Australia's Tobacco Plain Packaging Act: Convergence of Public Health and Global Trade

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Australia's Tobacco Plain Packaging Act: Convergence of Public Health and Global Trade

Cover Page Footnote
International Law; Commercial Law; Law
Australia’s Tobacco Plain Packaging Act: Convergence of Public Health and Global Trade

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I. Introduction

It is widely known that tobacco is both a deadly product and a profitable industry. On November 21, 2011, Australia passed the world’s toughest anti-tobacco law.1 Since its enactment, this law has sparked several national and international lawsuits and has put spotlight and increased pressure on the inherent tension between public health and global trade.2 Following an aggressive public awareness campaign battle, several transnational tobacco companies challenged the Tobacco Plain Packaging Act of 20113 (TPP Act) on constitutional grounds pertaining to breach of intellectual property rights without compensation.4 The High Court of Australia upheld the law in a monumental decision, paving the way for implementation on December 1, 2012.5

The tobacco epidemic is considered one of the world’s deadliest threats to public health.6 According to the World Health

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3 Tobacco Plain Packaging Act 2011 (Cth) (Austl.).


5 McGuirk, supra note 1.

6 Tobacco Fact Sheet, WORLD HEALTH ORG. (May 2012), http://www.who.int/
Organization (WHO), almost six million people die each year from tobacco, including over 600,000 nonsmokers who are exposed to second-hand smoke.\(^7\) Although tobacco use is becoming more widespread, there is evidence to suggest that tobacco use is decreasing in higher income nations.\(^8\) The international community has taken up the tobacco epidemic as a public health initiative, making great strides in raising awareness and implementing regulations in the last several decades.\(^9\)

That being said, governments attempting to regulate tobacco smoking face heavily financed opposition from the tobacco industry.\(^10\) The dilemma runs much deeper too. Although governments play an obvious role—and undoubtedly have a responsibility—in curtailing industries that are hazardous to public health, it appears that their “ability to take action to address this is sometimes limited by existing commitments to international trade.”\(^11\) The latest and most egregious example of this controversy involves Australia’s plain packaging law, as Big Tobacco has recently brought several international legal challenges, relying on international investment treaties and trade agreements, in a final effort to circumvent Australia’s national policy.\(^12\)

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\(^7\) Id.
\(^8\) Id.
\(^9\) See generally Jo Jewell, Global Trade: For Healthy Populations or Healthy Profits?, PLOS BLOGS (Dec. 17, 2012), http://blogs.plos.org/globalhealth/2012/12/17/jojewell/ (“If we go back to the basics of epidemiology, it is abundantly clear that patterns of disease are converging globally, with NCDs [also known as non-communicable diseases] emerging as the major threat to population health worldwide.... Tobacco smoking, alcohol consumption, unhealthy diet, physical inactivity and obesity are pervasive as risk factors globally.... As many are aware, NCDs are largely preventable.... In order to make meaningful progress in tackling NCDs, we need action that goes to the core of these risk factors by addressing supply-side factors and the environmental determinants. These are the push factors that drive trends towards increased consumption.... When we talk about supply-side factors and environmental determinants[,] we immediately think about what is being produced (in what context and with which incentives); what is available; how much it costs; and, how it is marketed.... Tobacco control policies ... primarily aim to reduce demand by changing the environmental push factors.”).
\(^10\) Id.
\(^11\) Id.
\(^12\) Id. The term “Big Tobacco” as used in this Comment includes Phillip Morris,
The decision handed down by the High Court of Australia was a milestone for tobacco regulation, but the implementation of plain packaging laws in Australia is not necessarily indicative of their efficacy as a health policy strategy of the future. This uncertainty is largely attributable to globalization, which "has completely reshaped the policy playing field." In addition to the possibility that the TPP Act will be struck down as incompatible with investment treaty and international trade obligations, there is also the risk that the international challenges brought by the tobacco industry will have a chilling effect on other countries considering plain packaging laws. The debate ultimately turns on the unresolved tension between tobacco control as a public health policy initiative and intellectual property rights established to facilitate international trade in a modern economy. In sum, the favorable ruling and recent implementation of the tobacco plain packaging law in Australia has global ramifications and is providing the international platform upon which a showdown between public health advocates and the tobacco industry will soon take place.

This Comment seeks to accomplish four things. First, it will survey the development of tobacco regulation as a public health strategy in the context of today's increasingly global economy with special emphasis on the mounting tension inherent in the international scheme. Second, this Comment will briefly discuss the TPP Act and explore the significance of the High Court of Australia's endorsement of the legislation as constitutional, noting that the decision, while monumental in many respects, was somewhat narrow in scope. Third, it will then analyze the various international legal challenges being brought by Big Tobacco against the Australian law, highlighting a few of the merits of each argument. Finally, this Comment will evaluate potential outcomes and resolutions and elaborate on the effectiveness of plain packaging laws in Australia.


13 Jewell, supra note 9.

14 Id. ("This new global dimension to public health policy reflects the structural dynamics that underpin both the supply side and the environmental determinants that affect demand—namely global integration of investment, trade and communication.").

packaging as a matter of public policy and legislative strategy.

II. Background

According to a joint study published by the World Trade Organization (WTO) and WHO in 2002, “[t]obacco promotion and trade has become a major global public health threat” and “[e]mpirical evidence confirms that trade openness leads to increased tobacco consumption.”16 The battle being waged between health advocacy and tobacco trade dates back several decades.17 In the 1980s and 1990s, tobacco consumption generally decreased in high-income countries but increased in developing countries.18 This continued phenomenon is attributable in large part to deliberate expansions into poor-income and middle-income countries by transnational tobacco companies in the last decade.19 These transnational tobacco companies have historically been “strong proponents of tariff reduction and open markets to enable them to compete with domestically manufactured tobacco products in high growth markets in Latin America, Eastern Europe, and Asia.”20 By scaling back tariffs and other import barriers, foreign companies have been able to compete more evenly with locally manufactured tobacco products.21 In addition, the increased competition resulting from opening the market to foreign producers has the added effect of triggering more rigorous promotion and marketing of tobacco products.22 Following the negotiation of bilateral trade agreements between the United States and several Asian countries in the 1980s, the transnational tobacco

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17 Id. ¶ 130.

18 Id. ¶ 125.

19 Id.; WORLD HEALTH ORG., HISTORY OF THE WHO FRAMEWORK CONVENTION ON TOBACCO CONTROL 1 (2009) [hereinafter History of WHO FCTC], available at http://whqlibdoc.who.int/publications/2009/9789241563925_eng.pdf (“Propelled by a multinational industry driven by the extremely profitable nature of tobacco manufacture and trade and fostered by the addictiveness of nicotine, the epidemic spread rapidly from the developed to the developing world.”).

20 WHO/WTO Study, supra note 16, ¶ 125.

21 Id.

22 Id.
companies engaged in extensive marketing efforts that stimulated demand for tobacco in an initial period of industry growth.\textsuperscript{23} As likely would be expected, the evidence shows that this marketing had a great impact on boosting tobacco consumption in the poorer and more vulnerable countries.\textsuperscript{24}

The globalization of the tobacco epidemic is attributable to the convergence of several key elements, including trade liberalization, direct foreign investment, global marketing, transnational tobacco advertising, promotion, sponsorship, and the international movement of counterfeit cigarettes.\textsuperscript{25} Government, generally speaking, has a duty to address serious health concerns—like the tobacco epidemic—that threaten public welfare, but such regulatory action is sometimes at odds with, or at least constrained by, "existing commitments to international trade."\textsuperscript{26} As such, the proper framework through which to understand the development of and resistance to tobacco regulation is the structure of international trade relationships, which have been heavily shaped by transnational tobacco companies in their own favor over the last several decades.\textsuperscript{27}

\textsuperscript{23} Id. ¶ 126.

\textsuperscript{24} Id.


\textsuperscript{26} Jewell, supra note 9.

\textsuperscript{27} For example, "[s]tudies of the individual and combined effects of various policies showed that increasing the price of tobacco products through excise taxes or duty tariffs constitutes by far the most important policy tool available." WHO/WTO Study, supra note 16, ¶ 128.

Higher tariffs on tobacco may, among other factors, contribute to a rise in consumer price, which leads to lower levels of consumption and lower prevalence of smoking among youth. Raising tariffs, however, runs counter to the general goal of trade liberalization, which is to reduce or eliminate tariffs and non-tariff barriers to international trade. Commitments to reduce tariffs on tobacco products are not part of existing multilateral, regional and bilateral trade agreements. But one of the key objectives of the WTO agreements—reducing tariffs and eliminating non-tariff barriers to trade—does not prevent governments applying non-discriminatory internal taxes and certain other measures which they may consider appropriate to safeguard public health.

