

## COMPATIBILITY OF NATIONAL LEGISLATION UNDER WORLD TRADE ORGANISATION (WTO) TREATY: THE CASE OF AUSTRALIAN PLAIN PACKAGING ACT 2011

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### Abstract

*Australia became the first country in the world to implement the Framework Convention on Tobacco Control (FCTC 2003) recommended plain packaging in national boundary when it enacted the Tobacco Plain Packaging Act 2011. In response to enactment of Australian national legislation, Ukraine, the Dominican Republic and Honduras have respectively submitted complaint in World Trade Organization (WTO) dispute settlement body, and subsequently received the establishment of a panel before the WTO Dispute Settlement in 2014, and claimed that the measure at issue was inconsistent with some provisions under the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS 1995), the Agreement on Technical Barriers to Trade (TBT 1995), and the General Agreement on Tariffs and Trade (GATT 1994). Subsequently, 35 other countries engaged in this dispute as third parties. The consistency of the Australian plain packaging requirements with the WTO Agreements will be a decisive test for future tobacco controls through plain packaging by other WTO Members. In this context, this paper analyzes the legal context of disputes under the TBT Agreement of WTO.*

### 1. Background

Consumption of tobacco products is one of the greatest health challenges of the 21st century.<sup>1</sup> Already now, the use of tobacco is considered to be the main risk factor for a number of potentially fatal illnesses, such as cancer; lung and cardiovascular diseases; and can be attributed to 5 million deaths every year.<sup>2</sup> The national tobacco policy design to curb the tobacco consumption from the public health concern came only in 1980s and accelerated in 90s.<sup>3</sup> This policy design was primarily caused by the accumulation of scientific evidence showing the existence of serious risks connected with smoking and the increased awareness of the general public as to this fact (e.g. due to the raise of anti-

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<sup>1</sup> It is estimated that by 2030 tobacco will be responsible for 10 million deaths annually, and will become the major cause of premature death; World Health Organization, *Report On The Global Tobacco Epidemic*, 2015; available at: [http:// apps. who. int/iris/bitstream/10665/ 178574/1/ 9789240694606 \\_eng.pdf?ua=1&ua=1](http://apps.who.int/iris/bitstream/10665/178574/1/9789240694606_eng.pdf?ua=1&ua=1); accessed on 15 April 2017.

<sup>2</sup> Ibid.

<sup>3</sup> For example, in 1976 only about 30 countries had some tobacco control legislation while in 1995 this raised to 91.

tobacco movements).<sup>4</sup> However, tobacco control measures can also have a negative impact on international trade, and as a consequence on the economic situation of millions of ordinary people. Because of different reasons, such as concerns on local employment or tax revenues, they may also impose unequal financial burdens on foreign companies as compare to local growers and producers, thus creating origin-based discrimination. This is where the rules of the World Trade Organization (WTO) become relevant to align the national tobacco control policies.

On 21 November 2011, Australia passed a measure, the *Tobacco Plain Packaging Act 2011* (TPP Act 2011), requiring all tobacco products “sold, offered for sale, or otherwise supplied in Australia to be in “plain packaging”.”<sup>5</sup> Australia’s plain packaging scheme is part of its comprehensive tobacco control measures that include bans on tobacco advertising and promotion,<sup>6</sup> mandatory textual and graphic warnings on tobacco packages,<sup>8</sup> restrictions on advertising tobacco products on the internet,<sup>9</sup> taxation of tobacco products, and large investments in anti-smoking social marketing campaigns.<sup>10</sup> The objectives of Australia’s plain packaging law are to improve public health by: discouraging smoking initiation, use and relapse; encouraging smoking cessation; and reducing exposure to secondhand-smoke.<sup>11</sup> It also implements Australia’s international obligations, as a party to the World Health Organization’s Framework Convention on Tobacco Control, into national legislation.<sup>12</sup> To achieve these goals, the Act prescribes the shape, size and type of tobacco packaging including cigarette packs and cartons.<sup>13</sup> It further requires all retail packaging to have a matt finish drab color.<sup>14</sup> With the exception of brand, business or company names; and variant names on retail packaging, tobacco products (including their wrappings and retail packaging) must not display any trademarks or other marks than that permitted by regulation.<sup>15</sup> Furthermore, the requirements set forth in the Act may not be circumvented by the use of any

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<sup>4</sup> L. Gruszczynski, *The TBT Agreement and Tobacco Control Regulations*, Third Biennial Global Conference, Centre for International law, National University of Singapore, Singapore, 2012, p 118.

<sup>5</sup> *Tobacco Plain Packaging Act 2011*.

<sup>6</sup> Including advertisement and promotion on radio and television, in newspapers and magazines and at sporting events.

<sup>7</sup> *Tobacco Advertisement Prohibition Act 1992* (Cth), sections 13 and 15.

<sup>8</sup> *Trade Practices (Consumer Product Information Standards) (Tobacco) Regulations 2004* (Cth), regs 35A, 42, 46, 50.

<sup>9</sup> *Tobacco Advertisement Prohibition Amendment Bill 2010* (Cth).

<sup>10</sup> Explanatory Memorandum, Tobacco Plain Packaging Bill 2011 (Cth) (Memorandum for the Plain Packaging Bill).

<sup>11</sup> *Plain Packaging Act*, note 1, section 3.

<sup>12</sup> *WHO Framework Convention on Tobacco Control 2003*.

<sup>13</sup> *Plain Packaging Act*, note 1, section 18.

<sup>14</sup> *Plain Packaging Act*, note 1, section 19.

<sup>15</sup> *Plain Packaging Act*, note 1, sections 20, 26.

feature that is designed to change after retail sale;<sup>16</sup> criminal and civil penalties apply for non-compliance with the Act.<sup>17</sup>

As part of its commitment to protect public health interest through its comprehensive tobacco control policy, Australia became the first country to require standardized packaging for tobacco products (referred to as plain packaging).<sup>18</sup> Predictably, this drew a strong response from the tobacco industry, as other forms of advertising have been restricted so packaging has become an increasingly important way for the tobacco industry to attract new smokers. As a result, the tobacco industry has launched or funded a series of challenges to *Australia's TPP Act 2011*.

Australian Government's move to implement stringent plain tobacco packaging has already survived two closely contested legal challenges of different perspectives. It won a tightly fought constitutional battle in the Australian High Court case of *JT International SA/British American Tobacco Australia Ltd v Commonwealth of Australia*.<sup>19</sup> The *TPP Act 2011* has also survived the legal challenge in the investment arena where the tobacco giant Philip Morris International's Hong Kong affiliate, Philip Morris Asia Limited, has brought arbitral proceedings in the International Centre for Settlement of Investment Disputes (ICSID) under the 1993 Agreement between the Governments of Australia and Hong Kong for the Promotion and Protection of Investments.<sup>20</sup>

Now as a last frontier, it has to survive the legal challenges brought against it in the World Trade Organization (WTO). To date, Ukraine,<sup>21</sup> Honduras,<sup>22</sup> the Dominican Republic<sup>23</sup>, Cuba,<sup>24</sup> and more recently Indonesia<sup>25</sup> have invoked the

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<sup>16</sup> *Plain Packaging Act*, note 1, section 25.

