported products, i.e. those markings that indicate the origin of imported products.

7.3000. Further context is provided by the phrase "permit compliance without" in Article IX:4. In this regard, we agree with Canada that this phrase suggests that the purpose of Article IX:4 is not to discipline whether Members may require marks of origin but to discipline how compliance with origin marking requirements may be prescribed.⁵⁸⁸⁵

7.3001. We note, as additional context, the structure and additional paragraphs of Article IX, which lay down a set of disciplines for Members regulating marks of origin. Paragraphs 1 and 5 of Article IX use the terms "marking requirements", whereas Article IX:3 refers to "required marks". This suggests that Article IX as a whole relates to laws and regulations that require the use of marks of origin on imported products. As observed by the Appellate Body, Article IX of the GATT 1994 reflects the legitimacy of providing origin information to consumers through mark of origin requirements:

⁵⁸⁷⁹ Oxford English Dictionary online, definition of "import, n.", available at:

<<http://www.oed.com/view/Entry/92550?rskey=QWA9QN&result=2&isAdvanced=false#eid>>, accessed 2 May 2017.

⁵⁸⁸⁰ Panel Report, *China – Publications and Audiovisual Products*, para. 7.1340.

⁵⁸⁸¹ The Agreement on Rules of Origin does not provide a definition of marks or origin.

⁵⁸⁸² The New Shorter Oxford English Dictionary on Historical Principles, L. Brown (ed.) (Oxford University Press, 1993), Vol. 1, p. 1698.

⁵⁸⁸³ Oxford English Dictionary online, definition of "mark, n.¹", available at:

<<http://www.oed.com/view/Entry/114169?rskey=CUyzXR&result=1&isAdvanced=false#eid>>, accessed 2 May 2017.

⁵⁸⁸⁴ Oxford English Dictionary online, definition of "origin, n.", available at:

<<http://www.oed.com/view/Entry/132561?rskey=89FKkc&result=1&isAdvanced=false#eid>>, accessed 2 May 2017.

⁵⁸⁸⁵ Canada's third-party submission, para. 105.

[S]upport for the legitimate nature of the objective of providing information to consumers on origin is also found elsewhere in the covered agreements, in particular in Article IX of the GATT 1994. This provision, entitled "Marks of Origin", expressly recognizes the right of WTO Members to require that imported products carry a mark of origin. ... Article IX does indicate that requiring origin labelling for imported goods is, at least in some circumstances and for some definitions of "origin", considered under WTO law to be a permissible means of regulating trade in goods.⁵⁸⁸⁶

7.3002. This interpretation is underscored by the object and purpose of Article IX:4 of the GATT 1994. Linking the objectives of Article IX:4 and Article IX:2⁵⁸⁸⁷, the Appellate Body understood these two provisions as serving to limit the impact of the use of marks of origin with regard to exporters:

We note that Article IX:2 calls for a *reduction* of difficulties and inconveniences that laws and regulations relating to marks of origin may cause to exporters. Furthermore, Article IX:4 requires that compliance with such laws and regulations should be possible without materially reducing the value of the products, or unnecessarily increasing the cost of the products. Hence, these provisions call for a limitation of the impact of the use of marks of origin.⁵⁸⁸⁸

7.3003. As noted, this objective is also reflected in the requirement under Article IX:4 that laws and regulations relating to the marking of imported products "shall be such as to *permit compliance without*" (emphasis added) causing the specific negative effects identified in the subsequent portions of Article IX:4, including materially reducing the value of imported products.⁵⁸⁸⁹ We read this phrase as balancing the legitimacy of providing origin information to consumers through marks of origin requirements⁵⁸⁹⁰ with the need to limit the impact that compliance with those requirements has on exporters.⁵⁸⁹¹ As explained below, in light of the linkages between the objectives of these two provisions, we read Article IX:4 as laying down one of a number of specific disciplines contained in Article IX for reducing to a minimum the difficulties and inconveniences that laws and regulations relating to marks of origin may cause to the commerce and industry of exporting countries.

7.3004. Read in the context of the title, structure and text of Article IX of the GATT 1994 taken as a whole, we therefore understand the scope of Article IX:4 as covering the rules of a WTO Member's domestic legal system connected to the marking of goods imported from another country or WTO Member identifying the origin of such goods.

7.3005. This interpretation is further informed by a decision on Marks of Origin adopted by GATT CONTRACTING PARTIES in 1958. The negotiating history of Article IX:4 further confirms this interpretation. We shall now turn to these.

⁵⁸⁸⁶ Appellate Body Reports, *US – COOL*, para. 445. (footnote omitted)

⁵⁸⁸⁷ Article IX:2 of the GATT 1994 provides that "[t]he Members recognize that, in adopting and enforcing laws and regulations relating to marks of origin, the difficulties and inconveniences which such measures may cause to the commerce and industry of exporting countries should be reduced to a minimum, due regard being had to the necessity of protecting consumers against fraudulent or misleading indications." We are reproducing here the relevant provision of the GATT 1947, as incorporated into the GATT 1994.

Paragraph 2(a) of the GATT 1994 includes the following Explanatory Note: "The references to 'contracting party' in the provisions of GATT 1994 shall be deemed to read 'Member'." See fn 5806.

⁵⁸⁸⁸ Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.356. (italics original; underlining added)

⁵⁸⁸⁹ Indeed, in the context of another provision of the GATT 1994, Article III:8, the Appellate Body underscored that the scope of a provision needs to be interpreted holistically, including by recourse to other terms contained in the same and related provisions: "Article III:8(a) contains several elements describing the types and the content of measures falling within the ambit of the provision. ... We consider that Article III:8(a) should be interpreted holistically. This requires consideration of the linkages between the different terms used in the provision and the contextual connections to other parts of Article III, as well as to other provisions of the GATT 1994." Appellate Body Reports, *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, para. 5.57.

⁵⁸⁹⁰ Appellate Body Reports, *US – COOL*, para. 445.

⁵⁸⁹¹ Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.356.

7.4.3.3.1.2 The 1958 Decision on Marks of Origin

7.3006. Australia refers to a GATT document adopted by the CONTRACTING PARTIES in 1958 (1958 GATT Decision)⁵⁸⁹², which it argues constitutes a subsequent agreement in the sense of Article 31(3)(a) of the Vienna Convention on the Law of Treaties⁵⁸⁹³, relevant for the interpretation of the scope of Article IX:4.⁵⁸⁹⁴

7.3007. The 1958 GATT Decision contains a Report by the GATT Working Party on Trade and Customs Regulations, as adopted by the CONTRACTING PARTIES on 21 November 1958. This report contains a "Recommendation on Marks of Origin" in which "[t]he CONTRACTING PARTIES recommend the adoption of [a series of] rules on Marks of Origin".⁵⁸⁹⁵

7.3008. The 1958 GATT Decision cannot, in our view, be considered to be a subsequent agreement within the meaning of Article 31(3)(a) of the Vienna Convention, as argued by Australia.⁵⁸⁹⁶ The 1958 GATT Decision was not adopted by WTO Members but by GATT CONTRACTING PARTIES, and the "relevant covered agreement"⁵⁸⁹⁷ to be interpreted in the WTO context is not the GATT 1947 but the GATT 1994, which is "legally distinct" from the GATT 1947.

7.3009. We consider it appropriate, however, to take due account of this Decision, to the extent that it may inform our understanding of the terms of Article IX:4, including its scope of

⁵⁸⁹² Marks of Origin, Report by the Working Party as adopted by the CONTRACTING PARTIES at their meeting of 21 November 1958, GATT document L/912/Rev.1, (1958 GATT Decision), (Exhibit AUS-294).

⁵⁸⁹³ See Australia's first written submission, para. 751 fn 1003.

⁵⁸⁹⁴ According to Australia, the 1958 GATT Decision supports the interpretation that Article IX of the GATT 1994 applies only to country of origin markings. See Australia's first written submission, paras. 750-752, in particular para. 751 and fn 1003; and 1958 GATT Decision, (Exhibit AUS-294).

⁵⁸⁹⁵ 1958 GATT Decision, (Exhibit AUS-294), p. 2.

⁵⁸⁹⁶ According to Article 31(3)(a) of the Vienna Convention, "[t]here shall be taken into account, together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions". The Appellate Body identified two criteria "[b]ased on the text of Article 31(3)(a) of the Vienna Convention": "[A] decision adopted by Members may qualify as a 'subsequent agreement between the parties' regarding the interpretation of a covered agreement or the application of its provisions if: (i) the decision is, in a temporal sense, adopted subsequent to the relevant covered agreement; and (ii) the terms and content of the decision express an *agreement* between Members on the *interpretation or application* of a provision of WTO law." Appellate Body Report, *US – Clove Cigarettes*, para. 262 (emphasis original). See also Appellate Body Report, *US – Tuna II*, paras. 371-372. In regard to the second criterion, the Appellate Body held that "by referring to 'authentic interpretation', the [International Law Commission] reads Article 31(3)(a) as referring to agreements bearing specifically upon the interpretation of a treaty". Appellate Body Reports, *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)*, para. 390. See also Appellate Body Report, *US – Clove Cigarettes*, para. 265; and Appellate Body Report, *US – Tuna II*, para. 372. According to the Appellate Body, "[t]he extent to which [a specific d]ecision will inform the interpretation and application of a term or provision of [a covered a]greement in a specific case ... will depend on the degree to which it 'bears specifically' on the interpretation and application of the respective term or provision." Appellate Body Report, *US – Tuna II*, para. 372 (referring to Appellate Body Report, *US – Clove Cigarettes*, para. 265, in turn quoting Appellate Body Reports, *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)*, para. 390). Australia contends that the 1958 GATT Decision fulfils the first criterion identified by the Appellate Body, i.e. the decision is, in a temporal sense, adopted subsequent to the relevant covered agreement. Australia's response to Panel question No. 83. We disagree. Although the 1958 GATT Decision was adopted more than a decade after the signature of the GATT 1947, the GATT 1947 was terminated "one year after the date of entry into force of the WTO Agreement". Transitional Co-Existence of the GATT 1947 and the WTO Agreement: Decision of 8 December 1994 adopted by the Preparatory Committee for the WTO and the Contracting Parties to the GATT 1947, GATT document PC/12, para. 3. The 1958 GATT Decision was not adopted by WTO Members but by the GATT CONTRACTING PARTIES, and the "relevant covered agreement" (Appellate Body Report, *US – Clove Cigarettes*, para. 262) to be interpreted in the WTO context is not the GATT 1947 but the GATT 1994, which is "legally distinct" from the GATT 1947. According to Article II:4 of the WTO Agreement, "[t]he General Agreement on Tariffs and Trade 1994 as specified in Annex 1A (hereinafter referred to as 'GATT 1994') is legally distinct from the General Agreement on Tariffs and Trade, dated 30 October 1947, annexed to the Final Act Adopted at the Conclusion of the Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, as subsequently rectified, amended or modified (hereinafter referred to as 'GATT 1947')."⁵⁸⁹⁸ As the 1958 GATT Decision precedes the GATT 1994 by decades, it is not temporally subsequent to Article IX:4 of the GATT 1994. Accordingly, and without assessing whether the above-mentioned second criterion is fulfilled, we do not consider the 1958 GATT Decision to be a subsequent agreement within the meaning of Article 31(3)(a) of the Vienna Convention concerning the interpretation of Article IX:4 of the GATT 1994.

⁵⁸⁹⁷ See Appellate Body Report, *US – Clove Cigarettes*, para. 262.

application.⁵⁸⁹⁸ There are at least two further ways in which GATT 1947 sources may gain legal relevance in the WTO: (i) as "other decisions of the CONTRACTING PARTIES" incorporated into the GATT 1994 on the basis of its paragraph 1(b)(iv); or (ii) as guidance pursuant to Article XVI:1 of the WTO Agreement.⁵⁸⁹⁹ We do not consider the 1958 GATT Decision to have been incorporated into the GATT 1994 under its paragraph 1(b)(iv).⁵⁹⁰⁰ However, we consider that it constitutes guidance under Article XVI:1 of the WTO Agreement⁵⁹⁰¹ that is relevant for the interpretive issue before us.⁵⁹⁰²

7.3010. Article XVI:1 provides that "[e]xcept as otherwise provided under this Agreement or the Multilateral Trade Agreements, the WTO shall be guided by the decisions, procedures and customary practices followed by the CONTRACTING PARTIES to GATT 1947 and the bodies established in the framework of GATT 1947." While the guidance provided by decisions of the CONTRACTING PARTIES in accordance with Article XVI:1 is not legally binding, it should "provide[] direction to the WTO" in that "the WTO 'shall be guided' by that decision".⁵⁹⁰³

⁵⁸⁹⁸ Although the parties did not present specific arguments in this regard, we recall that:

The principle of *jura novit curia* has been articulated by the International Court of Justice as follows:

It being the duty of the Court itself to ascertain and apply the relevant law in the given circumstances of the case, the burden of establishing or proving rules of international law cannot be imposed upon any of the parties, for the law lies within the judicial knowledge of the Court.

(International Court of Justice, Merits, *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, 1986 ICJ Reports, p. 14, para. 29 (quoting International Court of Justice, Merits, *Fisheries Jurisdiction Case (United Kingdom of Great Britain and Northern Ireland v. Iceland)*, 1974 ICJ Reports, p. 9, para. 17))

Appellate Body Report, *EC – Tariff Preferences*, para. 105 fn 220.

⁵⁸⁹⁹ According to the Appellate Body, these provisions "bring the legal history and experience under the GATT 1947 into the new realm of the WTO in a way that ensures continuity and consistency in a smooth transition from the GATT 1947 system"; and "[t]his affirms the importance to the Members of the WTO of the experience acquired by the CONTRACTING PARTIES to the GATT 1947 – and acknowledges the continuing relevance of that experience to the new trading system served by the WTO." Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 13, DSR 1996:I, 97, p. 108. See also Appellate Body Report, *US – FSC*, paras. 108-109.

⁵⁹⁰⁰ Under Article 1(b)(iv) of the GATT 1994, the GATT 1994 "shall consist of" *inter alia*: "(b) the provisions of the legal instruments set forth below that have entered into force under the GATT 1947 before the date of entry into force of the WTO Agreement: ... (iv) other decisions of the CONTRACTING PARTIES to GATT 1947". Although the 1958 GATT Decision constitutes a decision of the CONTRACTING PARTIES, not all such decisions are covered by paragraph 1(b)(iv) of the GATT 1994. As explained in a previous dispute, "in order for a decision of the CONTRACTING PARTIES to GATT 1947 to be a part of GATT 1994 within the meaning of paragraph 1(b)(iv), it must be a legal instrument within the meaning of the chapeau to paragraph 1, i.e., it must be a formal legal text which represented a legally binding determination in respect of the rights and/or obligations generally applicable to all contracting parties to GATT 1947". Panel Report, *US – FSC*, para. 7.63. This was upheld on appeal. See Appellate Body Report, *US – FSC*, paras. 78 and 108-114. We do not consider the 1958 GATT Decision to fall into this category. The 1958 GATT Decision contains rules that the CONTRACTING PARTIES merely "RECOMMEND the adoption of". 1958 GATT Decision, (Exhibit AUS-294), p. 2. Also, the recommended rules, including the points referenced by Australia, repeatedly use "should" – rather than the type of "mandatory language which usually characterizes binding legal instruments". Panel Report, *US – FSC*, para. 7.65. Accordingly, we do not consider the 1958 GATT Decision to be part of the GATT 1994 by virtue of the latter's paragraph 1(b)(iv).

