USING TOBACCO PLAIN PACKAGING TO PROTECT THE HUMAN RIGHTS OF CHILDREN

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The societal interest of public health protection has driven Australia's regulation of tobacco products for many years. The recent decision of the World Trade Organization Appellate Body, Australia – Tobacco Plain Packaging, should encourage states to protect supportable societal interests even if they restrict the exercise of intellectual property rights. As the decision suggests that non-World Trade Organization agreements can support tobacco control measures, this article advocates for greater attention towards the human rights implications of these measures. A primary objective of tobacco plain packaging measures is to protect young people, engaging Australia's obligations pursuant to the Convention on the Rights of the Child. The article argues that explicit engagement with children and recognition of their human rights in the development and implementation of plain packaging measures could have strengthened Australia's defence of its plain packaging measures. It provides novel insights into what a child rights-based approach could mean for the future development of tobacco control measures worldwide.

I INTRODUCTION

Children are particularly vulnerable to the ill effects of the global tobacco epidemic. Tobacco consumption and second-hand smoke seriously impact their health. The economic cost of tobacco addiction of family members can also have significant impacts on an even broader range of socio-economic rights. Governments have appropriately recognised the importance of effectively deterring children from initiating tobacco consumption as part of their tobacco control policies, including in Australian plain packaging legislation.[1] However, in Australia the human rights significance of these initiatives for children has not

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1 Explanatory Memorandum, Tobacco Plain Packaging Bill 2011 (Cth) 1.

been strongly emphasised. In disputes about tobacco plain packaging, the role of children's human rights has been underexplored.

This article analyses the relevance of children's human rights to the recent World Trade Organization ('WTO') Appellate Body decision in *Australia – Tobacco Plain Packaging* ('Appellate Body decision').[2] The Appellate Body upheld the decision of the Dispute Settlement Panel ('WTO Panel') in complaints made by other WTO members against Australian tobacco plain packaging measures.[3] Although Australia was successful, its defence failed to recognise the importance of children's human rights in tobacco control. Australia could have bolstered its position by relying on its international legal obligations pursuant to the *United Nations Convention on the Rights of the Child* ('*UNCRC*').[4] Obligations to protect children from misleading information about their health are specifically relevant to plain packaging measures that also support protection of children's rights to health and life and should be considered by all parties to the *UNCRC* who develop plain packaging measures. These obligations are also relevant to general objectives of tobacco control to improve health and associated socio-economic rights.

The Appellate Body decision is a significant triumph for Australia's global leadership in introducing plain packaging for tobacco. Yet, despite the increasing prevalence of these initiatives in recent years, the future of plain packaging and other attempts to reduce tobacco consumption remains uncertain in some countries.[5] Notwithstanding their ongoing failures to use litigation to prevent the implementation of plain packaging legislation, tobacco companies continue to systematically lobby against its introduction, using municipal and international courts to oppose such measures.[6] Even if these actions do not succeed, they may chill other attempts to introduce plain packaging.[7] This is particularly concerning, given the high rates of adolescent smoking in low-and middle-income countries that are less likely to have comprehensive tobacco control measures than high income countries such as Australia with lower rates.[8] Meanwhile, tobacco

2 Appellate Body Report, *Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WTO Docs WT/DS435/R and WT/DS441/R (9 June 2020) ('*Appeal Report*').

3 Panel Report, *Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WTO Docs WT/DS435/R, WT/DS441/R, WT/DS458/R and WT/DS467/R (28 June 2018) ('*Panel Report*').

4 *United Nations Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) ('*UNCRC*').

5 Tobin gives examples of legislative chill in Latin American countries: Jennifer L Tobin, 'The Social Cost of International Investment Agreements: The Case of Cigarette Packaging' (2018) 32(2) *Ethics and International Affairs* 153, 161–2.

6 Benjamin Hawkins, Chris Holden and Sophie Mackinder, 'A Multi-level, Multi-jurisdictional Strategy: Transnational Tobacco Companies' Attempts to Obstruct Tobacco Packaging Restrictions' (2019) 14(4) *Global Public Health* 570.

7 Tobin (n 5) 161–2; Lukasz Gruszczynski, 'Australian Plain Packaging Law, International Litigations and Regulatory Chilling Effect' (2014) 5(2) *European Journal of Risk Regulation* 242, 244; Eric Crosbie, 'Constraining Government Regulatory Authority: Tobacco Industry Trade Threats and Challenges to Cigarette Package Health Warning Labels' (PhD Thesis, University of California, 2016) 284–9.

8 See Emily Stone and Matthew Peters, 'Young Low and Middle-Income Country (LMIC) Smokers: Implications for Global Tobacco Control' (2017) 6(Suppl 1) *Translational Lung Cancer Research* S44,

companies have diversified their interests to include vaping.[9] Vaping can be highly appealing to adolescents and its regulation remains disputed in Australia and many other countries as safety concerns emerge.[10] Given these concerns, opportunities for relying on children's human rights to support measures to control consumption of harmful substances must be considered seriously. While WTO agreements do not explicitly refer to children's rights or human rights more generally, these norms constitute a potentially effective tool for controlling consumption of harmful substances by children. There remains limited recognition of the relationship between children's human rights and intellectual property protection.[11] This article seeks to address that absence. In addition to their rights to health, life and information, the implementation of plain packaging measures that are designed to protect young people engages their rights to development and participation.

Recognition of the links between tobacco and children's human rights in legislative development and defence of that legislation can be beneficial to more comprehensive tobacco control strategies that better protect children's rights.[12] Multilateral consensus around efforts to reduce tobacco consumption has emerged through the World Health Organization ('WHO') *Framework Convention on Tobacco Control* ('*FCTC*').[13] States implement the obligations found in the evidence-based *FCTC* and its guidelines when they develop measures to reduce tobacco consumption through a range of measures. Tobacco plain packaging is an important component of tobacco control that recognises the importance of reducing tobacco consumption in children and adolescents. This article explores the way that explicit recognition of *UNCRC* obligations using a child rights-based approach in legislative design and assessment can strengthen tobacco control measures directed towards young people. This approach recognises children's capabilities to be actively involved in decision-making processes about measures affecting them

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S44. See concerning identification of increases in youth smoking in some countries: Jeffrey Drope and Neil W Schluger (eds), *The Tobacco Atlas* (American Cancer Society and Vital Strategies, 6th ed, 2018) 20. See also Bo Xi et al, 'Tobacco Use and Second-Hand Smoke Exposure in Young Adolescents Aged 12–15 Years: Data from 68 Low-Income and Middle-Income Countries' (2016) 4(11) *Lancet Global Health* e795.

9 David T Levy et al, 'Altria-Juul Labs Deal: Why Did It Occur and What Does It Mean for the US Nicotine Delivery Product Market' (2020) 29(e1) *Tobacco Control* e171.

10 David Hammond, 'Outbreak of Pulmonary Diseases Linked to Vaping' (2019) 366(8214) *British Medical Journal* l5545:1–2.

11 Genevieve Wilkinson, 'Tobacco Plain Packaging, Human Rights and the Object and Purpose of International Trade Mark Protection' in Susy Frankel (ed), *The Object and Purpose of Intellectual Property* (Edward Elgar, 2019) 182, 212–15. Mitchell and Roberts argue that although human rights have not been explicitly recognised in disputes about Australia's plain packaging measures, the resulting decisions 'cannot be … divorced from the right to health': Andrew Mitchell and Marcus Roberts, 'Human Rights and Tobacco Plain Packaging in Australia' in Marie Elske Gispen and Brigit Toebes (eds), *Human Rights and Tobacco Control* (Edward Elgar, 2020) 252, 264.

12 This builds on the recent comprehensive doctrinal analysis of the relationship between tobacco and children's rights in Marie Elske C Gispen and Brigit CA Toebes, 'The Human Rights of Children in Tobacco Control' (2019) 41(2) *Human Rights Quarterly* 340.

13 *WHO Framework Convention on Tobacco Control*, opened for signature 21 May 2003, 2302 UNTS 166 (entered into force 27 February 2005) ('*FCTC*').

and acknowledges the best interests of the child as a primary consideration in such measures.

Part II of this article identifies specific obligations found in the *UNCRC* that are relevant to the impact of tobacco consumption on children and the introduction of tobacco plain packaging to address tobacco consumption. Part III examines the legal issues raised in the WTO tobacco plain packaging case. Part IV considers how Australia could have further supported its arguments by reference to its obligations to protect the human rights of children, recommends ways that a child rights-based approach can be used in the development and implementation of tobacco control measures and provides novel insights into the way that tobacco control measures can better address children's rights obligations. The final part concludes that to support plain packaging and similar measures using the *UNCRC*, states need to explicitly recognise children's rights when developing, implementing and defending legislation that may be vulnerable to trade disputes.

II CONVENTION ON THE RIGHTS OF THE CHILD, TOBACCO AND PLAIN PACKAGING

A Tobacco Plain Packaging and Human Rights

Tobacco packaging has been characterised as the last vehicle for tobacco advertising in countries that have restricted or banned all other types of advertising as part of their efforts to seek to reduce and control tobacco consumption.[14] There is evidence of direct links between packet advertising that includes the use of trade marks to create positive brand perceptions and initiation of tobacco consumption.[15] Consequently, where there are no other mechanisms for advertising because of heavy legislative regulation, the use of trade marks on tobacco can be very significant for strategies to reduce tobacco consumption. In a highly influential study in 2000, Saffer and Chaloupka emphasised the importance of comprehensive tobacco advertising bans to reduce tobacco consumption.[16] Saffer and Chaloupka's study reveals a significant causal contribution between package advertising using trade marks and tobacco consumption where there are no other mechanisms for advertising.[17] Consequently, the role of packaging is important to any comprehensive strategy to reduce tobacco consumption.[18]

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14 For example, tobacco packaging has been identified as the last available vehicle for advertising in Australia: Department of Parliamentary Services (Cth), *Bills Digest* (Digest No 35 of 2011–12, 24 August 2011) 5.

15 National Preventative Health Taskforce, *Tobacco Control in Australia: Making Smoking History* (Technical Report No 2, 2009) 20 ('*Technical Report*').

16 Henry Saffer and Frank Chaloupka, 'The Effect of Tobacco Advertising Bans on Tobacco Consumption' (2000) 19(6) *Journal of Health Economics* 1117.

17 Ibid 1121–2. See also Department of Parliamentary Services (Cth) (n 14) 5; Richard Edwards et al, 'Impact of Removing Point-of-Sale Tobacco Displays: Data from a New Zealand Youth Survey' (2017) 26(4) *Tobacco Control* 392.

