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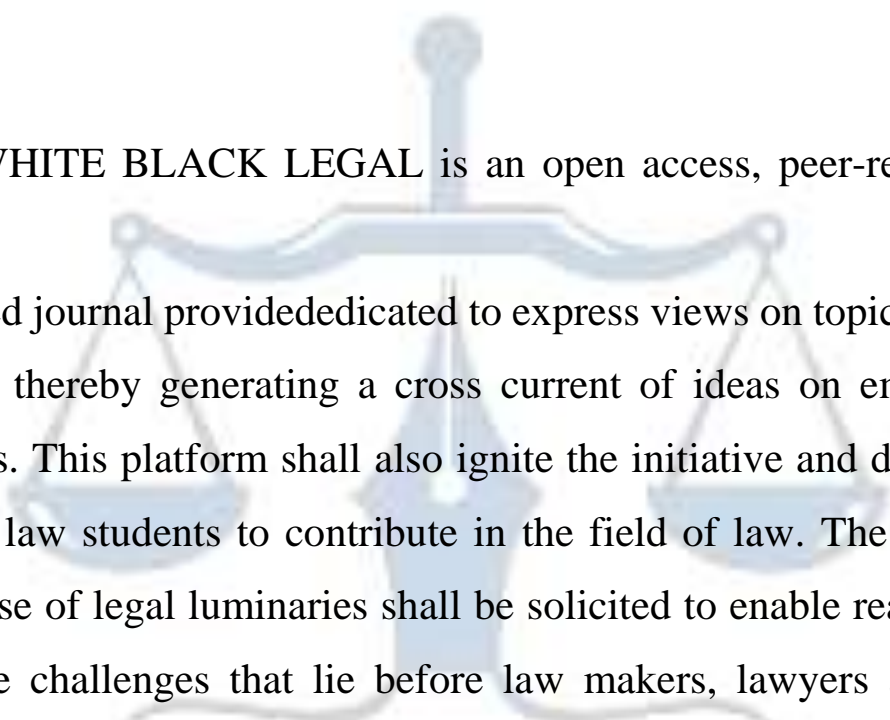


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WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal providededicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

TECHNICAL BARRIERS TO TRADE UNDER THE WTO REGIME: ANALYSING THE TREND OF PLAIN PACKAGING REQUIREMENTS

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INTRODUCTION

Technical Barriers to Trade (TBTs) are the non-tariff barriers to trade which are adopted by countries to preserve their natural resources, their consumers, to regulate their market etc. and it can also be used to discriminate against imports to protect their domestic industries. WTO members cannot afford protection through internal measures. Once the products have paid their custom duties and entered the domestic market, they shall be regulated in the similar manner as domestic product. Technical standards and regulations are important, but they may vary from country to country. Too many regulations make life difficult and if such standards are set arbitrarily then it may act as a disguised tool for protectionism to domestic industries.

In this paper the researcher would discuss the concept of Technical Barriers to trade (TBT), in particular analysing it in light of Article 2.2 of TBT agreement. Researcher would interpret Article 2.2 with the help of decided cases like *US-Clove cigarettes*, *US-COOL* and *US-TUNA II(Mexico)*.

The major question that this paper would answer is that whether Plain packaging requirements act as a barrier to free trade or not, for that matter what we need to see at the first place is that what is Plain Packaging?

Plain Packaging also referred to a standardised packaging is the removal of the attractive promotional aspects in packaging with only its brand name in a particular size, colour, and location on the package. In this paper the researcher will elucidate the concept of plain packaging as given by the World Health Organisation (WHO) Framework Convention on Tobacco Control (FCTC).

With the analysis of the Australian case on tobacco plain packaging and its recent landmark win the researcher would come to the conclusion that how Plain Packaging requirements adopted for the purpose of national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment are not an unnecessary trade restriction on the international trade.

