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**1 ARTICLE IX**

**1.1 Text of Article IX**

**Article IX**

*Marks of Origin*

1. Each contracting party shall accord to the products of the territories of other contracting parties treatment with regard to marking requirements no less favourable than the treatment accorded to like products of any third country.
2. The contracting parties recognize that, in adopting and enforcing laws and regulations relating to marks of origin, the difficulties and inconveniences which such measures may cause to the commerce and industry of exporting countries should be reduced to a minimum, due regard being had to the necessity of protecting consumers against fraudulent or misleading indications.
3. Whenever it is administratively practicable to do so, contracting parties should permit required marks of origin to be affixed at the time of importation.
4. The laws and regulations of contracting parties relating to the marking of imported products shall be such as to permit compliance without seriously damaging the products, or materially reducing their value, or unreasonably increasing their cost.
5. As a general rule, no special duty or penalty should be imposed by any contracting party for failure to comply with marking requirements prior to importation unless corrective marking is unreasonably delayed or deceptive marks have been affixed or the required marking has been intentionally omitted.
6. The contracting parties shall co-operate with each other with a view to preventing the use of trade names in such manner as to misrepresent the true origin of a product, to the detriment of such distinctive regional or geographical names of products of the territory of a contracting party as are protected by its legislation. Each contracting party shall accord full and sympathetic consideration to such requests or representations as may be made by any other contracting party regarding the application of the undertaking set forth in the preceding sentence to names of products which have been communicated to it by the other contracting party.

## 1.2 General

1.1. In *Australia – Tobacco Plain Packaging*, Cuba argued that Australia's tobacco plain packaging measures were inconsistent with Article IX:4 of the GATT 1994. As Article IX had never before been interpreted in dispute settlement proceedings, the Panel made a number of general observations about Article IX.

1.2. Recalling statements made by the Appellate Body in previous cases (in which Article IX was not at issue)<sup>1</sup>, the Panel noted that Article IX reflects the legitimacy of providing origin information to consumers through mark of origin requirements.<sup>2</sup>

1.3. With respect to the text and structure of Article IX, the Panel noted that the term "marks of origin" in the heading of Article IX is not defined in either the GATT 1994 or any other WTO covered agreement. The Panel therefore consulted dictionaries to ascertain the "ordinary meaning" of the term, and found that it "encompasses a sign, a token, an indication, a device, a stamp, a brand, a label, or an inscription on a product identifying from where such product originates".<sup>3</sup>

1.4. Additionally, the Panel noted that the subparagraphs of the Article lay down a number of specific disciplines for reducing to a minimum the difficulties and inconveniences that laws and regulations relating to marks of origin may cause to the commerce and industry of exporting countries.<sup>4</sup>

## 1.3 Article IX:2

1.5. In *US – COOL (Article 21.5 – Canada and Mexico)*, the Appellate Body stated that Article IX:2 "calls for a *reduction* of difficulties and inconveniences that laws and regulations relating to marks of origin may cause to exporters".<sup>5</sup> According to the Appellate Body, this provision therefore calls for a "limitation of the impact of the use of marks of origin".<sup>6</sup>

## 1.4 Article IX:4

### 1.4.1 General

1.6. In *Australia – Tobacco Plain Packaging*, the Panel noted that Article IX:4 has two main components:

"a. '[t]he laws and regulations of Members relating to the marking of imported products', which identifies the scope of the obligation, namely the types of measures and signs covered by this provision; and

b. 'shall be such as to permit compliance without ... materially reducing the[] value [of imported products]', which spells out the specific obligation under Article IX:4 that Cuba invokes in its claim."<sup>7</sup>

1.7. The Panel thus considered that in analysing Cuba's claim, it needed to address two issues: first, whether the challenged measure constituted a law or regulation relating to the marking of imported products, and was therefore covered by the scope of Article IX:4; and second, whether the challenged measure was such as to permit compliance without materially reducing the value of the relevant imported products.<sup>8</sup>

1.8. In the course of closely examining each of the two components listed above, the Panel made a number of general observations concerning the purpose and structure of Article IX:4. The Panel

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<sup>1</sup> Appellate Body Reports, *US – COOL*, para. 445; *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.356.

