Big Tobacco v Australia: Challenges to Plain Packaging

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I. Introduction

In 2011, Australia became the first country to enact plain packaging legislation for tobacco products as a policy measure to improve public health.[1] The legislation imposed restrictions on the retail packaging of tobacco products and prohibited the use of logos and other trademarks on tobacco packaging. In response to the legislation, the tobacco industry spearheaded a legal campaign against the Australian government in three different legal arenas: a constitutional challenge to the legislation in Australia's highest court, the High Court of Australia; an investor claim against Australia under the bilateral investment treaty between Hong Kong and Australia; and complaints brought by some tobacco-producing states against Australia in the World Trade Organization (WTO), which were reportedly financed by the tobacco industry. Australia won in all cases, although the WTO decision is subject to appeal.

This piece provides a summary of the litigation against Australia and draws some lessons. On the one hand, the tobacco industry's calculated, strategic and multi-pronged challenges to the plain packaging measures have had little, if any, adverse impact on public health in Australia as the measures continue to remain in place. However, the impact of the litigation is much more complex. The legal campaign waged by the tobacco industry shows that the industry will take aggressive action to protect profitability. Even if the industry is ultimately unsuccessful, such action may nevertheless delay the introduction of plain packaging measures in other jurisdictions through 'regulatory chill'.[2] This raises important questions about the application of the United Nations Guiding Principles on Business and Human Rights (UNGPs)[3] and the need for reform of international trade and investment law.

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[1] Tobacco Plain Packaging Act 2011 (Cth); Andrew Mitchell and David Studdert, 'Plain Packaging of Tobacco Products in Australia: A Novel Regulation Faces Legal Challenge' (2002) 307(3) *Journal of the American Medical Association* 261.

[2] Kyla Tienhaara, 'Regulatory Chill and the Threat of Arbitration: A View from Political Science' in Chester Brown and Kate Miles (eds), *Evolution in Investment Treaty Law and Arbitration* (Cambridge: Cambridge University Press, 2011) 606.

[3] Human Rights Council, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework', A/HRC/17/31 (21 March 2011).

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II. Australia's Plain Packaging Measures

The Tobacco Plain Packaging Act 2011 (Commonwealth) (Act) was enacted on 21 November 2011 and the implementing regulations, the Tobacco Plain Packaging Regulations 2011 (Commonwealth) (Regulations), were promulgated on 7 December 2011. The legislation required tobacco packages to comply with certain packaging requirements from 1 October 2012, and all tobacco products sold at retail outlets had to comply with the plain packaging requirements as at 1 December 2012.[4]

The objectives of the Act were twofold. First, the legislation expressly aimed to improve public health by discouraging people from taking up smoking, encouraging people to give up smoking, discouraging those who had given up smoking from relapsing, and reducing people's exposure to smoke from tobacco products.[5] The second objective of the Act was to give effect to certain obligations Australia has under the World Health Organization (WHO) Framework Convention on Tobacco Control (FCTC).[6] Under article 11(1)(a) of the FCTC, Australia agreed to implement measures to ensure that tobacco packaging did not mislead consumers about the health effects of smoking.

The Act sought to achieve these objectives by regulating the retail packaging and appearance of tobacco products in order to reduce their appeal to consumers, increase the effectiveness of health warnings on retail packaging, and reduce the ability of the packaging to mislead consumers about the harmful effects of smoking.[7] Sections 18 and 19 of the Act and the Regulations imposed specific requirements for the physical features, colour and finish of retail packaging. Packs and cartons were to be rectangular,[8] with only a matt finish[9] and embellishments on retail packaging were prohibited.[10] The colour of the packaging was to be the colour prescribed by the Regulations or otherwise, a drab dark brown.[11] Furthermore, the Act prohibited the use of trademarks on retail packaging with some limited exceptions such as the brand, business or company name for the tobacco products.[12] The way in which the brand, business and company name was to appear on packaging was also prescribed by the Act.[13]

III. The Constitutional Challenge

On 1 December 2011, members of the British American Tobacco Group (BAT) commenced proceedings against Australia in the High Court of Australia, claiming that the Act contravened Section 51(xxxi) of the Australian Constitution because it effected

[4] Tobacco Plain Packaging Act 2011 (Cth), sec 2(1), 17-27A and 31.

