

**IN THE WORLD TRADE ORGANIZATION**

**Before the Appellate Body**

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

**Third Participant Submission  
by  
Norway**

Geneva  
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Table of cases cited in this submission

<b>Short Title</b>	<b>Full Case Title and Citation</b>
<i>Brazil – Retreaded Tyres</i>	Appellate Body Report, <i>Brazil – Measures Affecting Imports of Retreaded Tyres</i> , WT/DS332/AB/R, adopted 17 December 2007, DSR 2007:IV, 1527
<i>China – Raw Materials</i>	Appellate Body Reports, <i>China – Measures Related to the Exportation of Various Raw Materials</i> , WT/DS394/AB/R / WT/DS395/AB/R / WT/DS398/AB/R, adopted 22 February 2012
<i>Colombia – Ports of Entry</i>	Panel Report, <i>Colombia – Indicative Prices and Restrictions on Ports of Entry</i> , WT/DS366/R and Corr.1, adopted 20 May 2009, DSR 2009:VI, 2535
<i>US – COOL</i>	Appellate Body Reports, <i>United States – Certain Country of Origin Labelling (COOL) Requirements</i> , WT/DS384/AB/R / WT/DS386/AB/R, adopted 23 July 2012
<i>US – COOL</i>	Panel Reports, <i>United States – Certain Country of Origin Labelling (COOL) Requirements</i> , WT/DS384/R / WT/DS386/R, adopted 23 July 2012, as modified by Appellate Body Reports WT/DS384/AB/R / WT/DS386/AB/R
<i>US – Tuna II (Mexico)</i>	Appellate Body Report, <i>United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products</i> , WT/DS381/AB/R, adopted 13 June 2012

## I. INTRODUCTION

1. Norway welcomes the opportunity to present its views as a third participant in these proceedings before the Appellate Body regarding Australia's plain packaging requirements applicable to tobacco products and packaging.
2. The World Health Organization (WHO) has labelled tobacco use as a global epidemic and "one of the biggest public health threats the world has ever faced".<sup>1</sup> According to the WHO, tobacco is "killing more than 7 million people a year".<sup>2</sup>
3. The WHO Framework Convention on Tobacco Control ("FCTC") forms a cornerstone in the world's efforts to reduce public health harms caused by tobacco use, and was developed as a response to the globalisation of the tobacco epidemic.<sup>3</sup>
4. The Conference of the parties to the FCTC has adopted Guidelines, which are intended to assist the parties "in meeting their obligations and in increasing the effectiveness of measures adopted".<sup>4</sup> The FCTC Guidelines are based on "available scientific evidence and the experience of the Parties themselves implementing tobacco control measures", and were adopted by consensus after a consultation procedure.
5. The Guidelines for the implementation of Articles 11 and 13 both recognise the importance of the packaging in marketing of tobacco products, and recommend the implementation of tobacco plain packaging. In full conformity with the FCTC, a number of countries, including Norway, have now also introduced plain packaging requirements as recommended by the Guidelines on the implementation of Article 11, as well as the Guidelines on the implementation of Article 13.
6. In this written submission, Norway will not address all of the issues before the Appellate Body in this appeal. Rather, Norway will confine itself to offer some remarks on the interpretation of Article 2.2 of the TBT Agreement as well as the appeal related to Article 11 and the contribution of the measure.

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<sup>1</sup> WHO Fact Sheet No. 339, updated 9 March 2018. Available from: <http://www.who.int/mediacentre/factsheets/fs339/en/>

<sup>2</sup> WHO Fact Sheet, No. 339, updated 9 March 2018. Available from: <http://www.who.int/mediacentre/factsheets/fs339/en/>

<sup>3</sup> WHO Fact Sheet No. 339, updated, 9 March 2018. Available from: <http://www.who.int/mediacentre/factsheets/fs339/en/>.

<sup>4</sup> Joint Amicus Brief to the Panel by the WHO and the WHO FCTC Secretariat, para. 22, submitted by Australia as exhibit AUS-42. The Guidelines for the implementation of Article 11, para. 1, and the Guidelines for the implementation of Article 13, para. 1.

## II. The TBT Agreement Article 2.2

### A. Interpretation of the term “trade-restrictive”

7. Honduras and the Dominican Republic both appeal the Panel’ conclusion that Australia’s tobacco plain packaging measure is not more trade-restrictive than necessary under Article 2.2 of the TBT Agreement.
8. It is clear from WTO jurisprudence that the words “trade-restrictive” in the second sentence of Article 2.2 should be read in light of the first sentence, which refers to an “obstacle to international trade”. The terms “international trade” and “trade”, in this context, refer to the commercial exchange of goods between WTO Members. The Appellate Body has held that, in Article 2.2, the phrase trade-restrictive “means something having a limiting effect on trade”.<sup>5</sup>
9. Thus, these terms encompass prohibitions on trade, which are the most severe form of obstacle or restriction, but also the imposition of restrictive conditions that limit, rather than banning entirely, trade.
10. In *US – COOL*, the panel indicated that the focus of an assessment of trade-restrictiveness is on “the competitive opportunities available to imported products”.<sup>6</sup> With respect to establishing the extent to which a measure restricts trade, it has been held that this “does not require the demonstration of any actual trade effects” but may, instead, be based “on the design of the measure, as opposed to resulting trade effects”.<sup>7</sup>
11. Honduras argues that the Panel in this case erred when finding that the plain packaging measures “are trade-restrictive, insofar as, by reducing the use of tobacco products, they reduce the volume of imported tobacco products on the Australian market, and thereby have a ‘limiting effect’ on trade”. According to Honduras, the tobacco plain packaging measures are trade-restrictive “due to their architecture, structure, and design rather than because of their impact on the volume of trade”.<sup>8</sup>
12. In their appellant submissions, both Honduras and the Dominican Republic allege that any limitation on “competitive opportunities” would be sufficient to establish that a

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<sup>5</sup> Appellate Body Report, *US – Tuna II (Mexico)*, para. 319. See also Appellate Body Report, *US – COOL*, para. 375. In the context of Article XI of the GATT 1994, the word “restriction” has been defined as “something that has a limiting effect, see e.g., Appellate Body Report, *China – Raw Materials*, para. 319, cited in Appellate Body Report, *US – Tuna II (Mexico)*, para. 319.

