

**STATEMENT BY THE DOMINICAN REPUBLIC TO THE COMMITTEE
ON TECHNICAL BARRIERS TO TRADE, 15 JUNE 2011**

The following statement, dated 15 June 2011, is being circulated at the request of the delegation of the Dominican Republic.

I. INTRODUCTION

1. On 8 April 2011, Australia notified to the Committee on Technical Barriers to Trade the "Tobacco Plain Packaging Bill 2011" ("the Bill") (G/TBT/N/AUS/67). The notification also refers to a "Plain Packaging of Tobacco Products Consultation Paper", which describes further provisions and other measures that Australia is considering for adoption for the purpose of implementing the Bill or regulating the packaging of tobacco products.

2. The Dominican Republic is seriously concerned about the impact of the measures proposed and their consistency with the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS Agreement") and the WTO Agreement on Technical Barriers to Trade ("TBT Agreement"). At the meeting of the Council for TRIPS on 7 June last, our delegation already highlighted the issues that concerned the TRIPS Agreement. We now wish to refer to the TBT Agreement.

3. We are particularly worried about the impact that the proposed measures could have on small and vulnerable economies which are largely dependent on the production and export of tobacco and tobacco products. In this connection, I should emphasize that in the Dominican Republic 55,000 people are employed directly in tobacco production and 63,000 more work in the tobacco industry, i.e. a total of 118,000 people plus their families that are dependent on this subsector, which accounts for 9.2 per cent of the Dominican agricultural sector. This already gives some idea of the tremendous social impact that excessively restrictive measures may have on poor countries.

II. GENERAL ASPECTS OF THE BILL

4. The Bill would authorize the adoption of a series of regulations requiring "plain packaging for tobacco products", amounting to a ban on the use of registered trademarks, logos and other distinguishing features on tobacco packaging apart from the brand name, which would be subject to specified lettering and placement.

5. The Consultation Paper lays down the steps proposed for implementation of the Bill as it concerns cigarette packaging. For other tobacco products, the Paper states that the proposed design features for the plain packaging are still under development and that consultations will be held on them in the second half of 2011. According to the Consultation Paper, Australia will also require that all tobacco packets be coloured a shade of dark olive brown with matt finish and that cigarette packets

display graphic health warnings that cover 75 per cent of the front of the packet in addition to the one already covering 90 per cent of the back, together with a further warning to cover one of the side panels (the other side panel is to display the manufacturer's details and a bar code). No details are given of changes in warning requirements for other tobacco products such as cigars. The Paper further states that all cigarette packs must be rectangular in shape with a flip-top opening, and that no branding, colours or design features other than those specified will be permitted.

6. These requirements would be in addition to Australia's existing laws and other provisions which prohibit the use of tobacco brand names on non-tobacco products and ban advertising campaigns that target consumers. Retail displays of tobacco products are likewise either banned already or to be banned in all Australian states and territories.

III. IMPACT OF THE PROPOSED MEASURES

7. The proposed measures would require all producers and importers of tobacco products to adopt highly standardized packaging which would in turn prevent sellers from asserting their intellectual property rights on packaging for cigarettes and other tobacco products, thereby depriving consumers of important information on the products they buy. As explained below, the Dominican Republic is concerned as to the consistency of these measures with Australia's obligations as a WTO Member.

8. Because the measures have serious consequences, it is important to be sure that the policy objectives they underpin are legitimate. According to Australia's notification to the TBT Committee, the measures are designed to "reduce the appeal of tobacco products to consumers; increase the effectiveness of health warnings on the packaging of tobacco products; and reduce the ability of the packaging of tobacco products to mislead consumers about the harmful effects of smoking". Apparently, each of these objectives forms part of a broader plan that seeks to reduce the number of smokers in Australia. However, the Dominican Republic is unclear as to how the proposed measures would contribute to meeting that goal.