INTERPRETATION OF ARTICLE 2.1 AND 2.2 OF TBT AGREEMENT

Technical Barriers to Trade (TBTs) are the non- tariff barriers to trade which are adopted by countries to preserve their natural resources, their consumers, to regulate their market etc. and it can also be used to discriminate against imports to protect their domestic industries.¹

Under the 2012 classification, TBTs are classified as one of the 16 Non-Tariff Measures (NTMs) chapters classified as chapter B and defined as "Measures referring to technical regulations, and procedures for assessment of conformity with technical regulations and standards, excluding measures covered by the SPS Agreement" Here, technical barriers to trade refer to measures such as labelling requirements, standards on technical specifications and quality standards, and other measures protecting the environment. Chapter B also includes all conformity-assessment measures related to technical requirements, such as certification, testing and inspection.²

The TBT Agreement is structured to achieve two opposing objectives simultaneously, On the one hand, the TBT Agreement aims at ensuring the trade liberalization objective, as provided for in the fifth recital of its preamble that "...technical regulations...do not create unnecessary obstacles to international trade, On the other hand, a WTO Member is entitled to adopt or apply "technical regulations" to pursue its legitimate policy objectives at the levels it considers appropriate; such as environmental protection, human health protection and so on and such technical regulations can act, by its nature, as obstacle and barriers to certain products, whether domestic or imported, that do not meet such technical regulations. So a question arises in this regard that to what extent a WTO member can restrict international trade by applying such technical regulations on certain products in order to achieve its own policy objectives. A technical regulation is defined by the TBT Agreement as "a document which lays down product

¹Technical barriers to trade https://en.wikipedia.org/wiki/Technical_barriers_to_trade, last seen on 12/08/2024

² *International classification of non-tariff measures*, http://unctad.org/en/PublicationsLibrary/ditctab20122_en.pdf, last seen on 7/08/2024

characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory”³. The aim of the TBT Agreement is to ensure that national technical regulations are not creating unnecessary obstacles to international trade or discriminating between like imported and domestic products. Those regulations which are in accordance with international standards and adopted or applied to one of the legitimate objectives enumerated in Art. 2.2 benefit from a rebuttable presumption that they do not create an unnecessary obstacle to international trade.⁴

Here will deal with how the two opposing objectives that is being spoken about earlier are reconciled by the panels and the appellate body in light of article 2.2 TBT agreement with the help of the case laws.

ARTICLE 2.1 OF THE TBT AGREEMENT:

The ingredients under article 2.1 are⁵:

- Measure adopted or applied shall be a “technical regulation”
- And the imported product shall be accorded “treatment no less favourable” than that accorded to the like national product.

TECHNICAL REGULATION

Technical regulation as defined by the TBT agreement is “a document which lays down product characteristics or their related processes and production methods including the applicable administrative provisions, with which compliance is mandatory”.

In other words there are 3 criteria that needs to be fulfilled in order to qualify as a “technical regulation”, they are:

- Document must apply to an “identifiable product or a group of products”
- Document must lay down one or more characteristics of the product
- Compliance with the product characteristics is mandatory

So if a measure fulfils the above mentioned criteria then it can be termed as a “technical

³ See annex 1.1 of TBT Agreement

⁴ Gruszczynski, Lukasz, "THE TBT AGREEMENT AND TOBACCO CONTROL REGULATIONS" , Asian Journal of WTO & International Health Law & Policy, 2013, https://www.researchgate.net/publication/256023707_The_TBT_Agreement_and_Tobacco_Control_Regulation , last seen on 26/04/2024

⁵ See article 2.1 of Technical barriers to trade agreement

regulation”⁶

In the case of *US-Tuna II (Mexico)*⁷ appellate body upheld the panel’s finding that the measure by the US falls within the ambit of technical regulation.

TREATMENT LESS FAVOURABLE

In the case of *US-Tuna II (Mexico)* the test laid down was whether the measure modified the conditions of competition in the domestic market to the detriment of the foreign product, so if the measure is such that it modifies or restricts the competition in the domestic market to the detriment of the foreign product then it is believed to be a treatment less favourable than that accorded to the like domestic product.