<sup>6</sup> In that case, the panel concluded that the measure at issue was trade-restrictive because it “negatively affect[ed] imported livestock’s conditions of competition in the US market in relation to domestic livestock, see Panel Report, *US – COOL*, paras. 7.572 and 7.574.

<sup>7</sup> Panel Report, *US – COOL*, para. 7.572. See also Panel Report, *Colombia – Ports of Entry*, para. 7.241 and paras. 7.232-7.240.

<sup>8</sup> Honduras’ Appellant Submission, para. 465.

technical regulation is trade-restrictive, referring to the panel in *US-COOL* and its interpretation of trade-restrictiveness in Article XI of the GATT 1994.<sup>9</sup>

13. Norway shares Australia's view that such an assumption, i.e. that any modification of "competitive opportunities" *per se* would have an actual limiting effect on international trade, would be erroneous. We therefore agree with Australia that the Panel was correct in finding that "what needs to be shown [is] *how* such effects on the conditions of competition on the market give rise to a limiting effect on international trade in tobacco products".<sup>10</sup>
14. Hence, the Panel properly reasoned that "a demonstration that the challenged measures may result in some alteration of the overall competitive environment for suppliers on the market would not, in itself, demonstrate their 'trade-restrictiveness'" in terms of Article 2.2.<sup>11</sup> And furthermore, what must be considered then "is the extent to which the technical regulation at issue has a *limiting effect on international trade*".<sup>12</sup>

#### **B. Consideration of whether less trade-restrictive alternatives exist**

15. With respect to the plain packaging measure, Norway notes the Panel's finding that "branded packaging" can function as an advertising and promotion tool.<sup>13</sup> This finding has not been challenged by the appellants. As Australia points out, the two proposed alternatives of an increase in the minimum legal purchase age (MLPA) and an increase in excise taxes would not have any effect on "the communication function of the pack, and would therefore not make an equivalent contribution to the objectives of the TPP measure".<sup>14</sup> This is because they would not eliminate the opportunity to use the package as a medium for advertising and promotion.
16. Moreover, restricting youth access to tobacco products by increasing the minimum legal purchase age to 21 years, only targets young people, whereas the aim of the plain packaging measure is not only to discourage the uptake of smoking amongst adolescents, but it is directed at all persons who are considering or trying to quit smoking, persons who have recently quit smoking, as well as the population as a whole. Hence, a measure that only targets young people would be less effective than the plain packaging measure.

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<sup>9</sup> Honduras' Appellant Submission, para. 484 ff. and the Dominican Republic's Appellant Submission, para. 1288 ff.

<sup>10</sup> Panel Report, para. 7.1168 (emphasis original).

<sup>11</sup> Panel Report, para. 7.1166.

<sup>12</sup> Panel Report, para. 7.1166 (emphasis original).

<sup>13</sup> Panel Report, paras 7.659 and 7.663.

<sup>14</sup> Australia's Appellee Submission, para. 387.

17. Norway would also stress that we agree with the points made by Australia about non-tobacco producing Members, *i.e.* that when a Member's market is supplied only by imported tobacco products, "any equivalent *contribution* to reducing the use of, and exposure to, tobacco products would necessarily entail an equivalent *limiting effect* on international trade in tobacco products".<sup>15</sup> Hence, any alternative measure to the plain packaging measures would have to be at least as trade-restrictive to make an equivalent contribution as these measures.
18. Furthermore, Norway would like to underline that complex health problems, such as promoting public health by reducing tobacco prevalence, must be viewed in the broader context of the comprehensive strategies implemented to fight such problems. In this regard, we refer to the Appellate Body in *Brazil – Retreaded Tyres*, which stated that "substituting one element of [a] comprehensive policy for another would weaken the policy by reducing the synergies between its components, as well as its total effect".<sup>16</sup> As stressed by Australia, it is therefore up to the complainants to demonstrate that proposed alternative measures in this case "would make an equivalent contribution due to any synergistic effects they would have with other non-challenged aspects of Australia's tobacco control policy",<sup>17</sup>

### **III. THE DSU ARTICLE 11 AND THE MEASURES' CONTRIBUTION**

19. Before concluding, Norway would like to make some brief remarks on the Appellants' claims under Article 11 of the DSU related to the tobacco plain packaging's contribution and their assertion that the Panel's assessment lacked even-handedness. While the appellants argue that the Panel's findings in respect of contribution was erroneous, we agree with Australia that this argument is faulted by the fact that the appellants omit to acknowledge that it is the complainants, and not Australia, who bear the burden of proof in establishing their *prima facie* case that the plain packaging measures do not contribute to reducing the use of, and exposure to, tobacco products.<sup>18</sup>

### **IV. CONCLUSION**

20. Norway respectfully requests the Appellate Body to take account of the considerations set out above when evaluating the claims in this dispute.

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<sup>15</sup> Australia's Appellee Submission, para.

<sup>16</sup> Appellate Body Report, *Brazil – Retreaded Tyres*, para. 172.

<sup>17</sup> Australia's Appellee Submission, para. 386.

<sup>18</sup> Australia's Appellee Submission, para. 491.