⁵⁹⁰¹ Pursuant to Article XVI:1 of the WTO Agreement, "[e]xcept as otherwise provided under th[e WTO] Agreement or the Multilateral Trade Agreements [contained in Annexes 1-3 to the WTO Agreement], the WTO shall be guided by the decisions, procedures and customary practices followed by the CONTRACTING PARTIES to GATT 1947 and the bodies established in the framework of GATT 1947."

⁵⁹⁰² As the Appellate Body indicated, the assessment does not end with finding that a specific decision may constitute guidance within the sense of Article XVI:1 of the WTO Agreement. In addition, the meaning of such guidance and its substantive relevance for the specific legal question and the specific provision of the covered agreement at issue also need to be ascertained. See Appellate Body Report, *US – FSC*, paras. 115-119.

⁵⁹⁰³ Panel Report, *US – FSC*, para. 7.78 (footnotes omitted). The consideration that "adopted panel reports should be taken into account 'where they are relevant to a dispute' ... applies equally to any other decision, procedure or customary practice of the CONTRACTING PARTIES to GATT 1947". Panel Report, *US –*

7.3011. One category of GATT instruments covered by Article XVI:1 is "decisions" of the CONTRACTING PARTIES. The 1958 GATT Decision was adopted by the CONTRACTING PARTIES on 21 November 1958.⁵⁹⁰⁴ The second recital of the Recommendation on Marks of Origin contained in this Decision states that the Recommendation's purpose is to "facilitate the attainment of the objectives of the General Agreement"⁵⁹⁰⁵, thus linking the purpose of this Decision, and the Recommendation on Marks of Origin it contains, to the attainment of the objectives of the GATT.

7.3012. The first recital of the Recommendation on Marks of Origin notes that "in Article IX of GATT the contracting parties recognize that, in adopting and enforcing laws and regulations relating to Marks of Origin, the difficulties and inconveniences which such measures may cause to the commerce and industry of exporting countries should be reduced to a minimum and that they have agreed on certain basic principles for the carrying out of this idea".⁵⁹⁰⁶ The language of this recital is thus similar to the text of paragraph 2 of Article IX⁵⁹⁰⁷. The final phrase of the same recital ("and ... certain basic principles for the carrying out of this idea") references other paragraphs of Article IX, including paragraph 4. Indeed, in light of the linkages between the objectives of these two provisions⁵⁹⁰⁸, we read Article IX:4 as laying down one of a number of specific disciplines contained in Article IX for reducing to a minimum the difficulties and inconveniences that laws and regulations relating to marks of origin may cause to the commerce and industry of exporting countries.

7.3013. The structure of the operative part of the Recommendation confirms that its main purpose, and thus of Article IX:4 with which it is intrinsically linked, is to address certain negative effects on international trade that may result from Members' laws and regulations requiring the marking of imported products. Points 1-4 of the Recommendation on Marks of Origin limit the situations and ways in which origin marks would be required⁵⁹⁰⁹, whereas points 5-6 of the Recommendation on Marks of Origin elaborate on the kind of marking that should be "sufficient" for the purposes of point 4.⁵⁹¹⁰ Further points of the of the Recommendation on Marks of Origin

FSC, para. 7.78 (footnotes omitted). See also Appellate Body Reports, *US – FSC*, paras. 79, 104 and 115; and *EC – Poultry*, para. 80.

⁵⁹⁰⁴ 1958 GATT Decision, (Exhibit AUS-294), title. As explained in a previous dispute, "Article XVI:1 of the WTO Agreement on its face is not limited to decisions in the form of 'legal instruments', but rather applies to all decisions by the CONTRACTING PARTIES to GATT 1947 ... as well as to procedures and customary practices of the CONTRACTING PARTIES". Panel Report, *US – FSC*, para. 7.77 (footnote omitted). See also *ibid.* para. 7.65.

⁵⁹⁰⁵ 1958 GATT Decision, (Exhibit AUS-294), p. 2.

⁵⁹⁰⁶ 1958 GATT Decision, (Exhibit AUS-294), p. 2.

⁵⁹⁰⁷ Article IX:2 provides that "[t]he Members recognize that, in adopting and enforcing laws and regulations relating to marks of origin, the difficulties and inconveniences which such measures may cause to the commerce and industry of exporting countries should be reduced to a minimum, due regard being had to the necessity of protecting consumers against fraudulent or misleading indications." See fn 5806 above.

⁵⁹⁰⁸ See para. 7.3002 above.

⁵⁹⁰⁹ According to points 1-4 of the Recommendation on Marks of Origin:

1. Countries should scrutinize carefully their existing laws and regulations with a view to reducing as far as they possibly can the number of cases in which marks of origin are *required*, and to limit the requirements of marks of origin to cases where such marks are indispensable for the information of the ultimate purchaser.
2. The requirement of marks of origin should not be applied in a way which leads to a general application to all imported goods, but should be limited to cases where such a marking is considered necessary.
3. If marks of origin are *required*, any method of legible and conspicuous marking should be accepted which will remain on the article until it reaches the ultimate purchaser.
4. The national provisions concerning marks of origin *should not contain any other obligation than the obligation to indicate the origin of the imported product*.

1958 GATT Decision, (Exhibit AUS-294), p. 2. (emphasis added)

⁵⁹¹⁰ According to points 5-6 of the Recommendation on Marks of Origin:

5. Countries should accept as a satisfactory marking the indication of the name of the country of origin in the English language introduced by the words "made in".
6. Commonly-used abbreviations, which unmistakably indicate the country of origin, such as UK and USA, should be considered a satisfactory replacement for the full name of the country concerned.

1958 GATT Decision, (Exhibit AUS-294), p. 3.

contained in the 1958 GATT Decision provide additional expressions of the aforementioned purpose of Article IX:4.⁵⁹¹¹

7.3014. The Recommendation on Marks of Origin contained in the 1958 GATT Decision thus reflects the concern that any burden or nuisance arising for exporters from their compliance with laws and regulations relating to marks of origin should be limited to a minimum. As relevant guidance for the WTO, this confirms that the purpose of Article IX:4 is to prevent excessive burdens arising from compliance with marks of origin requirements adopted by a Member, that could jeopardize exporters' interests in marketing their goods in that Member's territory.

7.4.3.3.1.3 Negotiating history

7.3015. This interpretation is further confirmed by the negotiating history of Article IX:4.⁵⁹¹² Australia refers in this regard to a summary of the history of Article IX prepared by the GATT Secretariat in 1956, according to which mark of origin requirements had been originally imposed by countries "to protect the domestic producer by branding the foreign product as foreign".⁵⁹¹³ Further, Australia invokes the report of the Economic Committee of the League of Nations, upon which Article 37 of the Havana Charter for an International Trade Organization (Havana Charter), the predecessor to Article IX of the GATT 1947, was based.⁵⁹¹⁴

7.3016. The first of these documents is a summary of the history of Article IX, prepared by the GATT Secretariat in 1956 (1956 GATT Secretariat Note).⁵⁹¹⁵ At the outset, this Note identifies the root of the marks of origin "problem", that later gave rise to Article IX:

⁵⁹¹¹ For instance, the introduction to the 1958 GATT Decision adds that "the recommendation that national provisions concerning marks of origin should not contain any other obligation than the obligation to indicate the origin of the imported product (point 4 of the Recommendation) has to be interpreted so as to invite countries to keep such requirements separate from requirements introduced for other purposes, e.g. to protect the health of the population, etc." 1958 GATT Decision, (Exhibit AUS-294), p. 1. In turn, points 7-12 of the Recommendation on Marks of Origin specify exemptions from product marking requirements, such as: marking the container (as opposed to marking the product) (*ibid.* p. 3, points 7-8); imports for non-commercial personal use (*ibid.* p. 3, point 9); original "objets d'art" (*ibid.* p. 3, point 10); and goods in transit and goods while in bond or otherwise under customs control (*ibid.* p. 3, point 11). Point 12 of the Recommendation on Marks of Origin allows for further flexibility by suggesting that "in exceptional cases the application of a mark of origin should be permitted under customs supervision in the importing country". *Ibid.* p. 3. In turn, point 14 limits penalties to the situations foreseen in paragraph 5 of Article IX, including when "the required marking has been intentionally omitted", whereas point 13 introduces additional flexibility by carving out "[t]he re-exportation of products which cannot be marked under customs supervision" from situations subject to penalties. *Ibid.* p. 3. Further, point 15 sets forth a transparency requirement "[w]hen a government introduces a system of marking, or makes it compulsory for a new product", and point 16 foresees the possibility of recourse to dispute settlement under Article XXII of the GATT "with a view to the possible removal of the difficulties encountered" "when an importing country is not in a position to comply with any one of the above recommendations". *Ibid.* p. 4.

⁵⁹¹² Article 32 of the Vienna Convention provides that "[r]ecourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) Leaves the meaning ambiguous or obscure; or (b) Leads to a result which is manifestly absurd or unreasonable." The Appellate Body has held that, similar to the general rule of treaty interpretation as set out in Article 31 of the Vienna Convention, the supplementary means of treaty interpretation as set out in Article 32 of the same Convention "ha[ve] attained the status of a rule of customary or general international law" in the sense of Article 3.2 of the DSU. Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 10, DSR 1996:I, 97, p. 104 (quoting Appellate Body Report, *US – Gasoline*, p. 17, DSR 1996:I, p. 3). The Appellate Body has had recourse to supplementary means of treaty interpretation to confirm a certain interpretation reached in accordance with the general rule of treaty interpretation, whilst explicitly recognizing that this was not "strictly necessary". See, e.g. Appellate Body Report, *US – Carbon Steel*, paras. 89-90.

⁵⁹¹³ GATT Secretariat, Marks of Origin: Note by the GATT Secretariat Concerning the ICC Proposal, GATT document L/556, (1956 GATT Secretariat Note), (Exhibit AUS-295), p. 1.

⁵⁹¹⁴ League of Nations Economic Committee, Report to the Council on the Work of the Thirty-Fifth Session, held at Geneva from 18 to 22 June 1931, League of Nations document C.427.M.177.1931.II.B (24 June 1931), (1931 League of Nations Report), (Exhibit AUS-296).

⁵⁹¹⁵ 1956 GATT Secretariat Note, (Exhibit AUS-295). We address the 1956 GATT Secretariat Note not as negotiating history *per se* but as an indication of the negotiating history of Article IX of the GATT 1994. As

The requirement of marks of origin to protect the domestic producer by branding the foreign product as foreign became a problem after the First World War. In May 1927 the International Economic Conference took up this question and tried to discredit marking requirements which had a protective effect through being difficult or impossible of compliance.

...

The League of Nations did not succeed in arriving at a definite recommendation. And its Economic Committee, reporting in 1931, had to be content with "hearing the experts" and presenting "an account of their discussions, together with the conclusions to be drawn from them". This report, however, contained an almost complete enumeration of the problems involved.

The ... draft charter of 1946 for an international trade organization included an article on "marks of origin" based on the main principles brought out by the League's experts in 1931. This article was taken over in GATT with slight changes... and thus became Article IX which contains the existing obligations of the contracting parties.⁵⁹¹⁶

7.3017. The 1956 GATT Secretariat Note adds that "Article IX contains most of the principles suggested by the League Committee in 1931, namely: ... [t]he recommendation providing for a marking requirement which avoids 'seriously damaging the product or materially reducing its value or unreasonably increasing its cost'".⁵⁹¹⁷

7.3018. The second document invoked by Australia is the 1931 Report of the League of Nations Economic Committee (1931 League of Nations Report) referred to in the passage cited above. It notes that:

It appears impossible to refuse States the right to take measures to enable the consumer to distinguish home from foreign merchandise, but the means to be employed by States for this purpose should be such as to reduce to a minimum the difficulties and inconvenience which the regulations may cause to the commerce and industry of exporting countries.⁵⁹¹⁸

7.3019. The 1931 League of Nations Report also records that "[t]he remarks of the experts convinced [the Economic Committee] of the importance of the question of marks of origin" as "[t]hey revealed that the complaints arising out of [domestic] legislation on this subject and the application of its provisions are becoming more frequent and more numerous", and domestic "legislation on marks of origin is tending to become more severe".⁵⁹¹⁹

7.3020. This negotiating history confirms that the object of Article IX, of which Article IX:4 is a part, is generally to address, and minimize, the inconveniences and burdens that may arise from compliance with laws and regulations relating to origin marking. Specifically, the purpose of Article IX:4 is to prevent exporters' interests in marketing their goods in an importing Member's territory from being jeopardized by excessively cumbersome or costly marks of origin requirements adopted by such Member.

7.3021. In light of the text, context, object and purpose of Article IX:4, and taking into account the guidance provided by the 1958 GATT Decision of the CONTRACTING PARTIES on Marks of

Australia explained, it submitted the 1956 GATT Secretariat Note as a "convenient summary of the history leading up to the inclusion of Article IX in the GATT 1947". Australia's response to Panel question No. 84.

⁵⁹¹⁶ 1956 GATT Secretariat Note, (Exhibit AUS-295), paras. 3, 5 and 6. In fact, Article IX:4 is identical to Article 37.4 of the Havana Charter. Under Article 37.4 of the Havana Charter, "[t]he laws and regulations of Members relating to the marking of imported products shall be such as to permit compliance without seriously damaging the products or materially reducing their value or unreasonably increasing their cost."

⁵⁹¹⁷ 1956 GATT Secretariat Note, (Exhibit AUS-295), para. 7.

⁵⁹¹⁸ 1931 League of Nations Report, (Exhibit AUS-296), Appendix III (Report on Marks of Origin), Section III (Rights of States).

⁵⁹¹⁹ 1931 League of Nations Report, (Exhibit AUS-296), Appendix III (Report on Marks of Origin), Section VI (Tendency to Increase the Severity of Legislation concerning Marks of Origin).

