

AUSTRALIA – TOBACCO PLAIN PACKAGING¹ (DS435, 441, 458 AND 467)

PARTIES		AGREEMENT	TIMELINE OF THE DISPUTE	
Complainant	<i>Honduras, the Dominican Republic, Cuba, Indonesia</i>	<i>TBT Art. 2.2, TRIPS Art. 2.1 (in conjunction with Arts. 6quinquies and 10bis, paras. 1, 3(1) and 3(3) of the Paris Convention), 15.4, 16.1, 16.3, 20, 22.2(b) and 24.3, GATT Art. IX:4, and DSU Art. 11</i>	Establishment of Panels	<i>25 September 2013 (DS435) 25 April 2014 (DS441) 25 April 2014 (DS458) 26 March 2014 (DS467)</i>
			Circulation of Panel Reports	<i>28 June 2018</i>
Circulation of AB Reports	<i>9 June 2020</i>			
Respondent	<i>Australia</i>		Adoption	<i>DS458 and DS467 adopted on 27 August 2018; DS435 and DS441 adopted on 29 June 2020</i>

1. MEASURE AND PRODUCT AT ISSUE

- **Measure at issue:** Tobacco plain packaging (TPP) measures requiring tobacco products and their retail packaging to appear in a uniform manner.
- **Product at issue:** Tobacco products and their retail packaging.

2. SUMMARY OF KEY PANEL/AB FINDINGS

- **TBT Art. 2.2 (technical barriers to trade):** The Appellate Body upheld the Panel's finding that the TPP measures were apt to make a meaningful contribution to Australia's objective of improving public health by reducing the use of, and exposure to, tobacco products and the complainants had not demonstrated that they were more trade-restrictive than necessary to fulfil a legitimate objective, within the meaning of Art. 2.2, taking into account the nature and gravity of the risks that would arise from the non-fulfilment of Australia's objective, and the fact that none of the alternatives proposed by the complainants were less trade restrictive than the TPP measures. The Appellate Body found that the Panel erred in its application of Art. 2.2 in concluding that the proposed alternatives would not make an equivalent contribution to Australia's objective as that of the TPP measures, given the Panel's findings that both the TPP measures and each of the proposed alternatives can make a meaningful contribution to Australia's objective. However, this finding of error was not consequential, as the Appellate Body agreed with the Panel that the proposed alternatives were not less trade restrictive than the TPP measures.
- **Paris Convention Art. 6quinquies (registration of trademarks):** The Panel found that Honduras and Cuba had not demonstrated that the TPP measures were inconsistent with Australia's obligation to accept for filing and protect "as is" every trademark duly registered in the country of origin.
- **TRIPS Art. 15.4 (an obstacle to registration of a trademark):** The Panel found that Honduras, the Dominican Republic and Cuba had not demonstrated that the nature of the goods to which the TPP measures apply (tobacco products) formed an obstacle to the registration of trademarks contrary to Art. 15.4.
- **TRIPS Art. 16.1 (rights conferred to an owner of a registered trademark):** The Appellate Body upheld the Panel's finding that the complainants had not demonstrated that the TPP measures were inconsistent with Australia's obligation to allow the owner of a registered trademark to prevent unauthorized use of identical or similar trademarks on identical or similar products, where such use would result in a likelihood of confusion. The Appellate Body agreed with the Panel that neither Art. 16.1, any of the other provisions of the TRIPS Agreement, nor the provisions of the Paris Convention (1967) that are incorporated by reference into the TRIPS Agreement, confer upon a trademark owner a positive right to use its trademark or a right to protect the distinctiveness of that trademark through use.
- **TRIPS Art. 16.3 (well-known trademarks):** The Panel found that Cuba and Indonesia had not demonstrated that the TPP measures were inconsistent with Australia's obligation to protect well-known trademarks under Art. 16.3.
- **TRIPS Art. 20 (other requirements):** The Appellate Body upheld the Panel's finding that the complainants had not demonstrated that the TPP measures unjustifiably encumbered the use of trademarks in violation of Art. 20. The Appellate Body considered that the Panel did not err by not including an examination of alternative measures as a requisite consideration for determining whether the use of a trademark has been "unjustifiably" encumbered by special requirements. The Appellate Body also found that the Dominican Republic had failed to demonstrate on appeal that the Panel acted inconsistently with DSU Arts. 7.1 and 11 by not addressing its claim that the TPP measures' requirements for individual cigarette sticks were inconsistent with TRIPS Art. 20.
- **Paris Convention Art. 10bis (unfair competition):** The Panel found that Cuba and Indonesia had not demonstrated that the TPP measures compelled market actors to engage in acts of unfair competition of such a nature as to create confusion within the meaning of **para. 3(1)** or to engage in acts amounting to misleading indications or allegations within the meaning of **para. 3(3)**; Honduras, the Dominican Republic and Cuba had not demonstrated that the TPP measures required market actors to engage in such acts of unfair competition against which Australia was bound to assure effective protection pursuant to **para. 1**.
- **TRIPS Art. 22.2(b) (use of geographical indications (GIs) constituting unfair competition):** The Panel found that the complainants had not demonstrated that the TPP measures compelled market actors to engage in acts of unfair competition that would amount to misleading indications or allegations about product characteristics within the meaning of Paris Convention Art. 10bis(3)(3) in respect of GIs.
- **TRIPS Art. 24.3 (pre-existing domestic protection of GIs):** The Panel found that the complainants had not demonstrated that the protection that GIs enjoyed under Australian law immediately prior to the date of entry into force of the WTO Agreement had been diminished as a result of the TPP measures or that the TPP measures were inconsistent with Art. 24.3.
- **GATT Art. IX:4 (marking of imported products):** The Panel found that Cuba had not demonstrated that the TPP measures constituted "laws and regulations relating to the marking of imported products" within the meaning of Art. IX:4 or that the restrictions imposed by the TPP measures would lead to a material reduction in the value of the Habanos sign and the Cuban Government Warranty Seal within the meaning of Art. IX:4.
- **Art. 11 of the DSU:** The Appellate Body addressed and rejected most of the claims on appeal by Honduras and the Dominican Republic that the Panel failed to make an objective assessment of the facts of the case, as required under Art. 11, in its assessment of the claims before it under Art. 2.2 of the TBT Agreement. The Appellate Body also found that, although the Panel erred by disregarding certain arguments and evidence adduced by the Dominican Republic, and acted inconsistently with Art. 11 by compromising the complainants' due process rights with respect to the Panel's reliance on multicollinearity and non-stationarity when reviewing the parties' econometric evidence, such errors were not sufficiently material to vitiate the Panel's findings regarding the contribution of the TPP measures to Australia's objective, namely improving public health by reducing the use of, and exposure to, tobacco products.

¹ *Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*