18 Panel Report, *Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WTO Docs WT/

Plain packaging measures vary between states. The *FCTC* does not prescribe a single type of packaging but provides some guidance such as the minimum recommended size of graphic health warnings.[19] In Australia, tobacco plain packaging measures require uniform packaging of cigarettes, using a drab brown colour and uniform font.[20] Use of branding on packaging is restricted to a textual indication of the brand, business or company name or variant name.[21] Packaging must display uniform health warnings, graphic photographs and a Quitline mark. These requirements are designed to deter smokers and significantly restrict the use of trade marks on packaging.[22]

The use of tobacco-related trade marks on product packaging to induce individuals to consume tobacco can directly engage states' obligations to protect individuals in realisation of their rights to health that are found in the *UNCRC* and the *International Covenant on Economic, Social and Cultural Rights* ('*ICESCR*').[23] Interpretation of the right to health by the Committee on Economic, Social and Cultural Rights identifies state obligations to protect individuals from the harmful impact of tobacco, noting that 'the failure to discourage production, marketing and consumption of tobacco' constitutes a violation of these obligations.[24] Owners of tobacco-related trade marks have historically demonstrated systematic disregard for the health and safety of individuals and obstructed access to information about the harmful and addictive impact of smoking.[25] There is also evidence that they have used variant branding to indicate that some types of cigarettes have less negative health impacts than others.[26] Consequently, tobacco packaging engages states' obligations to protect individuals against the actions of third parties that may

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DS435/R/Add.1, WT/DS441/R/Add.1, WT/DS458/R/Add.1 and WT/DS467/R/Add.1 (28 June 2018) annex B-5 B-96 ('*Integrated Executive Summary of the Arguments of Australia*'). Empirical evidence supports the vulnerability of children to tobacco advertising: John P Pierce et al, 'Receptivity to Tobacco Advertising and Susceptibility to Tobacco Products' (2017) 139(6) *Pediatrics* 1; Robert J Wellman et al, 'The Extent to which Tobacco Marketing and Tobacco Use in Films Contribute to Children's Use of Tobacco: A Meta-Analysis' (2006) 160(12) *Archives of Pediatrics and Adolescent Medicine* 1285.

19 World Health Organization Framework Convention on Tobacco Control, Conference of the Parties, *Guidelines for Implementation of Article 11 of the WHO Framework Convention on Tobacco Control (Packaging and Labelling of Tobacco Products)*, 3rd sess, WHO Doc FCTC/COP3(10) (November 2008) ('*Guidelines*').

20 *Tobacco Plain Packaging Act 2011* (Cth) ch 2 pt 2.

21 Ibid.

22 Ibid.

23 *UNCRC* (n 4) art 24; *International Covenant on Economic, Social and Cultural Rights,* opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) art 12 ('*ICESCR*').

24 Committee on Economic, Social and Cultural Rights, *General Comment No 14 (2000): The Right to the Highest Attainable Standard of Health (Article 12 of the International Covenant on Economic, Social and Cultural Rights)*, UN ESCOR, 22nd sess, Agenda Item 3, UN Doc E/C.12/2000/4 (11 August 2000) [51] ('*CESCR General Comment 14*'). See also Committee on the Rights of the Child, *General Comment No 4 (2003): Adolescent Health and Development in the Context of the Convention on the Rights of the Child*, 33rd sess, UN Doc CRC/GC/2003/4 (1 July 2003) [25]–[26] ('*CRC General Comment 4*').

25 Brigit Toebes et al, 'A Missing Voice: The Human Rights of Children to a Tobacco-Free Environment' (2018) 27(1) *Tobacco Control* 3, 4.

26 Ibid, citing Sally Dunlop et al, 'Australia's Plain Tobacco Packs: Anticipated and Actual Responses among Adolescents and Young Adults 2010–2013' (2017) 26(6) *Tobacco Control* 617 and Edwards et al (n 17).

negatively affect the health of individuals and failure to provide that protection constitutes a violation of state obligations under the *ICESCR*.[27] The UN Guiding Principles on Business and Human Rights also provide that business enterprises need to respect internationally recognised human rights including the *ICESCR,* avoid infringing the rights of others and address human rights impacts in which they are involved.[28] The principles recognise the responsibility of businesses to avoid causing adverse impact on human rights protection,[29] a responsibility that is specifically relevant to the protection of children's rights.[30] The activities of tobacco companies in 'designing and selling tobacco products with flavours, additives and attractive packaging to target children in particular' are contrary to these principles.[31] These activities also measure unfavourably against guidance provided by the United Nations Children's Fund ('UNICEF') on respect for children's rights in business in *Children's Rights and Business Principles*.[32] Tobacco industry involvement with human rights bodies to address human rights concerns needs to be continuously scrutinised to ensure it is consistent with human rights objectives.[33]

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27 *CESCR General Comment 14*, UN Doc E/C.12/2000/4 (n 24) [51]; *General Comment 15* of the Children's Rights Committee identifies state protection obligations towards children in relation to tobacco: Committee on the Rights of the Child, *General Comment No 15 (2013) on the Right of the Child to the Highest Attainable Standard of Health (art 24)*, 62nd sess, UN Doc CRC/C/GC/15 (17 April 2013) [65] ('*CRC General Comment 15*'). The obligation to protect is also recognised at [78]. See *CRC General Comment 4*, UN Doc CRC/GC/2003/4 (n 24) [25]–[26]; John Tobin, 'Article 24 the Right to Health' in John Tobin (ed), *The UN Convention on the Rights of the Child: A Commentary* (Oxford University Press, 2019) 902.

28 John Ruggie, *Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework*, UN GAOR, 17th sess, Agenda Item 3, UN Doc A/HRC/17/31 (21 March 2011) annex ('*Guiding Principles*'). The principles were unanimously adopted by the UN General Assembly.

29 Ibid 13 [11]–[12].

30 Committee on the Rights of the Child, *General Comment No 16 (2013) on State Obligations Regarding the Impact of the Business Sector on Children's Rights*, 62nd sess, UN Doc CRC/C/GC/16 (17 April 2013); Paula Gerber, Joanna Kyriakakis and Katie O'Byrne, '*General Comment 16* on State Obligations Regarding the Impact of the Business Sector on Children's Rights: What Is Its Standing, Meaning and Effect?' (2013) 14(1) *Melbourne Journal of International Law* 93, 113. See also Sera Mirzabegian, 'Big Tobacco v Australia: Challenges to Plain Packaging' (2019) 4(1) *Business and Human Rights Journal* 177, 183–4. These rights need to be taken seriously: Ingrid Landau, 'Human Rights Due Diligence and the Risk of Cosmetic Compliance' (2019) 20(1) *Melbourne Journal of International Law* 221. See the assessment of how these principles apply to companies in development of obesity prevention measures in Elizabeth Handsley and Belinda Reeve, 'Holding Food Companies Responsible for Unhealthy Food Marketing to Children: Can International Human Rights Instruments Provide a New Approach?' (2018) 41(2) *University of New South Wales Law Journal* 449.

31 Toebes et al (n 25) 4. See also Gro Harlem Brundtland, 'Achieving Worldwide Tobacco Control' 284(6) *Journal of the American Medical Association* 750, 750.

32 United Nations International Children's Emergency Fund, The Global Compact and Save the Children, *Children's Rights and Business Principles* (Report, 2012) <https://www.unglobalcompact.org/docs/issues_doc/ human_rights/CRBP/Childrens_Rights_and_Business_Principles.pdf>.

33 Bialous argues that the exclusion of the tobacco industry from participating in the UN Global Compact following an integrity review 'offers yet another avenue of guidance' for *FCTC* parties to comply with the obligations found in *FCTC* art 5.3 requirements for them to protect their public health policies regarding tobacco control 'from commercial and other vested interests of the tobacco industry': Stella Bialous, *Compatibility of the United Nations' Guidelines on Cooperation between the United Nations and the Business Sector and the Guiding Principles on Business and Human Rights with Article 5.3 of*

The restrictions that Australia's plain packaging legislation places on the use of trade marks have prompted unsuccessful claims in the Australian High Court[34] and international arbitration,[35] as well as in the WTO disputes considered in this article. States' human rights obligations were not considered in any of these disputes. This separation of human rights considerations from intellectual property reflects the failure to explicitly recognise the human rights obligations found in the *UNCRC* and other human rights instruments within the intellectual property provisions of trade agreements. This is perhaps not surprising in the historical context of fragmentation between the distinct fields of intellectual property and human rights. While there is some recognition of moral and material interests for authors of literary, artistic and scientific productions in the *ICESCR*,[36] there has only very recently been recognition of human rights in intellectual property agreements.[37] There is no explicit recognition of human rights in the *Agreement on Trade-Related Aspects of Intellectual Property* ('*TRIPS*'),[38] the key agreement governing minimum intellectual property standards required of WTO members. However, the interpretation of articles 7 and 8 in the recent WTO decisions suggests systemic

the WHO Framework Convention on Tobacco Control (Report, April 2018) 3. See also the decision by Danish Human Rights Institute to end the engagement with Philip Morris International: Danish Institute for Human Rights, 'Human Rights Assessment in Philip Morris International: The Danish Institute for Human Rights Ends Engagement with Philip Morris International' (Media Release, 4 May 2017).

34 *JT International SA v Commonwealth* (2012) 250 CLR 1. The plaintiffs were JT International SA, British American Tobacco Australasia Ltd, British American Tobacco (Investments) Ltd and British American Tobacco Australia Ltd. Philip Morris Ltd, Van Nelle Tabak Nederland BV and Imperial Tobacco Australia Ltd were supporting interveners. The majority rejected claims that plain packaging legislation was inconsistent with constitutional requirements for appropriation of property on just terms, finding that the relevant intellectual property assets had not been appropriated as a result of the legislation: at 34–5 (French CJ), 61 (Gummow J), 73 (Hayne and Bell JJ), 108 (Crennan J), 128–32 (Kiefel J).

35 *Philip Morris Asia Ltd v Australia* (*Notice of Arbitration*) (Permanent Court of Arbitration, Case No 2012-12, 21 November 2011). Philip Morris claimed that the legislation was inconsistent with the provisions of Australia's bilateral investment agreement with Hong Kong that protected foreign investors from expropriation of assets and treatment that was not fair and equitable: at [1.6]. The arbitral panel dismissed the claim as an abuse of process as the investment interests in the tobacco-related trade marks in dispute were not acquired by the claimant until after the introduction of plain packaging legislation was announced by the Australian government and the previous owner was not protected under the governing agreement: *Philip Morris Asia Ltd v Australia* (*Award on Jurisdiction and Admissibility*) (Permanent Court of Arbitration, Case No 2012-12, 17 December 2015) 184 [585].

36 *ICESCR* (n 23) art 15(1)(c).

37 *Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled*, opened for signature 27 June 2013, [2018] OJ L 48/3 (entered into force 30 September 2016).

38 *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1C ('*Agreement on Trade-Related Aspects of Intellectual Property Rights*') ('*TRIPS*').

integration is increasingly possible.[39] Some alignment between human rights and the objectives and principles of *TRIPS* is identifiable.[40]

The human rights implications of tobacco plain packaging measures demonstrate why it is important to bring the fields together. Much of the discourse surrounding *TRIPS* and human rights initially focused on the impact of pharmaceutical protection on the human right to health.[41] Subsequently, it has been recognised that the relationship between human rights and intellectual property engages other fields of intellectual property protection, as well as many other human rights.[42] Tobacco plain packaging is an excellent example of the way that regulation of trade marks engages questions of the human right to health. However, such measures also engage interdependent human rights, as identified in the following analysis of the children's rights implications of plain packaging measures.

B *UNCRC* Obligations Relevant to Tobacco Control

Tobacco plain packaging engages states' duties to protect children's human rights, including the right to health, the right to life, survival and development, the right to information and the right to an adequate standard of living. All United Nations ('UN') members except the United States have ratified the *UNCRC* since it opened for signature in 1989.[43] The *UNCRC* obliges states to protect a broad range of civil, political, economic, social and cultural rights for children. Children are defined to include all human beings below the age of eighteen years unless majority is attained earlier under the law applicable to the child.[44] It is unclear how

39 See Wilkinson (n 11) 212–16; Christophe Geiger and Luc Desaunettes-Barbero, 'The Revitalisation of the Object and Purpose of the *TRIPS* Agreement: The Plain Packaging Reports and the Awakening of the *TRIPS* Flexibility Clauses' (Research Paper No 2020-01, Centre for International Intellectual Property Studies, 2020) 42–7. See also Johan Rochel, 'Intellectual Property and Its Foundations: Using Art 7 and 8 to Address the Legitimacy of the *TRIPS*' (2020) 23(1–2) *Journal of World Intellectual Property* 21, 35.

