Australian Plain Packaging Law, International Litigations and Regulatory Chilling Effect

Lukasz A Gruszczynski, Institute of Law Studies, Polish Academy of Sciences
Trade, Investment and Risk

This section highlights the interface between international trade and investment law and municipal and international risk regulation. It is meant to cover cases and other legal developments in WTO law (SPS, TBT and TRIPS Agreements and the general exceptions in both GATT 1994 and GATS), bilateral investment treaty arbitration and other free trade agreements such as NAFTA. Pertinent developments in international standardization bodies recognized by the SPS and TBT Agreement are also covered. Risk regulation refers broadly to regulation of health, environmental, financial or security risks. Of recurrent interest in this Area are questions of whether precautionary policies can be justified, the extent to which policy can and should influence risk regulation and the standard of review with which international judicial and quasi-judicial bodies assess scientific evidence.

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Lukasz Gruszczynski*

I. Introduction

Introduction of plain packaging law by Australia in 2012 was met with strong opposition from transnational tobacco companies (TTCs). While advocates of the law see it as a logical step in governmental efforts to curb tobacco use and improve public health in Australia, TTCs claim that the new law is scientifically unsound, overly intrusive and that it infringes a number of international law provisions relating to trademark and property protection. Some TTCs, either directly or indirectly, have decided to test the Australian measure before international tribunals. Although, these challenges are connected with interests held by TTCs in Australia, they should be seen as a part of a global struggle against new emerging international standards in the field of tobacco control. In this context, it is also submitted that these litigations can produce “regulatory chilling effect” with respect to activities of other states. This article aims to look at this problem more closely.

The text proceeds as following. The subsequent part provides a brief overview of the new Australian plain packaging law and international legal proceedings that have been instituted against that country. The third part analyses the problem of regulatory chilling effect in the context of these two international litigations. The last section concludes.

II. Plain packaging and international disputes

The Tobacco Plain Packaging Act (Act)¹ is one of the latest initiatives of the Australian government aimed at reducing the level of tobacco consumption. It sets restrictions on the colour, size and format of tobacco products packaging and determines the rules applicable to the appearance of brand, company and variant names on packs. According to the Act, all tobacco packaging needs to be in drab dark brown colour in a matt finish. It also prohibits the use of any trademarks or other marks on the retail packaging of tobacco products except for “the brand, business or company name for the tobacco products, and any variant name for the tobacco products” and “the relevant legislative requirements.”² In addition, any such names which appear on the packaging have to be placed in a specific area and be displayed in a stan-

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* Assistant professor at the Institute of Legal Studies, Polish Academy of Sciences (Poland). The research was financed by the Polish National Science Center pursuant to grant number 2012/07/B/H55/03767.


² Ibidem, cl. 20.
The adoption of the Act was also accompanied by the introduction of another piece of tobacco control legislation: the Competition and Consumer (Tobacco) Information Standard 2011, which sets revised and very stringent requirements for the health warnings that appear on tobacco packaging (i.e., increases size of the health warnings placed at the front of tobacco packages to 75% of the surface). Together, they establish a very strict regime for packaging of tobacco products.

The law has been contested both at the national and international level. TCCs challenged the Act in the Australian High Court, claiming that it amounted to unlawful acquisition of their intellectual property rights (such as trademarks, registered designs, goodwill) by the Australian State, which violated Article 51 (xxxi) of the Constitution. The High Court disagreed and ruled against the challenge in August 2012. Two proceedings that were initiated at the international level still remain unsettled. Within the WTO, a number of Members (i.e., Cuba, Dominican Republic, Ukraine, Honduras and Indonesia) initiated formal proceedings against Australia. The countries maintain, among the other things, that the plain packaging law violates various provisions of the TRIPS Agreement. In particular, they disagree with Australia as to (i) whether certain provisions of the TRIPS are concerned solely with the registration of a trademark, or they also extend to the use of such trademark (i.e., whether the right to register also implies the existence of a right to use) and (ii) whether the Act constitutes an unjustifiable encumbrance over the use of trademark as prohibited by Article 20.

8 Phillip Morris Asia (PMA) also began an individual proceeding under the bilateral investment treaty (BIT) between Hong Kong and Australia (HKA BIT). Among the various claims made by PMA, two are the most important. First, it argues that the Act constitutes an unlawful expropriation of its investment in Australia and therefore violates Article 6.1 of the HKA BIT. Second, it maintains that the new law fails to provide for equitable and fair treatment with respect to PMA’s Australian investments, and therefore infringes Article 2.2 of the HKA BIT.