\textsuperscript{27} Id. ¶ 129. The conflict between the promotion of public health and the trade priorities encapsulated in the global economy is especially evident in context to
In response to this trend towards global trade openness that was all but eliminating the possibility of effective comprehensive tobacco control programs, the WHO proposed the establishment of the Framework Convention on Tobacco Control (FCTC) in 1996.\textsuperscript{28} The need to provide legal support to the international health cooperation was apparent to scholars and advocates in the field, as very few countries had taken action to address the tobacco epidemic at the time.\textsuperscript{29} Globalization introduced new challenges to traditional approaches used to curb tobacco consumption.\textsuperscript{30} Adopted by the World Health Assembly in 2003 and entered into force in 2005, the FCTC is the first and only international health treaty.\textsuperscript{31} Article 3 of the FCTC explains that the objective of the treaty and its protocols is:

> to protect present and future generations from the devastating health, social, environmental and economic consequences of tobacco consumption and exposure to tobacco smoke by providing a framework for tobacco control measures to be implemented by the Parties at the national, regional and

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\textsuperscript{28} \textit{Id. ¶ 135; The History of the WHO Framework Convention on Tobacco Control, WORLD HEALTH ORG. (2013), http://www.who.int/fctc/about/history/en/index.html.}

The idea for an international instrument for tobacco control was formally initiated in May 1995 at the 48th World Health Assembly. The following year, the 49th World Health Assembly adopted resolution WHA49.17, requesting the Director-General to initiate the development of a WHO Framework Convention on Tobacco Control (WHO FCTC). With this, [the] WHO's first treaty-making enterprise was formally launched. However, it was not until 1999 that actual negotiations on the WHO FCTC began, one year after the then WHO Director-General, Dr. Gro Harlem Brundtland, had made global tobacco control a priority for [the] WHO. \textit{Id.}

\textsuperscript{29} \textit{See HISTORY OF WHO FCTC, supra note 19, at 4. In an early conversation in late 1994 before WHO negotiations began, Mr. Neil Collishaw, former WHO Secretariat, noted that gaining consensus among the member states could prove challenging because only about ten countries had implemented comprehensive tobacco control programs. Id.}

\textsuperscript{30} \textit{Id. at 1 ("Active promotion of tobacco use by the industry rendered the approach of the medical model inadequate. The traditional public health methods for reducing tobacco use were no match for the tobacco industry's power, transnational reach and formidable resources.")}.\textsuperscript{31} \textit{About the WHO Framework Convention on Tobacco Control, WORLD HEALTH ORG. (2013), http://www.who.int/fctc/about/en/index.html.}
international levels in order to reduce continually and substantially the prevalence of tobacco use and exposure to tobacco smoke.\textsuperscript{32}

The FCTC was revolutionary in marking the first ever instance of the WHO exercising its treaty-making power under Article 19 of its constitution,\textsuperscript{33} which further underlines the need to "establish an international regulatory mechanism for tobacco control."\textsuperscript{34}

There are currently 176 parties to the FCTC,\textsuperscript{35} making it one of the most widely accorded treaties in United Nations history.\textsuperscript{36} The purpose of the Framework Convention is to "facilitate multilateral cooperation and action at the global level to address transnational tobacco control strategies."\textsuperscript{37} These collectively accepted strategies, which have been proven through empirical evidence to decrease consumer demand, include "tobacco taxes and prices, restrictions on advertising and promotion, use of mass media and counter-advertising, design of warning labels and packaging, clean indoor air policies, and treatment of tobacco dependence."\textsuperscript{38}

\begin{footnotes}
\item[32] WHO Framework Convention on Tobacco Control, supra note 25, art. 3.
\item[34] History of FCTC, supra note 19, at 2 ("Approved on 7 April 1948, WHO's Constitution mandates the Organization and its Member States to work for ‘the attainment by all peoples of the highest possible level of health.’ It also describes the extensive powers vested in the World Health Assembly, WHO's highest policy-making body, to protect and promote international public health, including the preparation and adoption of standards, legislation, conventions and agreements.").
\item[36] WHO Framework Convention on Tobacco Control, supra note 25, foreword at vi.
\item[37] WHO/WTO Study, supra note 16, ¶ 135.
\item[38] Id.; see also id. ¶ 134 ("In addition to tax increases and other price measures, these programs include policies to ban or severely restrict tobacco advertising, expand public health information campaigns, restrict sales through vending machines, ban smoking in public places and encourage cessation of tobacco use, and support for tobacco control coalitions."). Articles 6 through 14 of the WTO FCTC address measures relating to the reduction of tobacco demand, specifically price and tax measures; non-price measures; protection from exposure to tobacco smoke; regulation of the contents of tobacco products; regulation of tobacco product disclosures; packaging and labeling of
\end{footnotes}
According to one blogger from the World Cancer Research Fund International, this package of policy directives “has been hugely successful at empowering government and controlling the activity of tobacco corporations.”

But there continues to be some uncertainty regarding the legal status and also, as a result, the forcefulness of the treaty obligations. While the international treaty provisions are binding on state parties, the traditional approach of framework conventions is to set forth general obligations to be put into action by protocols and related procedures that are subsequently developed. The legal status of the implementation guidelines, which are established through agreement of the Conference of the Parties (COP), faces the most scrutiny. Even so, the content of the guidelines offer insight into the general direction of tobacco control mechanisms envisioned and expected by the Framework Convention.

In addition, the process of negotiating the treaty was in many
ways as instrumental in effecting change as the formal adoption of the treaty. In the course of building consensus for this global tobacco control agenda, treaty negotiations served to “raise[] the political profile of tobacco as a global public health problem” and “improve[] awareness of the issues and effective interventions among policymakers.”45 Interestingly, a number of countries put into place national legislative policies that mirrored the FCTC priorities even before the treaty entered into force.46 The timing of this development suggests that the years of negotiations fostered a sense of commitment to tobacco regulation among the pertinent countries, simultaneously strengthening relationships between those countries and the public health community.47 In this vein, the preparation and collaborative process that contributed to the framework is noteworthy for its seminal role in raising the stakes and increasing the pressure in the global public health landscape.

On balance, the FCTC is considered one of the “most rapidly and widely embraced treaties” in United Nations history.48 But amidst the development of this ideological unionization against the tobacco industry, the practical tension with global trade commitments, which are compelling and meritorious in their own right, only grows more persistent and apparent.49 The manner in which governments choose to regulate tobacco trade and tobacco products can implicate an array of WTO rules.50 Even as early as 2002, the WHO and WTO predicted that future tobacco-related conflicts among WTO member states could implicate several WTO agreements, including the Technical Barriers to Trade (TBT) Agreement “in relation to product requirements such as packaging and labeling,” the Agreement on Agriculture “in relation to government support for tobacco production,” the General Agreement on Trade in Services (GATS) “in relation to

45 History of WHO FCTC, supra note 19, at 20.
46 Id. at 18.
47 Id. at 18, 20.
48 About the WHO Framework Convention on Tobacco Control, supra note 31.
49 WHO/WTO Study, supra note 16, ¶ 129 (noting that while raising tariffs is an effective tobacco control mechanism, doing so “runs counter to the general goal of trade liberalization” and would violate existing trade agreements).
50 Id. ¶ 134 (citing the United States-Thailand tobacco case in the WTO as the earliest example of the interplay between international tobacco trade and domestic public health policy).
restrictions on cigarette advertising," and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) "in relation to trademark protection and the disclosure of product information considered by producers to be confidential."

Given the existing relationship and legally mandated cooperation between the WHO and WTO, the Framework Convention reflects a deliberate attempt to resolve the tension between recommended tobacco control measures and international trade requirements. According to a 2002 WHO and WTO joint study, the draft text proposed that a guiding principle require that "[t]obacco-control measures should not constitute a means of arbitrary or unjustifiable discrimination in international trade." Furthermore, "[n]one of the provisions of the FCTC are inherently WTO-inconsistent; and many of the restrictions called for by some of its provisions may well be determined to be ‘necessary’ for health protection under WTO rules." Yet at the same time, the Preamble of the Framework Convention specifically identifies the “need to be alert to any efforts by the tobacco industry to undermine or subvert tobacco control efforts and the need to be informed of activities of the tobacco industry that have a negative impact on tobacco control efforts.” In addition, the Guidelines for Implementation of FCTC Article 5.3 single out the tobacco industry as an opposing force and known threat to the public health agenda of the treaty. While this

51 Id.
52 See id. ¶ 138.
53 Id.
54 Id.
55 WHO Framework Convention on Tobacco Control, supra note 25, pmbl.
56 "In setting and implementing their public health policies with respect to tobacco control, Parties shall act to protect these policies from commercial and other vested interests of the tobacco industry in accordance with national law.” Id. art. 5.3.
57 WORLD HEALTH ORGANIZATION, GUIDELINES FOR IMPLEMENTATION OF ARTICLE 5.3 OF THE WHO FRAMEWORK CONVENTION ON TOBACCO CONTROL ¶ 13, available at http://www.who.int/fctc/guidelines/article_5_3.pdf (“There is a fundamental and irreconcilable conflict between the tobacco industry’s interests and public health policy interests. The tobacco industry produces and promotes a product that has been proven scientifically to be addictive, to cause disease and death and to give rise to a variety of social ills, including increased poverty. Therefore, Parties should protect the formulation and implementation of public health policies for tobacco control from the tobacco industry to the greatest extent possible.”).
language does not address the WTO per se—and in fact acknowledges that measures should be in accordance with national law—the general tone likely would reproach the interference of preexisting trade commitments to the extent that they are a political tool wielded by the tobacco industry, a clear enemy to the treaty's vision. However, it remains to be seen whether health objectives or trade agreements should ultimately take precedence. Consequently, "the relationship between WTO rules and the FCTC will depend on the direction that future negotiations of the FCTC take, and the manner in which its rules are applied by governments." It is within this regulatory structure that plain packaging has evolved as a high profile and extremely controversial tobacco control strategy. In particular, Article 11 of the Framework Convention addresses packaging and labeling of tobacco products and requires member states to adopt and implement effective tobacco product packaging and labeling measures within three years of the FCTC entering force. The Guidelines for Implementation of Article 11 supplement this directive by setting forth a series of design elements, including location, size, use of pictorials, color, rotation, message content, language, and source attribution. The Guidelines go on to propose the implementation of mandatory plain packaging as a means of developing effective restrictions, stating that parties should "consider adopting measures to restrict or prohibit the use of logos, colours, brand images or promotional information on packaging other than brand names and product names displayed in a standard colour and font style." So while not explicitly referenced in the FCTC, plain

