Australia — Certain Measures Concerning Trademarks and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging
(WT/DS434)

Australia — Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable To Tobacco Products and Packaging
(WT/DS435, WT/DS441, WT/DS458, WT/DS467)

Request for Permission to Submit Information to the Panel by a Non-Party

on behalf of the

World Health Organization
and
The WHO Framework Convention on Tobacco Control Secretariat

16 February 2015

World Health Organization
Avenue Appia 20
1211 Geneva 27
Switzerland
REQUEST FOR PERMISSION TO SUBMIT INFORMATION TO THE PANEL BY A NON-PARTY

1. Authority of the Panel to seek and receive information

1. Article 13 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) governs the right of a panel to seek information. Article 13 states:

   1. Each panel shall have the right to seek information and technical advice from any individual or body which it deems appropriate. However, before a panel seeks such information or advice from any individual or body within the jurisdiction of a Member it shall inform the authorities of that Member. A Member should respond promptly and fully to any request by a panel for such information as the panel considers necessary and appropriate. Confidential information which is provided shall not be revealed without formal authorization from the individual, body, or authorities of the Member providing the information.

   2. Panels may seek information from any relevant source and may consult experts to obtain their opinion on certain aspects of the matter. With respect to a factual issue concerning a scientific or other technical matter raised by a party to a dispute, a panel may request an advisory report in writing from an expert review group. Rules for the establishment of such a group and its procedures are set forth in Appendix 4.

2. In *US – Shrimp* the Appellate Body confirmed that Article 13 of the DSU permits a panel to accept information and advice whether requested by a panel or not.¹ The World Health Organization requests that the Panel exercise this power, accept the attached information and take it into account.

3. The factors set out below weigh in favor of the Panel accepting the attached information.

2. The Identity of the Applicants

4. The World Health Organization (WHO) is a specialized agency within the terms of Article 57 of the Charter of the United Nations.² At present, the WHO has 194 Member States.

5. The objective of the WHO is the “attainment by all peoples of the highest possible level of health.”³ To achieve this goal, Article 2 of the Constitution of the WHO defines the functions of the WHO. These include:

   (a) to act as the directing and co-ordinating authority on international health work;

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² Constitution of the World Health Organization, [hereinafter "WHO Constitution"], 14 UNTS 185 [preamble].
³ WHO Constitution, Article 1.
(b) to establish and maintain effective collaboration with the United Nations, specialized agencies, governmental health administrations, professional groups and such other organizations as may be deemed appropriate;

(d) to furnish appropriate technical assistance and, in emergencies, necessary aid upon the request or acceptance of Governments;

(n) to promote and conduct research in the field of health;

(q) to provide information, counsel and assistance in the field of health;

(u) to develop, establish and promote international standards with respect to food, biological, pharmaceutical and similar products;

6. Pursuant to its objective and functions, the WHO works to reduce the global burden of disease and death caused by tobacco, thereby protecting present and future generations from the devastating health, social, environmental and economic consequences of tobacco use and exposure to tobacco smoke.

7. In addition to establishing the technical functions of the WHO, the Constitution of the WHO empowers the World Health Assembly (WHA) to adopt conventions or agreements with respect to any matter within the competence of the Organization. Pursuant to this power the WHA adopted the WHO Framework Convention on Tobacco Control (WHO FCTC) in 2003. The Convention, which has 180 Parties entered into force in 2005.

8. The WHO FCTC Secretariat was established in accordance with Article 24 of the WHO FCTC by the Conference of the Parties to the WHO FCTC, which is the governing body of the WHO FCTC and is composed of all Parties to the Convention. The Convention Secretariat is hosted by the WHO, with an independent Workplan and Budget adopted by the Conference of the Parties to the Convention.

9. The main functions of the WHO FCTC Secretariat are governed by the WHO FCTC and the decisions adopted by the Conference of the Parties (COP), including the Workplan and Budget. The Convention Secretariat’s main functions comprise monitoring of implementation of the Convention through the analysis of regular implementation reports submitted by Parties in accordance with Article 21 WHO FCTC and providing technical, legal and financial assistance to Parties in implementation of the WHO FCTC, its Protocols and Guidelines. Assistance is provided to Parties upon request, either through direct support or cooperation with stakeholders. Under the guidance of the COP, the WHO FCTC Secretariat also promotes international cooperation and mobilization of resources by partnering

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4 WHO Constitution, Article 19.
6 Pending the entry into force of the Convention for Zimbabwe on 4 March 2015.
with international and regional intergovernmental and nongovernmental organizations.

3. The Applicants’ Interest in the Dispute
10. As the directing and coordinating authority on international health work, the WHO has an interest in evidence-based public health interventions, in the outcome of the dispute and in any implications it has for public health in the territory of WHO Member States. The outcome of the dispute may also have a direct effect on technical assistance provided by the WHO to Member States. In this respect, a number of WHO Member States are actively considering the introduction of plain packaging. Governments in France, Ireland, New Zealand and the United Kingdom have backed the introduction of plain packaging in their jurisdictions.7 This fact, along with the burden of disease associated with tobacco consumption, means that the dispute is of particular importance to public health.

11. The WHO FCTC Secretariat has an interest in any measure taken to implement the Convention and its Guidelines. The WHO FCTC and its Guidelines address tobacco packaging and labelling measures, including implementation of plain packaging of tobacco products. Accordingly, the outcome of the dispute could have implications not only for implementation of the Convention by its Parties, but also for the work of the WHO and the WHO FCTC Convention Secretariat. In addition, the Conference of the Parties has requested the WHO FCTC Secretariat to, inter alia, “facilitate the provision of technical support, training and capacity building activities if necessary, in respect of legal challenges to implementation of the Convention”.8

4. The Applicants’ Independence from the Parties to the Dispute
12. The WHO is an independent inter-governmental organization. The WHO FCTC Secretariat is an entity hosted by the WHO. All parties to the dispute are WHO Member States. Australia, Honduras and Ukraine are Parties to the WHO FCTC and Cuba has signed but not ratified the Convention.

5. How the Applicants’ Submission may Contribute to Decision-Making
13. The submission by the WHO and the WHO FCTC Secretariat does not set out legal arguments concerning interpretation or application of WTO law. Rather, the

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submission sets out factual information concerning the risks to health posed by tobacco products, international efforts to address those risks, WHO and the WHO FCTC Secretariat’s view on the contribution of plain packaging to protection of human health and the role of plain packaging as part of a comprehensive multisectoral approach to tobacco control. The submission does not examine the specific impact of plain packaging as implemented in Australia, on grounds that the parties to the dispute are well placed to make submissions on that question.

14. The submission by the WHO and the WHO FCTC Secretariat also brings a perspective, knowledge and insight distinct from that of the disputing parties. As the directing and coordinating authority on international health work, the WHO is in a unique position to provide information on global tobacco control. In addition to assisting the Panel in making findings of fact and law, the WHO and WHO FCTC Secretariat submission will assist the Panel to understand the broader international context in which this dispute arises. This context includes a broad consensus among states of the negative health, social and economic costs associated with tobacco consumption and an acceleration of international and domestic efforts to address those costs.

6. The Applicants’ willingness to provide further information

15. Within the scope of their mandates, the WHO and the WHO FCTC Secretariat stand prepared to provide additional information at the request of the Panel.