

Domestic Measures for Public Health Policy and International IP/Trade Law

—The Case of the Australian Plain Packaging Act—

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I. ISSUES

From a public health perspective, businesses relating to tobacco are restricted in a number of ways around the world. A few examples of such regulation include controls on the manufacture or sale of tobacco and the packaging and advertisement of tobacco. These regulations are given legal basis in international law because the World Health Organization (WHO) adopted “The WHO Framework Convention on Tobacco Control” (WHO FCTC).¹⁾ On the other hand, the consistency between such regulations and international economic law is controversial as such controls restrict certain kinds of economic activities including international commerce. In fact, there have been several disputes relating to the consistency of tobacco regulations

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1) This convention was adopted by WHO in 2003 and came into effect in 2005.

to the WTO agreement and its predecessor, GATT (the General Agreement on Tariffs and Trade).²⁾ From a theoretical perspective, tobacco regulations illustrate how the WTO agreement as a convention of trade regulates measures which do not object to trade as well as how international economic law can restrict non-economic governmental measures.

There is a new movement in tobacco regulations. On November 11 2011, the Parliament of Australia enacted the Tobacco Plain Packaging Act.³⁾ The Plain Packaging Act is recognized now as the strictest regulation of tobacco packaging in the world.⁴⁾ Several controversial points related to international law are discussed by legal scholars and practitioners domestically

2) Under GATT or the WTO, cases relating to consistency between the agreements and measures relevant to tobacco are as follows: (i) GATT Panel Report, *Thailand - Cigarettes*, DS10/R-37S/200 (1990), where the panel held that import prohibition and taxation to tobacco breached Article XI and Article III: 2 of GATT; (ii) GATT Panel Report, *U.S. - Tobacco*, DS44/R (1994), where the panel held that restriction to sell particular tobacco domestically breached Article III: 2 and III: 5 of GATT because it enhance the sales of domestic tobacco; (iii) Panel Report, *Dominican Republic - Cigarettes*, WT/DS302/R (2004), and Appellate Body Report, *Dominican Republic - Cigarettes*, WT/DS302/AB/R (2005), which held such measures as stamp and bond requirement on cigarettes violate Article III: 2, III: 4, and X: 1; (iv) Panel Report, *Thailand - Cigarettes*, WT/DS371/R (2010), and Appellate Body Report, *Thailand - Cigarettes*, WT/DS371/AB/R (2011), which held that a value added tax of imported tobacco breached Articles III: 2, III: 4 and X: 3 of GATT because it was discriminative; and (v) Panel Report, *U.S. - Clove Cigarettes*, WT/DS406/R (2011), where the panel found that legislation prohibit the sale of specific tobacco products which have characterizing flavor except for menthol breached Articles 2.1, 2.9.2 (obligation to notify the WTO) and 2.12 (interval more than 6 months) of the TBT Agreement.

3) Precisely, there are two acts that have been enacted in relation to the tobacco plain packaging regulation; i. e., the Tobacco Plain Packaging Act 2011 and the Trade Marks Amendment (Tobacco Plain Packaging) Act 2011. In this article, the legislation is referred to simply as the "Tobacco Plain Packaging Act." The Plain Packaging Act 2011 is available at <http://www.comlaw.gov.au/Details/C2011A00148> (last visited September 24, 2012), and the Trademarks Amendment Act 2011 is available at <http://www.comlaw.gov.au/Details/C2011A00149> (last visited September 24, 2012).

4) For example, in Europe, under Directive 2001/37/EC and Directive 2003/33/EC, each member country is implementing regulations to obligate to print health warnings on packages of tobacco products and to prohibit advertisement of tobacco products. The U.S. has also expected to tightened the control of health warnings on packages of tobacco products; see, http://www.fda.gov/Tobacco_Products/Labeling/default.htm (last visited September 24, 2012). In contrast to those restrictions, the Plain Packaging Act of Australia is the strictest since it largely restricts the act to use trademarks for tobacco products.

and internationally.⁵⁾ Particularly, the key criticism is that this law has a fundamental problem relevant to intellectual property (especially, trademarks). This article will examine the consistency of tobacco regulations with international economic law (in a broad sense) by focusing on the Australian Plain Packaging Act. This article will discuss the relationship between the obligation imposed on Australia by multilateral treaties of intellectual property or commerce and the measures related to the Plain Packaging Act (hereinafter the Plain Packaging regulation). However, this article will stop short of expressing a final conclusion as to the consistency of the Plain Packaging regulation with the treaties, because to do that, it is necessary to take into account such facts as actual international trend relating to tobacco regulations, concrete implementation of the Plain Packaging Act, and the tendency of the trade of Australian tobacco or other goods, but identifying these facts is beyond the capacity of this author.

