

# NOTE

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## **SMOKE 'EM IF YOU GOT 'EM: Discussing the WTO Dispute Settlement Panel's Decision to Uphold Plain Packaging in Australia and its Impact on the Future**

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*This Paper discusses the landmark decision by the WTO Dispute Resolution Panel that the Australian Tobacco Plain Packaging Act 2011 (“TPPA”) is consistent with its obligations under the TBT Agreement, the TRIPS Agreement, and the GATT, all of which are WTO Agreements.*

*It argues that Indonesia’s claim that the TPPA is discriminatory and contrary to its obligation of national treatment is unfounded. The Paper presents evidence of the health risks involved with tobacco use, and discusses why the TPPA falls under an exception to its obligations to the cited WTO Agreements.*

*Further, this Paper contends that the decision could lead to strict plain packaging regulations for other products in the future. However, tobacco has unique and significant health risks, and by comparing it to several products, the Paper explains why it is unlikely that these products will be subject to similar stringent packaging regulations in the future.*

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## INTRODUCTION

Imagine, in the near future, you walk into a supermarket with a list of things to buy that you usually keep around the house. You walk in and go straight for the cereal aisle, because you are out of your favorite sugary “fruit loops” cereal. You approach the cereal only to double-take, because all the boxes now look the same. Instead of the colorful box you are used to, there is a plain white box with a large photo of rotting teeth that says, “Fruit Loops” in the same plain font as every other cereal box on the aisle. It just doesn’t feel right to buy the fruit loops without the normal packaging, so you move to the next item on your list.

Now imagine you decide to buy some beer for an upcoming dinner party. You walk to the beer aisle to pick out the most appealing brand. But as you approach the aisle, you realize that, like the cereal, every type of beer looks the same. All the beer is packaged in a dark brown color with photos of failed livers and cars wrapped around telephone poles. The beers have different names, but the font and text size are identical. Instead of gravitating to the beers that look interesting, you must try to find a brand name that sounds like something your friend may like. After fifteen minutes, you get frustrated and give up.

Finally, you decide to leave the store, but not before grabbing a carton of your favorite cigarettes. You approach the register and notice that again, all the tobacco products look similar. The cigarettes are packaged in an olive-green box with photos of black lungs and large warnings that say, “smoking causes cancer.” This is the last straw. You storm out of the supermarket, having spent twenty minutes shopping and coming away empty handed. The packaging was part of the fun, and it has been taken away from you. You enjoyed playing the games on the back of the

fruit loops box. You loved the artistic beer packages that had the added value of convenience.

Given the World Trade Organization's ("WTO") recent decision to uphold plain packaging laws in Australia, this dystopian hypothetical could be a reality.<sup>1</sup> Australia was the first country in the world to implement plain packaging laws for tobacco products with the Tobacco Plain Packaging Act of 2011<sup>2</sup> ("TPPA"), and others have followed suit. Countries like Britain, France, and Hungary have already passed plain packaging laws, while others like Ireland, Canada, South Africa, New Zealand and Belgium are considering the idea.<sup>3</sup> Countries that export tobacco, like Indonesia, are angered by the measures and the negative economic impact it will have. In 2013, Indonesia launched an attack on Australia's new laws by requesting a consultation from the WTO.<sup>4</sup> A five-year legal battle ensued, ending in a landmark decision by the WTO that was a major blow to big tobacco.<sup>5</sup>

This Paper will discuss the WTO's decision and the potential impact, whether good or bad, this decision could have moving forward. Indonesia claims that Australia's laws contradict their obligations under three major agreements recognized by the WTO: the Agreement on Technical Barriers to Trade ("TBT"), the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS"), and the General Agreement on Tariffs and Trade ("GATT").<sup>6</sup> The following Parts will discuss the claims made under the TBT Agreement, TRIPS Agreement, and the GATT, as well as provide a prediction of the panel's legal analysis and debate the possible impact it may have on the future of packaging and product advertising.

## I. WHAT DO AUSTRALIA'S LAWS MANDATE?

In its request for consultations to the WTO, Indonesia challenged Australia's TPPA, Tobacco Plain Packaging Regulations 2011 ("TPPR"), the Trade Marks Amendment of the TPPA, and any other related measures that amend those laws or new measures adopted.<sup>7</sup> The following Parts will discuss the specific regulations mandated by the TPPA and TPPR.

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1. Tom Miles & Martinne Geller, *Australia Wins Landmark WTO Tobacco Packaging Case*, REUTERS (May 4, 2017, 7:02 AM), <https://www.reuters.com/article/us-wto-tobacco-australia/australia-wins-landmark-wto-tobacco-packaging-case-bloomberg-idUSKBN1801S9> [<https://perma.cc/9UT8-R7RK>].

2. *Tobacco Plain Packaging Act 2011* (Cth) (Austl.).

3. Miles & Geller, *supra* note 1.

4. Request for Consultations by Indonesia, *Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WTO Doc. WT/DS467/1 (Sep. 25, 2013) [hereinafter Request for Consultations].

5. Miles & Geller, *supra* note 1.

6. Request for Consultations, *supra* note 4, at 1.

7. *Id.*

A. *The Tobacco Plain Packaging Act 2011*

The Australian Parliament enacted the TPPA with the objective of improving public health.<sup>8</sup> It seeks to discourage its citizens from smoking, prevent relapse for those who have quit, and reduce overall exposure to tobacco products.<sup>9</sup> In this spirit, the TPPA regulates “the retail packaging and appearance of tobacco products”<sup>10</sup>, and therefore can “reduce the appeal of tobacco products . . . increase the effectiveness of health warnings . . . and reduce the ability of the retail packaging of tobacco products to mislead consumers about the harmful effects of smoking.”<sup>11</sup>

The TPPA enforces stringent requirements for the packaging of all tobacco products and establishes penalties and sanctions for violations.<sup>12</sup> The Act regulates all tobacco products but includes specific regulations for cigarettes as well.<sup>13</sup> For example, cigarette packaging must be rigid, have a matte finish, be made of cardboard, and must not be “embellished in any way, [unless] permitted by the regulations.”<sup>14</sup> The color of the packaging must be a drab brown color (unless a regulation calls for a specific color), with the only exceptions being health warnings and brand names.<sup>15</sup>

The TPPA also states that no trademarks can appear on packaging except for the company name, relevant legislative materials, and any trademarks permitted by the TPPR.<sup>16</sup> Further, the brand or company name must comply with specific provisions set out in the TPPR and may only appear once on the packaging.<sup>17</sup>

The TPPR establishes requirements for specific colors, dimensions, and features of the packaging.<sup>18</sup> These regulations not only give the packaging a uniform and unattractive appearance, they also help prevent tobacco companies from misleading consumers and maximize the effectiveness of the health warnings.<sup>19</sup> The color of the packaging must be “Pantone 448C,” a dull olive green and brown mixture like the color mentioned in the above hypothetical.<sup>20</sup> These regulations also state that writings, other than health warnings, must be “in the typeface known as Lucida Sans . . . no larger than 10 points in size . . . in a normal weighted regular font . . . and in the colour known as Pantone Cool Gray 2C.”<sup>21</sup>

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8. *Tobacco Plain Packaging Act 2011* (Cth) s 3 (Austl.).

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.* at s 18.

14. *Id.*

15. *Id.* at s 19.

16. *Id.* at s 20.

17. *Id.* at s 21.

18. *See generally Tobacco Plain Packaging Regulations 2011* (Cth) (Austl.).

19. *Id.* at sub-div 1.1.3.

20. *Id.* at div 2.2.

21. *Id.*

## II. WHAT AGREEMENTS ARE INDONESIA CLAIMING AUSTRALIA VIOLATED?

Indonesia has claimed that Australia breached its obligations under three WTO agreements; the TBT Agreement, the TRIPS Agreement, and the GATT.<sup>22</sup> It makes two claims under the TBT, eight claims under the TRIPS, and one claim under the GATT.<sup>23</sup>

### A. *Claims Under the TBT Agreement*

The TBT Agreement is a multilateral agreement enacted as part of the establishment of the WTO in 1995.<sup>24</sup> This agreement seeks to further the goals set out in its predecessor, the GATT, and encourage standards of conformity for members. More specifically, the TBT Agreement seeks to “ensure that technical regulations and standards, including packaging, marking and labelling requirements, and procedures for assessment of conformity with technical regulations and standards do not create unnecessary obstacles to international trade.”<sup>25</sup>

#### 1. Article 2.1

Indonesia cites to Articles 2.1 and 2.2 of the TBT, which fall under the “Preparation, Adoption and Application of Technical Regulations by Central Government Bodies” section of the agreement.<sup>26</sup> Article 2.1 of the TBT Agreement declares that member states “shall ensure that in respect of technical regulations, products imported from the territory of any Member shall be accorded treatment no less favourable than that accorded to like products of national origin and to like products originating in any other country.”<sup>27</sup>

In an earlier case, *US-Clove Cigarettes* (“Clove Cigarettes”), Indonesia complained that the United States violated, among other things, Article 2.1 of the TBT Agreement.<sup>28</sup> Similar to its later complaint in *Australia-Plain Packaging*, Indonesia challenged U.S. regulations that were created to promote public health by dissuading tobacco use.<sup>29</sup> Specifically, Indonesia challenged measures that banned flavored tobacco and clove cigarettes but not menthol cigarettes.<sup>30</sup> Because Indonesia is a large producer of clove cigarettes, and the United States is a large producer of menthol cigarettes, Indonesia claimed the regulations “accorded to

22. Request for Consultations, *supra* note 4, at 1.

23. *Id.*

24. *See generally* Agreement on Technical Barriers to Trade art. 1, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 120 [hereinafter TBT Agreement].

