As delivered

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 Second Meeting of the Panel

Geneva, 30 October 2015

1. As Australia's Ambassador and Permanent Representative to the World Trade Organization, and on behalf of the Government of Australia and our entire delegation, I would like to express our sincere thanks for the detailed and careful attention that you have given to the important issues before you in these disputes, not only this week, but throughout these proceedings.

2. It is not our intent this morning to burden you by revisiting all of the legal and factual arguments you've heard over the past two days. Instead, we would like to use our limited time today to address some of the broader issues that this dispute raises. When I addressed you in June, I closed my remarks by noting some of the troubling implications raised by the complainants' claims and arguments in this case. I would like to return to that topic now, because the complainants' presentations since then have only served to amplify those concerns.

3. The principal issue that I would like to address is the nature and extent of evidence on which WTO Members may rely when seeking to implement new policies designed to protect public health. On this subject, the complainants' positions have profoundly disturbing implications not only for all WTO Members considering the adoption of such measures, but for the WTO dispute settlement system as well.

4. Before evaluating their positions, I'd ask you to recall the basis on which Australia proceeded when it adopted the tobacco plain packaging measure that is now before you. To listen to the complainants' narrative, Australia's decision to implement tobacco plain packaging was akin to an inexperienced sailor recklessly venturing off into unchartered seas without so much as a compass or sextant.

5. In fact, nothing could be further from the truth. Australia has decades of experience designing and administering effective tobacco control policies. Our decision to supplement those successful existing policies with tobacco plain packaging was based upon an extensive body of scientific evidence available at the time. It also was based on the explicit recommendation of the 180 Parties to the Framework Convention on Tobacco

Control to adopt tobacco plain packaging as a means to implement Parties' obligations under the Convention.[1]

6. Despite this, the complainants assert that no rational policymaker in Australia's position would have undertaken tobacco plain packaging. In their view, a far greater evidentiary base was required before it would have been reasonable to conclude that the implementation of tobacco plain packaging was "apt" to contribute to its public health objectives.

7. It is worth considering in some detail precisely how, under the complainants' approach, Australia should have proceeded to meet their standards. First, Australia apparently should have independently verified the voluminous prior research, spanning decades, demonstrating the causal link between tobacco advertising and smoking behaviour. That is because in their view, it was insufficient for Australia to rely on the nearly unanimous consensus on this topic reflected in published analyses conducted by such highly respected international bodies as the United States Surgeon General, the United States Institute of Medicine, the International Agency for Research on Cancer, the United States National Cancer Institute, the United States Food and Drug Administration, and the World Health Organization.

8. Having finished that task, Australia then should have undertaken for itself additional independent research to confirm that tobacco packaging actually functions as advertising, again notwithstanding the nearly unanimous academic and scientific consensus supporting this common-sense proposition, and one that I note the tobacco industry itself has acknowledged to be the case, not only generally, but with respect to the Australian market in particular.

9. Next, it would have been incumbent upon Australia to verify for itself the scores of experimental research studies regarding the effects of tobacco plain packaging in reducing the appeal of the pack, increasing the noticeability of graphic health warnings,

[1] *WHO Framework Convention on Tobacco Control: Guidelines for Implementation* (2013 edition) Exhibit AUS-109, Article 11, p. 63 and Article 13, pp.99-100.

and reducing the ability of the pack to mislead, to ensure that all of these studies were sound. Moreover, under the complainants' view, to the extent that any of this prior research addressed the effects of plain packaging generally, rather than in Australia in particular, it was of no utility whatsoever. Rather, all of that research should have been replicated to take account of Australia's "dark market" and the enlarged graphic health warnings intended to be introduced simultaneously with plain packaging.

10. Further, in respect of each of the tasks that I have just mentioned, Australia apparently would have been required to seek out the underlying data from all of those prior peer-reviewed studies and then retain its own experts to rerun all of their analyses using different methodologies and statistical tests to ensure that the peer-review process had performed its intended function.

11. Having assured itself of the validity of each of these underlying propositions, it apparently was then incumbent upon Australia to have conducted multiple longitudinal studies to determine *empirically* whether implementing tobacco plain packaging in Australia would, in fact, achieve Australia's public health objectives of reducing smoking initiation, encouraging quitting, discouraging relapse, and reducing exposure to smoke. And if the complainants' "individualized assessment" and "pre-vetting" claims are to be taken seriously, presumably all of this would have needed to be undertaken in respect of each element, of each trademark, for each of the many hundreds of tobacco and cigar packages that were on the market in Australia prior to the implementation of tobacco plain packaging.

12. The complainants' representatives appearing after me will likely stand up and seek to ridicule what I have just said as an unfair caricature of their positions in this dispute. It is not. It is a faithful recounting of what the complainants and their experts – all 21 of them – have repeatedly insisted was the only legitimate basis on which Australia could have considered and adopted the tobacco plain packaging measure.