40 See Geiger and Desaunettes-Barbero (n 39); Peter K Yu, 'The Objectives and Principles of the *TRIPS* Agreement' (2009) 46(4) *Houston Law Review* 979, 1000.

41 Laurence R Helfer, 'Human Rights and Intellectual Property: Conflict or Coexistence?' (2003) 5(1) *Minnesota Intellectual Property Review* 47, 54–7.

42 See, eg, Christophe Geiger (ed), *Research Handbook on Human Rights and Intellectual Property* (Edward Elgar, 2015); Laurence R Helfer and Graeme W Austin (eds), *Human Rights and Intellectual Property: Mapping the Global Interface* (Cambridge University Press, 2011); Paul LC Torremans (ed), *Intellectual Property and Human Rights: Enhanced Edition of Copyright and Human Rights* (Kluwer Law International, 2nd ed, 2008); Paul LC Torremans (ed), *Intellectual Property Law and Human Rights* (Kluwer Law International, 3rd ed, 2015).

43 'Status of Treaties: *United Nations Convention on the Rights of the Child*', *United Nations Treaty Collection* (Web Page, 17 November 2021) < https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&chapter=4&clang=_en>. The United States is a signatory so it is obliged 'to refrain from acts which would defeat the object and the purpose of a treaty': *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) art 18 ('*VCLT*').

44 *UNCRC* (n 4) art 1. In *General Comment 20*, the Children's Rights Committee notes that, as part of the entitlement of all persons up to the age of 18 years to continuing protection from all forms of exploitation and abuse, the minimum age limit should be 18 years for 'the purchase and consumption of alcohol and tobacco, in view of the degree of associated risk and harm': Committee on the Rights of the Child, *General Comment No 20 (2016) on the Implementation of the Rights of the Child during Adolescence*, UN Doc CRC/C/GC/20 (6 December 2016) [40] ('*CRC General Comment 20*').

the *UNCRC* applies to the rights of future children whose health may be impaired by tobacco consumption and passive smoking.[45] Gispen and Toebes identify numerous states with legislation that regulates the impact of tobacco consumption on foetuses but recognise that the scope of protection available for future children in the *UNCRC* remains unclear.[46] Given this uncertainty, the article will not focus on those rights but it is important to recognise that these issues separately impact on the human rights of pregnant women.

UNCRC obligations are relevant to restrictions on promotion and advertising of tobacco on packaging in multiple ways. Numerous methods are used by tobacco companies to engage children and young people in smoking.[47] Tactics include paying retailers near schools to use marketing materials and displays that attract young customers, distributing merchandising with tobacco company logos to children and exploiting loopholes in advertising bans that permit use of digital and social media platforms.[48] Concerns about tobacco advertising and children engage *UNCRC* obligations for states to protect rights to information, health and an adequate standard of living.[49] Particular problems exist where there is limited regulation of tobacco in the developing world.[50] Cabrera and Gostin note that 'smoking prevalence and the burden of tobacco-related diseases affect the poorest people in the world'.[51] Poverty is an underlying social determinant of health[52] that can increase through tobacco consumption.[53] The WHO has recognised the way in which tobacco addiction can entrench poverty, as it requires valuable family resources that could be used to support an adequate standard of living.[54]

Parties to the *UNCRC* are obliged to protect the rights of children to 'the enjoyment of the highest attainable standard of health'[55] and to the right to life.[56]

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45 See Gispen and Toebes (n 12) 352–3.

46 Ibid 353.

47 Carolyn Dresler and Stephen Marks, 'The Emerging Human Right to Tobacco Control' (2006) 28(3) *Human Rights Quarterly* 599, 620–2.

48 World Health Organization, 'Tobacco: Industry Tactics to Attract Younger Generations' (Web Page, 25 March 2020) <https://www.who.int/news-room/q-a-detail/tobacco-related-industry-tactics-to-attract-generations>.

49 Dresler and Marks (n 47) 618–25. See also Benjamin Mason Meier, 'Breathing Life into the *Framework Convention on Tobacco Control*: Smoking Cessation and the Right to Health' 2005 5(1) *Yale Journal of Health Policy, Law, and Ethics* 137.

50 Dresler and Marks (n 47) 604.

51 Oscar A Cabrera and Lawrence O Gostin, 'Human Rights and the *Framework Convention on Tobacco Control*: Mutually Reinforcing Systems' (2011) 7(3) *International Journal of Law in Context* 285, 285–6.

52 Audrey R Chapman, *Global Health, Human Rights and the Challenge of Neoliberal Policies* (Cambridge University Press, 2016) 264–7.

53 Oscar A Cabrera and Juan Carballo, 'Tobacco Control in Latin America' in Andrew D Mitchell and Tania Voon (eds), *The Global Tobacco Epidemic and the Law* (Edward Elgar, 2014) 235, 236.

54 Dresler and Marks (n 47) 618–25; World Health Organization, *Tobacco Increases the Poverty of Individuals and Families* (Fact Sheet, 2004) archived at <https://web.archive.org/web/20180128030935/http://www.who.int/tobacco/communications/events/wntd/2004/en/factsindividuals_en.pdf>; *Tobacco and Poverty: A Vicious Cycle*, WHO Doc WHO/NMH/TFI/04.01 (2004) archived at <https://web.archive.org/web/20201222191236/https://www.who.int/tobacco/communications/events/wntd/2004/en/wntd2004_brochure_en.pdf>.

55 *UNCRC* (n 4) art 24.

56 Ibid art 6.

Parties must also ensure that the child has 'access to information and material from a diversity of national and international sources, especially those aimed at the promotion of his or her social, spiritual and moral well-being and physical and mental health'.[57] Article 3 provides that for 'all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration'. Tobacco consumption impacts the rights of children protected by the *UNCRC* in a number of ways.[58] This includes direct and indirect consumption of tobacco and the health impacts of this,[59] misleading tobacco advertising,[60] and the involvement of child workers in tobacco production.[61] Obligations found within the *UNCRC* to protect health overlap with protection for the human right to the highest attainable standard of health found in the *ICESCR*. In *General Comment 14,* the Committee on Economic, Social and Cultural Rights provides that it is incumbent on capable state parties to the *ICESCR* to assist in providing economic and technical assistance and cooperation to other state parties in order to assist them to fulfil their core obligations.[62] Relevant state obligations that are engaged by plain packaging legislation include implementation of national health strategies,[63] ensuring child health care,[64] and prevention, treatment and control of diseases.[65]

Human rights concerns engaged by tobacco consumption apply to children across a wide range of ages. In *General Comment 15*, the Committee on the Rights of the Child ('Children's Rights Committee') expressed concern about tobacco use among adolescents.[66] It specifically recommended that states become parties to the *FCTC* and emphasised the necessity of adopting a rights-based approach to the use of harmful substances that employs harm reduction strategies where appropriate.[67] It recognised state obligations to protect children from tobacco and regulate the advertising and sale of substances harmful to children's health.[68] Children should receive information and life skills education about the dangers of tobacco use.[69] It also provided that 'private companies should … refrain from the advertisement, marketing and sale to children of tobacco'.[70]

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57 Ibid art 17.

58 Reubi describes the limited success of attempts to frame tobacco control as a children's human rights issue in international organisations: David Reubi, 'Making a Human Right to Tobacco Control: Expert and Advocacy Networks, Framing and the Right to Health' (2012) 7(Suppl 2) *Global Public Health* S176, S187–8 n 1–2. See also Toebes et al (n 25).

59 *UNCRC* (n 4) art 24; Dresler and Marks (n 47) 618.

60 Dresler and Marks (n 47) 618–22.

61 Ibid 622–5.

62 *CESCR General Comment 14*, UN Doc E/C.12/2000/4 (n 24) [45].

63 Ibid [43].

64 Ibid [44].

65 Ibid.

66 *CRC General Comment 15*, UN Doc CRC/C/GC/15 (n 27) [38].

67 Ibid [66]. See also at [44].

68 Ibid [65].

69 Ibid [59].

70 Ibid [81].

Article 17 of the *UNCRC* requires parties to develop guidelines to protect children from harmful information as well as support the positive role that the mass media can play in the dissemination of diverse material to children. The Children's Rights Committee guides parties in interpreting how article 17 protects children's rights of access to diverse information regarding health in its general comments. *General Comment 4* interprets this obligation to protect adolescents from information that is harmful to their health and development.[71] In *General Comment 20*, the committee further requires parties to provide adolescents 'with accurate and objective information based on scientific evidence aimed at preventing and minimizing harm from substance use'.[72] Adolescents are not only more likely to initiate drug use, they are also at 'a higher risk of drug-related harm than adults'.[73] The Children's Rights Committee recommends that 'States parties should ensure adolescents' right to health in relation to the use of … tobacco … and put in place prevention, harm-reduction and dependence treatment services, without discrimination and with sufficient budgetary allocation'.[74] Parties can use all of these elements to support tobacco control measures. In circumstances where those measures restrict the use of trade marks, specific human rights issues relevant to children are likely to arise as a result of their responses to advertising. Increasingly, trade marks have been recognised as an important part of branding and, consequently, advertising.[75] Children may be particularly vulnerable to misleading or harmful advertising.[76] The inclusion of article 17 in the *UNCRC* recognises this.[77] Article 17 has no normative equivalent in other human rights instruments. Consequently, where this provision is relevant to tobacco control measures, it is particularly important that parties recognise and assert their obligations pursuant to the *UNCRC*.

Article 3 of the *UNCRC* provides that the best interests of the child shall be a primary consideration in all actions concerning children. Eekelaar and Tobin argue that, in combination with article 12 protection for the rights of children to express their views, article 3 'requires the adult world to continually re-appraise its activities by reflecting on how they might be felt by children, and, because it is a human right, to do so with respect to all the world's children'.[78] The weight

71 *CRC General Comment 4*, UN Doc CRC/GC/2003/4 (n 24) [25]–[26].

72 *CRC General Comment 20*, UN Doc CRC/C/GC/20 (n 44) [64].

73 Ibid.

74 Ibid.

75 Jennifer Davis, 'The Value of Trade Marks: Economic Assets and Cultural Icons' in Ysolde Gendreau (ed), *Propriété Intellectuelle: Entre L'Art et L'Argent* [*Intellectual Property: Bridging Aesthetics and Economics*] (Editions Themis, 2006) 97.

76 This has been recognised by the Children's Rights Committee. See, eg, Committee on the Rights of the Child, *Consideration of Reports Submitted by States Parties under Article 44 of the Convention: Concluding Observations, Italy*, 58th sess, 1668th mtg, UN Doc CRC/C/ITA/CO/3-4 (31 October 2011) [32]. See also John Tobin and Elizabeth Handsley, 'Article 17 the Mass Media and Children: Diversity of Sources, Quality of Content and Protection against Harm' in John Tobin (ed), *The UN Convention on the Rights of the Child: A Commentary* (Oxford University Press, 2019) 600, 639.

