

WTO notification

1. World Trade Organisation Article 2.9 of the technical barriers to trade agreement

To avoid accusations that a government has failed to notify a relevant standard, it is recommended that plain packaging legislation is notified to the World Trade Organisation (WTO) under Technical Barriers to Trade (TBT) Article 2.9. This is a procedural process that allows other governments to comment on a technical requirement and does not mean that plain packaging of tobacco products breaches any of the WTO agreements.

The purpose of the TBT Agreement is to avoid unnecessary regulatory obstacles to international trade while **allowing for the regulatory autonomy of states to protect legitimate public interests such as public health**. Article 2.9 obliges WTO member to notify drafts of technical regulations that could impact on international trade and which are not international standards, so that other WTO members can consider the regulations and make comments.

A technical regulation is defined as being a regulation that: *“lays down product characteristics or their related processes and production methods. Compliance is mandatory. They may also deal with terminology, symbols, packaging, marking and labelling requirements.”*

Plain packaging falls within the definition of a technical regulation that relates to the trade in goods and is one that has not as yet been established as an international standard.

2. The notification should be of draft legislation

This means that it should be at a stage which sets out the detail of what the government intends to adopt but is still capable of amendment. The WTO TBT procedure then requires a **60 day stand still period** during which the legislative adoption process is frozen so that written comments from other WTO members can be sent on the draft measure. **This period must be factored into the legislative timetable.**

There is also a requirement under Article 2.9 that the final adopted measure be published and it is recommended that there is a 6 month period between publication and coming into force.

The WTO webpage that provides details and materials on the WTO notification procedure can be found at www.wto.org/english/tratop_e/tbt_e/tbt_notifications_e.htm and the guidelines and forms are available in English, Spanish and French.

Most governments have a single agency or department that administers all the country’s notifications. But the Ministry of Health responsible for plain packaging will need to coordinate with that other department or agency to enable the notification to be made effectively.

3. Examples of plain packaging of tobacco products WTO notifications

To date, each country to have adopted plain packaging has notified their legislation under TBT 2.9. Examples of existing notifications can assist any government seeking comply with the notification procedures.

- Ireland's WTO TBT notification of 17 June 2014 is available here:
https://docs.wto.org/dol2fe/Pages/FE_Search/DDFDocuments/125256/q/G/TBTN14/IRL1.pdf
- The UK's WTO TBT notification of September 2014 is available here:
https://docs.wto.org/dol2fe/Pages/FE_Search/DDFDocuments/126836/q/G/TBTN14/GBR24.pdf
- Norway's WTO TBT notification of 18 May 2015 is available here:
https://docs.wto.org/dol2fe/Pages/FE_Search/DDFDocuments/132085/q/G/TBTN15/NOR23.pdf
- Hungary's WTO TBT notification of 12 December 2015 is available here:
<https://docs.wto.org/imrd/directdoc.asp?DDF-Documents/t/G/TBTN15/HUN31.DOC>

Many of these notifications received comments from other member countries in TBT committee meetings. Some countries, including those that brought a WTO dispute procedure against Australia (such as Indonesia, Dominican Republic, Cuba and Honduras) and some tobacco producing countries (such as Malawi, Zimbabwe and Nicaragua), have given negative comments to the committees; but many countries including New Zealand, Norway, Canada, Uruguay and the EU also provided positive comments supporting the position that plain packaging does not breach the WTO agreements and is a legitimate public health measure. In a number of committee meetings where Member State's proposals for plain packaging were discussed, a representative of the World Health Organisation provided support for the measure and stressed that there is a strong body of evidence to support the position that plain packaging will achieve its objectives¹.

None of these comments in committee have led to further dispute procedures being commenced against any country that has adopted plain packaging laws, other than Australia.

4. WTO dispute procedures against Australia's plain packaging laws

At the time of writing, a WTO dispute settlement panel is adjudicating complaints by Cuba, the Dominican Republic, Honduras and Indonesia with respect to Australia's plain packaging laws. It has been widely reported that British American Tobacco and Philip Morris are providing funding and legal support for Honduras and Dominican Republic in the proceedings.

The panel's decision is expected *not before* May 2017.

There are well established principles and rules that demonstrate the flexibility for WTO Members to regulate for public health. These are described in the WHO publication on plain packaging of tobacco products² and are set out briefly in the **Reference Section K: LEGAL ISSUES AND CASE SUMMARIES**. The main issues of dispute fall under Article 2.2 of the TBT Agreement and Article 20 of the Trade Related Aspects of Intellectual Property Agreement (TRIPS).

The WTO panel decision may be the subject of an appeal by the Parties but in the meantime it appears unlikely that any further dispute will arise concerning plain packaging laws of other WTO Members until that dispute is fully resolved.

The issues in this dispute are separate from the procedural requirement to notify regulations under TBT Article 2.9.

1. See for instance the TBT committee meeting on 27-28 November 2012, where New Zealand's notification of its plain packaging laws was discussed: G/TBT/M/58 Document 13-0617
2. At pages 43 to 46 <http://www.who.int/tobacco/publications/industry/plain-packaging-tobacco-products/en/>