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INTELLECTUAL PROPERTY RIGHTS AND PUBLIC POLICY ON THE ROLE OF PLAIN PACKAGING AND HEALTH CARE IN INDIA

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Abstract

Although tobacco is a multi-billion-dollar industry globally, its consumers are prone to various non-communicable diseases, such as cancer, heart attack, etc. Therefore, to prevent this, many states have taken initiatives to discourage the consumption of this harmful product. Many international organizations like World Health Organization (WHO) have supported these preventive measures through The WHO Framework Convention on Tobacco Control (WHO FCTC). The main objective of this convention is to encourage the concept of packaging all brands of tobacco products in a uniform standard, which is known as the Plain packaging process. This was the first initiative adopted by Australia. This research aims to determine the intellectual property rights and public policy on the role of plain packaging and health care in India as a developing country and the best strategy to tackle these issues. The authors have also made efforts to have a comparative study of New Zealand, Australia, Bangladesh, etc for better understanding.

Keywords : Plain packaging, Tobacco, Convention, Products, Organization.

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I. INTRODUCTION

Some consumable goods, such as tobacco are harmful to humans, addictive in nature, and hazardous to health. According to a 2017 report by the World health organization, “Globally, tobacco use causes more than 7 million deaths per year with a potential increase to 8 million deaths yearly by 2030, supposing this pattern of consumption doesn’t change.”¹ Therefore, in order to discourage consumers from consuming such goods many countries have implemented various protocols in the form of tobacco control policies, ranging from graphic pack warnings, advertising bans to the creation of no smoking areas². Moreover, the Convention on Tobacco Control (FCTC) makes

¹ “Tobacco,” Centre for Disease Control and Prevention, accessed 19 March 2020, https://www.cdc.gov/tobacco/data_statistics/fact_sheets/fast_facts/index.htm.

² “WHO Report on the Global Tobacco Epidemic 2017 Monitoring Tobacco Use and Prevention Policies,” World Health Organisation Tobacco Free Initiative, accessed 19 March 2020, <https://www.who.int/tobacco/>

it necessary for all nations, which have ratified the convention, to take steps in banning all tobacco advertisements and any sort of promotion. Therefore, the packaging of tobacco has become a key promotional vehicle for this industry to interest smokers and potential smokers³. Several countries have taken significant steps by removing the last bit of glamour and attraction from the tobacco packs and embrace the concept of “plain packaging.” This process is a principle that prevents any product from carrying industrial brand imagery as mobile billboards.⁴ The principle of “plain packaging” has become mandatory in Australia since December 2012.⁵

II. MEANING OF PLAIN PACKAGING

Another term for “plain packaging” is “Standardized packaging,” which means that products such as tobacco are packaged in a uniform plain color, texture, shape, size, and even with the use of the same materials. Moreover, it lays down restrictions on any sort of branding, use of logos, and promotional element. Rather, it only allows the use of brand and product names, quantity, and contact details of the manufacturers and marketers along with a standard typeface. This is in addition to other mandatory information such as health warnings and tax stamps which can be printed on the products’ package⁶. These are various steps taken by the state in order to discourage advertisement and fancy display of products hazardous to the human health. Therefore, standardized law of packaging is imposed on harmful products such as tobacco.

III. OBJECTIVES OF PLAIN PACKAGING

Packaging and trademark play essential roles in promoting one’s product. This is because the manner in which a product is packed tends to attract the consumer. Due to this reason, many industries spend millions conducting extensive studies on color schemes, designs, and types of product packaging that are most appealing to their intended consumers.⁷ Conversely, trademark

[global_report/2017/en/](#).

³ Becky Freeman, Simon Chapman and Matthew Rimmer, “The Case for The Plain Packaging of Tobacco Products,” *Addiction* 103, no. 4 (2008): 585, DOI:10.1111/j.1360-0443.2008.02145.x.

⁴ Amit Yadav, et. al., “Plain packaging of tobacco products: the logical next step for tobacco control policy in India,” *BMJ global health* 3, no. 5 (2018): 2, DOI:10.1136/bmjgh-2018-000873.

⁵ Sinclair Davidson and Ashton de Silva, “The Plain Truth about Plain Packaging: An Econometric Analysis of the Australian 2011 Tobacco Plain Packaging Act,” *Agenda* 21, no. 1 (2014): 33, DOI: 10.22459/ag.21.01.2014.02.

⁶ “Global issue plain packaging,” Tobacco Free Kids, accessed on 22 March 2020, <https://www.tobacco-freekids.org/what-we-do/global/plain-packaging>.