Despite the fact that Australia’s legal position seems to be relatively strong, some uncertainty as to the outcome of the disputes remains, particularly if one considers the enigmatic language of the TRIPS Agreement, the limited case law, existence of contradictory arbitral awards and the lack of a provision in the HKA BIT that would provide parties with flexibility to protect public health.

III. Plain packaging, international litigations and regulatory chilling effect

Australia is a medium-sized cigarette market, with 15.1% of the population above 14 years old being daily smokers (a significant drop from 16.6% in 2007). The net profit of the three biggest tobacco companies operating in Australia and controlling about 98% of the market amounted to AUD $86 million in 2007. These are significant numbers, but they are still low compared to a number of other countries. One may

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3 Tobacco Plain Packaging Regulations 2011, cl. 2.4.1-2.
6 Note also that although it is Ukraine and Honduras which contest the Australian measure, it is common knowledge that BAT stands behind their complaint, while Dominican Republic is supported by Philip Morris (A. Martin, Philip Morris Leads Plain Packs Battle in Global Trade Arena, 22 August 2013, available at http://www.bloomberg.com/news/2013-08-22/philip-morris-leads-plain-packs-battle-in-global-trade-arena.html (accessed 27 March 2014)).
7 E.g. Request for the Establishment of a Panel by Ukraine, Australia – Certain Measures concerning Trademarks and other Plain Packaging Requirements Applicable to Tobacco Products and Packaging, WT/DS434/11, 17 August 2012.
therefore wonder why TTCs have decided to take such an aggressive strategy in fighting the new Australian law. It seems that the major reason behind their decisions is the precedential nature of the new law and a fear that the packaging requirements will be copied in other jurisdictions. The precedential character of the Australian plain packaging law was, for example, recognized by the WHO Director-General, who stressed that “[w]ith so many countries lined up to ride on Australia’s coattails, what we hope to see is a domino effect for the good of public health.” 12 Consequently, the main objective of the TTCs is to strike down the Australian Act and preserve the current status quo with respect to tobacco packaging.

Since the legal position of Australia is relatively strong, the aggressive approach of TTCs can be also explained by other reasons (i.e. other than just fighting against the precedent). Note that their approach sends a strong signal to other countries contemplating the introduction of plain packaging laws that any such initiative may be challenged. This in turn can have a chilling effect on national regulatory initiatives of other states. The concept of “regulatory chill” is conventionally understood as a situation in which a particular country refrains from enacting regulatory measures due to a fear that such regulation will be incompatible with its international obligations (in particular trade and investment rules), which in turn may result in responsibility of such a state. 13 In this context it is argued that a) trade and investment rules are inherently complex and uncertain (sometimes deliberately so in order to secure consensus among the parties negotiating a particular trade/investment agreement); and b) the jurisprudence (at least with respect to some issues) is still underdeveloped, leading to legal uncertainty. As a consequence, it may sometimes be difficult for the countries to precisely assess the compatibility of proposed regulatory measures with their international obligations. Some authors also add that the level of uncertainty may be particularly high in the field of tobacco control, as innovation and regulatory experimentation in this area is essential for developing effective policies. 14 In addition, while “a mere threat of legal action can have a powerful deterrent effect on governments considering the introduction of new laws to regulate industry,” 15 such a threat combined with an actual proceeding against another state arguably have an even stronger impact on the conduct of countries (as it reinforces the threat).

Arguably international challenges are more important in this respect than national proceedings. It must be noted that international trade law, and to a lesser extent investment rules, are quasi-universal. The outcome of an international dispute is therefore directly relevant for all countries, while in the case of national proceedings taking place in particular jurisdictions there is only an indirect (if any) impact on third parties (i.e. rationales used by foreign courts are not easily transferable between jurisdictions). Second, WTO and international investment rules are formulated in very general language, leaving the determination of many legal nuances to international tribunals. It is frequently difficult to determine what kind of actions are permissible under such rules, particularly if a specific legal problem has not yet been clarified in a dispute settlement process. As a consequence, the level of legal uncertainty (and corresponding risks) is usually higher here as than in national law, the latter of which normally provide clearer standards and have more developed case law. Third, the expertise of many governments, particularly in smaller and less developed countries, in international trade and investment rules is limited. This automatically increases the level of legal uncertainty and discourages them from taking any action. Fourth, one may reasonably assume that the chilling effect produced by the investment dispute should be stronger than in case of the WTO proceeding (although most probably it is not possible to demonstrate this empirically). Note that WTO dispute settlement bodies are entitled to authorize compensations or the withdrawal of concessions only with respect to impairment or nullification that occurs after the lapse of a reasonable period of time for bringing a measure into conformity with WTO law. A gov-