25. *Id.*

26. *Id.* at art. 2; Request for Consultations, *supra* note 4, at 2.

27. TBT Agreement, *supra* note 24, at art. 2.1.

28. Appellate Body Report, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, ¶ 84, WTO Doc. WT/DS406/AB/R (adopted April 24, 2012).

29. *Id.* ¶ 79.

30. *Id.* ¶ 78.

imported clove cigarettes less favourable treatment than that accorded to like menthol cigarettes of national origin.”<sup>31</sup>

This vital Appellate Body decision articulated the proper test for determining a violation of Article 2.1.<sup>32</sup> According to the Appellate Body, to establish a violation of Article 2.1, “three elements must be satisfied: (i) the measure at issue must be a technical regulation; (ii) the imported and domestic products at issue must be like products; and (iii) the treatment accorded to imported products must be less favourable than that accorded to like domestic products.”<sup>33</sup>

Regarding the first element, Annex 1.1 of the TBT Agreement defines the term “technical regulation” as a “[d]ocument which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method.”<sup>34</sup> Because regulations in question are likely to be agreed upon as technical regulations, this element of the test need not be further discussed.

The second element of the test requires that the imported and domestic products be “like.”<sup>35</sup> In *Clove Cigarettes*, the Appellate Body addressed the meaning of like products in the context of Article 2.1.<sup>36</sup> Although it agreed that menthol cigarettes and clove cigarettes were like products, it disagreed with the way the Panel came to that conclusion.<sup>37</sup> According to the Appellate Body, the Panel erred in focusing on “the purposes of the technical regulation at issue, as separate from the competitive relationship between and among the products.”<sup>38</sup> The proper analysis of like products must take into consideration the context of “Article 2.1 itself . . . other provisions of the TBT Agreement . . . the TBT Agreement as a whole, and . . . Article III:4 of the GATT 1994, as well as the object and purpose of the TBT Agreement . . .”<sup>39</sup> When viewed in this context, the test for likeness should be “based on the competitive relationship between and among the products . . .”<sup>40</sup>

The third element, that “the treatment accorded to imported products must be less favourable than that accorded to like domestic products”<sup>41</sup>, was also addressed by the Appellate Body in *Clove Ciga-*

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31. *Id.* ¶ 3.

32. *Id.* ¶ 87.

33. *Id.*

34. TBT Agreement, *supra* note 24, at annex 1.1.

35. *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, *supra* note 28, ¶ 87.

36. *Id.* ¶ 104.

37. *Id.* ¶ 156.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.* ¶ 87.

rettes.<sup>42</sup> The Appellate Body first noted that, in the context of the TBT Agreement, Article 2.1's "treatment no less favorable" requirement prohibits both *de jure* and *de facto* discrimination.<sup>43</sup> However, to analyze Article 2.1 in the context of the similarly worded Article III:4 of the GATT, the Appellate Body noted that any examination of an Article 2.1 violation "should seek to ascertain whether the technical regulation at issue modifies the conditions of competition in the market of the regulating Member to the detriment of the group of imported products *vis-à-vis* the group of like domestic products."<sup>44</sup>

In light of these conflicting ideas, the Appellate Body concluded that where measures do not "de *jure* discriminate against imports, the existence of a detrimental impact on competitive opportunities for the group of imported *vis-à-vis* the group of domestic like products is not dispositive of less favourable treatment under Article 2.1."<sup>45</sup> Instead, the correct approach is to "analyze whether the detrimental impact on imports stems exclusively from a legitimate regulatory distinction rather than reflecting discrimination against the group of imported products."<sup>46</sup> A detrimental impact stemming from a legitimate distinction is determined by careful scrutiny of the particular circumstances of the case.<sup>47</sup>

After careful scrutiny, the Appellate Body determined that the U.S. measure did not stem exclusively from a legitimate regulatory distinction.<sup>48</sup> Specifically, the Appellate Body cited the purpose behind the measure as a reason why it was not in compliance with Article 2.1.<sup>49</sup> Because the measure was enacted to deter youth smoking by banning flavored cigarettes, and menthol cigarettes are flavored, there was no reason for menthol cigarettes to be exempted.<sup>50</sup>

## 2. Article 2.2

Article 2.2 states that WTO member states may not adopt technical regulations that create "unnecessary obstacles to international trade."<sup>51</sup> Further, any technical regulations adopted "shall not be more

42. *Id.* ¶ 161.

43. *Id.* ¶ 175.

[T]he context and object and purpose of the *TBT Agreement* weigh in favour of reading the "treatment no less favourable" requirement of Article 2.1 as prohibiting both *de jure* and *de facto* discrimination against imported products, while at the same time permitting detrimental impact on competitive opportunities for imports that stems exclusively from legitimate regulatory distinctions.

*Id.*

44. *Id.* ¶ 180.

45. *Id.* ¶ 182.

46. *Id.*

47. *Id.* These circumstances include: "the design, architecture, revealing structure, operation, and application of the technical regulation at issue, and, in particular, whether that technical regulation is even-handed . . ." *Id.*

48. *Id.* ¶ 225.

49. *See id.* ¶ 225-26.

50. *See id.*

51. TBT Agreement, *supra* note 24, at art. 2.2.

trade-restrictive than necessary to fulfil a legitimate objective . . . ”<sup>52</sup> Article 2.2 specifically mentions, among other things, “protection of human health or safety” as a legitimate objective.<sup>53</sup> Indonesia contends that Australia’s plain packaging laws are an unnecessary obstacle to trade because they are more restrictive than they need to be to accomplish their objectives.<sup>54</sup> In order to determine whether Australia’s regulations are consistent with the TBT Agreement, an analysis of what constitutes a violation of Article 2.2 must be completed.

In US-Tuna II (“Tuna II”), Mexico complained that the Dolphin Protection Consumer Information Act (“DPCIA”) enacted by the United States violated, inter alia, Article 2.2 of the TBT Agreement.<sup>55</sup> The DPCIA set out requirements for the labeling of “dolphin-safe” tuna products in the U.S.<sup>56</sup> The DPCIA prohibited eligibility for any tuna harvested through Mexico’s primary technique, “setting on” dolphins in the Eastern Tropical Pacific Ocean (“ETP”).<sup>57</sup> Mexico argued that the Agreement on the International Dolphin Conservation Program (“AIDCP”) acted as an international standard, and that “both the AIDCP dolphin-safe standard and the U.S. dolphin-safe standard could co-exist, each subject to its own labelling requirements.”<sup>58</sup>

The Appellate Body articulated a three-part test to determine whether a violation of Article 2.2 has occurred.<sup>59</sup> The three-factors of the test, which determine if a measure is more trade-restrictive than necessary, include:

- (i) the degree of contribution made by the measure to the legitimate objective at issue; (ii) the trade-restrictiveness of the measure; and (iii) the nature of the risks at issue and the gravity of consequences that would arise from non-fulfilment of the objective(s) pursued by the Member through the measure.<sup>60</sup>

The Appellate Body subsequently reviewed the Panel’s decision that the United States’ measure was more trade restrictive than necessary.<sup>61</sup> It found that the Panel’s analysis was based, in part, on a faulty comparison, which ignored the fact that the AIDCP and DPCIA would coexist.<sup>62</sup> Further, although the DPCIA and the AIDCP would be substan-

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52. *Id.*

53. *Id.*

54. Request for Consultations, *supra* note 4, at 2.

55. Appellate Body Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, ¶ 3, WTO Doc. WT/DS381/AB/R (adopted June 13, 2012).

56. *Id.* ¶ 172.

57. *Id.*

58. *Id.* ¶ 48.