58 WHO Framework Convention on Tobacco Control, supra note 25, art. 5.3.
60 WHO Framework Convention on Tobacco Control, supra note 25, art. 11.1.
61 For example, the size considerations propose that "[p]arties should consider using health warnings and messages that cover more than 50% of the principal display areas and aim to cover as much of the principal display areas as possible" and that "[t]he text of health warnings and messages should be in bold print in an easily legible font size and in a specified style and colour(s) that enhance overall visibility and legibility." WORLD HEALTH ORGANIZATION, GUIDELINES FOR IMPLEMENTATION OF ARTICLE 11 OF THE WHO FRAMEWORK CONVENTION ON TOBACCO CONTROL ¶ 12, available at http://www.who.int/fctc/guidelines/article_11.pdf.
62 Id. ¶ 46 (noting that plain packaging may "increase the noticeability and effectiveness of health warnings and messages, prevent the packaging from detracting
packaging is at least recommended as a useful policy tool for tobacco control in the implementation guidelines, which are designed to provide best practices and standards to help member parties meet their treaty obligations.

Broadly speaking, tobacco plain packaging regulations typically require "the removal of all colors, brand imagery, corporate logos and trade marks, permitting manufacturers to print only the brand name in a mandated size, font, and place, in addition to required health warnings and other legally mandated product information such as toxic constituents, tax-paid seals or package contents." The restrictions are meant to apply to the package exterior, the package interior, the cellophane wrappers, and the cigarettes to ensure complete uniformity in shape, size, and texture. The ultimate goal of plain packaging as a tobacco control strategy is to standardize the visual appearance of tobacco products—both packaging as well as products—in an effort to neutralize their status display and consumer appeal. By stripping tobacco products of their individualized brand packaging, governments can eliminate a primary vehicle for tobacco marketing and instead use the increased surface area on packages for health warnings without risk of legal constraints. There is clear evidence that brand logos and imagery distract consumers' attention away from health warnings, so presumably the printed information regarding smoking cessation would have a greater impact under a plain packaging regime.

Attention from them, and address industry package design techniques that may suggest that some products are less harmful than others.

63 Becky Freeman et al., The Case for the Plain Packaging of Tobacco Products, 103 Addiction 580, 587 (2008) (criticizing the lack of direct reference to tobacco packaging as an important tool for tobacco promotion in the FCTC as an "unfortunate omission" but also acknowledging that plain packaging would be consistent with the treaty language on advertising).

64 Id. at 581.
65 Id.
66 Id.
67 Id. at 580-81.
68 Id. at 587 ("A recent multi-country tobacco survey examining the effectiveness of warnings showed that the larger and more prominent a health warning, the more likely it is to be recalled.").
cigarette packages less appealing and also making health warnings more visible—will likely lead to reduced levels of tobacco consumption.\(^{69}\)

In stark contrast to the public health gains associated with plain packaging are the glaring losses to be borne by the tobacco industry. Although tobacco companies maintain that packaging does not have an impact on consumption, the international scale of their efforts to thwart plain packaging legislation would suggest otherwise.\(^{70}\) Even putting aside the research published on the effects of plain packaging, the candor of internal documents and trade literature reveals a pervasive understanding within the tobacco industry that cigarette packaging is a powerful advertising tool.\(^{71}\) The overwhelming amount of money that tobacco companies invest in the name branding and packaging design of their products only reinforces this perception.\(^{72}\) To illustrate the magnitude of financial resources involved, the world’s most popular cigarette brand, Marlboro, is the tenth most valuable brand in the world with an estimated value of $27 billion.\(^{73}\) There are several reasons for this phenomenon. For starters, studies indicate that roughly half of the smoking population cannot tell the difference between cigarettes that are alike, which means that branding is all the more integral to product demarcation.\(^{74}\) The

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\(^{69}\) Alberto Alemanno & Enrico Bonadio, *Do You Mind My Smoking? Plain Packaging of Cigarettes Under the TRIPS Agreement*, 10 J. MARSHALL REV. INTELL. PROP. L. 450, 451-52 (2011). These studies claim that generic packaging, by increasing the effectiveness of health warnings and reducing misconceptions about the risks of smoking, might carry the potential to reduce smoking uptake, especially among children and young people, and accordingly protect human health. *Id.* In particular, plain packaging is expected to play a valuable role in product perceptions and smoking initiation, effectively breaking the shift from experimentation to regular use. *Id.*

\(^{70}\) Freeman et al., *supra* note 63, at 584; see infra Part III.

\(^{71}\) Freeman et al., *supra* note 63, at 587.

\(^{72}\) Mitchell, *supra* note 15, at 407; see also Freeman, *supra* note 63, at 583 (“Industry documents confirm that companies invest significant research effort into pack design in order to communicate messages to specific demographic groups, chiefly young people.”).

\(^{73}\) Freeman et al., *supra* note 63, at 581.

\(^{74}\) Mitchell, *supra* note 15, at 407-08 (citing D. Germain et al., *Adolescents’ Perceptions of Cigarette Brand Image: Does Plain Packaging Make a Difference?*, 46(4) J. ADOLESC. HEALTH 385 (2010)) (discussing a study in which one of every two smokers could not discern between comparable cigarettes in blind testing and noting that consumer choice was driven more by psychological factors than by relatively
theory of marketing underscores "that the product package is the communication life-blood of the firm and that the packaging acts as a promotional tool in its own right." More to the point, "[p]acks can communicate the 'personality' of a brand to smokers, and smokers can project these characteristics by handling and displaying the package throughout their daily routines." "Unlike many other mass products, cigarette boxes remain with users once first opened and are continuously displayed in public, thus becoming a powerful and direct form of mobile advertising for the brand." As such, cigarette boxes, with their distinctive and appealing brand imagery, serve as promotional tools to anyone who comes in contact with the smoker, targeting first time consumers and competing brand consumers.

As the international movement towards restrictions on tobacco advertising gains visibility and momentum, tobacco packaging "assumes unprecedented importance as a promotional vehicle for reaching potential and current smokers." Furthermore, the FCTC directs member parties to "undertake a comprehensive ban of all tobacco advertising, promotion and sponsorship," or to the extent possible in accordance with their national constitutions. In light of an absolute prohibition on other forms of brand promotion, tobacco packaging is the last remaining and, consequently, the single most important marketing tool available to tobacco manufacturers. This has long been anticipated, with one industry trade journal advising that "if your brand can no longer shout from the billboards, let alone from the cinema screen or the pages of a

insignificant smoking characteristics).

75 Mitchell, supra note 15, at 408 (internal quotations omitted); see also Freeman, supra note 63, at 581 ("Packaging differentiates brands, being particularly important in homogeneous consumer goods categories such as cigarettes. Marketing literature highlights routinely the critical role played by pack design in the marketing mix, emphasizing . . . the 'silent salesman' that reaches out to customers.").

76 Freeman et al., supra note 63, at 580 (comparing branded cigarette cartons to "designer clothing, accessories and cars" as signaling social cues of the owner’s "style, status and character" to the surrounding public).

77 Alemanno & Bonadio, supra note 69, at 455-56.

78 Mitchell, supra note 15, at 408.

79 Freeman et al., supra note 63, at 580.

80 WHO Framework Convention on Tobacco Control, supra note 25, art. 13.

81 Freeman et al., supra note 63, at 580.
glossy magazine... it can at least court smokers from the retailer’s shelf.”

With a reputation for being ahead of the curve on matters concerning public health, “Australia is a quintessential ‘dark market’ where all tobacco advertising is banned.” Described as an “early mover on anti-tobacco laws,” Australia banned tobacco promotion on television and radio in 1976, banned tobacco advertising in newspapers in 1989, and banned tobacco sponsorship of sports and cultural events in 1992. The government also amended the Tobacco Advertising Prohibition Act of 1992 to extend the advertising restrictions to the Internet in 2012. As a result of these early reforms, tobacco packaging has long been considered the final remaining platform, and as a result, the government’s latest target for brand advertising in Australia.

From the perspective of Australian Health Minister Tanya Plibersek, “[t]his is the last gasp of a dying industry.” The plain packaging law was a policy initiative that arose directly out of the National Preventative Health Taskforce (Taskforce), a committee of health experts appointed in 2008 to advise the government on preventative health reform measures. The Taskforce developed a

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82 Mitchell, supra note 15, at 408; see also Freeman, supra note 63, at 583 (attributing the quoted words, among other examples of “appeals to manufacturers to utilize packaging as an advertising vehicle,” to a trade magazine called World Tobacco).