77 Tobin and Handsley (n 76) 604, 602.

78 John Eekelaar and John Tobin, 'Article 3 the Best Interests of the Child' in John Tobin (ed), *The UN Convention on the Rights of the Child: A Commentary* (Oxford University Press, 2019) 73, 106.

given to the principle of the best interests of the child by decision makers may vary, depending on whether the decision affects children directly or indirectly.[79] This makes it important to consider the direct impact on children of activities that involve tobacco promotion and lead to tobacco consumption. As noted, tobacco consumption negatively impacts children in multiple ways including posing serious risks to their health as either smokers or second-hand smokers, as well as financial consequences associated with the high cost of tobacco on their families.[80] Sormunen and Karjalainen argue that the obligation to consider the best interests of children as a primary consideration applies whether children are directly or indirectly concerned by measures.[81]

State parties to the *UNCRC* may adopt different approaches to tobacco control depending on the age of the child. There is a balance between a protective approach and an empowerment approach and the balance can change, given the age of the child and the role of parents in supporting the evolving capacities of children.[82] States should also consider how their obligations can be implemented to enhance children's health capabilities so that they can realise the 'health goals they value and act as agents of their own health'.[83] So that children are not 'passive subjects of protection', they should be encouraged to participate in the development of tobacco control measures and consulted in the legislative development process.[84] Children are particularly important stakeholders to acknowledge as they are considered to be 'replacement smokers' by the tobacco industry and the negative health impacts of tobacco consumption increase depending on the length of consumption.[85]

Explicit recognition of the link between *UNCRC* obligations and tobacco plain packaging can reinforce the recognition by the Children's Rights Committee that state parties have a legal obligation to protect children from the harmful impacts of tobacco.[86] Although the *FCTC* is not a human rights agreement,[87] the *FCTC*

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79 Ibid 79.

80 This engages the right to life, survival and development and the right to an adequate standard of living: *UNCRC* (n 4) arts 6, 27.

81 Milka Sormunen and Sakari Karjalainen, 'The Tobacco Endgame: Experiences from Finland' in Marie Elske Gispen and Brigit Toebes (eds), *Human Rights and Tobacco Control* (Edward Elgar, 2020) 223, 230.

82 Gispen and Toebes (n 12) 346.

83 Ibid 345, quoting Jennifer Prah Ruger, 'Health Capability: Conceptualization and Operationalization' (2010) 100(1) *American Journal of Public Health* 41, 42.

84 Gispen and Toebes (n 12) 346. This is consistent with children's right to participation: *UNCRC* (n 4) art 12.

85 Toebes et al identify plain packaging as one of a range of approaches that governments can use to 'minimise tobacco use and exposure in children's living environments': Toebes et al (n 25) 4. Gispen and Toebes argue that human rights obligations linking children and tobacco are under-recognised and set out the basis in international law for states to be obliged to regulate the impacts on children of consumption of tobacco products, tobacco farming and exposure to second hand smoke: Gispen and Toebes (n 12). See also Pamela M Ling and Stanton A Glantz, 'Why and How the Tobacco Industry Sells Cigarettes to Young Adults: Evidence from Industry Documents' (2002) 92(6) *American Journal of Public Health* 908; Richard Doll et al, 'Mortality in Relation to Smoking: 50 Years' Observations on Male British Doctors' (2004) 328 *British Medical Journal* 1519:1–9.

86 *CRC General Comment 4*, UN Doc CRC/GC/2003/4 (n 24) [25]–[26].

87 Allyn Taylor and Alisha McCarthy, 'Human Rights in the Origins of the *FCTC*' in Marie Elkse Gispen and Briget Toebes (eds), *Human Rights and Tobacco Control* (Edward Elgar, 2020) 158, 159.

preamble recalls the human right to the highest attainable standard of physical and mental health enshrined in article 12 of the *ICESCR*. It also recognises the significance of tobacco control for the protection of the right to health of children, enshrined in the *UNCRC*. The governing body of the *FCTC*, the Conference of Parties ('COP'), has subsequently recognised the significant impact of tobacco on children, but there has been little specific formal output about this to guide parties.[88] At the *FCTC* COP held in 2016 ('COP7'), the link between human rights and tobacco control measures was emphasised but reporting did not explicitly recognise the link between tobacco consumption and children's human rights.[89] In the COP meeting in 2018 ('COP8'), the European Union 'expressed a firm desire to include a reference to the rights of the child given that children were vulnerable to the tobacco industry through the employment of child labour and their exposure to second-hand smoke and to advertising'.[90] Participants debated reaching a decision on the '[c]ontribution of the WHO *FCTC* to the promotion and fulfilment of human rights' but the matter was not resolved as some parties required further deliberation over the decision text favoured by the majority of parties urging parties 'to consider including *FCTC* implementation efforts when engaging with UN human rights mechanisms'.[91] This matter will be addressed further in the Tenth Session of the COP ('COP10').[92]

States should be encouraged to adopt a rights-based framework for addressing tobacco control issues that affect children.[93] Child rights-based approaches can strengthen the implementation of plain packaging and be used to develop effective mechanisms for tobacco control in the future.[94] The following section will explore the way that decisions of the WTO Dispute Settlement Bodies failed to explicitly consider the human rights of children. Nonetheless, as the protection of children is an important part of plain packaging policy, children's human rights can provide a separate and important justification for the introduction of plain packaging. This article proposes an approach for states to use their *UNCRC* obligations to develop their tobacco plain packaging measures and strengthen their defence of tobacco plain packaging legislation, if it is contested.

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88 Toebes et al (n 25) 4.

89 Ibid 3.

90 Conference of the Parties to the World Health Organization Framework Convention on Tobacco Control, *Report of the Eighth Session of the Conference of the Parties to the WHO Framework Convention on Tobacco Control* (Report, October 2018) [110] ('*COP8 Report*').

91 Ibid [111].

92 Ibid [112]. Conference of the Parties to the World Health Organization Framework Convention on Tobacco Control, *Provisional Agenda Annotated*, 9th sess, Provisional Agenda Item 1.1, WHO Doc FCTC/COP/9/1 (14 July 2021) 1.

93 See also explanation of the benefits of a rights-based framework for addressing childhood obesity in David Patterson et al, 'Identifying a Human Rights-Based Approach to Obesity for States and Civil Society' (2019) 20(Suppl 2) *Obesity Reviews* 45, 47–52.

94 Short-term monitoring has occurred: Tasneem Chipty, *Study of the Impact of the Tobacco Plain Packaging Measure on Smoking Prevalence in Australia* (Report, 24 January 2016) 2 ('*Post-Implementation Review*').

III AUSTRALIAN TOBACCO PLAIN PACKAGING AND ARTICLE 20 OF *TRIPS*

Australia's plain packaging legislation provides a model for other states who wish to adopt a comprehensive approach to reduce tobacco consumption. Tobacco advertising is extensively restricted in Australia. Australia's arguments in the WTO plain packaging disputes highlighted that plain packaging is part of a comprehensive approach to banning tobacco advertising.[95] The *Tobacco Plain Packaging Act 2011* (Cth), the *Trade Marks (Plain Packaging) Act 2011* (Cth) and supporting regulations introduced broad requirements for the packaging of tobacco-related products.

A Why Did Australia Introduce Plain Packaging Legislation?

The *Tobacco Plain Packaging Act 2011* (Cth) articulates the primary policy concerns of plain packaging legislation as the protection of public health and the implementation of the *FCTC*.[96] The public health objectives of plain packaging legislation focus on discouraging people from taking up smoking or returning to smoking after quitting, encouraging people to stop using tobacco products, and reducing people's exposure to smoke from tobacco products.

The key health claims of plain packaging legislation are that it will:

- reduce the attractiveness and appeal of tobacco products to consumers, particularly young people;
- increase the noticeability and effectiveness of mandated health warnings;
- reduce the ability of the tobacco product and its packaging to mislead consumers about the harms of smoking; and
- through the achievement of these aims in the long term, as part of a comprehensive suite of tobacco control measures, contribute to efforts to reduce smoking rates.[97]

There are multiple mechanisms for achieving this using plain packaging. Plain packaging legislation restricts advertising. The way that trade marks can be used is restricted to their traditional function of indicating source of origin and associated quality.[98] The restrictions permit only use of word marks in prescribed size, font and colour in a designated position on the packet.[99] Graphics or device marks cannot be used.[100] Graphic health warnings must cover a significant percentage of tobacco packaging.[101]

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95 *Integrated Executive Summary of the Arguments of Australia*, WTO Docs WT/DS435/R/Add.1, WT/DS441/R/Add.1, WT/DS458/R/Add.1 and WT/DS467/R/Add.1 (n 18) B-96.

96 *Tobacco Plain Packaging Act 2011* (Cth) s 3.

97 Explanatory Memorandum, Tobacco Plain Packaging Bill 2011 (Cth) 1. See also *Post-Implementation Review* (n 94) 1.

98 *Tobacco Plain Packaging Regulations 2011* (Cth) div 2.3.

99 Ibid div 2.4; *Tobacco Plain Packaging Act 2011* (Cth) ss 20–1.

100 *Tobacco Plain Packaging Act 2011* (Cth) ss 20–1.

101 *Competition and Consumer (Tobacco) Information Standard 2011* (Cth) pt 2.

Plain packaging legislation corresponds to guidelines developed to interpret article 11 of the *FCTC*.[102] The *FCTC* is an evidenced-based treaty that explicitly links tobacco control to children's rights in its preamble.[103] Plain packaging is relevant to the *FCTC*'s overall objective of regulation of tobacco consumption. Articles 5, 11 and 13 of the *FCTC* are especially relevant to plain packaging and guidelines adopted by the COP for articles 11 and 13 specifically recommend the introduction of plain packaging.[104] Article 11 of the *FCTC* requires parties to the treaty to adopt and implement effective packaging and labelling measures within three years of becoming a party, including measures requiring minimum sizing of graphic warnings about the negative health impacts of tobacco on tobacco packaging. The COP adopted the Guidelines to Article 11 in November 2008.[105] Part of the Guidelines recommends that parties adopt plain packaging measures.[106] '[I]ntended to assist Parties in meeting their obligations under Article 11 of the Convention, and to propose measures that Parties can use to increase the effectiveness of their packaging and labelling measures',[107] they were developed through a process of negotiation and consensus.[108] The Guidelines consider young people in relation to the effectiveness of large picture warnings in communicating the health effects of tobacco[109] and as a sub-group that should be targeted in the design of warnings.[110]

Tobacco companies and tobacco-producing member states of the WTO contested legislation in disputes in the Australian High Court,[111] in an investor-state dispute,[112] and in the WTO. The analysis in this part focuses on the claims in the WTO dispute that the legislation unjustifiably posed special requirements on the use of trade marks in the course of trade, in breach of article 20 of *TRIPS*. Children's human rights could have been relevant to these arguments, but the WTO Panel did not address them. However, the recognition of the relevance of another non-WTO agreement in the decision, the *FCTC*, demonstrates a potential role for children's human rights in future *TRIPS* disputes. A key justification for the tobacco plain packaging measures defended by Australia was compliance

102 *Guidelines*, WHO Doc FCTC/COP3(10) (n 19).

103 *FCTC* (n 13) 1–3. The preamble specifically notes deep concern 'about the escalation in smoking and other forms of tobacco consumption by children and adolescents worldwide, particularly smoking at increasingly early ages': at 1.

104 The Explanatory Memorandum provides that 'Clause 3 is not intended to be an exhaustive list of ways in which public health may be improved or Australia's obligations under the WHO *FCTC* may be met': Explanatory Memorandum, Tobacco Plain Packaging Bill 2011 (Cth) 7.

105 *Guidelines*, WHO Doc FCTC/COP3(10) (n 19). See further information about implementation of these guidelines amongst members in *Tobacco Plain Packaging: Global Status Update*, WHO Doc WHO/NMH/PND/NAC/18.9 (3 October 2018).

106 *Guidelines*, WHO Doc FCTC/COP3(10) (n 19) [46].