II. The Contents of the Plain Packaging Act

1. Aims

The aims of the Plain Packaging Act are to improve public health and to fulfill obligations imposed by the WHO FCTC. The act provides that improvement of public health will be accomplished by (i) discouraging

5) In fact, Ukraine, Honduras and Dominican Republic requested consultations with Australia at the WTO on March 13, April 4 and July 18, 2012 respectively on the Plain Packaging regulation (DS 434, 435 and 441). The provisions referred to in the requests for consultations which are claimed to be violated by the Australian measures are: Article 1, 2.1, 3.1, 15, 16, 20, 22.2(b), 24.3 and 27 of the TRIPS Agreement, Article 2.1 and 2.2 of the TBT Agreement, and Article III: 4 of GATT. On August 14, 2012, Ukraine requested the establishment of a panel, and the DSB (Dispute Settlement Body) established a panel on September 28, 2012. Besides the possible problems with regard to international law, the Plain Packaging Act was also argued as unconstitutional, being contrary to section 51 (xxxii) of the Australian Constitution which provides for “the acquisition of property on just terms from any State or person.” However, the High Court of Australia rejected the constitutional challenge by tobacco companies. *JT International SA v. Commonwealth of Australia*; *British American Tobacco Australasia Limited & Ors v. Commonwealth of Australia* [2012] HCA 30 (Aug. 15, 2012).

smoking, (ii) encouraging giving up smoking, (iii) discouraging relapsing from smoking, and (iv) reducing people's exposure to smoke.⁶⁾ Analysis of the aims of the WHO FCTC is essential because the "fulfillment of obligations imposed by the WHO FCTC" will affect the evaluation of consistency of the Plain Packaging regulation with other treaties.

The WHO FCTC imposed on parties several obligations related to tobacco packaging and advertisement. A summary of the obligations are as follows: (i) To take effective measures to ensure that tobacco product packaging and labeling do not promote a tobacco product by any means that are false, misleading, deceptive or likely to create an erroneous impression about its characteristics, health effects, hazards or emissions, including terms such as "light" or "mild," (ii) To print health warnings and information on relevant constituents and emissions of tobacco products on no less than 30% of the principal display areas of each unit packet and package of tobacco products and any outside packaging and labeling of such product, and (iii) To comprehensively ban on advertising, promotion and sponsorship of tobacco products, or, if a country of the convention is not in a position to undertake a comprehensive ban due to its constitution or constitutional principles, the country shall restrict these activities. Article 11 of the Convention relates directly to packaging and labeling of tobacco and provides as follows:

Each Party shall, within a period of three years after entry into force of this Convention for that Party, adopt and implement, in accordance with its national law, effective measures to ensure that: (a) tobacco product packaging and labelling do not promote a tobacco product by any means that are false, misleading, deceptive or likely to create an erroneous impression about its characteristics, health effects, hazards or emissions, ..., and (b) each unit packet and package of tobacco products and any outside packaging and labelling of such products also carry health warnings describing the harmful effects of tobacco use, and may include other appropriate messages

6) Section 3 of the Plain Packaging Act 2011.

Hence, the WHO FCTC requires packaging and labeling of tobacco products to avoid being deceptive or misleading and to carry health warnings. WHO does not provide for specific obligations to restrict the use of trademarks (although it is certainly possible that the use of trademarks can fall within the scope of the use of deceptive or misleading packaging or labeling). However, the “Guidelines for implementation of Article 11 of the WHO Framework Convention on Tobacco Control” adopted in 2008 requires parties to consider using plain packaging.⁷⁾ Nonetheless, these guidelines are not legally binding. Therefore, the Australian government passed the Plain Packaging Act not to fulfill the obligations imposed by WHO, but rather to adopt measures recommended under the WHO FCTC.

2. Contents of the Plain Packaging Act

The act applies penalties in cases in which the supply, purchase and production of tobacco products do not follow labeling requirements. The requirements are as follows:

- (i) Restriction on the physical features of retail packaging; e.g. prohibition on decorations which are not provided in the regulations,
- (ii) Restriction on the color and finish of retail packaging; e.g. the color must generally be drab dark brown or the finish must be matt,
- (iii) Prohibition on trademarks and marks generally appearing on retail packaging other than the permissible manner,
- (iv) Requirements on the brand, business, company or variant names, and
- (v) Requirements on the wrappers; e.g. as principle, wrappers must be transparent and have no trademarks.⁸⁾

7) Paragraph 46 of the guidelines.