<sup>2</sup> Panel Reports, *Australia – Tobacco Plain Packaging*, para. 7.3001.

<sup>3</sup> Panel Reports, *Australia – Tobacco Plain Packaging*, para. 7.3000.

<sup>4</sup> Panel Reports, *Australia – Tobacco Plain Packaging*, paras. 7.3001, 7.3003 and 7.3012.

<sup>5</sup> Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.356.

<sup>6</sup> Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.356.

<sup>7</sup> Panel Reports, *Australia – Tobacco Plain Packaging*, para. 7.2993.

<sup>8</sup> Panel Reports, *Australia – Tobacco Plain Packaging*, para. 7.2994.

remarked that "the purpose of Article IX:4 is not to discipline whether Members may require marks of origin but to discipline how compliance with origin marking requirements may be prescribed".<sup>9</sup> Additionally, the Panel considered that Article IX:4 reflects a balance between the legitimacy of providing origin information to consumers through marks of origin requirements with the need to limit the impact that compliance with those requirements has on exporters.<sup>10</sup> According to the Panel, the purpose of Article IX:4 is precisely to prevent excessive burdens arising from compliance with marks of origin requirements adopted by a Member, that could jeopardize exporters' interests in marketing their goods in that Member's territory.<sup>11</sup> Put another way, the purpose of the provision is to prevent exporters' interests in marketing their goods in an importing Member's territory from being jeopardized by excessively cumbersome or costly marks of origin requirements adopted by such Member.<sup>12</sup>

#### **1.4.2 "[t]he laws and regulations of Members relating to the marking of imported products"**

1.9. The Panel in *Australia – Tobacco Plain Packaging* first considered the interpretation of the phrase "[t]he laws and regulations of Members relating to the marking of imported products".<sup>13</sup> After examining dictionary definitions of the relevant terms, the Panel found that the phrase "[t]he laws and regulations of a Member relating to the marking of imported products" refers to rules of a WTO Member's domestic legal system connected to the action of putting a mark on goods introduced into the territory of such Member from another country or WTO Member.<sup>14</sup> More specifically, the Panel explained that Article IX:4 covers only those laws and regulations relating to markings that indicate or identify the origin of imported products.<sup>15</sup> Thus, the Panel explained that:

"[T]he phrase '[t]he laws and regulations of Members relating to the marking of imported products' does not encompass all laws and regulations relating to the marking of imported products generally but rather covers those setting out the conditions for complying with requirements for 'marks of origin', i.e. signs, tokens, devices, stamps, brands, labels or inscriptions on products identifying where such products originate."<sup>16</sup>

1.10. The Panel next observed that while Article IX:4 focuses on compliance with laws and regulations establishing an obligation to affix marks of origin, aspects of other laws and regulations could also fall under the obligation of Article IX:4 insofar as they prescribe requirements that must be complied with for the marking of imported products, e.g. in what form marks of origin should appear.<sup>17</sup> However, the Panel explained that the purpose of Article IX:4 is not to discipline whether or to what extent Members may require marks of origin but to discipline *how* compliance with origin marking requirements may be prescribed. Accordingly, Article IX:4 does not cover measures that impose limitations "on the use of marks of origin".<sup>18</sup>

1.11. Turning to the case before it, the Panel held that Australia's tobacco plain packaging measures did not fall within the scope of Article IX:4 because they operated to restrict or limit the ways in which exporters could use marks of origin (that is, they were restrictions *on* marks of origin), rather than imposing requirements that must be complied with for the marking of imported products (that is, conditions on *how* marks of origin were to be used).<sup>19</sup>

#### **1.4.3 "such as to permit compliance without materially reducing the value" of imported products**

1.12. The Panel in *Australia – Tobacco Plain Packaging* noted that Article IX:4 identifies three types of impact that laws and regulations relating to the marking of imported products must not

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<sup>9</sup> Panel Reports, *Australia – Tobacco Plain Packaging*, para. 7.3000.