107 World Health Organization Framework Convention on Tobacco Control, Conference of the Parties, *Decisions and Ancillary Documents*, 3rd sess, WHO Doc FCTC/COP/3/REC/1 (2009) 17–18.

108 Ibid 17; Chang-fa Lo, 'Guidelines and Protocols under the Framework Convention' in Andrew D Mitchell and Tania Voon (eds), *The Global Tobacco Epidemic and the Law* (Edward Elgar, 2014) 32, 41.

109 *Guidelines*, WHO Doc FCTC/COP3(10) (n 19) [7].

110 Ibid.

111 *JT International SA v Commonwealth* (2012) 250 CLR 1. The claim was unsuccessful.

112 *Philip Morris Asia Ltd v Australia* (*Award on Jurisdiction and Admissibility*) (Permanent Court of Arbitration, Case No 2012-12, 17 December 2015). The claim was dismissed as an abuse of process.

with its obligations with the *FCTC*.[113] The WTO Panel recognised these *FCTC* obligations as further support for Australia's public health objective in introducing plain packaging, suggesting that other non-WTO agreements with widespread ratification such as the *UNCRC* might be relevant to the adjudication of future WTO disputes interpreting *TRIPS*.

B What Were the WTO Complaints about?

In the WTO Panel proceedings, Australia successfully defended the extensive claims brought against its tobacco plain packaging legislation by four complainants: Indonesia, Honduras, the Dominican Republic and Cuba. As part of the WTO dispute settlement process, the claimants unsuccessfully alleged breaches of the *Agreement on Technical Barriers to Trade* ('*TBT*') and *TRIPS*.[114] Honduras and the Dominican Republic unsuccessfully appealed the decision of the WTO Panel to the WTO Appellate Body.[115] The dispute provides insight into the way that states may assert intellectual property rights in international trade law without recognition of the impact of those rights on children's human rights. Tobacco companies may influence this behaviour by providing states with funding for litigation that challenges tobacco control measures in jurisdictions where they lack standing to initiate the dispute.[116]

The dispute involved extensive assessment of Australia's justification for adopting plain packaging measures. The claimants argued that plain packaging measures constituted a barrier to trade and were inconsistent with obligations to prevent technical regulations that cause unnecessary obstacles to international trade.[117] Article 2.2 provides that 'technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking into account the risks non-fulfilment would create'. Legitimate interests include 'protection of human health or safety'.[118] As part of the *TBT* claims, the WTO Panel considered whether the *FCTC* formed an international standard that constituted a rebuttable presumption in the article 2.2 claims that plain packaging legislation implemented technical regulations that present an unnecessary obstacle to trade.[119] Although a rebuttable presumption was not established, the WTO Panel emphasised that the obligations found in the *FCTC* were still relevant as support to Australia's successful defence to the *TBT* claims.[120] The WTO Panel's finding that Australia's plain packaging measures did not breach the *TBT* was upheld on appeal.[121]

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113 *Panel Report*, WTO Docs WT/DS435/R, WT/DS441/R, WT/DS458/R and WT/DS467/R (n 3) [7.2589].
114 Ibid [1.1]–[1.8], [1.51]–[1.54].
115 *Appeal Report*, WTO Docs WT/DS435/R and WT/DS441/R (n 2) [7.6], [7.10], [7.13].
116 Stephanie Nebehay, 'Australia Says Big Tobacco Aiding WTO Challengers', *Reuters* (online, 23 May 2012) <http://www.reuters.com/article/trade-tobacco-idUSL5E8GMHBW20120522>.
117 *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1A ('*Agreement on Technical Barriers to Trade*') art 2.2.
118 Ibid.
119 *Panel Report*, WTO Docs WT/DS435/R, WT/DS441/R, WT/DS458/R and WT/DS467/R (n 3) [7.404].
120 Ibid.
121 *Appeal Report*, WTO Docs WT/DS435/R and WT/DS441/R (n 2) [7.6].

The claimants asserted multiple breaches of *TRIPS* obligations by Australia, arguing that plain packaging measures posed restrictions on protected intellectual property rights.[122] Australia's international obligations pursuant to the *FCTC* provided relevant support for Australia's objective of protecting public health and life that justified the encumbrances that the WTO Panel found resulted from plain packaging requirements.[123] Article 20 provides that the use of a trade mark in the course of trade shall not be unjustifiably encumbered by special requirements. The finding that Australia's plain packaging legislation did constitute special requirements that significantly encumbered the use of trade marks by owners in the course of trade was not appealed.[124] However, the Appellate Body agreed with the WTO Panel that restrictions on the rights of owners can be justified by societal interests, including the protection of public health, that sufficiently support the restrictions.[125]

C How Did Australia Justify Plain Packaging Measures in the WTO Dispute?

In defence of the article 20 claims, Australia relied on evidence establishing that 'the tobacco plain packaging measure, and any encumbrance it imposes, is capable of contributing to its public health objectives' to support the measures.[126] Tobacco plain packaging aims to prevent children from initiating tobacco consumption; this objective was important to Australia's justification arguments but not framed with reference to human rights.[127] Plain packaging was expected to have its greatest impact in the long term 'due to the time required for the cohort of children who have never been exposed to fully-branded tobacco packaging to reach adolescence … and the nature of tobacco addiction'.[128] Even if the measure worked as intended in the short term, it would be difficult to use data to establish this.[129] Nonetheless, post-implementation qualitative evidence indicated that 'plain packaging changes have made a statistically significant contribution to reductions in smoking prevalence and tobacco consumption'.[130] As long-term data to support the implementation of plain packaging is not yet available, it is not surprising that Australia also relied on 'an extensive body of supporting scientific evidence, and the explicit recommendation of the *FCTC* Guidelines to adopt tobacco plain packaging as a means of implementing Parties' obligations under the *FCTC*' to justify plain packaging measures.[131]

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122 *Panel Report*, WTO Docs WT/DS435/R, WT/DS441/R, WT/DS458/R and WT/DS467/R (n 3) [1.1]–[1.8].
123 Ibid [7.2589].
124 Ibid [7.2292].
125 *Appeal Report*, WTO Docs WT/DS435/R and WT/DS441/R (n 2) [6.719].
126 *Integrated Executive Summary of the Arguments of Australia*, WTO Docs WT/DS435/R/Add.1, WT/DS441/R/Add.1, WT/DS458/R/Add.1 and WT/DS467/R/Add.1 (n 18) B-117 (emphasis omitted).
127 Ibid B-100.
128 Ibid B-106.
129 Ibid B-107.
130 Ibid B-107–8.
131 Ibid B-97.

The objectives of tobacco plain packaging legislation are consistent with the human rights of children, yet the voices of children have been very quiet in disputes about Australia's plain packaging measures. Australia did not rely on its *UNCRC* obligations in the dispute. The arguments used by Australia to justify the measures reflected its approach to legislative development. In developing the legislation, government officials undertook widespread consultation and relied on extensive scientific evidence.[132] This was contemporaneous with Australia's participation in the development of Guidelines to *FCTC* article 11 by the COP.[133] Prior to this, the National Interest Analysis for the *FCTC* foreshadowed that these obligations might result in future legislative changes in relation to packaging.[134] Explanatory material supporting the introduction of the legislation identified extensive public health justifications and Australia's obligation to meet its *FCTC* obligations.[135] The objects clause of the legislation referenced these objectives explicitly. Plain packaging legislation entered Parliament before human rights scrutiny requirements operated.[136] Later legislation recognised that plain packaging measures support the right to health found in the *ICESCR* but did not explicitly consider the rights of children.[137] Although the WTO proceedings indicate that some consultation with children regarding plain packaging legislation occurred,[138] it is not clearly demonstrated in explanatory materials that this was a primary consideration of the government.

D Decision on Justification for Tobacco Plain Packaging

The Appellate Body did not disturb the approach adopted by the WTO Panel in interpretation of article 20.[139] The WTO Panel determined that

> Article 20 reflects the balance intended by the drafters of the *TRIPS* Agreement between the existence of a legitimate interest of trademark owners in using their trademarks in the marketplace, and the right of WTO Members to adopt measures for the protection of certain societal interests that may adversely affect such use.[140]

Significantly, the panel used the object and purpose provision found in articles 7 and 8 to interpret flexibilities available for *TRIPS* member states as a result of the inclusion of open-ended terms like 'unjustifiably' in article 20.[141] In assessing

132 See, eg, *Technical Report* (n 15) 20.
133 *Guidelines*, WHO Doc FCTC/COP3(10) (n 19).
134 Department of Health and Ageing (Cth), 'World Health Organization Framework Convention on Tobacco Control' (National Interest Analysis [2004] ATNIA 7, 30 March 2004) [15].
135 See, eg, Explanatory Memorandum, Tobacco Plain Packaging Bill 2011 (Cth).
136 *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth).
137 Explanatory Statement, Tobacco Plain Packaging Amendment Regulation 2012 (No 1) (Cth). It was not mandatory to consider the human rights compatibility of the original legislation and regulations as parliamentary scrutiny had not been implemented: *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth).
138 *Panel Report*, WTO Docs WT/DS435/R, WT/DS441/R, WT/DS458/R and WT/DS467/R (n 3) [1.95]–[1.100].
139 *Appeal Report*, WTO Docs WT/DS435/R and WT/DS441/R (n 2) [6.660].
140 *Panel Report*, WTO Docs WT/DS435/R, WT/DS441/R, WT/DS458/R and WT/DS467/R (n 3) [7.2429].
141 See Antony Taubman, 'Australia's Interests under *TRIPS* Dispute Settlement: Trade Negotiations by Other Means, Multilateral Defence of Domestic Policy Choice, or Safeguarding Market Access?' (2008)

whether an encumbrance is justified, weighing and balancing of the interests of rights holders and other interests that are important to member states should occur on a case by case basis.[142] The WTO Panel determined that three questions are relevant to the assessment:

a. The nature and extent of the encumbrance resulting from the special requirements, bearing in mind the legitimate interest of the trade mark owner in using its trade mark in the course of trade and thereby allowing the trade mark to fulfil its intended function;

b. The reasons for which the special requirements are applied, including any societal interests they are intended to safeguard; and

c. Whether these reasons provide sufficient support for the resulting encumbrance.[143]

Australia's objective in applying the special requirements was found to be the improvement of public health through reducing the use of and exposure to tobacco products.[144] Public health has been recognised and affirmed as a type of societal interest that may provide a basis for justification of special requirements in article 8.1. The *Declaration on the TRIPS Agreement and Public Health*[145] reaffirms the legitimacy of public health as relevant to the development of intellectual property policies domestically and guides interpretation of article 20 in light of articles 7 and 8.[146] The WTO Panel further noted the comprehensive range of tobacco controls already implemented in Australia as well as Australia's intention of giving effect to certain obligations under the *FCTC* through the adoption of the plain packaging measures.[147] In considering this justification, the WTO Panel noted Australia's explanations of how the plain packaging measures reflect the *FCTC* Guidelines[148] and recognised the additional support given to the public health justification as implementation of Australia's *FCTC* commitments, noting that the agreement supported multilateral public health policies and was widely ratified.[149] Although reliance on the *FCTC* was contested on appeal, the Appellate Body found that it was relevant to recognise this as further evidentiary support.[150] This suggests that where societal interests are relevant to justifications for restricting owner rights,

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9(1) *Melbourne Journal of International Law* 217, 234; Molly Land, 'Rebalancing *TRIPS*' (2012) 33(3) *Michigan Journal of International Law* 433, 468; Susy Frankel and Daniel Gervais, 'Plain Packaging and the Interpretation of the *TRIPS* Agreement' (2013) 46(5) *Vanderbilt Journal of Transnational Law* 1149.