12 Statement by WHO Director-General, Dr Margaret Chan, WHO welcomes landmark decision from Australia’s High Court on tobacco plain packaging act, 15 August 2012.


ernment can, therefore, always withdraw a measure and avoid retaliation. The situation is different in investment arbitration, where an investor seeks compensation for all damages (including the actual damage resulting from expropriation as well as lost profits).

Note that even if the TTCSs lose both cases, they will still gain some additional time before plain packaging obligations are introduced in other jurisdictions.16 Consequently, it is not surprising to see that they seem to be more interested in maintaining uncertainty rather than obtaining a final judgement. The progress in the two cases has been very slow so far. In the WTO context, although the first panel was established already in September 2012, Ukraine almost immediately requested suspension of the panel composition and the process was reactivated only in August 2013. This coincided in time with the second request of Honduras for establishment of a panel (10 months after its first request). In the meantime, three other countries also asked for consultations with Australia, and panels were established on 26 March 2014 (Indonesia) and 25 April 2014 (Dominican Republic and Cuba).17 The parties also agreed to have the same panelists for all five disputes and they were eventually appointed by the WTO Director General at the beginning of May 2014. The investment arbitration proceeding is fully confidential, so one may only speculate as to why the whole process is so slow. What is known is that the first hearing took place in July 2012 and concerned procedural issues. The parties submitted their statements of claim and defense in 2013, and the second hearing was eventually held in February 2014. It is not clear whether the arbitration tribunal has already decided that the case should be split into two phases (jurisdiction and ruling on the merits) or rather will handle it in one step. According to Philip Morris, the case is expected to be completed by 2015, at the earliest.18

Against the above discussion, one may ask about the effectiveness of the chilling strategy. There are currently several countries, both developed and developing, which are working (or have worked) on plain packaging laws. This group includes Canada, the European Union (EU), Ireland, Israel, New Zealand, Norway, Turkey and the United Kingdom.19 Some of them, however, are still at the very preliminary stage of the regulatory process and the chilling effect of the proceedings may not yet be visible there (e.g. Canada, Israel, Turkey and Norway). As a consequence, only more advanced countries are discussed below.

The regulatory chilling effect is probably most visible in the case of New Zealand. The country started work on the revision of its tobacco control law already in 2011.20 At the beginning, plain packaging was discussed only as one of the available options. Although, the government eventually decided to follow the Australian example, this was made conditionally upon the outcome of legal disputes. The Regulatory Impact Statement for the plain packaging law prepared by the NZ Ministry of Health in 2012 indicated that there is a reasonably high risk of WTO and arbitration disputes, with the outcome that is difficult to predict.21 The same concern was also repeated during the meeting of the government. Eventually, the Minister of Health openly admitted that “the Government will wait and see what happens with Australia’s legal cases”, and added that “enactment of New Zealand legislation and/or regulations could be delayed pending those outcomes.”22

The case of the European Union is more complicated. Although the work on revision of the Tobacco Products Directive – which could lead to the introduction of plain packaging – started already in 2010, the Commission was not able to finalize its propos-

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19 In addition, proposals for plain packaging laws were also submitted in India and France (as parliamentary initiatives) but did not obtain the support of the government.
al for a long time. A draft was finally published in December 2012.\(^{23}\) There are various reasons which may explain this delay – e.g. a great number of submissions received in the process of public consultations, or the unexpected dismissal of the EU Commissioner for Health and Consumer Protection, Mr. Dalli, from his post following the anticorruption investigation by the European Anti-Fraud Office. Although Mr. Dalli clearly stated that “we are not waiting for the outcome [of the legal proceedings against Australia]; ... we are going to continue to progress on our own studies and evaluations and I am sure that the results will be very interesting.”\(^{24}\) there are also those who claim that the on-going disputes were one of the factors that contributed to the delay. In particular Alemanno noted that “the lawsuits currently pending ... against Australia [plain packaging] ... also forced the Commission to carefully assess the impact of its proposal under EU international obligations.”\(^{25}\)