<sup>10</sup> Panel Reports, *Australia – Tobacco Plain Packaging*, para. 7.3003.

<sup>11</sup> Panel Reports, *Australia – Tobacco Plain Packaging*, para. 7.3014.

<sup>12</sup> Panel Reports, *Australia – Tobacco Plain Packaging*, para. 7.3020.

<sup>13</sup> Panel Reports, *Australia – Tobacco Plain Packaging*, paras. 7.2996-7.7.3021.

<sup>14</sup> Panel Reports, *Australia – Tobacco Plain Packaging*, para. 7.2998.

<sup>15</sup> Panel Reports, *Australia – Tobacco Plain Packaging*, paras. 7.2999 and 7.3004.

<sup>16</sup> Panel Reports, *Australia – Tobacco Plain Packaging*, para. 7.3021.

<sup>17</sup> Panel Reports, *Australia – Tobacco Plain Packaging*, para. 7.3026.

<sup>18</sup> Panel Reports, *Australia – Tobacco Plain Packaging*, para. 7.3027.

<sup>19</sup> Panel Reports, *Australia – Tobacco Plain Packaging*, para. 7.3028.

produce: seriously damaging the products, materially reducing their value, or unreasonably increasing their cost. As Cuba only alleged that Australia's tobacco plain packaging measures materially reduced the value of Cuban products, the Panel focused its analysis on the meaning of that limb of the provision.<sup>20</sup>

1.13. The Panel began by examining the meaning of the phrase "materially reducing". According to the Panel, a material reduction is a reduction that is important, relevant, significant, and substantial.<sup>21</sup> Thus, in the Panel's view, Article IX:4 tolerates certain negative consequences of law and regulations relating to the marking of imported products, and only prohibits a reduction in value that reaches the threshold of materiality.<sup>22</sup> In this connection, the Panel observed that Article IX:4 strikes a balance between the "legitimacy of providing origin information to consumers through mark of origin requirements, on the one hand, with the need to limit the impact that the use of marks of origin has on exporters, on the other hand".<sup>23</sup>

1.14. The Panel next recalled its earlier finding that Article IX:4 is concerned with limiting the impact of the use of marks of origin, rather than to discipline limitations on the use of such marks. In the light of this finding, the Panel found that Article IX:4 does not protect the use of origin-related signs on products *per se*, and therefore also does not protect the added value or price premium that the use of such origin-related signs may accord to imported products.<sup>24</sup>

1.15. Turning to the case before it, the Panel held that Article IX:4 does not cover the kind of reduction in value about which Cuba was complaining, namely, the reduction in value of tobacco products that could no longer be affixed with certain graphic labels (a "Habanos" GI and a Cuban Government Warranty Seal<sup>25</sup>) indicating their Cuban origin.<sup>26</sup>

Current as of: December 2020

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<sup>20</sup> Panel Reports, *Australia – Tobacco Plain Packaging*, para. 7.3031.

<sup>21</sup> Panel Reports, *Australia – Tobacco Plain Packaging*, para. 7.3037.

<sup>22</sup> Panel Reports, *Australia – Tobacco Plain Packaging*, para. 7.3037.

<sup>23</sup> Panel Reports, *Australia – Tobacco Plain Packaging*, para. 7.3038.

<sup>24</sup> Panel Reports, *Australia – Tobacco Plain Packaging*, para. 7.3040.

<sup>25</sup> Panel Reports, *Australia – Tobacco Plain Packaging*, paras. 7.2974-7.2983.

<sup>26</sup> Panel Reports, *Australia – Tobacco Plain Packaging*, para. 7.3403.