8) Sections 18 to 26 of the Plain Packaging Act 2011.

3. Relationship with the Trade Marks Act

An applicant for the registration of a trademark in respect of tobacco products is taken to intend to use the trademark for the purposes of the Trade Marks Act, if the applicant would intend to do so but for the operation of the Plain Packaging Act 2011.⁹⁾ Furthermore, the Trade Marks Amendment Act 2011 provides that the Plain Packaging Act 2011 and relevant regulations prevail over the Trade Marks Act.

III. Analysis

1. Introduction

The consistency of the Plain Packaging regulation with international intellectual property law and international trade law is problematic particularly when tobacco manufacturers are restricted in their use of trademarks. In the context of trademark law, there are two ways in which tobacco manufacturers use registered trademarks. One is to use them as the owners of the trademarks, and the other is to use them as the licensees. Because the former way seems to be more common in the tobacco industry, the following analysis assumes situations where manufacturers use the marks as their owners.

2. Relevant treaties and standards of interpretation

The Plain Packaging Act might possibly conflict with the Paris Convention for the Protection of Industrial Property (the Paris Convention)¹⁰⁾ and the TRIPS Agreement¹¹⁾ which are examples of multilateral conventions. In

9) Section 28 (1) of the Plain Packaging Act 2011.

10) Paris Convention for the Protection of Industrial Property of March 20, 1883, as revised at Brussels on December 14, 1900, at Washington on June 2, 1911, at The Hague on November 6, 1925, at London on June 2, 1934, at Lisbon on October 31, 1958, and at Stockholm on July 14, 1967, and as amended on September 28, 1979.

11) The Agreement on Trade-Related Aspects of Intellectual Property Rights. The agreement is Annex 1 C of the Agreement Establishing the WTO.

addition, the consistency of the Plain Packaging Act with the TBT Agreement¹²⁾ and GATT¹³⁾ also becomes an issue with regard to the trade in goods.

Interpretation of the above multilateral treaties must follow the principles provided in Vienna Convention on the Law of Treaties.¹⁴⁾ A basic principle of the Vienna Convention is that “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” Moreover, as a supplementary means of interpretation, recourse to the preparatory work of the treaty and the circumstances of its conclusion is also possible.¹⁵⁾

3. Analysis

(1) Consistency with the rules concerning trademark registration (the Paris Convention and the TRIPS Agreement)

(a) Provisions of relevant conventions

Article 6*quinquies* A (1) of the Paris Convention provides that “[e]very trademark duly registered in the country of origin shall be accepted for filing and protected as is (*telle quelle*) in the other countries of the Union” (this is known as the *telle quelle* provision). Moreover, Article 6*quinquies* B also provides that “[t]rademarks covered by this Article may be neither denied registration nor invalidated except in the following cases” but raises three circumstances as exceptions: when the trademarks infringe rights acquired by third parties, when the trademarks are devoid of any distinctive character, or when the trademarks are contrary to morality or public order.

12) The Agreement on Technical Barriers to Trade. The agreement belongs to Annex 1 A of the Agreement Establishing the WTO.

13) The General Agreement on Tariffs and Trade 1994. The agreement belongs to Annex 1 A of the Agreement Establishing the WTO. Substantive provisions of the Agreement are quoted from GATT 1947.

14) Vienna Convention on the Law of Treaties.

15) Articles 31.1 and 32 of the Vienna Convention. For interpretation of treaties and the WTO Agreement in particular, *see, e.g.*, MITSUO MATSUSHITA, THOMAS J. SHOENBAUM & PETROS C. MAVROIDIS, *THE WORLD TRADE ORGANIZATION: LAW, PRACTICE, AND POLICY* 26–37 (2d ed. 2006); SIMON LESTER & BRYAN MERCURIO, *WORLD TRADE LAW: TEXT, MATERIALS AND COMMENTARY* 202–04 (2008).

Furthermore, Article 7 of the Paris Convention provides that “[t]he nature of the goods to which a trademark is to be applied shall in no case form an obstacle to the registration of the mark.”¹⁶⁾

In addition, Article 2.1 of the TRIPS Agreement incorporates these provisions as the obligations of parties to the TRIPS Agreement.