<sup>17</sup> Inter alia: selling and manufacturing non-compliant products or products in non-compliant packaging or products that are packaged in no-compliant retail packaging; See, *Plain Packaging Act*, note 1, sections 30 to 49.

<sup>18</sup> Request for Consultations by Ukraine, *Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WT/DS434/1.

<sup>19</sup> A Marsoof, 'The TRIPs Compatibility of Australia's Tobacco Plain Packaging Legislation', *The Journal of World Intellectual Property*, Issue 16, no 5-6, 2013, pp 197–221.

<sup>20</sup> Ibid.

<sup>21</sup> Request for Consultations by Ukraine, *Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WT/DS434/1.

<sup>22</sup> Request for Consultations by Honduras, *Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WT/DS435/1.

<sup>23</sup> Request for Consultations by the Dominican Republic, *Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WT/DS441/1.

<sup>24</sup> Request for Consultations by Cuba, *Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WT/DS458/1, G/L/1026/IP/D/34, G/TBT/D/43.

dispute settlement process of the World Trade Organization (WTO) to challenge whether the Australian *TPP Act 2011* complies with Australia's obligations under the various WTO Agreements. Recently, the first complain initiator against Australia, Ukraine withdraw from the dispute with a view to find a mutually agreed solution.<sup>26</sup> In March 2014, subsequent other complaining nations got approval of establishing panel.<sup>27</sup> A record number of 35 WTO Members kept their third party rights to join the dispute.<sup>28</sup> It is expected that the success or failure of the Australian legislation will shape global tobacco trade and its future.

## 2. Summary of Disputes under WTO

On 13 March 2012 Ukraine initiated first complaint against *TPP Act 2011* in WTO by requested consultations with Australia concerning certain Australian laws and regulations that impose trademark restrictions and other plain packaging requirements on tobacco products and packaging.<sup>29</sup> After, that Honduras, the Dominican Republic, Cuba and Indonesia have raised individually different claims against Australia.<sup>30</sup> All these complaints has gone to panel establishment stage on the allegation that the enactment of *TPP Act 2011* as well as the measures implementing through this legislation have violated the Agreement on technical Barriers to Trade (TBT Agreement); the *Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement)* and the *General Agreement on Tariffs and Trade 1994 (GATT 1994)*. The table below summarizes all the claims brought by the complaints.

Country	Dispute Case No.	Legal Basis Under WTO Agreements		
		TBT Agreement	TRIPS Agreement	GATT 1994
Ukraine	DS434	Art. 2.1, 2.2	Art. 1.1, 2.1, 3.1, 15.1, 15.4, 16, 16.1, 16.3, 20, 1, 27	Art. I, III:4
Honduras	DS435	Art. 2.1	Art. 2.1, 3.1, 15.4, 16.1, 20, 22.2(b), 24.3	Art. III:4
Dominican	DS441	Art. 2.1, 2.2	Art. 2.1, 3.1, 15.4, 16.1,	Art. III:4

<sup>25</sup> Request for Consultations by Indonesia, *Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WT/DS467/1, G/TBT/D/46/IP/D/34/G/L/1041.

<sup>26</sup> “DISPUTE SETTLEMENT: DISPUTE DS434”, *Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, [https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds434\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds434_e.htm); accessed on 17 April 2017).

<sup>27</sup> “DISPUTE SETTLEMENT: DISPUTE DS467”, *op.cit.*

<sup>28</sup> Ibid.

<sup>29</sup> Request for Consultations by Ukraine, WT/DS434/1

<sup>30</sup> Communication from the Panel, *Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WT/DS467/19.

Republic			20, 22.2(b), 24.3	
Cuba	DS458	Art. 2.1, 2.2	Art. 3.1, 15.4, 16.1, 20, 22.2(b), 24.3	Art. III:4, IX
Indonesia	DS467	Art. 2.1, 2.2	Art. 2.1, 3.1, 15.4, 16.1, 16.3, 20, 22.2(b), 24.3	Art. III:4

Note: The Table is compiled while taking information from respective countries "Request for consultation" Documents. WTO Identification no. for these documents is: WT/DS434/1; WT/DS435/1; WT/DS441/1; WT/DS458/1; WT/DS467/1

This paper focuses to analyze the claims brought in to World Trade Organization (WTO) by these dispute cases under the *TBT Agreement* 1995. The paper specifically analyzes the disputable issues under the articles 2.1, 2.2 of TBT agreement.

### 3. Analytical Framework

The disputes discussed in this paper will be analyzed within the understanding of legal framework under the WTO Agreements. Thus the basis of analysis is legal. It will first review the arguments of complainants about the violation of provisions of concerned articles, and then will consider the counter arguments for defense. For conclusion, it will use the convention of international treaty law, case law mainly based on previous WTO Dispute Panels and Appellate Body reports.

### 4. Challenged Measure under the Disputes

The challenged measures at issue under these disputes are following:

- *Tobacco Plain Packaging Act* 2011, Act No. 148 of 2011. This is an Act to discourage the use of tobacco products, and for related purposes.<sup>31</sup>
- *Tobacco Plain Packaging Regulations* 2011 (Select Legislative Instrument 2011, No. 263), as amended by the *Tobacco Plain Packaging Amendment Regulation* 2012 (No. 1) (Select Legislative Instrument 2012, No. 29).<sup>32</sup>
- *Trade Marks Amendment (Tobacco Plain Packaging) Act* 2011, Act No. 149 of 2011, "An Act to amend the Trade Marks Act 1995, and for related purposes."<sup>33</sup>

<sup>31</sup> Communication from the Panel, WT/DS467/19, *op.cit.*

<sup>32</sup> Communication from the Panel, WT/DS467/19, *op.cit.*

<sup>33</sup> Ibid.

- and Any related measures adopted by Australia, including measures that implement, complement or add to these laws and regulations, as well as any measures that amend or replace these laws and regulations.<sup>34</sup>

Besides, the measures apply to the retail sale of cigarettes, cigars, and other tobacco products. The measures establish comprehensive requirements regarding the appearance and form of the retail packaging of tobacco products, as well as the tobacco products themselves.<sup>35</sup> The measures also establish penalties, including criminal sanctions, for the violation of these requirements.<sup>36</sup> The measures require, inter alia, the following:

- with respect to the retail packaging of tobacco products, the measures (i) regulate the appearance of trademarks and geographical indications, including by prohibiting the display of design and figurative features, including those forming part of these intellectual property rights; (ii) prescribe that the brand and variant names forming part of trademarks appear on the front face, top and bottom of the package in a uniform typeface, font, size, color, and placement<sup>1</sup>; (iii) prohibit the display of other words (except for basic information, including country of origin and manufacturer contact details); and (iv) mandate a matt finish and drab dark brown color (Pantone 448C) for retail packaging.<sup>37</sup>
- the measures establish that individual cigarettes may not display trademarks, geographical indications or any other marking other than an alphanumeric code for product identification purposes.<sup>38</sup>
- the measures provide that individual cigars may carry: the brand name, variant name, country of origin, and an alphanumeric code; these must be displayed in a uniform typeface, font, size, and color on a single band in a drab dark brown color (Pantone 448C)<sup>2</sup>;<sup>39</sup> and
- the measures regulate other aspects of both tobacco packaging and tobacco products, such as the following requirements: (i) a retail package for cigarettes must be in a prescribed size, form and material; (ii) cigarettes must be white<sup>3</sup>; and (iii) a cigar tube must be cylindrical, rigid, and have an opening of at least 15 mm.<sup>40</sup>

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<sup>34</sup> Ibid.

