

# THE GLOBAL TOBACCO EPIDEMIC, THE PLAIN PACKAGING OF TOBACCO PRODUCTS, AND THE WORLD TRADE ORGANIZATION

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*In response to complaints by Ukraine, Honduras, the Dominican Republic, Cuba, and Indonesia, the government of Australia has defended the introduction of plain packaging of tobacco products in the World Trade Organization. This article focuses upon the legal defence of Australia before the WTO Panel. A key part of its defence has been the strong empirical evidence for the efficacy of plain packaging of tobacco products as a legitimate health measure designed to combat the global tobacco epidemic. Australia has provided a convincing case that plain packaging of tobacco products is compatible with the TRIPS Agreement 1994, particularly the clauses relating to the aims and objectives of the agreement; the requirements in respect of trade mark law; and the parallel measures in relation to access to essential medicines. Australia has also defended the consistency of plain packaging of tobacco products with the TBT Agreement 1994. Moreover, Australia has provided clear reasons for why the plain packaging of tobacco products is compatible with GATT. The position of Australia has been reinforced by a number of third parties — such as New Zealand, the United Kingdom, Ireland, Norway, Canada, and others — which have also been pioneers in tobacco control and public health. Australia's leadership in respect of tobacco control and plain packaging of tobacco products is further supported by larger considerations in respect of international public health law, human rights, and sustainable development.*

## I INTRODUCTION

The World Health Organization ('WHO') has highlighted the serious, devastating impact of the global tobacco epidemic in a series of reports.<sup>1</sup> The agency has stressed that tobacco is a leading cause of death, illness and impoverishment: 'The tobacco epidemic is one of the biggest public health threats the world has ever faced, killing around 6 million people a year'.<sup>2</sup> Moreover, the WHO observes that 'children from poor households are frequently employed in

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<sup>1</sup> World Health Organization, *WHO Report on the Global Tobacco Epidemic, 2008: The MPOWER Package* (WHO, 2008) <http://www.who.int/tobacco/mpower/2008/en/>; World Health Organization, *WHO Report on the Global Tobacco Epidemic, 2009: Implementing Smoke-free Environments* (WHO, 2009) <<http://www.who.int/tobacco/mpower/2009/en/>>; World Health Organization, *WHO Report on the Global Tobacco Epidemic, 2011: Warning about the Dangers of Tobacco* (WHO, 2011) <[http://www.who.int/entity/tobacco/global\\_report/2011/en/index.html](http://www.who.int/entity/tobacco/global_report/2011/en/index.html)>; World Health Organization, *WHO Report on the Global Tobacco Epidemic, 2013: Enforcing Bans on Tobacco Advertising, Promotion and Sponsorship* (WHO, 2013) < [http://www.who.int/tobacco/global\\_report/2013/en/](http://www.who.int/tobacco/global_report/2013/en/)>; World Health Organization, *WHO Report on the Global Tobacco Epidemic, 2015: Raising Taxes on Tobacco* (WHO, 2015) <[http://www.who.int/entity/tobacco/global\\_report/2015/report/en/index.html](http://www.who.int/entity/tobacco/global_report/2015/report/en/index.html)>.

<sup>2</sup> World Health Organization, 'Tobacco' (Fact Sheet, June 2016) <<http://www.who.int/mediacentre/factsheets/fs339/en/>>.



tobacco farming to provide family income’.<sup>3</sup> The agency stresses that there is an important children’s rights dimension to the issue: ‘These children are especially vulnerable to “green tobacco sickness”, which is caused by the nicotine that is absorbed through the skin from the handling of wet tobacco leaves’.<sup>4</sup>

In the face of the threat of the global tobacco epidemic, the WHO has established the *WHO Framework Convention on Tobacco Control* (‘FCTC’).<sup>5</sup> Article 3 of the Convention highlights the collective goal ‘to protect present and future generations from the devastating health, social, environmental and economic consequences of tobacco consumption and exposure to tobacco smoke’. Dr Margaret Chan, former Director-General of the WHO, has highlighted the important role of the agreement,<sup>6</sup> noting that ‘following the adoption of the agreement, governments around the world have taken decisive steps not only to reduce tobacco use, but also to stand up to the multinational tobacco companies standing in the way of global progress’.<sup>7</sup> The WHO has been supportive of its members introducing plain packaging of tobacco products as part of the FCTC. There has been concern, though, at the conference of parties about the use of trade and investment agreements to challenge public health measures, such as tobacco control.<sup>8</sup>

A pioneer in public health, Australia has undertaken an ‘Olive Revolution’ and introduced plain packaging for tobacco products.<sup>9</sup> Melanie Wakefield and colleagues commented upon the regime established in Australia: ‘From 1 September 2012, all tobacco manufactured for sale in Australia was required to be contained in plain dark brown packs, with 75% front-of-pack graphic health warnings and the brand name and variant limited to a standardised font size and type’.<sup>10</sup> After a constitutional challenge by ‘big tobacco’ companies, Australia successfully defended the plain packaging of tobacco products scheme in the High Court of Australia.<sup>11</sup> Furthermore, Australia also defeated an Investor–State Dispute Settlement action by Philip Morris brought under a Hong Kong–Australia investment agreement.<sup>12</sup> Australia’s plain

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<sup>3</sup> Ibid.

<sup>4</sup> Ibid.

<sup>5</sup> *WHO Framework Convention on Tobacco Control* (‘FCTC’), opened for signature 16 June 2003, 2302 UNTS 166 (entered into force 27 February 2005) <<http://www.who.int/fctc/en/>>. For a history of the agreement, see: Gro Harlem Brundtland, *Madam Prime Minister: A Life in Power and Politics* (Farrar, Straus and Giroux, 2002); and Heather Wipfli, *The Global War on Tobacco: Mapping the World’s First Public Health Treaty* (John Hopkins University Press, 2015).

<sup>6</sup> Margaret Chan, ‘Every Tobacco Death is an Avoidable Tragedy. The Epidemic Must Stop Here’, *The Guardian* (online), 6 November 2016, <[https://www.theguardian.com/global-development/2016/nov/06/tobacco-death-avoidable-tragedy-epidemic-india-conference-margaret-chan-world-health-organisation?CMP=share\\_btn\\_tw](https://www.theguardian.com/global-development/2016/nov/06/tobacco-death-avoidable-tragedy-epidemic-india-conference-margaret-chan-world-health-organisation?CMP=share_btn_tw)>.

<sup>7</sup> Ibid.

<sup>8</sup> The ‘Punta del Este Declaration’ of 2010 reiterates the firm commitment of parties to the FCTC ‘to prioritize the implementation of health measures designed to control tobacco consumption’ and ‘their concern regarding actions taken by the tobacco industry that seek to subvert and undermine government policies on tobacco control’: Conference of the Parties, WHO Framework Convention on Tobacco Control, *Punta del Este Declaration, fourth session of the Conference of the Parties, Held in Punta del Este, Uruguay, 15–20 November 2010*.

<sup>9</sup> *Tobacco Plain Packaging Act 2011* (Cth) and *Tobacco Plain Packaging Regulations 2011* (Cth). For a history of the debate, see Simon Chapman, and Becky Freeman, *Removing the Emperor’s Clothes: Australia and Tobacco Plain Packaging* (Sydney University Press, 2014).

<sup>10</sup> Melanie Wakefield et al, ‘Introduction Effects of the Australian Plain Packaging Policy on Adult Smokers: A Cross-sectional Study’ (2013) 3(7) *BMJ Open* doi:10.1136/bmjopen-2013-003175.

<sup>11</sup> *JT International SA v Commonwealth of Australia* [2012] HCA 43, High Court of Australia; Matthew Rimmer, ‘The High Court of Australia and the Marlboro Man: The Battle Over The Plain Packaging of Tobacco Products’, in Tania Voon, Andrew Mitchell, and Jonathan Liberman (eds) *Regulating Tobacco, Alcohol and Unhealthy Foods: The Legal Issues* (Routledge, 2014) 337; and Catherine Bond, ‘Tobacco Plain Packaging in Australia: *JT International v Commonwealth* and Beyond’ (2017) 17 *QUT Law Review* 1.

<sup>12</sup> *Philip Morris Asia Ltd v Australia (Award on Jurisdiction and Admissibility)* (Permanent Court of Arbitration,

packaging of tobacco products has also been the subject of a challenge in the World Trade Organization ('WTO'). That challenge will be the focus of this article.

The topic of intellectual property and public health has also been the subject of much disputation in international trade law in respect of tobacco control and plain packaging in the 2010s. The tobacco industry has sought to challenge the validity and the legitimacy of the plain packaging of tobacco products, through political lobbying, public relations campaigns, litigation, Investor–State Dispute Settlement clauses,<sup>13</sup> and trade agreements. The tobacco industry has also engaged in various tactics to disrupt the impact of plain packaging of tobacco products.<sup>14</sup> In terms of international trade, five countries — Ukraine, Honduras, the Dominican Republic, Cuba, and Indonesia — have challenged Australia's regime of plain packaging of tobacco products in the WTO.<sup>15</sup> The five complaints have progressed slowly.<sup>16</sup> In May 2014, WTO Director General Roberto Azevêdo appointed three panellists to examine the dispute against Australia's public health measure requiring tobacco products to be sold in plain packaging in this country.<sup>17</sup> The panellists include Alexander Erwin, a former trade minister from South Africa, François Dessemontet from Switzerland, and Billie Miller, a former politician from Barbados. In 2015, the WTO Panel heard oral proceedings in the case.<sup>18</sup> Four complainants presented oral argument: Honduras, Indonesia, Cuba and Dominican Republic. Ukraine withdrew its legal claim in the middle of the dispute.<sup>19</sup> There were 36 third parties participating in the WTO proceeding.<sup>20</sup>

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PCA Case No 2012-12, 17 December 2015) <<http://www.pcacases.com/web/view/5>>.

<sup>13</sup> For an excellent case note on this dispute, see Jarrod Hepburn and Luke Nottage, 'Case Note: *Philip Morris Asia v Australia*' (2017) 18 *Journal of World Investment and Trade* 307. For a discussion of the larger debate over Investor–State Dispute Settlement, see: Andrew Mitchell, Elizabeth Sheargold and Tania Voon, *Regulatory Autonomy in International Economic Law: The Evolution of Australian Policy on Trade and Investment* (Edward Elgar, 2017); and Jarrod Hepburn, *Domestic Law In International Investment Arbitration* (Oxford University Press, 2017). For an analysis of the implications of Investor–State Dispute Settlement for non-communicable diseases, see Hope Johnson, 'Investor–State Dispute Settlement and Tobacco Control: Implications for Non-Communicable Diseases Prevention and Consumption–Control Measures', (2017) 17 *QUT Law Review* 102.

<sup>14</sup> Michelle Scollo et al, 'Tobacco Product Developments Coinciding with the Implementation of Plain Packaging in Australia' (2014) *Tobacco Control* doi: 10.1136/tobaccocontrol-2013-051509.

<sup>15</sup> WTO Dispute Settlement, Dispute regarding *Australia — Certain Measures Concerning Trademarks and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*. The complainants are: Ukraine, Dispute DS434, <[http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds434\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds434_e.htm)>; Honduras, Dispute DS435 <[http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds435\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds435_e.htm)>; Dominican Republic, Dispute DS441, <[http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds441\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds441_e.htm)>; Cuba, Dispute DS458, <[http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds458\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds458_e.htm)>; and Indonesia, Dispute DS467, <[http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds467\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds467_e.htm)>.

<sup>16</sup> Catherine Saez and William New, 'WTO to Consider Five Australian Plain Packaging Disputes Under One Panel', *Intellectual Property Watch* (online), 26 April 2014, <<http://www.ip-watch.org/2014/04/26/wto-to-consider-australia-plain-packaging-disputes-under-one-panel/>>.

<sup>17</sup> 'Panel Appointed for WTO Mega-case on Australian Plain Packaging', *Intellectual Property Watch* (online), 6 May 2014, <<http://www.ip-watch.org/2014/05/06/panel-appointed-for-wto-mega-case-on-australia-tobacco-packaging/>>.

<sup>18</sup> Action on Smoking and Health ('ASH'), 'World Trade Organization Panel to Hear Oral Arguments on Australia[n] Tobacco Plain Packaging Case from 28 to 30 October 2015' (Press Release, 27 October 2015) <<http://ash.org.uk/media-and-news/press-releases-media-and-news/world-trade-organization-panel-to-hear-oral-arguments-on-australia-tobacco-plain-packaging-case-from-28-to-30-october-2015/>>.

<sup>19</sup> 'Ukraine Drops Lawsuit Against Australia Over Plain-Packaging Tobacco Laws, WTO Says', *ABC News* (online), 4 June 2015, <<http://www.abc.net.au/news/2015-06-04/plain-packaging-tobacco-ukraine-drops-lawsuit-against-australia/6520160>>.

<sup>20</sup> ASH, above n 18.

This article — being written in late 2017, before the decision of the WTO Panel has been handed down publicly — is an analysis of the arguments in the dispute. In May 2017, there were reports in the media that Australia has prevailed in the matter.<sup>21</sup> In fact, the decision has been communicated in private to the parties, however, it will not be made public until the middle of 2018, due to the need for the work to be translated. It is a somewhat unsatisfactory state of affairs to have a leaked draft outcome, without the accompanying reasoning. Nonetheless, public health advocates were delighted by the decision. Nicola Roxon observed: ‘I’m absolutely thrilled with the news today because it’s a big win for Australia, both for our previous government [and] also for the current government that continued to fight so hard’.<sup>22</sup> No doubt, Australia’s opponents will contemplate a further appeal against the decision. Of necessity, this article has been written in the interval between the argument of the case and the publication of the final decision. Given the stage of the proceedings, and that the official WTO decision and reasons are as yet unavailable, it will consider the broad arguments of the parties in the dispute, and will not engage in a detailed black letter analysis of the dispute, as that would be premature (especially given the decision is expected to be lengthy). The focus of the article is upon the competing arguments of the parties to the dispute, and the third parties.