87 Kennedy, supra note 86.

88 Mitchell, supra note 15, at 412; AUSTRALIAN GOV’T NATIONAL PREVENTATIVE
comprehensive set of evidence-based recommendations in three areas of immediate priority—obesity, tobacco, and alcohol—in a discussion paper entitled *Australia: The Healthiest Country By 2020.*

The discussion paper provides a great deal of insight into the Australian government’s public policy agenda regarding the plain packaging law. The report highlights the government’s interest in seeking preventative health action, explaining that “[c]hronic diseases not only result in death and disease, [but] they are also a massive economic burden on the community and the health system.” The report further acknowledges that tobacco use is the “single-biggest preventable cause of death and disease in Australia,” leaving no doubt that the government has a clear public interest in controlling the detrimental reach of the tobacco industry. The Taskforce concluded that setting and achieving a goal of reducing smoking prevalence by 9 percent by 2020—by “halv[ing] the rate of smoking uptake and doubl[ing] the percentage of smokers who quit each year”—would yield enormous savings over the next several decades. To reach this goal the report recommended a number of tobacco control measures, most notably plain packaging of tobacco products.

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89 Mitchell, *supra* note 15, at 412; *TASKFORCE DISCUSSION PAPER, supra* note 88, at vii, x (explaining that the health problems associated with obesity, tobacco, and alcohol combined contribute to approximately 32 percent of illness in Australia, providing justification for the three areas of priority).

90 *TASKFORCE DISCUSSION PAPER, supra* note 88, at viii.

91 *Id.* at 19.

92 *Id.* at 21 (“Modeling the impact on deaths and costs over just the next 10 years predicts that for every 1000 smokers who quit, at least 40 will be spared a diagnosis of chronic lung disease, lung cancer, heart attack or stroke, with significant healthcare savings. Accelerating the decline of smoking would bring benefits not only in public health but also in keeping people in the workforce longer, reducing absenteeism and increasing productivity.”); see also *id.* at vii (citing a recent study in the United States that showed a return on investment of $5.60 within five years for every one dollar invested in community-based disease prevention programs).

93 Alemanno & Bonadio, *supra* note 69, at 452-53. The report identified six specific action items necessary to reaching the goal of reducing daily smoking rates in Australia to at least nine percent by 2020: (1) “[e]nsure that cigarettes become
The Australian government formally accepted the Taskforce’s recommendations on mandatory plain packaging in 2010, pledging to begin testing design strategies and develop legislation immediately.94 This decision helped shape the role of national governments as active and relevant players in the international showdown between the tobacco industry and public health.95 Moreover, the Australian government clearly affirmed the aforementioned legislative purpose, articulating that plain packaging would:

[I]ncrease the noticeability, recall and impact of health warning messages; reduce the ability of packaging to mislead consumers to believe that some products may be less harmful than others; reduce the attractiveness of the tobacco product, for both adults and children; and reduce the appeal and desirability of smoking generally.96

significantly more expensive, and that efforts to achieve this through increases in excise and customs duty are not undermined by the increasing availability of products on which these duties have been evaded;” (2) “[f]urther regulate the tobacco industry with measures such as ending all forms of promotion including point-of-sale displays and mandating plain packaging of tobacco products;” (3) “[i]ncrease the frequency, reach and intensity of education campaigns that personalize the health risks of tobacco and increase a sense of urgency about quitting among people in all social groups;” (4) “[e]nsure that all smokers in contact with the Australian healthcare system are identified and given the strongest and most effective available encouragement and support to quit;” (5) “[e]nsure access to information, treatment and services for people in highly disadvantaged groups who suffer a disproportionate level of tobacco-related harm;” and (6) “[i]ncrease the understanding about processes of social diffusion against smoking—how being a non-smoker and smoking cessation become more ‘contagious’—so that these processes can be accelerated among less well-educated groups and disadvantaged communities.” TASKFORCE DISCUSSION PAPER, supra note 88, at 23.


95 See, e.g., Gara, supra note 84 (“At the beginning of December, one of the world’s toughest anti-tobacco laws came into effect in Australia, banning all company branding and logos from cigarette packaging. . . . Those plain-packaging laws, which were vigorously opposed by the tobacco industry in Australia, could next move over to Europe.”).

96 TAKING PREVENTION ACTION, supra note 94, at 69. Similarly, but with greater
The Australian Senate passed the TPP Act on November 10, 2011, and immediately received international attention for establishing an official position at odds with the tobacco industry.97 The TPP Act received royal assent on December 1, 2011, and went into effect on December 1, 2012.98 As established by Sections 18 through 27, the law prohibits logos, branding, colors, and promotional text from tobacco packaging such that “[b]rand names will appear in a standardized font on olive-brown-

detail, Section 3 of the TPP Act states:

The objects of this Act are to improve public health by discouraging people from taking up smoking, or using tobacco products; and encouraging people to give up smoking, and to stop using tobacco products; and discouraging people who have given up smoking, or who have stopped using tobacco products, from relapsing; and reducing people’s exposure to smoke from tobacco products; and to give effect to certain obligations that Australia has as a party to the Convention on Tobacco Control.

_Tobacco Plain Packaging Act 2011_ (Cth) s 3 (Austl.). It goes on to state:

It is the intention of the Parliament to contribute to achieving the objects ... by regulating the retail packaging and appearance of tobacco products in order to reduce the appeal of tobacco products to consumers; and increase the effectiveness of health warnings on the retail packaging of tobacco products; and reduce the ability of the retail packaging of tobacco products to mislead consumers about the harmful effects of smoking or using tobacco products.

_Id._

97 Parliament Passes World First Plain Packaging of Tobacco Legislation, _supra_ note 2. The Health Minister used intentionally bold and polarizing rhetoric to celebrate the passage of the landmark legislation:

Today I ask [Big Tobacco] to break their habit and act in the best interest of the health and wellbeing of the Australian people and accept the determination of the people’s Parliament. Let there be no mistake, big tobacco is fighting against the Government for one very simple reason—because it knows, as we do, that plain packaging will work. While it is fighting to protect its profits, we are fighting to protect lives.

_Id._

colored\textsuperscript{99} packets, and health warnings with graphic images of the harmful effects of smoking will cover 75\% of the front of any packaging, and 90\% of the back.\textsuperscript{100} For a visual illustration, the following images depict the plain packaging design that the Australian Health Minister unveiled to the public when the legislation was first introduced.\textsuperscript{101}


\textsuperscript{101} \textit{British American Tobacco Australia Flags Cigarette Packaging Fight}, supra note 99.
As is evident from the above images, the dominant feature of the plain packaging is a startling health warning, and the only aesthetic concession to tobacco companies is their brand name and variant displayed at the bottom of the carton. The use of trademarks or any other distinguishing brand imagery associated with a tobacco company is effectively prohibited.

But prior to the law taking effect, several multinational tobacco companies—Philip Morris International, British American Tobacco, Imperial Tobacco, and Japan Tobacco—filed suit against the Commonwealth of Australia in the High Court of Australia, challenging the legality of the plain packaging law. Their

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102 The range of graphic images used on the front of packages as health warnings includes mouth ulcers, cancerous lungs, and gangrenous limbs. Siegel, supra note 100.
103 Kennedy, supra note 86.
104 See id.
105 Curran, supra note 100. These four tobacco companies manufacture 5.5 trillion cigarettes a year, accounting for approximately 45 percent of the global tobacco market. Id.
“counter punch” to the law’s passage also included an “extensive media campaign to try to persuade the public and government of the shortcomings of plain packaging.” The legal question before the High Court was the constitutionality of the plain packaging law. In furtherance of the claim that the TPP Act infringed upon their intellectual property rights without compensation, the tobacco companies asserted that the proscription on their use of trademarks amounted to an acquisition of their property on unjust terms in violation of Section 51(xxxi) of the Australian Constitution. In a six to one vote, the High Court held:

While the imposition of [the controls that the TPP Act places on tobacco product marketing] may be said to constitute a taking in the sense that the plaintiffs’ enjoyment of their intellectual property rights and related rights is restricted, the corresponding imposition of controls on the packaging and presentation of tobacco products does not involve the accrual of a benefit of a proprietary character to the Commonwealth which would constitute an acquisition.

Each of the justices’ opinions turned on the meaning of the term “acquisition” in the Australian Constitution, explaining that to rise to the level of a violation of Section 51(xxxi), the government would need to have acquired a “benefit of a proprietary character by reason of the operation of the TPP Act on the plaintiffs’ property rights.”

106 Kennedy, supra note 86.


108 In their pleadings, the parties defined their property to include numerous items including registered and unregistered trademarks, copyright, goodwill, design, licensing, and patents. JT Int’l SA v. Commonwealth [2012] HCA 43 (Austl.).

109 JT Int’l SA v. Commonwealth [2012] HCA 43, ¶ 2, 28 (Austl.). Section 51(xxxi) of the Commonwealth of Australia Constitution Act states, “The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to the 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.” AUSTRALIA CONSTITUTION § 51(xxxi).


111 Id. ¶ 42. See Richard A. Samp, Australia’s Plain Packaging Ruling: An
TPP Act rendered the tobacco industry’s trademarks essentially valueless, the justices maintained that the TPP Act was constitutional because the government was merely regulating the tobacco industry’s trademarks rather than seeking to appropriate them for its own use or advantage. Importantly, one justice weighed in on the policy debate behind plain packaging generally, opining that the law “reflects a serious judgment that the public purposes to be advanced and the public benefits to be derived from the regulatory scheme outweigh those public purposes and public benefits which underpin the statutory intellectual property rights and the common law rights enjoyed by the plaintiffs.”