59. *Id.* ¶ 317.

60. *Id.* ¶ 322.

61. *Id.* ¶ 324.

62. The Panel compared that to the scenario “under the AIDCP;” where “a label would only be granted if no dolphins [were] killed, but where certain unobserved adverse effects could nonetheless have been caused to dolphins.” This comparison,

tially the same outside of the ETP, tuna caught by “setting on” dolphins inside the ETP could be labeled as dolphin-safe through the AIDCP but not the DPCIA.<sup>63</sup> The Appellate Body noted that “the panel should have examined whether the labelling of tuna products complying with the requirements of the AIDCP label would achieve the United States’ objectives to an equivalent degree as the measure at issue.”<sup>64</sup> Accordingly, the Appellate Body concluded that “the alternative measure proposed by Mexico would contribute to both the consumer information objective and the dolphin protection objective to a lesser degree than the measure at issue, because, overall, it would allow more tuna harvested in conditions that adversely affect dolphins to be labelled ‘dolphin-safe.’”<sup>65</sup>

### B. *Article 3.1 Claim Under the TRIPS Agreement*

The TRIPS Agreement was also enacted as a part of the establishment of the WTO in 1995.<sup>66</sup> Its purpose is to “reduce distortions and impediments to international trade . . . and to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade . . .”<sup>67</sup> Indonesia cites to, inter alia, Article 3.1 in its Request for Consultations.<sup>68</sup> This Part will examine Article 3.1 and its WTO jurisprudence.

Article 3.1 is the “National Treatment” provision of the TRIPS Agreement, much like Article 2.1 of the TBT Agreement and Article III:4 of the GATT. Article 3.1 states, in pertinent part, that “[e]ach Member shall accord to the nationals of other Members treatment no less favourable than that it accords to its own nationals with regard to the protection of intellectual property . . .”<sup>69</sup> WTO jurisprudence on Article 3.1 is scant, but one dispute heard by the Panel, EC-Trademarks and Geographical Indications, discusses the application of Article 3.1 in detail.<sup>70</sup>

In EC-Trademarks and Geographical Indications, the United States argued that Article 12(1) of the European Communities (“EC”) measure 2081/92 was in violation of, inter alia, its obligations under Article 3.1 of

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however, fails to take into account that the alternative measure identified by Mexico is *not* the AIDCP regime, as such, but rather the *coexistence* of the AIDCP rules with the US measure.

*Id.* ¶ 328.

63. *Id.* ¶ 329.

64. *Id.* ¶ 330.

65. *Id.*

66. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299 [hereinafter TRIPS Agreement].

67. *Id.* at pmb1.

68. Request for Consultations, *supra* note 4, at 2.

69. TRIPS Agreement, *supra* note 66, at art. 3.1.

70. Panel Report, *European Communities – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs*, ¶ 7.123, WTO Doc. WT/DS174/R (adopted April 20, 2005) [hereinafter EC-Trademarks and Geographical Indications].

the TRIPS Agreement.<sup>71</sup> More specifically, the United States claimed that geographical indications (“GIs”) of origin for agricultural products and foodstuff of other WTO member states outside of the European Union “can only be registered under the Regulation if that Member satisfies the conditions in Article 12(1), which require it to adopt a system for GI protection that is equivalent to that in the European Communities and provide reciprocal protection to products from the European Communities.”<sup>72</sup> Thus, this measure gave nationals of other WTO member states treatment less favorable than that of EC nationals.

According to the Panel, two elements are required to show that a Member acted inconsistently with its obligations under 3.1: “(1) the measure at issue must apply with regard to the protection of intellectual property; and (2) the nationals of other Members must be accorded ‘less favourable’ treatment than the Member’s own nationals.”<sup>73</sup> The Panel first defined the terms “protection”<sup>74</sup> and “intellectual property”<sup>75</sup> under the first element. After determining that element one was satisfied, the Panel turned to a more involved discussion of the second element.<sup>76</sup> The Panel noted the important distinction that Article 3.1 applies to “nationals not products”; unlike its predecessor, GATT Article III:4,<sup>77</sup> before moving to its discussion of less favorable treatment.<sup>78</sup>

The Panel turned to the GATT III:4 interpretation of the phrase “treatment no less favourable” to determine its meaning under Article 3.1.<sup>79</sup> Using that interpretation, the Panel determined that the appropri-

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71. *Id.* ¶7.38.

72. *Id.*

73. *Id.* ¶ 7.125.

74. The Panel concluded that footnote 3 of the TRIPS Agreement provided the definition of protection as follows: “[f]or the purposes of Articles 3 and 4, ‘protection’ shall include matters affecting the availability, acquisition, scope, maintenance and enforcement of intellectual property rights as well as those matters affecting the use of intellectual property rights specifically addressed in this Agreement.” *Id.* ¶ 7.126.

75. The Panel found the definition for intellectual property in Article 1.2: “[f]or the purposes of this Agreement, the term ‘intellectual property’ refers to all categories of intellectual property that are the subject of Sections 1 through 7 of Part II.” *Id.* ¶ 7.127.

76. *Id.* ¶ 7.131.

77. The Panel noted that the TRIPS Agreement was derived from previous intellectual property agreements and took its purpose to be the same: “[l]ike the pre-existing intellectual property conventions, Article 3.1 applies to ‘nationals’, not products. Like GATT 1994, Article 3.1 refers to ‘no less favourable’ treatment, not the advantages or rights that laws now grant or may hereafter grant, but it does not refer to likeness.” *Id.* ¶ 7.131. This is an important distinction, as Article 3.1 refers to people, not products, and thus does not require likeness.

78. *Id.* ¶ 7.132.

79. The words “treatment no less favourable” in paragraph 4 call for effective equality of opportunities for imported products in respect of the application of laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products. This clearly sets a minimum permissible standard as a basis.

Panel Report, *United States – Section 337 of The Tariff Act of 1930*, ¶ 5.11, L/6439

ate analysis was “whether the difference in treatment affects the ‘effective equality of opportunities’ between the nationals of other Members and the European Communities’ own nationals with regard to the ‘protection’ of intellectual property rights, to the detriment of nationals of other Members.”<sup>80</sup> After analyzing the measure at hand, the Panel determined that because of the equivalence and reciprocity requirements, “the Regulation accords treatment to the nationals of other Members less favourable than that it accords to the European Communities’ own nationals, inconsistently with Article 3.1 of the TRIPS Agreement.”<sup>81</sup>

### C. *Article III:4 Claim Under the GATT*

Much like Article 2.1 of the TBT Agreement and Article 3.1 of the TRIPS Agreement, Article III:4 of the GATT seeks to prevent discrimination between WTO member states.<sup>82</sup> The GATT was the predecessor to the TBT and the TRIPS Agreements, and it introduced the important “National Treatment” principle that is essential to a successful international trading system.<sup>83</sup> The GATT was originally signed after the Second World War in 1947 by only 23 countries in order to create some uniformity in international trade.<sup>84</sup> In 1994, “[t]he WTO replaced GATT as an international organization, but the General Agreement still exists as the WTO’s umbrella treaty for trade in goods . . .”<sup>85</sup> Because the GATT is the founding agreement of the WTO, there have been many disputes outlining the obligations of member states. One dispute, *Korea—Measures Affecting Imports of Fresh, Chilled and Frozen Beef* (“Korea-Beef”), is a useful example of how Article III:4 works.

In *Korea-Beef*, the United States requested consultations with Korea relating to, inter alia, violations under Article III:4 of the GATT.<sup>86</sup>

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(Nov. 7, 1989), GATT BISD (36th Supp.), at 345, 386 (1990).

80. *EC—Trademarks and Geographical Indications*, *supra* note 70, ¶ 7.134.

81. *Id.* ¶ 7.213.

82. *See* General Agreement on Tariffs and Trade 1994 art. III:4, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187, 33 I.L.M. 1153 [hereinafter GATT 1994].

83. The similarity to Article 2.1 of the TBT Agreement and Article 3.1 of the TRIPS Agreement can be found in the language of Article III:4:

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.

GATT 1994, *supra* note 82, at art. III:4.

84. *The GATT years: from Havana to Marrakesh*, WTO (Mar. 6, 2018, 3:10 PM), [https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/fact4\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm) [https://perma.cc/9UHN-Y5UL].

85. *The Uruguay Round*, WTO (Mar. 6, 2018, 3:25 PM), [https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/fact5\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact5_e.htm) [https://perma.cc/429N-E9L6].

86. Panel Report, *Korea—Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WTO Doc. WT/DS161/R, WT/DS169/R (adopted Jan. 10, 2001) [hereinafter *Korea-Beef Panel Report*].