Appellate Body held that any adverse impact on competitive opportunities for imported products vis-à-vis like domestic products that is caused by a particular measure may potentially be relevant⁸.

In the case of *US-Clove Cigarettes* the panel upheld Indonesia’s claim on the basis that ‘menthol cigarettes’ are like product in respect of the ‘clove cigarettes’ and thus the US’ ban on all flavoured cigarettes but excluding the ‘menthol cigarettes’, the measure accorded less favourable treatment to imported clove cigarettes than that it accords to domestic menthol cigarettes⁹.

ARTICLE 2.2 OF THE TBT AGREEMENT

Article 2.2¹⁰ says that members shall ensure that the technical regulations are not adopted with a view to cause unnecessary obstacle to International Trade, for this the technical regulation shall not be:

- More trade restrictive than necessary
- To fulfil a legitimate objective
- Taking account of the risk of non-fulfilment

⁶ See supra note 3

⁷ *Unites states- measures concerning the importation, marketing and sale of Tuna and Tuna Products*, [http://wtocentre.iift.ac.in/DisputeAnalysis/Dispute%20Analysis_US-Tuna%20\(AB\).pdf](http://wtocentre.iift.ac.in/DisputeAnalysis/Dispute%20Analysis_US-Tuna%20(AB).pdf), last seen on 17/04/2024

⁸ *Unites states- measures concerning the importation, marketing and sale of Tuna and Tuna Products*, Report of Appellate Body, https://www.wto.org/english/tratop_e/dispu_e/381abrw_e.pdf , last seen on 18/04/2024

⁹ *Cigarettes & Public health at the WTO: The Appeals of the labelling Disputes begins*, <https://www.asil.org/insights/volume/16/issue/6/cigarettes-and-public-health-wto-appeals-tbt-labeling-disputes-begin>, last seen on 22/04/2024

¹⁰ See Article 2.2 of the TBT Agreement

LEGITIMACY OF OBJECTIVES:

The panel in the *US-clove cigarettes* explained that the identification of the objective pursued by the member is the starting point of analysis under article 2.2 of TBT agreement.

After the objective has been identified the panel shall see whether the objective is “legitimate” under Article 2.2 and further it is to be checked whether the “legitimate objective” is “more trade restrictive than necessary” or not¹¹.

Legitimacy

It is the complainant who has to establish that the identified objective falls outside the scope of legitimacy under the provision, for this, the panel examines whether such objectives correspond to the ones listed as “legitimate” under the third sentence of Article 2.2. Article 2.2 3rd sentence gives out the legitimate objectives as national security requirements, prevention of deceptive practices, protection of human health or safety, animal or plant life or health, or environment protection but it is to be noted that this is not a closed list whereas it is open ended and thus any objective related to the mentioned objective or any objective based on some standards is a legitimate objective.

Few general guidelines provided by the Panel and the Appellate Body, for the examination of the legitimacy of the identified objectives are:-

- Complainant might contend that since the WTO members have acted in bad faith thus the objective is not legitimate.
For example, in the *US-Clove Cigarettes*, Indonesia contended that since the ban on clove cigarettes was a disguised restriction on international trade, thus the objective of reducing youth smoking was not legitimate.
- The panel in the *US-COOL* pointed out that due importance should be given to “**social norms**” while estimating legitimacy of the identified objectives.
As in the decision of the *EC-Sardines*, the panel held that legitimate objective is the one ‘supported by the relevant public policies or other social norms’¹².

¹¹*United States- Measures Affecting the production and sale of clove cigarettes*, [www.worldtradelaw.net/reports/wtoab/us-clovecigarettes\(ab\).doc](http://www.worldtradelaw.net/reports/wtoab/us-clovecigarettes(ab).doc)

¹² *Agreement on Technical Barriers to Trade*, https://www.wto.org/english/res_e/booksp_e/analytic_index_e/tbt_01_e.html, last seen on 17/04/2024

- The legitimacy of the objective is estimated irrespective of the means used in pursuit of the objective

For example, in *US-Tuna II (Mexico)*, Mexico contended in its appeal that ‘dolphin protection’ objective was “coercive” in nature and thus not legitimate but the appellate body held that it is immaterial that what means has been used in the pursuit of the objectives and even if the means was coercive the objective can still be legitimate.¹³

NECESSITY

In the analysis of necessary requirements there has to be Relational analysis and a comparative analysis.