<sup>35</sup> Ibid.

<sup>36</sup> Ibid.

<sup>37</sup> Communication from the Panel, WT/DS467/19, *op.cit.*

<sup>38</sup> Ibid.

<sup>39</sup> Ibid.

<sup>40</sup> Ibid.

### **5. Arguments by Complainant Countries against Australia that it Violated Obligation under the “TBT Agreement” when it Implemented *Tobacco Plain Packaging Act 2011***

#### Argument 1: The measures under *TPP Act 2011* of Australia are technical barriers to trade.

The *Tobacco Plain Packaging Act 2011* imposes specific requirements for packaging of tobacco materials to be eligible for selling in Australian market.<sup>41</sup> It requires the background colour for cigarette packets only in drab brown, Pantone 448C;<sup>42</sup> the brand name in 14 point font in Lucida Sans font face; the lettering must be in Pantone Cool Gray 2C;<sup>43</sup> a variant of the brand may appear in 10 point font in the same colour and font face and can only appear once at the bottom of the front of the packet.<sup>44</sup> Besides, it also requires trademarks cannot be printed on the cigarette sticks and those sticks must be white or predominantly white with an imitation cork tip, and a text warning and graphic warning must cover at least 75% of the total area of the front of a cigarette packet and 90% of the back of a packet.<sup>45</sup> According to *TBT Agreement*,<sup>46</sup> a “technical regulation” which is a “document 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 labeling requirements as they apply to a product, process or production method”.<sup>47</sup> The specific requirements under *Tobacco Plain Packaging Act 2011* is consistent with above mentioned operational definition of “technical regulation” under the TBT agreement 1995 because it applies to an identifiable group of products: namely tobacco products as defined in it; it lays down product characteristics in positive and/or negative form,<sup>48</sup> including characteristics dealing with packaging or labeling requirements; and its mandatory nature (establishes a number of offences and civil penalties for non-compliance).<sup>49</sup> For all of these aspects of the measures, it becomes technical barrier to trade for tobacco exporting nations.

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<sup>41</sup> *Tobacco Plain Packaging Act 2011*.

<sup>42</sup> *Ibid*, para 2.2.1.

<sup>43</sup> *Ibid*, para 2.4.1.

<sup>44</sup> *Ibid*.

<sup>45</sup> *Competition and Consumer (Tobacco) Information Standard 2011*, section 9.20.

<sup>46</sup> *Agreement on Technical Barriers to Trade 1994*, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 120, [TBT].

<sup>47</sup> XVII. Annex 1: Terms and their definitions for the purpose of this Agreement; available at: [https://www.wto.org/english/res\\_e/booksp\\_e/analytic\\_index\\_e/tbt\\_02\\_e.htm#ann\\_1](https://www.wto.org/english/res_e/booksp_e/analytic_index_e/tbt_02_e.htm#ann_1); accessed on 17 April 2017.

<sup>48</sup> Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-containing Products*, WT/DS135/AB/R.

<sup>49</sup> *Plain Packaging Act*, *supra* note 1, sections 30 to 49.

Argument 2: The measures are inconsistent with international standard.

The objective of the enacted law is to improve the public health condition of Australia by discouraging tobacco consumption and reducing people's exposure to smoke from tobacco products.<sup>50</sup> However, the way it wants to achieve the objective through this law is not accordance to international standard because Australia is the first country to require tobacco products to be sold in plain packaging.<sup>51</sup> *TBT Agreement* 1995 encourages members to use international standards whenever possible.<sup>52</sup> The current practices around the world include restriction on advertisements, mandatory warning in packages, partial smoking ban in public places and high sales tax.<sup>53</sup> The Australian measures are different than these accustomed measures, thus did not follow the international standard.

Argument 3: The measure under *TPP Act* 2011 directly violates article 2.1 of the *TBT Agreement* 1995.

According to compliant nations, these regulations violate article 2.1<sup>54</sup> of the *TBT Agreement* 1995.<sup>55</sup> Specifically, they claims that Australia's Plain Packaging Requirement accords imported tobacco products treatment "less favorable" than that accorded tobacco products of national origin.<sup>56</sup> Because, before the implementation of *TPP Act* 2011, imported tobacco products (foreign producers) enjoy a great deal of more brand loyalty than national tobacco products (Australian producers) do, and after the legislation loyalty of these brands will significantly reduce due to the removal of trademarks and distinctive packaging by this law. The legislation has essentially stripped off the competitive marketing advantage and the brand value, which is a result of significant business investment over a long period of time. Therefore, Australian producers would be able to gain market share as consumers' brand loyalty waned, as well as capture the market for new smokers who have not yet

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<sup>50</sup> WTO Committee on Technical Barriers to Trade, *Minutes of the TBT Meeting of 10-11 November 2011*, G/TBT/M55.

<sup>51</sup> Plain Tobacco Packaging; available at: [https://en.wikipedia.org/wiki/Plain\\_tobacco\\_packaging](https://en.wikipedia.org/wiki/Plain_tobacco_packaging); accessed on 7 April 2017.

<sup>52</sup> NLW Wilson, 'Clarifying the Alphabet Soup of the TBT and the SPS in the WTO', *Drake Journal of Agricultural Law*, Vol. 8, Issue. Fall, 2013.

<sup>53</sup> World Health Organization, *Report On The Global Tobacco Epidemic*, 2015; available at: [http://apps.who.int/iris/bitstream/10665/178574/1/9789240694606\\_eng.pdf?ua=1&ua=1](http://apps.who.int/iris/bitstream/10665/178574/1/9789240694606_eng.pdf?ua=1&ua=1); accessed on 15 April 2017.

