

WORLD TRADE ORGANIZATION

*Panel established pursuant to Article 6 of the Understanding on Rules and Procedures
Governing the Settlement of Disputes*

**Australia – Certain Measures Concerning Trademarks,
Geographical Indications and other Plain Packaging
Requirements Applicable to Tobacco Products and
Packaging
(WT/DS435/441/458/467)**

**Closing Statement of Australia
at the First Meeting of the Panel**

Geneva, 5 June 2015

1. Mr Chairman, distinguished members of the Panel, good morning. On behalf of the Government of Australia and our entire delegation, I would like to take this opportunity to express our sincere thanks for the detailed and careful attention that you have given this week to the important issues before you in these disputes. And particularly in the light of the somewhat challenging circumstances that have arisen in the past week in these disputes. In light of the full opportunity that you have provided for us to express our views on these issues during the course of this first substantive meeting, Australia will limit its closing statement this morning to a few observations on certain issues that it believes lie at the heart of these disputes.
2. As I explained at the beginning of this week, Australia's tobacco plain packaging measure is an extension of Australia's comprehensive restrictions on tobacco advertising and promotion to one of the tobacco industry's last available "billboards" in the Australian market – the package itself. The tobacco plain packaging measure reduces the ability of tobacco companies to advertise and promote their products, while preserving their ability to distinguish their products in the course of trade. In this way the measure advances Australia's indisputably legitimate public health objectives while allowing trademarks to fulfil their essential function.
3. The complainants have not disputed during the course of this week that tobacco retail packaging serves to advertise and promote tobacco products. This is understandable, as any such assertion would be contrary to common sense, contrary to the tobacco industry's own admissions, and contrary to the fact that the tobacco industry spends vast amounts of money on the design and appearance of tobacco packaging. Clearly, tobacco packaging *is* a form of advertising. This cannot be credibly disputed.
4. Rather than disputing that tobacco packaging is a form of advertising, the complainants have sought to convince you that the design and appearance of tobacco packaging affects certain aspects of human behaviour, but not others. The complainants would have you believe that branded tobacco packaging affects human behaviour insofar as it affects consumer loyalty and the willingness of consumers to pay a "premium price" for a particular brand, but at the same time, they would have you believe that branded tobacco packaging has no effect whatsoever on

other human behaviours, such as the way in which branded packaging might increase the appeal of smoking to someone who has never smoked, or make it harder for an existing smoker to quit.

5. As we pointed out on Monday, this has been a tobacco industry line for many years, but to no avail. In fact, in a judgment published this week, a court in Québec specifically rejected the proposition that tobacco advertising has no effect on increasing the appeal of smoking to non-smokers. The court held that "[i]t is simply too unbelievable to accept that the highly-researched, professionally-produced and singularly-attractive advertising" used by the tobacco company defendants in that litigation "neither was intended, even secondarily, to have, nor in fact had, any effect whatsoever on non-smokers' perceptions of the desirability of smoking, of the risks of smoking or of the social acceptability of smoking."¹ In response to the expert evidence put forward by the tobacco industry, the court in Quebec observed:

His testimony boils down to saying that, where a company finds itself in a 'mature market', it loses all interest in attracting any new purchaser for its products, including people who did not use any similar product before. This flies so furiously in the face of common sense and normal business practice that, with respect, we must reject it.²

6. This was by no means the first time that a court has rejected this proposition. In its landmark decision in *United States vs. Philip Morris*, the United States District Court for the District of Columbia issued a 1,653 page decision comprehensively examining the ways in which the tobacco industry has directed its advertising and marketing efforts toward young people. Australia has already submitted this decision as exhibit AUS-71, and I encourage you to take the time to read it, along with the other substantive documentation we have provided.

7. After summarizing volumes of testimony and documentary evidence in that case, the court concluded that "[t]he evidence is clear and convincing ... that Defendants have marketed to

¹ Cécelia Létourneau v. JTI Macdonald Corp. et al, No. 500-06-000070-982 (27 May 2015) (extract), para. 431, Exhibit AUS-526.

² Cécelia Létourneau v. JTI Macdonald Corp. et al, No. 500-06-000070-982 (27 May 2015) (extract), para. 432, Exhibit AUS-526.

young people twenty-one and under while consistently, publicly, and falsely, denying they do so."³ The court observed:

In response to the mountain of evidence to the contrary, Defendants claim that all the billions of dollars they have spent on cigarette marketing serves the primary purpose of retaining loyal customers ("brand loyalty"), and the secondary purpose of encouraging smokers to switch brands. They deny that any of their marketing efforts are aimed at encouraging young people to initiate smoking or to continue smoking.