It must be noted that the aspect of the measure to be justified as “necessary” under TBT Agreement is the trade restrictiveness, whereas under the GATT Article XX and Article XIV of the GATS it is the measure itself that needs to be justified as “necessary”¹⁴.

While assessing the necessity of regulations, the TBT agreement mandates the consideration of elements such as available scientific and technical information, related processing technology and intended end-uses of products, so a measure which is not discriminatory and applies equally to domestic and imported products could violate Article 2.2 if it lacks a sufficient scientific basis or is not the least restrictive alternative. The necessity requirement is formulated as a positive obligation under the TBT agreement and it is not an exception unlike the GATT 1994, Article XX i.e. general exception that allows justification of measures otherwise inconsistent with the TBT provisions.

TRADE RESTRICTIVENESS OF THE ALTERNATIVE

once it is found that the technical regulation at issue is trade-restrictive, the identified objective that a member state seeks to achieve is found to be legitimate and the degree of contribution of the measure to the legitimate objective is objectively determined, the panel shall subsequently undertake a “comparison analysis” where the challenged measure is to be compared with the alternative in terms of the following:

- Whether the challenged technical regulation more trade restrictive than the alternative;

¹³ See Supra note 7

¹⁴*US-Measures concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, <http://www.nluo.ac.in/wp-content/uploads/US-Measures-concerning-the-importation-marketing-and-sale-of-tuna-and-tuna-products-1.pdf>, last seen on 20/04/2024

- Whether the alternative is capable of making equal contribution to the legitimate objective that the challenged measure is to achieve, taking note of the risks that the non-fulfilment would create;
- Whether the alternative is reasonably available;

In the *US-Clove Cigarettes*, Indonesia argued that US ban on clove cigarettes was more trade restrictive than necessary, to fulfil a legitimate objective and was therefore inconsistent with Article 2.2, but the panel rejected Indonesia's claim, and found that the ban was for a legitimate objective and it made a material contribution to that objective and that Indonesia failed to demonstrate any less trade restrictive alternative that would make an equal contribution in attainment of the legitimate objective sought by the US.

In the *US-Tuna II (Mexico)*, the panel held that Mexico was right in claiming violation under Article 2.2, as the panel found that the US measure had legitimate objective (consumer information and Dolphin protection) and that the measures partially fulfil this legitimate objective, but Mexico had identified a less trade restrictive alternative that would achieve similar level of protection as attained by the existing measure¹⁵.

DEGREE OF CONTRIBUTION OF THE ALTERNATIVE TO THE OBJECTIVE

US-Tuna II (Mexico) is the only TBT case where the panel substantially undertook a comparison analysis, in the *US-Clove cigarettes* Indonesia could not present an alternative measure to enable the panel to compare with the challenged issue, and the panel in *US-COOL* did not even proceed to a comparison analysis.

RISK OF NON-FULFILMENT

When the interests at issue are high, the cost of mistakenly adopting alternatives that do not achieve the chosen level of protection would also be high. The measure can be necessary even if there exists an alternative that makes equal contribution to the objective and are also less trade restrictive.

When interests at issue are low the cost of mistakenly adopting alternative that do not achieve the chosen level of protection is also low. In this case the measure could be found unnecessary

¹⁵ See supra note 6

if there exists less trade restrictive alternative that makes less contribution to the objective.

Appellate body held that a comparison between the challenged measure and the alternative should be undertaken ‘in light of the nature of the risks at issue and the gravity of the consequences that would arise from non-fulfilment of the legitimate objective’.