<sup>54</sup> *Agreement on Technical Barriers to Trade*

Article 2: Preparation, Adoption and Application of Technical Regulations by Central Government Bodies With respect to their central government bodies:

Article 2.1: Members 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>55</sup> Communication from the Panel, WT/DS467/19, *op.cit.*

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



established brand loyalties. The importance of branding for cigarette marketing cannot be overstated, for a number of reasons.<sup>57</sup> Among all consumer products, cigarette brands have the highest brand loyalty, with less than ten percent of smokers changing brands annually.<sup>58</sup> Cigarette advertising has also largely been banned in Australia, meaning that packaging is one of the last places in which a cigarette producer can distinguish their brand.<sup>59</sup> If consumers are unable to distinguish between brands, they will be more likely to choose their cigarettes based off of other factors, such as price, or to mistakenly buy a brand other than the one they had intended to choose.<sup>60</sup> In this way current established brand would lose their value and market share. So these measures will essentially strip off the businesses' market competitiveness in terms of brand value, thus the imported tobacco products, which have the comparatively highest brand value in Australian market will bear the burden more. This exposure to burden would actually accord a less favorable treatment to imported products: brand owner. Thus, the measures under *TPP Act 2011* violate the provision of article 2.1 of *TBT Agreement 1995* and should be justified as WTO inconsistent.

Argument 4: The Australian measures violate article 2.2 of the TBT agreement 1995 on the ground that it creates unnecessary obstacles to international trade.

Article 2.2 of *TBT Agreement 1995* requires that technical regulations that create unnecessary obstacles to international trade wouldn't be valid as technical regulations.<sup>61</sup> In regards *TPP Act 2011*, the measures imposing by Australia are new one and they are first of this type around the world.<sup>62</sup> As well as, these new technical standards are not following the current international practices

<sup>57</sup> F Binesh, 'The Importance of Cigarette Pack as Brand Image', *International Business Management*, Vol. 5, no.2, 2011, pp 85-90.

<sup>58</sup> F Binesh, 'The Importance of Cigarette Pack as Brand Image', *op.cit.*

<sup>59</sup> S Frankel and D Gervais, 'Plain Packaging and the Interpretation of the TRIPS Agreement', *Vanderbilt Journal of Transnational Law*, Vol. 46, no.5, 2013, pp. 149-214.

<sup>60</sup> S Frankel and D Gervais, 'Plain Packaging and the Interpretation of the TRIPS Agreement', *op.cit.*

<sup>61</sup> *Technical Regulations and Standards:*

Article 2: Preparation, Adoption and Application of Technical Regulations by Central Government Bodies...

Article 2.2: Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfill a legitimate objective, taking account of the risks non-fulfillment would create. Such legitimate objectives are, *inter alia*: national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment. In assessing such risks, relevant elements of consideration are, *inter alia*: available scientific and technical information related processing technology or intended end-uses of products.

<sup>62</sup> WTO Committee on Technical Barriers to Trade, *Minutes of the TBT Meeting of 10-11 November 2011*, G/TBT/M55.

regarding the practices used for achieving the same regulatory objectives. Therefore, the basis for these technical measures is not scientifically backed and it would create unnecessary burdens for producers as they need to package differently for the Australian market.<sup>63</sup> The burdens are in form of extra packaging costs, different production process, compliance, and time. All of these are creating unnecessary obstacles for imported tobacco products: international trade of tobacco.

Argument 5 : The Australian measures are more trade restrictive than necessary to fulfill a legitimate objective

The purpose of current measures under *TPP Act 2011* is to reduce the tobacco consumption and use in Australia. This purpose could have imposed direct restriction on tobacco trade in Australia in several ways. First, the plain packaging measures undermine the importance, value and scope of trademarks and branding for tobacco products.<sup>64</sup> Trademarks played a crucial role in branding for tobacco products.<sup>65</sup> It is eminent for distinguishable product characteristics in tobacco business, and considered as a determinant for market competitiveness.<sup>66</sup> Current measures under *TPP Act 2011* will negatively impact on competitive characteristics for tobacco product in Australian market. For example, it would make it near impossible for foreign manufactures new to the Australian market to marketing and enter it. This is clearly excessive trade restriction than necessary.

Second, under current *TPP Act 2011* legislation, non compliant packaging tobacco still can be imported in to Australia but it cannot be offered or supplied in Australian market.<sup>67</sup> In US- Tuna II (Mexico) case, the panel held that access to the “US dolphin-Safe label” provided a valuable advantage to the US market so the labeling provisions restricting certain tuna products from accessing to the label were trade restrictive under article 2.2 of the TBT agreement 1995.<sup>68</sup> On basis of this finding, it is evident that the plain packaging measures restrict domestic consumers in Australia from access to tobacco products in non-compliant retail packaging: banded packs, and result in giving adverse impact on the importation of tobacco products. So these measures are trade restrictive more than necessary under the article 2.2 of TBT agreement.

Third, the plain packaging measures include the civil penalty provisions, according to it, a person if sells tobacco without compliance of required retail packet will commit an offence. This set out offences and the penalty are

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<sup>63</sup> Ibid.

<sup>64</sup> ‘Minutes of the TBT Meeting of 10-11 November 2011’, *op.cit.*

<sup>65</sup> Council for Trade-Related Aspects of Intellectual Property Rights, and Committee on Technical Barriers to Trade, *Australia’s Tobacco Plain Packaging Bill 2011*, IP/C/W/567,G/TBT/W/347.

<sup>66</sup> Ibid.

<sup>67</sup> Y Ishikawa, ‘Plain Packaging Requirements and Article 2.2 of the TBT Agreement’, Chinese (Taiwan) Yearbook of International Law and Affairs, Vol.30, 2014.

<sup>68</sup> Ibid.

disincentive to importation.<sup>69</sup> In *Brazil-Retreaded Tyres* case, WTO panel established that penalty measures those are not imposed at border also can be function as trade restrictive.<sup>70</sup> In this case, this civil penalty provisions may also be feel sufficient enough to impose more trade restrictive regime than necessary.

## **6. Australian Government Defense to Support that it did not Violate Its Obligations under the TBT Agreement 1995 when It Implements Tobacco Plain Packaging Act 2011**

Argument 1 : The Australian legislation stands as Technical Regulations under TBT agreement 1995 , thus did not violate article 2.1 of the TBT Agreement.

Article 2.1 of TBT Agreement requires that any technical regulations implemented by any member government should be justifiable until it ensures 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>71</sup> In this case, the requirements by the *Tobacco Plain Packaging Act* 2011 are uniformly applicable to any tobacco product irrespective of its origin and supply.<sup>72</sup> Therefore, the like products (cigarettes, cigar and other related products) of domestic origin also have to abide the packaging requirements as mandatory for imported foreign products. This non discrimination will ensure that the export parties wouldn't accorded less favorably. Therefore, Australian measures are not violating the two conditions required under the article 2.1, and these are as technical regulation consistent with *TBT Agreement* 1995.

Argument 2: The Australian measures are intended to achieve a "legitimate objective" under the article 2.2 of the TBT agreement 1995.

The objective of the plain packaging act is "to improve public health" through certain means.<sup>73</sup> According to article 2.2 of *TBT Agreement* 1995 "legitimate objectives are, *inter alia*: national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or

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<sup>69</sup> *Tobacco Plain Packaging Act* 2011.

<sup>70</sup> Panel Report, *Brazil—Measures Affecting Imports of Retreaded Tyres* , WT/DS332/R, supra note 17, paras.7.370-7.372.