In fact, the overwhelming evidence set forth in this Section -- both Defendants' internal documents, testimony from extraordinarily qualified and experienced experts called by the United States, and the many pictorial and demonstrative exhibits used by the Government – prove that, historically, as well as currently, Defendants do market to young people, including those under twenty-one, as well as those under eighteen. Defendants' marketing activities are intended to bring new, young, and hopefully long-lived smokers into the market in order to replace those who die (largely from tobacco-caused illnesses) or quit.⁴

8. In the visual presentation that I gave earlier this week, I provided examples of tobacco packages that were available on the Australian market prior to the introduction of plain packaging, and that were clearly intended to appeal to young people. I also provided examples of packages that were intended to appeal to girls and women, as well as packages that detracted from the effectiveness of graphic health warnings.

9. Yesterday, we heard a deal of indignation from the complainants about aspects of my presentation, an again perhaps today. Clearly, it struck a nerve. But why? If the complainants were true to their convictions, they would not be concerned, for example, by the pack of Fantasia cigarettes that we handed out to the Panel and the complainants. Under the complainants' theory, the design of this package could have no effect on increasing the appeal of smoking to young people. In the complainants view, the purpose of this package design must have been to ensure

³ *United States of America, et al., v. Philip Morris USA, Inc., et al.*, Final Opinion (2006). 449 F. Supp. 2d 1 (D.D.C), para. 3296, Exhibit AUS-71.

⁴ *United States of America, et al., v. Philip Morris USA, Inc., et al.*, Final Opinion (2006). 449 F. Supp. 2d 1 (D.D.C), paras. 3297-3298, Exhibit AUS-71.

"brand loyalty" among long-term smokers of Fantasia cigarettes, or perhaps to induce smokers of Marlboro Reds to switch to Fantasias. Does this seem likely?

10. The complainants apparently did not have sufficient courage in their convictions to take that line. Instead, they sought to confuse two different meanings of the word "appeal". Pointing to their Longbeach example, the complainants argue that there is no correlation between the aesthetic "appeal" of a package and its popularity in the marketplace. From this premise, the complainants attempt to argue that there is no connection between the appeal of a package and smoking-related behavioural outcomes. But this misses the point. Tobacco companies design branded packages to appeal to different people. Just as the Pall Mall Slims brand which I displayed to you on Monday appears designed to appeal to women and the Vibes brand is evidently designed to appeal to young people, the Longbeach brand is designed to appeal to the price conscious. It is therefore not surprising that Longbeach is a brand with high market share in Australia.

11. Ask yourself these questions. If Philip Morris thought that the design of the Longbeach brand was *not* achieving its commercial objectives, do you think it would have maintained that brand design for as long as it did and has? Do you think that Philip Morris is unaware of the fact that the Longbeach brand is not perceived, for example, as sophisticated, feminine, or well-off? Of course not. The Longbeach brand, like every other tobacco brand, is designed to advertise and promote the product. It is part of an elaborate, well-researched, and well-financed marketing campaign to affect consumers' perceptions of tobacco use. Longbeach is not a popular brand in Australia because its appearance is unappealing. It's a popular brand because it appeals to ordinary people.

12. As far as Australia is aware, no tobacco company has ever designed a brand to be unappealing. And indeed, just to depart briefly from the text for a moment, the Longbeach pack evolution was targeted at what Philip Morris terms the "supervalue segment".⁵ It was supported

⁵ Webb, WH, "Change in existing brand Longbeach", (24 January 2002), Philip Morris Collection, Bates no. 2073880633-2073880638, (AUS-527), p 1 available at: <http://legacy.library.ucsf.edu/tid/rjt90h00>

by consumer research akin to that criticised by the complainants as being uninformative. To quote from a 1996 Philip Morris document:

The Longbeach packaging upgrade is primarily designed to enhance the quality presentation whilst maintaining the contemporary aspects inherent in the design. The changes are of an evolutionary nature and aim to lift the branding elements within the overall presentation.⁶

The preferred pack design was perceived as adding quality appeal to the brand packaging, driven primarily by a filled in Gold Crest, whilst retaining its contemporary appeal with a more stylised beach logo ... The presented option was preferred by the respondents.⁷

13. In fact, it appears to Australia that there is a basic contradiction in the complainants' arguments. The Dominican Republic, in particular, has placed a great deal of emphasis on its proposed alternative of an "individual assessment" of branded tobacco packages. It takes the untenable position that this "individual assessment" is somehow compelled by the legal provisions at issue in this dispute. Setting aside that error of interpretation, however, one has to wonder what the point of this "individual assessment" would be. If, as the complainants contend, there is no causal connection between branded tobacco packaging and tobacco-related behaviours, then the Dominican Republic would seem to be advocating a pointless mechanism. The very premise of the Dominican Republic's proposed "individual assessment" appears to acknowledge the connection between branded tobacco packaging and tobacco-related behaviours.