With respect to the ‘risk non-fulfilment would create under Article 2.2 the panel in the *US-Tuna II (Mexico)* found:

An alternative means of achieving the objectives that would entail greater ‘risks of non-fulfilment’ would not be a valid alternative even if it was a lesser trade restrictive alternative which contributes equally to the desired objective.

More important the value that the technical regulation purports to protect, more likely that the panel will show deference to the domestic regulation¹⁶.

PLAIN PACKAGING IN LIGHT OF TBT AGREEMENT AND AUSTRALIAN CASE

PLAIN PACKAGING

The concept of plain packaging is defined in guidelines for implementation of Article 11 (Packaging & labelling of tobacco products) & Article 13 (Tobacco advertising, promotion & sponsorship) of the WTO FCTC.

Article 11 obliges parties to implement “effective measures” to ensure that tobacco packaging & labelling do not promote tobacco products by means that are false, deceptive or misleading and to check whether the tobacco packaging carries health warning mentioning the harmful effects of tobacco use¹⁷.

With respect to plain packaging, paragraph 46 of the guidelines state that¹⁸:

Parties should adopt such measures which would restrict or prohibit the usage of logos, colours, brand images or promotional information on packaging. Only the Brand name and the product name can be displayed in a standard colour and font style (plain packaging).

¹⁶ See supra note 7

¹⁷ *Guidelines for implementation of Article 11 of the WHO Framework Convention on Tobacco Control*, http://www.who.int/fctc/guidelines/article_11.pdf, last seen on 12/04/2024

¹⁸ See paragraph 46 of Article 11 of WHO Framework Convention on tobacco control

This is done in order to highlight the health warnings and messages, prevent the package from detracting attention from them, and address industry package design techniques that may suggest that some products are less harmful than others.

While coming to the purpose of Plain Packaging viewing in context of the WTO FCTC, and particularly Article 11 and 13, the few of the many purposes it serves includes:-

1. Eliminating the effects of tobacco packaging as a form of advertising and protection,
2. It makes the health warnings more noticeable and effective ,
3. It reduces the attractiveness of the tobacco product;

In **Australia**, under section 3 of the Tobacco Plain Packaging Act 2011 which describes the objectives of legislation; the objectives are:-

(a) To improve public health by:

- (i) Discouraging people from taking up smoking, or using tobacco products; and
- (ii) Encouraging people to give up smoking, and to stop using tobacco products; and
- (iii) Discouraging people who have given up smoking, or who have stopped using tobacco products, from relapsing; and
- (iv) Reducing people's exposure to smoke from tobacco products; and

(b) To give effect to certain obligations that Australia has as a party to the Convention on Tobacco control.

In **Ireland**, the Plain Packaging measure is described in the Explanatory & Financial Memorandum accompanying the Public Health (Standardised Packaging of Tobacco) Bill 2014.

The purpose of this bill is to control the design and appearance of tobacco products & packaging. All forms of branding- trademarks, logos, colour and graphics would be removed and only the brand & variant names would be present in a uniform typeface for all brands in the market. The packs would be in neutral colours, except for the mandatory health warnings and any other item as provide by the law¹⁹.

AUSTRALIAN PLAIN PACKAGING CASE

Under this case Australia adopted the various plain packaging requirements in the packaging of Tobacco products specifically cigarette packaging. The various measures were:

¹⁹ *Plain packaging of tobacco product, Evidence , Design and Implementation*, http://apps.who.int/iris/bitstream/10665/207478/1/9789241565226_eng.pdf last seen on 16/04/2024

- No trademark shall appear on the cigarette packets
- Brand, Business and Company Name: Any brand name must be printed in Lucida Sans, no larger than 14 points in size, and in the colour of Pantone Cool Gray 2C.
- Package colour should be Drab dark brown and in matt finish.
- Warning Statement/Graphic: Both must cover at least 70% of the total area on the front outer surface and at least 90% of the total area on the back outer surface including an explanatory message. The text of a warning statement must be a white on a black background²⁰.



