

Dear Sir, Madam,

With this letter, the Government of Nicaragua wants to express its concern over the proposed Tobacco Plain Packaging Act 2011 which is under consideration by your Committee.

As you may know, the Government of Nicaragua has already made its concerns known to the Australian Enquiry Point on Technical Barriers to Trade following Australia's notification to the WTO Committee on Technical Barriers to Trade of the "Tobacco Plain Packaging Bill 2011" which was circulated by the WTO Secretariat on 8 April, 2011 as WTO document G/TBT/N/AUS/67.

The Tobacco Plain Packaging Act 2011 and its implementing regulations seek to eliminate the use of trademarks on all tobacco packaging and on tobacco products themselves, with the exception of the brand name which may appear on the packs and the products but only in a standardized form.

The Government of Nicaragua is not putting in question Australia's right to regulate the sale and consumption of tobacco products and fully supports worldwide efforts to reduce smoking. However, Nicaragua is concerned that the Tobacco Plain Packaging Act 2011 is not based on sufficient evidence that the measure will be effective in achieving the health objective of reducing smoking, while at the same time introducing a very significant limitation on the use of trademarks and brands which play such an important role in distinguishing tobacco products. The limitation on competitive opportunities and thus the restriction on trade imposed by the plain packaging measure is disproportionate, and risks violating Australia's international obligations under, in particular, the WTO Agreement on Technical Barriers to Trade ("TBT") and the Agreement on Trade Related Aspects of Intellectual Property Rights ("TRIPS").

In this respect, the Government of Nicaragua notes that Article 2.2 of the TBT Agreement requires that Members ensure that their technical regulations prescribing product or packaging requirements shall not be prepared, adopted or applied with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfill a legitimate objective, taking account of the risks that non-fulfillment would create. When assessing such risks, governments should take into consideration relevant scientific evidence. As noted before, Nicaragua considers that the proposed plain packaging legislation is more trade-restrictive than necessary to fulfill the stated objective of reducing tobacco consumption. The prohibition on the use of all distinguishing trademarks, design, logo, and color characteristics from the packaging of branded tobacco products, leaving only the brand name in a standard form significantly restricts competitive opportunities in the Australian market. It provides a strong disincentive to export to Australia and will make it extremely difficult, if not impossible, for any manufacturer of tobacco products not currently present in the Australian market to enter that market. The potential adverse impact on international trade in tobacco products with Australia is not outweighed by any evidence of a similarly important reduction in tobacco consumption. The evidence referred to in the Explanatory Memorandum does not support the conclusion that plain packaging will actually reduce tobacco consumption. Australia already has very strict and effective anti-tobacco

regulations in place, and recently introduced a significant tax increase on tobacco products. These less trade restrictive measures which are fully consistent with Australia's international obligations confirm that the plain packaging measure that is before you is an unnecessary obstacle to trade.

Similarly, the prohibition on the use of the trademarks and the requirement to use the brand name in a certain standard form only are unjustifiable encumbrances imposed on the use of trademarks, prohibited by Article 20 of the TRIPS Agreement, which requires that the use of trademarks in the course of trade not be "unjustifiably encumbered by special requirements, such as .....use in a special form or use in a manner detrimental to its capability to distinguish the goods or services of one undertaking from those of other undertakings." The proposed plain packaging legislation is inconsistent with this provision because it mandates a "special form" and does not allow competing goods to be distinguished. The prohibition on the use of trademarks also would be inconsistent with various provisions of the Paris Convention for the Protection of Industrial Property that has been incorporated into the TRIPS Agreement.

The TRIPS Agreement does not contain a general exception for measures necessary to protect health. While Article 8.1 of TRIPS allows countries to adopt measures to protect public health, such measures must be otherwise consistent with the provisions of TRIPS, which plain packaging is not. In any case, the disproportionate limitation on intellectual property rights for no measurable benefits in terms of public health confirms that the plain packaging measure is an unjustifiable encumbrance on the use of trademarks. In this respect, Nicaragua wants to point to the important unintended but real consequences of the proposed plain packaging measure which would undermine its health objective. The measure could lead to lower prices and a flood of "cheap white," unbranded cigarettes, thus likely to increase tobacco consumption. Generic packaging might increase contraband trade, counterfeiting, and smuggling of tobacco products, the adverse health consequences of which are well known. Increased smuggling also implies a significant loss of revenue for the government, which currently funds anti-smoking campaigns in large part from the taxes assessed on tobacco sales. Clearly, the plain packaging measure goes against the alleged health objective and is for that reason as well, unjustifiable.

Finally, Nicaragua notes that the Tobacco Plain Packaging Act 2011 and the Explanatory Memorandum state that the plain packaging measure is adopted to give effect to Australia's obligations under Articles 5, 11 and 13 of the WHO Framework Convention on Tobacco Control (FCTC). However, nothing in these provisions of the FCTC oblige Australia to adopt such measures. The FCTC does not even mention plain packaging and no other country party to the FCTC has adopted plain packaging measures, thus confirming that plain packaging is clearly not necessary to give effect to any of the obligations of the FCTC. The FCTC Guidelines merely propose that countries "consider" adopting plain packaging. As is clear from Article 2.1 of the FCTC, an important aspect of this proposed "consideration" will need to be whether such a measure would be compatible with obligations under international law, including WTO law. The FCTC Guidelines thus do not require Australia to adopt the plain packaging measure either.

The Government of Nicaragua is grateful for this opportunity to present its view before the Committee and sincerely hopes that the Australian parliament will take into account the concerns in respect of the Tobacco Plain Packing Act of 2011 as expressed in these comments.