⁷ “The Importance of Product Packaging,” Carter Paper, accessed 26 March 2020, <https://carterpaper.com/importance-product-packaging/>.

acts as an essential tool for communication, therefore with the help of a single brand or logo, it conveys intellectual and emotional attributes and messages regarding the company, and its reputation through products⁸. The tobacco industry tries to attract customers through their smart marketing skills such as packaging, which lead to the inception of the plain packaging rule to protect consumers.⁹

The aims of plain packaging are as follows:¹⁰

- 1) Firstly to discourage a customer from buying such product, it is important to reduce its attractiveness.
- 2) Remove the means of advertising and promoting tobacco through packaging.
- 3) Remove possibilities of package design techniques likely to convey misleading information that such products are less harmful than others.
- 4) Create true and effective health warnings.
- 5) The plain package is a way to discourage the consumer from falling into the trap of attractive products.

It helps consumers to desist from its usage. For instance, a research made in Australia, published in *BMJ Open*, stated that cigarette smokers that consume the product from a plain rather than a branded pack have thought of quitting at least once, found the product less satisfying, or even thought that the quality was poor¹¹. Tobacco is a highly addictive substance that affects consumers and cultivators despite being a billion-dollar industry. The process of plain packaging is a positive step towards discouraging consumers from its consumption as well help them to quit its consumption.

IV. EVOLUTION OF PLAIN PACKAGING

Some available products in the market have an adverse effect on the health of their consumers. Therefore, to discourage its consumption and create awareness of tobacco's harmful effects, various countries have come forward to set the following specified norms.

a) Canada

⁸ Abigail Rubinstein, "7 Reasons Why Trademarks Are Important to Your Business," *Entrepreneur Asia Pacific*, 24 July 2014, accessed 26 March 2020, <https://www.entrepreneur.com/article/235887>.

⁹ Tobacco Free Kids, "Global Issue."

¹⁰ "Plain Packaging," World Health Organisation, Europe, accessed on 26 March 2020, <https://www.euro.who.int/en/health-topics/disease-prevention/tobacco/publications/key-policy-documents/who-framework-convention-on-tobacco-control-who-fctc/key-areas-of-tobacco-control-policy/plain-packaging>.

¹¹ *Ibid.*

In Canada, Gerry Karr presented a proposal accepted by the Canadian Medical Association (CMA) in 1986. The proposal stated that cigarettes should be sold ‘in the equivalent of plain brown wrappers.’ In the subsequent year, CMA set the proposal before the federal government to introduce a law that would set guidelines for tobacco products to be sold in plain, standard-sized packages that specifically state, “This product is injurious to your health.”¹²

b) New Zealand

In May 1989, New Zealand’s Toxic Substances Board published far-reaching proposals to strengthen tobacco control. On the report’s release, a health concern group, Coalition against Tobacco Advertising and Promotion, clamored for a complete ban on the advertisement of all cigarette packs.¹³

c) United Kingdom

Several agencies were concerned about the health and safety of UK citizens. Therefore, in October 1991, the agency called ‘Action on Smoking and Health’ presented a proposal to the UK Government that stated its concern on the hazardous effect of tobacco and demanded a law that deals with cigarette packaging. Moreover, it laid guidelines such as uniform and plain packets, typeface, and the inscription of health warnings and product details.¹⁴ Due to unknown reasons, the action against the tobacco industry and packaging faded into the mist within thirteen years. Even the most fanatical anti-smoking campaigners stopped taking action or raising any issues publicly. The anti-tobacco campaign resurfaced in 2008 when Australian sociologist Simon Chapman wrote an article titled ‘The case for the plain packaging of tobacco products.’ Chapman was an anti-smoker and also the co-founder of the activist group BUGAUP (Billboard Utilizing Graffitiists against Unhealthy Promotions) in the 1970s. The BUGAUP consists a group of people that protested against the advertisement of cigarettes in Australia led by Chapman. The main idea behind the campaign was to weaken the influence of tobacco sponsorship. The critical links of color, unique font style, and logo designs associated with advertising a specific brand, was the center of attraction for consumers. Conversely, it was also claimed that, with the help of plain packaging, shopkeepers reduced the size of their tobacco displays. Seventeen years later, these arguments are still relevant and have helped create a heavily

¹² “History of Plain Packaging: Developing the Intellectual Property Argument,” Tobacco Tactics, accessed 25 October 2020, <https://tobaccotactics.org/wiki/history-of-plain-packaging-developing-the-intellectual-property-argument/>.

¹³ Donley T. Stuldar, “The Political Dynamics of Tobacco Control in Australia and New Zealand: Explaining Policy Problems, Instruments, and Patterns of Adoption” *Australian Journal of Political Science* 40, no. 2 (2005): 255, DOI:10.1080/10361140500130063.