[5] Ibid, sec 3(1)(a).

[6] Ibid, sec 3(1)(b); World Health Organization Framework Convention on Tobacco Control, WHO Document WHA56.1 (entered into force 27 February 2005).

[7] Ibid, sec 3(2).

[8] Ibid, sec 18(2)(b)(i).

[9] Ibid, sec 19(2)(a).

[10] Ibid, sec 18(1)(a).

[11] Ibid, sec 19(2)(b).

[12] Ibid, sec 20.

[13] Ibid, sec 21.

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an acquisition of their intellectual property rights and goodwill on other than just terms.[14] JT International SA (JTI) commenced similar proceedings on 15 December 2011. Philip Morris Ltd (PML), Van Telle Tabak Nederland BC and Imperial Tobacco Australia Ltd also intervened in the BAT case.

Section 51(xxxi) of the Constitution confers on the Commonwealth Parliament the power to make laws with respect to '[t]he acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws'. The tobacco companies' key complaint was that the Act amounted to an acquisition of their property because it prohibited them 'from using their intellectual property in or on their retail packaging in the way in which they have used it, and would wish to continue to use it, to promote the sale of their products'.[15] They argued that the Act rendered them 'unable to exploit their claimed property, especially their trademarks and product get-up, in connection with the sale of cigarettes in any meaningful or substantive way'.[16] These tobacco companies also claimed that the Act would reduce their sales, and would adversely affect the value of their intellectual property that could have been realized by assignment or licence.[17] Thus, it was argued, the Act reduced the value of their businesses.[18]

On 15 August 2012, a majority of the High Court rejected the claims made by BAT and JTI. The Court found that there had been no acquisition of the companies' property within the meaning of Section 51(xxxi) of the Constitution. This was because the Act's imposition of controls on the way in which tobacco products could be packaged and marketed did not involve 'the accrual of a benefit of a proprietary character to the Commonwealth which would constitute an acquisition'.[19]

IV. The Investor–State Dispute

On 21 November 2011, Philip Morris Asia Limited (PMA) commenced arbitration proceedings against Australia pursuant to the Agreement between the Government of Hong Kong and the Government of Australia for the Promotion and Protection of Investment dated 15 September 1993 (Investment Treaty).[20] At the time the proceedings were brought, PMA was the regional headquarters for the Asia region of the Philip Morris International (PMI) group of companies (PMI Group). PMA owned 100 per cent of the shares of Philip Morris (Australia) Limited (PM Australia), which, in turn, was the holding company of PML.[21] The Tribunal noted that PML was a trading company

[14] *British American Tobacco Australasia Limited v The Commonwealth of Australia*; *JT International SA v Commonwealth of Australia* (2012) 250 CLR 1.

[15] Ibid, [164] per Hayne and Bell JJ.

[16] Ibid, [262] per Crennan J.

[17] Ibid, [163] per Hayne and Bell JJ.

[18] Ibid.

[19] Ibid, [44] per French J.

[20] The arbitration was conducted in the Permanent Court of Arbitration under the UNCITRAL Arbitration Rules, UN Doc A/65/17, annex I.

[21] *Philip Morris Asia Limited (Hong Kong) v The Commonwealth of Australia*, Award on Jurisdiction and Admissibility (17 December 2015), https://pca-cpa.org/en/cases/5/ (accessed 3 September 2018), [6].

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incorporated in Australia that engaged 'in the manufacture, import, marketing and distribution of tobacco products for sale within Australia'.[22]

PMA claimed that Australia breached its obligations under the Investment Treaty by enacting the Act and the Regulations. It argued that by prohibiting the use of intellectual property on tobacco products and packaging, the plain packaging legislation transformed PML 'from a manufacturer of branded products to a manufacturer of commoditised products with the consequential effect of substantially diminishing the value of [PMA's] investments in Australia'.[23] PMA sought an order that Australia withdraw the plain packaging measures or refrain from applying them against its investments or as an alternative, an award of damages to the amount of at least USD$4,160 million in damages plus interest, as well as an award of legal costs.[24] In response, Australia rejected PMA's claims on the merits and also raised certain preliminary objections relating to the jurisdiction of the Tribunal and the admissibility of PMA's claims.