As such, the piece is written from the perspective of evaluating the arguments of the countries involved in the trade dispute (which have been supported by the tobacco industry).<sup>23</sup> The article highlights the importance of public health and human rights in the context of international trade,<sup>24</sup> and supports the position of Australia that plain packaging of tobacco products is defensible under international trade law. Part II considers the relationship between international trade law, and the FCTC,<sup>25</sup> and considers the public health arguments of Australia in respect of the regime. Part III examines the conflict over the *Agreement on Trade-related Intellectual Property Rights* (‘TRIPS’), and the plain packaging of tobacco products.<sup>26</sup> Part IV explores the operation of the *Agreement on Technical Barriers to Trade* (‘TBT’).<sup>27</sup> Part V briefly considers the arguments about plain packaging of tobacco products, and the *General Agreement on*

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<sup>21</sup> Tom Miles and Martinne Geller, ‘Australia Wins Landmark WTO Tobacco Packaging Case — Bloomberg’, *Reuters*, 5 May 2017, <<https://www.reuters.com/article/us-wto-tobacco-australia/australia-wins-landmark-wto-tobacco-packaging-case-bloomberg-idUSKBN1801S9>>; ‘Australia wins Landmark WTO Tobacco Plain Packaging Case’, *ABC News* (online), 5 May 2017, <<http://www.abc.net.au/news/2017-05-05/australia-wins-landmark-wto-tobacco-packaging-case/8498750>>; Simon Chapman, ‘World Trade Organization Gives Australia’s Plain Tobacco Packs The (Draft) Thumbs Up’, *The Conversation*, 5 May 2017, <<https://theconversation.com/world-trade-organisation-gives-australias-plain-tobacco-packs-the-draft-thumbs-up-77234>>; ‘WTO Ruling Could Light the Way to a Tobacco-free Future’ (QUT News, 5 May 2017) <<https://www.qut.edu.au/news/news?news-id=117336>>.

<sup>22</sup> Nick Grimm, ‘Cigarette Plain Packaging: Former Health Minister Nicola Roxon Hails Leaked WTO Ruling’, *The World Today*, 5 May 2017, <<http://www.abc.net.au/news/2017-05-05/nicola-roxon-hails-leaked-wto-plain-packaging-ruling/8500610>>.

<sup>23</sup> Christopher Thompson, ‘Big Tobacco Backs Australian Law Opposers’, *Financial Times* (online), 29 April 2012, <<http://www.ft.com/intl/cms/s/0/314c9446-91fb-11e1-867e-00144feab49a.html>>. The reporter noted: ‘Philip Morris International and British American Tobacco, the two largest publicly listed tobacco companies by volume outside China, told the FT they were advising several countries that had complained that Australia’s plain packaging laws — in which tobacco companies will have to sell their products in identical drab packaging — violate international trade agreements’.

<sup>24</sup> Lawrence Gostin, *Global Health Law* (Harvard University Press, 2014), 205.

<sup>25</sup> WHO FCTC <<http://www.who.int/fctc/en/>>.

<sup>26</sup> *Agreement on Trade-related Aspects of Intellectual Property Rights* (‘TRIPS Agreement’), adopted 15 April 1994 at Marrakesh, TRT/WTO01/001, entry into force 1 January 1995 (annex 1C of the *Marrakesh Agreement Establishing the World Trade Organization*, 1867 UNTS 3).

<sup>27</sup> *Agreement on Technical Barriers to Trade* (‘TBT Agreement’), opened for signature on 15 April 1994, 1868 UNTS 120 (entered into force 1 January 1995) (annex 1A of the *Marrakesh Agreement Establishing the World Trade Organization*, 1867 UNTS 3).

*Tariffs and Trade* ('GATT').<sup>28</sup> Part VI considers the arguments of third parties to the dispute. In particular, it highlights the positions of key countries in respect of intellectual property and public health. The article concludes in Part VII that Australia's plain packaging of tobacco products regime is consistent and compatible with international law on trade, and technical barriers to trade, intellectual property, and public health. Moreover, the parallel field of access to medicines supports the need for intellectual property flexibilities in respect of public health.

## II INTERNATIONAL HEALTH LAW

International public health law provides an important context for Australia's trade dispute in respect of the plain packaging of tobacco products. The question of the efficacy of plain packaging of products is an important consideration in respect of intellectual property, technical barriers to trade, and other general considerations in respect of trade. The overarching argument of this article is that international trade law does need to pay due deference to international public health law, human rights, and sustainable development.

### A *The World Health Organization*

Internationally, the WHO welcomed the landmark ruling of the High Court of Australia, and called upon the 'rest of the world to follow Australia's tough stance on tobacco marketing'.<sup>29</sup> The then Director-General of WHO, Dr Margaret Chan, emphasised that the ruling would encourage other countries to implement tobacco control measures, such as the plain packaging of tobacco products: 'With so many countries lined up to ride on Australia's coat-tails, what we hope to see is a domino effect for the good of public health'.<sup>30</sup> She also stressed that the Australian experience would be of benefit to other nations:

The evidence on the positive health impact of plain packaging compiled by Australia's High Court will benefit other countries in their efforts to develop and implement strong tobacco control measures to protect the health of their people and to stand resolute against the advances of the tobacco industry.<sup>31</sup>

Nicola Roxon — a key figure in the implementation of Australia's plain packaging regime as Minister for Health and as Attorney-General — received a special award from the WHO for 'her unwavering leadership' in the field of health.<sup>32</sup>

For World No Tobacco Day in 2012, the WHO disseminated videos, lauding Australia's regime for the plain packaging of tobacco products.<sup>33</sup> This was followed in 2016 by the World No

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<sup>28</sup> *General Agreement on Tariffs and Trade* ('GATT'), LT/UR/A-1A/1/GATT/2 (signed 30 October 1947) (as incorporated in annex 1A of *Marrakesh Agreement Establishing the World Trade Organization*, 1867 UNTS 3).

<sup>29</sup> Margaret Chan, 'WHO Welcomes Landmark Decision from Australia's High Court on Plain Packaging', (Statement by WHO Director-General, 15 August 2012) <[http://www.who.int/mediacentre/news/statements/2012/tobacco\\_packaging/en/index.html](http://www.who.int/mediacentre/news/statements/2012/tobacco_packaging/en/index.html)>.

<sup>30</sup> *Ibid.*

<sup>31</sup> *Ibid.*

<sup>32</sup> Shin Young-soo, 'Turn-over of Awards to Honourable Nicola Roxon, Minister for Health and Ageing for the Australian Government' (Speech by World Health Organization Regional Director for the Western Pacific to Parliament of Australia, Canberra, 30 May 2011) <[http://www.wpro.who.int/regional\\_director/speeches/2011/20110531/en/index.html](http://www.wpro.who.int/regional_director/speeches/2011/20110531/en/index.html)>.

<sup>33</sup> World Health Organization, *Countries Stand Shoulder to Shoulder Fighting Big Tobacco* (4 June 2012) YouTube <[http://www.youtube.com/watch?feature=player\\_embedded&v=EAfLvuQvSSc](http://www.youtube.com/watch?feature=player_embedded&v=EAfLvuQvSSc)>.

Tobacco Day ‘Get Ready for Plain Packaging’ campaign.<sup>34</sup> In 2017, WHO has highlighted how the tobacco epidemic compromises a number of the global goals of sustainable development.<sup>35</sup>

At the TRIPS Council, the representatives of the WHO provided vocal support for Australia’s position.<sup>36</sup> They emphasised ‘that tobacco use was one of the greatest threats to public health the world had ever faced, and the single most preventable cause of death in the world today’.<sup>37</sup> The representatives observed: ‘Globally, tobacco consumption killed nearly six million people a year through both direct use and the deadly effects of second-hand smoke, more than 70 per cent of whom reside in low- and middle-income countries’.<sup>38</sup> The WHO was worried that ‘as necessary tobacco control measures continued to be implemented in developed countries, the tobacco industry, through aggressive marketing and interference practices, had shifted its focus to new markets in the developing world some time ago’.<sup>39</sup> The WHO stressed that ‘it was a critical moment in the global effort to curb the tobacco epidemic for the introduction of necessary public health interventions under the *WHO Framework Convention on Tobacco Control*’,<sup>40</sup> and emphasised that:

Because [non-communicable diseases] would result in long-term macroeconomic impacts on labour supply, capital accumulation and GDP worldwide, with the consequences most severe in developing countries, strong public health interventions, like the plain packaging measure, were relevant in addressing both health and economic concerns.<sup>41</sup>

The WHO was

of the view that the implementation of plain tobacco product packaging, representing a legitimate tobacco control measure, would have a substantial impact on tobacco consumption, was fully in line with the spirit and intent of the outcome of the UN High-Level Meeting, and was in accordance with international legal obligations under the WHO Framework Convention on Tobacco Control.<sup>42</sup>

On 29 October 2014, the Head of the Convention Secretariat made a joint statement with the WHO at the WTO TRIPS Council Meeting.<sup>43</sup> In response to concerns related to plain

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<sup>34</sup> World Health Organization, *World No Tobacco Day 2016: Get Ready for Plain Packaging* (2016), <<http://www.who.int/campaigns/no-tobacco-day/2016/en/>>.

<sup>35</sup> *World No Tobacco Day: Tobacco — A Threat to Development* (31 May 2017) World Health Organization <<http://www.who.int/campaigns/no-tobacco-day/2017/event/en/>>; Margaret Chan, ‘Tobacco is a Deadly Threat to Global Development’, (WHO Commentary, 30 May 2017) <<http://www.who.int/mediacentre/commentaries/2017/tobacco-threat-development/en/>>; United Nations Development Programme, *Integrating the WHO Framework Convention on Tobacco Control into UN and National Development Planning Instruments* (2014) <[http://www.who.int/fctc/publications/Development\\_Planning\\_and\\_Tobacco\\_Control\\_20140312.pdf](http://www.who.int/fctc/publications/Development_Planning_and_Tobacco_Control_20140312.pdf)>.

<sup>36</sup> World Trade Organization, *The Council for TRIPS Meeting of 28–29 February 2012*, IP/C/M/69 (minutes published 15 May 2012) <[https://docs.wto.org/dol2fe/Pages/FE\\_Search/FE\\_S\\_S006.aspx?Query=\(+%40Symbol%3d+ip%2fc%2fm%2f\\*\)&Language=ENGLISH&Context=FomerScriptedSearch&languageUIChanged=true#](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?Query=(+%40Symbol%3d+ip%2fc%2fm%2f*)&Language=ENGLISH&Context=FomerScriptedSearch&languageUIChanged=true#)>.

<sup>37</sup> *Ibid.*

<sup>38</sup> *Ibid.*

<sup>39</sup> *Ibid* [219].

<sup>40</sup> *Ibid* [219].

<sup>41</sup> *Ibid* [221].

<sup>42</sup> *Ibid* [223].

<sup>43</sup> World Health Organization, ‘WHO and FCTC Made a Joint Statement on Plain Packaging at WTO Meeting’ (Media Briefing, November 2014); WTO TRIPS Council Meeting, 28–29 October 2014, and WTO TBT Committee Meeting, 5 November 2014 <<http://www.who.int/fctc/mediacentre/news/2014/wtotrade/en/#.VGJxWnhBaV0.twitter>>; Statement of the

packaging of tobacco products and their compatibility with the *TRIPS Agreement*, the WHO stated that ‘the implementation of standardized tobacco product packaging represents a legitimate and effective tobacco control measure, and is fully in line with the spirit and intent of the outcome of the UN High-level Meeting, and is in accordance with international legal obligations under the WHO FCTC.’<sup>44</sup> A similar statement was made to the WTO TBT Committee Meeting.<sup>45</sup> The WHO recommended that Parties should consider adopting plain packaging in the guidelines for implementation of both Articles 11 and 13.

Dr Margaret Chan observed at the World Conference on Tobacco and Health that there was strong empirical evidence supporting plain packaging of tobacco products: ‘The evidence base is strong, empirical, and comes from well-qualified, respected, and credible sources’.<sup>46</sup>

Jonathan Liberman has emphasised the significance of the FCTC to understanding the conflicts over the plain packaging of tobacco products, observing that both domestic challenges and ongoing international challenges to Australia’s legislation will have to consider ‘the relationship between the FCTC, as both international law and international norm, and trade and investment obligations’.<sup>47</sup> He has suggested:

The accumulation of litigation experience and development of jurisprudence build an invaluable collective resource of ideas, themes and narratives that can be drawn upon in different ways in different places to strengthen ongoing efforts to reduce the global burden caused by tobacco and the tobacco industry.<sup>48</sup>

For its part, the tobacco industry has sought to undermine the FCTC and the global dissemination of plain packaging of tobacco products.<sup>49</sup>

The WTO disputes raise a larger meta-question about the relationship between international health law and trade law, between the FCTC and trade agreements, such as the *TRIPS Agreement*, the *TBT Agreement*, and *GATT*.

## B *Post-implementation Empirical Evidence in Respect of Plain Packaging in Australia*

There has been an important debate in the WTO about the empirical evidence for the impact of plain packaging of tobacco products. The introduction of plain packaging was supported by a strong body of empirical research,<sup>50</sup> as set out by Australia’s National Preventative Health

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World Health Organization in Relation to the Issue of Standardized Tobacco Product Packaging to WTO TRIPS Council Meeting; Geneva 28–29 October 2014; and Statement of the World Health Organization in Relation to the Issue of Standardized Tobacco Product Packaging to WTO TBT Committee Meeting; Geneva 5 November 2014.

<sup>44</sup> Ibid.

<sup>45</sup> Ibid.

<sup>46</sup> Dr Margaret Chan, Director-General of the World Health Organization, ‘Keynote address’ (delivered at the World Conference on Tobacco and Health, Abu Dhabi, United Arab Emirates, 18 March 2015) <<http://www.who.int/dg/speeches/2015/trends-tobacco-use/en/>>.