The High Court’s ruling to affirm the legality of the world’s most restrictive tobacco control law was a landmark decision in many respects. To begin with, the outcome of the case signified that the plain packaging law had overcome the final hurdle towards its implementation on December 1, 2012. Australia is the first country in the world to require tobacco products to be sold in plain packaging, which is a groundbreaking accomplishment alone. As early as January 2013, the Australian government received anecdotal evidence that plain packaging was having the intended deterrent effect on smokers. Health advocates expressed optimism that the High Court of Australia’s decision would prove to be a “watershed moment” in the international

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112 See Samp, supra note 111; see also JT Int'l SA v. Commonwealth [2012] HCA 43, ¶ 43 (Austl.) (“The fact that the restrictions and prohibitions imposed by the TPP Act create the ‘space’ for the application of Commonwealth regulatory requirements as the textual and graphical content of tobacco product packages does not constitute such an accrual.”).


114 Kennedy, supra note 86.

movement towards tobacco plain packaging laws and set a precedent to encourage other countries to take similar action against the tobacco epidemic.\textsuperscript{116}

While legal experts have suggested that the High Court's ruling "effectively ends the tobacco industry's legal battle against plain packaging in Australia,"\textsuperscript{117} the decision is not necessarily indicative of the final outcome due to the High Court's narrow holding, and is likely just the first round of challenges to be brought by the tobacco industry.\textsuperscript{118} The decision's rationale was actually quite limited in nature, turning on a matter of constitutional law that is unique to Australia. The "just terms" provision of the Australian constitution is a higher threshold than similar provisions in other national constitutions.\textsuperscript{119} Section 51(xxxi) requires there to be an acquisition, i.e., deriving some beneficial use beyond a mere impairment of property, to warrant compensation.\textsuperscript{120} Because the High Court readily acknowledged that the trademark restrictions imposed by the TPP Act constitute a taking,\textsuperscript{121} there is reason to believe that constitutional challenges to plain packaging laws in other countries could have a different outcome.\textsuperscript{122} Furthermore, the decision's rationale seemingly left open the possibility that subsequent challenges could be made to the TPP Act on the basis of intellectual property rights infringement.\textsuperscript{123} The tobacco industry's reaction to the High Court's ruling generally reflects the viewpoint that the domestic court is only the first arena in which multinational tobacco

\textsuperscript{116} See Siegel, supra note 100. For example, Jonathan Liberman, a legal expert and director of the McCabe Center for Law and Cancer in Melbourne, Australia, said, "The clear message from today's ruling is that the tobacco industry can be beaten. When other countries are confronted with the tobacco industry's legal threats, they will remember how empty those threats proved to be in Australia." \textit{Id.}

\textsuperscript{117} \textit{Id.}

\textsuperscript{118} See Samp, supra note 111.

\textsuperscript{119} \textit{Id.} (comparing the just terms provision of the Australian Constitution to the takings clause under the 5th Amendment of the United States Constitution).

\textsuperscript{120} \textit{Id.}

\textsuperscript{121} See supra note 110 and accompanying text.

\textsuperscript{122} Samp, supra note 111 ("[T]he High Court's rejection of the tobacco industry's just terms claims should not be viewed as a harbinger of similar decisions in other countries.").

\textsuperscript{123} See \textit{id.}
companies will seek to block the plain packaging legislation.\textsuperscript{124} A spokesperson for one tobacco company even went on record warning the Australian government that it could “end up wasting millions of taxpayers’ dollars in legal fees trying to defend their [sic] decision,” presumably in anticipation of additional legal challenges.\textsuperscript{125} The narrow scope of the High Court’s decision—along with the tobacco industry’s willingness to silence plain packaging laws at all costs—indicates that the lawsuit, while an unprecedented victory for public health, is but the first battleground for tobacco plain packaging regulations. Its significance, then, is symbolic of progress for the public health community but somewhat peripheral to the global showdown regarding tobacco controls that has yet to fully unfold.

\textbf{III. International Impact}

Turning now to the global impact of Australia’s TPP Act, the still-to-come legal challenges pose a larger and more uncertain threat to the future of plain packaging as a viable tobacco control mechanism. In the aftermath of their stinging defeat in the High Court of Australia, multinational tobacco companies are now seeking new avenues for contesting plain packaging in the arena of international law, specifically in regard to the regulations’ validity under bilateral investment treaties and international trade agreements.\textsuperscript{126} Despite the minute size of the tobacco market in Australia, tobacco companies “fear that the adoption of plain packaging by the Australian government will set a landmark precedent that could be emulated by other countries in a sort of

\textsuperscript{124} See, e.g., Kennedy, supra note 86 (“But Scott McIntyre of BAT says it is not that straightforward, arguing that the Australia government only won because of the peculiarities of Australia constitutional law. But there is no doubt that tobacco companies have suffered a rare legal setback, although there could still be further action by them at the World Trade Organization.”).

\textsuperscript{125} British American Tobacco Australia Flags Cigarette Packaging Fight, supra note 99. Note that the context of the spokesperson’s statement was in reaction to the introduction of the legislation. \textit{Id}.

\textsuperscript{126} Jewell, supra note 9 (“[T]here are a number of international legal challenges that remain. These have been brought against the government by the tobacco industry, seeking new avenues to block regulatory action. As they lose clout with national governments, these companies increasingly tr[y] to circumvent national policy through international trade law.”).
As such, tobacco companies have a sizeable interest in preventing plain packaging from trending globally, whether through the enforcement of favorable international legal tribunal decisions or by disincentivizing plain packaging legislation with the threat of costly legal defense of such policies. The significant financial stake that the tobacco industry has in the global war between free trade and public health is apparent from the lengths to which the tobacco industry has gone to prevent the effectiveness and attractiveness of Australia’s latest regulatory measures, including resorting to international tribunals. Although the tobacco plain packaging restrictions have gone into effect in Australia, examining the law’s compatibility with the country’s existing trade and investment obligations is nonetheless a worthwhile exercise.

Among the non-legal policy arguments put forth by the tobacco industry is that the restrictions do not have the intended impact of reducing consumption, and instead increase youth smoking, lower cigarette prices, and encourage illegal counterfeit cigarettes. For example, Scott McIntyre, the spokesperson for

127 Vadi, supra note 41, at 97.

128 Mitchell, supra note 15, at 407 (“It is important to examine the issues of WTO compatibility because concerns about breaching trade obligations, fueled by the tobacco industry, may have a chilling effect on a move to plain packaging”); Vadi, supra note 41, at 97 (“The threat of an investment dispute, however, may prove potent in less industrialized countries where it may have a chilling effect on policy makers.”).

129 See Vadi, supra note 41, at 97.

130 Alemanno & Bonadio, supra note 69, at 454-55. Alemanno and Bonadio note the following:

First of all, opponents of plain packaging stress that generic packaging would not be very effective to the stated purpose of reducing smoking and protecting human health. To support this claim, it is often pointed out that there is a lack of evidence that generic packaging makes cigarette boxes less attractive to consumers, and also that more visible health warnings and information would induce smoking cessation. Plain packaging could even have ‘boomerang’ effect, i.e., it could increase smoking uptake as companies would be prompted to compete only on cigarette prices, making tobacco cheaper and more affordable for consumers, particularly among young people. It is argued instead that other less invasive instruments would be far more effective than generic packaging in the struggle against smoking, such as educational campaigns, health information and warnings on cigarette boxes, among other options. Finally, plain packaging would encourage the counterfeiting of tobacco products by: (i) making it easier and less expensive to copy packaging; (ii) reducing trademark holders’ ability to bring legal action against counterfeiters;
leading Australian tobacco company British American Tobacco,\textsuperscript{131} said: "Plain packaging has always been misleading and won't stop smoking because branded cigarettes will be smuggled in and because tobacco companies will have to respond to that by cutting prices to stay competitive.'\textsuperscript{132} However, the common denominator between the international challenges is the violation of intellectual property rights.\textsuperscript{133} Industry lawyers argue that plain packaging regulations, through the exclusion of brand logos and other distinguishing features on cigarette cartons, function as an unlawful infringement upon their explicitly protected trademarks, which are tobacco companies' most valued assets.\textsuperscript{134} As a consequence of the prohibition of trademark insignia on packaging, tobacco companies stand to lose a "powerful means of communication between them[elves] and consumers" and fear that "what they see as a serious curtailment of their trade mark, trade-dress and goodwill-related rights could hit hard their flourishing businesses and decrease cigarette sales."\textsuperscript{135} On the other hand, public health advocates contend that countries should be able to utilize the "flexibilities within international trade agreements to protect public health"\textsuperscript{136} given the long-term potential of plain packaging regulations to successfully prevent

and (iii) increasing the burden on enforcement agencies, which in turn would jeopardize consumers' interests.

\textit{Id.; Mitchell, supra note 15, at 410} ("One argument is that packaging has no impact on consumption, and is designed to encourage existing smokers to switch brands and build brand loyalty, rather than encourage the uptake of smoking. In other words it is about increasing market share rather than the size of the market. . . . They have also argued that plain packaging would increase youth smoking because it would be seen as 'more risky and anti-authoritarian.'").

\textsuperscript{131} Siegel, supra note 100.

\textsuperscript{132} Kennedy, supra note 86.