The Tribunal ordered the bifurcation of the proceedings to address two of Australia's preliminary objections before consideration of the merits of PMA's claims. On 17 December 2015, the Tribunal upheld Australia's argument that PMA's invocation of the Investment Treaty constituted an abuse of rights (or abuse of process). The claims raised in the arbitration were therefore found to be inadmissible and the Tribunal was precluded from exercising jurisdiction over the dispute.[25] The Tribunal's decision was based on the principle that 'the commencement of treaty-based investor–State arbitration constitutes an abuse of right (or abuse of process) when an investor has changed its corporate structure to gain the protection of an investment treaty at a point in time where a dispute was foreseeable'.[26] In the midst of political developments concerning plain packaging, the PMI Group had decided to restructure several companies within the group and transfer its wholly owned Australian subsidiaries including PM Australia and PML to PMA. On 23 February 2011, PMA formally acquired its shareholding in PM Australia and PML. The Tribunal found that the adoption of the plain packaging legislation 'was foreseeable well before the Claimant's decision to restructure was taken (let alone implemented)'.[27] Furthermore, the evidence showed that 'the principal, if not sole, purpose of the restructuring was to gain protection under the Treaty' in respect of the plain packaging measures that were the subject of the arbitration.[28] In other words, 'the adoption of the Plain Packaging Measures was not only foreseeable but actually foreseen by the Claimant when it chose to change its corporate structure'.[29] In these circumstances, the Tribunal considered that the initiation of the arbitration by PMA under the Investment Treaty constituted an abuse of rights.

[22] Ibid.
[23] Ibid, [7].
[24] Ibid, [89].
[25] Ibid, [588].
[26] Ibid, [585].
[27] Ibid, [586].
[28] Ibid, [587].
[29] Ibid.

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V. The WTO Disputes

Unlike the High Court challenge and the investor–state dispute, in which tobacco companies were directly involved as parties, the WTO claims were brought by other states. Ukraine, Honduras, the Dominican Republic, Cuba and Indonesia each challenged the plain packaging measures in the WTO. The complainants claimed that the measures contravened the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement), the Agreement on Technical Barriers to Trade (TBT Agreement) and the General Agreement on Tariffs and Trade 1994 (GATT 1994) in that they infringed trademark rights, imposed unjustifiable trade restrictions and were discriminatory. Although each of the complainant states made tobacco products, 'trade flows between them and Australia have been low or non-existent' and the tobacco industry reportedly admitted to paying the legal fees of the complaining states.[30]

Six years after the first of the claims was brought, on 28 June 2018, the WTO Panel published its report.[31] The Panel dismissed the complaints and found that the plain packaging measures did not contravene the TRIPS Agreement, the TBT Agreement or the GATT 1994. Excluding 226 pages of addenda and 150 pages of appendices, the Panel's decision is more than 880 pages long and it is beyond the scope of this piece to examine the decision in detail. Suffice it to say that the Panel found that when combined with the other tobacco control measures implemented by Australia, the plain packaging measures made 'a meaningful contribution to Australia's objective of reducing the use of, and exposure to, tobacco products'.[32]

There are two other matters to note about the Panel's report. First, apart from its legal force, the Panel's report arguably had a degree of political legitimacy as several other states and organizations participated in the proceedings: twenty-four states made arguments as third parties and several organizations including business organizations, non-governmental organizations and the WHO made amicus curiae submissions to the Panel. Second, and significantly, Honduras and the Dominican Republic have both lodged appeals against the Panel's decision. Thus, the challenge to Australia's plain packaging measures in the WTO is not yet over.

VI. Lessons Learned

The cases brought against Australia's plain packaging measures clearly demonstrate that the tobacco industry will do whatever it takes to challenge anti-tobacco regulatory regimes. The legal action taken by the industry was strategic and multi-pronged: two companies directly challenged the measures as unconstitutional, while others joined that domestic suit as interveners; another company rearranged its corporate structure and

[30] Sergio Puig, 'Tobacco Litigation in International Courts' (2016) 57:2 *Harvard International Law Journal* 383, 411.