<sup>47</sup> Jonathan Liberman, ‘Plainly Constitutional: The Upholding of Plain Tobacco Packaging by the High Court of Australia’ (2013) *American Journal of Law and Medicine* 361.

<sup>48</sup> Ibid.

<sup>49</sup> Sarah Boseley, ‘Philip Morris Waging Global Effort to Hobble Anti-smoking Treaty, Files Show’, *The Guardian* (online), 14 July 2017, <[https://www.theguardian.com/business/2017/jul/13/philip-morris-international-tobacco-smoking-treaty?CMP=share\\_btn\\_tw](https://www.theguardian.com/business/2017/jul/13/philip-morris-international-tobacco-smoking-treaty?CMP=share_btn_tw)>.

<sup>50</sup> Department of Health (Aust), *Introduction of Tobacco Plain Packaging in Australia* (27 March 2016) <<http://www.health.gov.au/internet/main/publishing.nsf/content/tobacco-plain>>.

Taskforce in 2009. There were market research reports, and there were further consultations on the draft legislation to enact the scheme in Australia. Plain packaging of tobacco products was considered to be a logical progression for tobacco control in Australia, given there was already a range of other tobacco control measures leading up to it.<sup>51</sup> And as noted by public health researchers Simon Chapman and Becky Freeman, the Australian government has been systematically evaluating the impact of plain packaging, since its introduction.<sup>52</sup>

There was an important early study by Wakefield and colleagues into the introduction effects of the Australian plain packaging policy on adult smokers.<sup>53</sup> The objective of the study was ‘to determine whether smokers smoking from packs required under Australia’s plain packaging law had different smoking beliefs and quitting thoughts, compared with those still smoking from branded packs’.<sup>54</sup> They undertook a cross-sectional telephone survey during the roll-out phase of the law. The study involved 536 cigarette smokers with their usual brand, of whom 72.3 per cent were smoking from plain packaging, and 27.7 per cent were smoking from branded packaging. The researchers found: ‘Compared with branded pack smokers, smokers who were smoking from plain packs rated their cigarettes as being lower in quality and as tending to be less satisfying than 1 year ago’.<sup>55</sup> They argued that:

Given that Australia is the first nation to implement plain packaging, our study provides an early investigation of its actual effects on smokers in a market where plain packs are available to all, compared with past studies that have experimentally exposed smokers to a single viewing of a plain or branded pack which may or may not have been their own brand, and naturalistic studies that have mocked-up plain packs for smokers to carry around with them in a trial situation.<sup>56</sup>

In 2015, the *British Medical Journal* published a special supplement of *Tobacco Control*, containing the results of fifteen peer-reviewed articles on Australia’s tobacco plain packaging legislation.<sup>57</sup> This work showed that the specific objectives of plain packaging were achieved and generally sustained among adult smokers.<sup>58</sup> The Australian government’s *Post-Implementation Review of Tobacco Plain Packaging* released in February 2016<sup>59</sup> concluded that the tobacco plain packaging measure had begun to achieve its public health objectives of reducing smoking in Australia. The review concluded:

[A]nalysis of Roy Morgan Single Source Survey Data shows that the 2012 packaging changes (plain packaging combined with enhanced graphic health warnings) have contributed to declines in smoking prevalence, even at this early time after implementation. The analysis estimated that the 2012 packaging changes resulted in a ‘statistically significant decline in

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<sup>51</sup> Michelle Scollo, Megan Bayly, and Melanie Wakefield, ‘Plain Packaging: A Logical Progression for Tobacco Control in One of the World’s “darkest markets”’ (2015) 24(Suppl 2) *Tobacco Control* ii3, doi:10.1136/tobaccocontrol-2014-052048.

<sup>52</sup> Simon Chapman and Becky Freeman, *Removing the Emperor’s Clothes: Australia and Tobacco Plain Packaging* (Sydney University Press, 2014), 157–80.

<sup>53</sup> Wakefield et al, above n 10.

<sup>54</sup> *Ibid.*

<sup>55</sup> *Ibid.*

<sup>56</sup> *Ibid.*

<sup>57</sup> *Implementation and Evaluation of the Australian Plain Packaging Policy* (2015) 24(Suppl 2) *British Medical Journal – Tobacco Control* <[http://tobaccocontrol.bmj.com/content/24/Suppl\\_2](http://tobaccocontrol.bmj.com/content/24/Suppl_2)>.

<sup>58</sup> Melanie Wakefield et al, ‘Australian Adult Smokers’ Responses to Plain Packaging With Larger Graphic Health Warnings 1 Year After Implementation: Results From a National Cross-sectional Tracking Survey’ (2015) 24(Suppl 2) *Tobacco Control* <[http://tobaccocontrol.bmj.com/content/24/Suppl\\_2/ii17.full#cite-by](http://tobaccocontrol.bmj.com/content/24/Suppl_2/ii17.full#cite-by)>.

<sup>59</sup> Department of Health (Aust), *Post-Implementation Review Tobacco Plain Packaging 2016* (2016), <<http://ris.dpmc.gov.au/2016/02/26/tobacco-plain-packaging/>>.



smoking prevalence [among Australians aged 14 years and over] of 0.55 percentage points over the post-implementation period, relative to what the prevalence would have been without the packaging changes'. This decline accounts for approximately one quarter of the total decline in average prevalence rates observed between the 34 months prior to implementation of the measure and the 34 months following the implementation of the measure (the total decline between the two periods was estimated as being 2.2 percentage points, with average prevalence falling from 19.4% to 17.2%). .... [T]obacco plain packaging is achieving its aim of improving public health in Australia and is expected to have substantial public health outcomes into the future.<sup>60</sup>

Further work is still being done in this area. A study in October 2016 considered the impact of Australia's plain packaging of tobacco products among adolescents and young adults.<sup>61</sup> The tobacco industry's claims about plain packaging of tobacco products impacting upon counterfeiting and smuggling have not been supported by evidence from customs in Australia.<sup>62</sup> Indeed, in the United Kingdom, the courts have been highly critical of the poor evidence presented by the tobacco industry in their efforts to question the efficacy of plain packaging of tobacco products.<sup>63</sup> The strong empirical evidence of efficacy was an important factor in terms of the defensibility of the plain packaging measure in the WTO.

### C Evidence of the Efficacy of Plain Packaging in the WTO

In the executive summary of its argument, Australia emphasised the powerful evidence supporting the efficacy of plain packaging of tobacco products.<sup>64</sup> It noted:

Under the two principal provisions at issue in this dispute — Article 20 of the TRIPS Agreement and Article 2.2 of the TBT Agreement — the complainants have assumed the burden of proving that the tobacco plain packaging measure will make no contribution to its public health objectives. .... The qualitative and quantitative evidence before the Panel, and the complainants' own contradictory arguments regarding the effects of the measure, demonstrate that the complainants have failed to discharge this burden.<sup>65</sup>

Australia highlighted the important public health context of the dispute, noting that 'this dispute concerns a Member's right to regulate the advertising and promotion of tobacco — a unique, highly addictive product that kills half of its long-term users'.<sup>66</sup> It also stressed the larger international context of the global tobacco epidemic:

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<sup>60</sup> Ibid 4.

<sup>61</sup> Sally Dunlop et al, 'Australia's Plain Tobacco Packs: Anticipated and Actual Responses among Adolescents and Young Adults 2010–2013' (2016) *Tobacco Control* <<http://tobaccocontrol.bmj.com/content/early/2016/11/15/tobaccocontrol-2016-053166.full>>.

<sup>62</sup> Amy Corderoy, 'Tobacco Industry Claims on Impact of Plain Packaging Go Up in Smoke', *Sydney Morning Herald* (online), 12 March 2014 <<http://www.smh.com.au/federal-politics/political-news/tobacco-industry-claims-on-impact-of-plain-packaging-go-up-in-smoke-20140311-34kfc.html#ixzz2znabG7HE>>.

<sup>63</sup> *British American Tobacco Limited and others v The Queen* [2016] EWHC 1169 (Admin); *British American Tobacco UK Ltd & Ors v The Secretary of State for Health* [2016] EWCA Civ 1182 (30 November 2016).

<sup>64</sup> Australia, *Certain Measures Concerning Trademarks, Geographical Indications and other Plain Packaging Requirements Applicable to Tobacco Products and Packaging: Integrated Executive Summary of Australia's Submissions to World Trade Organization Panel (WT/DS435/441/458/ 467)* 23 March 2016, 9 <<http://dfat.gov.au/international-relations/international-organisations/wto/wto-dispute-settlement/Documents/integrated-executive-summary-aus-submissions-tobacco-plain-packaging-ds435-441-458-467.pdf>>.

<sup>65</sup> Ibid 1.

<sup>66</sup> Ibid 1–2.

To combat the global epidemic of tobacco use, the FCTC requires comprehensive tobacco control strategies in recognition that they are the most effective means of reducing the incidence and prevalence of smoking. .... To be effective, such comprehensive strategies must cover all aspects of supply and demand; apply to all tobacco products; optimize synergies between complementary measures; and be continually refreshed and revised.<sup>67</sup>

Australia's evidence considered a wide range of empirical research into the efficacy of plain packaging of tobacco products, drawing upon economics, behavioural science, and marketing. Indeed, the work of Cass Sunstein and Alberto Alemanno have highlighted how graphical health warnings and plain packaging of tobacco products are a form of nudge economics, which can help produce behavioural change.<sup>68</sup> In fact plain packaging relies upon graphic design in order to promote behavioural change in respect of smoking.<sup>69</sup> In its conclusion to the executive summary, Australia highlighted the larger ramifications of the dispute: 'The complainants' claims and arguments in this case threaten the essential right of a WTO Member... to decide the level of protection it seeks to achieve when it comes to protecting the lives and wellbeing of its citizens'.<sup>70</sup> Australia insisted that 'tobacco plain packaging is a legitimate public health measure, based upon an extensive body of scientific evidence and the explicit recommendations of the Parties to the FCTC'.<sup>71</sup> In its view, 'The evidence demonstrates that the measure is already contributing to achieving Australia's public health objectives and its effects are likely to grow over the long term.'<sup>72</sup> Australia's strong health justifications seem to be a key part of its victory in the WTO Panel Decision.<sup>73</sup>

### III THE *TRIPS* AGREEMENT 1994

The *TRIPS Agreement* lays down minimum standards for the protection of intellectual property rights, including trademarks, patent law and copyright law. Article 8(1) clearly acknowledges 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'. The *UNCTAD-ICTSD Resource Book on TRIPS and Development* provides a useful account of the origins and nature of Article 8:

Since language of a treaty is presumed not to be surplus, it would appear that Article 8.1 is to be read as a statement of TRIPS interpretative principle: it advises that Members were expected to have the discretion to adopt internal measures they consider necessary to protect public

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<sup>67</sup> Ibid 2.

<sup>68</sup> Cass Sunstein, *The Ethics of Influence: Government in the Age of Behavioural Science* (Cambridge University Press, 2016); Alberto Alemanno, 'Unpacking Plain Packaging and Other Standardization Requirements in Light of Behavioural Sciences', in Alberto Alemanno and Enrico Bonadio (eds), *The New Intellectual Property of Health: Beyond Plain Packaging* (Edward Elgar, 2016), 15–42.

<sup>69</sup> Sarah Schrauwen, Lucienne Roberts, and Rebecca Wright, *Can Graphic Design Save Your Life?* (GraphicDesign&, 2017); Oliver Wainwright, 'Can Graphic Design Save Your Life? Review – Thrills, Pills and Big Pharma', *The Guardian* (online), 8 September 2017, <[https://www.theguardian.com/artanddesign/2017/sep/07/can-graphic-design-save-your-life-review-wellcome-collection-london?CMP=share\\_btn\\_tw](https://www.theguardian.com/artanddesign/2017/sep/07/can-graphic-design-save-your-life-review-wellcome-collection-london?CMP=share_btn_tw)>.

<sup>70</sup> Australia, 'Certain Measures', above n 64.

<sup>71</sup> Ibid 40.

<sup>72</sup> Ibid.

<sup>73</sup> 'Tobacco Industry Suffers Defeat as WTO Upholds Australia's Plain Packaging laws', *Reuters* (online), 5 May 2017 <<https://www.theguardian.com/global/2017/may/05/australias-defeats-wto-challenge-to-plain-packaging-of-tobacco>>.

health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development.<sup>74</sup>

Article 8 can and should inform the interpretation of the *TRIPS Agreement*, both as a whole, and in its individual articles. Its operation is certainly not limited to pharmaceutical drugs or patents. Indeed, Article 8 is not even limited to health-care. It refers to food security ('nutrition'), technology transfer and development ('the public interest in sectors of vital importance to their socio-economic and technological development') and competition policy. Philosophically, intellectual property is designed to promote the public interest, particularly in respect of the promotion of public health. Nobel Laureate Joseph Stiglitz has emphasised the need to provide proper recognition of public health and equality under intellectual property rules in international trade agreements.<sup>75</sup> Stiglitz and colleagues have also stressed the need to ensure that intellectual property promotes the UN's Sustainable Development Goals.<sup>76</sup>

The dispute over the plain packaging of tobacco products has raised larger issues in respect of the relationship between intellectual property, public health, and trade.

### A *The Complainants*

Confident that the regime was compatible with international trade law, Australia passed legislation for the plain packaging of tobacco products in 2011.

In March 2012, Ukraine asked for consultations over Australia's plain packaging regime.<sup>77</sup> Ukraine argued that Australia's measures, especially in the context of its comprehensive tobacco regulatory regime, were inconsistent with Articles 1, 1.1, 2.1, 3.1, 15, 16, 20 and 27 of the *TRIPS Agreement*. At the TRIPS Council, Ukraine complained that the plain packaging requirements set forth in the legislation would violate a number of Australia's WTO obligations,<sup>78</sup> and reiterated its strong concern that the *Tobacco Plain Packaging Act 2011* (Cth) and its implementing regulations violated several provisions of the *TRIPS Agreement*, as well as provisions of the *Paris Convention* as incorporated into *TRIPS*. Ukraine maintained that Australia's tobacco measures appeared to be neither necessary to protect health, nor consistent with the provisions of the *TRIPS Agreement*.

