

AUSTRALIA — TOBACCO PLAIN PACKAGING



SUMMARY OF WTO DISPUTE PANEL REPORT

USE OF THIS SUMMARY DOCUMENT. This document is intended to provide a summary of some of the key issues that may be relevant to countries considering plain packaging of tobacco products, particularly in responding to tobacco industry arguments and to signpost important parts of the long ruling. It is not intended to provide a comprehensive summary of all the many legal issues raised by the case relating to international trade law.

In 2012 and 2013, Ukraine, Honduras, Indonesia, the Dominican Republic, and Cuba filed complaints with the World Trade Organization (WTO) claiming that Australia's plain packaging laws breach various articles of the WTO agreements. A panel was composed in May 2014, and final written submissions were made in December 2015.¹ On May 28, 2015, Ukraine suspended its dispute with the Trade Minister saying that *"economic logic is absent in this dispute"*.² A record number of WTO member states (41 in total) joined the disputes as third parties.

The complaining countries argued that Australia's plain packaging measures breach:

- the Agreement on Technical Barriers to Trade (TBT) because it is 'more trade-restrictive than necessary' to fulfil its public health objective;
- the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) by failing

to provide protections to trademarks rights and because plain packaging is an 'unjustifiable encumbrance' on the use of tobacco trademarks.

The panel's 872 page report³ was finally published on June 28, 2018. It **rejected all the grounds of complaint**, ruling in favor of Australia that its plain packaging laws do not unnecessarily restrict trade and do not violate the tobacco companies' trademark rights.

Parties may appeal the ruling to the WTO's Appellate Body which is then technically required to rule within 90 days of an appeal being filed (but often takes longer). Of note is that the trade in tobacco between the complaining countries and Australia was, and continues to be, minimal.⁴ It has also been reported that Philip Morris and British American Tobacco provided financial and legal support to Dominican Republic, Ukraine and Honduras in the dispute.⁵

FINDINGS ON THE EVIDENCE

The dispute settlement panel analyzed extensive volumes of evidence put forward by Australia and the complaining countries relating to all aspects of tobacco plain packaging. In its ruling, the panel made strong findings about what that evidence demonstrated. These findings, summarized below, are authoritative, should be powerful in persuading governments to move forward with plain packaging and can be used to resist the flawed arguments the tobacco industry puts forward to oppose the policy.

THE EVIDENCE SHOWS PLAIN PACKAGING REDUCES THE USE OF TOBACCO

The WTO panel ruled that the totality of the evidence supports the conclusion that:

"Plain packaging measures, in combination with other tobacco-control measures maintained by Australia (including the enlarged GHWs introduced simultaneously with TPP), are apt to,

and do in fact, contribute to Australia's objective of reducing the use of, and exposure to, tobacco products" [7.1025]

BRANDED PACKAGING ACTS AS ADVERTISING

The panel found that:

"branded packaging can act as an advertising or promotion tool in relation to tobacco products, and that this has in fact been considered to be the case by tobacco companies operating in the Australian market" [7.659]

The panel also stated that branded tobacco packaging can have a promotional effect even with large 75% graphic health warnings on them.[7.660] This demonstrates the importance of combining plain packaging with large GHW as well as undermining arguments used by the tobacco industry that plain packaging isn't necessary if a country already has large health warnings.

FINDINGS ON THE EVIDENCE *(contd.)*

The panel noted packaging can make tobacco products more appealing. It concluded that the tobacco industry's use of various bold design features, including bright colors, textures, typography, special openings and novel shapes such as 'perfume packs', all created or reinforced brand image and positive associations with the tobacco products, making them more appealing. [7.661]

BRANDED PACKAGING CAN WORK TO ATTRACT NEW SMOKERS

The panel strongly disagreed with the argument (often used by the tobacco industry) that branded packaging only works to impact on a smoker's choice of one brand over another. Instead the panel confirmed that:

"In particular, we note the recognized importance, for the industry, of attracting new consumers, and therefore making their products appealing to those most likely to initiate tobacco use (i.e. youth), including through branded packaging." [7.1032]

PLAIN PACKAGING INCREASES THE IMPACT OF HEALTH WARNINGS

The panel found that the evidence supports that tobacco plain packaging measures:

"increase the effectiveness of GHWs [making them] easier to see, more noticeable, perceived as being more credible and more serious, attract greater visual attention ... and are read more closely and thought about more." [7.825]

The complaining countries argued that people in Australia were already very aware of the risks of smoking but the panel found that the pre-existence of a high level of knowledge or risk awareness did not mean that "GWH could not be made more effective in achieving their objectives of increasing such knowledge or risk awareness." [7.843]