Eventually, the EU Commission decided not to include any mandatory plain packaging requirements in its draft directive, and this issue was left as a mere option to Member States (and this is also a case for a final version of the directive). One may only speculate as to why the Commission withdrew from its initial plans on plain packaging. Probably the main reason was the fact that it was aware that any plain packing initiative would be opposed by a number of Member States, which consider such a requirement to be overly restrictive. At the same time, it seems that concerns over the compatibility of such a measure with WTO law also played a role. The issue of legality has been considered by various EU institutions involved in the regulatory process, and some Commission officials identified this matter as one of the important problems.\(^{26}\) The fact that concern was real is also indirectly suggested by the preamble of the TPD, which explicitly asks Members States to guarantee that any national plain packaging initiatives are compatible with WTO obligations.\(^{27}\) Having said this, it seems that the EU institutions did not, overall, regard the threat of international legal proceeding as a decisive factor in their decision on plain packaging.

As far as the UK is concerned, already in 2011 the government commissioned a research study on plain packaging (the report was eventually delivered in 2012\(^{28}\)) and launched public consultations on standardised packaging of tobacco products (which ended in August 2012).\(^{29}\) A majority of the participants in the consultation process opted for plain packaging. This was also the official position of the Health Department,\(^{30}\) while the report commissioned by the government confirmed the scientific plausibility of a plain packaging law.\(^{31}\) Nevertheless, the UK government has decided not to proceed with the plain packaging initiative. The Secretary of State for Health in its official statement explained that the health effects of such a measure were unclear and that was advisable to wait until empirical evidence is available.\(^{32}\) To this end a new study was commissioned, the results of which were delivered in April 2014. The report stated that plain packaging is a viable option. At the same time, the officials from the Health Department also admitted that one reason that behind the decision of the government was the uncertain legal status of such measures under international trade.

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26 Personal interviews of the author (15 January 2014).
31 C. Moodie et. al., supra note 28.
and investment obligations, and threats of legal actions were included in all of the industry submissions in the course of public consultation.

Similarly as in case of the EU, the decision of the British government not to proceed with the plain packaging proposal seems to be primarily motivated by factors other than the threat of legal challenges. Apart from the limited scientific findings (the official reason for withdrawal of the proposal), there were also numerous rumours in the British press that the decision of the government was heavily influenced by pro-tobacco lobbyists and pre-elections concerns (losing votes to the United Kingdom Independence Party, which is against plain packaging).

More recently, however, there seems to be yet another shift in the direction of policy of the British government, which now appears to be ready to introduce the ban.

On the other hand, Ireland has decided to implement a plain packaging law without waiting for the outcome of the two Australian disputes. According to the governmental plan, the new law requiring plain packaging will be enacted by the Irish parliament in 2014. The government also seems to be prepared to face potential disputes, both at the national and international level.

IV. Conclusions

Although the disputes over the plain packaging law are of a bilateral nature, they should be seen as a fight over a future global precedent. In this context, this article argues that the trade and investment proceedings are of prime importance, and the significance of the judgement of the Australian High Court is rather limited, and that even before any judgement is rendered, the litigations may have a chilling effect on the regulatory activities of other states. While “the regulatory chill is a difficult force to document, as it takes the form of internal decision making”, the above analysis shows that concerns over the legality of plain packaging laws have prompted at least one country to delay the introduction of a similar regulatory measure, while in other cases they played some (albeit limited) role in the final decision of governments over the shape of the tobacco control regime. One may also rationally assume (especially in the light of the "strategy of delays" employed by TTCs) that there are a number of other countries which are awaiting the outcome of the litigation against Australia before proceeding at all with plain packaging proposals.

The analysis presented above also leads to the conclusion that the threat of potential legal proceedings is rarely the sole (or even the main) factor that influences a state’s decision as to the adoption of plain packaging rules (at least as far as developed countries are concerned). Other factors include, inter alia, the influence of the tobacco industry on the regulatory system (e.g. via lobbyists), the short-term economic consequences connected with the introduction of plain packaging laws, and the importance of tobacco control on the national political agenda.

41 C. J. Fooks & A. Gilmore, “International trade law, plain packaging and tobacco industry political activity: the Trans-Pacific Partnership”, Tobacco Control 2013;20:1-9. doi:10.1136/tobaccocontrol-2012-050869, who note that “the chilling effect is likely to be greater still for low and middle income countries as the calculation of compensation is not tied to their ability to pay” (p. 3).