BEFORE PLAIN PACKAGING



AFTER PLAIN PACKAGING

The major issues in regard of this case related to TBT agreement are:

²⁰ Leaks indicate victory for Australia in seminal WTO Plain Packaging Dispute – a knockout blow for tobacco brands, <http://www.worldtrademarkreview.com/Blog/detail.aspx?g=8ac77409-af50-4b21-bca1-30f70d250e9c> last seen on 19/04/2024

- Article 2.1 of the TBT Agreement, because the technical regulations at issue accord to imported tobacco products treatment less favourable than accorded like products of national origin;²¹
- Article 2.2 of the TBT Agreement, because the technical regulations at issue create unnecessary ²²
- Obstacles to trade because they are more trade-restrictive than necessary to fulfil a legitimate objective.

WHETHER THE MEASURES AND THE CONDITIONS APPLIED BY AUSTRALIA ARE TECHNICAL REGULATION

To be a technical regulation under article 2.1 there are certain conditions to be fulfilled, which are:-

- Document must apply to an identifiable product or a group of product, In the Australian Plain Packaging case the measures must apply to the Tobacco Products and the tobacco product here is the identifiable product.
- Documents must lay down on one or more characteristics of the product,

Australia lays down the subject matter of the plain packaging measures which corresponds to 'packaging' enumerated in the second sentence of annex 1.1.

- Compliance with the product characteristics is mandatory, Since the plain packaging measures contain civil penalty provisions, according to which those who contravene the plain packaging requirements are liable to a civil penalty, it also stipulates that a person cannot sell, offer or supply tobacco products in non-compliant retail packaging in Australia, as compliance with the product characteristics is considered to be "mandatory".

WHETHER THE REGULATIONS APPLIED WAS TO ACHIEVE "LEGITIMATE OBJECTIVE"

The objectives that Australia wanted to achieve through Plain Packaging were:-

1. Reduce the appeal of the Tobacco Products to consumers
2. Increase the effectiveness of health warnings on the retail packaging of tobacco products

²¹ See Article 2.1 of the TBT Agreement

²² See Article 2.2 of the TBT Agreement

3. Reduce the ability of the retail packaging of tobacco products to mislead consumers about the harmful effects of smoking²³.

In the objective 3 Australia also aims at preventing deceptive practices.

In the *US-Clove Cigarettes* where Indonesia claimed that exempting menthol cigarettes from the ban constituted a disguised restriction on international trade and thus the objective was not legitimate²⁴, but the Plain Packaging measure apply to ‘all Tobacco products’ and thus the regulatory scope of the Plain Packaging measure would not prevent the above mentioned objectives from being legitimate.

NECESSARY REQUIREMENT

Once the objectives have been identified and the objectives have been found to be legitimate then the complainant has to establish that these regulations are more trade restrictive than necessary to fulfil the identified objectives, taking account of the risk non-fulfilment would create.

The various things that were analysed under this are:-

- Trade restrictiveness
- Degree of contribution
- Alternatives

• TRADE RESTRICTIVENESS

As the tobacco products that do not follow such conditions or requirements, whether domestic or imported cannot be offered or supplied inside the Australian market but they can be imported, the domestic importers repackage such tobacco products with compliant retail packaging and sell them in Australian market.

As in the *US-Tuna II* the ‘US-dolphin safe label’ provided an advantage to the US market as certain Mexican tuna products could not access the label thus was trade restrictive.

Similarly the Plain Packaging requirements were found to be trade restrictive.

²³ Plain Packaging of Tobacco Products, evidence design and implementation, http://apps.who.int/iris/bitstream/10665/207478/1/9789241565226_eng.pdf , chapter 3.2, pg-43, last seen on 20/04/2024

²⁴ See Supra note 8

DEGREE OF CONTRIBUTION

The various objectives that Australia wanted to achieve were being analysed on the basis of the degree of its contribution:

In case of objective 1 which is reduction of the attractiveness and appeal of tobacco products to consumers, it is widely confirmed by a number of design elements on a cigarette pack reduces its appeal and perceptions about the likely enjoyment and desirability of smoking. A recent study by the Cancer Council Victoria surveyed adult smokers in Victoria during the roll out period, and could assess the actual impact of plain packaging on smokers in Australia in respect of the perceived appeal and harmful outcomes. Those who smoke from Plain Packaging packets perceived their cigarettes to be lower in quality and less satisfying.

