



12 April 2012

LGL/WTO/DS/AUS/TOB

▶ Minister of Trade

For action by 16 April 2012

WTO Dispute Settlement: Australia Tobacco Case – Additional Claims

Submission	Issues
Purpose	To propose New Zealand involvement as a third party in a second WTO case on tobacco plain packaging being brought by Honduras, and any additional cases subsequently brought by other WTO members.
Comments	Media interest is anticipated given the high profile nature of this issue and New Zealand's own consideration of plain packaging.

Recommended referrals

▶ Minister of Foreign Affairs	For information by 18 April 2012
▶ Minister of Health	For information by 18 April 2012
▶ Associate Minister of Health (Hon Tariana Turia)	For information by 18 April 2012
▶ Minister of Commerce	For information by 18 April 2012
▶ Minister of Economic Development	For information by 18 April 2012

Contact details

NAME	ROLE	DIVISION	WORK PHONE	MOBILE PHONE
<i>withheld s9(2)(a)</i>	Head, Trade Law Unit	Legal	439 8340	[Mobile]
<i>withheld s9(2)(a)</i>	Deputy Director, Trade Law Unit	Legal	[Work]	<i>withheld s9(2)(a)</i>

Minister's Office comments

Signed / Referred
Date: ____ / ____ / ____

Key points

- On 29 March 2012 New Zealand joined as a third party the WTO dispute settlement consultations between Ukraine and Australia regarding Australia's recently implemented requirements for the plain packaging of tobacco products. Those consultations are due to take place in Geneva on 12 April.
- On 10 April Honduras circulated its own request for consultations regarding plain packaging. The request is in similar (although not identical) terms as the Ukraine request. New Zealand has until 20 April to request to join the consultations.
- [withheld s9(2)(h)]
- For the reasons set out in our submission dated 16 March on the Ukraine request (annexed for ease of reference), officials consider that New Zealand should register its interest as a third party in the consultations requested by Honduras and in any further consultations requested by other WTO members on the same issue.
- In the event that the plain packaging related disputes proceed to panel stage, it is likely that they will be consolidated under a single panel in accordance with Article 9 of the Dispute Settlement Understanding.

Recommendations

It is recommended that you:

- | | | |
|---|--|----------|
| 1 | Note that New Zealand has joined as a third party the WTO dispute settlement consultations between Ukraine and Australia regarding Australia's recently implemented requirements for the plain packaging of tobacco products. | Yes / No |
| 2 | Note that Honduras has also now requested WTO dispute settlement consultations with Australia regarding the same plain packaging requirements, and further requests for consultation by other WTO members are possible. | Yes / No |
| 3 | Note that New Zealand supports Australia's plain packaging initiative and is considering the introduction of plain packaging in New Zealand. | Yes / No |
| 4 | Agree that New Zealand should join the Honduras dispute as a third party, and any further disputes on the same issue that may be brought by other WTO members. | Yes / No |
| 5 | Refer this submission on to the Ministers of Foreign Affairs, Health, Commerce and Economic Development and to the Associate Minister for Health for their information. | Yes / No |

withheld s9(2)(a)

for Secretary of Foreign Affairs and Trade

Document ID No. 0

Annex: Submission of 16 March Regarding Ukraine's Request for Consultations



16 March 2011	LGL/WTO/DS/AUS/TOB
---------------	--------------------

Minister of Trade	For action by 21 March 2012
-------------------	-----------------------------

WTO DISPUTE SETTLEMENT: AUSTRALIA TOBACCO CASE

Submission:	Issues
Purpose:	To propose New Zealand involvement as a third party in a WTO case being brought by Ukraine alleging that Australia's recent requirements for the 'plain packaging' of tobacco products are inconsistent with WTO obligations.