PLAIN PACKAGING HAS REDUCED SMOKING RATES IN AUSTRALIA

The panel concluded that the post-implementation evidence demonstrated plain packaging had contributed to a reduction in smoking rates in Australia, stating that:

"pre-existing downward trends in smoking prevalence and overall sales and consumption of tobacco products have not only continued but accelerated since the implementation of the

TPP measures, and that the TPP measures and enlarged GHWs had a negative and statistically significant impact on smoking prevalence and cigarette wholesale sales". [7.986]

PLAIN PACKAGING HAS NOT INCREASED ILLICIT TRADE IN TOBACCO

The tobacco industry regularly argues that plain packaging will increase the illicit trade in tobacco. The panel found that various factors affect illicit trade that are unrelated to the packaging and branding of products. The panel analyzed but placed little weight on the main piece of evidence produced by the complainants, a report on Illicit Tobacco in Australia by KPMG commissioned by the tobacco companies.⁶ The panel was:

"not persuaded that the potential scale of illicit trade ... is of the magnitude estimated in the KPMG Report." [7.1013]

Instead, the panel found that the evidence does not establish

"either through empirical evidence or descriptive argument based on the drivers of illicit trade, that the [plain packaging] measures have given rise to an increase in Australia's illicit tobacco trade" [7.1023]

THE PANEL'S APPROACH TO THE EVIDENCE

Plain packaging was designed to act in the first instance on:

- reducing the appeal of tobacco products,
- increasing the effectiveness of graphic health warnings (GHWs), and
- reducing the ability of the packaging to mislead consumers about the harmful effects of smoking or using tobacco products

The panel ruled that evidence relating to the impact on these 'non-behavioral' outcomes was highly relevant in assessing the degree to which plain packaging contributed to the overall objective (see below), along with the evidence relating to the 'behavioral' outcomes such as initiation, cessation and relapse [7.499]. This demonstrates the importance of carefully crafting policy objectives for public health policies.

The panel, for instance, considered that GHWs that were more noticeable and perceived as more credible and serious as a result of plain packaging measures, should then be expected to have an impact on

FINDINGS ON THE EVIDENCE *(contd.)*

smoking behaviours such as initiation, cessation and relapse [7.869].

The panel also considered that the evidence must be assessed in light of the fact that tobacco control measures are designed to have an impact over the

long term and that their effects may take time to manifest [7.986 and 7.1044].

The panel frequently relied on the WHO FCTC in support of its findings throughout the ruling. [7.1022, 7.1728, 7.2596, and 7.2604]

FINDINGS ON THE LAW: TBT

Responding to complaints under TBT Article 2.2, the panel held that tobacco plain packaging measures are ‘not more trade restrictive than necessary to fulfil a legitimate objective’ [7.1732].

The legal analysis involved considering Australia’s objective for the measures; then whether and to what extent the measures restrict trade; and lastly, looking at the evidence to determine whether the restriction was necessary to fulfill the identified objective.

AUSTRALIA’S OBJECTIVE

The panel confirmed that — as set out in Australia’s law — the objective pursued by Australia was:

“to improve public health by reducing the use of, and exposure to, tobacco products”

and the panel held that Australia’s intention “to give effect to certain obligations” in the WHO Framework Convention on Tobacco Control (FCTC) further supported and confirmed that objective [7.243].

TRADE RESTRICTIVENESS OF PLAIN PACKAGING

The panel found that the only way plain packaging measures have a limiting effect on trade is that:

“by reducing the use of tobacco products, they reduce the volume of imported tobacco products” [7.1255].

The panel noted that reducing tobacco use is the objective of the measure.

The panel rejected arguments that plain packaging restricted competitive opportunities [7.1167], that it would make it more difficult for new brands to enter the market [7.1178], or that the compliance costs for companies were sufficient to amount to a limitation on trade [7.1244].

The panel also rejected the complainants’ arguments that plain packaging would lead to an increase in price competition and therefore a fall in prices, stating the evidence showed that plain packaging:

“led to an increase in the price of cigarettes.” [7.1218]

ALTERNATIVE MEASURES

The complainants argued plain packaging is *not necessary* because there are 4 alternative measures which would be less trade restrictive but equally effective at contributing to Australia’s objective:

1. increasing the minimum legal purchasing age (MLPA) from 18 to 21
2. increasing tobacco taxation
3. improved social marketing campaigns
4. a pre-vetting mechanism for individual pack designs (instead of the blanket approach of plain packaging)

The panel concluded that, individually, each of the four alternatives:

“would not make a contribution to Australia’s objective that is equivalent to the contribution made by the tobacco plain packaging measures” [7.1721].