<sup>71</sup> Agreement on Technical Barriers to Trade; available at: [https://www.wto.org/english/docs\\_e/legal\\_e/17-tbt\\_e.htm](https://www.wto.org/english/docs_e/legal_e/17-tbt_e.htm); accessed on 15 April 2017.

<sup>72</sup> *Competition and Consumer (Tobacco) Information Standard* 2011.

<sup>73</sup> Plain Packaging Act, Subparagraph 3, Part 1, Chapter 1.

These means are i) discouraging people from taking up smoking, or using tobacco products; ii) encouraging people to give up smoking, and to stop using tobacco products; iii) discouraging people who have given up smoking, or who have stopped using tobacco products, from relapsing; and iv) reducing people's exposure to smoke from tobacco products.

health, or the environment.”<sup>74</sup> Australia’s current measures are corresponding to fulfill the “protection of human health or safety” and “prevention of deceptive practices” under the article 2.2 of *TBT Agreement* 1995.<sup>75</sup> Even the complaining states (The Dominican Republic and Honduras) against Australia admitted these measures are related to improve the public health conditions.<sup>76</sup> From the above information, it is clear that Australian measures are targeted to achieve a legitimate objective consistent to *TBT Agreement* 1995.

Argument 3: The measures did not violate article 2.1 of the TBT Agreement 1995.

The measures taken to implement *TPP Act 2011* by Australia did not violate article 2.1 of the *TBT Agreement* 1995 because the measures under consideration, by law apply to all cigarette products, regardless of their origin or the type of cigarette. As the law requires uniform packaging for all, so there is no scope for accorded imported tobacco products treat “less favorable” than that accorded tobacco products of national origin. Thus, the *TPP Act 2011* did not violate the national treatment principle under the article 2.1 of *TBT agreement* 1995.

Argument 4: The Australian measures are based on “International Standard”.

Australia enacted its tobacco plain packaging measure in accordance with *Framework Convention on Tobacco Control* (FCTC 2003).<sup>77</sup> The FCTC is one of the most widely embraced treaties in the United Nations system.<sup>78</sup> Currently, 180 states are following this convention.<sup>79</sup> FCTC 2003 set out the comprehensive range of tobacco control measures in its guidelines.<sup>80</sup> The FCTC Guidelines reflect the international scientific consensus.<sup>81</sup> FCTC Guidelines for article 11 (Concerning the packaging and labeling of tobacco products) and article 13 (concerning tobacco advertising, promotion, and sponsorship) explicitly recommend the implementation of tobacco plain packaging.<sup>82</sup> Therefore, Australian measures are based on International Standard.

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<sup>74</sup> Agreement on Technical Barriers to Trade, *op.cit.*

<sup>75</sup> *Competition and Consumer (Tobacco) Information Standard* 2011.

<sup>76</sup> Minutes of the Meeting of 10-11 November 2011, G/TBT/M/55. *Op.cit.*

<sup>77</sup> WHO Framework Convention on Tobacco Control, Foreword, June 16, 2003, 2302 U.N.T.S. 166 (WHO FCTC).

<sup>78</sup> Ibid.

<sup>79</sup> Integrated Executive Summary of Australia’s Submission, *Australia-Tobacco Plain Packaging*, DS435/441/458 and 467, March 23, 2016.

<sup>80</sup> *WHO Framework Convention on Tobacco Control* 2302 UNTS 166

<sup>81</sup> Conference of the Parties to the *WHO Framework Convention on Tobacco Control*; available at: <http://www.who.int/fctc/cop/en/>; accessed on 15 April 2017.

<sup>82</sup> *WHO Framework Convention on Tobacco Control* 2302 UNTS 166.

Argument 5: There are no available alternative trade-restrictive measures remain than necessary compared to Australian measures.

Australia currently has very stringent tobacco control policy. Australia is implementing one of the largest social marketing campaigns as a tobacco control strategy under the FCTC guidelines.<sup>83</sup> It has also in place several other measures: an excise tax, binding legal purchase age of tobacco products, and restrictive advertisement.<sup>84</sup> All of these measures are also followed in across the world as contemporary regulation to control the negative impact of tobacco consumption.<sup>85</sup> Despite of having these measures in practice, Australia find that still the burden of tobacco related disease is increasing and poses more risks to the society. It identified that current measures are not able to achieve the maintained targeted objectives within the measures. That's why Australia is following the FCTC guidelines and enacted this new law to achieve the level of its public health commitment.

## **7. Discussion on Both Parties Arguments under the Legal Basis of the TBT Agreement 1995**

The WTO Appellate bodies use three specific conditions to be fulfilled whether justify any specific measure as “technical regulation”.<sup>86 87</sup> These are i) a document must apply to an “identifiable product or group of products”, ii) this document must lay down one or more “characteristics of the product”; and iii) compliance with the product characteristics must be “mandatory”.<sup>88</sup> The measures under *Australian TPP Act 2011* fulfill all these three conditions because the plain packaging measures specifies the retail packaging and wrappers of “tobacco products”<sup>89</sup>; it follows that the measures are relate to specifically to tobacco products so that they can be identified<sup>90</sup> as the subject matter of the plain packaging measures corresponds to “packaging” enumerated in the second sentence of Annex 1.1 of *TBT Agreement 1995*;<sup>91</sup> and inclusion of certain civil penalty provisions into the act stipulates that a person cannot sell, offer, or supply tobacco products in non-compliant retail packaging in Australia as compliance with the product characteristics is considered to be “mandatory”.<sup>92</sup> In light of the above information, the plain packaging measures

<sup>83</sup> Integrated Executive Summary of Australia's Submission, *op.cit.*

<sup>84</sup> *Ibid.*

<sup>85</sup> Conference of the Parties to the WHO Framework Convention on Tobacco Control, *op.cit.*

<sup>86</sup> Reports of Appellate bodies (EC-Asbestos, EC-Sardines, US-TunaII( Mexico)).

<sup>87</sup> *WTO ANALYTICAL INDEX: TECHNICAL BARRIERS Agreement on Technical Barriers to Trade*, available at: [https://www.wto.org/english/ res\\_e/booksp\\_e/analytic\\_index\\_e/tbt\\_e.htm](https://www.wto.org/english/ res_e/booksp_e/analytic_index_e/tbt_e.htm); accessed on 13 March 2017.

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

<sup>89</sup> *Competition and Consumer (Tobacco) Information Standard 2011*.

<sup>90</sup> *Ibid.*

<sup>91</sup> *Agreement on Technical Barriers to Trade, op.cit.*

<sup>92</sup> *Competition and Consumer (Tobacco) Information Standard 2011*.

would be found to constitute “technical regulation” within the meaning of Annex 1.1 of the *TBT Agreement* 1995.