¹⁴ Tobacco Tactics, “History of Plain Packaging.”

regulated and retail environment for tobacco, leading to the state's Plain packaging 'incremental step'.¹⁵

Some of the countries that started to adopt the new concept to discourage tobacco consumption are as follows:

a) Australia

This was the first country to introduce and implement the plain packaging act. In the case of *JT International SA v Commonwealth of Australia*,¹⁶ four tobacco industries joined hands to challenge the Plain Packaging Act of 2011. They laid down the argument that the act is a violation of section 51(xxxi) of the constitution, which deals with property acquisition by the state. Conversely, they also argued that these norms amounted to the acquisition of the tobacco companies IP (intellectual property) rights which includes trademark.¹⁷ The Australian High Court held that "Although the Act regulated the plaintiff's Intellectual Property (IP) rights and imposed controls on the packaging and presentation of tobacco products, it did not confer a proprietary benefit or interest on the Commonwealth or any other person."¹⁸ Therefore, from observation, to become an acquisition, the government needs to have an interest and benefit in the property's nature. Moreover, the requirement of the act itself is similar to any other legislation because it only lays down certain grounds and creates a margin of the requirement to state on the misuse of tobacco which is very important in relation to the right of the customer. It helps in reducing the possibility of harm when there is awareness among users. This is further observed in the landmark judgment of *Philip Morris Asia Ltd v Australia*¹⁹.

According to the facts of this case, a Hong Kong-based registered company called Philip Morris Asia Limited (PM Asia) was the claimant. Therefore, due to the corporate restructuring within the Philip Morris group in 2011, the company acquired indirect ownership in an Australian subsidiary in the name Philip Morris Limited (PML). This industry would

¹⁵ "Plain Packaging Commercial expression, anti-smoking extremism and the risks of hyper-regulation", Christopher Snowdon, accessed on 26 March 2020, <https://static1.squarespace.com/static/56edde762cd9413e151ac92/t/573c949c4d088e9a7fed45f6/1463587999195/plain-packaging.pdf>.

¹⁶ *JT International SA v Commonwealth*, Matter No. S409/2011, available at www6.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/hca/2012/43.html.

¹⁷ "Case Summaries," Tobacco-Free Kids, accessed on 26 March 2020, <https://www.tobaccofreekids.org/microsites/plainpackaging/resources/case-summaries>.

¹⁸ Matthew Rimmer, "Plain Packaging of Tobacco Products: Landmark Ruling," *WIPO Magazine*, 2018, accessed on 26 March 2020, https://www.wipo.int/wipo_magazine/en/2018/06/article_0006.html.

¹⁹ *Philip Morris Asia Ltd. v. The Commonwealth of Australia*, Permanent Court of Arbitration Case No. 212-12, 2015.

sell tobacco products in Australia with different brand names. However, issues arose with the introduction of the plain packaging Act, which set up new guidelines for selling tobacco products in Australia. The main aim of the act was to discourage consumers from smoking and prohibited the use of trademarks, symbols, graphics, or images on tobacco products and packaging. It also demanded the mandatory display of the tobacco company in standard font and size. Eventually, this resulted in difficulty for consumers to distinguish one property from the other.²⁰ Therefore, the PMA claimed compensation for the losses that occurred due to the act with their arguments based on the following:

- 1) Plain packaging had the equivalent effect of expropriating the property rights in a trademark.
- 2) The act is arbitrary in nature because there was no evidence to show it is likely to affect the reduction of consumers.²¹

The tribunal held that:

“PM Asia was completely aware that the Australian government would go forward with the enactment of the activities during the time it acquired PML. Therefore, the dispute was considered foreseeable to PM Asia. Moreover, the main and determinative reason for the corporate restructuring was the intention to bring a claim under the BIT, using the Hong Kong entity as a claimant. Based on these facts, the tribunal dismissed the claim on the grounds that the commencement of the arbitration by PM Asia constituted an abuse of rights.”²²

The above judgment rejected the claims laid down by PM Asia and stated that it is an abuse of power as PM Asia was aware of the Australian government’s intention regarding enacting the packaging act when acquiring the PML.

b) United Kingdom

It also laid down the requirement for cigarettes to be sold in plain, standardized packaging in December 2012. The United Kingdom became the second country globally to pass similar legislation, with Ireland and France following suit. In the UK, tobacco companies were no longer permitted to manufacture or import packs with promotional features, although they had until 20th May 2017 to sell through old stock.²³

²⁰ *Ibid.*

²¹ ASH Briefing, “Standardised Plain Packaging.”

²² Monika Arora, et. al., “Exploring Perception of Indians.”