\textsuperscript{133} For background on the relationship between intellectual property and international trade in context to Australia, see \textsc{Australian Government Department of Foreign Affairs and Trade, Intellectual Property and International Trade, available at http://www.dfat.gov.au/ip/}.

\textsuperscript{134} Freeman et al., supra note 63, at 585 (noting that tobacco companies are "heavily reliant upon trademark protection in order to communicate to consumers, and exclude rivals and competitors from the market place").

\textsuperscript{135} Alemanno & Bonadio, supra note 69, at 475. For a broader discussion on the hindrances that general packaging poses to the fundamental function of trademarks, see \textit{id.} at 456-57.

\textsuperscript{136} Freeman et al., supra note 63, at 585.
fatalities from tobacco-related diseases.\footnote{137}{Alemanno & Bonadio, supra note 69, at 475.} The manner in which bilateral investment treaties prioritize investors' rights to promote foreign direct investment and cultivate economic development often undermines domestic tobacco control policy.\footnote{138}{Vadi, supra note 41, at 93 ("[T]he tobacco business has been facilitated by foreign investment protection, which has increased competition and lowered tobacco prices.").} "As investment treaties broadly define the notion of investment, a potential tension exists when a State adopts tobacco control measures that interfere with foreign investments because such regulation may be considered a violation of investment treaty provisions protecting the trademarks of tobacco companies."\footnote{139}{Id. at 96.} "Moreover, because investment treaties provide foreign investors with direct access to investment arbitration, foreign investors can directly challenge national measures aimed at tobacco control and can seek compensation for the impact of such regulation on their business."\footnote{140}{Id. at 96-97.} Philip Morris Asia filed a notice of investor-state arbitration against Australia, arguing that the TPP Act violates the terms of a 1993 bilateral trade pact between Hong Kong and Australia that "safeguards each country's respective offshore investments."\footnote{141}{See Curran, supra note 100; see also Agreement Between the Government of Australia and the Government of Hong Kong for the Promotion and Protection of Investments, Austl.-Hong Kong, Oct. 15, 1993, 1748 U.N.T.S. 385, available at http://www.austlii.edu.au/au/other/dfat/treaties/1993/30.html.} The bilateral investment treaty protects trademarks as a category of intellectual property, so Philip Morris is seeking damages for the financial losses stemming from the curbed use of trademarks as a result of plain packaging.\footnote{142}{Vadi, supra note 41, 96-97.} The tobacco company is, in effect, framing the TPP Act as a threat to global trade.\footnote{143}{Jewell, supra note 9.} An arbitration panel of the U.N. Commission on International Trade Law will adjudicate the claim.\footnote{144}{Myron Levin, Tobacco Industry Uses Trade Pacts To Try To Snuff Out Anti-Smoking Laws, FAIR WARNING, Nov. 29, 2012, http://openchannel.nbcnews.com/_news/2012/11/29/15519194-tobacco-industry-uses-trade-pacts-to-try-to-snuff-out-anti-smoking-laws.}
The packaging law is that investment treaties generally do not provide for general exceptions for public health purposes. In addition to the potentially negative outcome of the arbitration dispute, its existence could provoke a “regulatory chill,” especially in countries that have fewer resources to mount a legal defense on behalf of plain packaging legislation. Philip Morris appears to be exploiting this particular angle, having issued a public statement that the arbitration could last several years and cost Australia billions of dollars’ worth of compensatory damages. Nevertheless, Australia has maintained a firm posture on the matter, continuing to defend the TPP Act and announcing that the government will no longer support stipulations within bilateral trade agreements that interfere with domestic social,

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145 Vadi, supra note 41, at 98 (distinguishing investment law from public law, which “acknowledges the fundamental and irreconcilable conflict between the tobacco industry’s interests and public health policy interests”); see Christian Kerr, Appeal To WTO May Yet Deliver Big Tobacco Victory, THE AUSTRALIAN, Aug. 18, 2012, http://www.theaustralian.com.au/national-affairs/appeal-to-wto-may-yet-deliver-big-tobacco-victory/story-fn59niix-1226452794144 (“[Kyla] Tienharra [of the Regulatory Institutions Network] says the BIT dispute is particularly concerning for supporters of plain packaging. ‘Unlike the WTO, there’s no exception under the treaty for public health measures. And unlike the Australian Constitution, “expropriation” – the act of a government taking private property – is defined very broadly.’”). But see Leanne Mezrani, Tobacco Challenges Unlikely To Succeed, LAWYERS WEEKLY, Aug. 17, 2012, http://www.lawyersweekly.com.au/news/tobacco-challenges-unlikely-to-succeed (“Don Anton, an international law academic at the Australian National University, said that Philip Morris Asia’s suit is also ‘questionable’ . . . [because] ‘[u]nder most investment treaties[,] public regulation for a public purpose, such as promoting the health and welfare of the citizenry, is not direct or indirect expropriation and therefore is not prohibited by investment treaty prohibitions against expropriation.’”); Kerr, supra (“Mark Davidson, a professor of law at Monash University and a member of the Expert Advisory Group on Tobacco Plain Packaging, [said], “PMA will struggle to show that there has been any expropriation within the meaning of the BIT.”).

146 Allyn Taylor, Plain Packaging: Fighting the Chill of Investment Treaties, JURIST, Dec. 7, 2011, http://jurist.org/forum/2011/12/allyn-taylor-tobacco-suit.php. Of equal concern is the fact that the arbitration hearings “may be conducted in private, outside of Australia and by an ad hoc tribunal” and that the proceedings “may be completely lacking in transparency with neither the pleadings nor the final award ever made public.” Id.

147 Id. Philip Morris Australia spokesperson Chris Argent boldly insisted, “[d]espite the fact that plain packaging does not reduce smoking it does devalue our investment by confiscating our brands and therefore compensation will be due.” Kerr, supra note 145.
environmental, or economic policy.\textsuperscript{148} Tipping the scales of the substantive argument in the opposite direction is Andrew Mitchell, an international law expert at Melbourne University, who contends that Philip Morris might not be able to prove its legitimate expectations—an important component of the treaty obligation in question—have been violated, as the development of progressive tobacco regulations in Australia would have put tobacco companies on notice.\textsuperscript{149} While tobacco control measures have been the subject of several investor-state arbitrations, none of these arbitrations have involved plain packaging specifically, so there is no clear precedent for the decision.\textsuperscript{150} In terms of the conflicts presented by international trade agreements, the WTO\textsuperscript{151} has been asked to weigh in on the validity of Australia’s plain packaging law in the context of three intellectual property treaties.\textsuperscript{152} Ukraine, the Dominican Republic, and Honduras have each filed complaints with the WTO alleging that the trademark restrictions imposed by the TPP Act amount to violations of several free trade agreements to which Australia is committed.\textsuperscript{153} The countries are collectively asserting that the law

\begin{itemize}
\item[\textsuperscript{148}] Jewell, \textit{supra} note 9.
\item[\textsuperscript{149}] Mezrani, \textit{supra} note 145. Mitchell also questioned whether the company’s restructuring decision was made in good faith or for purposes of litigation given that Philip Morris Asia purchased shares of Philip Morris Australia over a year after the Australian government announced its plan to develop tobacco plain packaging legislation. \textit{Id.} For purposes of background knowledge, Philip Morris Asia is based in Hong Kong and owns Philip Morris Australia as an affiliate. Vadi, \textit{supra} note 41, at 96-97.
\item[\textsuperscript{150}] Vadi, \textit{supra} note 41, at 95-97.
\item[\textsuperscript{151}] The function of the WTO is to oversee the implementation of global trade and commerce regulations established primarily through international trade agreements, and to adjudicate complaints when member countries are accused of violating those regulations. Jewell, \textit{supra} note 9. For background on the relationship between Australia and WTO dispute settlement generally, see Australia and WTO Dispute Settlement, AUSTRALIAN GOVERNMENT DEPARTMENT OF FOREIGN AFFAIRS AND TRADE, http://www.dfat.gov.au/trade/negotiations/wto_disputes.html (last visited Oct. 25, 2013).
\item[\textsuperscript{152}] Note that “[o]nce a country ratifies a trade agreement, its terms supersede domestic laws” such that “[i]f a country’s regulations are found to impose unreasonable restrictions on trade, it must amend the rules or compensate the nation or foreign corporation that brought the complaint.” Levin, \textit{supra} note 144.
\item[\textsuperscript{153}] See Dispute Settlement: Dispute DS434 Australia—Certain Measures Concerning Trademarks and Other Plain Packaging Requirements Applicable to
violates Australia’s trade obligations pertaining to intellectual property rights under the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS), the Technical Barriers to Trade Agreement (TBT), and the General Agreement on Tariffs and Trade 1994 (GATT). On September 28, 2012, the WTO Dispute Settlement Body announced the establishment of a panel to investigate the claims of non-compliance brought against Australia’s plain packaging restrictions. It is worth noting that

_Tobacco Products and Packaging, WORLD TRADE ORGANIZATION, http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds434_e.htm (providing details on the WTO complaint filed by Ukraine against the TPP Act on March 13, 2012); Dispute Settlement: Dispute DS441 Australia—Certain Measures Concerning Trademarks and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging, WORLD TRADE ORGANIZATION, http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds441_e.htm (providing details on the WTO complaint filed by the Dominican Republic against the Australia TPP Act on July 18, 2012); Dispute Settlement: Dispute DS435 Australia—Certain Measures Concerning Trademarks and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging, WORLD TRADE ORGANIZATION http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds435_e.htm (last visited Nov. 22, 2013) (providing details on the WTO complaint filed by Honduras against the TPP Act on November 20, 2012). Several other countries requested to join each of the consultations.