13. I will pause at this juncture and pose a simple question: does the approach to policymaking that I just described seem like a plausible way for governments to go about

their business of considering and adopting public health and other important policy measures? In Australia's view, the implausibility of the complainants' approach is self-evident, and ignores entirely the real world in which policymakers discharge their important responsibilities.

14. And yet it is against this improbable standard that the complainants ask you to evaluate Australia's decision to implement tobacco plain packaging, and on the basis of which they ask you to conclude that Australia has acted inconsistently with its obligations under the TRIPS and TBT Agreements.

15. It seems fair to ask, what is the basis for the complainants' position that the process I just described not only was how Australia should have proceeded, but also was how Australia was *compelled* to proceed? More precisely, what provisions in the TRIPS and TBT Agreements *require* the extreme evidentiary approach to public health policymaking that the complainants have advanced? We have yet to hear anything approaching a tenable response to that critical question.

16. In respect of the TRIPS Agreement, the complainants' contention appears to be that the obligation arises exclusively from Article 20's prescription against Members "unjustifiably" encumbering the use of trademarks. To characterize this assertion as implausible is a generous understatement. Surely it is a non-controversial proposition that if the drafters of the TRIPS Agreement had intended to prescribe the specific evidentiary approach to public health policymaking that the complainants propose, then the drafters could have, and surely would have, chosen a more direct approach than concealing it in this single term. That conclusion is all the more compelling when one recalls the Members' collective recognition that the TRIPS Agreement "does not and should not prevent members from taking measures to protect public health".[2]

17. With respect to the TBT Agreement, the complainants fare no better. The TBT Agreement encourages Members to adopt technical regulations in accordance with

[2] WTO Ministerial Conference, 'Declaration on the TRIPS Agreement and Public Health', WT/MIN (01)/DEC/2, (20 November 2011), Exhibit AUS-247.

international standards, where they exist. This, of course, is precisely what Australia did in this case, implementing the tobacco plain packaging measure in accordance with the Framework Convention on Tobacco Control Guidelines. Beyond that, the TBT Agreement imposes no particular obligations on Members with respect to the nature and extent of evidence on which they may rely before adopting a technical regulation to protect public health or for any other purpose.

18. Not even the SPS Agreement, which of course is not at issue in this dispute, imposes upon Members the kind of onerous approach to policymaking that the complainants are seeking to graft onto the TRIPS and TBT Agreement. To the contrary, as the Appellate Body has recognized, the scientific basis on which a Member imposes an SPS measure *need not* reflect the majority view within the scientific community, but instead may legitimately reflect divergent or even minority views.[3] In this case, the complainants are seeking to turn that principle on its head by asking the Panel to find unlawful a public health policy measure that had the support of "at least the majority, and potentially the unanimous view" of the relevant public health community.[4] The Panel in *US – Clove Cigarettes* confronted a similar counterintuitive argument, and properly gave it the short shrift it deserved.[5] I urge you to follow the same sensible approach here.

19. Remarkably, the complainants in this case have advanced a proposition that is even more extreme and baseless than the one Indonesia proffered in *US – Clove Cigarettes*. According to the complainants, unless a panel insists upon the provision of data behind peer-reviewed studies submitted for its consideration, it would be inappropriate for the panel to rely upon those studies in discharging its obligations under Article 11 of the DSU.[6] In their view, in the absence of such data, it would be "impossible to make an objective assessment of the findings" set out in such studies.[7]

[3] Appellate Body Report, *US – Continued Suspension*, para. 591.

[4] Panel Report, *US – Clove Cigarettes*, para. 7.401.

[5] Panel Report, *US – Clove Cigarettes*, paras. 7.415-7.417.

[6] Honduras' second written submission, para. 160.

[7] Dominican Republic's second written submission, paras. 443-445.

20. This is an extraordinary proposition that finds no support in the covered agreements or in any of the jurisprudence applying their provisions. To the contrary, this proposition is squarely contradicted by the treatment that WTO panels have accorded to such studies in prior cases, as Australia has amply demonstrated in response to Panel Question 134. It is noteworthy that not one of the complainants has been able to bring to your attention a single prior dispute in which a panel has adopted their extreme approach. Unlike the complainants, Australia is confident that the Panel will be able to conduct an objective assessment of the published, peer-reviewed studies on the record in this case without having access to the raw data underlying those studies.

21. In a similar vein, where is the foundation in law or logic for the complainants' repeated contention that post-implementation empirical evidence alone should be the litmus test for evaluating whether the tobacco plain packaging measure is apt to contribute to its objectives? Recall in this regard that two of the complainants in this dispute (Honduras and the Dominican Republic) filed their consultations and panel requests *before* Australia had even implemented the tobacco plain packaging measure. Plainly, they were confident at that time that the Panel would be able to evaluate their claims without *any* consideration whatsoever of post-implementation empirical evidence.