Article 15.4 of the TRIPS agreement also extends the scope of Article 7 of the Paris Convention to services by providing that “The nature of the goods or services to which a trademark is to be applied shall in no case form an obstacle to registration of the trademark.”

(b) Analysis

In the above provisions Article 6*quinquies* A of the Paris Convention (which is incorporated into the TRIPS Agreement through its Article 2.1) provides that other countries of the Union shall protect “trademark duly registered in the country of origin” “as is.” For example, when tobacco company X registered trademark A for tobacco products in Country P, Country Q must make it possible for X to have trademark A also be registered in Country Q and thus “protect” trademark A “as is” except for when it falls within an exception provided in the Paris Convention.¹⁷⁾ If Country Q happens to be Australia, company X may be able to have trademark A registered in Country Q (Australia), but there is a strong possibility that X cannot use trademark A “as is” under the Plain Packaging Act. The question whether such a situation is inconsistent with Article 6*quinquies* A of the Paris Convention, in the end, depends on what the term “protection” of a trademark (or a trademark right) means. Whether a trademark right subject to the protection by the Convention includes a positive right or only a negative right should be a decisive factor. The point (definition

16) The official text of the Paris Convention is in French. The official English translation of the Convention (*see* Article 29 (1) (c)) is cited in this article.

17) In the examples, without any special mention, each example supposes countries which have obligations under the Convention. Besides, members of the WTO have obligations to follow provisions of the Paris Convention which are discussed in this article without taking into account whether these parties are parties to the Paris Convention, because Article 2.1 of the TRIPS Agreement incorporates these provisions of the Paris Convention.

of trademark right) is not clearly provided in the Paris Convention. Hence, the interpretation of “protection” to trademarks “as is in the country of origin” will be discussed here in the context of the protection of trademarks under the TRIPS Agreement.

All other parts of the above provisions literally provide rules of trademark registration.¹⁸⁾ The Plain Packaging Act does not restrict registration of trademarks, but rather the act restricts the use of trademarks.¹⁹⁾ If cancellation of trademark registration becomes inevitable²⁰⁾ as a result of the Plain Packaging Act, then the regulation will directly restrict trademark registration. However, on this point, the act clearly provides that non-use of a trademark as a result of the act or its operation does not constitute reasonable or appropriate grounds to reject or cancel trademark registrations.²¹⁾ Therefore, if the above provisions in the relevant treaties only cover trademark registration and do not cover restrictions on the use of trademarks, the relationships between the Plain Packaging Act and the provisions may not be controversial after all.

On the other hand, even if trademark registration is accepted, regulation of the use of trademarks may have the effect of rendering registration substantially null and void. As the Plain Packaging Act has the effect of prohibiting use of registered trademarks in their original form, it may be argued that the above provisions in the treaties which relate to trademark registration are relevant to the act. On this latter point, opinions of scholars vary.²²⁾

18) However, the wording “be accepted for filing” in Article 6*quinquies* A of the Paris Convention is written in French as “*sera admise au dépôt*” in the original texts. In French this means acceptance of application to trademark registration. Yet, since “*et protégée*”; “and protected” comes after the wording, there is no doubt that parties agreed to accept not only application of trademarks, but also registration.

19) Section 28 of the Plain Packaging Act 2011 confirms that restrictions of the act do not cover trademark registration.

20) Article 92 of the Australian Trade Marks Act 1995 provides that a third person may require removal of a trademark registration if the registered trademark is not used for three years.

21) See Section 28 (3) of the Plain Packaging Act. In addition, Article 19.1 of TRIPS Agreement also provides “... obstacle to the use of the trademark ... or other government requirements for goods or services protected by the trademark, shall be recognized as valid reasons for non-use.”

22) Commentators who support the Plain Packaging Act and mention its consistency with relevant conventions state the former opinion in most cases. See, e.g., Alberto Alemanno

One view is that if registered trademarks cannot be used, then such trademark rights are just “paper rights,”²³⁾ and the registration might not mean much for the owner of the mark. Therefore, there is some reason to consider that the above provisions obligate the members of the treaties not only to accept trademark registration but also to guarantee the right holders a right to use trademarks.

However, as argued here, the above provisions provide rules concerning registration of trademarks as their own wording and do not regulate the measures that merely restrict use of trademarks. There are four points for such an argument.