²³ “Standardised Plain Packaging, Action on Smoking and health,” ASH Briefing, accessed on 26 March

A similar object against the concept of plain packaging was raised by the tobacco industries in the United Kingdom. In the landmark judgment, *R (British American Tobacco & Ors) v. Secretary of State for Health*²⁴, Justice Green rejected all the legal challenges put forth by the world's largest tobacco manufacturers against the introduction of plain packaging, which came into effect on 20 May 2016. Moreover, the court upheld the legality of the act and rejected every ground stated by the tobacco industry. The judge concluded that the Regulations were proportionate, both when Parliament was promulgated and considering the need to provide up-to-date evidence.²⁵

c) France

On 1 January 2017, France implemented the standardized format for all packs on sale.

d) Ireland

It laid down the requirement for all manufactured products to comply after 30th September 2017.²⁶ Furthermore, a growing number of other countries in Europe and worldwide are now introducing standardized packaging.²⁷

e) India

As a developing country and a welfare state, India is poised to safeguard its citizen and create awareness in relation to the consumption of harmful products. Therefore, with the global activism against tobacco consumption of any kind, India has also taken steps to introduce a law to discourage its consumption. The government of India introduced the Cigarettes and Other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply, and Distribution) (COTPA) act 2004²⁸. This act laid down regulation of tobacco products by banning its advertisement, trade, and commerce and setting control of production, supply, and distribution. This act is aligned in respect to

2020, <https://ash.org.uk/category/information-and-resources/packaging-labelling-information-and-resources/standardised-plain-packaging/>.

²⁴ England and Wales High Court (Administrative Court), *British American Tobacco Ltd. v. Secretary of State for Health*, EWHC 2493, 2004.

²⁵ "R British American Tobacco & Ors v Secretary of State for Health," Black stone chambers, accessed on 26 March 2020, https://www.blackstonechambers.com/news/case-r_british_american_1/.

²⁶ Ireland, *Public Health (Standardised Packaging of Tobacco) Regulations*, Statutory Instruments No. 422 of 2017, available at <http://www.irishstatutebook.ie/eli/2017/si/422/made/en/print>.

²⁷ "Standardized tobacco packaging," ASH Briefing, accessed on 26 March 2020, http://ash.org.uk/wp-content/uploads/2017/04/plain_packaging-26-April-2017.pdf.

²⁸ Monika Arora, et. al., "Exploring Perception of Indians About Plain Packaging of Tobacco Products: A Mixed Method Research," *Frontiers in Public Health* 1 (2013): 2, DOI:10.3389/fpubh.2013.00035.

the resolution passed by the 39th World Health Assembly (WHO), on May, 1986.²⁹ In 2014 an expert committee analyzed the best practices conducted globally, which helped develop the best practice applicable in India. This recommended that plain packaging is the most feasible method to the Ministry of Health and Family Welfare, Government of India, and was adopted in April 2015.³⁰ Although its implementation was delayed due to some unreasonable circumstances, these were done away with, and the order passed by the Rajasthan High Court. The court laid down strict directions, and the law came into effect in April 2016. In another case,³¹ the court stated that “plain packaging is an improved and effective strategy, and therefore, suggested the legislature to give it some serious thought.” In other words, plain packaging is an alternate solution in the creation of awareness among the consumers, and therefore serious steps need to be taken by the parliamentarians. Furthermore, in the case *Love Care Foundation v. Union of India and Others*,³² the Allahabad High Court laid directions for the Centre and the State Governments with regard to the implementation of plain packaging of tobacco products. The court also held that “tobacco plain packaging measures would be a long-term investment to safeguard the health of the Indian youth.” It acknowledged the role of plain packaging of all kinds of tobacco products as it will help Indian youths to live healthy life.³³ Therefore, in April 2016, there was an increase in the size of graphic pictorial warnings by 85% on various kinds of packaging of tobacco products.³⁴ Presently, a number of states have picked up a positive attitude towards discouraging the consumption of tobacco. At the initial stage, this industry tried to go against agencies’ regulations concerning plain packaging.³⁵

V. ROLE OF THE FRAMEWORK CONVENTION ON

²⁹ India, *The Cigarettes and Other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) act*, Act No. 34 of 2003, available at <http://legislative.gov.in/sites/default/files/A2003-34.pdf>.

³⁰ *Ibid.*

³¹ India High Court of Judicature at Bombay, *Tobacco-Free Kids v. Union of India & Ors.*, Writ Petition No. 11/2010, 2010.

³² India High Court of Judicature at Rajasthan, *Rahul Joshi v. Union of India & Ors.*, Writ Petition No. 8680/2015, 2015.

³³ Amit Yadav, et. al., “Plain Packaging of Tobacco Products,” 4.