In addition, noting that plain packaging was only trade restrictive to the extent that it reduced the sales volumes of tobacco products (see above), the extent to which any of these measures could make an equivalent contribution to reducing tobacco use, meant that those measures would also be at least as trade restrictive as plain packaging [7.1468, 7.1491, 7.1583 and 7.1715].

FINDINGS ON THE LAW: TBT *(contd.)*

TOBACCO CONTROL REQUIRES A COMPREHENSIVE STRATEGY

Relying on the WHO FCTC, the panel emphasized that the comprehensive nature of tobacco control was highly relevant and that the use of tobacco products should be addressed through a combination of measures working together — in other words plain packaging is not intended to operate as a standalone

policy, but in conjunction with measures such as GHW and restrictions on advertising.

The Panel held that one measure in a multi-dimensional strategy could not be substituted for another, where this would leave unaddressed an aspect of the problem that plain packaging seeks to address, such as the appeal of tobacco packaging [7.1729 and 7.1731].

FINDINGS ON THE LAW: TRADEMARKS AND TRIPS

PLAIN PACKAGING IS A JUSTIFIED RESTRICTION ON THE USE OF TRADEMARKS

Article 20 of TRIPS prohibits ‘unjustifiable encumbrances’ on the use of trademarks. Plain packaging clearly encumbers, or restricts, tobacco companies’ use of their trademarks. The complaining countries argued that plain packaging measures amounted to an unjustified encumbrance.

The panel recognized that trademarks have substantial economic value and that plain packaging restrictions are far reaching. The panel also stated that trademark owners have a ‘legitimate interest’ in using their trademark ‘in the course of trade’ [7.2428].

The panel relied on the Doha Declaration⁷ (which the panel described as a subsequent agreement of WTO Members), and held that Article 8 of TRIPS provided guidance on the interpretation of ‘unjustified’ in Article 20. Combined, these make it clear that TRIPS is not intended to prevent the adoption of laws pursuing measures to protect public health [7.2407].

However, the panel ultimately returned to its conclusion on the evidence (set out above) that plain packaging laws:

“are capable of contributing, and in fact do contribute to Australia’s objective of improving public health by reducing the use of, and exposure to, tobacco products.”

This finding provides sufficient justification for the restrictions on the use of tobacco trademarks [7.2604].

The complainants had tried to argue that, because there was no assessment of individual trademarks, plain packaging is such an extreme measure that it should be considered unjustifiable without any consideration of other factors — the panel disagreed [7.2594].

The panel also dismissed arguments that plain packaging prevented or restricted the ability to register tobacco product trademarks in a way that breached the TRIPS agreement.

NO RIGHT TO USE A TRADEMARK UNDER TRIPS

The complainants made a number of arguments that TRIPS obliged states to allow trademark holders to use their trademarks and that plain packaging breached those obligations. The panel dismissed all those arguments. Among other issues, the panel confirmed that TRIPS Article 16.1 only provides a right for trademark owners to prevent others from using their marks but gives no positive right to use a trademark. Nor does Article 16 provide an entitlement to maintain or extend the distinctiveness of an individual trademark through even a minimum level of continued use [7.2015 and 7.1031]. And TRIPS Article 15.4 did not oblige states to register non-distinctive signs that might, if used, acquire distinctiveness through that use [7.1894].

1. A summary of the disputes together with publicly available documents is available from the Australian Department of foreign affairs website: <http://dfat.gov.au/trade/organisations/wto/wto-disputes/Pages/wto-disputes-tobacco-plain-packaging.aspx>
2. Interfax Ukraine news agency, Ukraine ends dispute with Australia over Cigarettes, May 6, 2018
3. DS435, DS441, DS458, DS467 Australia — Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging.
4. Data from United Nations COMTRADE database. In 2012 there was no reported trade in tobacco (HS24) between Australia and Cuba or Honduras. Trade between Australia and Dominican Republic was \$102,000, and between Australia and Indonesia was \$1.7mil.
5. Reuters, Australia says big tobacco aiding WTO challengers, May 22, 2012.
6. KPMG, “Illicit Tobacco in Australia: 2013 Full Year Report”, (3 April 2014), commissioned by BATA, Imperial Tobacco Australia and Philip Morris Limited.
7. Declaration on the TRIPS agreement and public health, Doha WTO Ministerial 2001.