22. Nonetheless, the complainants seek to elevate such evidence to a pre-eminent position among all of the evidence before the Panel, seeking to diminish in the process the weight the Panel should accord to the wealth of pre-implementation evidence on which Australia relied in adopting tobacco plain packaging. The evolution in the complainants' position is striking. It is premised on their misguided view that the analyses of the post-implementation evidence that their experts have advanced proves to a scientific certainty that tobacco plain packaging has made zero contribution to the observed declines in smoking prevalence seen since its introduction, and is incapable of making any contribution to Australia's public health objectives in the future.

23. In fact, those analyses do nothing of the sort. As you certainly are aware by now, Australia does not share the complainants' unflinching confidence in the conclusions their experts have offered, and neither should you for all of the reasons that my colleague,

Mr O'Donovan, discussed on Wednesday. In this regard, I would like to offer a simple but important observation. When the complainants refer to post-implementation empirical evidence as the "best evidence", they indiscriminately treat *data* and their experts' *analysis and opinions* concerning that data, as if they were the same thing. They are not. The *data* speak for themselves and they do so in a single voice. The *data* on smoking prevalence that Dr Southern discussed with you on Wednesday establish unequivocally that smoking prevalence has continued to decline in Australia since the introduction of tobacco plain packaging.

24. In sharp contrast, the complainants' experts' *analysis and opinions* certainly do not speak with a common voice. Although there are many illustrations of this, perhaps the most prominent is their inability to agree on such a basic proposition as the proper convention for reporting whether the results of their various models produce statistically significant results. Unlike the complainants' other experts, who have reported statistical significance at the 10%, 5% and 1% significance levels, Professor List has uniformly chosen to adopt a more restricted convention of reporting at the 5%, 1% and 0.1% levels. This is contrary to the complainants' other experts, contrary to the practice Professor List has adopted in his published academic papers,[8] and contrary to the standard that the American Economic Review requires their authors to use.[9] It seems worth recalling that this is the journal that Professor List considers to be "*the* premier Economics journal".[10]

25. Why does Professor List's more restrictive approach to reporting statistical significance matter? Because as Mr O'Donovan explained on Wednesday, had Professor List adopted the "customary approach" for reporting standard errors advocated by the complainants and their other experts, he would have reported evidence of meaningful declines in smoking prevalence attributable to the 2012 packaging changes in both his June and September reports. Professor List continues his practice of failing to

[8] See Supplementary expert report of T. Chipty (26 October 2015), Exhibit AUS-586, para. 22 and fn 38.

[9] See Supplementary expert report of T. Chipty (26 October 2015), Exhibit AUS-586, fn 37.

[10] See List Report I, Exhibit DR/IND-1, para. 6.

report statistical significance according to the "customary approach" in his submissions filed on Wednesday. However, having corrected his standard error calculations in response to Dr Chipty's critique, he is obliged to report three results which are statistically significant even on his more restrictive approach. Notwithstanding the number of statistically significant results disclosed, he dismisses the results without explanation.[11]

26. When this fact is combined with the complainants' experts' collective acknowledgement that the post-implementation evidence establishes that tobacco plain packaging reduces the appeal of tobacco products and increases the noticeability of graphic health warnings, it should be apparent just how high a hurdle the complainants face in trying to convince you that their experts have provided "definitive" proof that tobacco plain packaging is not having its intended effects and is incapable of ever doing so. That hurdle becomes even steeper still when one recalls that it is these same experts who originally created the impression that tobacco plain packaging had "backfired" by leading to increased tobacco consumption.

27. The absence of any legal basis for the complainants' attempt to impose their evidentiary approach to public health policymaking on Australia and the rest of the WTO Membership is a sufficient basis for rejecting it. But it by no means is the only reason for doing so. Even a cursory consideration of the practical implications of what they are proposing confirms the wisdom of rejecting it.

28. For Australia and the rest of the WTO membership, it is not at all hyperbolic to suggest that the implications of accepting the complainants' approach would be potentially devastating, both for Members' domestic policymaking processes and WTO dispute settlement. Consider the extraordinary resource burdens that it would impose, particularly for those developing country Members without the "deep pockets" apparently at the complainants' disposal, to retain dozens of experts, first to advise them when

[11] See List Report III, Exhibit DOM/IND-5.

considering important public policy measures, and then to defend them in the face of the inevitable legal challenges that will ensue once such measures are adopted.