At a meeting on 28 September 2012, the Dispute Settlement Bodies established a panel. Initially, Argentina, Brazil, Canada, the Dominican Republic, Ecuador, the European Union, Guatemala, Honduras, India, Indonesia, Japan, Korea, New Zealand, Nicaragua, Norway, Oman, the Philippines, Singapore, Chinese Taipei, Turkey, the United States, Uruguay, Zambia and Zimbabwe reserved their third party rights. Furthermore, Chile, China, Cuba, Egypt, Nigeria, Malaysia, Malawi, Mexico, Moldova, Peru, and Thailand also reserved their third party rights in the dispute.

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<sup>74</sup> United Nations Conference on Trade and Development and International Centre for Trade and Sustainable Development, *Resource Book on TRIPS and Development* (Cambridge University Press, 2005).

<sup>75</sup> Joseph Stiglitz, *Globalization and Its Discontents Revisited: Anti-Globalization in the Era of Trump* (WW Norton & Company, 2017), 40–43.

<sup>76</sup> Dean Baker, Arjun Jayadev and Joseph Stiglitz, *Innovation, Intellectual Property, and Development: A Better Set of Approaches for the 21<sup>st</sup> Century* (AccessIBSA, 2017) <<http://ip-unit.org/wp-content/uploads/2017/07/IP-for-21st-Century-EN.pdf>>.

<sup>77</sup> *Ukraine v Australia — Certain Measures Concerning Trademarks and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging* (World Trade Organization, Dispute No 434), <[http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds434\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds434_e.htm)>.

<sup>78</sup> WTO, *Council for TRIPS Meeting*, above n 36, [196].

Four other complainants subsequently joined the dispute, requesting consultations with Australia concerning certain Australian laws and regulations that impose trademark restrictions and other plain packaging requirements on tobacco products and packaging,<sup>79</sup> beginning with Honduras on 4 April 2012. Honduras claimed that Australia's measures appeared to be inconsistent with its obligations under Articles 2.1, 3.1, 15.4, 16.1, 20, 22.2(b) and 24.3 of the *TRIPS Agreement*. At the TRIPS Council, Honduras expressed fears that producers and importers of affected tobacco products would be obliged to adopt standardized packaging and would at the same time be prevented from using their legitimate intellectual property rights on the packaging.<sup>80</sup> In its view, Honduras believed that this requirement would violate Article 20 of the *TRIPS Agreement*. That Article establishes that the use of a trademark could not be unjustifiably encumbered in trade operations by specific requirements such as the use with another trademark, the use in a special form, or use in a manner which could undermine the ability for the brand to distinguish the goods or services of one company from those of other companies.<sup>81</sup> Honduras argued that plain packaging measures created a serious risk of confusion between competing tobacco products.

On the 18 July 2012, the Dominican Republic joined the dispute,<sup>82</sup> claiming that Australia's measures were inconsistent with Australia's obligations under Articles 2.1, 3.1, 15.4, 16.1, 20, 22.2(b) and 24.3 of the *TRIPS Agreement*. At the TRIPS Council, the Dominican Republic maintained that Australia's plain packaging measures were a threat to intellectual property rights which were vital for international trade and should be a matter of concern to each and every Member.<sup>83</sup> It argued that Australia's plain packaging measures would eliminate the distinctive features of tobacco sector products by banning designs and trademarks, as well as by prescribing standardised packaging, and the measures would negate intellectual property rights.

In May 2013, Cuba joined the dispute.<sup>84</sup> The Republic of Cuba is a major producer of cigars,<sup>85</sup> as reported by *The New York Times*: 'Cigar sales are handled by Habanos, a 50-50 joint venture between the Cuban state tobacco company and Altidis, a unit of Imperial Tobacco'.<sup>86</sup> It is a curious irony that Communist Cuba should support the capitalist tobacco industry in the challenge to Australia's plain packaging regime. Cuba also claimed that Australia's measures were inconsistent with its obligations under Articles 2.1, 3.1, 15.4, 16.1, 20, 22.2(b) and 24.3 of the *TRIPS Agreement*.<sup>87</sup> It argued that Australia breaches Article 20 because 'Australia unjustifiably encumbers the use of trademarks for tobacco products in the course of trade

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<sup>79</sup> *Honduras v Australia — Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging* (WTO, Dispute No DS435) <[http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds435\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds435_e.htm)>.

<sup>80</sup> WTO, *Council for TRIPS Meeting*, above n 36, [193].

<sup>81</sup> *Ibid* [194].

<sup>82</sup> *Dominican Republic v Australia — Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging* (WTO, Dispute No DS441) <[http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds441\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds441_e.htm)>.

<sup>83</sup> WTO, *Council for TRIPS Meeting*, above n 36, [157].

<sup>84</sup> *Cuba v Australia — Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging* (WTO, Dispute No DS458) <[http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds458\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds458_e.htm)>.

<sup>85</sup> David Jolly, 'Cuba Challenges Australian Tobacco Rules', *The New York Times* (online), 6 May 2013, <[http://www.nytimes.com/2013/05/07/business/global/07iht-smoke07.html?\\_r=3&](http://www.nytimes.com/2013/05/07/business/global/07iht-smoke07.html?_r=3&)>.

<sup>86</sup> *Ibid*.

<sup>87</sup> *Cuba v Australia* (WTO Dispute No DS458) <[http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds458\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds458_e.htm)>.

through special requirements',<sup>88</sup> because it mandates: (i) that trademarks relating to tobacco products be used in a special form, and (ii) that trademarks relating to tobacco products be used in a manner which is detrimental to their capability to distinguish tobacco products of one undertaking from tobacco products of other undertakings. Cuba complained that the Australian Bill had created tension between the right of governments to protect human health, and the commercial interests associated with tobacco consumption.<sup>89</sup> Cuba was concerned that the requirement of standard packaging would have an impact on advertising and consumption of tobacco. The delegate lamented that Cuban cigars had been the target of counterfeiting for many years and in many markets,<sup>90</sup> and Cuba was concerned that plain packaging would defeat its anti-counterfeiting measures; and that it would no longer be possible to use the 'Habano' designation of origin seal or the national guarantee of origin seal used by the Republic of Cuba on its cigars; and that it would be prevented from applying the brand name and the place of origin, La Habana, Cuba, to the rings on cigars.

Indonesia then joined the fray in September 2013.<sup>91</sup> Indonesia alleged breaches of the *TRIPS Agreement*, the *TBT Agreement*, and *GATT*. There was much debate about this action – especially given that Indonesia is a close neighbour of Australia, and a previous disputant over trade and tobacco control in the WTO.<sup>92</sup>

A number of countries have expressed support for these complainants. El Salvador raised concerns about Australia's Tobacco Plain Packaging Bill and its compatibility with the *TRIPS Agreement*.<sup>93</sup> Zimbabwe's delegation shared the concerns expressed by the Dominican Republic and other delegations as regards the likely consequences for consumers and producers of tobacco products of the plain packaging measures being put in place by Australia.<sup>94</sup> Chile had serious doubts that imposing plain packaging for cigarettes was the least trade restrictive measure available and that it was consistent with certain provisions of the *TRIPS Agreement*, in particular Article 20.<sup>95</sup> Mexico's delegation was sensitive to the legitimate objectives sought by Australia, which served as a basis for its Plain Packaging Bill, but shared some of the concerns of Chile. Ecuador was concerned about the impact of the plain packaging upon commercial sales of tobacco, and local farming communities.<sup>96</sup>

## B *Australia*

In June 2011, the Australian government notified the TRIPS Council of its intention to

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<sup>88</sup> *Ibid.*

<sup>89</sup> WTO, *Council for TRIPS Meeting*, above n 36, [181].

<sup>90</sup> *Ibid* [186].

<sup>91</sup> *Indonesia v Australia — Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging* (WTO, Dispute No DS467) <[http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds467\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds467_e.htm)>.

<sup>92</sup> 'Indonesia Becomes Fifth to File WTO Case against Australia Tobacco Plain Packaging', *Intellectual Property Watch*, 22 September 2013 <<http://www.ip-watch.org/2013/09/22/indonesia-becomes-fifth-to-file-wto-case-against-australia-tobacco-plain-packaging/>>; AFP, 'Indonesia to Challenge Australia's Plain Packaging Tobacco Laws at World Trade Organisation', *ABC News* (online), 27 March 2014, <<http://www.abc.net.au/news/2014-03-27/new-wto-challenge-to-australia-plain-packaging-tobacco-law/5348078>>; Helen Davidson, 'Indonesia Granted Right to Challenge Australia's Plain Packaging Laws', *The Guardian* (online), 27 March 2014 <<http://www.theguardian.com/world/2014/mar/27/indonesia-granted-right-to-challenge-australias-plain-packaging-laws>>.

<sup>93</sup> WTO, *Council for TRIPS Meeting*, above n 36, [187].

<sup>94</sup> *Ibid* [210].

<sup>95</sup> *Ibid* [207].

<sup>96</sup> *Ibid* [216].

introduce plain packaging of tobacco products.<sup>97</sup> The Australian statement emphasised that ‘Australia’s Plain Packaging legislation was a legitimate and appropriate measure which would make a significant contribution to protecting the health of Australians’.<sup>98</sup> Australia pointed out that ‘Tobacco packaging was one of the last remaining forms of tobacco advertising in Australia and the plain packaging legislation was therefore the next logical step in Australia’s tobacco control efforts’.<sup>99</sup> The statement highlighted:

The plain packaging of tobacco products was designed to reduce the attractiveness and appeal of tobacco products to consumers, particularly young people; to increase the noticeability and effectiveness of mandated health warnings; to 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.<sup>100</sup>

It stressed that the ‘Guidelines agreed by the Conference of the Parties to the *WHO Framework Convention on Tobacco Control* (FCTC) in 2008 for the implementation of Articles 11 and 13 of the FCTC recommended that Parties consider the introduction of plain packaging’.<sup>101</sup> Further,

The proposed legislation was consistent with recommendations made to the Government by Australia’s National Preventative Health Taskforce which had been based on extensive research evidence that explored the impacts of tobacco packaging and tested the reactions of respondents exposed to different packaging options under experimental conditions. The weight of the evidence indicated that a plain packaging requirement, as part of a comprehensive suite of tobacco control measures, would help to reduce smoking rates.<sup>102</sup>

Australia emphasised that the plain packaging regime was compatible with its international obligations to protect intellectual property rights under the *TRIPS Agreement*: ‘In framing its policy on plain packaging, Australia had paid full regard to its obligations under the *TRIPS Agreement* 1994 and would ensure that the new policy was implemented in a manner consistent with that Agreement’.<sup>103</sup> The Australian delegate stressed ‘that amendments to the *Tobacco Plain Packaging Bill* had been proposed to ensure trademark owners’ ability to protect their trademarks from use by other persons, and the ability to register and maintain the registration of a trademark had been preserved’.<sup>104</sup>

In its executive summary, Australia maintained that the complainants had failed to demonstrate that the tobacco plain packaging measure was inconsistent with the *TRIPS Agreement*.<sup>105</sup> Indeed, Australia argued that its opponents’ ‘claims are based on theories of “interests” that supposedly “pervade” the TRIPS Agreement 1994, and on attempts to rewrite various provisions of the TRIPS Agreement 1994 to create rights and obligations that do not exist in the text itself’.<sup>106</sup> First, Australia contended that the complainants failed to demonstrate that

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<sup>97</sup> WTO, *Council for TRIPS Meeting* (Minutes of the Meeting of June 2011), IP/C/M/67.

<sup>98</sup> WTO, *Council for TRIPS Meeting*, above n 36, [178].

<sup>99</sup> Ibid [180] 32, quoting Minutes of TRIPS Council Meeting, June 2011 (IP/C/M/66) recording Australian Statement.

<sup>100</sup> Ibid [180] 33.

<sup>101</sup> Ibid [179] 31.

<sup>102</sup> Ibid.

<sup>103</sup> Ibid [179] 32.

<sup>104</sup> Ibid [176].

<sup>105</sup> Australia, *Certain Measures*, above n 64.

<sup>106</sup> Ibid 16.

the measure was inconsistent with Article 20 of the *TRIPS Agreement*, and that ‘the complainants have failed to establish a prima facie case that the tobacco plain packaging measure imposes “special requirements” that “encumber” the “use of a trademark in the course of trade”’.<sup>107</sup> Australia noted: ‘The relevant “use” of a trademark under Article 20 ... is the use of a trademark to distinguish the goods or services of one undertaking from those of other undertakings’,<sup>108</sup> and insisted that ‘the use of trademarks to advertise and promote the trademarked product is not a relevant “use” of trademarks under Article 20’.<sup>109</sup> Australia also observed that ‘The complainants have not even attempted to demonstrate that the tobacco plain packaging measure encumbers the relevant use of trademarks in the course of trade.’<sup>110</sup>

Second, Australia maintained that ‘Article 20 of the *TRIPS Agreement* does not encompass the aspects of the tobacco plain packaging measure which prohibit the use of trademarks on tobacco packaging and products’.<sup>111</sup> Third, Australia said that the ‘complainants’ interpretation of the term “unjustifiably” is unfounded’.<sup>112</sup> In conclusion, Australia observed that the complainants failed to show that the tobacco plain packaging measure is inconsistent with Article 20 of the *TRIPS Agreement*:

The complainants have failed to show that the measure encumbers by special requirements the relevant ‘use’ of a trademark to distinguish the goods of one undertaking from those of other undertakings in the course of trade, and have therefore failed to establish the threshold applicability of Article 20. The use of trademarks to advertise and promote tobacco products is not a relevant ‘use’ of trademarks under Article 20. Any encumbrance upon this use is therefore irrelevant to establishing the applicability of Article 20.<sup>113</sup>

Moreover, ‘The complainants have failed to provide a coherent interpretative or factual basis for their assertion that the prohibitive elements of the tobacco plain packaging measure are “special requirements” that fall within the scope of Article 20, while other widely-adopted measures that affect the use of a trademark do not’.<sup>114</sup> Furthermore, Australia maintained: ‘Assuming arguendo that these prohibitive elements do fall within the scope of Article 20, the complainants have failed to demonstrate that the measure as a whole encumbers the relevant use of a trademark’.<sup>115</sup> The case of Australia in relation to the interpretation of the *TRIPS Agreement* is a plausible and persuasive argument.