Korea was regulating the retail sale of beef via a “dual-retail system” through the “Management Guidelines for Imported Beef.”<sup>87</sup> This system specified that “imported beef (except for pre-packed imported beef) may only be sold in specialized imported-beef shops.”<sup>88</sup> The United States argued that this practice violated Korea’s national treatment obligations under Article III:4.<sup>89</sup> The United States contended that because “imported beef does not enjoy the same competitive opportunity to be sold in the same manner and in the same stores in which Korean beef is sold, it is treated less favourably than domestic beef.”<sup>90</sup> Korea disagreed, stating that its dual-retail system had “perfect regulatory symmetry” and amounted to neither *de jure* nor *de facto* discrimination.<sup>91</sup>

Considering both arguments, the Appellate Body presented a three-element test for finding a violation of Article III:4.<sup>92</sup> According to the panel, an Article III:4 violation is established when it is shown that the “imported and domestic products at issue are ‘like products’; that the measure at issue is a ‘law, regulation, or requirement affecting their internal sale, offering for sale, purchase, transportation, distribution, or use’; and that the imported products are accorded ‘less favourable’ treatment than that accorded to like domestic products.”<sup>93</sup> Of the three elements, the United States and Korea were only disputing the final “less favorable treatment” element.<sup>94</sup>

The Panel found that a measure based “exclusively on criteria relating to the nationality or origin of products is incompatible with Article III:4.”<sup>95</sup> However, the Appellate Body noted that providing different treatment to imported products does not necessarily violate Article III:4, provided the treatment is no less favorable.<sup>96</sup> The Appellate Body found that differences between treatment of imported and domestic products are “neither necessary, nor sufficient to show a violation of Article III:4.”<sup>97</sup> Further, “[w]hether or not imported products are treated ‘less favourably’ than like domestic products should be assessed instead by

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87. *Id.* ¶ 26.

88. *Id.*

89. *Id.* ¶ 51.

90. Appellate Body Report, *Korea—Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, ¶ 50, WTO Doc. WT/DS161/AB/R, WT/DS169/AB/R (adopted Jan. 10, 2001) [hereinafter *Korea—Beef Appellate Body Report*].

91. *Id.* ¶ 17. Korea further argued that “[i]mported beef is sold only in stores that choose to sell imported beef, and domestic beef is sold only in stores choosing to sell domestic beef. In addition, there is total freedom on the part of retailers to switch from one category of shops to the other.” *Id.*

92. *Id.* ¶ 133.

93. *Id.*

94. *Id.*

95. *Id.* ¶ 135.

96. *Id.*

97. *Id.* ¶ 137.

examining whether a measure modifies the conditions of competition in the relevant market to the detriment of imported products.”<sup>98</sup>

While examining the Panel Report, the Appellate Body found that the number of imported beef shops was drastically lower than the number of domestic beef shops.<sup>99</sup> The Appellate Body disagreed with Korea’s argument, stating that the restrictive choice of only selling imported or domestic beef resulted in a “reduction of access to normal retail channels.”<sup>100</sup> Therefore, the Appellate Body held that Korea’s treatment of imported beef was less favorable than the treatment of domestic beef, resulting in a violation of Article III:4.<sup>101</sup>

### III. ANALYSIS OF WTO JURISPRUDENCE IN RELATION TO THE AGREEMENTS CITED

#### A. *Analysis of TBT Agreement Claims*

In confronting Australia’s tobacco requirements, Indonesia cited violations of Articles 2.1 and 2.2 of the TBT Agreement in its Request for Consultations.<sup>102</sup> This Part will apply the previously discussed WTO jurisprudence on the cited Articles to explain how the Panel likely came to its decision.

##### 1. Article 2.1

As previously noted, Article 2.1 of the TBT Agreement seeks to prevent member states from enacting measures that accord imported products less favorable treatment than like domestic products.<sup>103</sup> Indonesia claims that Australia’s TPPA is in violation of Article 2.1.<sup>104</sup> This, however, cannot be true, because the TPPA applies to all tobacco products sold in Australia.<sup>105</sup> The Panel most likely looked to the test set out by the Appellate Body in *Clove Cigarettes*. This test is comprised of three elements, all of which must be satisfied to show a violation of Article 2.1.<sup>106</sup> First, the Panel will ask whether the TPPA is a technical regulation. According to the definition set out in Annex 1.1 of the TBT Agreement,

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98. *Id.*

99. At the time, there were approximately 5,000 imported beef shops and 45,000 domestic beef shops. *Id.* ¶ 145.

100. *Id.* ¶ 146.

101. *Id.* ¶ 148.

102. Request for Consultations, *supra* note 4, at 2.

103. TBT Agreement, *supra* note 24, at art. 2.1.

104. Request for Consultations, *supra* note 4, at 2.

105. *Tobacco Plain Packaging Act 2011* (Cth) s 18 (Austl.).

106. The three elements are: “(i) the measure at issue must be a technical regulation; (ii) the imported and domestic products at issue must be like products; and (iii) the treatment accorded to imported products must be less favourable than that accorded to like domestic products.” *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, *supra* note 28, ¶ 87.

the TPPA falls squarely into this category.<sup>107</sup> The first element of the test will likely be satisfied.

The second element of the test requires the products being examined to be “like.”<sup>108</sup> Based on the Appellate Body’s finding in Clove Cigarettes that the analysis must be “based on the competitive relationship between and among the products;” it is fair to say the imported and domestic products are like.<sup>109</sup> Unlike Clove Cigarettes, Australia-Plain Packaging does not require an analysis of different types of tobacco products, as the TPPA applies to all tobacco products.<sup>110</sup> Therefore, the second element of the test will likely be satisfied.

In all likelihood, the only element of this test in contention is the third and final element. This element begs the question: are tobacco products imported to Australia accorded less favorable treatment than domestic tobacco products?<sup>111</sup>

The Appellate Body in Clove Cigarettes noted that Article 2.1 prohibits both de jure and de facto discrimination.<sup>112</sup> Because the TPPA encompasses all tobacco products, it does not discriminate against imports, and therefore can only be de facto discrimination. Based on the Appellate Body’s analysis, for a violation to occur, the TPPA must modify the conditions of competition in Australia to Indonesia’s detriment vis-à-vis the group of like domestic products.<sup>113</sup> However, the Appellate Body stated that this analysis is not dispositive when the regulation is not de jure discriminatory.<sup>114</sup> Because the TPPA applies to all tobacco products, it is not discriminatory on its face, and can only be de facto discrimination.<sup>115</sup> Therefore, according to the Appellate Body, a further analysis is necessary.<sup>116</sup>

To determine whether this is truly a discriminatory measure, the Panel will analyze whether the impact on Indonesia “stems exclusively from a legitimate regulatory distinction.”<sup>117</sup> Specifically, the Panel will look to “the design, architecture, revealing structure, operation, and

107. A technical regulation is defined as a: “[d]ocument which lays down product characteristics or their related processes and production methods . . . with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method.” TBT Agreement, *supra* note 24, at annex 1.1.

108. *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, *supra* note 28, ¶ 87.

109. *Id.* ¶ 156.

110. *Tobacco Plain Packaging Act 2011* (Cth) s 18 (Austl.).

111. *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, *supra* note 28, ¶ 87.

112. *Id.* ¶ 175.

113. *Id.* ¶ 181.

114. *Id.* ¶ 182.

115. *Tobacco Plain Packaging Act 2011* (Cth) s 18 (Austl.).

116. *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, *supra* note 28, ¶ 182.

117. *Id.*

application of the technical regulation at issue, and, in particular, whether that technical regulation is even-handed . . . ”<sup>118</sup> The TPPA is even-handed in that it applies to all tobacco products. Its design and operation show this to be true, as domestic cigarettes are subject to the same packaging regulations as imported cigarettes.<sup>119</sup>

Further, Australia-Plain Packaging differs from Clove Cigarettes because of the TPPA’s blanket ban. Recall from the earlier discussion on Clove Cigarettes that the United States’ measure did stem from a legitimate regulatory distinction because menthol cigarettes were exempt while all other flavored cigarettes were banned.<sup>120</sup> The TPPA simply cannot be placed into the same line of reasoning. It applies to all tobacco products, domestic and imported, unlike Clove Cigarettes where one like domestic product was not banned.<sup>121</sup> The very reason the United States’ measure in Clove Cigarettes did not comply with Article 2.1 can be attributed to the fact that it did not apply to all flavored tobacco products.<sup>122</sup> For the foregoing reasons, the Panel likely found that the TPPA satisfies the third element of the test and therefore is in compliance with Article 2.1 of the TBT Agreement.