29. Consider this fact: the panel record now includes 55 expert submissions on the effect of tobacco plain packaging – including 14 new ones submitted just this week – authored by a total of 33 separate experts. And there can be little doubt that these numbers will continue to rise before this proceeding is finished. This is because it is clear that the complainants' approach is predicated on their experts' continuous moving of the goalposts so that they can claim to have had the last word on every conceivable subject *on their terms*. Is that what WTO dispute settlement has become – an endless "battle of the experts" in which panels are expected to sort through an avalanche of conflicting opinions and adopt as the definitive answer the opinion of whichever expert happens to get the last word? I hope that proposition is as troubling to you as it is to Australia.

30. But even more importantly, there can be little doubt that the complainants' approach, if adopted, would inevitably constrain the development of future important public health initiatives. Indeed, stripped of its purported scientific veneer, the approach that the complainants are proposing in this case is nothing less than a prescription for policymaking paralysis, and the perpetual enshrinement of the status quo. And this applies to the regulation of measures to protect public health and other public policy initiatives as well, such as regulatory measures designed to protect the environment, worker safety, plant and animal health, and countless other important policy objectives.

31. To their credit, the complainants are not bashful in acknowledging this perverse consequence of their approach. Consider, for example, Honduras' argument that Australia had no need to implement tobacco plain packaging because the *other* measures that form part of Australia's comprehensive approach to tobacco control have been effective in reducing tobacco prevalence.[12] Never mind the *additional* benefits that the tobacco plain packaging measure will have on reducing tobacco-related premature deaths

[12] Honduras' first written submission, paras. 894-895, 906.

and serious disease for potentially tens of thousands of Australians. In Honduras' view, Australia should have been content that its pre-existing tobacco policy regime was working well, and not be concerned with trying to maintain and improve that trend by enacting complementary measures that will further reduce smoking prevalence.

32. With respect, it is not the complainants' place to decide for Australia, or for any other WTO Member, what degree of success it should consider sufficient when it comes to protecting the lives and wellbeing of its citizens. As prior panels and the Appellate Body have repeatedly recognized, that is a matter that the covered agreements leave exclusively to the discretion of Members seeking to address important objectives through various public policy measures.[13] The complainants' claims and arguments in this case are an assault on that essential right.

33. Nor is there any reason to believe that the complainants' attack on the right of Members to pursue legitimate measures to promote important public health objectives will end with their challenge to Australia's plain packaging measure should they be successful in this case. Next in their sights will be the tobacco plain packaging measures currently being introduced or considered in New Zealand, Ireland, the United Kingdom, France, Norway, and Chile, soon followed by challenges to all of the other Members of the Framework Convention on Tobacco Control persuaded of the benefits of implementing tobacco plain packaging.

34. Of equal concern are the implications of some of the complainants' arguments as they pertain to other aspects of well-accepted tobacco control measures that have been in place in many countries for many years. Consider, for example, graphic health warnings. Although the complainants did not challenge Australia's introduction of the larger and more graphic health warnings introduced simultaneously with tobacco plain packaging, their decision to refrain from doing so was a litigation choice, nothing more. It certainly was not motivated by the complainants' acceptance of the proposition that graphic health warnings are effective tobacco control policies. We know this because in the course of

[13] Appellate Body Report, *US – Continued Suspension*, para. 523 (citing Appellate Body Report, *Australia – Salmon*, para. 199)

these proceedings, their experts have purported to establish that such warnings are ineffective in reducing smoking prevalence, for example by seeking to discredit the positive effects Canada has attributed to the introduction of enlarged health warnings more than a decade ago.[14] If graphic health warnings are ineffective, as the complainants clearly believe is the case, then the underlying logic and legal interpretations that they have advanced in this case with respect to plain packaging would appear to apply more strongly to graphic health warnings.

35. In a similar vein, consider the complainants' arguments regarding the scope of TRIPS Article 20. To date, they have been unable to come forward with a viable interpretation that would not bring within its scope an array of measures, such as bans on print and media advertising that have been in place for decades in many countries. Given the complainants' position in the present dispute that advertising restrictions in general are ineffective, it is unclear why they too would not be deemed "unjustifiable" under their interpretation of Article 20.

36. Mr Chairman, and members of the Panel, regrettably, what I have just described is the future that Australia, the rest of the WTO membership and the panels that will follow in your footsteps will confront if the complainants are in any way successful in this dispute. We have provided you with all of the evidentiary and legal arguments you need to reject that future, and we are confident that you will accept them and dismiss the complainants' claims in their entirety.

37. In closing, I would like to reiterate my thanks to the Panel for the time and energy that it has adopted to these disputes over the course of this past week to listen to the Parties' arguments and consider our submissions. I would also like to once again thank the Secretariat and its staff for all of the hard work it had to undertake in order to prepare for this hearing. We very much appreciate the work that the Panel and the Secretariat have undertaken to make this hearing such a useful exploration of the issues before you. I wish you all a safe journey home. Thank you.

[14] See IPE Report II, Exhibit DOM-303; List Report II, Exhibit DOM/IND-3.