Comments:	Media interest is anticipated given the high profile nature of this issue and New Zealand's own consideration of plain packaging.
------------------	---

Recommended Referrals

Minister of Foreign Affairs	For information by 21 March 2012
Minister of Health	For information by 21 March 2012
Associate Minister of Health (Hon Tariana Turia)	For information by 21 March 2012
Minister of Commerce	For information by 21 March 2012
Minister of Economic Development	For information by 21 March 2012

Contacts

<i>withheld s9(2)(a)</i>	Head, Trade Law Unit	439 8340 (wk)
<i>withheld s9(2)(a)</i>	Deputy Director, Trade Law Unit	<i>withheld s9(2)(a)</i> (mob)

Minister's Office Comments

Signed / Noted / Referred / Agreed / Approved

Date: ___ / ___ / ___

Released under the Official Information Act

Key Points

- Ukraine has requested WTO dispute settlement consultations with Australia, alleging that Australia's recently implemented requirements for the plain packaging of tobacco products are inconsistent with WTO obligations. New Zealand has until 22 March to request to join the consultations.
- New Zealand has a direct and significant trade interest in the dispute as New Zealand is considering the introduction of its own plain packaging requirements (with the plain packaging next steps Cabinet paper expected to be submitted by the end of March). In addition, New Zealand has a strong systemic interest. The consultations concern the 'policy space' available in WTO agreements for public health measures, including the balance of rights and obligations under the TRIPS Agreement and ability to pursue legitimate regulatory objectives under the TBT Agreement.
- A number of other WTO members are expected to join the consultations as third parties, on both sides of the issue, but at the time of writing it has not been possible to confirm others' intentions.
- There are strong bilateral reasons for New Zealand to join the consultations as a third party. [withheld s6(a)]
- Officials consider that New Zealand should register its interest as a third party in the consultations requested by Ukraine. Should matters proceed to Panel officials will update you on proposed approach and resource implications.

Recommendations

It is recommended that you:

- 1 Note that Ukraine has requested WTO dispute settlement consultations with Australia alleging that Australia's tobacco plain packaging requirements are inconsistent with WTO obligations. Yes / No
- 2 Note that New Zealand supports Australia's plain packaging initiative and is considering the introduction of plain packaging in New Zealand. Yes / No
- 3 Agree that New Zealand should join the dispute as a third party. Yes / No

withheld s9(2)(a)

Head, Trade Law Unit

Report

On 13 March Ukraine requested consultations with Australia under the WTO's Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) in relation to Australia's plain packaging requirements on tobacco products. Ukraine alleges that plain packaging requirements are inconsistent with Australia's obligations under the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), Agreement on Technical Barriers to Trade (TBT) and the General Agreement on Tariffs and Trade (GATT). WTO members wishing to request to join the consultations as third parties have until 22 March to do so.

2 The Ukraine request alleges that Australia's plain packaging measures (contained in the Tobacco Plain Packaging Act 2011 and its implementing Tobacco Plain Packaging Regulations 2011; the Trade Marks Amendment (Tobacco Plain Packaging) Act 2011; and "Any further implementing regulations and related acts, policies or practices adopted by Australia that guide, amend, supplement, replace and/or implement [these] measures") are inconsistent with Australia's obligations under the TRIPS, TBT and GATT agreements as follows:

- Articles 1.1, 2.1, 15 and 16 of the TRIPS Agreement and Articles 6*quinquies*, 7, and 10*bis* of the Paris convention as incorporated in the TRIPS Agreement, because the measures discriminate against tobacco-related trademarks based on the nature of the product, fail to give effect to the trademark holder's legitimate rights with respect to the trademark, fail to accord effective protection of the trademark "as is", and fail to prevent acts of such a nature as to create confusion by any means whatever with the establishment, the goods, or the industrial or commercial activities, of a competitor.
- Article 20 of the TRIPS Agreement because the measures constitute an unjustifiable encumbrance on the use of trademarks.
- Article 1 of the TRIPS Agreement because Australia has failed to give effect to Article 20 of the TRIPS Agreement in Australia's domestic laws and regulations.
- Article 27 of the TRIPS Agreement because by regulating the physical features of the patented packs, the measures prevent the normal exploitation and thus the enjoyment of the patent rights for tobacco products in a manner that discriminates based on the field of technology.
- Article 2.2 of the TBT Agreement because the measures constitute an unnecessary obstacle to trade and are more trade restrictive than necessary to achieve the state health objectives.
- Article III: 4 of the GATT 1994, Article 3.1 of the TRIPS Agreement, and Article 2.1 of the TBT Agreement because the measures fail to respect the national treatment requirement set out in these provisions by not providing equal competitive opportunities to imported tobacco products and foreign trademark right holders as compared to like domestic tobacco products and trademark right holders.

3 In order to join the consultations as a third party, Australia's agreement will be required that New Zealand has a "substantial trade interest" in the matter being discussed.