As the measures under *TPP Act* 2011 is equivalent to “technical regulation” of *TBT Agreement* under WTO, so its need to be validated with other provisions of *TBT Agreement* 1995 which the complaints nation alleged that the measures have violated. In this regard, these measures do not violate the provisions under article 2.1. Violation of article 2.1 requires that the measure accords imported tobacco products treatment “less favorable” than that accorded tobacco products of national origin.<sup>93</sup> This validation requires a two-step test: first, whether the products are “like” and second, whether one is treated less favourable than the other.<sup>94</sup> The measures under *TPPA* 2011 are uniform and it does not distinguish between the origins of tobacco products because any tobacco products—imported or domestic – needs standardized packaging for selling in Australian market. Therefore, the packaging is uniform for all types of tobacco products: like products. Thus, these measures are not treating any product less favorable and do not violate the provision of article 2.1 under the *TBT Agreement* 1995.

As the measures do not distinguish between domestic and imported cigarettes (or between cigarettes imported from different WTO Members) and apply uniformly to all retail tobacco products packaging. Therefore, there is no *de jure* violation of national treatment principle. However, the complaints claim that it may involve *de facto* discrimination between those cigarettes that are already established on the Australian market (and as a consequence they are known to consumers) and those which could be introduced in the future.<sup>95</sup> Since it will be practically not possible to distinguish such cigarettes from the products offered by other competitors, they will remain unnoticed by consumers. <sup>96</sup>For this, it needs to establish that the origin-neutral distinction negatively affects the competitive relationship of the group of imports in relation to the group of like domestic products and thus protects the latter against the former.<sup>97</sup>

As far as a *de facto* discrimination is concerned, the measures under *TPP Act* 2011 do not entail an impact on the competitive conditions in favor of local products on imported tobacco products because the measures are origin-neutral. For origin-neutral case, the *de facto* discrimination requires there must be an asymmetry in the competitiveness of foreign and domestic goods which is responsible for the rule's disparate impact on foreign goods to the advantage of

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<sup>93</sup> Article 2.1 of the TBT agreement established a principle of non discrimination in the following terms “Members 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>94</sup> Y Ishikawa, ‘Plain Packaging Requirements and article 2.2 of the TBT Agreement,’ *op.cit.*

<sup>95</sup> TBT Committee, Minutes of the Meeting of 15-16 June 2011, G/TBT/M/54, 20 September 2011.

<sup>96</sup> L Gruszczynski, ‘The TBT Agreement and Tobacco Control Regulations’, *op.cit.*

<sup>97</sup> Y Ishikawa, ‘Plain Packaging Requirements and article 2.2 of the TBT Agreement,’ *op.cit.*

national goods.<sup>98</sup> So that *de facto* or indirectly, like imports bear a heavier overall burden than the like domestic products.<sup>99</sup> In this case, the complaints argument is that as the measure going to curb their established brand in to uniform or equivalent to domestic product so they will be discriminated on their status quo brand loyalty ground.<sup>100</sup> They are pointing that the origin-neutral measure will accord them less favor on the basis of neutralizing the brand affect in current and future Australian tobacco market.<sup>101</sup> But this point is not substantiate with the *TPP Act 2011* because though the measures require uniform packaging but still the respective brand name is going to apparent in the cigarette package.<sup>102</sup> In that case, still product differentiation is available for recognizing band loyalty; therefore, it wouldn't neutralize the brand loyalty ground for the established brands and future entrants. Thus, the *TPP Act 2011* measures are not violating the provision under article 2.1 of *TBT Agreement 1995* from the context of future market access for foreign products or actual discrimination.

The next consideration for the measures is that whether it serves the "legitimate objective" of the enacting country. The ultimate objective of the Plain Packaging Act is "to improve public health" through certain means.<sup>103</sup> Its specific goals are to reduce the attractiveness and appeal of tobacco products to "consumers"; to increase the effectiveness of mandated health warnings on the retail packaging of tobacco products; and to reduce the ability of the retail packaging of tobacco products to mislead "consumers" about the harmful effects of smoking or using tobacco products.<sup>104</sup> The measures extent to apply on all tobacco products make it undisputed that Australia pursues objectives other than the ones referred through the *TPP Act 2011* and it also nullifies the measures are designed to disguise restriction on international trade.<sup>105</sup> Thus, Australian measures are legitimate one; and it was also admitted by the one of the complaint country.<sup>106</sup>

The next consideration is whether these measures are set according to international standard or not. The argument for opposition of *TPP Act 2011* is

<sup>98</sup> L Ehring, 'De Facto Discrimination in WTO Law: National and Most-Favored-Nation Treatment - or Equal Treatment?' The Jean Monnet Center for International and Regional Economic Law & Justice; available at: <http://www.jeanmonnetprogram.org/archive/papers/01/013201.html>; accessed on 21 February 2017.

<sup>99</sup> Ibid.

<sup>100</sup> TBT Committee, Minutes of the Meeting of 15-16 June 2011, *op.cit.*

<sup>101</sup> Ibid.

<sup>102</sup> *Tobacco Plain Packaging Act 2011*, C2011A00148, Act No.148 of 2011, An Act to discourage the use of tobacco products and for related purposes, December 1, 2011, Para, 2.4.1.

<sup>103</sup> T Voon and A.Mitchell, 'Implications of WTO law for plain packaging of tobacco products', in Andrew Mitchell, Tania Voon and Jonathan Liberman (eds), *Public Health and Plain Packaging of Cigarettes: Legal Issues*, UK, Edward Elgar, 2012.

<sup>104</sup> A Marsoof, 'The TRIPs Compatibility of Australia's Tobacco Plain Packaging Legislation', *op.cit.*

<sup>105</sup> L Gruszczynski, 'The TBT Agreement and Tobacco Control Regulations', *op.cit.*

<sup>106</sup> TBT Committee, Minutes of the Meeting of 15-16 June 2011, *op.cit.*

that these measures are new in the world and not consistent to current practices in anywhere else in world.<sup>107</sup> However, Australian measures are new but it follows the recommendation of *The World Health Organization Framework Convention on Tobacco Control (WHO FCTC)*.<sup>108</sup> The WHO FCTC is a treaty<sup>109</sup> adopted by the 56th World Health Assembly on 21 May 2003.<sup>110</sup> It became the first World Health Organization treaty adopted under article 19 of the WHO constitution.<sup>111</sup> According to article 2.5 of *TBT Agreement 1995*,<sup>112</sup> FCTC guidelines are standards within the meaning of “international standardizing body or organization”. Because, the guidelines recommend by FCTC is adopted through the Conference of the Parties (COP).<sup>113</sup> The COP<sup>114</sup> recognized activities in standardization and its membership is open to the relevant bodies of at least all members, and decisions have been made available to the public.<sup>115</sup> From the above facts, it is clear that though Australian measures are new but these are based on specific guidelines provided by credible international organizations, which is sufficient to justify as international standard under the requirements of *TBT Agreement 1995*.