[31] *Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WT/DS435/R, WT/DS/441/R, WT/DS/458/R, WT/DS/467/R (adopted 28 June 2018). The WTO convened one panel to decide all claims other than that made by the Ukraine. Ukraine's case against Australia did not ultimately proceed as Ukraine suspended the proceedings three years after its initial complaint.

[32] Ibid, [7.1043].

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affairs to facilitate an arbitration under a bilateral investment treaty; and the industry reportedly funded the multiple state complaints in the WTO. So far, Australia has won in all cases, and its plain packaging measures remain intact. Yet it has taken seven years, and millions of dollars in legal fees,[33] for the issue to be resolved – and that time and money cost is ongoing with the appeals pending in the WTO.

In Australia's case, the delay has had little, if any, negative impact on the Australian public as the plain packaging measures continued to apply during this period. Furthermore, as a developed country, Australia was able to foot the financial bill in defending the suits. Yet the impact of the litigation against Australia is more complex and wide reaching. As Voon notes, 'Australia's market was never Big Tobacco's real target'; rather, 'by launching multiple claims, the industry aimed to hinder the implementation of the Australian laws and discourage other countries from adopting similar laws'.[34]

The tobacco industry has arguably succeeded in that aim. As at 1 July 2017, only four countries (including Australia) had implemented plain packaging measures and four other countries had set dates for the introduction of plain packaging.[35] All eight states are developed countries, which presumably have the financial means and technical know-how to defend litigation commenced by the tobacco industry. However, even policy decisions made by these states are not immune from challenge. For example, after the New Zealand government announced that it would introduce plain packaging measures, the tobacco industry threatened the government with litigation in the international arena.[36] The New Zealand government decided to wait until the challenges to Australia's plain packaging measures had been resolved before implementing its policy. Based on interviews with New Zealand policy makers and health advocates, Crosbie and Thomson concluded that the legal threats contributed to a 'regulatory chill' which delayed the implementation of the measures in New Zealand by three years.[37] As the New Zealand case shows, 'the possibility that a measure may be inconsistent with a state's international obligations influences domestic policymaking'.[38]

In the immediate aftermath of PMA's loss in the investor–state dispute, PMI's Senior Vice President and General Counsel declared that '[t]here is nothing in today's outcome that addresses, let alone validates, plain packaging in Australia or anywhere else'.[39]

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[33] The tobacco companies were ordered to pay the Australian government's costs in both the High Court case and the investor–state arbitration but the amount of costs in both cases is unknown. It has been reported that Australia's costs in the investor–state dispute amounted to around AUD$50 million: Adam Gartrell, 'Philip Morris Ordered to Pay Australia Millions in Costs for Plain Packaging Case', *Sydney Morning Herald* (9 July 2017), https://www.smh.com.au/politics/federal/philip-morris-ordered-to-pay-australia-millions-in-costs-for-plain-packaging-case-20170709-gx7mv5.html (accessed 7 September 2018).

[34] Tania Voon, 'Big Tobacco vs Australia's Plain Packaging', *Pursuit* (5 September 2018), https://pursuit.unimelb.edu.au/articles/big-tobacco-vs-australia-s-plain-packaging (accessed 7 September 2018).

[35] Framework Convention Alliance, 'Tobacco Plain Packaging, 2017', https://www.fctc.org/plain-packs-proliferating/ (accessed 10 September 2018).

[36] Eric Crosbie and George Thomson, 'Regulatory Chills: Tobacco Industry Legal Threats and the Politics of Tobacco Standardised Packaging in New Zealand' (2018) 131(1473) *New Zealand Medical Journal* 25.

[37] Ibid.

[38] Andrew Mitchell and Elizabeth Sheargold, 'Protecting the Autonomy of States to Enact Tobacco Control Measures under Trade and Investment Agreements' (2015) 24 *Tobacco Control* 147, 148.