## 2. Article 2.2

The test articulated in the Appellate Body’s opinion, *US-Tuna II*, is of particular use when analyzing whether the TPPA violates Article 2.2 of the TBT Agreement. According to the Appellate Body, a Panel should examine:

- (i) the degree of contribution made by the measure to the legitimate objective at issue; (ii) the trade-restrictiveness of the measure; and (iii) the nature of the risks at issue and the gravity of consequences that would arise from non-fulfilment of the objective(s) pursued by the Member through the measure.<sup>123</sup>

An in-depth look at these three factors shows that the TPPA does not violate Article 2.2.:

First, it will be necessary to ask how much the TPPA contributes to Australia’s goal of discouraging tobacco use. This Paper will discuss the various studies that show the TPPA has been effective thus far.<sup>124</sup> Specifically, these studies show that the TPPA’s effectiveness will increase as time passes and more young people are exposed to the packaging

118. *Id.*

119. *Tobacco Plain Packaging Act 2011* (Cth) s 18 (Austl.).

120. *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, *supra* note 28, ¶ 225.

121. *Tobacco Plain Packaging Act 2011* (Cth) s 18 (Austl.).

122. *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, *supra* note 28, ¶ 225.

123. *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, *supra* note 55, ¶ 322.

124. See discussion *infra* Part IV.A.2.

requirements.<sup>125</sup> With the wealth of knowledge available, the Panel likely concluded that the TPPA does contribute a great deal to the decline of tobacco use in Australia.

The second factor requires an analysis of the trade restrictiveness of the TPPA.<sup>126</sup> This factor is Indonesia's best argument for an Article 2.2 violation. The TPPA is quite restrictive, and it is likely that Indonesia has made that fact known to the Panel. However, these factors are not dispositive, and a trade-restrictive measure is not an automatic violation of Article 2.2.<sup>127</sup> Further, because the TPPA has a legitimate objective, as explicitly mentioned in the text of Article 2.2, the Panel is more likely to give this factor less weight.<sup>128</sup>

The third factor favors Australia. This factor looks at the "nature of the risks at issue and the gravity of consequences that would arise from non-fulfilment of the objective."<sup>129</sup> As with the first factor, this Paper will implicate the dangers of tobacco use.<sup>130</sup> It is no secret that tobacco use is dangerous, and the Panel likely determined that the risks at issue are serious. If Australia was forced to repeal the TPPA and its progress was halted, tobacco use could gradually increase until it reached its prior average.

The consequence the Panel will look to is returning to pre-plain packaging Australia, which does not seem as dire as other consequences to non-fulfillment of legitimate objectives. However, when considering a study completed by the Australian Government Department of Health that found a decrease of .55 percent in Australian smokers from 2012 to 2015, the consequences the Panel must consider are counted in lives.<sup>131</sup> The latest census indicated that 24.8 million people live in Australia.<sup>132</sup> Assuming the rate of decrease remains stagnant, 136,400 people are not using tobacco that would have before. This is a rough estimate based on presumptions, but it shows how great the consequences could be. For the foregoing reasons, the Panel likely found that the TPPA is not more trade restrictive than necessary to fulfill a legitimate objective.

### B. *Analysis of Article 3.1 of the TRIPS Agreement*

Much like the analysis of Article 2.1 of the TBT Agreement, Article 3.1 of the TRIPS Agreement will not provide Indonesia with the relief it

125. *See infra* note 167.

126. *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, *supra* note 55, ¶ 322.

127. *Id.*

128. Article 2.2 specifically mentions "protection of human health or safety" as a legitimate objective. TBT Agreement, *supra* note 24, at art. 2.2.

129. *United State – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, *supra* note 55, ¶ 322.

130. *See discussion infra* Part IV.A.1.

131. *See infra* note 170.

132. *Population Clock*, AUSTL. BUREAU OF STATS., <http://www.abs.gov.au/ausstats/abs@.nsf/0/1647509ef7e25faaca2568a900154b63?OpenDocument> (last visited Apr. 11, 2018).

seeks, as the TPPA does not violate Australia's obligations under Article 3.1 of the TRIPS Agreement.

Because of the lack of WTO jurisprudence on Article 3.1, it is likely that the Panel turned to its analysis in EC-Trademarks and Geographical Indications for guidance. As discussed earlier, the two-element test for a violation of Article 3.1 is "(1) the measure at issue must apply with regard to the protection of intellectual property; and (2) the nationals of other Members must be accorded 'less favourable' treatment than the Member's own nationals."<sup>133</sup> Based on the Panel's definitions of "protection"<sup>134</sup> and "intellectual property,"<sup>135</sup> it is unlikely that the first element will be in dispute. However, based on the language in its request for consultations, Indonesia plans to argue the second element.<sup>136</sup>

In EC-Trademarks and Geographical Indications, the Panel determined that the correct analysis of the second element involves a determination of whether the measure "affects the 'effective equality of opportunities' between the nationals of other Members and the European Communities' own nationals."<sup>137</sup> Based on the Panel's analysis, it is unlikely that the Panel found merit in Indonesia's argument. Unlike the EC's measure in EC-Trademarks and Geographical Indications, Australia's TPPA does not alter the "effective equality of opportunities." The language of the TPPA refers to the regulation of retail packaging for all tobacco products in Australia.<sup>138</sup> It does not matter whether the tobacco products are made in Australia or imported from another country. The regulations apply to any tobacco product sold.<sup>139</sup>

Although the TPPA will treat Indonesia less favorably than before its enactment, the TPPA does not treat Indonesia less favorably than any other country, including Australia. Its purpose is broad, and thus its strict requirements aim to curb smoking habits by diminishing trademarks and advertising on all tobacco products.<sup>140</sup> Other member and non-member states that choose to import tobacco products into Australia will face identical stringent regulations. Unlike the European Communities in EC-Trademarks and Geographical Indications, Australia has no reciprocity requirement for importers of tobacco.<sup>141</sup> In fact, the only requirement

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133. *EC – Trademarks and Geographical Indications*, *supra* note 70, ¶ 7.125.

134. "For the purposes of Articles 3 and 4, 'protection' shall include matters affecting the availability, acquisition, scope, maintenance and enforcement of intellectual property rights as well as those matters affecting the use of intellectual property rights specifically addressed in this Agreement." *Id.* ¶ 7.126 (quoting TRIPS Agreement, *supra* note 66, at 3 n.3).

135. "For the purposes of this Agreement, the term 'intellectual property' refers to all categories of intellectual property that are the subject of Sections 1 through 7 of Part II." *Id.* ¶ 7.127 (quoting TRIPS Agreement, *supra* note 66, at art. 1.2).

136. Request for Consultations, *supra* note 4, at 2.

137. *EC–Trademarks and Geographical Indications*, *supra* note 70, ¶ 7.134.

138. *Tobacco Plain Packaging Act 2011* (Cth) s 18 (Austl.).

139. *Id.*

140. *Id.* at s 3.

141. *See generally Tobacco Plain Packaging Act 2011* (Cth) (Austl.).

is to abide by the regulations in the TPPA and TPPR, which Australian tobacco companies must do as well.<sup>142</sup> Because the TPPA does not afford Australia any special treatment, the Panel most likely found that it is a non-discriminatory measure in compliance with Australia's obligations under the TRIPS Agreement.

C. *Analysis of Article III:4 of the GATT*

Indonesia's Article III:4 claim will again meet the same fate as the national treatment provisions in the TBT Agreement and the TRIPS Agreement. Article III:4 is an anti-discriminatory provision in the GATT, and an in depth look at Korea-Beef will show that it was not violated by the TPPA.

In Korea-Beef, the Appellate Body illustrated a three-element test for a violation of Article III:4. The elements include: (i) the products in question must be "like" products, (ii) the measure in question must be a "law, regulation, or requirement affecting their internal sale, offering for sale, purchase, transportation, distribution, or use," and (iii) the imported products must be accorded less favorable treatment than the domestic products.<sup>143</sup> In this case, the imported and domestic products are both tobacco products for retail sale in Australia.<sup>144</sup> It is unlikely that the first element will be in dispute, and if it is disputed, the Panel's analysis will likely be short. The second element is also unlikely to be in dispute, as the TPPA is a law that regulates packaging and affects the sale, purchase, distribution, and use of tobacco products.<sup>145</sup>

The final element should be the central point of contention. Indonesia believes that it is receiving less favorable treatment because the TPPA has a negative commercial effect on its imported tobacco products. However, domestic tobacco products are subject to the same restrictions. In Korea-Beef, the Appellate Body noted that Korea's dual retail system resulted in "establishment of competitive conditions less favourable for the imported product than for the domestic product."<sup>146</sup> The important distinction in Australia-Plain Packaging is that domestic tobacco products will also be harmed, resulting in competitive conditions that are equal for domestic and imported goods.