As per the objective 2 of increasing the effectiveness of health warnings on the retail packaging, it was seen that the health warnings on the Plain Packaging are seen as being more serious than the same warnings on branded packs, and that the Plain Packaging increases the impact of health warnings. As at least 75% of the total area in the cigarette package consists of health warnings.²⁵

In case of the objective 3 in regard of reduction of the ability of the retail packaging to mislead consumers about harmful effects of smoking, some research conclude that unregulated package colouring and image create misperception about the level of tar and health risks of tobacco products, and that removing colour, image, and terms like 'smooth' 'gold' would reduce the false beliefs of the consumers.

ALTERNATIVES

Once the degree of contribution of the Plain Packaging measure to each objective is determined, a panel is next required to undertake a comparison analysis,

- That less trade restrictive alternative exists or not
- If exists then whether it makes equivalent contribution to each objective
- Taking account of the risks non-fulfilment would create

In the Australian Plain Packaging case complainant contended that Australia could have adopted a less strict requirement that would allow at least the trademark to appear on the retail

²⁵ Cigarette Package Health Warning: International Status Report, https://www.tobaccofreekids.org/assets/global/pdfs/en/WL_status_report_en.pdf , Last seen on 10/05/2024

packaging of tobacco products.

Chile stated at the TBT committee “could not he asked the same objective be achieved through the use of better, newer information in visible health warnings without affecting the legitimate use of the brand names”.

But the question that came up was whether less strict Plain Packaging requirement would also make an equivalent contribution to the achievement of each objective, it was argued that such an alternative equally reduces attractiveness and appeal of tobacco products to consumers but it could not be proved that trademarks on the retail packaging do not contribute to the increase in attractiveness and appeal of the tobacco products to consumers.

Even if alternatives might be available, which are less trade restrictive, they could hardly make an equivalent contribution to each objective²⁶.

For example, one of the alternatives suggested a ban on tobacco advertising, promotion, and sponsorship and it was claimed that it may contribute to reduction of attractiveness and appeal of the product to some extent but it was found that it would not contribute to the reduction of the ability of the retail packaging to mislead consumers about the harmful effects of smoking. So no less trade restrictive alternative could have been found which would contribute equally to the achievement of the legitimate objective and thus Australia had a landmark win in the WTO panel.

CONCLUSION AND RECOMMENDATION

CONCLUSION

It can be concluded that the Australian Plain Packaging regime does not violate Article 2.2 of the TBT Agreement and that such a measure was necessary for the human health protection under which as per TBT Article 2.2 the nation has the right to enforce certain measures or regulations.

The Post Implementation Review (PIR) was published on the office of best practice Regulation website on 26th February 2016 and it shows that Australia had been able to achieve its objective

²⁶ See supra note 18

of reducing the number of smokers²⁷. 2013 National Drug strategy Household Survey, Australian Bureau of statistics 2014-2015, National Health Survey and Household Expenditure 2014 survey shows that Tobacco consumption fell 2.9% in a quarter and 12.2% over the year, two years after the Plain Packaging legislation came into effect²⁸.

To sum up the topic, Few guidelines given by MASKUS & WILSON for remedying protectionist technical measures can be summed up as:-

- If the measure or its enforcement is cost-raising it is considered to be inefficient and shall be removed.
- If the measure is stronger than required in order to attain its policy objectives, and it increases domestic profit at the cost of foreign profits, it may have protectionist intent.
- If the measure is discriminatory between domestic and foreign firm, the gap between the two is viewed as unnecessary protection and shall be removed.
- If the measure not the least trade restrictive then it may be reviewed and necessary modifications may be made.