[39] PMA, 'Philip Morris Asia Limited Comments on Tribunal's Decision to Decline Jurisdiction in Arbitration Against Commonwealth of Australia Over Plain Packaging' (18 December 2015), http://www.newsboost.com/newsroom/

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Consistently with that statement, Big Tobacco continues to challenge anti-tobacco regulatory measures around the world.[40] With some 80 per cent of the world's 1.1 billion smokers living in low- and middle-income countries,[41] delayed implementation of anti-tobacco policies as a result of those challenges presents an ongoing threat to global public health.

We should, therefore, consider more systematic changes to counter the litigation strategies of the tobacco industry. Against the backdrop of Big Tobacco's litigation against Australia analysed in this piece, at least three observations could be made. First, in line with Principle 9 of the UNGPs,[42] states should 'maintain adequate policy space to meet their human rights obligations when pursuing business-related policy objectives with other States or business enterprises'. As the Commentary to Principle 9 makes clear, trade and investment agreements 'create economic opportunities for States' but can also 'affect the domestic policy space of Governments'.[43] It is thus imperative for states to retain sufficient 'policy and regulatory ability to protect human rights under the terms of such agreements, while providing the necessary investor protection'.[44]

Second, the tobacco industry's legal actions highlight the need to reform the international trade and investment regime. The Reform Package proposed by the United Nations Conference on Trade and Development (UNCTAD) is particularly relevant in this regard.[45] The package addresses five reform challenges including safeguarding a state's right to regulate for public policy interests and reforming investor dispute settlement to reduce the risk of regulatory chill.[46] The Reform Package also provides a number of policy tools to helps states meet these challenges including the use of carve-outs – that is, carving out certain public policy issues (such as tobacco control measures) from the scope of an investment treaty or the investor–state dispute settlement process in a treaty.[47]

Third, Big Tobacco's campaign against anti-tobacco health measures appears to be inconsistent with the business responsibility to respect human rights under the second pillar of the UNGPs. Principle 11 of the UNGPs provides that the responsibility to respect human rights means that business enterprises 'should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved'.[48] The Commentary to Principle 11 explains that business enterprises

(F'note continued)
philip-morris/philip-morris-asia-limited-comments-on-tribunal-s-decision-to-decline-jurisdiction-in-arbitration-against-commonwealth-of-australia-over-plain-packaging (accessed 10 September 2018).

[40] Voon, note 34.

[41] WHO, 'Tobacco: Key Facts', http://www.who.int/news-room/fact-sheets/detail/tobacco (accessed 9 September 2018).

[42] Human Rights Council, note 3, 12.

[43] Ibid.

[44] Ibid.

[45] UNCTAD, *UNCTAD's Reform Package for the International Investment Regime* (18 December 2017), http://investmentpolicyhub.unctad.org/News/Report/Archive/1576 (accessed 14 September 2018).

[46] Ibid, 18.

[47] For example, the May 2016 amendments to the free trade agreement between Singapore and Australia included a carve-out for tobacco control measures from the investor–state dispute settlement procedure in the revised investment chapter: ibid, 82.

[48] Human Rights Council, note 3, 13.

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'should not undermine States' abilities to meet their own human rights obligations, including by actions that might weaken the integrity of judicial processes'.[49] Furthermore, Principle 13 states that the responsibility to respect human rights requires that business enterprises '[a]void causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur'.[50] Not only is it difficult to see how the tobacco industry's multi-pronged challenge to Australia's plain packaging measures was consistent with these principles, but there is a broader question about the extent to which tobacco companies can comply with the UNGPs as long as they continue to produce and sell tobacco products. As the Danish Institute for Human Rights recently observed, 'the production and marketing of tobacco is irreconcilable with the human right to health' and '[f]or the tobacco industry, the UNGPs therefore require the cessation of the production and marketing of tobacco'.[51]

[49] Ibid.

[50] Ibid, 14.

[51] Danish Institute of Human Rights, 'Human Rights Assessment in Philip Morris International' (4 May 2017), https://www.humanrights.dk/news/human-rights-assessment-philip-morris-international (accessed 18 September 2018).

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