Each country generally claimed violations under the same three trade agreements, but varied somewhat in which specific provisions they identified within each one. Ukraine cited TRIPS Articles 1.1, 2.1, 15, 15.1, 15.4, 16, 16.1, 16.3, 20, 1, 27 and 3.1, TBT Articles 2.2 and 2.1, and GATT 1994 Articles I and III. Dispute Settlement: Dispute DS434: Australia — Certain Measures Concerning Trademarks and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging, WORLD TRADE ORGANIZATION (2013), http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds434_e.htm. The Dominican Republic cited TRIPS Articles 2.1, 3.1, 15.4, 16.1, 20, 22.2(b), and 24.3, TBT Articles 2.1 and 2.2, and GATT 1994 Article III. Dispute Settlement: Dispute DS441: Australia — Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging, WORLD TRADE ORGANIZATION (2013), http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds441_e.htm. Honduras cited TRIPS Articles 2.1, 2.2, 3.1, 15.4, 16.1, 20, 22.2(b), and 24.3, TBT Article 2.1, and GATT 1994 Article III. Dispute Settlement: Dispute DS435: Australia — Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging, WORLD TRADE ORGANIZATION (2013), http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds435_e.htm.

Panels Set Up on Australia’s Tobacco Measures and on US Duties on China’s Exports, WORLD TRADE ORGANIZATION, Sept. 28, 2012, http://www.wto.org/english/news_e/news12_e/dsb_28sep12_e.htm (toss up on whether this should be cited as an online newspaper article or as a website pursuant to BB 18.2.2).
tobacco companies are footing the bill for the three countries’ legal fees in the WTO action against Australia. While this is not an uncommon practice when mutual interests are involved, this particular arrangement has faced criticism, considering that none of the governments bringing challenges appear to have any direct stake in the policies governing Australia’s tobacco market. In fact, Konstantin Krasovsky, a tobacco control official in Ukraine’s Ministry of Health, has voiced public disapproval of the underhandedness, announcing, “Honduras, Dominican Republic and Ukraine agreed to be a prostitute.”

The merits of the particular arguments are largely beyond the scope of this Comment, but require some attention to better inform the interplay between global trade and public health. Legal experts assert that the most threatening and potentially fatal arguments to plain packaging regimes are related to their alleged incompatibility with the international system of trademark protection established by the TRIPS Agreement. Specifically, tobacco plain packaging could be viewed as a violation of TRIPS

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156 Levin, supra note 144 (“Philip Morris International is paying the firm of Sidley Austin to represent the Dominican Republican, while British American is picking up legal expenses for Ukraine and Honduras.”).

157 Id. (“While tobacco exports from Ukraine to Australia are nonexistent, exports from Honduras and Dominican Republic in the past three years have averaged $60,000 and $806,000, respectively, according to figures from Australia’s Department of Foreign Affairs and Trade.”).

158 Id.; Alberto Alemanno, WTO Challenge to Australian Plain Packaging Scheme, ALBERTO ALEMANNO (Mar. 28, 2012), http://albertoalemanno.eu/articles/wto-challenge-to-australian-plain-packaging-scheme (reporting that the decision to file a WTO consultation request was made in secret within the Ministry of Economics in subversion of the Ukrainian President’s efforts to advance tobacco control policies).

159 Alemanno & Bonadio, supra note 69, at 458-59; Mitchell, supra note 15, at 414 (“The TRIPS Agreement . . . requires WTO Member States to maintain a register of trademarks and establish minimum standards governing the registration of such marks.”); Alemanno & Bonadio, supra note 69, at 458-59 (2011) (“TRIPS is one of the WTO Agreements signed in 1994 at the end of the Uruguay Round and is one of the pillars of the multilateral trade system. TRIPS imposes on WTO Members the obligation to ensure a minimum level of protection of all types of IPRs, including trade marks.”). In contrast, scholars have focused less attention on the other two treaties invoked in the WTO dispute settlement claims because TBT has never before been considered in a tobacco-related controversy—but could be used to make the claim that plain packaging is not the “least trade restrictive alternative to reduce tobacco related problems”—and because there is existing case precedent for permitting health-related exceptions to GATT. Freeman et al., supra note 63, at 587.
Article 20, "which provides that use of a trade mark in the course of trade is not to be encumbered unjustifiably by special requirements, such as its use in a manner detrimental to its capability to distinguish the goods or services of one undertaking from those of other undertakings." This legal assessment has received support in a brief on the global tobacco industry circulated in June 2012 by the Berenberg Bank, a financial services firm in Europe. In predicting that the tobacco industry will prevail in the WTO action, the brief relies on the assertion that "international intellectual property treaties support trademark protection, regardless of the nature of the product" and also emphasizes that Australia has not "provided the scientific evidence to justify the effectiveness of plain packaging as an anti-smoking measure needed to trigger the public health exemption clauses."

In contrast, scholars in support of plain packaging contend that the TRIPS Agreement should be interpreted to "allow Members broad discretion in designing their policy space to respond to important health concerns," concluding that plain packaging is a justifiable restriction on trademarks as a means of curtailing tobacco-related diseases. Furthermore, "[t]rade mark law does not merely serve the limited purpose of protecting private property rights; it ultimately supports the broader public interest in providing accurate information to consumers" and in that vein, is entirely consistent with the public welfare justifications behind the plain packaging law. Finally, Mitchell argues the WTO claims contain flawed arguments and will not succeed because "TRIPS gives a negative right that restricts others from using your trademarks. Tobacco companies still have the right to use their trademark and are simply prohibited from exercising a positive right to use it on tobacco products." Consistent with TRIPS Article 16, the protection conferred by the Agreement is the right

60 Freeman et al., supra note 63, at 585.
61 Kerr, supra note 145.
62 Id.
63 Mitchell, supra note 15, at 420-22 ("It is implicit within the TRIPS Agreement itself, and especially Article 20, that a high degree of domestic regulatory autonomy shall be afforded to a Member State to enact measures to protect and promote public health.").
64 Freeman et al., supra note 63, at 585.
65 Mezrani, supra note 145.
to prevent others from using the trademark rather than the right to affirmatively use the trademark, the only aspect of trademark ownership to be affected by plain packaging.\textsuperscript{166} With credible arguments put forth by both sides of the debate, the stakes continue to rise while Australia’s tobacco labeling restrictions remain the subject of consultations in the WTO.

The outcomes of these various lawsuits are largely unpredictable.\textsuperscript{167} There is, however, a clear acknowledgement of the conflict between international trade and domestic policy.\textsuperscript{168} The plain packaging law in Australia provides a ripe environment for the public policy confrontation, as the government has repeatedly asserted its intention to defend the legality and fairness of the plain packaging law.\textsuperscript{169} The danger, which depends on the resolution of the substantive international law questions, is that other countries may not be as willing or have the necessary resources to defend their policies in the face of a powerful global industry.\textsuperscript{170} As one scholar noted:

Given the high economic stakes related to the introduction of plain packaging and the impact such measures could have on tobacco consumption and eventually on other regulatory sectors,

\begin{footnotesize}
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\item[166] Mitchell, supra note 15, at 415-16 ("While the shift towards plain packaging would affect the use of tobacco trademarks, the registration of such trademarks would remain unaffected. The plain packaging initiative seeks to prevent use of the tobacco trademark, not to limit the right to register. The fact that a trademark has been registered for a particular good does not give the owner the right to use the mark or be exempted from any regulatory limitation on the use of the mark.").
\item[167] See Alemanno & Bonadio, supra note 69, at 475.
\item[168] See Vadi, supra note 41, at 95-96 ("International trade law risks undermining the goal of tobacco control by significantly reducing tariff and non-tariff trade barriers, lowering the prices of tobacco products and thus causing an increase in cigarette smoking, particularly in low income countries. In parallel, investment treaties have furthered foreign direct investment in the tobacco business, thus increasing competition and lowering tobacco prices.").
\item[169] Julia Gillard Stands Firm On Cigarette Plain Packaging, HERALD SUN, June 27, 2011, http://www.heraldsun.com.au/news/breaking-news/julia-gillard-stands-firm-on-cigarette-plain-packaging/story-e6frf7jx-1226082603294. In response to news that Philip Morris had launched an international legal action against Australia, Prime Minister Julia Gillard said, "We're not going to be intimidated by big tobacco's tactics, whether they're political tactics, whether they're public affairs kind of tactics out in the community or whether they're legal tactics. We're not taking a backward step. We've made the right decision and we'll see it through." Id.
\item[170] Levin, supra note 144
\end{enumerate}
\end{footnotesize}
it is not unlikely that states adopting such a market restriction would expose themselves to a WTO dispute settlement proceedings or to claims of ‘investor state’ protection within the framework of bilateral investment treaties.\textsuperscript{171}

Although the outcomes of these legal disputes as they pertain to the Australia TPP Act are uncertain, they will undoubtedly be influential in future policy.\textsuperscript{172}

IV. Significance

In tracing the development of the plain packaging law as well as tobacco control measures more broadly in Australia, the one thing that remains clear is that globalization has had a significant impact in reshaping the policy playing field.\textsuperscript{173} More specifically, “[t]he overhaul of the economic model, including trade liberalization, has driven changes in the supply and promotion of consumer goods, with the emergence of transnational companies, retailers, foreign direct investment and global advertising.”\textsuperscript{174} As a result, countries will need to adapt and conform their public health initiatives to this new global dynamic incorporating investment and trade obligations in order to be policy leaders.\textsuperscript{175} The uncertainty surrounding obligations under foreign direct investment and free trade agreements on the one hand and whether they conflict with progressive public health strategies like plain packaging regulations on the other hand will soon be resolved though, as the battle over the Australia TPP Act demonstrates.