Origin and the negotiating history of Article IX, we conclude that the phrase "[t]he laws and regulations of Members relating to the marking of imported products" does not encompass all laws and regulations relating to the marking of imported products generally but rather covers those setting out the conditions for complying with requirements for "marks of origin", i.e. signs, tokens, devices, stamps, brands, labels or inscriptions on products identifying where such products originate.

7.4.3.3.2 Whether the TPP measures, insofar as they restrict the use of the Habanos sign and Cuban Government Warranty Seal, constitute "laws and regulations ... relating to the marking of imported products"

7.3022. Having clarified the meaning of the phrase "[t]he laws and regulations of Members relating to the marking of imported products" under Article IX:4, we address whether the TPP measures, and specifically the aspects identified by Cuba, i.e. the restrictions imposed through the TPP measures on the use of the Habanos sign and the Cuban Government Warranty Seal, fall within this scope.

7.3023. Cuba argues that the TPP measures, "insofar as they limit the use of the Habanos GI (and geographical indications more generally)", are measures that affect "marks" and, by extension, the "marking" of tobacco products.⁵⁹²⁰ Further, Cuba argues that tobacco products produced in Australia are not associated with any GIs, thus the restraints imposed by Australia on the display of GIs on tobacco product packaging can only apply to imported products. Accordingly, Cuba maintains, Australia's prohibition on the display on GIs is a measure which relates exclusively to the marking of "imported products" and, therefore, falls within the scope of Article IX:4 of the GATT 1994.⁵⁹²¹

7.3024. Australia considers Cuba's claim under Article IX:4 to be "without merit"⁵⁹²², in particular because Cuba has failed to demonstrate that origin marking refers to "something narrower" than the country of origin, such as the "factory or region of origin".⁵⁹²³ Second, according to Australia, Cuba has failed to show that Article IX applies to prohibitions on the use of marks of origin, and not just to requirements to affix such marks on imported products.⁵⁹²⁴ Australia adds that Cuba does not explain why the Cuban Government Warranty Seal falls within the disciplines of Article IX:4, apart from stating that the seal contains "indirect GIs" ("*indicaciones geográficas indirectas*") in the form of images of the Cuban coat of arms, Cuban tobacco fields and the national tree of Cuba, the royal palm.⁵⁹²⁵

7.3025. We have found that the TPP measures limit the use of the Habanos sign and of the Cuban Government Warranty Seal, in that they prevent the use of any non-word component of these signs and regulate the manner in which words that are part of a brand name or are otherwise permitted or required by separate legislation, may appear on tobacco products and their retail packaging.⁵⁹²⁶

7.3026. In light of its text, context, object and purpose, as confirmed also by its negotiating history, we have concluded that the phrase "[t]he laws and regulations of Members relating to the marking of imported products" is limited to laws and regulations setting out requirements for "marks of origin", i.e. signs, tokens, devices, stamps, brands, labels or inscriptions on products identifying where such products originate. We understand, therefore, that the obligation expressed in Article IX:4 focuses on compliance with laws and regulations establishing an obligation to affix marks of origin. However, this does not imply that aspects of other laws and regulations could not fall under the obligation of Article IX:4 insofar as they prescribe requirements that must be complied with for the marking of imported products, e.g. in what form marks of origin should appear. In these proceedings, Cuba's claim under Article IX:4 of the GATT 1994 is based exclusively on the argument that, as a result of the TPP measures, Cuban cigar exporters cannot

⁵⁹²⁰ Cuba's first written submission, para. 420.

⁵⁹²¹ Cuba's first written submission, para. 421.

⁵⁹²² Australia's second written submission, para. 573.

⁵⁹²³ Australia's first written submission, paras. 750-752.

⁵⁹²⁴ Australia's first written submission, paras. 745-749.

⁵⁹²⁵ Australia's comments on Cuba's responses to Panel question Nos. 187-191 and 193.

⁵⁹²⁶ See section 7.4.3.2 above.

use the Habanos sign or affix the Cuban Government Warranty Seal on their cigar boxes sold in Australia. We do not agree with Cuba that these elements of the TPP measures, that lay down limitations for market operators' use of certain signs, constitute requirements for the marking of imported products of the type covered by Article IX:4.

7.3027. As described, we understand Article IX:4 as laying down one of a number of specific disciplines on Members, contained in Article IX of the GATT 1994, for reducing to a minimum the difficulties and inconveniences that laws and regulations relating to marks of origin may cause to the commerce and industry of exporting countries.⁵⁹²⁷ Further, we have found that the phrase "shall be such as to permit compliance without", and in particular the words "permit compliance", suggest that the purpose of Article IX:4 is not to discipline whether or to what extent Members may require marks of origin but to discipline *how* compliance with origin marking requirements may be prescribed.⁵⁹²⁸ Specifically, as described above, Article IX:4 serves to prevent exporters' interests in marketing their goods in an importing Member's territory from being jeopardized by excessively cumbersome or costly marks of origin requirements applied to such products. According to the Appellate Body, Article IX:4 "call[s] for a limitation of the impact of the use of marks of origin."⁵⁹²⁹ As we understand it, therefore, Article IX:4 of the GATT 1994 does not serve to address a limitation imposed *on* the use of marks of origin.

7.3028. In the present case, while the TPP measures allow the indication of the country of origin on tobacco products, in accordance with separate Australian legislation requiring such origin marking on imported products, we are not persuaded that the limitations they impose on the use of the Habanos sign and the Cuban Government Warranty Seal constitute "laws and regulations relating to the marking of imported products" within the meaning of Article IX:4. Accordingly, we conclude that the TPP measures, insofar as they restrict the ways in which exporters may use the signs identified by Cuba, do not constitute "laws and regulations" of the type covered by Article IX:4, and are therefore not within the scope of this provision.

7.3029. In light of this finding, we need not consider Cuba's argument that the restraints imposed by Australia on the display of GIs on tobacco product packaging only apply to imported products because tobacco products produced in Australia are not associated with any GIs. We merely note that the TPP measures apply without distinction to domestic and imported products. We also refrain from addressing how GIs relate to marks of origin within the meaning of Article IX⁵⁹³⁰ and whether the composite form of the Habanos sign or the Cuban Government Warranty Seal amount to GIs. For the same reasons, we need not explore further Australia's argument that Article IX:4 covers only marks of origin "requirements" (as opposed to prohibitions of marks of origin)⁵⁹³¹, or whether Article IX:4 applies only to "country of origin" markings and not to "something narrower", such as the "factory or region of origin".⁵⁹³²

7.3030. In light of our determination that the TPP measures, insofar as they restrict the ways in which exporters may use the Habanos sign and the Cuban Government Warranty Seal, do not constitute "laws and regulations relating to the marking of imported products" covered by Article IX:4, we need not consider further whether the value of Cuban LHM cigars has been "materially reduced" as a result of compliance with these requirements.⁵⁹³³ In any event, as

⁵⁹²⁷ See para. 7.3020 above.

⁵⁹²⁸ See paras. 7.3000 and 7.3003 above.

⁵⁹²⁹ Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.356. (emphasis added)

⁵⁹³⁰ We note that the term "geographical indications" has a specific meaning under Article 22.1 of the TRIPS Agreement. Article 22.1 of the TRIPS Agreement provides that "[g]eographical indications are, for the purposes of this Agreement, indications which identify a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin." We have found that the TPP measures, insofar as they restrict the ways in which exporters may use the signs identified by Cuba, do not constitute "laws and regulations" of the type covered by Article IX:4, and are therefore not within the scope of this provision. Accordingly, we do not find it necessary to explore how this definition relates, as a general matter, to marks of origin and the scope of Article IX:4 of the GATT 1994.

⁵⁹³¹ Australia's first written submission, para. 745.

⁵⁹³² Australia's comments on Cuba's responses to Panel question Nos. 187-191 and 193.

⁵⁹³³ Given our conclusion that the TPP measures, insofar as they restrict the ways in which exporters may use the Habanos sign and the Cuban Government Warranty Seal, do not constitute "laws and regulations" of the type covered by Article IX:4, we do not address Australia's argument that Cuba does not explain why

explained in the next section, even assuming that relevant aspects of the TPP measures were to be considered to fall within the scope of Article IX:4, we are not convinced that Cuba has shown that the TPP measures are such as to not permit compliance with them without materially reducing the value of Cuban LHM cigars. We now turn to this point.

7.4.3.4 Whether the TPP measures are "such as to permit compliance without materially reducing the value" of Cuban LHM cigars

7.3031. Article IX:4 provides that "[t]he laws and regulations of Members relating to the marking of imported products shall be such as to permit compliance without seriously damaging the products, or materially reducing their value, or unreasonably increasing their cost."⁵⁹³⁴ Article IX:4 thus identifies three types of impacts of laws and regulations relating to the marking of imported products that must not arise from compliance with such laws and regulations. Cuba's claim is based on the second of these, i.e. the requirement that compliance be permitted without "materially reducing the value" of imported products.

7.3032. Cuba argues that the TPP measures materially reduce the value of Cuban LHM cigars in two ways. First, Cuba argues that the prohibition on affixing the Habanos sign and the Cuban Government Warranty Seal on tobacco products and packaging strip Cuban LHM cigars from the added value that GIs command, by limiting the ability of exporters to charge a price premium for Cuban LHM cigars.⁵⁹³⁵ Second, Cuba argues that Australia's prohibition on the display of the Habanos sign and the Cuban Government Warranty Seal inevitably gives rise to consumer uncertainty about the authenticity of the products that they are purchasing.⁵⁹³⁶ According to Cuba, this will constrain the ability of Cuban exporters to charge premium prices for Cuban LHM cigars.⁵⁹³⁷

7.3033. Both of these arguments are predicated on a certain understanding of the term "materially reducing the[] value [of imported products]" in Article IX:4 of the GATT 1994. We, therefore, first explore the meaning of this term to identify the type of situations Article IX:4 of the GATT 1994 serves to prevent.

the Cuban Government Warranty Seal falls within the disciplines of Article IX:4, apart from stating that the seal contains "indirect GIs" ("*indicaciones geográficas indirectas*") in the form of images of the Cuban coat of arms, Cuban tobacco fields and the national tree of Cuba, the royal palm. Australia's comments on Cuba's responses to Panel question Nos. 187-191 and 193.

⁵⁹³⁴ Pursuant to paragraph 1(a) of the GATT 1994:

The General Agreement on Tariffs and Trade 1994 ("GATT 1994") shall consist of: (a) the provisions in the General Agreement on Tariffs and Trade, dated 30 October 1947, annexed to the Final Act Adopted at the Conclusion of the Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment (excluding the Protocol of Provisional Application), as rectified, amended or modified by the terms of legal instruments which have entered into force before the date of entry into force of the WTO Agreement.

Further, paragraph 2(a) of the GATT 1994 includes the following Explanatory Note: "The references to 'contracting party' in the provisions of GATT 1994 shall be deemed to read 'Member'."

⁵⁹³⁵ Cuba's first written submission, paras. 422-424. See also Cuba's response to Panel question No. 79 (annexed to its response to Panel question No. 138). Cuba explains that the primary rationale for investing in a geographical indication scheme is to realise higher value from consumers. According to Cuba, by the same token, a prohibition on the display of an existing geographical indication limits the ability of exporters to charge a price premium and is likely to reduce the value of affected products (compared to what they would otherwise be). Cuba's first written submission, para. 423. According to Cuba, a prohibition on the display of an existing geographical indication, such as "Habanos", limits the ability of exporters to charge a price premium and is therefore likely to materially reduce the value of affected products. Cuba's response to Panel question No. 137 (referring to Cuba's first written submission, paras. 423 and 425). Likewise, Cuba argues that by distorting Cuban intellectual property (in particular, the Cuban Class 34 Trademarks, the Habanos GI and the Cuban Government Guarantee Seal), Australia's measures will affect the Cuban industry's ability to charge a premium. Cuba's first written submission, para. 24. See also Cuba's response to Panel question No. 191.

⁵⁹³⁶ Cuba's first written submission, para. 425. See also Cuba's responses to Panel question Nos. 79 and 191.

⁵⁹³⁷ Cuba's first written submission, para. 425. See also Cuba's responses to Panel question Nos. 79 and 191.

7.4.3.4.1 The meaning of the term "materially reducing the[] value [of imported products]"

7.3034. Article IX:4 of the GATT 1994 requires that laws and regulations relating to the marking of imported products permit compliance without "materially reducing their value". We shall interpret this term in accordance with the applicable customary rules of interpretation, taking into account, as relevant, the guidance provided by the 1958 GATT Decision.

7.3035. The verb "reduce" is defined as "[t]o contract, condense; to make smaller, diminish" and "[t]o bring down or diminish to ... a smaller number, amount, quantity, extent, etc., or to a single thing; ... to bring down to a simpler form."⁵⁹³⁸ Dictionary definitions of the noun "value" include: "[w]orth or quality as measured by a standard of equivalence" and "[t]he material or monetary worth of something; the amount at which something may be estimated in terms of a medium of exchange, as money or goods, or some other similar standard."⁵⁹³⁹

7.3036. Importantly, Article IX:4 qualifies the term "reducing the[] value [of imported products]" by using the word "materially". We therefore need to give meaning and effect to this word.⁵⁹⁴⁰ According to Cuba, the term "materially" in Article IX:4 must be understood in its ordinary meaning, i.e. "in a significant way".⁵⁹⁴¹ According to Australia, the term "materially" means "substantially, considerably".⁵⁹⁴² Dictionary definitions of "materially" include: "[t]o a material or important extent; significantly, substantially, considerably", "[b]y, with, or in respect of matter or physical substance; physically", and "[w]ith regard to the matter or the material aspect of something, as opposed to the form or formal aspect".⁵⁹⁴³ The ordinary meaning of the term "material" as used in Article 12.2 of the Anti-Dumping Agreement was established as: "important, essential, relevant".⁵⁹⁴⁴

7.3037. Therefore, we consider that a "material" reduction in value is an important and relevant reduction; in other words, a reduction that is significant and substantial. We agree with Australia⁵⁹⁴⁵ that the other adverbs in Article IX:4 ("without seriously damaging the products ... or unreasonably increasing their costs") also indicate that Article IX:4 tolerates certain negative consequences of laws and regulations relating to the marking of imported products, and serves to prevent such consequences only insofar as they reach a certain "material" degree.