³⁴ R. Prasad, “More countries are adopting the tough measure in order to curb tobacco consumption,” *The Hindu*, 2 January 2019, accessed on 26 March 2020, <https://www.thehindu.com/opinion/op-ed/boost-to-plain-packaging/article25884085.ece>.

³⁵ Tobacco Tactics, “History of Plain Packaging.”

TOBACCO CONTROL (FCTC)

The consumption of tobacco products is the ultimate reason behind the greatest single cause of premature and non-communicable mortality, leading to an estimated global death of 6 million people yearly. Most tobacco-related illness and deaths occur in low- and middle-income countries.³⁶ The hazards of tobacco are significant that even the UN Secretary-General Ban Ki-Moon raised concerns on the “World No tobacco day” and stated that all the governments worldwide need to encourage plain packaging because it tends to reduce the attractiveness of the product. Furthermore, Ki-Moon stated that such products need to be restricted from being advertised or promoted with an effective health warning.³⁷

The WHO Framework Convention on Tobacco Control (WHO FCTC) was enforced in 2005 to provide a framework for the implementation of tobacco control measures. The FCTC comprises of 17 articles³⁸ and since then, it has become one of the most widely adopted treaties of UN with 180 parties in 2016. These parties have shown progress in the implementation of legislation that controls the consumption of tobacco, thereby leading to a decline in high-income countries. However, many smokers are in low-income countries, and much progress is still needed for the vast majority of countries to achieve the WHO target of a 30% relative reduction in adult tobacco use worldwide by the year 2025.³⁹ The WHO FCTC contains 17 articles, which are concerned with the regulation and management of tobacco products. Out of these articles, 11 play significant roles for member states and the manner and size in which the tobacco product needs to be packed. Article 11 of WHO FCTC lays down a fixed time of three years, within which newly added members have to lay down legislation and regulation.⁴⁰ This prohibits any misleading packaging and labelling of tobacco products and further recommends labeling and discouraging pictures and images. Such warning needs at least cover 50% with not less than 30% of the principal display areas and including pictures.⁴¹ Displaying health warnings and various other kinds of messages on the package act as a medium of raising awareness regarding its harmful effect on

³⁶ “Impact of the WHO Framework Convention on Tobacco Control on the Implementation and Effectiveness of Tobacco Control Measures: A Global Evidence Review,” ITC Project, University of Waterloo, accessed on 16 April 2020, <https://www.who.int/fctc/cop/WHO-FCTC-ITC-Global-Evidence-Review.pdf>.

³⁷ “On World No Tobacco Day, UN Urges Plain Packaging of Tobacco Products to Save Lives,” *UN News*, 31 May 2016, accessed on 16 April 2020, <https://news.un.org/en/story/2016/05/530802-world-no-tobacco-day-un-urges-plain-packaging-tobacco-products-save-lives>.

³⁸ Janet Chung-Hall, et. al., “Impact of the WHO FCTC over the first decade: A global evidence review prepared for the Impact Assessment Expert Group” *Tobacco Control* 28, no. 2 (2018): 120, DOI:10.1136/tobaccocontrol-2018-054389.

³⁹ Amit Yadav, et. al., “Plain Packaging of Tobacco Products,” 5.

⁴⁰ *Ibid.*

⁴¹ PCA, Philip Morris Asia Limited v. The Commonwealth of Australia.

the consumers' health. This tends to create an environment where consumers are aware of what they are consuming. Furthermore, this aspect depends on how well such information is communicated to the intended audience. For instance, in Canada, a survey indicated that consumers found such a message useful because it helped them understand what they are consuming and encouraged them to be smokeless.⁴²

VI. GLOBAL PERSPECTIVE IN RESPECT TO WHO GUIDELINES UNDER ARTICLE 11 OF WHO FCTC

WHO FCTC was formed with the perspective of dealing with epidemics and reducing diseases caused by consumption of tobacco in order to promote global public health. The concept of plain packaging evolved because the medium of communication between the producer and the consumer is the packaging and advertising of its product. Therefore, plain packing and regulation of advertisement discourage consumers from consuming any kind of tobacco.⁴³ On the other hand, there are still many loopholes, which require special attention, and some of them are discussed below:

- a) Lack of uniformity in implementing the guidelines mentioned under article 11 of WHO FCTC. For instance, some countries have implemented stronger tobacco packaging regulations, which is consistent with the article's guidelines compared to others.⁴⁴
- b) It has been observed that most of the laws laid down by countries were more inclined towards displaying health warnings on the front and back of cigarette packs and cartons. However, they were generally weak in prohibiting the display of emission yields and placing warnings at the top of the principal display areas.
- c) Issues also arose in relation to colors and other insignia because it tends to give a false impression that one product is better than the other. For instance, countries like Brazil, Egypt, Malaysia, and China have banned the display of misleading descriptors. However, they have not prohibited the stealthy use of colors and other insignia.