### C *Academic Debate*

There has also been a significant scholarly debate over plain packaging of tobacco products and the *TRIPS Agreement*. Back in 2008, I made the case — along with my public health colleagues — that the plain packaging of tobacco products was indeed compatible with the strictures of *TRIPS*.<sup>116</sup> Our research into the internal documents of the tobacco industry revealed that the industry had been preparing for international trade, investment, and

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<sup>107</sup> Ibid 17.

<sup>108</sup> Ibid.

<sup>109</sup> Ibid 18.

<sup>110</sup> Ibid.

<sup>111</sup> Ibid 20.

<sup>112</sup> Ibid.

<sup>113</sup> Ibid 28.

<sup>114</sup> Ibid.

<sup>115</sup> Ibid.

<sup>116</sup> Becky Freeman, Simon Chapman and Matthew Rimmer, ‘The Case for the Plain Packaging of Tobacco Products’ (2008) 103 *Addiction* 580.

intellectual property challenges in the 1990s. The internal documents also highlighted that the tobacco industry had private doubts about whether such challenges would be successful. Further insights into the tactics of the tobacco industry can be gained by more recent revelations. In 2017, the Reuters press agency published internal documents of Philip Morris, which detail its strategies to use intellectual property and international trade to delay the introduction of plain packaging of products.<sup>117</sup>

A number of other academics have been confident that the plain packaging of tobacco products is compatible with the *TRIPS Agreement*. University of Melbourne trade scholars, Tania Voon and Andrew Mitchell, comment: ‘Interpreting TRIPS Article 20 in the light of Articles 7 and 8 and the *Doha Declaration*, it seems incontrovertible that a public health objective could justify an encumbrance under TRIPS Article 20’.<sup>118</sup> Treatise writer, Nuno Pires de Carvalho, observes that Article 20 of the *TRIPS Agreement* presents no such obstacle to special requirements in respect of the designation of tobacco, because such measures are justifiable.<sup>119</sup> Jayashree Watal has maintained that ‘Article 20 allows for justifiable encumbrances and these can be considered as permitted by TRIPS language’ and that fears about special requirements on tobacco labels and packaging have been excessive.<sup>120</sup> Professor Ben McGrady from Georgetown University maintains that plain packaging, as implemented by Australia, is consistent with WTO law.<sup>121</sup> Professor Mark Davison from Monash University, clearly the pre-eminent scholar on trademark law in Australia, has maintained that Australia’s plain packaging regime is compatible with the *TRIPS Agreement*.<sup>122</sup> He has noted that ‘the WTO tends to be cautious in its approach to interpretation of provisions in the relevant agreements as taking interpretative licence may tend to undermine the political consensus underpinning the WTO’.<sup>123</sup> He concludes that ‘the claims made by tobacco trademark owners are dependent on an expansive approach to their intellectual property rights unsupported by the wording or the objectives of TRIPS.’<sup>124</sup> Enrico Bonadio has maintained that ‘under the *TRIPS Agreement* and the *Paris Convention* trademark registrations do not offer a positive right to use the sign, but

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<sup>117</sup> *The Philip Morris Files: The Secrets of the World’s Biggest Tobacco Company*, Reuters Investigates (2017) <<https://www.reuters.com/investigates/section/pmi/>>; Aditya Kalra et al, ‘Inside Philip Morris’s Campaign to Subvert the Global Anti-Smoking Treaty’, *Reuters* (online), 13 July 2017, <<https://www.reuters.com/investigates/special-report/pmi-who-fctc/>>.

<sup>118</sup> Tania Voon and Andrew Mitchell, ‘Implications of WTO Law for Plain Packaging of Tobacco Products’ in Andrew Mitchell, Tania Voon and Jonathan Liberman (eds), *Public Health and Plain Packaging of Cigarettes: Legal Issues* (Edward Elgar, 2012), 109–36.

<sup>119</sup> Nuno Pires De Carvalho, *The TRIPS Regime of Trademarks and Designs* (Kluwer Law International, 2007).

<sup>120</sup> Jayashree Watal, *Intellectual Property Rights in the WTO and Developing Countries* (Kluwer, 2001), 252.

<sup>121</sup> Benn McGrady, ‘Revisiting TRIPS and Trademarks: The Case of Tobacco’ (2012) *Social Science Research Network*, <<http://ssrn.com/abstract=2144269>>.

<sup>122</sup> Mark Davison, ‘Plain Packaging of Cigarettes: Would it Be Lawful?’ (2010) 23 (5) *Australian Intellectual Property Law Bulletin*; Mark Davison, ‘The Legitimacy of Plain Packaging Under International Intellectual Property Law: Why There is No Right to Use a Trademark Under Either the Paris Convention or the TRIPS Agreement’ in Andrew Mitchell, Tania Voon and Jonathan Liberman (eds), *Public Health and Plain Packaging of Cigarettes: Legal Issues* (Edward Elgar, 2012), 81–108; Mark Davison, ‘Plain Packaging of Tobacco and the “Right” to Use a Trade Mark’ (2012) 8 *European Intellectual Property Review* 498; Mark Davison and Patrick Emerton, ‘Rights, Privileges, Legitimate Interests, and Justifiability: Article 20 of TRIPS and Plain Packaging of Tobacco’, (2013) *American University International Law Review* (forthcoming) <<http://ssrn.com/abstract=2322043>>; Mark Davison, ‘Plain Packaging and the TRIPS Agreement: A Response to Professor Gervais’ (2013) 23 *Australian Intellectual Property Journal* 160.

<sup>123</sup> Mark Davison, ‘Plain Packaging of Tobacco Products and the WTO Challenge’ in Alberto Alemanno and Enrico Bonadio (ed), *The New Intellectual Property of Health: Beyond Plain Packaging* (Edward Elgar, 2016), 163–83, 183.

<sup>124</sup> *Ibid.*



just a negative right to prevent third parties from exploiting the brand'.<sup>125</sup> Such a position is buttressed by a previous WTO Panel ruling in a complaint by the United States against the European Communities, in respect of trademark law and geographical indications.<sup>126</sup>

Civil society has also voiced its views about the claims of the tobacco industry. Deborah Arnott, Chief Executive of health charity ASH said: 'The claim that Australia's tobacco plain packaging infringes WTO agreements is ill founded and has little or no chance of success'<sup>127</sup> Alberto Alemanno comments that standardization measures are also used in other contexts in addition to tobacco, including in respect of alcohol, unhealthy foods, baby formulas, and pharmaceuticals.<sup>128</sup> He suggests that 'this emerging category of packaging requirements can, despite their intrusive nature (notably on trademarks), somehow be accommodated within IP regimes.'<sup>129</sup>

The reported WTO Panel Decision supports the view of such academic commentary that plain packaging of tobacco products is compatible with the *TRIPS Agreement*.

#### IV THE *TBT AGREEMENT* 1994

In the dispute over Australia's plain packaging of tobacco products before the WTO, a number of the complainants raised the question of technical barriers to trade, alleging among other things that Australia's regime of plain packaging was inconsistent with Articles 2.1 and 2.2 of the *TBT Agreement*.<sup>130</sup> Article 2.2 of the *TBT Agreement* provides:

Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create. Such legitimate objectives are, inter alia: ...protection of human health or safety.<sup>131</sup>

Moreover, it states: '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.'<sup>132</sup>

The WTO's *World Trade Report* for 2012 places particular emphasis upon technical barriers to trade in.<sup>133</sup> In his foreword, Pascal Lamy emphasised that there were a number of reasons why we should take matters of non-tariff measures ('NTMs') seriously:

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<sup>125</sup> Enrico Bonadio, 'On the Nature of Trademark Rights: Does Trademark Registration Confer Positive or Negative Rights?' in Alberto Alemanno and Enrico Bonadio (ed) *The New Intellectual Property of Health: Beyond Plain Packaging* (Edward Elgar, 2016), 43–68, 68.

<sup>126</sup> *European Communities — Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs*, (WTO, Dispute No DS174), <[https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds174\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds174_e.htm)>.

<sup>127</sup> ASH, above n 18.

<sup>128</sup> Alemanno, above n 68.

<sup>129</sup> Ibid 42.

<sup>130</sup> *Ukraine v Australia* (WTO Dispute No 434)

<[http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds434\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds434_e.htm)>.

<sup>131</sup> *TBT Agreement*, above n 27.

<sup>132</sup> Ibid.

<sup>133</sup> World Trade Organization, *World Trade Report 2012: Trade and Public Policies: A Closer Look at Non-Tariff Measures in the 21st Century* (2012) <[http://www.wto.org/english/res\\_e/publications\\_e/wtr12\\_e.htm](http://www.wto.org/english/res_e/publications_e/wtr12_e.htm)>.

A clear trend has emerged over the years in which NTMs are less about shielding producers from import competition and more about the attainment of a broad range of public policy objectives. You could say we are moving from protection to precaution. This tendency is discernible in practically every economy, as concerns over health, safety, environmental quality and other social imperatives gain prominence.<sup>134</sup>

The topic of technical barriers to trade has become increasingly important, with significant battles in the WTO over matters such as tobacco control and the plain packaging of tobacco products; measures dealing with harmful products like asbestos; and environmental and consumer measures like eco-labelling.

Jeff Weiss from the Office of the US Trade Representative ('USTR') has discussed the evolution of WTO jurisprudence on technical barriers to trade.<sup>135</sup> He observed that there had been two main developments since the adoption of the *TBT Agreement*. First was 'the agreement by the WTO Committee on Technical Barriers to Trade in 2000 on a set of principles for the development of international standards, namely: (1) openness, (2) transparency, (3) impartiality and consensus, (4) relevance and effectiveness, (5) coherence and (6) the development dimension'.<sup>136</sup> Second, 'members now recognize that, with tariff levels generally falling around the world, the biggest obstacles faced by industries are often "behind the border" barriers, including problematic standards-related measures'.<sup>137</sup> Weiss observed that the USTR had published an annual report to 'document the steps taken by the Obama administration to address standards-related barriers to U.S. exports'.<sup>138</sup>

There has also been a complex dispute between Indonesia and the United States over the regulation of clove cigarettes in the WTO.<sup>139</sup> In 2010, Indonesia requested consultations with the United States regarding a provision of the *Family Smoking Prevention Tobacco Control Act* of 2009 (US), which banned clove cigarettes, but excluded menthol-flavoured cigarettes from the ban. Indonesia claimed that the provision was inconsistent with *GATT*, Article 2 of the *TBT Agreement*, and the *Agreement on the Application of Sanitary and Phytosanitary Measures*.<sup>140</sup> A Panel report was released in September 2011 and an Appellate report in April 2012. Professor Tania Voon has summarised the WTO Appellate Report,<sup>141</sup> observing that 'this decision makes clear that WTO Members implementing tobacco-control measures and other labelling and packaging requirements must refrain from discriminating in law or fact against imports, except to the extent that such discrimination arises "exclusively from a legitimate regulatory distinction"'.<sup>142</sup> Professor Lawrence Gostin lamented: 'What is most worrying about the clove cigarettes case was that the WTO trampled on a historic public health law fashioned after years of political compromise — as all democratic institutions must

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<sup>134</sup> Ibid.

<sup>135</sup> 'International Trade and Standards: An Interview with Jeff Weiss, Office of the US Trade Representative', ASTM Standardization News, May/June 2011 <[http://www.astm.org/SNEWS/MJ\\_2011/provocative\\_mj11.html](http://www.astm.org/SNEWS/MJ_2011/provocative_mj11.html)>.

<sup>136</sup> Ibid.

<sup>137</sup> Ibid.

<sup>138</sup> Ibid.

<sup>139</sup> *Indonesia v United States — Measures Affecting the Production and Sale of Clove Cigarettes* (Panel Report 2 September 2011, Appellate Report, 4 April 2012) <[http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds406\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds406_e.htm)>.

<sup>140</sup> *Agreement on the Application of Sanitary and Phytosanitary Measures* ('SPS Agreement'), opened for signature in Marrakesh 14 April 1994, entered into force 1 January 1995.

<sup>141</sup> Tania Voon, 'Note on WTO Appellate Body Report in US — Clove Cigarettes' (2012) 106 *American Journal of International Law* <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2143804](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2143804)>.

<sup>142</sup> Ibid.

compromise'.<sup>143</sup> Professor Jane Kelsey has also explored the significance of the dispute in US-Clove Cigarettes for other tobacco control measures, such as the plain packaging of tobacco products.<sup>144</sup>

In its complaint to the WTO about Australia's plain packaging regime, Ukraine alleged the measures were inconsistent with Articles 2.1 and 2.2 of the *TBT Agreement*.<sup>145</sup> Honduras made a similar complaint,<sup>146</sup> and the Dominican Republic also aired objections about technical barriers to trade.<sup>147</sup> Cuba complained that Australia violated Article 2.1 of the *TBT Agreement* because it imposed technical regulations that applied less favourable treatment to imported tobacco products treatment than that applied to like products of national origin.<sup>148</sup> Cuba also contended that the plain packaging regime was inconsistent with Article 2.2 because Australia imposed technical regulations that created unnecessary obstacles to trade and are more trade-restrictive than necessary to fulfil a legitimate objective, taking into account the risks that non-fulfilment would create. Indonesia has made similar complaints.<sup>149</sup>

In response to Indonesia's complaint, Australia said in a statement that 'tobacco plain packaging is a sound, well-considered measure designed and based on a broad range of scientific studies and reports to achieve a legitimate objective — the protection of public health'.<sup>150</sup> Australia also cited the view of the WHO about the need for global action in respect of the 'tobacco epidemic'. Furthermore, Australia highlighted the terrible health burden placed upon Indonesia because of tobacco. The Australian representatives 'remarked that Indonesia might look favourably upon such health measures, as a substantive majority of Indonesian males are smokers, and the country is estimated to have the second highest male smoking rate in the world'.<sup>151</sup>

Australia robustly defended the consistency of plain packaging of tobacco products with the *TBT Agreement*, arguing in its executive summary that the complainants failed to establish a *prima facie* case that the tobacco plain packaging measure is inconsistent with Article 2.2 of the *TBT Agreement*.<sup>152</sup>

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<sup>143</sup> Gostin, above n 24, 238.

