

AUSTRALIA – TOBACCO PLAIN PACKAGING¹

(DS435, 441, 458, 467)

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

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 FINDINGS

- **TBT Art. 2.2 (technical barriers to trade):** 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 would contribute to the objective to an equivalent degree.
- **Paris Convention Art. 6quinquies (registration of trademarks):** Honduras and Cuba did not demonstrate 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):** Honduras, the Dominican Republic and Cuba did not demonstrate 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 complainants did not demonstrate 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**.
- **TRIPS Art. 16.3 (well-known trademarks):** Cuba and Indonesia did not demonstrate 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 complainants did not demonstrate that the TPP measures unjustifiably encumbered the use of trademarks in violation of Art. 20.
- **Paris Convention Art. 10bis (unfair competition):** Cuba and Indonesia did not demonstrate 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 did not demonstrate 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 complainants did not demonstrate 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 complainants did not demonstrate that the protection that GIs enjoyed under Australian law immediately 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):** Cuba did not demonstrate 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.

3. OTHER ISSUES

- Honduras appealed certain findings in DS435 on 19 July 2018, and the Dominican Republic appealed certain findings in DS441 on 23 August 2018.
- The Panel's findings on Paris Convention Art. 6quinquies, TRIPS Arts. 15.4, 16.3 and 20, Paris Convention Art. 10bis, paras. 1, 3(1) and 3), TRIPS Arts. 22.2(b) and 24.3, and GATT Art. IX:4 were not appealed.

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