Korea had nearly 40,000 more domestic beef stores than imported beef stores, a discrepancy that was a direct result of the contested measures.<sup>147</sup> Under the TPPA, domestic and imported tobacco products will be sold at the same stores and in the same manner as before, except the packaging will be regulated. If anything, the TPPA makes competitive conditions more equal. Because of this equality of the competitive

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142. *Id.*; *Tobacco Plain Packaging Regulations 2011* (Cth) (Austl.).

143. *Korea-Beef Appellate Body Report*, *supra* note 90, ¶ 133.

144. Request for Consultations, *supra* note 4, at 1.

145. *See generally Tobacco Plain Packaging Act 2011* (Cth) (Austl.).

146. *Korea-Beef Appellate Body Report*, *supra* note 90, ¶ 146.

147. *Id.* ¶ 145.

conditions between domestic and imported products, the Panel should find in favor of Australia.

#### IV. THE FUTURE IMPACT OF THIS DECISION

No matter what opinion one may have about the outcome of Australia-Plain Packaging, the Panel's landmark decision will have far-reaching implications on the future of trade law and dispute settlement. This Part will discuss the positive impact of the panel's landmark decision. Further, it will discuss why this was the correct decision going forward.

##### A. *Policy Rationale in Favor of the Panel's Decision*

There is a compelling argument that Australia's TPPA infringes on international trade agreements. However, Article XX of the GATT<sup>148</sup>, Article 2.2 of the TBT Agreement<sup>149</sup> and Article 8 of the TRIPS Agreement<sup>150</sup> all mention the protection of public health as exceptions. The TPPA is a lawful regulation by Australia, but what makes regulating tobacco use legitimate? The obvious and most positive impact of the TPPA is a reduction in tobacco use. This Part will discuss the dangers of tobacco use, the positive impact of plain packaging in countries where it has been adopted, and why the panel's decision was the right one.

##### 1. The Dangers of Tobacco Use

Using tobacco products and, specifically, smoking cigarettes, is extremely unhealthy and can lead to death.<sup>151</sup> In fact, according to the World Health Organization ("WHO"), tobacco use "is one of the biggest public health threats the world has ever faced, killing more than 7 million people a year."<sup>152</sup> Part of the reason tobacco kills so many people is the fact that tobacco products contain nicotine, which has been proven to be a highly addictive substance.<sup>153</sup> Its addictive properties have been compared to other illicit drugs.<sup>154</sup> It is likely that once a person starts smoking, it will be much harder for them to stop. Further, most smokers begin by experimentation when they are adolescents.<sup>155</sup> It follows, then, that if most

148. General Agreement on Tariffs and Trade art. XX, Oct. 30, 1947, 55 U.N.T.S. 194 [hereinafter GATT 1947].

149. TBT Agreement, *supra* note 24, at art. 2.2.

150. TRIPS Agreement, *supra* note 66, at art. 8.1.

151. *See generally* U.S. DEPT OF HEALTH & HUMAN SERVS., THE HEALTH CONSEQUENCES OF SMOKING – 50 YEARS OF PROGRESS: A REPORT OF THE SURGEON GENERAL (2014) (describing the many health risks associated with smoking tobacco products).

152. *Tobacco Fact Sheet*, WHO, <http://www.who.int/mediacentre/factsheets/fs339/en/> (last updated March 2018) [<https://perma.cc/PVM8-YJTP>].

153. The 1988 Surgeon General Report, *The Health Consequences of Smoking – Nicotine Addiction*, "[e]stablished nicotine as a highly addictive substance, comparable in its physiological and psychological properties to other addictive substances of abuse." THE HEALTH CONSEQUENCES OF SMOKING, *supra* note 151, at 49.

154. "Cigarettes were now cast as addicting and as equally addictive as many illegal drugs." *Id.* at 30.

155. "The 1994 Surgeon General's report on Preventing Tobacco Use Among Young People emphasized that tobacco use and addiction almost always begins before

smokers begin in their teen years and become addicted, a regulation that curbs the experimental appetite of teenagers would reduce the amount of tobacco use.

Another danger of tobacco use, especially cigarette smoking, is second-hand smoke. Smoking not only hurts the smoker, but also anyone else who may be around.<sup>156</sup> The WHO estimates that around 890,000 people die from secondhand smoke every year.<sup>157</sup> This is what separates smoking from the other vices mentioned in this Paper. Smoking is far more detrimental to public health than many other substances. Sugar can cause obesity, which can lead to diabetes, heart disease, and other life-threatening diseases. Alcohol is also problematic, as long-term use can lead to cancer, heart disease, stroke, liver disease, and even depression.<sup>158</sup> However, each of these examples only affect the consumer's health. Eating unhealthy foods will not give heart disease to friends or strangers. Aside from violence stemming from alcohol intoxication, alcohol only hurts others when combined with something else, such as a car. Having a glass of wine with an evening meal will likely be harmless and may even be beneficial.<sup>159</sup> A regulated amount of natural sugar has physiological benefits.<sup>160</sup> However, even one cigarette can steal minutes from one's life expectancy.<sup>161</sup>

Second-hand smoke has been proven to cause medical issues, and no amount of smoke inhalation is safe. Thus, enacting regulations that curb the appetite of smokers and deter the public from smoking must be a positive measure.

## 2. The Effectiveness of Regulations

The positive effects of plain packaging will undoubtedly take time to reach their maximum potential. However, there are early signs that plain packaging is working to deter customers. One 2009 study states that the plain packaging regulations are an effective way to curb the public appetite for tobacco products.<sup>162</sup> Further, proponents of the Framework

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18 years of age and that most adolescent smokers face the same challenges as adults in quitting smoking." *Id.* at 31.

156. "Exposure to secondhand tobacco smoke has been causally linked to cancer, respiratory, and cardiovascular diseases, and to adverse effects on the health of infants and children." *Id.* at 7.

157. *Tobacco Fact Sheet*, *supra* note 152.

158. *Fact Sheets – Alcohol Use and Your Health*, CTR. FOR DISEASE CONTROL & PREV., <https://www.cdc.gov/alcohol/fact-sheets/alcohol-use.htm> (last updated Jan. 3, 2018) [<https://perma.cc/HV34-R6FU>].

159. *Red Wine and Resveratrol: Good for Your Heart?*, MAYO CLINIC (NOV. 12, 2016), <https://www.mayoclinic.org/diseases-conditions/heart-disease/in-depth/red-wine/art-20048281> [<https://perma.cc/6G9Z-GK5X>].

160. *Know Your Limit for Added Sugars*, CTR. FOR DISEASE CONTROL & PREV., <https://www.cdc.gov/nutrition/data-statistics/know-your-limit-for-added-sugars.html> (last updated Sept. 27, 2016) [<https://perma.cc/E3UN-CAGQ>].

161. See, Mary Shaw et al., Letter, *Time for a Smoke? One Cigarette Reduces Your Life by 11 Minutes*, BRIT. MED. J., Jan. 2000, at 53.

162. The evidence indicates three primary benefits of plain packaging: increasing

Convention on Tobacco Control (FCTC), a treaty established by the WHO, have opined that plain packaging works.<sup>163</sup>

Specifically, the TPPA and TPPR are working as expected in Australia. Australia's Department of Health stated that "while the full effect of tobacco plain packaging is expected to be realised over time, early available evidence indicates that the measure is beginning to achieve its public health objectives and is expected to continue to do so into the future."<sup>164</sup> Two years after the commencement of the TPPA and TPPR, the Australian government began a "Post-Implementation Review" ("PIR") of the tobacco plain packaging regulations.<sup>165</sup> The purpose of the PIR was to "assess whether a regulation remains appropriate, and how effective and efficient the regulation has been in meeting its objectives."<sup>166</sup> After over a year of data collection, the report concluded that "the tobacco plain packaging measure has begun to achieve its public health objectives of reducing smoking and exposure to tobacco smoke in Australia and it is expected to continue to do so into the future."<sup>167</sup>

According to the PIR, the positive impacts of plain packaging include: "reducing the appeal of tobacco products, increasing the effectiveness of health warnings, and reducing the ability of the pack to mislead. The studies also provide early evidence of positive changes to actual smoking and quitting behaviours."<sup>168</sup> In addition to the PIR, the Australian Department of Health also had Dr. Tasneem Chifty, an expert in econometric analysis, analyze smoking prevalence data to determine whether the TPPA and TPPR "had a discernible effect on the prevalence of smoking in Australia."<sup>169</sup> Dr. Chifty's results showed "a statistically significant estimated decline in smoking prevalence of around 0.55 percentage points between December 2012 and September 2015, or about

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the effectiveness of health warnings, reducing false health beliefs about cigarettes, and reducing brand appeal especially among youth and young adults. Overall the research to date suggests that 'plain' packaging regulations would be an effective tobacco control measure, particularly in jurisdictions with comprehensive restrictions on other forms of marketing.