<sup>144</sup> Jane Kelsey, *International Trade Law and Tobacco Control: Trade and Investment Law Issues relating to Proposed Tobacco Control Policies to Achieve an Essentially Smoke Free Aotearoa New Zealand by 2025: A report to the New Zealand Tobacco Control Research Tūrangā* (2012) 27. See also Jane Kelsey, *Hidden Agendas: What We Need to Know About the Trans-Pacific Partnership Agreement* (BWB Books, 2013); and WTO, *World Trade Report 2012*, above n 133.

<sup>145</sup> *Ukraine v Australia* (WTO Dispute No 434)

<[http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds434\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds434_e.htm)>.

<sup>146</sup> *Honduras v Australia* (WTO Dispute No DS435)

<[http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds435\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds435_e.htm)>.

<sup>147</sup> *Dominican Republic v Australia* (WTO Dispute No DS441)

<[http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds441\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds441_e.htm)>.

<sup>148</sup> *Cuba v Australia* (WTO Dispute DS 458)

<[http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds458\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds458_e.htm)>.

<sup>149</sup> *Indonesia v Australia* (WTO Dispute No DS467)

<[http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds467\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds467_e.htm)>.

<sup>150</sup> William New, 'Australia Accepts Indonesia WTO Dispute On Tobacco Packaging; Calls For Five Disputes To Be Joined', *Intellectual Property Watch*, 27 March 2014 <<http://www.ip-watch.org/2014/03/27/australia-accepts-indonesia-wto-dispute-on-tobacco-packaging-calls-for-five-disputes-to-be-joined/>>.

<sup>151</sup> *Ibid.*

<sup>152</sup> Australia, *Certain Measures*, above n 64.

The tobacco plain packaging measure is entitled to the presumption in Article 2.5 that it does not constitute an unnecessary obstacle to international trade, and the complainants have failed to rebut that presumption with the type of evidence required. Even if the complainants' claims were found to overcome that fundamental hurdle, the complainants have also failed to establish a prima facie case that the tobacco plain packaging measure is trade-restrictive at all, let alone that it is more trade-restrictive than necessary having regard to the contribution it makes to its public health objectives and the risks that non-fulfilment of those objectives would create.<sup>153</sup>

Australia stated that it had 'enacted its tobacco plain packaging measure in accordance with the FCTC Guidelines, which set out the relevant international standard for the plain packaging of tobacco products',<sup>154</sup> and argued that the complainants failed to make a prima facie case that the measure was trade restrictive under Article 2.2 of the *TBT Agreement*,<sup>155</sup> but instead had tried to artificially expand the definition of trade-restrictiveness.<sup>156</sup> Australia stated: 'None of the complainants has substantiated its claims that the tobacco plain packaging measure entails compliance costs, or increases barriers to market entry, such as to constitute a limiting effect on international trade in tobacco products',<sup>157</sup> contending that 'the complainants have failed in their attempt to establish that the tobacco plain packaging measure is not capable of contributing to its objectives of reducing the use of and exposure to tobacco products in Australia.'<sup>158</sup> Australia commented:

[T]he overwhelming weight of the qualitative evidence unequivocally establishes that, by prohibiting tobacco packaging from being used to advertise and promote tobacco products — and thereby reducing the appeal of tobacco products, increasing the effectiveness of graphic health warnings, and reducing the ability of tobacco packaging to mislead consumers — the tobacco plain packaging measure is capable of discouraging smoking initiation and relapse, encouraging cessation, and reducing people's exposure to tobacco products. The quantitative evidence corroborates this conclusion, and is consistent with the tobacco plain packaging measure operating synergistically with other elements of Australia's comprehensive tobacco control policy to reduce further the use of tobacco products and exposure to tobacco smoke in Australia. .... The complainants have thus failed entirely to discharge their burden of establishing that the tobacco plain packaging measure is incapable of contributing to its public health objectives.<sup>159</sup>

Furthermore, Australia observed that the complainants had failed to establish that the risks arising from non-fulfilment of the measure's objectives are not grave: 'Properly interpreted, the risks that would arise from the non-fulfilment of the public health objectives of the tobacco plain packaging measure are significant and grave, and the consequences would include increased tobacco-related deaths and disease in Australia.'<sup>160</sup>

Australia also noted that

three of the complainants' four purported 'alternatives' — an increase in excise tax, an increase in the minimum legal purchase age for tobacco products, and improved social marketing

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<sup>153</sup> Ibid 32.

<sup>154</sup> Ibid.

<sup>155</sup> Ibid 34.

<sup>156</sup> Ibid 35.

<sup>157</sup> Ibid.

<sup>158</sup> Ibid 36.

<sup>159</sup> Ibid.

<sup>160</sup> Ibid 37.

campaigns — are not alternatives at all, as they constitute variations on existing elements of Australia’s comprehensive tobacco control policy.<sup>161</sup>

It noted further that, regarding ‘the only actual alternative measure the complainants propose — a pre-vetting scheme — the complainants have failed to provide any credible evidence or argument to support their implausible assertion that the scheme would make “an equivalent or greater contribution” to that of the tobacco plain packaging measure’.<sup>162</sup>

The WHO has also defended the position of Australia in a statement at the WTO Committee on Technical Barriers to Trade.<sup>163</sup> The position of Australia seems to have been validated by the WTO Panel Decision.

## V GATT

There have also been a number of complaints that Australia’s plain packaging regime does not meet the requirements of *GATT*.<sup>164</sup> Honduras, the Dominican Republic, Cuba, and Indonesia (and Ukraine to begin with) contended that Australia’s tobacco regulatory regime appears to be inconsistent with Article III:4 of *GATT*, which provides that:

The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.

Moreover, it states that: ‘The provisions of this paragraph shall not prevent the application of differential internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product.’ Tania Voon and Andrew Mitchell comment that the ‘Australian plain packaging requirements and associated offences themselves are expressed in non-discriminatory terms and would apply equally to domestic (that is, locally manufactured) and imported tobacco products’.<sup>165</sup> They observe that ‘no de facto discrimination is likely to arise in their application because the requirements do not make any other distinctions that might affect local and imported products differently’,<sup>166</sup> and conclude that Australia’s plain packaging regime does not ‘breach the *GATT* 1994 because it is non-discriminatory, with a limited impact on international trade and a sound public health basis’.<sup>167</sup>

In its complaint, Cuba also argued that Australia’s plain packaging measures appear to be inconsistent with its obligations under *GATT*, in particular, that the measures violated Article IX:4, because ‘Australia imposes requirements relating to the marking of imported cigar products which materially reduce their value and/or unreasonably increase their cost of production’.<sup>168</sup> In its executive summary, Australia also addressed the *GATT* arguments,<sup>169</sup> in

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<sup>161</sup> Ibid 38.

<sup>162</sup> Ibid.

<sup>163</sup> World Health Organization, ‘WHO and FCTC Joint Statement’, above n 43.

<sup>164</sup> *General Agreement on Tariffs and Trade*, above n 28.

<sup>165</sup> Voon and Mitchell, above n 118, 135.

<sup>166</sup> Ibid.

<sup>167</sup> Ibid 136

<sup>168</sup> *Cuba v Australia* (WTO Dispute No DS 458)

<[http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds458\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds458_e.htm)>.

<sup>169</sup> Australia, *Certain Measures: Integrated Executive Summary*, above n 64.

particular, arguing that Cuba had failed to establish a prima facie case under Article IX:4,<sup>170</sup> and that ‘Cuba has failed to establish that measures affecting marks other than country of origin marks fall within the scope of Article IX’.<sup>171</sup> In any case, Australia said that ‘the Appellate Body has unambiguously confirmed that Article IX only disciplines measures that require marks of origin, not measures that prohibit such markings’.<sup>172</sup> Moreover, Australia maintained that ‘Cuba has failed to substantiate its assertion that there has been any reduction in the value of Cuban LHM cigars since the introduction of the tobacco plain packaging measure, let alone to demonstrate a “material” reduction that is attributable to the prohibition on the use of the mark “Habanos”’.<sup>173</sup>

The position of Australia appears to have been upheld by the WTO Panel decision, although final publication of the decision will obviously shed further light on the Panel’s reasoning.

## VI THIRD PARTIES

An important feature of the WTO Panel dispute has been the participation of a large number of third parties. Australia’s position in respect of plain packaging of tobacco products under the *TRIPS Agreement*, the *TBT Agreement*, and *GATT* has been reinforced by a number of other countries pioneering public health. Other countries, including the United Kingdom,<sup>174</sup> Ireland,<sup>175</sup> France,<sup>176</sup> and New Zealand,<sup>177</sup> have passed legislative measures in respect of the plain packaging of tobacco products. The ‘next generation’ of countries showing an interest in the introduction of standardized tobacco control measures include Norway, Sweden, Finland, Hungary, Slovenia, Canada, Singapore, Turkey, and South Africa.<sup>178</sup>

### A *New Zealand*

Professor Jane Kelsey of the University of Auckland has provided a lengthy analysis of New Zealand’s position in respect of plain packaging, public health, and international trade: ‘Possible interpretations of the TRIPS provisions and exceptions provide some comfort for New Zealand’s proposed policies, but they are yet to be tested’.<sup>179</sup> She has also highlighted ways that New Zealand could promote tobacco control policies, through notification of measures to the WTO; discussion at the WTO’s TBT Committee, and TRIPS Council; the WTO Trade Policy Review mechanism; and the WTO dispute mechanism. The government of

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<sup>170</sup> Ibid 38.

<sup>171</sup> Ibid.

<sup>172</sup> Ibid.

<sup>173</sup> Ibid 38–9.

<sup>174</sup> *Tobacco and Related Products Regulations* 2016 (UK); and *British American Tobacco Limited and others v The Queen* [2016] EWHC 1169 (Admin); and *British American Tobacco UK Ltd & Ors v The Secretary of State for Health* [2016] EWCA Civ 1182.

<sup>175</sup> *Public Health (Standardised Packaging of Tobacco) Act* 2015 (Irel).

<sup>176</sup> Decret No 2016-334 du 21 Mars 2016 Relatif au Paquet Neuter des Cigarettes et de Certains Produits du Tabac (France) <<https://www.legifrance.gouv.fr/eli/decret/2016/3/21/AFSP1603141D/jo>> [Decree No 2016-334 of 21 March 2016 Regarding Plain Packaging of Cigarettes and Certain Tobacco Products]; *Société JT International SA, Société d'Exploitation Industrielle des Tabacs et des Allumettes, Société Philip Morris France SA and Others* (State Council of France, CE, 23 December 2016).

<sup>177</sup> *Smoke-free Environments (Tobacco Standardised Packaging) Amendment* 2016 (NZ).

<sup>178</sup> For a summary, see Canadian Cancer Society, *Cigarette Package Health Warnings: International Status Report* (5th ed, 2016)

<<https://www.cancer.ca/~media/cancer.ca/CW/for%20media/Media%20releases/2016/CCS-international-cigarette-packaging-report-2016-English.pdf?la=en>>.

<sup>179</sup> Kelsey, *International Trade Law and Tobacco Control*, above n 144.

New Zealand has welcomed the Australian government's decision to legislate for the plain packaging of tobacco products, the TRIPS Council minutes recording:

The negative effects of smoking, which was the leading preventable cause of early death in New Zealand, could not be overstated. It was within a Member's right to implement necessary measures in order to protect public health. [New Zealand's] delegation noted the clear assurances by Australia that it had paid close attention to and respected its WTO obligations in developing its plain packaging proposal. [New Zealand] noted the numerous scientific studies which demonstrated that plain packaging of tobacco products could lead to positive public health outcomes by reducing the attractiveness and desirability of smoking and by increasing the prominence of public health warnings. It was [New Zealand's] view that plain packaging, as part of a comprehensive suite of tobacco control measures, could contribute to efforts to reduce smoking rates.<sup>180</sup>

New Zealand's Parliament conducted hearings on the scheme for the plain packaging of tobacco products in 2014,<sup>181</sup> and passed the implementing legislation in 2016.<sup>182</sup> Then Prime Minister, John Key, initially would have preferred to put the regime into operation, after the conclusion of the WTO dispute. The Associate Minister for Health, the Hon Peseta Sam Lotu-liga commented:

We too will have standardised packages starting to appear in New Zealand next year, by passing this bill into law today. They will be stripped of bright colours, and there will be no glamour. The bill will undoubtedly improve the health of New Zealanders and save lives. Along with tobacco excise increases and restrictions already in place, this move towards standardised packaging will help people to quit and prevent others from smoking.<sup>183</sup>

There was much discussion in the New Zealand Parliament about whether it should have passed the plain packaging regime in a more timely fashion.<sup>184</sup> In response to the media reports about the WTO Panel decision, New Zealand's then Trade Minister Todd McClay and Associate Health Minister Nicky Wagner put out a press release, indicating that the New Zealand government was confident that Australia would win the WTO case,<sup>185</sup> the Health Minister adding: 'Smoking is our leading cause of preventable disease and the Government is committed to the goal of making New Zealand smokefree by 2025'. McClay stressed:

This case is about a country's right to determine its own measures to protect public health. We have always said that the link between domestic public health rights and trade is important to our government and we are fighting hard to ensure this view is shared in the WTO. .... The WTO has a robust set of trade rules in place to preserve our rights and I remain confident that the WTO will find in Australia's favour on tobacco plain packaging.<sup>186</sup>

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<sup>180</sup> WTO, *Council for TRIPS Meeting*, above n 36 [202].