7.3038. We also note, as context, the phrase "permit compliance" in Article IX:4. In balancing the legitimacy of providing origin information to consumers through mark of origin requirements, on the one hand, with the need to limit the impact that the use of marks of origin has on exporters, on the other hand⁵⁹⁴⁶, we have found this phrase to suggest that the purpose of Article IX:4 is not to discipline whether Members may regulate marks of origin but to discipline *how* compliance with laws and regulations relating to origin marking may be prescribed. Taking guidance from the

⁵⁹³⁸ Oxford English Dictionary online, definition of "reduce, v.", available at: <<http://www.oed.com/view/Entry/160503?rskey=VWcAPS&result=2#eid>>, accessed 2 May 2017. (emphasis omitted)

⁵⁹³⁹ Oxford English Dictionary online, definition of "value, n.", available at: <<http://www.oed.com/view/Entry/221253?rskey=JLphH1&result=1&isAdvanced=false#eid>>, accessed 2 May 2017. Likewise, an earlier dispute considered the following dictionary definitions of the noun "value": "The term 'value' ... is defined in the *Oxford English Dictionary* as '[t]hat amount of a commodity, medium of exchange, etc., considered to be an equivalent for something else' and the term 'value' is defined in the *Black's Law Dictionary* as '[t]he monetary worth or price of something; the amount of goods, services or money that something will command in an exchange'." Panel Report, *Colombia – Ports of Entry*, para. 7.82 (footnotes omitted).

⁵⁹⁴⁰ As described by the Appellate Body, "[o]ne of the corollaries of the 'general rule of interpretation' in the *Vienna Convention* is that interpretation must give meaning and effect to all terms of a treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility." Appellate Body Report, *US – Gasoline*, p. 23, DSR 1996:I, 3, p. 21 (footnote omitted). See also Appellate Body Report, *Canada – Dairy*, para. 135.

⁵⁹⁴¹ Cuba's response to Panel question No. 137.

⁵⁹⁴² Australia's response to Panel question No. 137.

⁵⁹⁴³ Oxford English Dictionary online, definition of "materially, adj.", available at: <<http://www.oed.com/view/Entry/114931?redirectedFrom=materially#eid>>, accessed 2 May 2017.

⁵⁹⁴⁴ Panel Report, *EC – Tube or Pipe Fittings*, para. 7.423.

⁵⁹⁴⁵ Australia's response to Panel question No. 137.

⁵⁹⁴⁶ Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.356.

Recommendation on Marks of Origin contained in the 1958 GATT Decision, which seeks to limit any nuisance arising for exporters from their compliance with laws and regulations relating to marks of origin to a minimum⁵⁹⁴⁷, we found that the purpose of Article IX:4 is to prevent exporters' interests in marketing their products in an importing Member's territory from being jeopardized by any excessive burden or cost arising from compliance with marks of origin requirements adopted by such Member.⁵⁹⁴⁸

7.3039. In our view, this object and purpose of Article IX:4 also provides guidance as to what may constitute a material reduction in the value of imported products and, therefore, a breach of Article IX:4 of the GATT 1994. As noted, the Appellate Body linked the objectives of Article IX:4 and Article IX:2, and understood these two provisions as serving to limit the impact that the use of marks of origin may have on exporters:

We note that Article IX:2 calls for a *reduction* of difficulties and inconveniences that laws and regulations relating to marks of origin may cause to exporters. Furthermore, Article IX:4 requires that compliance with such laws and regulations should be possible without materially reducing the value of the products, or unnecessarily increasing the cost of the products. Hence, these provisions call for a limitation of the impact of the use of marks of origin.⁵⁹⁴⁹

7.3040. We noted that the Appellate Body described the objective of Article IX:4 in that it "call[s] for a limitation of the impact of the use of marks of origin"⁵⁹⁵⁰ and, therefore, does not serve to address, or call for, a limitation of any impact *on* the use of marks of origin.⁵⁹⁵¹ Against this background we have concluded that the TPP measures, insofar as they restrict the ways in which exporters may use the signs identified by Cuba, are not within the scope of Article IX:4. In our view, this purpose also informs our interpretation of what constitutes a material reduction in the value of imported products. Since Article IX:4 of the GATT 1994 does not protect the use of origin-related signs on products *per se*, it also does not protect the added value or price premium that the use of such origin-related signs may accord to imported products, or the ensuing private interest to affix such signs on imported products. In light of the primary purpose of Article IX:4 to limit any nuisance arising for exporters from their compliance with mark of origin requirements, this provision, in our view, cannot at the same time be read to safeguard any value that private parties might derive from the use of marks of origin or other origin-related signs themselves.

7.3041. In light of the above, we thus understand that Article IX:4 does not protect against any reduction in the value of imported products, but only against a material reduction in value, i.e. a reduction in value above a certain "material" degree.⁵⁹⁵² Further, in protecting against such a material reduction in value caused by compliance with Members' marking requirements, Article IX:4 of the GATT 1994 is not concerned with safeguarding any added value or price premium that the use of such origin-related signs may accord to imported products.

7.3042. In light of the above considerations, we conclude that the phrase "materially reducing the[] value [of imported products]" in Article IX:4 of the GATT 1994 does not cover, or protect against, the type of situation argued by Cuba in the context of its Article IX:4 claim. We therefore find that Cuba has not demonstrated that the value of Cuban LHM cigars has been materially

⁵⁹⁴⁷ See section 7.4.3.3.1.2 above.

⁵⁹⁴⁸ See para. 7.3014 above.

⁵⁹⁴⁹ Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.356.

(emphasis original; underlining added)

⁵⁹⁵⁰ Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.356.

(emphasis added)

⁵⁹⁵¹ In making this finding, we reiterate that we do not address whether the Habanos sign and the Cuban Government Warranty Seal amount to marks of origin within the meaning of Article IX:4 of the GATT 1994.

⁵⁹⁵² Cuba argues that the term "material" does not imply a higher evidentiary threshold, as the burden of proof to prove a material reduction of the value of imported products continues to rest on the complainant. Cuba's response to Panel question No. 191. We agree with Cuba that the standard allocation of burden of proof is not affected by the term "materially" in Article IX:4; a violation of this provision needs to be demonstrated by the complainant. At the same time, to do so, the complainant will have to show more than just any reduction in value; it has to show that the value of imported products is being "materially" reduced in the sense explained above.

reduced in the sense of Article IX:4 of the GATT 1994 by virtue of the limitations on affixing the Habanos sign or the Cuban Government Warranty Seal on Cuban LHM cigars.

7.3043. Having made this finding, we nonetheless find it appropriate to consider the evidence submitted by Cuba in regard to each of the two lines of its argument that the value of Cuban LHM cigars has been materially reduced as a result of the TPP measures, namely, first, that Cuban LHM cigars are stripped from the added value that GIs command and, second, that the TPP measures create consumer uncertainty about the authenticity of Cuban LHM cigars.

7.4.3.4.2 Whether Cuban LHM cigars are stripped from added value, thus leading to a material reduction of their value in the sense of Article IX:4

7.3044. As explained, Cuba argues that the prohibition on affixing the Habanos sign and the Cuban Government Warranty Seal on tobacco products and packaging will strip Cuban LHM cigars from the added value that GIs command by limiting the ability of exporters to charge a price premium for Cuban LHM cigars.⁵⁹⁵³ According to Cuba, this will "materially reduce" the value of Cuban LHM cigars within the meaning of Article IX:4 of the GATT 1994.⁵⁹⁵⁴

7.3045. Cuba submits four pieces of evidence to demonstrate such a material reduction in value. Three of these are documents relating generally to the added value provided by GIs: a scientific meta-analysis of GI food valuation studies addressing what drives the premium for origin-based labels (Deselnicu et al. Meta-Analysis)⁵⁹⁵⁵, an extract from a book on the law of GIs (Gangjee Book)⁵⁹⁵⁶, and a guide published by the FAO concerning the promotion of quality linked to geographical origin and sustainable GIs (FAO Guide).⁵⁹⁵⁷ Cuba argues that these three documents endorse "[t]he assumption that geographical indications are, as a general matter, associated with price premiums".⁵⁹⁵⁸ As the fourth piece of evidence, Cuba submits a 2012 study commissioned by the European Union (2012 EU GI Study)⁵⁹⁵⁹ concluding that GIs confer a value premium rate of 2.23.⁵⁹⁶⁰ According to Cuba, this 2012 EU GI Study shows that the use of a GI is associated with a price increase of 223% for food and agricultural products in the European Union.⁵⁹⁶¹

7.3046. Before examining this evidence, we note that Cuba's argument is predicated on the assertion that the TPP measures prohibit the use of Habanos sign and the Cuban Government Warranty Seal. We have, however, found that the TPP measures neither terminate the pre-existing, separate requirement to show the name of the country in which the product was made or produced (e.g. "Made in Cuba"), nor require or prohibit all aspects of what Cuba describes as the Habanos GI, or of the Cuban Government Warranty Seal. Specifically, we recall our earlier

⁵⁹⁵³ Cuba's first written submission, paras. 422-424. See also Cuba's response to Panel question No. 79 (annexed to its response to Panel question No. 138). Cuba explains that the primary rationale for investing in a geographical indication scheme is to realise higher value from consumers. According to Cuba, by the same token, a prohibition on the display of an existing geographical indication limits the ability of exporters to charge a price premium and is likely to reduce the value of affected products (compared to what they would otherwise be). Cuba's first written submission, para. 423. According to Cuba, a prohibition on the display of an existing geographical indication, such as "Habanos", limits the ability of exporters to charge a price premium and is therefore likely to materially reduce the value of affected products. Cuba's response to Panel question No. 137 (referring to Cuba's first written submission, paras. 423 and 425). Likewise, Cuba argues that by distorting Cuban intellectual property (in particular, the Cuban Class 34 Trademarks, the Habanos GI and the Cuban Government Guarantee Seal), Australia's measures will affect the Cuban industry's ability to charge a premium. Cuba's first written submission, para. 24. See also Cuba's response to Panel question No. 191.

⁵⁹⁵⁴ Cuba's first written submission, paras. 422-424. See also Cuba's response to Panel question No. 79 (annexed to its response to Panel question No. 138).

⁵⁹⁵⁵ O. Deselnicu, M. Costanigro, D. Souza-Monteiro, and D. McFadden, "A Meta-Analysis of Geographical Indication Food Valuation Studies: What Drives the Premium for Origin-Based Labels?", *Journal of Agricultural and Resource Economics*, Vol. 38, No. 2 (2013) pp. 204-219, (Deselnicu et al. Meta-Analysis), (Exhibit CUB-34).

⁵⁹⁵⁶ Dev Gangjee, *Relocating the Law of Geographical Indications* (Cambridge University Press, 2012), pp. 281-283, (Gangjee Book), (Exhibit CUB-10).

⁵⁹⁵⁷ FAO Guide, (Exhibit CUB-31).

⁵⁹⁵⁸ Cuba's first written submission, para. 423.

⁵⁹⁵⁹ 2012 EU GI Study, (Exhibit CUB-36).

⁵⁹⁶⁰ Cuba's first written submission, para. 423.

⁵⁹⁶¹ Cuba's first written submission, para. 423.

determination that we do not understand the use of the term "Habanos" as a brand name or part of a brand name, to be prohibited. We also recall that the indication of the country of origin is permitted under the TPP measures. We understand the indication "handmade" also to be permitted.⁵⁹⁶²

7.3047. Cuba refers to a "meta-analysis of studies estimating the premiums for agricultural products differentiated by Geographical Indication (GI)" conducted by Deselnicu et al. (Deselnicu et al. Meta-Analysis).⁵⁹⁶³ This analysis covers "food" GIs, without specific reference to tobacco or tobacco products.⁵⁹⁶⁴ It focuses on European GIs and European consumers.⁵⁹⁶⁵ Further, while conducting a meta-analysis of studies covering various regions, the Deselnicu et al. Meta-Analysis emphasises the importance of distinguishing among specific products and markets⁵⁹⁶⁶, and indicates that the institutional framework of a given market also significantly influences price premiums.⁵⁹⁶⁷ Although the Deselnicu et al. Meta-Analysis notes that "[t]he average percentage premium for GIs is 15.1%",⁵⁹⁶⁸ it cautions against generalized interpretations.⁵⁹⁶⁹ In fact, the Deselnicu et al. Meta-Analysis does not suggest that all GIs command a price premium in all markets. It notes that "[t]he percentage premium for all GIs varies widely from a minimum of -36.7% for Provolone Valpadana Cheese to +181.9% for Valle d'Aosta Fromadzo Cheese in Italy"⁵⁹⁷⁰, and refers to "a premium/discount with respect to a generic, non-GI, products".⁵⁹⁷¹ The Deselnicu et al. Meta-Analysis excludes country-of-origin labels.⁵⁹⁷²

⁵⁹⁶² See Cuba's first written submission, para. 71, explaining that "handmade" is still permitted because Regulation 8(c)(ii) of the CI Regulations requires a "true description" on imported products. This explanation of the operation of the TPP measures has not been challenged by Australia.

⁵⁹⁶³ Deselnicu et al. Meta-Analysis, (Exhibit CUB-34), p. 204.

⁵⁹⁶⁴ Deselnicu et al. Meta-Analysis, (Exhibit CUB-34), Table 1, p. 209. The Deselnicu et al. Meta-Analysis explains that "[f]rom a statistical viewpoint, it would be ideal to have all product categories represented within each GI-based quality assurance scheme, with similar frequencies. Instead, PDO [i.e. protected designation of origin] protected products are mostly cheese, followed by wine, olive oil, fruits and vegetables, and meat. The majority of PGI-certified [i.e. protected geographical indication] products in our sample are meats, followed by grains and olive oil, while GI trademarks are mostly used with wine products (73%), as well as fruits and vegetables, such as Washington apples and Idaho potatoes." Ibid. p. 211. (footnote omitted)

⁵⁹⁶⁵ The Deselnicu et al. Meta-Analysis notes that "the majority of studies in th[e reviewed] sample (55%) are based on valuations by European consumers, followed by studies of North and Central American products (31%), and then Australian and New Zealand studies (14%)". Deselnicu et al. Meta-Analysis, (Exhibit CUB-34), p. 209.

⁵⁹⁶⁶ According to the Deselnicu et al. Meta-Analysis, "[t]he systematic analysis of the existing body of research on GI premiums unequivocally confirmed our original observation: while GIs constitute an effective differentiation instrument in food markets, the magnitude of the price premium associated with GIs varies rather significantly across products and markets". Deselnicu et al. Meta-Analysis, (Exhibit CUB-34), pp. 214-215.

⁵⁹⁶⁷ According to the Deselnicu et al. Meta-Analysis:

The relationship between institutional framework regulating GIs and price premiums is especially relevant for its implications on food marketing policies. In Europe, more stringent regulations for the PDO designation appear to secure a higher price premium than its less stringent quality-assurance counterpart (PGI). Stricter regulations may signal increased benefits to consumers in the form of food safety, quality assurance, and stronger cultural or heritage connection, prompting a higher willingness to pay for products that are more closely regulated.

Deselnicu et al. Meta-Analysis, (Exhibit CUB-34), p. 215.

⁵⁹⁶⁸ Deselnicu et al. Meta-Analysis, (Exhibit CUB-34), p. 209.