Despite the collective efforts of the multibillion dollar tobacco industry, the Australian government has successfully defended the plain packaging policy in domestic court.\textsuperscript{176} The court ruling proved to be a “major blow” to tobacco companies, fueling their concern that other countries will be emboldened to adopt similar

\textsuperscript{171} Alemanno & Bonadio, supra note 69, at 475.
\textsuperscript{172} See id.
\textsuperscript{173} Jewell, supra note 9.
\textsuperscript{174} Id.
\textsuperscript{175} Id. (“The fact that a policy arena for NCDs is now operating at the global level means that policy-makers must consider the challenge of global trade when formulating national policy, but it also indicates that globalization may be a significant factor (or amplifier) in the emergence and spread of the global NCD epidemic.”).
\textsuperscript{176} Curran, supra note 100.
labeling restrictions. Their apprehension is justifiable in the sense that consumer brand recognition is the lynchpin of their financial profit realization, and that over thirty-five countries have already put into place some limitation on tobacco advertising and promotion. The best-case scenario for public health advocates is that the TPP Act serves as the necessary impetus to instigate a trend towards complete restrictions on tobacco use. Margaret Chan, the Director General of the World Health Organization, stated: "With 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. The lawsuits filed by big tobacco look like the death throes of a desperate industry." In fact, New Zealand recently announced plans to develop tobacco plain packaging legislation, which would make it only the second country in the world to impose such restrictions. Tariana Turia, New Zealand’s Associate Minister of Health, announced: "We cannot continue to allow tobacco companies to use sophisticated packaging designs to promote their products. There is a risk that tobacco companies will try and mount legal challenges against any legislation, as we have seen in Australia." Even so, the tobacco industry does not appear at all ready to back down. In anticipation of the international challenges on the horizon, Louis C. Camilleri, Chairman and CEO of Philip Morris International publicized that the company would use “all necessary resources and ... where necessary litigation, to actively challenge unreasonable regulatory proposals,” specifically referencing labeling restrictions and display prohibitions. Given the international force with which the tobacco industry has opposed the TPP Act, the public health community fears that other

177 Id.
178 Levin, supra note 144.
181 Id. However, Turia conceded that New Zealand would “delay implementation until legal disputes faced by Australia are resolved.” Id.
182 Levin, supra note 144.
countries could be deterred from advancing similar tobacco control measures.183 Matthew L. Myers, President of the Campaign for Tobacco-Free Kids in Washington, D.C., explained: “The cost of defending this case, and the risk of being held liable, would intimidate all but the most wealthy, sophisticated countries into inaction.”184 This dichotomy could be amplified by the fact that the tobacco industry is expanding to new markets, so although prosperous nations may have the resources to go to bat, poor countries will be unwilling or unable to defend their policies and unlikely to adopt them.185 There is, however, a precedent of interaction and influence set by the FCTC between non-governmental organizations in developing countries and their counterparts in developed countries that could help counteract Big Tobacco’s expansion into more vulnerable markets.186

News reports reveal that other countries, including Britain, France, Norway, India, and New Zealand, have been closely following the legal developments in Australia to determine their own future plain packaging laws.187 Most notably, the European Commission published a draft proposal for legislation similar to Australia’s TPP Act on December 19, 2012.188 The draft proposal was made available to the media just several weeks after the plain packaging regulations went into effect in Australia, inciting the tobacco industry’s fear that “tougher packaging rules will reduce already dwindling European sales and set a worrying precedent for growth markets in Asia and Africa.”189 The draft proposal involves major revisions and updates to the Tobacco Products

183 Id.
184 Id.
185 Jewell, supra note 9 (“There has also been aggressive expansion to target new markets (women in established markets; new smokers in emerging low- and middle-income economies).”).
186 History of WHO FCTC, supra note 19, at 21.
187 Kennedy, supra note 86.
Directive, which dates back to 2001. More specifically, the proposal bans the use of characterizing flavors in cigarettes, roll-your-own tobacco, and smokeless tobacco products; mandates large pictorial health warnings on cigarettes and roll-your-own tobacco; regulates cross border internet sales to combat illicit trades; expands measures to control electronic cigarettes and herbal smoking products; imposes labeling and ingredients requirements on chewing and nasal tobacco; and maintains a ban on oral tobacco. The law is expected to go into effect in 2015 or 2016, following approval by the twenty-seven European Union (EU) member states and the European Parliament.

While the labeling and packaging components of the EU legislation admittedly fall short of the plain packaging law in Australia, member states are explicitly permitted to adopt more draconian measures, including an absolute prohibition on branding, if those measures are warranted on public health grounds. Media reports indicate that Britain and France are contemplating imposing such measures within their own borders. The impetus behind these drastic changes to the EU tobacco rules, which are designed to dissuade younger generations from smoking, has been linked exclusively to public health. In

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190 Tobacco Products: Towards Bigger Health Warnings and Ban of Strong Flavourings, supra note 188.

191 Id.


193 Tobacco Products: Towards Bigger Health Warnings and Ban of Strong Flavourings, supra note 188.

All cigarette and Roll Your Own packages must contain a combined picture and text health warning covering [seventy-five percent] of the front and the back of the package and must carry no promotional elements. The current information on tar, nicotine and carbon monoxide, which is perceived as misleading, is replaced by an information message on the side of the pack that tobacco smoke contains more than [seventy] substances causing cancer.

Id.


195 Id.

196 The European Commission announced that the use of tobacco products is the leading cause of premature death in Europe, accounting for 700,000 deaths each year.
demonstration of his support for the enhanced restrictions, EU Health Commissioner Tonio Borg stated: “Consumers must not be cheated. Tobacco products should look and taste like tobacco products, and this proposal ensures that attractive packaging and flavourings are not used as a marketing strategy.”

The EU draft proposal appears to be substantially similar in nature and purpose to the Australian plain packaging law, as both policies demonstrate unflinching support for public health without regard for the tobacco industry. This becomes especially evident when put in context of the innumerable hurdles that the EU faced in the years leading up to announcement of the draft proposal in December 2012. Moreover, the criticism that the draft proposal has faced from the tobacco industry thus far has involved intellectual property objections similar to those mounted against the Australia law. Syea Schroeder, a spokesperson for Reemtsma, Europe’s largest cigarette producer and subsidiary of Imperial Tobacco, contends that the draft proposal violates German and European laws and also stated: “This is plain packaging by the back door, and by that token it is a deep intrusion into the intellectual property rights and trademark rights of the manufacturer. It destroys brand values that companies have built up over time.” In short, the recently proposed draft changes to the EU tobacco law provide some indication that cigarette plain packaging is gaining momentum in nations beyond Australia, validating Big Tobacco’s fear that this heightened form of anti-tobacco legislation will soon take hold on a global scale.

Today, tobacco control constitutes one of the most advanced policy fields in the world and is even sometimes used as a

Draft EU Rules to Open Door to Plain Cigarette Packets, supra note 189.

197 Dunmore, supra note 194.

198 Draft EU Rules to Open Door to Plain Cigarette Packets, supra note 189.

199 “The European Commission proposed the bill after two years of discussion, a period marked by heavy industry lobbying, the resignation of an EU health commissioner amid cash-for-influence allegations and a break-in at the offices of anti-smoking groups in Brussels.” Dunmore, supra note 194.

200 Draft EU Rules to Open Door to Plain Cigarette Packets, supra note 189.

201 “When the Australian High Court rejected an appeal against the new plain-packaging laws back in August, tobacco companies worried the laws would soon be tested overseas, and today’s news on the draft EU decision will certainly keep those worries alive.” Gara, supra note 84.
template to create regulatory action in other areas.202 This is underscored by the exemplary basis of consensus upon which the FCTC was negotiated, despite the steep obstacles posed by conflicting interests of stakeholders at the beginning of the current era of international tobacco regulation.203 This progress-oriented template is especially meaningful as tobacco control is an "important aspect of contemporary public health governance."204 Whether it is painted as a "human rights issue or a mere public policy objective, the legitimacy of such a goal is uncontested."205 Consequently, the tobacco industry likely will not succeed against this momentum, which makes this particular crossroads with the Australia TPP Act all the more interesting to consider within a larger context.

202 Jewell, supra note 9.
203 History of the WHO FCTC, at 16 ("The negotiation of the FCTC was... a major global undertaking designed to set new standards for public health in an area involving major private and public interests not necessarily convergent—and in many cases strongly divergent—with the overall objectives of the negotiation.").
204 Vadi, supra note 41, at 94-95.
205 Id. "In addition to the fundamental humanitarian concerns raised by the tobacco epidemic, the economic literature provides further ground for tightening tobacco control measures: a World Bank study examines the long-term costs of treating tobacco illness vis-à-vis the short-term economic benefits derived from tobacco production and trade." Id.