Guidelines

4 The following are the general guidelines that have been used in the past in assessing whether to recommend to Ministers that New Zealand become involved in a WTO dispute:

- whether New Zealand has a direct trade interest (and the extent of such interest) in the dispute;
- whether there are systemic WTO principles at stake, or flow-on effects if we let the situation continue unchallenged;
- the robustness of our legal case, and the consequences of a possible loss;
- whether other methods have been used to try to resolve the dispute, and whether they have failed, or are likely to continue to fail (less of a factor in third party involvement);
- the views of other relevant departments and whether there is support for our involvement from stakeholders;
- the views of our trade partners, including whether we are in good company;
- the potential impact on bilateral relations of taking a case; and
- resources to pursue the case, both within MFAT and relevant departments.

5 In assessing participation in the consultations requested by Australia, we take into account the following factors:

- New Zealand is not a significant exporter of tobacco products so there is no direct trade interest in that sense. But the consultations are of direct trade interest in the following ways: New Zealand is considering the introduction of plain packaging (with the plain packaging next steps Cabinet paper expected to be submitted by the end of March), so the trade implications of such measures are of vital interest; Australia is a significant source of tobacco imports to New Zealand and Australian tobacco companies have significant investments in New Zealand; alignment of Australia's and New Zealand's tobacco labelling regulations is envisaged in both the Smoke-free Environments Act 1990 and the Trans-Tasman Mutual Recognition Arrangement (TTMRA).
- We have a strong systemic interest in seeing WTO disciplines correctly applied. As a small country that is export focused, New Zealand benefits from a rules-based international trading system and the ability to enforce those rules. We also have a strong systemic interest in the 'policy space' available in WTO agreements for public health measures, including the balance of rights and obligations under the TRIPS Agreement and ability to pursue legitimate regulatory objectives under the TBT Agreement. We have participated in a number of WTO

disputes in the past on the basis of systemic interests, rather than direct impacts on our trade per se.

- This dispute has significant precedent value. The issues and legal provisions under consideration have either never been considered by a WTO panel, or considered in only a limited way. It is important that New Zealand do what it can to ensure that the precedent established by this dispute is a sensible one.
- Joining the consultations would be consistent with our interventions in recent discussions of plain packaging in the TRIPS Council and TBT Committee, and with our strong advocacy for public health in other international fora including at the World Health Organisation in relation to the Framework Convention on Tobacco Control.
- As a third party to the case, New Zealand would have the opportunity at the consultation phase to listen and gain additional information regarding the legal argumentation and supporting evidence for and against plain packaging. At the panel stage, New Zealand would obtain the written submissions of the principal parties. Third party participation will also provide New Zealand with the opportunity to put its views on the issues on the record, and positively influence the panel's consideration of those issues. The information gained would be useful for New Zealand in the development of domestic policy on tobacco control.
- We expect that a number of other WTO members will join the consultations as third parties. Based on interventions in discussions of plain packaging at recent meetings of the TRIPS Council and TBT Committee, such members could include

[withheld]
s6(a)]

(But at the time of writing it has not been possible to confirm others' intentions.)

- There are strong bilateral reasons for New Zealand to join the consultations as a third party.

[withheld s6(a)]

We do not see any negative bilateral implications in relation to Ukraine or its likely supporters.

- Resource implications at the consultations phase of a dispute are not significant. In the event that a panel is formed, the exact nature and extent of New Zealand involvement will need to be adjusted in

accordance with relevant considerations such as the state of domestic policy development related to plain packaging. MFAT would also need to manage resourcing. To be effective for New Zealand's broad interests in this dispute (including with a view to potential defence of our own measures at some future point), third party involvement in this case will require thorough engagement on all of the legal issues in this case, whether made by principals or third parties. Officials intend updating you on a proposed approach and resource implications as the dispute progresses.

6 Given this assessment, officials consider that New Zealand should register its interest as a third party in the consultations requested by Ukraine. The exact nature and extent of our involvement can be determined later, once it is clear whether the case will proceed to the next stage of Panel formation (likely considerations will be the state of domestic policy development related to plain packaging, the likely arguments put by the principal parties in the case, and resource constraints).

Consultation with Other Departments

7 MOH and MED have been consulted on this submission and agree with the recommendations.

Consultation MFAT/NZAID

8 This is not an issue that requires consultation between MFAT and NZAID.

Consultation MFAT/EAB

9 This is not an issue that requires consultation between MFAT and EAB.