However, we also need to justify whether the Australian measure is more trade restrictive than necessary to fulfill the “legitimate objective”, which is human health protection. The mandatory measures are very stringent and it can be adjudicated as trade restrictive for following reasons. First, tobacco products that do not follow such conditions or requirements for the appearance of marks and other design features on the retail packaging (i.e. branded packs), whether domestic or imported, cannot be offered or supplied inside the Australian market, but it does not necessarily mean that the plain packaging measures prevent tobacco products in non-compliant packaging from being imported into

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<sup>107</sup> Ibid.

<sup>108</sup> Ibid.

<sup>109</sup> The treaty came into force on 27 February 2005. It had been signed by 168 countries and is legally binding in 180 ratifying countries.

<sup>110</sup> *WHO Framework Convention on Tobacco Control, op.cit.*

<sup>111</sup> ‘Adoption of Framework Convention on Tobacco Control’, *The American Journal of International Law*, Vol. 97, No. 3, 2003, pp. 689–691.

<sup>112</sup> Article 2.5: A Member preparing, adopting or applying a technical regulation which may have a significant effect on trade of other Members shall, upon the request of another Member, explain the justification for that technical regulation in terms of the provisions of paragraphs 2 to 4. Whenever a technical regulation is prepared, adopted or applied for one of the legitimate objectives explicitly mentioned in paragraph 2, and is in accordance with relevant international standards, it shall be rebuttably presumed not to create an unnecessary obstacle to international trade.

<sup>113</sup> The Conference of the Parties (COP) is the governing body of the WHO FCTC and is comprised of all Parties to the Convention. It keeps under regular review the implementation of the Convention and takes the decisions necessary to promote its effective implementation, and may also adopt protocols, annexes and amendments to the Convention. Observers may also participate in the work of the COP. The work of the COP is governed by its Rules of Procedure. Starting from COP3, the regular sessions of COP are held at two-year intervals.

<sup>114</sup> The COP has played effective role in developing guidelines for testing and measuring contents and emissions of tobacco products, and for the regulation of those contents and emissions.

<sup>115</sup> *WHO Framework Convention on Tobacco Control, op.cit.*



Australia.<sup>116</sup> Still, they permit domestic importers to repackage such tobacco products with compliant retail packaging and to sell them in the Australian market.<sup>117</sup> The panel in *US – Tuna II (Mexico)* held that the access to the “US dolphin-safe label” provided a valuable advantage to the US market, and the US dolphin-safe labeling provisions restricting certain tuna products from accessing to such label were found to be trade-restrictive under article 2.2 of the *TBT Agreement* 1995.<sup>118</sup> On the basis of this decision, it is evident that the plain packaging measures certainly restrict domestic consumers in Australia from access to tobacco products in non-compliant retail packaging (i.e. branded packs), and result in giving adverse impact on the importation of tobacco products. Second, the plain packaging measures include the civil penalty provisions, according to which the person who sells a tobacco product which has been packaged for retail sale is deemed to commit an offence, if the retail packaging does not comply with a tobacco product requirement. Pursuant to this decision, although the offences and penalty set out in the plain packaging measures are not imposed at the border, they could still be found to be trade-restrictive under article 2.2, to the extent that the level of the offences and penalty are high enough to act as a disincentive to importation.<sup>119</sup> Third, the plain packaging measures might undermine the importance, value or scope of trademarks and branding for tobacco products, and as a result it would lead to a conclusion that they are trade-restrictive.<sup>120</sup>

However, this trade restriction should be considered in context of objectives of *TPP Act* 2011. The objectives of Australian measures were undisputed in the TBT committee.<sup>121</sup> So the dispute is on the ground that the Australian measures are design to curb the tobacco consumption and use more stringent than necessary: more trade restrictive than necessary.<sup>122</sup> Here the key issue is to validate the term “necessary”. This is supposed to determine the “degree of contribution” of a measure at issue to the objective on the basis of the design, structure, and operation of the technical regulation, as well as from evidence relating to its application.<sup>123</sup> The degree of contribution of the plain packaging measures to each objective identified before is determined on the basis of scientific research and evidence about the impact of the plain packaging on consumers, rather than the design, structure and operation of the measures.<sup>124</sup>

<sup>116</sup> Y Ishikawa, ‘Plain Packaging Requirements and article 2.2 of the TBT Agreement’, *op.cit.*

<sup>117</sup> *Ibid.*

<sup>118</sup> Appellate Body Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R, *supra* note 42, paras. 7.291, 7.568.

<sup>119</sup> *Brazil-Retreaded Tyres (Panel)*, *supra* note 17, paras. 7.370-7.372

<sup>120</sup> S Frankel and D Gervais, ‘Plain Packaging and the Interpretation of the TRIPS Agreement’, *op.cit.*

<sup>121</sup> TBT Committee, Minutes of the Meeting of 15-16 June 2011, *op.cit.*, paras 34-35.

<sup>122</sup> *Ibid.*

<sup>123</sup> Y Ishikawa, ‘Plain Packaging Requirements and article 2.2 of the TBT Agreement’, *op.cit.*

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

Before enacting these new measures, Australia has already maintained quite comprehensive range of tobacco control measurement accordance to FCTC guidelines.<sup>125</sup> Despite of having such measures, the new measures are adopted because Australian government felt that the maintained measures were not fulfilling its objectives to limit existing level of threat, and achieve the desire level of prevalence of tobacco related disease.<sup>126</sup> Australia government has taken this position on the basis of scientific studies including those which formed a basis for the official WHO FCTC guidelines.<sup>127</sup> The FCTC guidelines indicate that plain packaging on tobacco products would increase the impact of health warning and reduce the attractiveness of products to segments of the population specifically targeted by tobacco companies.<sup>128</sup> In light of these facts, it seems that Australian current measures are highly on course to make a contribution to achieve their stated legitimate objective: human health protection.

Still it needs to compare with other available alternatives for comparison analysis, whereby it is assessed if there are less trade-restrictive alternatives that make an equivalent contribution to each objective in light of the risks non-fulfillment would create.<sup>129</sup> However, given the fact that, Australia has already in place almost all contemporary tobacco control measures those are in practice across the world, it would be very hard to considering any existing measures which could have achieve the same level of appropriateness to achieve the stated objectives as alternative to plain packaging. Under this consideration, any proposed alternative measures also should be considered as a new measure. Thus, this new measure would also potentially raise the same doubt of how it would be considered as less trade restrictive, and thus justify the degree of contribution to necessity and trade restrictiveness. On the basis of this approach, it might be possible to found some alternatives to be less restrictive but they could hardly make an equivalent contribution to each objective, especially because the scope of the objective that Australia pursues through the plain packaging measures is narrowly defined.<sup>130</sup> For example, a ban on tobacco advertising, promotion and sponsorship may contribute to the reduction of the attractiveness and appeal of tobacco products to some extent, but it would not contribute to the reduction of the ability of the retail packaging to mislead consumers about the harmful effects of smoking, because it does not involve the impact of the retail packaging. In this regard, it would be justify that current measures under *TPP Act* 2011 are enough trade restrictive to achieve the Australia's legitimate objective: protect public health.