14. In sum, there is no credible basis for the complainants to assert: that tobacco packaging is not a medium for advertising and promoting tobacco products; or that tobacco advertising and promotion has no effect on smoking-related behaviours, including the initiation and cessation of tobacco use. As I stated in my oral statement at the beginning of the week, it cannot be the case that tobacco advertising and promotion – including through the medium of the package – affects

⁶ Webb, WH, "Change in existing brand Longbeach", (24 January 2002), Philip Morris Collection, Bates no. 2073880633-2073880638, Exhibit AUS-527, p 2 available at: <http://legacy.library.ucsf.edu/tid/rjt90h00>

⁷ Webb, WH, "Change in existing brand Longbeach", (24 January 2002), Philip Morris Collection, Bates no. 2073880633-2073880638, Exhibit AUS-527, p 2 available at: <http://legacy.library.ucsf.edu/tid/rjt90h00>

a very narrowly confined set of human behaviours. This assertion, as the court in Québec so aptly stated last week, "flies furiously in the face of common sense" and must be rejected.

15. It is clear, though, why the complainants in this dispute are trying to advance the same baseless arguments that the tobacco industry has unsuccessfully advanced in other fora. Once it is established that branded tobacco packaging is a medium for advertising and promotion, and that advertising and promotion have an effect on tobacco-related behaviours, then it becomes obvious that tobacco plain packaging is a sensible and well-justified complement to Australia's existing tobacco control strategies. This, by itself, disposes of the complainants' core claims under Article 20 of the TRIPS Agreement and Article 2.2 of the TBT Agreement.

16. I'll begin with Article 20 of the TRIPS Agreement. In order to establish a violation of that provision, the complainants must establish that any "special requirements" imposed by the measure "unjustifiably" "encumber" the "use" of a trademark "in the course of trade". In Australia's view, it is clear that the complainants have failed to meet their burden of proof under this provision.

17. Now yesterday, we had a discussion of the meaning of the term "unjustifiably". At the moment Australia is unclear about where the complainants now stand on the meaning of this term. Having staked out extreme interpretative positions in their first written submissions – for example, that the meaning of the term "unjustifiably" is somewhere beyond "necessity" – the complainants appear to have moderated their positions somewhat. But as we listened to the complainants speaking yesterday, we were still left wondering how, exactly, they propose to interpret the term "unjustifiably" in accordance with the requirements for interpretation under the Vienna Convention on the Law of Treaties.

18. Australia's interpretation of the term "unjustifiably", unlike the complainants', is based on the ordinary meaning of this term interpreted in its context and in light of the object and purpose of the TRIPS Agreement. Properly interpreted, an encumbrance upon the use of a trademark in the course of trade is not "unjustifiable" so long as it bears a rational connection to the pursuit of a legitimate objective. By contrast, the complainants' apparent interpretations of the term "unjustifiable" find no support in the ordinary meaning of this term. To take just one example,

consider the Dominican Republic's assertion that the term "unjustifiable" somehow requires an "individual assessment" of specific trademarks. This makes no interpretative sense. It is in the nature of the types of measures encompassed by Article 20 that they will typically be addressed to a *category* of trademarks that implicates a public policy concern, not to specific trademarks. This and the other elements of the Dominican Republic's "five factor" test are simply a necessity test by another name, and have no textual basis in the provision of Article 20 itself.

19. Under any conceivable interpretation of the term "unjustifiably", however, it is clear that the complainants have failed to demonstrate that Australia's tobacco plain packaging measure does not meet the proper legal standard under that provision, Article 20. For all of the reasons that we have explained and documented at length, the tobacco plain packaging measure is clearly not "unjustifiable" in light of the connection between the advertising and promotion of tobacco products, on the one hand, and tobacco-related behaviours, on the other. It is, as I have said, a logical extension of a widely-adopted type of tobacco control measure to a different advertising medium. It reduces the ability of tobacco manufacturers to advertise and promote tobacco products while maintaining their ability to use trademarks to distinguish their products in the course of trade. Consistent with Article 8.1 of the TRIPS Agreement, it is precisely the type of measure that Members may adopt in the pursuit of important health objectives.