⁴² WHO Study Group on TobReg, *Best Practices in Tobacco Control: Regulation of Tobacco Control Report*, World Health Organization, 2005, accessed on 17 April 2020, http://www.who.int/tobacco/global_interaction/tobreg/Canada%20Best%20Practice%20Final_For%20Printing.pdf?ua=1.

⁴³ Mark Hulit, "Marketing Issues," transcript of speech delivered at Corporate Affairs Conference, Manila, 27 May 1994, accessed on 26 June 2020, <https://www.industrydocuments.ucsf.edu/tobacco/docs/#id=qsbd0116>.

⁴⁴ Ayodeji J. Awopegba and Joanna E. Cohen, "Country tobacco laws and article 11 of the WHO Framework Convention on Tobacco Control: a review of tobacco packaging and labeling regulations of 25 countries," *Tob Induc Dis* 11, no. 1 (2013): 23 (31), DOI: 10.1186/1617-9625-11-23.

- d) The vagueness of the act in some countries is also a major issue for countries like Indonesia and Bangladesh, which do not require health warnings to be rotated despite being one of the countries' requirements.
- e) Lack of the requirement of health warnings. According to a study conducted, it was found that Spain was the only county that laid down the requirement of health warnings in its legislation which covers all five components of the requirements under the category known as "Message content." However, countries like Ukraine and Egypt failed to inscribe health warnings and the hazardous effect of smoking on their packs.⁴⁵

From the above points, it is concluded that WHO FCTC has been implemented as a less cost-effective and efficient tool to regulate the consumption and marketing of tobacco products. However, there are a number of loopholes that countries have to align themselves with to bring uniformity in their legislation. This will help to have a more regulated market in respect of tobacco products.

VII. THE AUSTRALIAN LEGISLATION AND THE TRIPS AGREEMENT

Australia successfully implemented the World's first scheme in December 2012, known as Tobacco Plain Packaging Act 2011. According to this act, it is prohibited to use promotional colors and logos on the package of tobacco products. It also laid down a detailed specification in which the tobacco manufacturers are allowed to pack their product, such as details related to the font, size, and color. These prohibition and detailed guidelines meant the trademark owners are prohibited from using their specific and fancy trademark on the product except for brand names, such as Marlboro.⁴⁶ However, the validity of this legislation has been challenged by many Tobacco trademark owners, including the WTO, in countries such as Cuba, the Dominic Republic, Honduras, and Indonesia.⁴⁷ Recently the Australian High court upheld the constitutionality of the legislation in cases like the *JT International SA/ British American Tobacco Australia Ltd v Commonwealth of Australia*⁴⁸ and

⁴⁵ *Ibid.*

⁴⁶ Australia, *Tobacco Plain Packaging Act*, Act No. 148 of 2011, section 20-21, available at < www.legislation.gov.au/Details/C2011A00148>]. See also *Tobacco Plain Packaging Regulations 2011* as amended by *Tobacco Plain Packaging Amendment Regulation 2012*; Australia, *Trade Marks Amendment (Tobacco Plain Packaging) Bill 2011*, Act No. 149 of 2011, available at < www.legislation.gov.au/Details/C2011A00149>].

⁴⁷ Tania Voon, "Trade Third Strike: The WTO Panel Reports Upholding Australia's Tobacco Plain Packaging Scheme," *The Journal of World Investment & Trade* 20, no. 1 (2019), 146.

⁴⁸ "Tobacco Packaging: Tobacco Industry Marketing," *Tobacco Tactics*, accessed on 26 June 2020, <https://>

Philip Morris cases.⁴⁹ Apart from the question of whether the act upholds the constitutional validity of the constitution of Australia, another important question was raised by Honduras and the Dominican Republic. Its appeal asked whether the Australian plain packaging act complies with the obligation mentioned under article 20 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement).⁵⁰ It is important to note that Australia is a member of the WTO, therefore, it needs to comply with TRIPS and the Paris Convention for the Protection of Industrial Property 1883 (“Paris Convention”). Article 2.1 of the TRIPS agreement guarantees the minimum intellectual property rights to trading partners in Australia. However, it is also important to keep in mind that article 2.1 of the TRIPS agreement explicitly incorporates article 8 of the Paris Convention (1967).⁵¹ Conversely, article 20 of the TRIPS agreement enumerates the following:

*“The use of a trademark while special requirements shall not unjustifiably encumber trading, such as the use with another trademark in a special form or use in a manner detrimental to its capability to distinguish the goods or services. This does not preclude a requirement prescribing the use of the trademark in identifying the undertaking producing the goods or services. Rather, it is conducted to distinguish specific goods or services without linking the trademark of the undertaking in question.”*⁵²

Article 2 of the TRIPS agreement plays a significant role in influencing the compliance of TRIPS along with Australia’s plain packaging act. The argument laid down by the Australian state is that the restriction and control on tobacco trademark amount to “special requirement.” Therefore, to counter this possible argument, it is important to understand the packaging legislation of Australia, which is incorporated to discourage consumers from consuming tobacco. This act is applicable to all tobacco products under which no retail packaging is allowed to deviate from the detailed laid down rules. Even the shape and material of the package must be according to the criteria mentioned under the act. In addition, all tobacco products are mandated to be packed in similar color boxes with a warning sign inscribed on them. No retail packaging of tobacco products is permitted to display any trademark, except the brand name.⁵³ This clearly shows that there is no place left for a trademark. Although

tobaccotactics.org/wiki/tobacco-packaging-tobacco-industry-marketing/.

⁴⁹ *Ibid.*

⁵⁰ Tania Voon, “Trade Third Strike,” 149.

⁵¹ Article 2, Agreement on Trade-Related Aspects of Intellectual Property Rights [TRIPS Agreement], opened for signature 15 April 1994, 1869 UNTS 299 (entered into force 1 January 1995).

⁵² Article 20, TRIPS Agreement.

⁵³ Althaf Marsoof, “The TRIPS Compatibility of Australia’s Tobacco Plain Packaging Legislation,” *The Journal of World Intellectual Property* 16, no. 5 (2013): 200, DOI: 10.1002/jwip.12013.

under the domestic law of the Australian trademark act 1995, trademark registration in relation to tobacco products is permitted, however, they are not allowed to be used in the same manner as registered under the plain packaging act.⁵⁴

However, an important question arises in determining the possibility of plain packaging as a special requirement and an “unjustifiable” encumbrance. However, from observation, public interest is given more relevance under this context. Plain packaging aims mainly to discourage smokers or tobacco consumers, which would eventually lead to the improvement of public health. Moreover, article 20 must be read with article 8 of TRIPS which stated that members have the ability to formulate and amend the act in such a way that it would improve and protect public health. However, such an amendment needs to be consistent with the agreement.⁵⁵ It is also important to note that the WTO’s Declaration on the TRIPs and Public Health 2001, also known as Doha, is the only declaration that does not amend the TRIPS agreement.⁵⁶ Moreover, the provision under the article cannot be interpreted by creating a positive right to use a trademark. Australia cannot be considered suitable in taking into account the positive rights guaranteed under the domestic Australian trademark law. Furthermore, there is nothing under article 20 of the agreement, which justifies its scope to be limited to positive restrictions on the use of marks. Moreover, the plain packaging act does not completely restrict the use of the trademark. Meanwhile, it only imposes special criteria which are followed in terms of packaging tobacco. It comprises figurative elements, a combination of colours that cannot form a brand name legitimately displayed under the plain packaging act. According to the judgment in the case of JTI and BATA,⁵⁷ the court was influenced by the translatability of the plaintiffs’ registered tobacco marks into permitted “brand names” under the plain packaging regime. This means that the effect of plain packaging for tobacco trademarks totally depends on the nature of the mark. In other words, the closer a registered trademark is to a letter, word, or number, the lesser its impact. Conversely, the more fancy, attractive, and misleading, the greater its impact.⁵⁸

⁵⁴ Australia, *Trademark Act 1995*, Act no. 119 of 1995, section 20(1)(a), available at www.legislation.gov.au/Details/C2017C00046.

⁵⁵ Article 8, TRIPS Agreement.

⁵⁶ Alemanno and Bonadio, “The Panel report in EC—Trademarks and Geographical Indications,” accessed on 21 April 2020, jsumundi.com/en/document/decision/en-european-communities-protection-of-trademarks-and-geographical-indications-for-agricultural-products-and-foodstuffs-complaint-by-australia-report-of-the-panel-tuesday-15th-march-2005.

⁵⁷ India, *The Cigarettes and Other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) act*, Act No. 34 of 2003, available at <http://legislative.gov.in/sites/default/files/A2003-34.pdf>.