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<sup>125</sup> Integrated Executive Summary of Australia's Submission, *op.cit.*

<sup>126</sup> *Ibid.*

<sup>127</sup> *Ibid.*, p 33.

<sup>128</sup> *WHO Framework Convention on Tobacco Control.*

<sup>129</sup> World Trade Organization, 'WTO ANALYTICAL INDEX: TECHNICAL BARRIERS Agreement on Technical Barriers to Trade'; available at: [https://www.wto.org/english/res\\_e/booksp\\_e/analytic\\_index\\_e/tbt\\_e.htm](https://www.wto.org/english/res_e/booksp_e/analytic_index_e/tbt_e.htm); accessed on 28 March 2017.

<sup>130</sup> Y Ishikawa, 'Plain Packaging Requirements and article 2.2 of the TBT Agreement', *op.cit.*

## 8. Conclusion

This paper analyses the compatibility of the Australian *TPP Act* 2011 with the core provisions of *WTO TBT Agreement* 1995 because the huge tobacco multinationals are attempting to manipulate globalization trends in their favor. The global shift towards trade liberalization facilitated by multilateral trade agreements such as the single package of World Trade Organization (WTO) trade agreements have encouraged the penetration of new markets by tobacco multinationals. It offers big cigarette companies to look for greater production volumes: the more you produce the more profitable you are.<sup>131</sup> However, market liberalization and penetration has consequently been linked to a greater risk of increased tobacco consumption, especially in low and middle income countries.<sup>132</sup> The fact that the opening of markets and the process of globalization has been linked to increased health risks supports the need for a stronger national regulatory environment for tobacco control and harmonization of national policies between countries. Furthermore, the challenges made in WTO Dispute framework by the big tobacco producer nations against the implementation of Australian *TPP Act* 2011 emphasized that the commercial interests of trading partners may overshadowed individual countries concerns form public health, and can manipulate the liberal trade window. Thus, this analysis is relevant for countries that might adopt a similar plain packaging scheme in future to adopt stringent tobacco control policy for public health concern or want to curb the tobacco consumption up to a certain level.

From the discussion, it is evident that the Australian *TPP Act* 2011 specifies the packaging of all tobacco products. It specifies certain color for packaging, in certain ways to display the brand names, display the required text and graphic health warnings. It prohibits the display of logos, brand images or promotional text. The objective of this specification is to regulate as well as activities to reduce tobacco-related harm in Australian community by reducing smoking rates. The Act will neutralize the negative advertisement effect of tobacco companies by reducing the appeal of tobacco products as well as making health warnings more effective while removing misleading information on packaging. The Act also ensures uniform applicability on tobacco sell, offer to sell, supply, and package or manufacture tobacco products in Australia. Even if the products for sale are not visible to the public, they must still meet plain packaging laws.

From the legal context, the analysis shows the Australian *TPP Act* 2011 neither conflict with any of the provisions in *WTO TBT Agreement* 2011. The specific measures enacted in the Australian *Tobacco Plain Packaging Act* 2011 are valid “technical regulation” under the *TBT Agreement* 1995 because the measures are

<sup>131</sup> Vardavas C, Filippidis FT, Ward B, et al. Plain packaging of tobacco products in the European Union: an EU success story? *Eur Respir J* 2017; 50: 1701232; available at: <https://doi.org/10.1183/13993003.01232-2017>.

<sup>132</sup> European Commission. Special Eurobarometer 429: Attitudes of Europeans towards tobacco and electronic cigarettes; available at: [http://ec.europa.eu/public\\_opinion/archives/ebs/ebs\\_429\\_en.pdf](http://ec.europa.eu/public_opinion/archives/ebs/ebs_429_en.pdf); accessed in May 2015.

in accordance to article 2.1 and 2.2 of *TBT Agreement* 1995. In this case, the use of FCTC 2003 standard as the basis of enactment of plain packaging act, and mandatory uniform applicability to product of all countries (both foreign and domestic) under *TPP Act* 2011 justify the measures under consideration as valid “technical regulation” for international trade. Thus, the Australian *TPP Act* 2011 being a national legislation still is fully compatible with Australia’s commitment to World Trade Organization Treaty.

The analysis presented in this paper is also very much relevant for Bangladesh commitment and efforts toward tobacco control policy. Tobacco control policy is one of the utmost priorities for Bangladesh as she set to make the nation tobacco free within 2040.<sup>133</sup> However, the challenge is enormous given that WHO ranked Bangladesh as the 7th largest tobacco growing and 8th largest tobacco consuming country.<sup>134</sup> The disease burden of tobacco is huge as an estimate in 2018 revealed each year tobacco kills 161253 people, which is 19% of all deaths.<sup>135</sup> Bangladesh’s meaningful effort to counteract the public health threat of tobacco began when she ratifies WHO FCTC 2003.<sup>136</sup> <sup>137</sup>As a Party to the WHO FCTC, she requires implementing domestic law to give legal effect to the convention. As a result, in 2005, Bangladesh enacted the *Smoking and Using of Tobacco Products (Control) Act* with the objective of controlling tobacco products for public health. The enacting of 2005 law banned the tobacco advertisement in Bangladesh.<sup>138</sup> As a continuation to her effort to drive out tobacco related public health burden over the time this law has been amended several times (2013, 2015) to accommodate several important provisions.<sup>139</sup> However, Bangladesh has not yet able to frame a comprehensive policy as loophole remains to regulate tobacco cultivation, to mitigate the environmental harms by tobacco, and most disappointingly there is no provision in the country's tobacco control laws to prevent tobacco industry interference in formulating tobacco control measures.

In this regard, Bangladesh can adopt similar act like Australian *TPP Act* 2011. Adaptation of similar act like TPP would definitely foster the activities and effort of tobacco control policy in Bangladesh as well as nullify the big influence of current multinational brands; especially it would give a comprehensive and effective framework to curb the influence of multinational tobacco industry to interfere in formulating tobacco control measures in Bangladesh.

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<sup>133</sup> Imtiaz A Sazal, ‘National response to tobacco control’ *The Daily Star* (Dhaka, 8 January 2019).

<sup>134</sup> Imtiaz A Sazal, ‘National response to tobacco control’.

<sup>135</sup> WHO, ‘Bangladesh Tobacco Fact Sheet’; available at: <http://www.searo.who.int/bangladesh/bangladesh2009tobaccofactsheet2018r4.pdf>; accessed on 5 November 2019.

<sup>136</sup> WHO, ‘Making a difference: Tobacco control in Bangladesh’; available at: <http://www.searo.who.int/bangladesh/enbantobaccosuccess/en/>; accessed on 5 November 2019.

<sup>137</sup> Bangladesh was the first country to sign the WHO Framework Convention on Tobacco Control (FCTC) in 2003 which is the world’s first health treaty against the global tobacco epidemic and was also the first country to ratify the treaty, in May 2004.

<sup>138</sup> WHO, ‘Making a difference: Tobacco control in Bangladesh’.

<sup>139</sup> Imtiaz A Sazal, ‘National response to tobacco control’.