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Jakarta, ²² July 2011

Committee Secretary
Standing Committee on Health and Ageing
House of Representative
PO BOX 6061
Parliament House
CANBERRA ACT 2600
AUSTRALIA
Tel: (02) 6277 4145
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Submission No. 56 (Plain Packaging Bill) A.O.C. Date: 26/07/2011

Dear Sir/Madam,

Re: Government of Indonesia Submission regarding to Tobacco Plain Packaging Bill 2011 Australia

As a tobacco and cigarette producing country, Indonesia is concerned about the draft regulation which standardizes all tobacco packaging to show only a brand name and variant, along with health warnings and other government mandated information or markings, in specified locations, without any symbols, logos or design features of all tobacco products which are sold in Australia.

Indonesia recognizes Australia's objective to control tobacco use to protect public health, but would like to submit its concerns and request clarification on a number of issues.

Requiring tobacco products to be sold in standardized, plain packaging is an extreme measure that reduces the ability of tobacco brand owners from effectively branding and differentiating their products. New tobacco brands from Indonesia would face yet another barrier in gaining market access against brands that are already popular in Australia. Currently, the law prohibits using tobacco trademarks on anything other than tobacco packages and trade communications. It is unlawful to do *anything* which gives publicity to or promotes smoking, tobacco products, or tobacco brands. With all cigarette advertising already banned, new brands entering Australia will find it virtually impossible to sell them in Australia.

Further, by eliminating the value of branding, the economic value of Australia's WTO market access commitment in the tobacco sector will be significantly diminished.

It is our view that the public health benefits of standardized, plain packaging needs to be more fully demonstrated. As plain packaging is a novel measure, it is also uncertain whether this measure would reduce tobacco consumption at the population level, rather than at the level of individual brands. Against this negative impact on new entrants to Australia's market for tobacco products, there are arguably other tobacco control measures that are less trade restrictive.

For the above reasons, we believe that the implementation of the Plain Packaging Bill may present an unnecessary barrier to trade contrary to the WTO Technical Barriers to Trade (TBT) Agreement Article 2.2. We would therefore like pose the following questions to better understand the justification of the proposed measure.

Questions:

Issue 1: In notifying this measure to the TBT Committee, Australia recognizes that the proposed measure will result in barriers to trade.

Questions:

- Has Australia quantified the trade impact of this new measure?
- If so, can Australia provide the TBT Committee with a trade impact study?
- If not, can Australia satisfy the Committee that the impact of the measure on developing Members will not be negative as compared to developed Members?

Issue 2:

Australia states that the proposed measure is necessary and contributes to Australia's health objectives on the basis of the opinion of the Preventive Health Taskforce.

- Did Australia, or the Taskforce, examine any studies on the impact of plain packaging other than those listed in the Consultation paper and if so which ones?
- To the extent that studies showing outcomes different from the studies listed in the Consultation Paper were examined, how did Australia weigh and measure the material impact of the different evidence?
- If Australia did not consult other studies, to what extent can it be confident that the proposed measure is necessary and will contribute to Australia's policy objectives?

- Since the drafting of the Consultation Paper, has Australia taken into consideration any other studies showing the material contribution of the proposed measure?
- Did Australia examine the material contribution of existing measures to the achievement of its health policy objectives or how the implementation of existing measures could or should be improved?

Issue 3:

WTO Members must ensure that technical regulations are not applied if they have the effect of creating unnecessary obstacles to international trade or discriminate against imports.

Questions:

- Has Australia considered alternative measures and to what extent were those alternative measures weighed against the measures proposed on the basis of trade restrictiveness?
- Has Australia taken steps to ensure that there will be no discrimination as between local and imported tobacco products, not only in relation to cigarettes but other tobacco products on a like product by like product basis?
- Has Australia examined the extent to which the proposed limitation on the use of brands will have an impact on trade in the different like products covered by the proposed measure?

Issue 4:

The TBT Agreement contains non-discrimination provisions that act in conjunction with the GATT to maintain conditions for healthy competition between imported and domestic products.