142 *Panel Report*, WTO Docs WT/DS435/R, WT/DS441/R and WT/DS458/R, WT/DS467/R (n 3) [7.2431].

143 Ibid [7.2430]–[7.2431].

144 Ibid [7.2586].

145 *Declaration on the TRIPS Agreement and Public Health,* WTO Doc WT/MIN(01)/DEC/2 (20 November 2001, adopted 14 November 2001) (Ministerial Declaration).

146 Ibid [7.2588].

147 Ibid [7.2589].

148 Although it presented separate evidence of public health justifications for introducing plain packaging, Australia explicitly relied on its obligations under the *FCTC* as justification for plain packaging measures: ibid [7.2581].

149 Ibid [7.2604].

150 *Appeal Report*, WTO Docs WT/DS435/R and WT/DS441/R (n 2) [6.707].

non-WTO agreements can be relevant to adjudication of disputes about compliance with *TRIPS*.[151]

The WTO Panel did not reference children's human rights when assessing whether plain packaging measures were justified. The summary of arguments of all of the parties suggests that none of the complainants, Australia or the many third parties to the dispute emphasised any human rights obligations in their arguments to the panel.[152] *TRIPS* decisions have not previously recognised human rights obligations.[153] Although human rights institutions recognise the relationship between trade and investment, intellectual property and human rights, there have only been very limited references to human rights in the WTO Dispute Settlement mechanism or in investment arbitrations.[154] This suggests that there is fragmentation between the different fields, reflecting their separate institutional development.[155] However, the way that the WTO Panel recognised Australia's *FCTC* obligations as supporting its justification for introducing plain packaging legislation in adjudication of the article 20 dispute suggests a future role for human rights obligations, including children's rights obligations, in WTO disputes. In rejecting the claim by Honduras that undue legal weight had been given to the *FCTC* Guidelines for articles 11 and 13, the Appellate Body emphasised that the *FCTC* was used as factual support for Australia's defence against the article 20 claims. The *FCTC* is an evidence-based treaty. However, although the *FCTC* was not explicitly used as a tool to interpret the meaning of the relevant provisions of *TRIPS,* the type of factual support it provided for Australia's justification of its limitations on intellectual property rights is significant. As 'additional factual support' for 'emerging multilateral public health policies in the area of tobacco control as reflected in the FCTC and the work under its auspices, including the Article 11 and Article 13 FCTC Guidelines', the status of the *FCTC* as a widely supported agreement influenced the Panel's assessment of whether the encumbrance Australia's plain packaging measures placed on the use of trade marks was sufficiently supported by societal interests.[156] In the future, widely supported human rights treaties, including the

151 Although the WTO Panel focused on this as an evidentiary matter, a separate interpretative argument can be made that human rights agreements were relevant to article 20, using *VCLT* (n 43) article 31: Wilkinson (n 11) 212–15.

152 *Panel Report*, WTO Docs WT/DS435/R, WT/DS441/R, WT/DS458/R and WT/DS467/R (n 3) [7.2294]–[7.2392].

153 Alfred de Zayas, *Report of the Independent Expert on the Promotion of a Democratic and Equitable International World Order*, UN GAOR, 33rd sess, Agenda Item 3, UN Doc A/HRC/33/40 (12 July 2016) 29, 34. Voon and Mitchell identify very limited references in other WTO decisions: Tania Voon and Andrew Mitchell, 'Community Interests and the Right to Health in Trade and Investment Law' in Eyal Benvenisti and Georg Nolte (eds), *Community Interests Across International Law* (Oxford University Press, 2018) 249, 258–61.

154 Voon and Mitchell (n 153) 258–61.

155 See International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, UN GAOR, 58th sess, UN Docs A/CN.4/L.682, Add.1 and Corr.1 (13 April 2006).

156 *Panel Report*, WTO Docs WT/DS435/R, WT/DS441/R, WT/DS458/R and WT/DS467/R (n 3) [7.2604], [7.416]; *Appeal Report*, WTO Docs WT/DS435/R and WT/DS441/R (n 2) [6.700]–[6.702]. See also arguments of Devillier and Gleason, considering the Panel Report and other WTO decisions including Panel Report, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, WTO Doc

almost universally-ratified *UNCRC,* could also be used as evidence of multilateral norms that are relevant to assessments of justification for encumbrances on the use of trade marks in the course of trade.

IV CONSIDERING CHILDREN'S RIGHTS IN THE DEVELOPMENT AND DEFENCE OF PACKAGING MEASURES: RECOMMENDATIONS FOR POLICY MAKERS

This section explores ways that plain packaging legislation can strengthen children's human rights. It uses the Panel and Appellate Body decisions in the WTO about Australia's plain packaging measures as a starting point to examine the way that children's human rights obligations are relevant to disputes about restrictions on intellectual property rights that result from standardised packaging requirements. It outlines features of a children's rights-based approach to tobacco control that could have further strengthened the consistency of Australia's measures with its *UNCRC* obligations. The resulting recommendations provide helpful lessons for other states seeking to introduce and defend plain packaging measures, as well as Australian policy makers dealing with regulation of other potentially harmful substances.

A How Could Children's Rights Have Been Used in Arguments about Plain Packaging?

Plain packaging legislation has been designed as a long-term measure to reduce tobacco consumption. In disputes about long-term legislative measures shortly following their introduction, it can be difficult for parties to obtain data to demonstrate that their effectiveness justifies implementation.[157] The Panel and Appellate Body decisions shows that overlapping international obligations can provide important additional evidence supporting a state's justifications for imposing particular measures.[158] A number of arguments made by Australia in the WTO dispute to justify tobacco plain packaging are relevant to specific children's human rights protected by the *UNCRC*. The WTO Panel recognised the specific relevance of plain packaging measures to smoking initiation amongst young persons who are susceptible to advertising and the likelihood that smokers commenced

WT/DS406/R (24 April 2012) that, although there has been no express adoption of the *FCTC* as a legal norm, 'the consistent and recurring use of these norms in WTO and ISDS disputes demonstrates de facto reliance on the normative content of the FCTC': Nathalie Devillier and Ted Gleason, 'Consistent and Recurring Use of External Legal Norms: Examining Normative Integration of the *FCTC* Post-*Australia – Tobacco Plain Packaging*' (2019) 53(4) *Journal of World Trade* 533, 534, 560.

157 *Integrated Executive Summary of the Arguments of Australia*, WTO Docs WT/DS435/R/Add.1, WT/DS/441/R/Add.1, WT/DS458/R/Add.1 and WT/DS467/R/Add.1 (n 18) B-106. See Cheryl Kirschner, 'Australia's Tobacco Plain Packaging Law: An Analysis of the *TRIPS* Article 20 Challenge at the WTO' (2019) 32(2) *Pace International Law Review* 247, 305–7.

158 *Panel Report*, WTO Docs WT/DS435/R, WT/DS441/R, WT/DS458/R and WT/DS467/R (n 3) [7.2604]; *Appeal Report*, WTO Docs WT/DS435/R and WT/DS441/R (n 2) [6.707].

tobacco consumption before the age of eighteen.[159] Australia argued that plain packaging measures focus on deterring initiation of smoking as the standardisation of packaging reduced young people's exposure to tobacco-related advertising and associated perceptions of the desirability of smoking.[160] The complainants strongly contested the role of tobacco packaging as a form of advertising for tobacco, although this argument appears inconsistent with the interests that they sought to have protected in their *TRIPS* article 20 claims.[161]

Multiple societal objectives can justify measures that restrict intellectual property rights. It is recommended that states who seek to restrict the interests of intellectual property owners should not only identify the societal objectives that justify these restrictions but consider the international obligations that support protection of these objectives. Article 7 identifies societal objectives that need to be balanced in interpretation of *TRIPS*,[162] including that 'protection and enforcement of intellectual property rights' be 'in a manner conducive to social and economic welfare'. This objective can be closely linked to respecting human rights,[163] and children's rights are human rights that are directly relevant to tobacco control measures. The justification for removing advertising opportunities that may influence children to smoke is supported by states' obligations to protect children's rights to health in *UNCRC* article 24, and obligations in relation to protection of the life, survival, and development of children in *UNCRC* article 6. Both smoking and second-hand smoke cause health and developmental harm to children of all ages.[164] In some countries, there is evidence of very young children smoking.[165] Infants and children are particularly vulnerable to the negative health impacts of tobacco-related harms.[166] In addition to this, there is specific recognition in the *UNCRC* of the relationship between information and health in *UNCRC* article 17. The Children's Rights Committee has interpreted this right to information as a requirement for states 'to regulate or prohibit information on and marketing of substances such as alcohol and tobacco, particularly when it targets children and adolescents'.[167] The specific links between tobacco consumption and articles 6 and 17 provide additional justification for states to comprehensively regulate tobacco.

If they addressed the significance of plain packaging measures for protection of children's rights, Australia's arguments on this point could have emphasised

159 *Panel Report*, WTO Docs WT/DS435/R, WT/DS441/R, WT/DS458/R and WT/DS467/R (n 3) [7.721]–[7.756].

160 Ibid [7.2475].

161 Tania Voon, 'Third Strike: The WTO Panel Reports Upholding Australia's Tobacco Plain Packaging Scheme' (2019) 20(1) *Journal of World Investment and Trade* 146; *Appeal Report*, WTO Docs WT/DS435/R and WT/DS441/R (n 2) [6.86].

162 *Panel Report*, WTO Docs WT/DS435/R, WT/DS441/R, WT/DS458/R and WT/DS467/R (n 3) [7.2402]–[7.2403].

163 Geiger and Desaunettes-Barbero (n 39) 45.

164 Gispen and Toebes (n 12) 355.

165 Ibid. There is evidence of widespread smoking by children in Indonesia: Anna Marie Wattie Sukamdi, 'Tobacco Use and Exposure among Children in Migrant and Non-migrant Households in Java, Indonesia' (2013) 22(3) *Asian and Pacific Migration Journal* 447.

166 Gispen and Toebes (n 12) 355–6.

167 *CRC General Comment 4*, UN Doc CRC/GC/2003/4 (n 24) [25].

that a key priority of plain packaging legislation is to 'reduce the attractiveness and appeal of tobacco products to … young people'.[168] This corresponds to Australia's obligations to protect the rights of children to 'the enjoyment of the highest attainable standard of health'[169] and to ensure that the child has 'access to information and material from a diversity of national and international sources, especially those aimed at the promotion of his or her social, spiritual and moral well-being and physical and mental health'.[170] In *General Comment 4*, the Children's Rights Committee interpreted this obligation to protect adolescents from information that is harmful to their health and development. States should 'regulate or prohibit information on and marketing of … tobacco, particularly when it targets children and adolescents'.[171] This obligation is directly relevant to the restrictions on marketing required by plain packaging legislation. Scientific evidence regarding adolescents and plain packaging supports these restrictions.[172]

As a party to the *UNCRC,* Australia is obliged to implement its provisions and ensure that plain packaging legislation is consistent with the obligations outlined above. The Children's Rights Committee has emphasised the importance of ratifying and implementing the *FCTC*.[173] However, Australia has not explicitly used these *UNCRC* obligations to support the introduction of the legislation.[174] Despite this, the objective of tobacco plain packaging to reduce the appeal of tobacco to young people suggests that these obligations are particularly relevant. The right to information considerations found in *UNCRC* article 17 are not found in the *FCTC*, nor in other human rights instruments, but they reflect the specific vulnerabilities of children to advertising that are important to assessments of tobacco plain packaging.[175] So that *UNCRC* obligations can be used to support societal interests that justify legislation restricting the rights of intellectual property owners, it is recommended that the issue should be explicitly considered in design of tobacco control measures, legislative development and ongoing monitoring of the effectiveness of the measures.