20. I will now turn briefly to the complainants' claims under Article 2.2 of the TBT Agreement. Australia explained in its opening statement on Monday that in their written submissions, the complainants focused their "trade-restrictiveness" arguments on the alleged "downtrading" effects of the tobacco plain packaging measure. Australia further explained that one of the principal failings of the complainants' "downtrading" arguments was the complainants' failure to establish whether and to what extent any alleged downtrading effects of the tobacco plain packaging measure would necessarily result in a *limiting* effect on overall trade in tobacco products.

21. After hours of opening statements and lengthy exchanges yesterday, Australia's observations on Monday regarding the fundamental defects in the complainants' trade restrictiveness arguments are as apt today as they were at the beginning of the week. During this first substantive meeting, the complainants have remained focused on the alleged "downtrading"

effects of the measure, but they have failed to establish that these claimed effects are likely to occur in the Australian market as a result of the design, structure and operation of the measure. Nor have they even attempted to demonstrate that any alleged downtrading effects will necessarily result in a *limiting* effect on overall trade in tobacco products.

22. Instead, the complainants have continued to make arguments with respect to downtrading and its asserted impact on "premium" products in particular market segments. These arguments attempt to convert Article 2.2 of the TBT Agreement into a provision that protects particular company's expectations to certain levels of profit or market share. Contrary to the complainants' claims, the plain text of Article 2.2 protects the expectations of WTO Members that technical regulations will not limit *international trade*, meaning trade *between nations*,⁸ to a greater extent than is necessary to fulfil a legitimate objective. The complainants have not demonstrated any conceivable connection between the alleged impact on "premium" products in particular market segments and a limiting effect on international trade, as properly understood. Indeed, it is also not at all obvious that the observed downtrading is due to plain packaging. As stated in a letter to shareholders in the Philip Morris International 2013 Annual Report, it has been recognized that downtrading is not a phenomenon particular to the Australian tobacco plain packaging market:

Within the context of our overall share performance, Marlboro was resilient, particularly given the sizable total industry declines in a large number of its strongholds and downtrading across a wide range of markets.⁹

23. As Australia has noted previously, there is a reason that the complainants' trade restrictiveness arguments remain so entirely divorced from the text of the relevant provision. It is because the complainants realize that they cannot suggest that the measure will reduce demand for tobacco products, which would necessarily result in a reduction in imports in Australia's market. If the complainants made such a trade-restrictiveness argument, they would simultaneously have to acknowledge that the measure is trade restrictive only to the extent

⁸ *The Shorter Oxford English Dictionary*, 6th ed., L. Brown (ed.) (Oxford University Press, 2007), Vol. 2, Exhibit AUS-245, p. 1412 ("international": *adjective* 1. Existing, occurring, or carried on *between nations*; pertaining to relations, communications, travel, etc., *between nations*"). (emphasis added)

⁹ Philip Morris International, 2013 Annual Report, (2013), Exhibit AUS-528, p 3.

required to contribute to Australia's public health objectives. In other words, their claims would necessarily fail.

24. In Australia's view, however, the complainants' claims must fail in any event. As was argued by numerous third parties in both their written submissions and their oral statements here on Wednesday, the tobacco plain packaging measure reflects a world-wide consensus in the scientific community and among the 180 Parties to the FCTC that measures affecting consumer perceptions, intentions, and attitudes toward tobacco products are apt to contribute, as part of a comprehensive tobacco control policy, to reducing smoking behaviour, and ultimately, to saving lives. In Australia's view, the complainants' burden to demonstrate that such a measure is more trade restrictive than necessary to fulfill an indisputably legitimate objective is insurmountable in this case, even accepting the complainants' unfounded understanding of the meaning of trade restrictiveness.

25. Mr Chairman, members of the Panel. In closing, I would like to reiterate my thanks to the Panel for the time and energy that it has devoted to these disputes over the course of this past week to the listen to the Parties arguments and consider our submissions. I would also like to thank the Secretariat and its staff for all of the hard work it had to undertake in order to prepare for this hearing. It must be particularly difficult with so many Members and so many Parties. We very much appreciate the Panel and the Secretariat for their significant contribution to having made the hearing such a useful exploration of the issues before you. I wish you all a safe journey home.