⁵⁹⁶⁹ According to the Deselnicu et al. Meta-Analysis, "[w]hile these results appear evident, their interpretation should be approached more cautiously: an overly literal interpretation of the estimates' magnitudes is not advisable given the aggregate and heterogeneous nature of our data". Deselnicu et al. Meta-Analysis, (Exhibit CUB-34), p. 215. The Deselnicu et al. Meta-Analysis adds that, "[w]hile the mean [willingness to pay] is positive, indicating that consumers are generally willing to pay more for GI products, there is a great deal of variability in the reported premiums". Ibid. p. 209.

⁵⁹⁷⁰ Deselnicu et al. Meta-Analysis, (Exhibit CUB-34), p. 209. (emphasis added)

⁵⁹⁷¹ Deselnicu et al. Meta-Analysis, (Exhibit CUB-34), p. 207. (emphasis added)

⁵⁹⁷² The Deselnicu et al. Meta-Analysis states that "[s]tudies estimating consumer valuation of country of origin labels (COOL) were excluded from the sample because the link between geographic name and specific growing conditions (the concept of terroir) was considered too weak". Deselnicu et al. Meta-Analysis, (Exhibit CUB-34), p. 207.

7.3048. Further, the Deselniciu et al. Meta-Analysis notes that the price premiums commanded by GIs are affected by coexistence with brand names of more expensive products.⁵⁹⁷³ We note in this regard that Cuba does not contest that the TPP measures allow the continued use of brand names on Cuban LHM cigars⁵⁹⁷⁴, nor does Cuba explain how any price premium commanded by any GIs would be affected by the continued use of brand names on the packaging of Cuban LHM cigars.

7.3049. We consider that, even assuming that the Habanos sign and the Cuban Government Warranty Seal were considered to constitute a GI, the Deselniciu et al. Meta-Analysis has limited, if any, relevance for Cuba's claim that compliance with restrictions on the use of these signs under the TPP measures leads to a material reduction of the value of LHM cigars on the Australian market. The study makes clear, in particular, that any premium value commanded by a specific GI depends on the circumstances of a given market. The GIs analyzed in the study do not relate to tobacco products and relate to the European market. It is not clear therefore that the findings of this study shed any light on the question before us.

7.3050. Cuba also refers to a book on GIs, the Gangjee Book. The extracts of this book presented by Cuba note that "there is the hypothesis that consumers value and are willing to pay premiums for IGO [i.e. indications of geographical origin] labelled products", and record "cautious optimism" concerning this hypothesis, based on "preliminary research".⁵⁹⁷⁵ The Gangjee Book adds that "there is some evidence, predominantly from Europe, that consumers are attracted to regional products":⁵⁹⁷⁶ "[i]n 14 out of 18 cases, the price of a PDO/PGI product is higher than the price of its comparator product" and "[t]he positive price premium ranges from 5% in the cases of Sitia Lasithi Kritis, Jamón de Teruel ... and Turrón de Alicante/Jijona to 300% in the case of Volaille de Bresse."⁵⁹⁷⁷

7.3051. We consider that these elements have limited, if any, relevance for Cuba's demonstration that the value of LHM cigars has been "materially reduced" as a result of compliance with the requirements of the TPP measures. As some of the passages cited above illustrate, the findings at issue mostly concern European GIs assessed in the European context. Like the Deselniciu et al. Meta-Analysis, the excerpts from the Gangjee Book submitted by Cuba do not mention, let alone address tobacco or tobacco products. Further, the above-quoted extract on European GIs suggests that any price premium is specific to the GI product. The fact that 14 out of the 18 cases assessed entailed a higher price for the GI products could also imply that 4 of those 18 cases did not necessarily entail any price premium.

7.3052. Likewise, we consider that the FAO Guide is of limited, if any, relevance for Cuba's demonstration. The FAO Guide is a general "guide for promoting quality linked to geographical origin and sustainable Geographical Indications".⁵⁹⁷⁸ It does not specifically address either tobacco and tobacco products, or the Australian context.⁵⁹⁷⁹ Further, in referencing value creation more

⁵⁹⁷³ As the Deselniciu et al. Meta-Analysis states, "[a]ccording to our estimates, there is a relatively strong, inversely proportional relationship between the use of firm branding and the GI premium ..., which is robust to the type of consumer population (rest of the world vs, European only). ... When purchasing more expensive products (such as wine and olive oil), the incentive to learn about differences in quality across brand names is more pronounced, allowing brand names to capture a larger share of the reputation premium." Deselniciu et al. Meta-Analysis, (Exhibit CUB-34), p. 215.

⁵⁹⁷⁴ Cuba's response to Panel question No. 189.

⁵⁹⁷⁵ Gangjee Book, (Exhibit CUB-10), p. 281.

⁵⁹⁷⁶ Gangjee Book, (Exhibit CUB-10), p. 282. Further, the Gangjee Book notes that "[a] growing body of empirical research considers the impact of PDO [i.e. protected designation of origin] or PGI [i.e. protected geographical indication] labels upon the consumer's willingness to pay higher prices", specifying that the "drivers for this demand" are varied and "are thought to include rising incomes, concerns about food quality and safety, a demand for superior or specific organoleptic quality, the roles of such products as symbols of cultural heritage, a desire for authenticity and to enable purchases in support of national producers". The Gangjee Book adds that "this consumer demand is correlated with the ability to charge a premium for the product, as several case studies have demonstrated", in particular in the European context. Ibid. p. 282.

⁵⁹⁷⁷ Gangjee Book, (Exhibit CUB-10), p. 282.

⁵⁹⁷⁸ The subtitle of the FAO Guide reads: "A guide for promoting quality linked to geographical origin and sustainable geographical indications". FAO Guide, (Exhibit CUB 31), cover page.

⁵⁹⁷⁹ The product-specific portions of the FAO Guide dealing with price differences amount to case studies related to the "[i]nfluence of reputation on price formation" in the context of pummelo fruit produced in a specific region of Thailand (FAO Guide, p. 21, case study 4), and a box containing a comparison of prices

generally, the FAO Guide states that "[o]igin-linked products have the potential to create added value through market".⁵⁹⁸⁰ The FAO Guide adds that "[t]he value creation process requires" certain actions, such as "the co-ordination of small-scale actors (horizontal and vertical relations along the supply chain)".⁵⁹⁸¹ As its subtitle indicates, one of the purposes of the FAO Guide is to assist countries in realizing such value creation.⁵⁹⁸²

7.3053. As Cuba notes⁵⁹⁸³, the 2012 EU GI Study concludes that "[t]he value premium rate of GI products was estimated at 2.23, which means that GI products were sold 2.23 times as high as the same quantity of non-GI products".⁵⁹⁸⁴ However, as the 2012 EU GI Study points out, this is a "whole value premium rate in the EU 27 for GI products".⁵⁹⁸⁵ As the 2012 EU GI Study explains, "[b]ehind that average, there was a variety of situations".⁵⁹⁸⁶ While noting these variations and specificities, the 2012 EU GI Study does not refer or relate to the Australian context.⁵⁹⁸⁷ Nor does the 2012 EU GI Study make any mention of tobacco or tobacco products.⁵⁹⁸⁸ Accordingly, the 2012 EU GI Study also has limited, if any, relevance for Cuba's marks of origin claim.

7.3054. In light of the above, we conclude that even if this evidence were considered to show that, in specific contexts or as a matter of principle, GIs may command a price premium, such evidence is not sufficiently consistent or specific to support Cuba's argument that the Habanos sign or the Cuban Government Warranty Seal would entail an added value of an identifiable magnitude for imported Cuban LHM cigars in the Australian market or to demonstrate that compliance with the TPP requirements in relation to the use of such signs would have led to a material reduction in the value of Cuban LHM cigars in Australia within the meaning of Article IX:4 of the GATT 1994.

7.3055. We also note in this respect Cuba's own description of the capacity of the term "Habanos" in conveying the specific associations that Cuba indicates constitute the added value of the designation of a LHM Cuban cigar as "Habanos":

As a result of Cuba's efforts to protect and promote its cigar industry and exports, the term "Habanos" has become known worldwide to describe large, high-quality hand-made cigars of Cuban provenance.⁵⁹⁸⁹

7.3056. As described above, we consider that the term "Habanos" may be used as a brand name or part of a brand name. Therefore, to the extent that this term itself, as Cuba indicates, is associated with "large, high quality hand-made cigars of Cuban provenance", Cuba retains the ability, under the TPP measures, to convey these characteristics.

7.3057. Similarly, we note the observations in Parr et al. 2011b, which is discussed further below, that for frequent and connoisseur cigar smokers, "[t]he brand name is taken as a sign of authenticity or legitimacy of the product".⁵⁹⁹⁰ To the extent, therefore, that the Cuban Government

between origin-differentiated and non-origin differentiated roasted coffees on international markets, depending on the type and origin of the coffees. FAO Guide, (Exhibit CUB-31), p. 20, Box 2.

⁵⁹⁸⁰ FAO Guide, (Exhibit CUB-31), p. 20. (emphasis added)

⁵⁹⁸¹ FAO Guide, (Exhibit CUB-31), p. 22.

⁵⁹⁸² FAO Guide, (Exhibit CUB-31), cover page.

⁵⁹⁸³ Cuba's first written submission, para. 423.

⁵⁹⁸⁴ 2012 EU GI Study, (Exhibit CUB-36), p. 4.

⁵⁹⁸⁵ 2012 EU GI Study, (Exhibit CUB-36), p. 71.

⁵⁹⁸⁶ 2012 EU GI Study, (Exhibit CUB-36), p. 71. Indeed, the 2012 EU GI Study dedicates several pages to "the great diversity of situations, according to schemes and to [EU] Member States" (ibid. p. 71), addressing, for instance, "[v]alue premium rates by class of agricultural products and foodstuffs" (ibid. p. 72) and the differences in "[v]alue premium rate of GIs products per category and Member State". Ibid. p. 77. The 2012 EU GI Study adds further specificity in describing the "[v]alue premium rate by national sector" by noting that "[u]ndoubtedly, the value premium rate reflects national GI sectors' structures and history". Ibid. p. 81.

⁵⁹⁸⁷ As the 2012 EU GI Study notes, "[t]he data presented ... are based on European and national statistics". 2012 EU GI Study, p. 4. See also the reference to the "[s]ales value of GI products in the EU 27". 2012 EU GI Study, (Exhibit CUB-36), Chap. 2, title.

⁵⁹⁸⁸ The 2012 EU GI Study deals with "agricultural products and foodstuffs, wines, aromatised wines and spirits protected by a geographical indication". 2012 EU GI Study, (Exhibit CUB-36), cover page and title.

⁵⁹⁸⁹ Cuba's first written submission, Annex 1, Part 2, para. 1. (emphasis added)

⁵⁹⁹⁰ Parr et al. 2011b, (Exhibits AUS-219, JE-24(50)), p. 10. Likewise, as regards less frequent cigar smokers, Parr et al. 2011b emphasises the importance of brand association and branding for less frequent cigar smokers: "More so than the more frequent smokers, the less frequent smokers take particular interest in

Warranty Seal guarantees the authenticity of the Cuban origin of a cigar, it appears that this function may still be performed through the use of a relevant brand name, in combination with the indication of country of origin (e.g. "Made in Cuba"), which is required, under separate legislation, to appear on cigars or packages, and is also permitted under the TPP measures.

7.3058. Overall, therefore, we are not persuaded that Cuba has demonstrated that the restrictions imposed under the TPP measures on the use of the Habanos sign and the Cuban Government Warranty Seal strip Cuban LHM cigars of relevant added value such that compliance with them would lead to a material reduction in their value within the meaning of Article IX:4.

7.4.3.4.3 Whether the TPP measures create consumer uncertainty about the authenticity of Cuban LHM cigars, thus leading to a material reduction of their value

7.3059. As noted, Cuba also claims that the value of Cuban LHM cigars has been materially reduced as a result of the alleged prohibition, under the TPP measures, on affixing the Habanos sign and the Cuban Government Warranty Seal on tobacco products and packaging, because this will, according to Cuba, inevitably give rise to consumer uncertainty about the authenticity of the products that they are purchasing.⁵⁹⁹¹ According to Cuba, this will constrain the ability of Cuban exporters to charge premium prices for Cuban LHM cigars in Australia.⁵⁹⁹²

7.3060. Cuba refers⁵⁹⁹³ to Parr et al. 2011b, according to which frequent smokers of premium cigars were concerned that plain packaging would interfere with their ability to verify the quality and legitimacy of the cigars that they purchase.⁵⁹⁹⁴ Cuba references⁵⁹⁹⁵ the words of one consumer interviewed by GfK Blue Moon: "How do I know the guy in the shop isn't selling me a \$10 cigar for \$50?!".⁵⁹⁹⁶ According to Cuba, it is indisputable that consumer uncertainty about the quality of products on offer leads to lower valuations of those products, and consumer uncertainty is likely to be particularly acute in circumstances where a GI that has been used for decades is abruptly removed from the market.⁵⁹⁹⁷

7.3061. We note that, more generally, Cuba calls into question the reliability of Parr et al. 2011b⁵⁹⁹⁸, arguing that it utilised an inadequate sample⁵⁹⁹⁹ and suffered from methodological flaws.⁶⁰⁰⁰ As both Cuba⁶⁰⁰¹ and Australia⁶⁰⁰² point out, for the purposes of Parr et al. 2011b, cigar

the branding and packaging of cigar tubes. ... The branding also has a strong effect on their perceptions of quality in regards to their purchases... ." Ibid. p. 10.

⁵⁹⁹¹ Cuba's first written submission, para. 425. See also Cuba's response to Panel question No. 79 (annexed to its response to Panel question No. 138).

⁵⁹⁹² Cuba's first written submission, para. 425. See also Cuba's response to Panel question No. 79 (annexed to its response to Panel question No. 138).

⁵⁹⁹³ Cuba's first written submission, para. 425. See also Cuba's response to Panel question No. 79 (annexed to its response to Panel question No. 138).

⁵⁹⁹⁴ Parr et al. 2011b, (Exhibits AUS-219, JE-24(50)), pp. 10, 11, 42, 44 and 47.

⁵⁹⁹⁵ Cuba's first written submission, para. 425. See also Cuba's response to Panel question No. 79 (annexed to its response to Panel question No. 138).

⁵⁹⁹⁶ Parr et al. 2011b, (Exhibits AUS-219, JE-24(50)), p. 42.

⁵⁹⁹⁷ Cuba's first written submission, para. 426. See also Cuba's response to Panel question No. 79 (annexed to its response to Panel question No. 138).