Question:

- To what extent has Australia examined the potential freezing of market share due to restrictions on the use of brands on both imported and domestic tobacco products in the context of maintaining open competition?

Issue 5:

Australia has joined with the EU, Mexico, the United States, Chile, Argentina, and New Zealand in questioning in the TBT Committee Thailand's proposals on pictorial health warnings on alcoholic beverages. Australia expressed concern that Thailand did not have sufficient scientific evidence to justify the measures being proposed and had not considered less trade-restrictive, less costly, and

less burdensome alternatives. Yet, Australia's proposed tobacco measure foresees a substantial expansion of the cigarette packaging space devoted to pictorial health warnings on the use of tobacco.

Questions:

- Is Australia in a position to distinguish its position in relation to pictorial health warnings on alcoholic beverages from its proposals on tobacco?
- Does Australia consider that the same rules and concerns apply to its plain packaging proposal and to Thailand's proposals on pictorial health warnings on alcoholic beverages?
- Did Australia consider less trade-restrictive measures for tobacco labeling? Is Australia in a position to distinguish the impact of the proposed measures from already implemented measures?

Issue 6:

Section 11 of the Exposure Draft provides that the proposed measure does not apply to the extent that it would result in an acquisition of property from a person otherwise than on just terms. We can conclude that that this is a reference to Article 51(xxxi) of the Australian Constitution. Section 11 provides that if the proposed measure is found to be in breach of the acquisition on just terms provisions, the trademark "may be used on the packaging of tobacco products."

Questions:

- Can Australia confirm that Section 11 refers to the provisions of the Australian Constitution and in particular Article 51?
- Would the provisions of Section 11 apply if the proposed measure was found to be in breach of Article 20 of the TRIPS Agreement, which provides that trademarks must not be encumbered in their ability to distinguish one tobacco producer's product from another's?

Issue 7:

Section 14 of the Draft Bill sets out requirements for the packaging and the appearance of tobacco products. In particular, Section 14(2) provides that regulations under the proposed measure may prohibit the use of trademarks (or any brand identification in general) on tobacco products and/or may specify the conditions under which trademarks (or designs or other brand identifiers) may be used on tobacco products. At the same time, Article 20 of the TRIPS Agreement provides that the trademarks must not be "unjustifiably encumbered" so as to render them incapable of distinguishing one producer from another. Article 17 of the TRIPS Agreement provides for conditional exceptions, and Article 8 of the TRIPS Agreement sets out the principles governing all intellectual property rights referred to in the TRIPS Agreement.

Questions:

- Can Australia explain how the provisions of Section 14 of the Draft Bill are compatible with the provisions of Article 20 of the TRIPS Agreement?
- If Australia considers that the proposed measure comes within the exception provided for in Article 17 of the TRIPS Agreement, can Australia explain: a) to what trademark "rights" does the exception refer; b) how the legitimate interests of trademark owners are taken into account; and c) how the legitimate interests of third parties, including consumers and tobacco vendors, are taken into account?
- Does Australia consider that the provisions of Article 8 of the TRIPS Agreement apply, and if so, whether the proposed measure is "consistent" with the provisions of the TRIPS Agreement as required by Article 8?

Issue 8:

Section 15 of the Draft Bill provides that the Registrar of Trade Mark, or competent courts of law, must not refuse or revoke or remove etc. trademarks because they may not be usable on tobacco products because of the provisions of the proposed measure.

Question:

- Can Australia explain what the purpose of this provision of the proposed measure is, particularly in the light of Article 15 and 19 of the TRIPS Agreement?

I look forward your response to our concerns on this bill immediately.

Yours sincerely,



Gusmardi Bustami
Director General

Cc:

- Minister of Trade of the Republic of Indonesia;
- Vice Minister of Trade of the Republic of Indonesia;
- Director of Multilateral Trade Cooperation, Ministry of Trade of the Republic of Indonesia;
- Indonesian Commercial Attache for Australia.