David Hammond, "*Plain Packaging*" *Regulations for Tobacco Products: The Impact of Standardizing the Color and Design of Cigarette Packs*, 52 SALUD PÚBLICA DE MÉXICO [SAL. PUB. MEX.] S226, S230 (2010).

163. Karine Gallopel-Morvan, *Studies Are Conclusive: Plain Packaging of Tobacco Works*, FRAMEWORK CONVENTION ALL., <http://www.fctc.org/fca-media/opinion-pieces/1409-studies-show-that-plain-packaging-of-tobacco-works> (last visited Apr. 10, 2018) [<https://perma.cc/HXX2-TTA8>].

164. *Evaluation of Tobacco Plain Packaging in Australia*, AUSTRAL. GOV. DEP'T OF HEALTH, <http://www.health.gov.au/internet/main/publishing.nsf/content/tobacco-plain-packaging-evaluation> (last updated Oct. 23, 2017) [<https://perma.cc/UGH5-UCKZ>].

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

one quarter of the total drop in prevalence during the period.”<sup>170</sup> During the roughly three year period Dr. Chipty estimated that the plain packaging regulations resulted in a total reduction of 108,228 smokers.<sup>171</sup>

While these studies may seem like minor progress, they are extremely encouraging, and the Australian government expected the progress to be slow-going.<sup>172</sup> The regulations are working as expected, and now Australia has roughly 108,228 less smokers than it did before.

While a decrease in the overall number smokers is evidence that the regulations are working, the most worthwhile study may be one on adolescents. Studies show that most smokers start before the age of eighteen.<sup>173</sup> The strategy is simple: make it “uncool” for teenagers to start smoking and they will be less likely to start. In their 2015 research paper, Victoria White, Tahlia Williams, and Melanie Wakefield sought to examine the impact of plain packaging on youth perception of pack image and perceived brand differences.<sup>174</sup>

The study was conducted on adolescents from the age range of twelve to seventeen from schools all over Australia.<sup>175</sup> It included samples collected over two years, 2011 and 2013, at 179 schools.<sup>176</sup> The students were first asked if they had recently seen a cigarette pack<sup>177</sup>, then asked to rate cigarette brand appeal<sup>178</sup>, attraction of cigarette packs<sup>179</sup>, and brand differences.<sup>180</sup> The results of the study showed that standardized pack-

170. *Id.*

171. *Id.*

172. *Id.*

173. THE HEALTH CONSEQUENCES OF SMOKING, *supra* note 151, at 31.

174. Victoria White et al., *Has the Introduction of Plain Packaging with Larger Graphic Health Warnings Changed Adolescents' Perceptions of Cigarette Packs and Brands?*, 24 TOBACCO CONTROL ii42 (2015).

175. *Id.* at ii43.

176. *Id.*

177. “Students indicated how long ago they had seen a cigarette pack by choosing a response from: in the past 6 months, more than 6 months ago but less than 12 month ago, more than 12 months ago.” *Id.*

178. According to the study:

[S]tudents were presented with a photographic image of each of four brands of Australian cigarettes and asked to indicate their level of agreement with three statements about the brand and the pack (‘this brand appeals to me’, ‘the pack looks good’, ‘the pack looks ugly’) and three statements about people who smoke the brand (‘are cool’, ‘are successful’, ‘are daggy (uncool)’).

*Id.*

179. In this section of the study, “students who had seen a cigarette pack in the previous 6 months indicated their level of agreement to four positive (‘cool’, ‘good’, ‘interesting’, ‘exciting’), and four negative (‘ugly’, ‘daggy (uncool)’, ‘gross’, ‘disgusting’) descriptions of cigarette packs using a five-point scale ((1) ‘strongly disagree’ to (5) ‘strongly agree’).” *Id.*

180. In the final section of the study:

Students indicated their level of agreement (‘strongly disagree’ (1) to ‘strongly agree’ (4)) to five statements reflecting that some brands of cigarettes are: ‘easier to smoke than others’, ‘more addictive than others’, ‘easier to quit than others’, ‘have more harmful substances in them than others’ and ‘have better looking packs than others’.

aging has decreased usage among all smoking status groups.<sup>181</sup> Because the study only collected data in 2011 and 2013, a plethora of collectable data remains. The authors believe that further research could show whether continued exposure to plain packaging decreases interest in cigarettes even more.<sup>182</sup>

This study is vital, especially considering the adolescents surveyed had only been exposed to nationwide plain packaging for one year. The TPPA and TPPR seem to be working and making Australia a healthier place to live.

### 3. A Common-Sense Argument: Why the Panel Made the Right Decision

The panel's decision was correct for several reasons. The decision was consistent with the previous interpretations of each Article addressed. WTO jurisprudence shows that the TPPA is consistent with Australia's national treatment obligations under the TBT Agreement, TRIPS Agreement, and the GATT.<sup>183</sup> But perhaps the path to understanding why this was the correct decision stems from common-sense.

First, these regulations do not restrict consumer choices, because consumers are free to buy tobacco products just as they were before. Packaging changes only make it more difficult for certain products to catch the eye of consumers. For example, small children can relate colorful fruit loops boxes to delicious, but unhealthy, sugary cereals. Advertising is not always a good thing—just ask any parent who has had to make the difficult decision of refusing a temper-tantrum-throwing-three-year-old his fruit loops in a public market. Advertising groups spend billions every year looking for ways to target consumers to maximize their profits.<sup>184</sup> While this is a completely normal business tactic, targeting specific groups with unhealthy products, especially young people, can be regarded as immoral.

Second, even if it is a little more inconvenient, wouldn't the benefit outweigh the harm? This tobacco measure is statistically reducing the number of smokers in Australia, which reduces cases of cancer, heart disease, and lung disease.<sup>185</sup> Is that not better than allowing tobacco companies to have the creative control they want? Further, the negative impact of widespread tobacco use can hurt the economy. Take the United

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Students could also give a 'don't know' (5) response.

*Id.* at ii44.

181. *Id.* at ii45.

182. *Id.* at ii48.

183. This is in reference to the sections analyzing jurisprudence for Article 2.1 of the TBT Agreement, Article 3.1 of the TRIPS Agreement, and Article III:4 of the GATT. See TBT Agreement, *supra* note 24, at art. 2.1; TRIPS Agreement, *supra* note 66, at art. 3.1; GATT 1947, *supra* note 148, at art. III.4.

184. Lucy Handley, *Global Advertising Spend to Slow in 2017, While 2016 Sales Reached Nearly \$500bn: Research*, CNBC (Dec. 5, 2016, 7:55 AM), <https://www.cnbc.com/2016/12/05/global-ad-spend-to-slow-in-2017-while-2016-sales-were-nearly-500bn.html> [<https://perma.cc/9BCA-EPDR>].

185. *Evaluation of Tobacco Plain Packaging in Australia*, *supra* note 164.

States as an example, a country where plain packaging does not exist. The Center for Disease Control estimates that smoking alone costs \$300 billion dollars a year.<sup>186</sup>

What the regulations take away from one sector, they give to another. Less sick people means money can be spent on things other than healthcare, which will stimulate the economy. It also means that the cost of healthcare will go down for everyone. Using the United States as an example, \$300 billion dollars could go a long way to helping people. Imagine if that amount of money was donated to Cancer research instead of treating those who already have the disease. Regardless of economics, the health of citizens is of paramount importance. Without health, what do we have?

While the jury is still out on the complete impact the regulations will have, it is important to remember that societal changes take time. The packaging limitations set forth in the TPPA and TPPR commenced on December 1, 2012.<sup>187</sup> Limiting the amount of time to judge whether these regulations are effective to five years would be a crucial mistake. These regulations need time to take effect and influence younger generations of citizens before any decision can conclusively be made as to their effectiveness.

#### B. *Could the Decision Open the Door for Plain Packaging of Other Products?*

Now that the decision has been made, this could open the floodgates for countries to regulate other products. There are many other unhealthy products being imported and exported around the world. The hypothetical at the outset of this Paper delves into what such a world could look like, and a discussion on the possible impact is certainly not frivolous.