⁵⁹⁹⁸ As regards the alleged methodological flaws, Cuba contends that Parr et al. 2011b, *inter alia*, asked the wrong questions: for example, the interviewers asked respondents to compare images of digitally created, unbranded, plain pack cigar tubes, carrying a full health warning, with images of existing branded cigar tubes with no health warning. Cuba's first written submission, para. 425. See also ibid. paras. 263-268; Honduras's first written submission, paras. 530-537; Honduras's second written submission, paras. 127-128; and Dominican Republic's first written submission, paras. 627-639.

⁵⁹⁹⁹ As regards the allegedly inadequate sample, Cuba notes that Parr et al. 2011b elicited responses from only eight LHM Cigar smokers, none of whom were selected randomly to participate in the research. Cuba argues that it goes without saying that a study in which only eight people were interviewed should not be used to draw conclusive findings. Cuba's first written submission, para. 264.

⁶⁰⁰⁰ Cuba's first written submission, para. 266 (referring to Parr et al. 2011b, (Exhibits AUS-219, JE-24(50)), pp. 18-19). Cuba adds that the interviewers also presented respondents with a plain pack cigar band that did not display any information at all and asked them to compare it with a fully branded band. Given that cigar bands under the TPP measures do convey some (albeit limited) information, Cuba alleges that this particular measure is unlikely to have the same effect on LHM Cigar smokers in the real world as predicted by Parr et al. 2011b. Cuba's first written submission, para. 267.

⁶⁰⁰¹ Cuba's first written submission, para. 267. (footnote omitted)

smokers were shown a plain packaged cigar band which did not display any information at all. As Australia notes⁶⁰⁰³, it was in reaction to such a completely plain cigar band⁶⁰⁰⁴, that some frequent cigar smokers expressed concern about being able to make informed purchases⁶⁰⁰⁵, because such smokers assess the authenticity of the product by reference to the brand name of the product.⁶⁰⁰⁶ Indeed, according to Parr et al. 2011b, for more frequent and connoisseur cigar smokers "[t]he brand name is taken as a sign of authenticity or legitimacy of the product" and "[t]his information is most often contained on the cigar band".⁶⁰⁰⁷ Likewise, Parr et al. 2011b emphasises the importance of brand association and branding for less frequent cigar smokers, especially on cigar tubes:

More so than the more frequent smokers, the less frequent smokers take particular interest in the branding and packaging of cigar tubes. ... The branding also has a strong effect on their perceptions of quality in regards to their purchases and as such the plain packaged tube has a marked effect on the perceived appeal of cigar smoking.⁶⁰⁰⁸

7.3062. We agree with Australia⁶⁰⁰⁹ that the reactions of cigar smokers to a completely plain cigar band are not an accurate reflection of the impact of the TPP measures, to the extent that the

⁶⁰⁰² Australia's second written submission, para. 584 (referring to Parr et al. 2011b, (Exhibits AUS-219, JE-24(50)), pp. 10 and 42).

⁶⁰⁰³ Australia's second written submission, para. 584 (referring to Parr et al. 2011b, (Exhibits AUS-219, JE-24(50)), pp. 10 and 42).

⁶⁰⁰⁴ According to Parr et al. 2011b, "[f]or frequent smokers the band is one of the first places they go to when looking at a cigar, so they immediately noticed the difference with the plain pack band", and "[f]or frequent and connoisseur cigar smokers the plain packaging band would have no effect on the overall appeal or attractiveness of cigar smoking, but these smokers felt the plain packaging lowered the overall perceived desirability of any given particular cigar as they could not discern any product information." Furthermore:

Both frequent and less frequent smokers reported currently leaving the band on their cigars with none reporting that they removed it. However, there were differing perceptions of the purpose of the band, and reactions to the plain pack band were largely driven by those perceptions. As shown to respondents, the plain pack band had no warning statement or image on it but rather consisted only of the band in the plain pack colour obscuring the branded band underneath. Both frequent and less frequent cigar smokers reported that it stands out significantly, especially in comparison to the existing bands.

Parr et al. 2011b, (Exhibits AUS-219, JE-24(50)), p. 42.

⁶⁰⁰⁵ One of the main conclusions of Parr et al. 2011b is that "the plain packaging colour and design, across RYO [i.e. roll your own], cigarillos and premium cigars, [would be] minimising appeal and perceptions of quality". This conclusion is based in part on the finding that:

For more frequent cigar smokers, rather than the packaging it is the cigar bands, which act as markers of legitimacy and carry essential product information, in particular for single sale loose cigars. Frequent and connoisseur smokers feel the bands are an essential means of identifying what product they want to purchase and consume. As such, introduction of the plain pack band was felt likely to lower the ability of this category of consumers to purchase products they felt informed about and felt confident were legitimate. This suggests a need to make product information available by some other means at and after point of sale.

Parr et al. 2011b, (Exhibits AUS-219, JE-24(50)), p. 42. As regards "more frequent and connoisseur cigar smokers", Parr et al. 2011b adds that plain packaged cigar "tubes did not have the same impact in terms of lowering appeal or attractiveness of cigar smoking". According to Parr et al. 2011b, for more frequent and connoisseur cigar smokers "[t]he brand name is taken as a sign of authenticity or legitimacy of the product" and "[t]his information is most often contained on the cigar band". Parr et al. 2011b adds that "[a]s such a plain pack band (which did not display any information) obscuring the branded band has a more significant impact as it deprives [more frequent cigar smokers] of the product information which they use to inform their purchases", which in turn "lowers the desirability of any given particular cigar as they are unable to verify the product they are receiving as opposed to lowering the overall appeal of cigar smoking which remains high". Ibid. p. 10. This summary of key findings in Parr et al. 2011b does not amount to the Panel necessarily accepting such findings as well-founded.

⁶⁰⁰⁶ Australia's second written submission, para. 584 (referring to Parr et al. 2011b, (Exhibits AUS-219, JE-24(50)), p. 10).

⁶⁰⁰⁷ Parr et al. 2011b, (Exhibits AUS-219, JE-24(50)), p. 10.

⁶⁰⁰⁸ Parr et al. 2011b, (Exhibits AUS-219, JE-24(50)), p. 10.

⁶⁰⁰⁹ Australia's second written submission, para. 584.

measures allow cigar bands to be marked with the brand, company or business name and variant name, as well as the name of the country in which the cigar was produced.⁶⁰¹⁰ The same applies to Parr et al. 2011b's findings concerning less frequent cigar smokers⁶⁰¹¹ insofar as the cigar tubes shown in the Report were completely free⁶⁰¹² from the kind of information that may continue to appear on cigar tubes under the TPP measures.⁶⁰¹³ Therefore, as Australia points out, Parr et al. 2011b does not support the contention that consumers would be uncertain about the authenticity of the product in circumstances when cigar packaging, including cigar bands and cigar tubes, may still be labelled with brand and variant names and "Made in Cuba".⁶⁰¹⁴

7.3063. For the same reasons, and without assessing the reliability of Parr et al. 2011b in more detail, we do not agree with Cuba that the alleged shortcomings of Parr et al. 2011b are "separate" and "something different" from the point argued by Cuba, "namely the fact that interviewees were worried that plain packaging would affect their ability to verify the genuineness of cigars".⁶⁰¹⁵ As Cuba noted, the packaging of cigars is materially different under TPP measures from what was depicted in Parr et al. 2011b and those aspects that appear to have led respondents, in the context of Parr et al. 2011b, to have doubts about the authenticity of the product (i.e. the absence of any brand information on the cigar band itself) have in fact not been implemented in the TPP measures.⁶⁰¹⁶

⁶⁰¹⁰ See section 2.1.2.4.2 and Figure 9 above.

⁶⁰¹¹ As regards less frequent cigar smokers, Parr et al. 2011b emphasises the importance of brand association and branding, especially on cigar tubes:

More so than the more frequent smokers, the less frequent smokers take particular interest in the branding and packaging of cigar tubes. Their smoking is largely driven by social occasions within which the 'presenting' or giving of cigars can play a major role in the perceived appeal. The branding also has a strong effect on their perceptions of quality in regards to their purchases and as such the plain packaged tube has a marked effect on the perceived appeal of cigar smoking. It significantly deglamourises the event and reduces their appeal as gifts or when presenting them to friends. The lack of brand association for the plain packaged products, in contrast with existing products, leaves them nothing 'to go on' bar the colour of the tube. This was described as 'muddy', 'tar like' and highly unappealing. This lack of appeal is strongly tied to a perception of low quality.

Parr et al. 2011b, (Exhibits AUS-219, JE-24(50)), p. 10.

⁶⁰¹² According to Parr et al. 2011b, "[t]he images of mock up cigar tubes only featured the health warning statement 'Smoking cigars causes lung cancer'." Parr et al. 2011b, (Exhibits AUS-219, JE-24(50)), p. 18. It continued:

In the case of cigar tubes it was not possible to produce images of branded products that would show both the health warning in full as well as the brand. This was due to the specification that the health warning take up 60% of the circumference and 95% of the length of the tube. It was determined that images showing only the health warning or branding in part would not be useful for research purposes. In addition, time constraints meant it was not possible to create physical mock ups of cigar tubes. Therefore, the comparison was between images of a digitally created plain packaged cigar tube with the full health warning and images of existing branded cigar tubes with no health warning.

Ibid. pp. 18-19.

⁶⁰¹³ See para. 2.27 and Figure 5 above.

⁶⁰¹⁴ Australia's second written submission, para. 584. See also paras. 2.27 and 2.36 above.

⁶⁰¹⁵ Cuba's response to Panel question No. 187.

⁶⁰¹⁶ Cuba argues that:

With respect to cigars, the PP Regulations require that only a single cigar band may be placed on cigars, and mandate the use of a uniform colour on cigar bands (Pantone 448C). The [T]PP Measures allow for the display of: (1) a brand, business or company name; (2) a variant name; and (3) the country of origin information, on cigar bands. An alphanumeric code can be retained on the cigar band as well. The [T]PP Measures require that these signs and information are presented in a uniform typeface, font, colour and placement, and be within a maximum size on the cigar band.

Cuba's first written submission, para. 64. (footnotes omitted)

7.3064. Further, we agree with Australia⁶⁰¹⁷ that Parr et al. 2011b does not include any statements to the effect that the alleged removal of the Habanos sign results in any uncertainty about the product, much less that any such removal would result in a level of uncertainty that would lead to a material reduction in the value of Cuban LHM cigars in Australia. We note that, likewise, the study does not address the perceived effects of the alleged removal of the Cuban Government Warranty Seal from Cuban LHM cigars.

7.3065. Cuba points out that its argument is not based solely on the effect of the TPP measures relating to the genuineness of the product but also on the effect on the price Cuban producers can command for their product.⁶⁰¹⁸ In response to a request for clarification by the Panel, Cuba states that it "agrees with Honduras that, although the complainants have not submitted empirical data on a 'downdrading' effect with respect to cigars, the economic reasons for the downdrading that currently affects cigarettes also apply to the cigar market in Australia".⁶⁰¹⁹

7.3066. We note that in response to the Panel⁶⁰²⁰, Cuba states that it cannot provide any value and volume data because it "does not have access" to "the data on retail sales of Cuban LHM cigars in Australia as well as other markets for purposes of a comparison".⁶⁰²¹ Instead, Cuba argues that "a slow erosion of the unique position of Cuban LHM cigars is, however, inevitable if the plain packaging measures remove the last means of communicating with clients".⁶⁰²² However, as explained above, the TPP measures do not prevent certain information, including information considered as important by the cigar smokers surveyed by GfK Blue Moon, as reported in Parr et al. 2011b, from appearing on cigar bands and cigar tubes, which, according to Parr et al. 2011b, were perceived as relevant places of product information by frequent and less frequent cigar smokers, respectively. We also note that, separately, Cuba submitted sales data by the main Australian importer of Cuban LHM cigars⁶⁰²³ to show that "there does not appear to have been any decrease in monthly sales of LHM Cigars after December 2012, not least when the post-implementation sales volumes are compared to monthly sales in the two years immediately prior to the introduction of the [T]PP Measures." Cuba adds that, "[i]ndeed, it appears that sales of LHM Cigars have marginally increased since December 2012."⁶⁰²⁴ Further, according to Cuba, the same sales information in half-yearly, rather than monthly, format "clearly illustrates the consistency of sales volumes over time ... and the apparent increase in sales of LHM Cigars in the post-implementation period".⁶⁰²⁵

7.3067. Accordingly, we conclude that Cuba has not demonstrated that the TPP measures' limitations on the use of the Habanos sign and the Cuban Government Warranty Seal on tobacco retail packaging and products create consumer uncertainty about the authenticity of Cuban LHM cigars in a way that would materially reduce the value of such cigars in Australia within the meaning of Article IX:4 of the GATT 1994.

7.4.4 Conclusion

7.3068. We have determined that the TPP measures, insofar as they limit the use of the Habanos sign or the Cuban Government Warranty Seal, do not constitute "laws and regulations relating to the marking of imported products" within the meaning of Article IX:4. Even assuming that they were covered by Article IX:4, we have additionally found that Cuba has not demonstrated that the value of the Cuban LHM cigars has been materially reduced within the meaning of Article IX:4 of

⁶⁰¹⁷ Australia's second written submission, para. 584.

⁶⁰¹⁸ Cuba's response to Panel question No. 187.

⁶⁰¹⁹ Cuba's response to Panel question No. 192.

⁶⁰²⁰ Panel question No. 193 to Cuba reads: "Please explain whether volumes and values of sales of Cuban cigars in Australia, including Cuban LHM cigars, and Cuban LHM cigars carrying the Habanos GI and/or the Cuban Government Warranty Seal have changed as a result of the plain packaging measures, and whether the price of cigars in the above product categories has changed as a result of the plain packaging measures."

⁶⁰²¹ Cuba's response to Panel question No. 193.

⁶⁰²² Cuba's response to Panel question No. 193.

⁶⁰²³ In particular, the sales data relates to Pacific Cigar Company's (PCC) "wholesale sales of LHM Cigars in Australia between January 2009 and July 2014. The PCC data is considered to be a relevant measure of consumption of LHM Cigars, as it is estimated that PCC have held a market share of approximately 70% of total LHM Cigar sales made in Australia over this time period." Cuba's first written submission, para. 159.

⁶⁰²⁴ Cuba's first written submission, para. 160 and Figure 25.

⁶⁰²⁵ Cuba's first written submission, para. 161 and Figure 26.

the GATT 1994 as a result of the TPP measures' limitations on the use of the Habanos sign and the Cuban Government Warranty Seal on tobacco retail packaging and products.

7.3069. Accordingly, we conclude that Cuba has not demonstrated that the TPP measures are inconsistent with Article IX:4, insofar as they limit the use of the Habanos sign and the Cuban Government Warranty Seal on tobacco products and packaging.