<sup>181</sup> Matthew Rimmer, 'New Zealand, Plain Packaging, and the Trans-Pacific Partnership', *InfoJustice*, 28 March 2014 <<http://infojustice.org/archives/32570>>.

<sup>182</sup> *Smoke-free Environments (Tobacco Standardised Packaging) Amendment 2016 (NZ)*.

<sup>183</sup> New Zealand, *Parliamentary Debates*, 'Smoke-Free Environments (Tobacco Standardised Packaging) Amendment Bill: Third Reading', 8 September 2016 (Peseta Sam Lotu-liga) <[https://www.parliament.nz/en/pb/hansard-debates/rhr/combined/HansDeb\\_20160908\\_20160908\\_20](https://www.parliament.nz/en/pb/hansard-debates/rhr/combined/HansDeb_20160908_20160908_20)>.

<sup>184</sup> *Ibid*; see also Jane Kelsey, 'Regulatory Chill: Learnings from New Zealand's Plain Packaging Tobacco Law' (2017) 17 *QUT Law Review* 21.

<sup>185</sup> New Zealand Government, 'NZ Confident of Plain Packaging WTO Case' (Press Release, 6 May 2017) <<http://www.scoop.co.nz/stories/PA1705/S00130/nz-confident-of-plain-packaging-wto-case.htm>>.

<sup>186</sup> *Ibid*.

New Zealand has had a keen interest in proceedings because its regime for plain packaging of tobacco products would come into force on the 14<sup>th</sup> March 2018. Under new Prime Minister Jacinda Ardern, the government promises to be even more progressive in terms of its commitment to public health and tobacco control.

## B *The United Kingdom*

After initially supporting plain packaging, former Prime Minister of the United Kingdom, David Cameron, postponed the measure, under the pressure of lobbying by the tobacco industry.<sup>187</sup> The government of Scotland threatened to press ahead with its plans to introduce the plain packaging of tobacco products, if the UK did not.<sup>188</sup> Wales was also supportive of the introduction of plain packaging measures.<sup>189</sup> The UK government commissioned Sir Cyril Chantler to investigate the health impacts of plain packaging. The Public Health Minister Jane Ellison promised to introduce plain packaging, after receiving the Chantler report. Chantler advised: ‘Tobacco packages appear to be especially important as a means of communicating brand imagery in countries like Australia and the UK which have comprehensive bans on advertising and promotion’.<sup>190</sup> After various false starts, the UK Parliament passed the legislative regime,<sup>191</sup> and the introduction of plain packaging of tobacco products has led to a slump in cigarette sales.<sup>192</sup> But the government has had to defend plain packaging in the High Court of Justice,<sup>193</sup> in a case brought by British American Tobacco and others. In the case, Justice Green also considered the larger international context of the debate over the plain packaging of tobacco products, and emphasised that the *TRIPS Agreement* and the FCTC should be seen as mutually compatible:

It is plain from the above that intellectual property rights are not absolute and must be balanced against other competing public interests. In particular the right to use a trade mark can, under national law, yield to limitations imposed in the pursuit of superior public policy considerations. There is no canonical list of the public interests that may or may not be resorted to on the part of contracting states to limit intellectual property rights and a good deal of discretion is accorded to the signatories. What is however clear is that intellectual property rights can be derogated from in the name of public health since this is one of the few public interests which is explicitly identified. It is a point I return to later but it is worth emphasising

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<sup>187</sup> Sarah Boseley and Andrew Sparrow, ‘Delay on Plain Cigarette Pack Decision “Sad Day for Child Health”’, *The Guardian* (online), 13 July 2013 <<http://www.theguardian.com/society/2013/jul/12/delay-plain-cigarette-pack-decision-child-health>>; Brian Brady, ‘PM’s Election Guru Lynton Crosby Triggers Smoke Alarm’, *The Independent* (online), 14 July 2013 <<http://www.independent.co.uk/news/uk/politics/pms-election-guru-lynton-crosby-triggers-smoke-alarm-8707592.html>>; Editorial, ‘Cigarette Packaging: A Retreat on Public Health that Shames No 10’, *The Observer*, 14 July 2013; Toby Helm and Jamie Doward, ‘David Cameron Told to Sack Strategy Chief over Link to Tobacco Giants’, *The Observer* (online), 14 July 2013, <<http://www.theguardian.com/politics/2013/jul/13/david-cameron-lynton-crosby-tobacco>>; Jamie Doward, ‘Revealed: Tobacco Giant’s Secret Plans to See Off Plain Cigarette Packets’, *The Observer* (online), 28 July 2013 <<http://www.theguardian.com/business/2013/jul/28/philip-morris-plain-packaging>>.

<sup>188</sup> The Scottish Government, ‘Tobacco Plain Packaging: Scottish Government to Press Ahead with Plans’ (News, 7 September 2013) <<https://news.gov.scot/news/tobacco-plain-packaging>>.

<sup>189</sup> ‘Cigarette Packaging: Wales Could Go It Alone’, *BBC News* (online), 12 July 2013, <<http://www.bbc.co.uk/news/uk-wales-23291737>>.

<sup>190</sup> Susan Boseley, ‘England to Introduce Plain Packaging for Cigarettes’, *The Guardian* (online), 3 April 2014, <<http://www.theguardian.com/society/2014/apr/03/uk-plain-packaging-cigarettes-smokers>>.

<sup>191</sup> *Tobacco and Related Products Regulations* 2016 (UK).

<sup>192</sup> Angela Monaghan, ‘New Cigarette Rules Have Led to Slump in Sales, Says Londis Owner’, *The Guardian* (online), 14 September 2017, <[https://www.theguardian.com/society/2017/sep/14/new-cigarette-rules-slump-sales-londis-booker?CMP=share\\_btn\\_tw](https://www.theguardian.com/society/2017/sep/14/new-cigarette-rules-slump-sales-londis-booker?CMP=share_btn_tw)>.

<sup>193</sup> *British American Tobacco Limited and others v The Queen* [2016] EWHC 1169 (Admin).



here: For all the above reasons TRIPS and the FCTC can be read together without any risk of them colliding or being mutually inconsistent.<sup>194</sup>

The judge comments:

TRIPS makes it abundantly clear that the scope and effect, including usage, of intellectual property rights may be subject to limitations on grounds of public health; and [Directive 2014/40/EU of the European Parliament and Council, the ‘TPD’] which is an internal market (shared competence) measure expressly aspires to be compliant with relevant international law obligations (such as TRIPS).<sup>195</sup>

The judge concluded that the regulations are consistent with the *TRIPS Agreement*. This decision was upheld on appeal.<sup>196</sup> There are certainly global lessons for tobacco control policy that can be learnt from the tobacco industry’s challenge to the UK’s standardised packaging legislation.<sup>197</sup>

### C *The European Union and Neighbouring Countries*

Ireland has adopted the plain packaging of tobacco products.<sup>198</sup> The *Public Health (Standardised Packaging of Tobacco) Act 2015* was passed by both Houses of the Oireachtas, and signed into law by the Irish President on 10th March 2015. Ireland became the first country in Europe and the second country in the world to pass such legislation.<sup>199</sup> Hungary is due to introduce plain packaging of tobacco products in 2018, and Slovenia will do so in 2020. Belgium and Finland have taken steps towards the introduction of plain packaging.

A number of neighbouring countries to the European Union have also endorsed Australia’s position. At the TRIPS Council, Australia received strong support from Norway, whose government ‘expressed its support for the Australian measures at previous meetings of the Council and wished to reiterate its view that the *TRIPS Agreement* 1994 provided Members the flexibility to adopt measures necessary to protect public health’.<sup>200</sup> Norway was confident that Australia’s plain packaging regime was consistent with international trade law: ‘Following the information provided by the Australian delegation in this matter, Norway remained confident that the measures described would be implemented in a manner consistent with Australia’s WTO obligations’.<sup>201</sup> In 2016, Norway introduced a Bill for plain packaging of tobacco products,<sup>202</sup> and in 2017 Norway successfully defended the standardised packaging of these

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<sup>194</sup> *British American Tobacco v The Queen* [2016] EWHC 1169 (Admin) [186] 88.

<sup>195</sup> *Ibid* [913] 362.

<sup>196</sup> *British American Tobacco UK Ltd v Secretary of State for Health* [2016] EWCA Civ 1182; Haroon Siddique, ‘Tobacco Firms Fail to Stop UK Introduction of Plain Packaging’, *The Guardian* (online), 30 November 2016, <[https://www.theguardian.com/society/2016/nov/30/tobacco-firms-uk-introduction-plain-packaging-court-of-appeal?CMP=share\\_btn\\_tw](https://www.theguardian.com/society/2016/nov/30/tobacco-firms-uk-introduction-plain-packaging-court-of-appeal?CMP=share_btn_tw)>; ‘Tobacco Giants Lose Appeal Over Plain Packaging’, *ITV News*, 30 November 2016 <<http://www.itv.com/news/2016-11-30/tobacco-giants-appeal-over-plain-packaging-defeated-at-court-of-appeal/>>.

<sup>197</sup> Jonathan Griffiths, ‘The Tobacco Industry’s Challenge to the United Kingdom’s Standardised Packaging Legislation — Global Lessons for Tobacco Control Policy’ (2017) 17 *QUT Law Review* 66.

<sup>198</sup> Jamie Smyth, ‘Ireland Plans to Adopt Plain Packaging of Cigarettes’, *The Financial Times*, 28 May 2013; Rimmer, above n 181.

<sup>199</sup> Eoin O’Dell, ‘Property and Proportionality: Evaluating Ireland’s Tobacco Packaging Legislation’ (2017) 17 *QUT Law Review* 46.

<sup>200</sup> WTO, ‘Council for TRIPS Meeting’, above n 36, [191].

<sup>201</sup> *Ibid* [191].

<sup>202</sup> Bill 142L, *Amendments to the Tobacco Control Act* (implementation of Directive 2014/40/EU and standardised

products in an important legal precedent.<sup>203</sup> Switzerland also expressed its support in the TRIPS Council for public health measures in the area of anti-smoking as long as such measures were implemented in a manner consistent with the *TRIPS Agreement* and also the *Paris Convention*.<sup>204</sup>

#### D *The Americas*

In WTO Discussions, Canada ‘was confident that Australia, in the elaboration of its Bill, had taken into account the importance of respecting international obligations’.<sup>205</sup> Under the new government of Justin Trudeau, Canada has pushed forward with its own process into launching plain packaging of tobacco products.<sup>206</sup> Jane Philpott, the Canadian Minister of Health, commented: ‘I don’t believe tobacco companies should be allowed to build brand loyalty with children, for a product that could kill them’.<sup>207</sup> She emphasised: ‘Research shows that plain packaging of tobacco products is an effective way to deter people from starting to smoke and will bolster our efforts to reduce tobacco use in Canada.’<sup>208</sup> Rob Cunningham of the Canadian Cancer Society stated that ‘Plain packaging is a key tobacco control measure to protect youth and to advance public health .... We strongly support implementation of plain packaging in Canada, just as so many other countries have done or are in the process of doing.’<sup>209</sup> As Dr Becky Freeman has commented, there is a strong case for Canada to join the tobacco plain packaging revolution.<sup>210</sup>

Uruguay has been sympathetic to the position of Australia, especially after its graphic health warnings were disputed by tobacco companies under investment treaties.<sup>211</sup> Providing vocal support for Australia in the WTO dispute settlement, Uruguay emphasised that it could not remain silent in this fight against ‘the most serious pandemic confronting humanity’.<sup>212</sup> Uruguay also said that ‘the norms of the Multilateral Trading System cannot and should not force its members to allow that a product that kills its citizens in unacceptable and alarming proportions continues to be sold wrapped as candy to attract new victims’.<sup>213</sup> In the wake of its defence of graphic health warnings in an Investor–State Dispute Settlement matter,<sup>214</sup> Uruguay

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tobacco packaging), introduced in Norwegian Parliament, 10 June 2016.

<sup>203</sup> Government of Norway, ‘Full Victory to Norway Over Snus Producer Swedish Match’ (Press Release, No 47/2017, 6 November 2017) <<https://www.regjeringen.no/en/aktuelt/full-victory-to-norway-over-snus-producer-swedish-match/id2577797/>> and Ruling <<http://www.who.int/fctc/implementation/ruling-norway-plain-packaging.pdf>>

<sup>204</sup> WTO, ‘Council for TRIPS Meeting’, above n 36, [215].

<sup>205</sup> *Ibid* [209].

<sup>206</sup> Health Canada, ‘Minister Philpott Launches Public Consultations on Tobacco Plain Packaging: Measures Would Regulate the Size and Shape of Tobacco Products and Require Standardized Colour and Font’, (News Release, 31 May 2016, <<https://www.canada.ca/en/health-canada/news/2016/05/minister-philpott-launches-public-consultations-on-tobacco-plain-packaging.html?=&=&>>).

<sup>207</sup> *Ibid*.

<sup>208</sup> *Ibid*.

<sup>209</sup> *Ibid*.

<sup>210</sup> Becky Freeman, ‘Making the Case for Canada to Join the Tobacco Plain Packaging Revolution’ (2017) 17 (2) *QUT Law Review* 83.

<sup>211</sup> Benn McGrady, ‘Implications of Ongoing Trade and Investment Disputes Concerning Tobacco: *Philip Morris v Uruguay*’, in Tania Voon et al (eds), *Public Health and Plain Packaging of Cigarettes: Legal Issues* (Edward Elgar, 2012), 173–99; and *Philip Morris Brands Sàrl v Uruguay*, ICSID Case No ARB/10/7, Award (8 July 2016).

