



## **Workshop: Plain packaging in the industry**

### **The WTO Plain Packaging Case – and Beyond**

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#### **Abstract**

The talk will focus on the WTO tobacco plain packaging dispute. Plain packaging of tobacco products is a public health measure firstly adopted by Australia in 2011, and entered into force in that country in December 2012. It has then been implemented by other countries such as UK, Ireland and France.

The Australian measure has been challenged at the WTO by several developing countries, including Indonesia, Dominican Republic, Honduras and Cuba. These countries claim that it violates several articles of the TRIPS Agreement and the Paris Convention, especially trademark-related provisions. The decision of the WTO Panel is expected in a few months.

Indeed, this measure means that trademarks, graphics and logos are removed from packs, except for the brand name, which is displayed in a standard font identical for all brands in the market. Large graphic health-warning images also dominate on the front. A dark colour such as olive green permeates the pack. The aim is to make cigarette boxes unappealing, especially for adolescents, so reducing the prevalence and uptake of smoking.

Obviously, tobacco companies – and the countries lobbied by them, including the complainants in the WTO dispute - strongly opposes plain packaging. Seen from their perspective, such a legislative move is capable of confusing consumers and is an unacceptable deprivation of their (intellectual) properties, namely their powerful brands, for which they have invested, and are still investing, so much money. In particular, they have claimed that this measure infringes their trademark rights, as it would end up in banning the use of all logos and graphic, fancy and design elements, which are protected by trademark registrations, for which tobacco companies have paid and will keep on paying filing and renewal fees.

Alongside this, the industry has argued that standardised packaging will not be effective in reducing the uptake of smoking, and may even have a “boomerang” effect of increasing smoking uptake – without the possibility of adorning their packs, it is argued, tobacco companies would compete only on prices making tobacco cheaper and more affordable.

Such arguments – the talk will argue - are not convincing.

First, tobacco manufacturers are still able to distinguish their products from those of competitors as the measure allows them to display on their packs the brand name, although in a standard font.

Second, trademark registrations do not offer their owners a positive right to actually use the protected sign, but just the negative right to prevent counterfeiters from copying it. Indeed,

enterprises and businessmen are able to use brands regardless of trademark registrations: the simple fact of starting a business allows them to use signs and logos in the course of trade. And the fact that trademark registrations do not offer their owners a positive right to use the trademark allows governments to introduce measures, such as standardised packaging, that prohibit or restrict such use on public interest grounds. This was already found in 2005 by a WTO Panel in a geographical indications related dispute brought against the EU.

Third, standardised packaging seems also effective. Australia has justified this measure by relying on convincing scientific evidence. Recent figures show that total consumption of tobacco and cigarettes in Australia is the lowest ever recorded. The number of young people taking up smoking also appears to have fallen.

After briefly analysing the WTO dispute, the talk will mention the possible spill-over effects of plain packaging of tobacco. It will in particular highlight how “strong” packaging-appropriation measures may soon be adopted in fields concerning other harmful products and services such as alcohol, unhealthy food and even gambling.