

PLAINLY JUSTIFIABLE? THE WORLD TRADE ORGANIZATION'S RULING ON THE VALIDITY OF AUSTRALIA'S "PLAIN PACKAGING" UNDER ARTICLE 20 OF THE TRIPS AGREEMENT

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ABSTRACT

In June 2018, the World Trade Organization published its decision on Australia's "plain packaging" legislation. A key element of the decision concerned Article 20 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement). For the first time, a Panel has elaborated on the applicable standard of justification for encumbrances on the use of trademarks in aid of societal objectives. The "balancing" test proposed by the Panel requires consideration of both the stated objective and the extent of the encumbrance. This case-by-case approach, however, provides no bright-line standard of validity. There remains considerable uncertainty around the legitimate scope of state regulation under Article 20 and the viability of measures that, while not strictly "necessary," appear nevertheless to be "justifiable."

KEYWORDS: *plain packaging, public health, trade, TRIPS Article 20, intellectual property, trademarks, justifiability, proportionality*

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