⁵⁸ Susy Frankel and Daniel J. Gervais, “Plain Packaging and the Interpretation of the TRIPS Agreement,”

VIII. PLAIN PACKAGING IN INDIA: ISSUES AND CHALLENGES

The India Government has put forward several efforts with respect to the control and regulation of tobacco consumption. In this aspect, many legislations have been enacted, such as the Cigarettes Act, 1975, the Cigarettes and Other Tobacco Products Act, 2003, the Framework Convention on Tobacco Control in 2005, the National Tobacco Control Programme 2007, and the Ban on Gutkha/Smokeless Tobacco in 2012. The parliamentarians took active court actions such as the Kerala High Court in the case of *K. Ramakrishnan and Anr. v. State of Kerala and Ors*⁵⁹ which held that “Public smoking of tobacco in the form of cigarettes, cigars, beedies or otherwise is illegal, unconstitutional and violates article 21 of the Constitution of India.” However, in 2001 the Supreme Court held the following,

*“Realizing the gravity of the situation and considering the adverse effect of smoking on smokers and passive smokers, we direct and prohibit smoking in public places and issue directions to the Union of India, State Governments as well as the Union Territories to take effective steps to ensure smoking is prohibited in public places...”*⁶⁰

With the help of the above judgments it is analyzed that India is ready to take steps in respect to adopting the concept of plain packaging. However, the following major challenges must be kept in mind, assuming the country eventually implements these rules.⁶¹

Similar to other countries all over the world, tobacco industries are the biggest hurdles to plain packaging in India. This industry is likely to stand up and initiate various cases against the violation of humans’ constitutional rights, including the freedom to trade, loss of livelihood, right to property, and other laws such as competition and consumer protection laws. Furthermore, this tends to occur with respect to suits against the prohibition of the display of pictorial warnings, which had caused a delay in abiding by these legislations in India.

The tobacco industries have used various provisions mentioned in

Vanderbilt Journal of Transnational Law 46, no. 5 (2013):1167.

⁵⁹ Supreme Court of India, *K. Ramakrishnan and Anr. v. State of Kerala and Ors.* (12 July 1999).

⁶⁰ Supreme Court of India, *Murli S. Deora v. Union of India* (2 November 2001).

⁶¹ “Tobacco Control in India: Accomplishments Challenges and Opportunities,” World Heart Federation, accessed on 21 April 2020, https://www.world-heart-federation.org/emerging-leaders/wp-content/uploads/sites/3/2017/11/5-5._Tobacco_Control_In_India.pdf.

multilateral and bilateral trade and investment treaties against plain packaging in countries such as Australia and the UK. The same series of specific investment provisions will likely occur in India.⁶²

All cigarette packs and cartons must be made of cardboard and rectangular in shape such that all surfaces meet at 90degree. Furthermore, the packs or carton edges need to be rigid and straight, giving them the requisite standardization. All retail packages of tobacco products must have a mat finish and colored dark brown, although this color code does not apply to the text of the brand, business, company, or product variant name and health warnings to be mandatorily displayed. The retail packaging of tobacco products should not be permitted to display any trademark, however, the brand, business, company, or variant name may comply with the prescribed form. No trademark is allowed to appear on the tobacco product. For instance, a brand name could appear on the front outer surface of a cigarette pack or horizontally below and in the same orientation as the health warning.

IX. CONCLUSION

Tobacco producing industries is a billion-dollar market that always finds a way to attract its customers, with false and misleading packaging and advertisements. Millions of people die or develop incurable and non-communicable diseases, such as cancer and respiratory issues, due to tobacco product consumption. Therefore, it is high time the state took initiative steps to discourage the public from using and consuming tobacco. Some of these steps include laying measures of awareness on the packaging of the product and encouraging the plain packaging. However, various states have various drawbacks in implementing plain packaging, one of which is uniformity. Diseases caused by the consumption of tobacco are universal issues. Therefore, similar to an environmental issue that is universal and in respect to global legal binding norms, various rules have been in respect to the consumption of tobacco products. This tends to bring uniformity in the formation of plain packaging laws and help poor and developing countries like India to form stronger laws. Furthermore, it enables countries like India and Bangladesh to have a stronger backbone to challenge the tobacco-producing industries.

India has started to take initiatives to discourage tobacco consumption, such as developing and implementing larger pictorial health warnings with plain packaging, the next obvious and logical step, supposing it is supported by strong political will. However, with the implementation of plain packaging,

⁶² Amit Yadav, et. al., "Plain packaging of tobacco products," 5.

India is also likely to face unique challenges from the unregulated markets of bidis and smokeless forms of tobacco, sale of its loose products, and a myriad of varieties, most of which are produced and marketed in the unorganized sector. With strategic planning and preparedness, these challenges will be avoided. This is feasible by ensuring provisions in the constitutional and legal backing for a public health policy like plain packaging of tobacco products. The overwhelming support of the public provides the much-needed impetus for its consideration by the lawmakers.

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