B Human Rights Mechanisms, Inter-Institutional Cooperation, Tobacco Control and Children's Rights

States should consider the assistance available from human rights bodies as they develop tobacco control measures that effectively promote children's human rights and defend those measures if they are contested. Australia may have benefited from explicitly considering the knowledge, expertise, and information available from bodies like the Children's Rights Committee to strengthen

168 Explanatory Memorandum, Tobacco Plain Packaging Bill 2011 (Cth) 1.
169 *UNCRC* (n 4) art 24.
170 Ibid art 17.
171 *CRC General Comment 4*, UN Doc CRC/GC/2003/4 (n 24) [25].
172 Toebes et al also identify packaging of cigarettes and misleading advertising on cigarettes as important issues for governments to address to protect children's rights: Toebes et al (n 25).
173 *CRC General Comment 15*, UN Doc CRC/C/GC/15 (n 27) [66], [44].
174 See, eg, Explanatory Memorandum, Tobacco Plain Packaging Bill 2011 (Cth).
175 Tobin and Handsley describe the provision as unique but note that this 'presents a significant challenge when one seeks to interpret its scope and content': Tobin and Handsley (n 76) 602.

legislative development and defend disputed tobacco control measures. Australia was supported by statements from the WHO in the WTO disputes endorsing their plain packaging measures.[176] As the Children's Rights Committee is comprised of experts in relation to children's human rights, a statement of support or *amicus curiae* brief from the committee could also be important. For other countries wishing to introduce packaging measures that have limited resources to defend their legislation against well-resourced corporate interests,[177] utilising the expertise of these bodies could be important to overcoming the chilling impact of threats of litigation on policy development that have historically deterred other states from introducing plain packaging measures.[178]

The role of the Children's Rights Committee can expand beyond the expert guidance provided in its General Comments on the importance of tobacco control measures to protect children's human rights. Specific guidance on measures such as plain packaging can be stressed by the Committee when it responds to regular reporting by parties.[179] This could be useful for states seeking to justify their adoption of those measures. Children should also be supported to participate in the individual complaints procedure to complain about tobacco control measures that are not consistent with their individual rights.[180] In 2019, children brought claims using the individual complaints procedure against Argentina, Brazil, France, Germany and Turkey for 'knowingly causing and perpetuating the climate change crisis', arguing that this breaches numerous children's rights including the right to health.[181] Children could bring analogous claims against parties to the third optional protocol to the *UNCRC* that do not regulate tobacco to protect children's rights. This mechanism provides a forum for children to advocate for their own rights and supports their empowerment and the Children's Rights Committee should continue to encourage state parties to adopt the protocol.

Another human rights mechanism that can play a role in advocating for the protection of children's rights using tobacco control measures is the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health ('Special Rapporteur'). In country visits and reports, the Special Rapporteur can strengthen awareness of the importance of implementing tobacco control measures, including ratifying the *FCTC*, where it is of relevant concern for realisation of the right to health in the visited party.

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176 *Panel Report*, WTO Docs WT/DS435/R, WT/DS441/R, WT/DS458/R and WT/DS467/R (n 3) [1.50].

177 See the resource limitations experienced by Uruguay in its defence of tobacco packaging measures against Philip Morris: Matthew Rimmer, 'The Chilling Effect: Investor-State Dispute Settlement, Graphic Health Warnings, The Plain Packaging of Tobacco Products, and the *Trans-Pacific Partnership*' (2017) 7(1) *Victoria University Law and Justice Journal* 76, 79–84.

178 Gruszczynski (n 7) 244; Tobin (n 5) 158–60; Crosbie (n 7) 284–9.

179 See discussion of the approach taken by the Committee on Economic, Social and Cultural Rights in Oscar A Cabrera and Alejandro Madrazo, 'Human Rights as a Tool for Tobacco Control in Latin America' (2010) 52(Suppl 2) *Salud Publica De Mexico* S288, S292–3.

180 Toebes et al (n 25) 4.

181 'Communication Submitted under Article 5 of the Third Optional Protocol to the United Nations *Convention on the Rights of the Child*', Communication to the Committee on the Rights of the Child in *Sacchi v Argentina*, 23 September 2019 <https://childrenvsclimatecrisis.org/wp-content/uploads/2019/09/2019.09.23-CRC-communication-Sacchi-et-al-v.-Argentina-et-al-2.pdf>.

In 2016, the Special Rapporteur identified particular concerns about tobacco consumption in their report on adolescents and the right to health to the Human Rights Council.[182] In 2020, the Special Rapporteur released a statement on the importance of information on providing front of label health warnings on food and beverages for compliance with the right to health.[183] A similar statement that supports tobacco control measures such as plain packaging could also be useful.

The assistance that human rights bodies can give could also be strengthened by inter-institutional engagement with the *FCTC* bodies. This could be strengthened if current proposals for promotion of the *FCTC* through human rights bodies are adopted in COP10 in 2021.[184] At the time of writing, all parties to the *FCTC* are also parties to the *UNCRC*, so engagement between these bodies could have great value and provide the Children Rights Committee with greater insights into the implementation of the *FCTC* amongst *UNCRC* parties.[185]

C States Should Recognise Umbrella Concepts in Children's Human Rights in Policy Design

Recognising the relevance of *UNCRC* obligations to tobacco control measures, states should address the complex nature of children's rights when designing and implementing tobacco plain packaging legislation. Tobacco plain packaging engages three umbrella concepts for children's human rights protection: health capability, evolving capacities and best interests of the child.[186] These concepts recognise the importance of child empowerment as well as child protection in tobacco control.[187] This includes giving children the opportunities to articulate their opinions regarding tobacco control. In tobacco control exercises it may be necessary to balance protection of younger children and more vulnerable children with empowerment of adolescents.[188]

States are required to conduct best interest assessments and determinations where measures engage the best interests of the child.[189] Australia may have implicitly considered the best interests of the child in developing plain packaging measures, but it has not characterised its activities in this way. Part of the consultation and implementation processes of plain packaging legislative development involved

182 Dainius Puras, *Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health*, 32nd sess, Agenda Item 3, UN Doc A/HRC/32/32 (4 April 2016).

183 Dainius Puras, 'Statement by the UN Special Rapporteur on the Right to Health on the Adoption of Front-of-Package Warning Labelling to Tackle NCDs' (News Release, United Nations Human Rights Office of the High Commissioner, 27 July 2020).

184 *COP8 Report* (n 90) [112].

185 See the distinction in COP8 between references to economic, social and cultural rights and references to children's rights, consistent with the less widespread ratification of *ICESCR* within *FCTC* parties: ibid [110].

186 Gispen and Toebes (n 12) 343.

187 Ibid 345.

188 Ibid.

189 Committee on the Rights of the Children, *General Comment No 14 (2013) on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (art 3, para 1)*, 62nd sess, UN Doc CRC/C/GC/14 (29 May 2013) [77]–[78]. See Sormunen and Karjalainen (n 81) 230.

surveying children.[190] The surveying of children is important because it permits children to be included in the decision-making processes associated with their health. Although some evidence already suggests support for plain packaging by children,[191] greater engagement with children in developing the measures would strengthen the realisation of the *UNCRC* obligations identified in this article as relevant to plain packaging. Legislators should consider the way in which children's human rights obligations can support societal interests that underpin future legislation that restricts intellectual property owners' rights. This can support systemic integration between intellectual property and human rights and reduce fragmentation between the fields.[192] A rights-based approach also means that states need to continue to monitor the effectiveness of plain packaging to ensure that measures are reducing the initiation of tobacco consumption and continued tobacco consumption in the expected timeframes.[193]

Considering children's human rights may strengthen the effectiveness of the legislation in building children's capacity to care for their own health needs. Importantly, Australia's expert reports assessing the effectiveness of plain packaging considered surveys of secondary-school aged children about plain packaging measures.[194] However, there was no evidence of explicit consultation with children of diverse ages in the development of the measures. Differences in age-appropriate tobacco control measures should also be considered by states wishing to reconcile their *UNCRC* obligations with *FCTC* obligations.[195]

D A Child Rights-Based Approach in Policy Development Can Strengthen *UNCRC* Compliance

The following section proposes a child rights-based approach that states can use in developing further plain packaging measures recognising the importance of children's participation and consultation with them, the role of educators and the importance of ongoing, meaningful engagement with children. This approach is recommended as it can strengthen the use of the *UNCRC* to justify those measures.

190 In the WTO Dispute, this raised issues regarding privacy, as the claimants sought access to this data: *Panel Report*, WTO Docs WT/DS435/R, WT/DS441/R, WT/DS458/R and WT/DS467/R (n 3) [1.95]–[1.100].

191 Gispen and Toebes (n 12) 371.

192 Henning Grosse Ruse-Khan, 'A Conflict-of-Laws Approach to Competing Rationalities in International Law: The Case of Plain Packaging between Intellectual Property, Trade, Investment and Health' (2013) 9(2) *Journal of Private International Law* 309, 331.

193 There are also complex questions about the value and effectiveness of legal interventions in relation to addiction and the way that human rights law engages with these concerns: Saul Takahashi, 'Drug Control, Human Rights, and the Right to the Highest Attainable Standard of Health: By No Means Straightforward Issues' (2009) 31(3) *Human Rights Quarterly* 748; Simon Flacks, 'Drug Control, Human Rights, and the Right to the Highest Attainable Standard of Health: A Reply to Saul Takahashi' (2011) 33(3) *Human Rights Quarterly* 856.

194 *Panel Report*, WTO Docs WT/DS435/R, WT/DS441/R, WT/DS458/R and WT/DS467/R (n 3) [7.839]–[7.842]. Cf Kirschner's arguments that effectiveness should not be the focus of justification enquires in the WTO: Kirschner (n 157) 307.

195 Gispen and Toebes (n 12) 373.

1 Participation and Consultation

A comprehensive child rights-based approach does not only implement states' obligations to protect children from injurious information and realise their rights to health and life.[196] It also realises children's rights to development and participation.[197] Participation is an important component of implementation of measures consistent with human rights principles of participation, accountability, non-discrimination, transparency, human dignity, empowerment and the rule of law.[198] To avoid 'merely viewing children as passive subjects of protection',[199] design of tobacco control measures such as labelling can give greater weight to the opinions and suggestions of children, recognising that the 'best interests' of the child is a primary consideration.

Labelling can be an important source of information that enables children and parents to take responsibility for the protection of children's rights.[200] Child rights-based approaches to researching labelling that focuses on meaningful consultation can include qualitative research that documents the words used by children.[201] This positions children as agents rather than subjects in research.[202] Children may have better suggestions about ways that they can be effectively educated about tobacco-related harm. The way that concerns about tobacco consumption is communicated to young children in cultures where adult tobacco consumption is prevalent could influence appropriate design. Children can provide insight into unintended consequences that may result from planned measures. Measures that make children feel ashamed of their parents or themselves may not be consistent with the emphasis on dignity found in human rights.[203] A consultative approach to design should also recognise that children will have differing evolving capacities. In some cases, this will relate to cultural or socio-economic background.[204] Evolving capacities also often depend on age.

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196 See John Tobin, 'Beyond the Supermarket Shelf: Using a Rights Based Approach to Address Children's Health Needs' (2006) 14(3) *International Journal of Children's Rights* 275.