<sup>212</sup> World Trade Organization, ‘Panels Set Up on Australia’s Tobacco Measures and on US Duties on China’s Exports’ (News Items, 28 September 2012) <[http://www.wto.org/english/news\\_e/news12\\_e/dsb\\_28sep12\\_e.htm](http://www.wto.org/english/news_e/news12_e/dsb_28sep12_e.htm)>.

<sup>213</sup> *Ibid*

<sup>214</sup> *Philip Morris Brands Sàrl v Uruguay*, ICSID Case No ARB/10/7, Award (8 July 2016)

has vowed to introduce plain packaging of tobacco products.<sup>215</sup>

In the United States, the position of the Obama Administration was complicated on the question of tobacco control. After introducing graphic health warnings for tobacco products, the Administration was embroiled in legal action; and eventually dropped the tobacco control measure for further consideration.<sup>216</sup> There has been criticism that the Obama Administration favoured the tobacco industry in trade negotiations,<sup>217</sup> and a lawsuit was launched against the Food and Drug Administration over the delays in reintroducing graphic health warnings.<sup>218</sup> There has been concern that the new Trump administration has strong links to the tobacco industry, particularly Vice President, Michael Pence, who has received significant funding from the tobacco industry.<sup>219</sup>

## E BRICS/BASIC Group

The members of the BRICS and BASIC groupings also offered their perspectives on the debate over the plain packaging of tobacco products in the TRIPS Council. The representative of China stressed that members of WTO needed to be cautious and strike a balance between the protection of IP right holders and the public interest in general.<sup>220</sup> China believed that plain packaging measures should not contravene international obligations under the *TRIPS Agreement*.

The representative of Brazil emphasised that the existing international rules on IP should be supportive of public policy measures designed to protect public health within Members.<sup>221</sup> Brazil stressed that Article 8 of the *TRIPS Agreement* and the *Doha Declaration on TRIPS and Public Health*<sup>222</sup> should guide the interpretation of the applicable TRIPS provisions on trademarks. It is worth recalling the actual, broad language of the *Doha Declaration*. Article 4 affirms 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. [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.

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<sup>215</sup> Tobacco Free Union, 'Uruguay to Move on Plain Packaging', 25 May 2017, <[https://twitter.com/TheUnion\\_TC/status/867713604287463424](https://twitter.com/TheUnion_TC/status/867713604287463424)>.

<sup>216</sup> Jennifer Corbett Dooren, 'FDA Scraps Graphic Cigarette Warnings', *The Wall Street Journal*, 19 March 2013.

<sup>217</sup> Mike Bloomberg, 'Why is Obama Caving on Tobacco?', *The New York Times* (online), 22 August 2013, <<http://www.nytimes.com/2013/08/23/opinion/why-is-obama-caving-on-tobacco.html>>.

<sup>218</sup> 'AAP, Health Groups File Lawsuit Pushing for Graphic Cigarette Warnings', *AAP* (online), 4 October 2016, <<http://www.aappublications.org/news/2016/10/04/FDALawsuit100416>>; *American Academy of Pediatrics and Others v United States Food and Drug Administration*, Complaint (United States District Court for the District Court of Massachusetts, 8 October 2016)

<[http://www.tobaccofreekids.org/content/press\\_office/2016/2016\\_10\\_04\\_fda\\_complaint.pdf](http://www.tobaccofreekids.org/content/press_office/2016/2016_10_04_fda_complaint.pdf)>.

<sup>219</sup> Erin Schumaker, 'Remember when Mike Pence said Smoking Doesn't Kill? Pence also Took Money from Tobacco Companies and fought Tax Hikes on Cigarettes', *The Huffington Post*, 29 October 2016, <[http://www.huffingtonpost.com.au/entry/mike-pence-said-smoking-doesnt-kill\\_us\\_58121434e4b064e1b4b0bf93](http://www.huffingtonpost.com.au/entry/mike-pence-said-smoking-doesnt-kill_us_58121434e4b064e1b4b0bf93)>.

<sup>220</sup> WTO, 'Council for TRIPS Meeting', above n 36, [212].

<sup>221</sup> *Ibid* [214].

<sup>222</sup> World Trade Organization, *Declaration on the TRIPS Agreement and Public Health*, Adopted at Doha on 14 November 2001, WT/Min(01)/DEC/2.

South Africa reserved its position initially,<sup>223</sup> noting that the question of plain packaging of tobacco products involved a tension between public health and a legitimate right to trademark protection. South Africa has since made further steps itself, towards the adoption of plain packaging of tobacco products.<sup>224</sup> India has shown an interest in the policy option of plain packaging,<sup>225</sup> having already introduced graphic health warnings on tobacco products.<sup>226</sup> However, the tobacco industry has been seeking to undermine India's tobacco control measures.<sup>227</sup> To encourage further legislative and regulatory action, the WHO has promulgated information for policy-makers on evidence, design, and implementation of plain packaging of tobacco products.<sup>228</sup>

## VII CONCLUSION

The overarching argument of this article has been that plain packaging of tobacco products is defensible under the *TRIPS Agreement*, the *TBT Agreement*, and *GATT*, and in light of larger concerns in respect of international public health law, human rights, and sustainable development. The article provides a critical examination of the arguments in the WTO dispute over plain packaging of tobacco products, before the publication of the first ruling in the dispute. As Alain Pottage has noted,

Plain packaging legislation raises a number of engaging theoretical and practical questions: about the legal qualities of the intellectual property rights that articulate branding strategies, about the relationship between the regimes of international trade law and world health policy, and about the history of regulatory initiatives to address the public health implications of smoking.<sup>229</sup>

According to media reports, Australia has prevailed in the WTO dispute.<sup>230</sup> The confidential interim report is said to emphasize that Australia's laws are a legitimate public health measure.<sup>231</sup> Australia's plain packaging regime was well designed to withstand legal challenges under the dispute settlement process of the WTO from Honduras, the Dominican Republic, Cuba, and Indonesia (and previously, Ukraine). There is a strong body of empirical evidence supporting the efficacy of plain packaging of tobacco products in Australia. As such, Australia was in a strong position to win the WTO dispute. The High Court of Australia's decision on the plain packaging regime, the decisions on standardised packaging in the UK, and the case of *Soci t  JT International* on plain packaging of tobacco products in the State Council of

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<sup>223</sup> WTO, 'Council for TRIPS Meeting', above n 36, [226].

<sup>224</sup> Valene Govender, 'South Africa Set to Join Global Plain Cigarette Packaging Trend', *News 24*, 26 May 2016, <<https://www.news24.com/SouthAfrica/Local/Coastal-Weekly/sa-set-to-join-global-plain-cigarette-packaging-trend-20160525>>.

<sup>225</sup> Australia India Institute, *Report of the Australia India Institute Taskforce on Tobacco Control: Plain Packaging of Tobacco Products* (2012); and Soumyadeep Bhaumik, 'Private Member's Bill Proposes Plain Packaging of Tobacco Products in India', (2013) 346 *British Medical Journal* 953.

<sup>226</sup> Rhythma Kaul, '85% Pictorial Warnings on Tobacco Packs: Government Survey', *Hindustan Times* (online), 12 June 2017 <<http://www.hindustantimes.com/health/85-pictorial-warnings-on-tobacco-packs-work-govt-survey/story-qmQt9B3bkfb4HuNH1wEvHJ.html>>.

<sup>227</sup> Aditya Kalra et al, 'Marlboro for Every Man: How One Tobacco Giant is Luring Youth to Smoke in India', *Reuters*, 23 July 2017, <<https://www.brisbanetimes.com.au/world/marlboro-for-every-man-how-one-tobacco-giant-is-luring-youth-to-smoke-in-india-20170719-gxeh6x.html>>.

<sup>228</sup> World Health Organization, *Plain Packaging of Tobacco Products: Evidence, Design, and Implementation*, (2016) <<http://www.who.int/tobacco/publications/industry/plain-packaging-tobacco-products/en/>>.

<sup>229</sup> Alain Pottage, 'No (More) Logo: Plain Packaging and Communicative Agency', (2013) 47 *University of California Davis Law Review* 515, 518–19.

<sup>230</sup> Miles and Geller, above n 21; 'Australia wins', *ABC News*, above n 21; Chapman, above n 21.

<sup>231</sup> 'Tobacco Industry Suffers Defeat', *Reuters*, above n 73.

France, have provided support for Australia's stance in the WTO.<sup>232</sup> Australia's adoption of plain packaging promotes the public interest purposes of the *TRIPS Agreement*, particularly in respect of the promotion of public health, human rights, and sustainable development. The measures are also consistent, in my view, with the *TBT Agreement* and *GATT*. Australia's plain packaging regime also supports the regime established under the WHO FCTC.

There is no doubt the potential for further appeal by Australia's opponents. A spokeswoman for British American Tobacco was of the belief that Australia's complainants would keep fighting: 'As there is a high likelihood of an appeal by some or all of the parties, it's important to note that this panel report is not the final word on whether plain packaging is consistent with international law'.<sup>233</sup> However, given the strength of Australia's position, it is doubtful that the panel report will be overturned. Nicola Roxon has recommended that the tobacco industry and its allies should discontinue their opposition to plain packaging of tobacco products:

We had a fight in the High Court, which we won. We had a fight in Hong Kong with Philip Morris that we won. We've had a fight in the WTO. It's time for them to call it quits. They can't keep fighting unless they think that simply by fighting they'll scare people off.<sup>234</sup>

Australia's initiative has already been followed by a number of early adopters around the world. One can hope the WTO panel decision will encourage other wavering nations to join the plain packaging revolution. There have also been significant parallel debates in the field of access to essential medicines, public health, and the intellectual property implications, particularly in respect of HIV/AIDS, tuberculosis, malaria, cancer, and neglected diseases,<sup>235</sup> with a longstanding debate at the United Nations in forums such as the WHO, the WTO, and the World Intellectual Property Organization.<sup>236</sup> Antony Taubman, diplomat at the WTO, has commented regarding the ongoing discussions over intellectual property and public health: 'The debate concerns balancing "access" (getting medicines to those who need them) with "innovation" (ensuring a sound foundation and the necessary resources for the development of needed new medicines)'.<sup>237</sup> The *Doha Declaration on Public Health and the TRIPS Agreement* 2001 and the *WTO General Council Decision* 2003 recognises that member states could make use of flexibilities in the *TRIPS Agreement* to address public health concerns.<sup>238</sup> The United

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<sup>232</sup> *JT International SA v Commonwealth of Australia* [2012] HCA 43; *British American Tobacco Limited and others v The Queen* [2016] EWHC 1169 (Admin); *British American Tobacco UK Ltd & Ors v The Secretary of State for Health* [2016] EWCA Civ 1182; and *Soci t  JT International SA, Soci t  d'Exploitation Industrielle des Tabacs et des Allumettes, Soci t  Philip Morris France SA and Others* (State Council of France, CE, 23 December 2016).

<sup>233</sup> 'Tobacco Industry Suffers Defeat', *Reuters*, above n 73.

<sup>234</sup> Grimm, above n 22.

<sup>235</sup> Thomas Pogge, Matthew Rimmer and Kim Rubenstein (eds) *Incentives for Global Public Health: Patent Law and Access to Medicines* (Cambridge University Press, 2010); Frederick Abbott, Thomas Cottier, and Francis Gurry, *International Intellectual Property in an Integrated World Economy* (Wolters Kluwer Law & Business, 2015); Burcu Kilic, *Boosting Pharmaceutical Innovation in the Post-TRIPS Era: Real-Life Lessons for the Developing World* (Edward Elgar, 2014); Joo-Young Lee, *A Human Rights Framework for Intellectual Property, Innovation and Access to Medicines* (Ashgate, 2015); and Ellen t'Hoen, *Private Patents and Public Health: Changing Intellectual Property Rules for Access to Medicines* (AMB, 2016).

<sup>236</sup> Benn McGrady, *Trade and Public Health: The WTO, Tobacco, Alcohol, and Diet* (Cambridge University Press, 2011); Graeme Dinwoodie and Rochelle Dreyfuss, *A Neofederalist Vision of TRIPS: The Resilience of the International Intellectual Property Regime* (Oxford University Press, 2012); Abbott et al, above n 235; and Obijiofor Aginam, John Harrington, and Peter Yu (ed), *The Global Governance of HIV/AIDS: Intellectual Property and Access to Essential Medicines* (Edward Elgar, 2013).

<sup>237</sup> Antony Taubman, *A Practical Guide to Working with TRIPS* (Oxford University Press, 2011), 179.

<sup>238</sup> WTO, *Declaration on the TRIPS Agreement and Public Health*. Adopted at Doha on 14 November 2001, WT/MIN(01)/DEC/2; and *Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and*

Nations Secretary-General's High Level Panel on Access to Medicines sought to address the longstanding tensions between intellectual property, trade, and public health in 2016.<sup>239</sup> There are common concerns in respect of human rights, public health, and sustainable development. As Nobel Laureate Joseph Stiglitz has observed, there is a need to recognise and respect the importance of public healthcare, human rights, and sustainable development under intellectual property, international trade, and investment law.<sup>240</sup>

It is hoped the epic international trade dispute over plain packaging of tobacco products will provide future guidance for the proper, harmonious relationship between intellectual property, public health, and international trade. There does need to be decisive collective international action to address the global tobacco epidemic.

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*Public Health*, WTO Doc WT/L/540 (2003) (WTO General Council Decision of 30 August 2003).

<sup>239</sup> United Nations Secretary-General's High Level Panel on Access to Medicines, *Report of the High Level Panel: Promoting Innovation and Access to Health Technologies* (2016) <<http://static1.squarespace.com/static/562094dee4b0d00c1a3ef761/t/57d9c6ebf5e231b2f02cd3d4/1473890031320/UNSG+HLP+Report+FINAL+12+Sept+2016.pdf>>.

<sup>240</sup> Stiglitz, above n 75; Baker et al, above n 76.