Recently, the Chilean government started a war on unhealthy foods by implementing several measures that diminish the marketing and packaging rights of companies all over the world.<sup>188</sup> The measures are extremely ambitious, even more so than the TPPA.<sup>189</sup> The Chilean measures prevent companies from using tactics to lure children to purchase products, such as using an animated character on a cereal box, including a trinket with a sugary treat, or even advertising on television

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186. This number includes \$170 billion in direct medical care for adults and \$156 billion in lost productivity due to premature death and exposure to secondhand smoke. *Smoking & Tobacco Use: Fast Facts*, CTR. FOR DISEASE CONTROL & PREV., [https://www.cdc.gov/tobacco/data\\_statistics/fact\\_sheets/fast\\_facts/index.htm](https://www.cdc.gov/tobacco/data_statistics/fact_sheets/fast_facts/index.htm) (last updated Feb 20, 2018) [<https://perma.cc/BWZ6-V4GH>].

187. *Tobacco Plain Packaging Act 2011* (Cth) s 1 (Austl.); *Tobacco Plain Packaging Regulations 2011* (Cth) sub-div 1.1.2 (Austl.).

188. Andrew Jacobs, *In Sweeping War on Obesity, Chile Slays Tony the Tiger*, N.Y. TIMES (Feb. 7, 2018), <https://www.nytimes.com/2018/02/07/health/obesity-chile-sugar-regulations.html> [<https://perma.cc/9NNU-V6ML>].

189. See generally *Tobacco Plain Packaging Act 2011* (Cth) (Austl.); Jacobs, *supra* note 188.

channels or certain internet sites that are frequented by children.<sup>190</sup> The measures also ban any marketing of infant formula to encourage breastfeeding and impose an 18 percent tax on all sugary sodas.<sup>191</sup> But perhaps the most analogous measure to the TPPA is the new labeling requirement that packaged food must “prominently display black warning logos in the shape of a stop sign on items high in sugar, salt, calories or saturated fat.”<sup>192</sup>

The food industry is predictably upset about these measures and will fight them tooth-and-nail, much like the tobacco companies fought against the TPPA.<sup>193</sup> But the question remains whether the measures will survive long enough to be brought in front of the WTO Dispute Settlement Panel. While there are frightening health statistics that seem to favor implementation of the measures<sup>194</sup> and a high economic burden of obesity,<sup>195</sup> the regulations as they stand likely will not make it to the WTO. The measures are extremely restrictive and will probably be altered before any WTO dispute. However, if a request for consultations is filed against Chile, Chile would certainly have a good argument that the measures were enacted to combat a legitimate health risk.

The WTO dispute settlement panel would most likely side against plain packaging regulations if they applied to other products such as unhealthy foods or alcohol. For example, a restrictive packaging law on alcohol that is similar to Australia’s on tobacco is unlikely to hold up because of how restrictive Australia’s packaging regulations are and how dangerous tobacco use is. To institute regulations as trade-restrictive as Australia did in the TPPA, the objective will likely have to be as compelling or more compelling than reducing smoking. Alcohol and unhealthy foods are similar to tobacco in many ways. All three are addictive and can lead to diseases that cause premature death.<sup>196</sup> However, tobacco use has one characteristic neither alcohol nor unhealthy foods have; the ability to immediately harm those around you.

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190. Jacobs, *supra* note 188.

191. *Id.*

192. *Id.*

193. *Id.*

194. According to the Chilean Health Ministry roughly 75% of Chilean adults are overweight or obese, and 50% of Chilean children are overweight or obese by the age of six. *Id.*

195. According to the *New York Times*, “[i]n 2016, the medical costs of obesity reached \$800 million, or 2.4 percent of all health care spending, a figure that analysts say will reach nearly 4 percent in 2030.” *Id.*

196. In the United States in 2015, alcohol caused 21,028 deaths from liver disease and 33,171 alcohol-induced deaths, excluding accidents and homicides. *Alcohol Use, CTR. FOR DISEASE CONTROL & PREV.*, <https://www.cdc.gov/nchs/fastats/alcohol.htm> (last updated Jan. 20, 2017) [<https://perma.cc/R5AV-8B2A>]. One study on the unhealthy diets of Americans estimated that “nearly half of all deaths from heart disease, stroke and diabetes — collectively, cardiometabolic diseases — are linked to poor diet.” Carey Goldberg, *Deadly Diets: Study Links Unhealthy Eating to Nearly Half of American Heart Deaths*, COMMONHEALTH (Mar. 7, 2017), <http://www.wbur.org/common-health/2017/03/07/deadly-diets-study-tufts> [<https://perma.cc/36YT-T96L>].

There are certainly arguments concerning the dangers of drinking too much and getting behind the wheel of a vehicle or the rising cost of healthcare in Chile due to poor diet. But second-hand smoke implicates another level of harm. As noted earlier, second-hand smoke kills an estimated 890,000 people per year, globally.<sup>197</sup> The economic cost is great as well.<sup>198</sup> All of this comes simply from being near someone who is making the decision to smoke. This is a big reason why there has been so much attention on the dangers of smoking. It is not only a huge health concern for those that choose to partake, but also those who do not.

Another reason smoking is a larger public health concern than alcohol and unhealthy foods is the minimum amount of use it takes to cause harm to the body. As previously noted, smoking one cigarette can cause irreparable harm to your body.<sup>199</sup> Having one drink or one unhealthy meal is unlikely to harm you in this way.

Another case to consider is marijuana use, which has been a growing trend in recent years. Marijuana is an interesting topic for several reasons. First, it is not legal in most places around the world. However, the legality of marijuana is trending, and there could be a robust market in the future.<sup>200</sup> Second, it is consumed in many different ways. It can be smoked like a cigarette, but does this mean it should be regulated like tobacco use? It can also be eaten, and in many instances, is made into flavored treats that mask the taste. Does that make it more like the unhealthy foods discussed earlier? In any way it is consumed, it gives the consumer a “high”, much like drinking alcohol to the point of intoxication. Does this mean it should be regulated like alcohol? The truth is that this is uncharted territory.

Of all the vices discussed, cannabis may be the one that passes the test for a legitimate health regulation. Because of its widespread illegality, there isn't as much data on the death toll and financial cost of marijuana use. However, the CDC does have some information about its effects.<sup>201</sup> This data suggests that marijuana could possibly cause mental disorders, cancer, and heart and lung health issues.<sup>202</sup> This is, of course,

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197. *Tobacco Fact Sheet*, *supra* note 152.

198. *Smoking & Tobacco Use: Fast Facts*, *supra* note 186.

199. Shaw, *supra* note 161.

200. According to a report by Arcview Market Research, consumer spending on legal cannabis in North America is outperforming previous approximations. The report indicates that retail cannabis sales will grow 33% from 2016 to nearly \$10 billion this year. By 2021 the legal market is expected to reach \$24.5 billion, at a 28% compound annual growth rate (CAGR).

*Global Legal Cannabis Sales Projected to Grow*, MORNINGSTAR: PR NEWSWIRE (Jan. 29, 2018, 9:00 AM), [https://www.morningstar.com/news/pr-news-wire/PRNews\\_20180129enUK201801299539/global-cannabis-sales-projected-to-grow.html](https://www.morningstar.com/news/pr-news-wire/PRNews_20180129enUK201801299539/global-cannabis-sales-projected-to-grow.html) [<https://perma.cc/A4S6-STPF>].

201. *Marijuana and Public Health*, CTR. FOR DISEASE CONTROL & PREV., <https://www.cdc.gov/marijuana/health-effects.htm> (last updated Jan. 26, 2017) [<https://perma.cc/6PUX-P6JB>].

202. *Id.*

assuming the marijuana is being smoked by the user. It can also be compared to tobacco use because of similar concerns around the dangers of second-hand smoke. Though there is not as much data, it seems safe to assume this could raise, at the very least, concerns over health issues. The question remains, is it as bad as cigarette smoke? Only time will tell, but because its use is not as widespread as tobacco, it is unlikely that cannabis will garner as much attention for plain packaging purposes. If the growing trend of marijuana legalization continues, we will surely have clarity on these issues sooner rather than later.

#### CONCLUSION

By enacting the TPPA, Australia did not violate its obligations under the TBT Agreement, the TRIPS Agreement, or the GATT. Because TPPA regulations affect all tobacco products sold in Australia, the TPPA does not favor Australian tobacco producers over non-Australian producers, such as Indonesia. Further, the regulation of tobacco products' packaging is a legitimate step to reducing the number of smokers in Australia. The WTO dispute resolution panel likely made its decision based upon these facts and previous decisions, and it was the right decision to make. The future of plain packaging other dangerous products may be uncertain, and WTO approval will likely stop at tobacco products for now, but the lessons learned from the analysis of these issues can help paint the future for regulations such as those enacted in Australia.