9. The Dominican Republic is also concerned that plain packaging might have unwanted effects that undermine the proposed health objectives. For example, if tobacco products were to be sold in standard packs that make product differentiation difficult, sellers may feel compelled to compete solely on the basis of price, causing a drop in retail prices which might in turn produce an increase in the demand and consumption of tobacco products, including cigarettes and cigars. Furthermore, the sale of tobacco products in plain packaging might make it easier to produce and to sell counterfeit and contraband tobacco products, which would increase the sale and consumption of non-regulated products. In other words, the plain packaging measures proposed could actually run counter to the objectives sought.

IV. THE TBT AGREEMENT

10. As Australia acknowledged in its notification to the TBT Committee, the plain packaging measures proposed are technical regulations covered by the TBT Agreement. As such, the measures must comply with Article 2.2 of the TBT Agreement, which stipulates that "technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create".

11. The plain packaging requirements proposed may very well (and this in fact appears to have been the objective sought) have a disproportionate impact on the trademarks for tobacco products. The Dominican Republic thinks that there is a genuine possibility of the proposed requirements leading to a decline in imports of finished trademark products derived from tobacco (as well as of the tobacco used in such trademark products). Moreover, the law would also reduce future trade

opportunities for legitimate manufacturers by significantly increasing the difficulties of introducing new brands into the Australian market. The Dominican Republic questions whether such restrictions are warranted, because it is not certain that the proposed measures will fulfil the legitimate objective of reducing tobacco consumption. As has already been emphasized, the plain packaging requirement might in fact have unwanted consequences that could lead to an increase in tobacco consumption.

V. THE FRAMEWORK CONVENTION ON TOBACCO CONTROL OF THE WORLD HEALTH ORGANIZATION (WHO) DOES NOT REQUIRE USE OF PLAIN PACKAGING

12. We understand from the notification that Australia is of the view that the plain packaging requirements proposed are part of Australia's commitments under the WHO Framework Convention on Tobacco Control. The Framework Convention does not require plain packaging.

13. Article 11 of the Framework Convention - the only provision that specifically addresses the question of packaging - prohibits packaging that is false or misleading. However, the plain packaging requirements proposed would ban the use of any design elements, regardless of whether or not they are misleading.

14. Article 13 of the Framework Convention deals not with packaging but with promotion. It requires a ban on tobacco advertising or, as a minimum, on advertising that is false or misleading. Packaging is not part of advertising but an integral part of the product as such. As has already been pointed out, the measures proposed would prohibit the use of any type of design, whether it is misleading or not.

15. We understand that the Conference of the Parties to the Framework Convention has prepared non-binding *Guidelines* recommending that the Parties should "consider" using plain packaging. These *Guidelines* do not, however, require the use of plain packaging, nor do they indicate that the design elements and registered trademarks used on the packets are in themselves misleading. Furthermore, as stated previously, there is no clear evidence requiring the Contracting Parties to "consider" using plain packaging.

16. The Dominican Republic kindly requests Australia to respond to the following questions to help clarify its position on these matters.

VI. QUESTIONS

- (a) Would Australia please specify the evidence it used as a basis for proving that the plain packaging requirement would meet the objectives set out in the notification and, more generally, how tobacco consumption would be reduced. Would Australia also kindly supply the references to relevant studies and a summary of the conclusions of such studies.
- (b) Has Australia explored the kind of effects that the use of plain packaging would have on low-budget generic-type tobacco products and on unregulated trade in tobacco products entering the country illegally as contraband? If so, would Australia please provide the results of its analysis.
- (c) Would Australia please explain whether it has considered and assessed the trade impact of the measures proposed, and how it has ensured that such measures will not impose unnecessary restrictions on trade in light of the objective of reducing tobacco consumption.

- (d) Would Australia please explain how, pursuant to Article 12.3 of the TBT Agreement, it has "take[n] account of the special development, financial and trade needs of developing country Members, with a view to ensuring that such technical regulations [...] do not create unnecessary obstacles to exports from developing country Members".

17. Lastly, we would strongly urge Australia to take into account the concerns expressed by the Dominican Republic and other countries and to amend the aforementioned measure.