Not just Australia but other countries have also passed the Plain Packaging laws:

Australia: Tobacco Plain Packaging Act was adopted in 2011 and full implementation happened in December 2012, including Tobacco Plain Packaging Regulation.²⁹

Ireland: The Public Health (Standardised Packaging of Tobacco) Act 2015 was adopted in March 2016.³⁰

France: Law on Plain Packaging passed by French Parliament in November 2015. Final version was published in the Official Gazette on the 27th January 2016.³¹

U.K: The Standardised Packaging was adopted in March 2016 and came into force on 20th May 2016.³²

²⁷ *Tobacco control*, *BMJ Journal*, http://tobaccocontrol.bmj.com/content/24/Suppl_2/ii17 last seen on 24/04/2024

²⁸ *Plain packaging to thank for Australia's decline in smoking, says labour*, <https://www.theguardian.com/society/2015/mar/12/plain-packaging-to-thank-for-australias-decline-in-smoking-says-labor>, last seen on 24/04/2024

²⁹ Public Health (Standardised Packaging of Tobacco) Act 2015, <https://www.irishstatutebook.ie/eli/2015/act/4/enacted/en/print>, last seen on 28/04/2024

³⁰ STANDARDIZED OR PLAIN TOBACCO PACKAGING, https://www.tobaccofreekids.org/assets/global/pdfs/en/standardized_packaging_developments_en.pdf

³¹ Ibid

³² Ibid

RECOMMENDATIONS

Food is important for our survival, which is why all living beings have developed an urge for high energy foods, like those high in sugar and artificial trans- fat. In today's world we have easy access to high energy junk food moreover the marketing companies are pushing them at consumers. While we walk around the supermarket aisle, a packet of chips is more likely to catch our attention than the fruits or vegetables. Food packaging plays a big part in triggering brain processes that influence our food choices - similar brain processes that get us stuck on addictive behaviours. Some people who eat too much high-calorie and high artificial trans-fat food show similar behavioural patterns to those with addiction.

Functional magnetic resonance imaging (fMRI), allows measuring the brain activity in young volunteers, researchers have started to investigate processes underlying how we eat and view foods with the help of this fMRI method. Studies have shown that images of food like chocolate bars and cakes have a stronger activity in the reward areas of brain than the fruits and vegetables. Studies show that stronger the reaction to brain's reward areas in regard of these food, the more weight people will gain over the years.

Studies found that these reward related brain activity towards these foods can be regulated through self-control. The main problem, though, is that people are not capable of applying self-control over longer periods.

We may think our eating decisions are mainly driven by rational factors such as weighing up the different attributes of products – for example, prices and content, but the design of packages, the brands and such influences are used by the companies to influence consumer choices. Companies make use of bright colours, and well-known characters from movies or other celebrities to distinguish their products from others and these act as signals and people are more likely to be attracted by these foods over other.

As per a study conducted on school children, they were given the same cereal in two different packages and one of them was specially designed with cartoon characters on it, the specially designed cereal pack not only tasted better to them but they were also willing to do more efforts

in order to receive it.³³

We are consuming these unnecessary calories which we do not need, kids and in fact the generation is moving towards being obese and thus with this landmark win of Australia in WTO tobacco plain packaging case, it is strongly recommended that the plain packaging standards shall be incorporated in the junk food which has high artificial trans-fat³⁴.

Similar requirements shall be made mandatory in alcohol packaging also, as the young generation is getting attracted and addicted to alcohol. Thus on the basis of the alcohol content the plain packaging requirement shall be made mandatory in those alcohol where the alcohol content crosses the threshold beyond which it is extremely harmful for health.



³³ Food Advertising and Marketing Directed at Children and Adolescents in the US, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC416565/>, last seen on 22/04/2024

³⁴ Why junk food should be sold in Plain Packaging like Cigarettes, https://munchies.vice.com/en_us/article/5343gk/experts-say-junk-food-should-be-sold-in-plain-packaging-like-cigarettes, last seen on 16/04/2022