7.3070. As a consequence, we need not address Australia's arguments, or Cuba's arguments in response, that the measures are justified under Article XX(b) of the GATT 1994.

8 COMPLAINT BY HONDURAS (DS435): CONCLUSIONS AND RECOMMENDATIONS

8.1. For the reasons set forth in this Report, the Panel concludes that:

- a. Honduras has not demonstrated that the TPP measures are inconsistent with Australia's obligations under Article 2.2 of the TBT Agreement;
- b. Honduras has not demonstrated that the TPP measures are inconsistent with Australia's obligations under Article 2.1 of the TRIPS Agreement in conjunction with Article 6*quinquies* of the Paris Convention (1967);
- c. Honduras has not demonstrated that the TPP measures are inconsistent with Australia's obligations under Article 15.4 of the TRIPS Agreement;
- d. Honduras has not demonstrated that the TPP measures are inconsistent with Australia's obligations under Article 16.1 of the TRIPS Agreement;
- e. Honduras has not demonstrated that the TPP measures are inconsistent with Australia's obligations under Article 20 of the TRIPS Agreement;
- f. Honduras has not demonstrated that the TPP measures are inconsistent with Australia's obligations under Article 2.1 of the TRIPS Agreement in conjunction with Article 10*bis* of the Paris Convention (1967);
- g. Honduras has not demonstrated that the TPP measures are inconsistent with Australia's obligations under Article 22.2(b) of the TRIPS Agreement; and
- h. Honduras has not demonstrated that the TPP measures are inconsistent with Australia's obligations under Article 24.3 of the TRIPS Agreement.

8.2. The Panel declines to rule on Honduras's claims under Article 3.1 of the TRIPS Agreement, Article 2.1 of the TBT Agreement, and Article III:4 of the GATT 1994, in relation to which Honduras presented no arguments.

8.3. In light of these findings, the Panel also declines Honduras's request that the Panel recommend, in accordance with Article 19.1 of the DSU, that the DSB request Australia to bring the measures at issue into conformity with the TRIPS Agreement and the TBT Agreement.

8 COMPLAINT BY THE DOMINICAN REPUBLIC (DS441): CONCLUSIONS AND RECOMMENDATIONS

8.1. For the reasons set forth in this Report, the Panel concludes as follows:

- a. in respect of Australia's preliminary ruling request the Panel concludes that:
 - i. Australia failed to demonstrate that the terms "including", "complement" and "add to", as used in the Dominican Republic's panel request, are, on their face, inconsistent with the requirement under Article 6.2 of the DSU to identify the specific measures at issue.
- b. in respect of the Dominican Republic's claims regarding the TPP measures, the Panel concludes that:
 - i. the Dominican Republic has not demonstrated that the TPP measures are inconsistent with Australia's obligations under Article 2.2 of the TBT Agreement;
 - ii. the Dominican Republic has not demonstrated that the TPP measures are inconsistent with Australia's obligations under Article 15.4 of the TRIPS Agreement;
 - iii. the Dominican Republic has not demonstrated that the TPP measures are inconsistent with Australia's obligations under Article 16.1 of the TRIPS Agreement;
 - iv. the Dominican Republic has not demonstrated that the TPP measures are inconsistent with Australia's obligations under Article 20 of the TRIPS Agreement;
 - v. the Dominican Republic has not demonstrated that the TPP measures are inconsistent with Australia's obligations under Article 2.1 of the TRIPS Agreement in conjunction with Article 10bis of the Paris Convention (1967);
 - vi. the Dominican Republic has not demonstrated that the TPP measures are inconsistent with Australia's obligations under Article 22.2(b) of the TRIPS Agreement; and
 - vii. the Dominican Republic has not demonstrated that the TPP measures are inconsistent with Australia's obligations under Article 24.3 of the TRIPS Agreement.

8.2. The Panel declines to rule on the Dominican Republic's claims under Article 2.1 of the TRIPS Agreement in conjunction with Article 6*quinquies* of the Paris Convention (1967), Article 3.1 of the TRIPS Agreement, Article 2.1 of the TBT Agreement, and Article III:4 of the GATT 1994 in respect of which the Dominican Republic presented no arguments.

8.3. In light of the above findings, the Panel also declines the Dominican Republic's request that the Panel recommend to the DSB that Australia be required to bring its TPP measures into conformity with the above-mentioned provisions of the TRIPS Agreement and the TBT Agreement.

8 COMPLAINT BY CUBA (DS458): CONCLUSIONS AND RECOMMENDATIONS

8.1. For the reasons set forth in this Report, the Panel concludes as follows:

- a. in respect of Australia's preliminary ruling request, the Panel concludes that:
 - i. Australia failed to demonstrate that Cuba's claims under Article 16.3 of the TRIPS Agreement and Article 6bis of the Paris Convention (through Article 2.1 of the TRIPS Agreement) fall outside its terms of reference;
 - ii. it was unnecessary to make a determination as to whether its claims under Article 15.1 and 17 of the TRIPS Agreement are properly before the Panel;
 - iii. it was unnecessary to determine whether Cuba's panel request "presents the problem clearly" in relation to its claims under Article 15.1 and 17 of the TRIPS Agreement; and
 - iv. Australia failed to demonstrate that the terms "including", "complement" and "add to", as used in Cuba's panel request, are, on their face, inconsistent with the requirement under Article 6.2 of the DSU to identify the specific measures at issue.
- b. in respect of Cuba's claims regarding the TPP measures, the Panel concludes that:
 - i. Cuba has not demonstrated that the TPP measures are inconsistent with Australia's obligations under Article 2.2 of the TBT Agreement;
 - ii. Cuba has not demonstrated that the TPP measures are inconsistent with Australia's obligations under Article 2.1 of the TRIPS Agreement in conjunction with Article 6*quinquies* of the Paris Convention (1967);
 - iii. Cuba has not demonstrated that the TPP measures are inconsistent with Australia's obligations under Article 15.4 of the TRIPS Agreement;
 - iv. Cuba has not demonstrated that the TPP measures are inconsistent with Australia's obligations under Article 16.1 of the TRIPS Agreement;
 - v. Cuba has not demonstrated that the TPP measures are inconsistent with Australia's obligations under Article 16.3 of the TRIPS Agreement;
 - vi. Cuba has not demonstrated that the TPP measures are inconsistent with Australia's obligations under Article 20 of the TRIPS Agreement;
 - vii. Cuba has not demonstrated that the TPP measures are inconsistent with Australia's obligations under Article 2.1 of the TRIPS Agreement in conjunction with Article 10*bis* of the Paris Convention (1967);
 - viii. Cuba has not demonstrated that the TPP measures are inconsistent with Australia's obligations under Article 22.2(b) of the TRIPS Agreement;
 - ix. Cuba has not demonstrated that the TPP measures are inconsistent with Australia's obligations under Article 24.3 of the TRIPS Agreement; and
 - x. Cuba has not demonstrated that the TPP measures are inconsistent with Australia's obligations under Article IX:4 of the GATT 1994.

8.2. The Panel declines to rule on Cuba's claims under Article 2.1 of the TRIPS Agreement in conjunction with Article 6*bis* of the Paris Convention (1967), Article 3.1 of the TRIPS Agreement, Article 2.1 of the TBT Agreement, and Article III:4 of the GATT 1994, in respect of which Cuba presented no arguments.

8.3. In light of the above findings, the Panel also declines Cuba's request that the Panel recommend, in accordance with Article 19.1 of the DSU, that the DSB request Australia to bring its measures into conformity with the TRIPS Agreement, the TBT Agreement and the GATT 1994.

8 COMPLAINT BY INDONESIA (DS467): CONCLUSIONS AND RECOMMENDATIONS

8.1. For the reasons set forth in this Report, the Panel concludes as follows:

- a. in respect of Australia's preliminary ruling request, the Panel concludes that:
 - i. Australia failed to demonstrate that the terms "including", "complement" and "add to", as used in Indonesia's panel request, are, on their face, inconsistent with the requirement under Article 6.2 of the DSU to identify the specific measures at issue.
- b. in respect of Indonesia's claims regarding the TPP measures, the Panel concludes as follows:
 - i. Indonesia has not demonstrated that the TPP measures are inconsistent with Australia's obligations under Article 2.2 of the TBT Agreement;
 - ii. Indonesia has not demonstrated that the TPP measures are inconsistent with Australia's obligations under Article 15.4 of the TRIPS Agreement;
 - iii. Indonesia has not demonstrated that the TPP measures are inconsistent with Australia's obligations under Article 16.1 of the TRIPS Agreement;
 - iv. Indonesia has not demonstrated that the TPP measures are inconsistent with Australia's obligations under Article 16.3 of the TRIPS Agreement;
 - v. Indonesia has not demonstrated that the TPP measures are inconsistent with Australia's obligations under Article 20 of the TRIPS Agreement;
 - vi. Indonesia has not demonstrated that the TPP measures are inconsistent with Australia's obligations under Article 2.1 of the TRIPS Agreement in conjunction with Article 10bis of the Paris Convention (1967);
 - vii. Indonesia has not demonstrated that the TPP measures are inconsistent with Australia's obligations under Article 22.2(b) of the TRIPS Agreement; and
 - viii. Indonesia has not demonstrated that the TPP measures are inconsistent with Australia's obligations under Article 24.3 of the TRIPS Agreement.

8.2. The Panel declines to rule on Indonesia's claims under Article 1.1 of the TRIPS Agreement, Article 2.1 of the TRIPS Agreement in conjunction with Article 6*quinquies* of the Paris Convention (1967), Article 3.1 of the TRIPS Agreement, Article 2.1 of the TBT Agreement, and Article III:4 of the GATT 1994, in respect of which Indonesia presented no arguments.

8.3. In light of the above findings, the Panel also declines Indonesia's request that the Panel find that the TPP measures are inconsistent with Australia's obligations under Article XXIII:1(a) of the GATT 1994 because it has nullified or impaired benefits accruing directly or indirectly to Indonesia under the TBT Agreement.

8.4. In light of these findings, the Panel also declines Indonesia's request that the Panel recommend that Australia bring its measures into conformity with its obligations under the TRIPS Agreement and the TBT Agreement.

TABLE A: PAPERS INCLUDED IN A PRIMARY TPP LITERATURE REVIEW AND/OR EXHIBIT JE-24

Exhibit #	Paper	TPP Literature Reviews					Main Outcomes ¹		
		Peer Review Project ²	Kleijnen Systematic Review ³	Klick TPP Literature Report ⁴	Stirling Review ⁵	Stirling Review 2013 Update ⁶	Appeal	Chantler Report ⁷	Warnings
AUS-557, JE-24(63)	Wakefield et al. 2012	X		X		X	X	Y	Y
JE-24(41)	McCool et al. 2012	X	X	X		X	X	Y	Y
JE-24(56)	Scheffels, J; Saabo, G. Perceptions of Plain and Branded Cigarette Packaging Among Norwegian Youth and Adults: A Focus Group Study. Nicotine & Tobacco Research; 2013; 15(2):450-456.	X	X	X		X	X	Y	Y
AUS-155, JE-24(44)	Moodie et al. 2011	X	X	X	X		X	Y	Y
AUS-154, JE-24(25)	Germain et al. 2010	X	X	X	X		X	Y	Y
AUS-162, JE-24(24)	Gallopel-Morvan et al. 2013	X	X	X	X		X	Y	Y
AUS-176	Gallopel-Morvan et al. 2010				X		X	Y	Y

¹ Entries in this column derive from the Stirling Review and/or the Chantler Report. See Chantler Report, (Exhibits AUS-81, CUB-61), Annex D, pp. 50-55, and Annex E, pp. 60-62; and Stirling Review, (Exhibits AUS-140, HND-130, CUB-59), Table 4.1. Where there are disagreements among reviewers as to whether an underlying study considered a particular outcome, this is indicated with a *. Papers for which there are no entries in the "Main Outcomes" column were either not reviewed by the Stirling Review or the Chantler Report, or were deemed by the Stirling Review or the Chantler Report to not address any of the three outcomes listed.

² See Peer Review Report, (Exhibit DOM/HND-3), Appendix B.

³ See Kleijnen Systematic Review, (Exhibit DOM/HND-4), Appendix 2, pp. 103-104.

⁴ See Klick TPP Literature Report, (Exhibit UKR-6), pp. 17-58.

⁵ See Stirling Review, (Exhibits AUS-140, HND-130, CUB-59), Section 6, pp. 91-95.

⁶ See Stirling Review 2013 Update, (Exhibits AUS-216, CUB-60), pp. 15-18.

⁷ See Chantler Report, (Exhibits AUS-81, CUB-61), Annex D, pp. 50-55, and Annex E, pp. 60-62.

Exhibit #	Paper	TPP Literature Reviews						Main Outcomes ¹		
		Klick TPP Literature Report ⁴	Stirling Review ⁵	Stirling Review 2013 Update ⁶	Chantler Report ⁷	Appeal	Warnings	Perceptions of Harm & Strength		
JE-24(12)	Centre for Behavioural Research in Cancer. Health warnings and contents labelling of tobacco products: review, research, recommendations. Specifically paper 13: "Adolescents' reactions to cigarette packs modified to increase extent and impact of health warnings" Carlton, Australia: Centre for Behavioural Research in Cancer; 1992.	X	X	X	X	X	Y	Y	*	
AUS-161, JE-24(60)	Van Hal et al. 2012	X	X	X	X	X	Y	Y		
AUS-185, JE-24(43)	Moodie and Mackintosh 2013	X	X	X		X	Y	Y		
JE-24(48) ⁸	Northrup and Pollard 1995	X	X	X	X		Y	Y		
AUS-145, JE-24(53)	Rootman and Flay 1995	X	X	X	X		Y	Y		
AUS-209, JE-24(27)	Goldberg et al. 1999	X	X	X	X		Y	Y		
AUS-221, JE-24(26)	Goldberg et al. 1995	X	X	X	X		Y	Y		
AUS-136, JE-24(9)	Borland et al. 2013	X		X		X	X	Y	Y	
AUS-173	White 2011		X		X	X	X	Y		Y
AUS-137, JE-24(20)	Ford et al. 2013a	X	X	X		X	X	Y		Y
AUS-184, JE-24(64)	Wakefield et al. 2013	X	X	X		X	X	Y		Y
AUS-175, JE-24(10)	Borland and Savvas 2013b	X	X	X		X	X	Y		Y

⁸ Compare with ISR newsletter, (Exhibit AUS-146).