197 Ibid 288–91. Peleg and Tobin recognise that adolescents' right to development is linked to their right to express their views, consistent with *UNCRC* art 12: Noam Peleg and John Tobin, 'Article 6 the Rights to Life, Survival and Development' in John Tobin (ed), *The UN Convention on the Rights of the Child: A Commentary* (Oxford University Press, 2019) 186, 234.

198 This PANTHER framework was developed in relation to implementation of the right to food: Food and Agriculture Organization of the United Nations, *The Right to Food: Making It Happen* (Report, 2013).

199 Gispen and Toebes (n 12) 346.

200 Handsley and Reeve consider the role of labelling in empowering children and parents to make informed decisions: Handsley and Reeve (n 30) 466.

201 See approach taken in Holly Doel-Mackaway, '"I Think It's Okay … but It's Racist, It's Bad Racism": Aboriginal Children and Young People's Views about the Intervention' (2017) 43(1) *Monash University Law Review* 76, 90–2.

202 Ibid 89.

203 Doel-Mackaway reports feelings of shame among Indigenous children in relation to measures taken in the Northern Territory Intervention as 'unanticipated negative implications': ibid 107–9.

204 Sormunen and Karjalainen argue that as tobacco use is more prevalent in different socio-economic groups in Finland, connection between non-discrimination and the right to health is engaged: Sormunen and Karjalainen (n 81) 232.

2 Education

Education provides further opportunities for engaging children in tobacco control measures while implementing obligations to provide children with access to information.[205] Education may prompt parental engagement on issues involving tobacco, health and information[206] and encourage adult cessation of smoking that reduces children's exposure to second-hand smoke. Educating children about scientific evidence of harm that results from tobacco consumption could be linked to national competitions, encouraging children to transform this knowledge into online formats accessible to children like memes or podcasts, depending on the age of the child.[207] WHO has already produced valuable resources to encourage children to understand the negative health impacts of tobacco consumption and to empower them to do something about those impacts, including a toolkit for adolescent school students that educates them about the tobacco industry tactics used to encourage addiction to their products.[208] This toolkit includes encouraging youth groups to engage with peers as part of a movement towards a tobacco-free generation.[209]

Education about relevant human rights instruments such as the UN Guiding Principles on Business and Human Rights and the *Children's Rights and Business Principles* can also facilitate advocacy by children that supports their own health interests. Child advocacy regarding environmental protection has not only encouraged children to reflect on the implications of current industry practices for the future and participate meaningfully in climate change debates, it has also stimulated engagement by adults.[210] With assistance from the non-government organisation Unfairtobacco, fifth and sixth grade students in Germany submitted posters, videos and a letter about the impact of smoking on children to the Children's Rights Committee.[211] Dresler et al describe 'exciting' opportunities for participation presented by students writing short reports about tobacco control in individual countries for the Human Rights and Tobacco Control Network that were reviewed by a senior author before being submitted to the Committee on Economic, Social and Cultural Rights.[212] As advocates, children may be encouraged to ask tobacco

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205 Gispen and Toebes identify adolescents receiving 'evidence-based impartial health-related information' as critical support for the evolving capacities of the child: Gispen and Toebes (n 12) 370.

206 See Handsley and Reeve (n 30) 460.

207 Makuch, Aczel and Zaman recommend emphasis be placed on technology to engage children in understanding their environmental rights so that they can participate meaningfully as stakeholders: Karen E Makuch, Miriam R Aczel and Sunya Zaman, 'Do Children Want Environmental Rights? Ask the Children!' (2020) 43(1) *Electronic Green Journal* 1–20.

208 See, eg, emphasis on empowerment of children in World Health Organization, *Workshop Toolkit*, 'Create-Your-Own World No Tobacco Day Workshop' (Web Page, May 2020) <https://www.who.int/campaigns/world-no-tobacco-day/world-no-tobacco-day-2020/workshop-toolkit>.

209 World Health Organization, *Call to Action* (Web Page, May 2020) <https://www.who.int/campaigns/world-no-tobacco-day/world-no-tobacco-day-2020/call-to-action>.

210 See Georgina Thompson and Helen Wylie, '16 Children, Including Greta Thunberg, File Landmark Complaint to the United Nations Committee on the Rights of the Child' (Media Release, UNICEF, 23 September 2019) <https://www.unicef.org/press-releases/16-children-including-greta-thunberg-file-landmark-complaint-united-nations>.

211 'Students Call on UN Committee: No Tobacco Anymore!' (Media Release, Unfairtobacco, 28 May 2020).

212 Carolyn Dresler et al, 'Assessment of Short Reports Using a Human Rights-Based Approach to Tobacco Control to the Committee on Economic, Cultural and Social Rights' (2018) 27(4) *Tobacco Control*

companies about the way that they protect the rights of children. Understanding both their rights to health and to be protected from injurious information may encourage children to ask tobacco companies about why they use different colours, flavours, or brands to market tobacco.

3 Meaningful, Ongoing Engagement

Explicitly involving children in future policy design for plain packaging of tobacco products is important to recognising children's rights to contribute to decision-making on matters affecting them.[213] In Australia, the involvement of children can be relevant to an ongoing assessment of the effectiveness of existing plain packaging measures and their implementation. These recommendations can also be important to other countries that are seeking to introduce tobacco plain packaging policies. A child rights-based approach recognises children's rights to contribute to decision-making and on matters affecting them.[214] The critical importance of engaging peers as 'the most effective influencers for older children and adolescents' has been recognised as valuable for all national campaigns to prevent future initiation of tobacco consumption.[215] This limits the likelihood that participation will be tokenistic and recognises the importance of children influencing decisions that affect them[216] as consistent with the important obligation for states to recognise the best interests of the child as a primary consideration.[217]

Engagement can also be important for packaging measures related to other products such as electronic cigarettes that are used in vaping. Internationally, a significant number of adolescents appear to be vaping instead of consuming tobacco.[218] The United States Food and Drug Administration has recently investigated marketing of e-cigarettes towards younger audiences by Juul, who markets e-cigarette flavours like Mango and Fruit and uses bright colours and younger models in advertising.[219] A major shareholder in Juul is Altria, formerly Philip Morris Companies.[220] There has been debate about the justifications for introducing Australian legislative measures to ban nicotine consumption through electronic cigarettes, often referred to as vaping.[221] Medical opinions about

385, 388. Shadow reports on the human rights implications of tobacco consumption have also been presented to the Children's Rights Committee: Agustina Mozzoni and Juan Carballo, 'We Present a Report on NCDs to the Committee on the Rights of the Child' (Media Release, fundeps, 17 April 2018). See also *A Guide to Tobacco-Related Shadow Reporting before United Nations Human Rights Bodies* (Report, O'Neill Institute for National and Global Health Law at Georgetown University and Fundación InterAmericana del Corazón–Argentina (FIC Argentina)).

213 Doel-Mackaway (n 201) 110.

214 Ibid.

215 Editorial, '#TobaccoExposed' (2020) 4(6) *The Lancet* 407.

216 Doel-Mackaway (n 201) 88.

217 *UNCRC* (n 4) art 3. See Handsley and Reeve (n 30) 457–8.

218 See Abi Rimmer and Gareth Iacobucci, 'Vaping: CDC Investigation Continues after Patient Dies from Severe Lung Injuries' (2019) 366 *British Medical Journal* l5320:1–2.

219 Yongcheng Zhan et al, 'Underage Juul Use Patterns: Content Analysis of Reddit Messages' (2019) 21(9) *Journal of Medical Internet Research* e13038:1–8.

220 Levy et al (n 9).

221 See Colin P Mendelsohn and Wayne Hall, 'Does the Gateway Theory Justify a Ban on Nicotine Vaping in Australia?' (2020) 78 *International Journal of Drug Policy* 1.

whether the overall health impact of vaping is negative vary, balancing competing considerations of its potential to cause lung damage, the extent to which it assists cessation of tobacco consumption, whether its negative impact on health is lesser than ordinary cigarettes and whether or not vaping poses a gateway to other forms of nicotine consumption, including cigarettes.[222] However, rather than focusing on the broader impact of the measure, states need to recognise that the 'best interests of the child' should be a primary consideration. Meaningful consultation with children on this issue may provide critical insight into how public health policy can appropriately recognise children's rights. Labelling measures that restrict the exercise of intellectual property rights may be an important component of resulting policies but the best approach to determining this should include asking the children themselves.

V CONSCIOUSLY PROTECTING CHILDREN'S RIGHTS ASSOCIATED WITH TOBACCO CONTROL

Disputes about Australia's plain packaging legislation have finally resolved but attempts to introduce plain packaging measures globally remain contested and could generate further disputes.[223] Recognition of children's human rights is important to future plain packaging measures. Rates of smoking among youths in emerging economies where plain packaging legislation is yet to be introduced remain extremely high.[224] Recognising children's human rights obligations can enable states to strengthen their justification for other policies that balance intellectual property rights against societal interests. This article has recommended ways that children can be involved in decision-making processes about plain packaging using a child rights-based approach. This can strengthen the effectiveness of plain packaging measures directed towards children, reinforcing public health justifications for the measures. Recognising children's human rights using a child rights-based approach could also be relevant to other disputes about packaging where health concerns are relevant such as marketing of sweet drinks and unhealthy food.[225]

States who wish to use children's rights to support policies that may engage disputes about the use of intellectual property rights need to be more explicit in involving children and then acknowledging relevant international obligations when developing, implementing, and defending health-based policies that may generate trade disputes. Australia explicitly relied on the *FCTC* in arguments defending the legislation, consistent with the explicit recognition of *FCTC* obligations in

222 See, eg, Rimmer and Iacobucci (n 218); Hammond (n 10). Cf Ronald Seifer 'The Dramatic Increase in Teen Vaping Is the Largest Public Health Success Story in Our Lifetime' (2019) 35(4) *Brown University Child and Adolescent Behavior Letter* 8.

223 Jennifer Tobin highlights examples of countries that have been deterred from introducing plain packaging: Tobin (n 5) 160–2.

224 See Xi et al (n 8).

225 Emma Gorman and Elizabeth Handsley, 'International Human Rights Law and the Prevention of Childhood Obesity' (2017) 23(3) *Australian Journal of Human Rights* 390, 391.

legislative development. In contrast, although explanatory material associated with the human rights compatibility of plain packaging regulations recognised the right to health,[226] the human rights implications of the legislation were not emphasised during Australia's legislative development process or in the disputes in which it subsequently defended the legislation.

Children are particularly vulnerable to a range of negative impacts directly and indirectly associated with tobacco consumption that engage human rights protection. Comprehensive bans on tobacco advertising support reductions of tobacco consumption, and plain packaging is an important part of a comprehensive tobacco control strategy as it limits the advertising function of trade marks. Owners of tobacco-related marks and tobacco-producing companies worldwide have strongly opposed tobacco plain packaging legislation. Pursuant to the *UNCRC*, states need to consider specific children's rights but should also develop measures consistent with realisation of health capabilities, evolving capacities and the best interests of children. This article has analysed the potential value for states in emphasising the protection of those rights in both the design of tobacco control measures and disputes about plain packaging, building on recent scholarship on the importance of recognising children's human rights in tobacco control programs. The recognition of obligations pursuant to the *FCTC* as relevant justifications for the introduction of this legislation in recent plain packaging disputes provides an important basis for states to emphasise the relevance of additional obligations pursuant to the *UNCRC*. This has not yet occurred despite the near universal ratification of the *UNCRC*. If it were to occur, states could not only strengthen their justification for plain packaging measures but strengthen protection for the human rights of children.

226 Explanatory Statement, Tobacco Plain Packaging Amendment Regulation 2012 (No 1) (Cth).