Exhibit #	Paper	TPP Literature Reviews					Main Outcomes ¹		Perceptions of Harm & Strength	Warnings
		Chantler Report ⁷	Stirling Review 2013 Update ⁶	Stirling Review ⁵	Klick TPP Literature Report ⁴	Kleijnen Systematic Review ³	Appeal			
AUS-166, JE-24(29)	Hammond et al. 2009	X	X	X	X	X	X	Y	Y	Y
AUS-158, JE-24(31)	Hammond et al. 2013b	X	X	X	X	X	X	Y	Y	Y
AUS-149, JE-24(62)	Wakefield et al. 2008	X	X	X	X	X	X	Y	Y	Y
AUS-156, JE-24(17)	Doxey and Hammond 2011	X	X	X	X	X	X	Y	Y	Y
AUS-157, JE-24(30)	Hammond et al. 2011	X	X	X	X	X	X	Y	Y	Y
AUS-174, JE-24(45)	Moodie et al. 2012	X	X	X	X	X	X	Y	Y	Y
AUS-152, JE-24(23)	Gallopel-Morvan et al. 2012	X	X	X	X	X	X	Y	Y	Y
AUS-189, JE-24(42)	Moodie and Ford 2011	X	X	X	X	X	X	Y	Y	Y
AUS-150, JE-24(3)	Bansal-Travers et al. 2011	X	X	X	X	X	X	Y	Y	Y
JE-24(21)	Ford et al. 2013b	X		X			X	X	Y	Y
AUS-148, JE-24(34)	Hoek et al. 2011	X	X	X	X	X	X	Y	Y	Y
AUS-229, JE-24(58)	Thrasher et al. 2011	X	X	X	X	X	X	Y	Y	Y
AUS-163, JE-24(35)	Hoek et al. 2012	X	X	X	X	X	X	Y	Y	Y
AUS-151, JE-24(16)	Donovan 1993	X	X	X	X	X	X	Y	Y	Y
AUS-142, JE-24(14)	Centre for Health Promotion 1993	X	X	X	X	X		Y	Y	Y
AUS-143, JE-24(7)	Bondy et al. 1994	X	X			X	X	Y	Y	Y

Exhibit #	Paper	TPP Literature Reviews						Main Outcomes ¹
		Chantler Report ⁷	Stirling Review 2013 Update ⁶	Klick TPP Literature Report ⁴	Stirling Review ⁵	TPP Literature Reviews	Appeal	Perceptions of Harm & Strength
Peer Review Project ²	Kleijnen Systematic Review ³							
JE-24(33)	Hoek et al. 2009	X			X		X	Y
JE-24(51)	Pechey et al. 2013	X				X	X	*
JE-24(59)	Uppal et al. 2013			X		X		Y
JE-24(52)	Ramunno, S; Mandeville, KL; Yarrow, K. The effect of plain cigarette packaging on attention to health warnings; The Lancet; 2012; 380:S5.	X	X	X		X	X	Y
AUS-200, JE-24(40)	Maynard et al. 2013	X	X	X		X	X	Y
AUS-203, JE-24(1)	Al-hamdani 2013	X	X	X		X	X	Y
AUS-147, JE-24(4)	Beede et al. 1990	X	X	X	X		X	Y
AUS-202, JE-24(6)	Beede and Lawson 1992	X	X	X	X		X	Y
AUS-199, JE-24(47)	Munafò et al. 2011	X	X	X	X		X	Y
AUS-179, JE-24(19)	Environics 2008a		X		X		X	
JE-24(18)	Environics 2008b		X		X		X	
AUS-177, JE-24(32)	Hammond et al. 2013a	X	X	X				
JE-24(38)	Lund and Scheffels 2013	X	X	X				
JE-24(2)	Arora et al. 2013	X	X	X				
AUS-160, JE-24(66)	White et al. 2012	X	X	X				
AUS-228, JE-24(54)	Rousu and Thrasher 2013	X	X	X				
AUS-198, JE-24(13)	CBRC 1992	X	X		X		X	
JE-24(55)	Scheffels and Lund 2013	X	X					

Exhibit #	Paper	TPP Literature Reviews					Main Outcomes ¹	
		Chantler Report ⁷	Stirling Review 2013 Update ⁶	Stirling Review ⁵	Klick TPP Literature Report ⁴	Peer Review Project ²	Appeal	Perceptions of Harm & Strength
AUS-117, JE-24(49)	Parr et al. 2011a	X	X					
AUS-219, JE-24(50)	Parr et al. 2011b	X	X					
JE-24(46)	Moodie et al. 2012	X	X					
JE-24(37)	London Economics. The role of packaging imagery on consumer preferences for experience goods: a consumer behavioural experiment. London, UK: London Economics, 2012.		X					
AUS-159	Al-hamdan 2011			X				
JE-24(61)	Vita, A. Is the power of aesthetics stronger than the power of brand? The case for plain packaging in the tobacco industry [Internet]. Copenhagen: Cand. Merc. Strategic Market Creation, Department Of Marketing, Copenhagen Business School, 2012 [accessed 18.9.14]. 88p.			X				
JE-24(36)	Cigarette packaging appeals to teens. Journal of the American Dental Association; 1995; 126(12):1604.			X				
JE-24(15)	Dewe, M; Ogden, J; Coyle, A. The cigarette box as an advertising vehicle in the United Kingdom: A case for plain packaging. Journal of Health Psychology; 2013; 0(0):1-9.	X		X				
JE-24(22)	Freeman B. Tobacco plain packaging legislation: a content analysis of commentary posted on Australian online news. Tobacco Control; 2011; 20(5):361-366.	X						
JE-24(65)	Wakefield et al. 2014	X						
AUS-135, JE-24(8)	Borland and Savvas 2013a	X						

Exhibit #	Paper	TPP Literature Reviews					Main Outcomes ¹	
		Klick TPP Literature Report ⁴	Stirling Review ⁵	Stirling Review 2013 Update ⁶	Chantler Report ⁷	Appeal	Perceptions of Harm & Strength	Warnings
AUS-153, JE-24(5)	Beede and Lawson 1991		X					
CUB-15	Shanahan P and Elliott D, 2009, Evaluation of the Effectiveness of the Graphic Health Warnings on Tobacco Product Packaging 2008, Australian Government Department of Health and Ageing, Canberra			X				
AUS-263, JE-24(11)	Brose et al. 2014							
AUS-222 (rev), JE-24(68), DOM-286	Zacher et al. 2014							
AUS-507, JE-24(57)	Scollo et al. 2014							
AUS-214, JE-24(67), DOM-285	Young et al. 2014							
AUS-91, JE-24(28)	Hammond 2010							
JE-24(39)	Madill-Marshall et al. 1996		X			X		
NOT ON RECORD	Rosenberg M, Pettigrew S, Wood L, Ferguson R and Houghton S (2012). Public support for tobacco control policy extensions in Western Australia: a cross-sectional study. <i>BMJ Open</i> , 2: e000784. doi:10.1136/bmjopen-2011-000784					X		
NOT ON RECORD	Wakefield, M. et al., "Effects of increasing size of health warnings on plain vs branded packs," 2011 SRNT 17th Annual Meeting. Westin Harbour Castle, Toronto: Society for Research on Nicotine and Tobacco (SRNT), 2011: 3.		X					

Exhibit #	Paper	TPP Literature Reviews					Main Outcomes ¹	
		Chantler Report ⁷	Stirling Review 2013 Update ⁶	Stirling Review ⁵	Klick TPP Literature Report ⁴	Peer Review Project ²	Appeal	Perceptions of Harm & Strength
NOT ON RECORD	Edwards R, Peace J, Russell M, Gifford H, Thomson G and Wilson N (2012). Qualitative exploration of public and smoker understanding of, and reactions to, an endgame solution to the tobacco epidemic. <i>BMC Public Health</i> , 12: 782. doi:10.1186/1471-2458-12-782	X	X	X	X		Y	
NOT ON RECORD	Hoek J, Gendall P, Maubach N and Edwards R (2012). Strong public support for plain packaging of tobacco products. <i>Australian and New Zealand Journal of Public Health</i> , 36(5): 405-407. doi:10.1111/j.1753-6405.2012.00907.x		X					
NOT ON RECORD	Hoek, J. (2007). Enhancing the Effectiveness of Warning Labels: Plain Packs vs. Branded Packs. In: Oceania Smokefree Conference, Auckland, 4-7 September, 2007. http://otcc.confex.com/otcc/otcc07/recordingredirect.cgi/id/94 .		X		X		Y	
NOT ON RECORD	Carter S M, Chapman S (2006). Smokers and non-smokers talk about regulatory options in tobacco control. <i>Tobacco Control</i> , 15(5): 398-404. http://dx.doi.org/10.1136/tc.2006.015818		X		X		*	
NOT ON RECORD	Swanson M (1997). Generic Packaging of Cigarettes. Thesis for Master of Public Health, University of Western Australia, Perth (unpublished).		X		X		Y	

Exhibit #	Paper	TPP Literature Reviews					Main Outcomes ¹	
		Chantler Report ⁷	Stirling Review 2013 Update ⁶	Stirling Review ⁵	Klick TPP Literature Report ⁴	Kleijnen Systematic Review ³	Appeal	Perceptions of Harm & Strength
NOT ON RECORD	Stephens T, Adlaf EM, Bondy SJ, Rehm J (1996). Survey Methods. In: Stephens T, Morin M (Eds.) (Health Canada). Youth Smoking Survey, 1994: Technical Report. Ottawa, ON: Minister of Supply and Services Canada (Catalogue No. H49-98/1-1994E), p23-36. http://www.hc-sc.gc.ca/hcps/pubs/tobac-tabac/yss-etj-1994/index-eng.php .		X			X	Y	
NOT ON RECORD	Carter O, Mills B, Phan T, Bremner J (2011). Measuring the effect of cigarette plain packaging on transaction times and selection errors and in a simulation experiment. <i>Tobacco Control</i> . Sep 26. [Epub ahead of print] http://dx.doi.org/10.1136/tobaccocontrol-2011-050087		X			X		
NOT ON RECORD	Freeman B, Gartner C, Hall W, Chapman S (2010) Forecasting future tobacco control policy: where to next? <i>Australian and New Zealand Journal of Public Health</i> , 34(5): 447-450. http://dx.doi.org/10.1111/j.1753-6405.2010.00588.x		X			X		
NOT ON RECORD	RBJ Health Management Associates (1993). Impact of Plain Packaging of Tobacco on Youth Perceptions and Behaviour. Report of Study 1. Toronto, ON: RBJ Health Management Associates.			X			Y	

Exhibit #	Paper	TPP Literature Reviews					Main Outcomes ¹	
		Chantler Report ⁷	Stirling Review 2013 Update ⁶	Stirling Review ⁵	Klick TPP Literature Report ⁴	Kleijnen Systematic Review ³	Appeal	Perceptions of Harm & Strength
Peer Review Project ²								
NOT ON RECORD	Shanahan P, Elliott D (2009b). Technical Report: Evaluation of the Effectiveness of the Graphic Health Warnings on Tobacco Product Packaging 2008. Prepared for the Australian Government Department of Health and Ageing, unpublished report. http://www.health.gov.au/internet/main/publishing.nsf/content/E09BB81F9347AACCA257588007F8D73/\$File/tech-rep-hw-eval.pdf		X					Y
NOT ON RECORD	White C, Hammond D. The impact of cigarette package design & plain packaging on female youth in Brazil: brand appeal & health-related perceptions. In: Public Health in Canada: Innovative Partnerships for Action, Canadian Public Health Association (CPHA) 2011 Conference; June 19-22, 2011; Palais des Congrès de Montréal, Montréal, QC, 2011.	X	X			X	Y	
NOT ON RECORD	Hammond D, Daniel S. Plain packaging and smoking susceptibility among UK youth (SYM2A). 2011 SRNT 17th Annual Meeting. Westin Harbour Castle, Toronto: Society for Research on Nicotine and Tobacco (SRNT), 2011: 3.	X	X			X	Y	Y
NOT ON RECORD	Gallois-Morvan K, Beguinot E, Eker F, Martinet Y, Hammond D. Perception de l'efficacité des paquets de cigarettes standardisés - Une étude dans un contexte français Bull Epidemiol Hebd (Paris) 2011;20-21:244-7. http://www.invs.sante.fr/beh/2011/20_21/beh_20_21_2011.pdf .	X	X			X	Y	Y

Exhibit #	Paper	TPP Literature Reviews				Main Outcomes ¹		
		Chantier Report ⁷	Stirling Review 2013 Update ⁶	Stirling Review ⁵	Klick TPP Literature Report ⁴	Appeal	Warnings	Perceptions of Harm & Strength
NOT ON RECORD	Gallopel-Morvan K, Gabriel P, Le Gall-Ely M, Rieunier S, Urien B (2010). Packaging to help public health. The case of tobacco control. [Le packaging au service de la santé publique. Application à la lutte contre le tabagisme.] In: Actes de la 1ère Journée Internationale du Marketing Santé, IAE (Institut d'Administration des Entreprises) Université de Lille 1, Lille, France, 25 November 2010.		X			X	Y	Y *
NOT ON RECORD	CNCT (Comité National Contre le Tabagisme) (2008a). ""Comment mettre en oeuvre les dispositions de la CCLAT pour parvenir à une ""dénormalisation" de la consommation de tabac?" Evaluation de l'impact du paquet de cigarettes neutre: Résultats d'une étude qualitative menée sur 34 personnes [Evaluation of the impact of a plain cigarette pack: Results of a qualitative study with 34 people]. Report for the Institut National de Cancer. Paris: CNCT.		X			X	Y	Y *
NOT ON RECORD	CNCT (Comité National Contre le Tabagisme) (Gallopel-Morvan K, Martinet Y, Diethelm P, Houzezec J, Tournade H, Villain N, Ratte S, Eker F, Béguinot E) (2008b). Evaluer l'impact du paquet neutre sur un échantillon de 20 personnes [Evaluation of the impact of plain cigarette pack with a sample of 20 people]. In: CNCT. Le paquet neutre des produits du tabac étude d'opportunité & faisabilité juridique. Rapport pour le ministère Français de la santé, mars. Paris: CNCT, p37-75.		X			X	Y	Y *

Exhibit #	Paper	Main Outcomes ¹				
		Perceptions of Harm & Strength	Warnings	Appeal	Chantler Report ⁷	Stirling Review 2013 Update ⁶
NOT ON RECORD	O'Neill PB (1991). Adolescent Consumers' Response to Plain Pack Cigarettes. Thesis for Master of Commerce, University of Otago, Dunedin (unpublished).			X		Y
NOT ON RECORD	Rootman I, Flay BR (Principal Investigators), Northrup D, Foster MK, Burton D, Ferrence R, Raphael D, Single E (Co-Investigators) (2003). A study on youth smoking: Plain packaging, health warnings, event marketing and price reductions. Updated figures (September 2003). Toronto, ON: Centre for Health Promotion, University of Toronto. http://www.utoronto.ca/chp/download/RptsandPresents/smokefig.pdf .		X			Y