First, the wording of the provisions clearly covers only trademark registration.

Second, under a trademark system, acceptance of trademark registration and scope of use of trademark or exercise of trademark rights are considered to be completely different issues.

Third, Article 7 of the Paris Convention is regarded to have a purpose which prohibits judging acceptability of trademarks of specific goods relying on whether these goods can be sold in countries of the Union.²⁴⁾ It means that Article 7 of the Paris Convention does not suppose a situation where the

& Enrico Bonadio, *Do You Mind My Smoking? Plain Packaging of Cigarettes Under the TRIPS Agreement*, 10 J. MARSHALL REV. INTELL. PROP. L. 450, 467–470. (2011); Tania Voon & Andrew Mitchell, *Implications of WTO Law For Plain Packaging of Tobacco Products*, MELBOURNE LEGAL STUDIES RESEARCH PAPER NO. 554, 6 (2011). As to the latter opinion, see Ulf Bernitz, *Logo Licensing of Tobacco Products—Can It Be Prohibited?*, 12 E. I. P. R. 137 (1990); Annette Kur, *Restrictions Under Trademark Law as Flanking Maneuvers to Support Advertising Bans Convention Law Aspects*, 23 IIC 31 (1992); Martti Castrén, *Tobacco Advertising and Trade Mark Law in Finland*, 17 E. I. P. R. 87 (1995); Annette Kur, *The Right to Use One’s Own Trade Mark: a Self-evident Issue or a New Concept in German, European and International Trade Mark Law?*, 18 E. I. P. R. 198 (1996); Jukka Palm, *The New Finnish Tobacco Act from a Trade Mark Point of View*, 28 IIC 706 (1997); Phillip Johnson, *Trade Marks without a Brand: The Proposals on “Plain Packaging” of Tobacco Products*, 34 E. I. P. R. 461 (2012).

23) Kur, *Restrictions*, *supra* note 22, at 43.

24) G. H. C. BODENHAUSEN, *GUIDE TO THE APPLICATION OF THE PARIS CONVENTION FOR THE PROTECTION OF INDUSTRIAL PROPERTY AS REVISED AT STOCKHOLM IN 1967*, 128 (1969). As an example, Bodenhausen claims that rejecting a registration of trademarks of a pharmaceutical on the ground that there is no permission to sell the pharmaceuticals is not acceptable.

character of goods prevents use of trademarks but rather a situation where the character of goods prevents applications of trademark registration.²⁵⁾ That is clear evidence about how the Paris Convention covers trademark registration and use of trademarks separately. Other provisions including *6quinquies* which are related to trademark registration should not be interpreted as directly applicable to the use of trademarks.

Fourth, the fact that most countries have a legal system to cancel trademark registration when the trademark goes unused is noted as one of the reasons that trademark registration and its use are two sides of the same coin. However, with regard to cancellation of registration by non-use, Article 19.1 of the TRIPS Agreement provides that “registration may be cancelled” and does not make it an obligation. Rather, this provision may also mean that the TRIPS Agreement covers trademark registration and its use separately.

In spite of these arguments, for the purpose of presenting thorough analysis, this article examines the consistency of the Plain Packaging Act with the above provisions in the Paris Convention and the TRIPS Agreement, on the assumption that the latter provisions could be interpreted as regulating not only the registration but also (implicitly) providing a right to use trademarks.

First, regarding Article *6quinquies* of the Paris Convention, the question arises whether or not the Plain Packaging regulation can fall within the scope of exception based on an assumption that the regulation concerning the use of trademarks boils down to a refusal or cancellation of trademark registration. There is a possibility, though very faint, that the term “when they are contrary to morality or public order” in Article *6quinquies* B. 3 may be applicable to the Plain Packaging regulation. On the other hand, there is no possibility to apply Article *6quinquies* B. 1 or 2, except for special cases with extraordinary circumstances.

However, Article *6quinquies* B. 3 of the Paris Convention covers the

25) BODENHAUSEN, *supra* note 24, at 12. Moreover, Bodenhausen introduces the fact that a proposal to provide “exclusive right to use” trademarks or extension of registration is not adopted. *See also*, Benn McGrady, *TRIPS and Trademarks: the Case of Tobacco*, 3 WORLD TRADE REVIEW 53, 66 (2004).

cases where the trademarks are contrary to morality or public order.²⁶⁾ It is impossible to justify a regulation which generally restricts the use of trademarks (irrespective of the content of the marks) based on the provision, arguing that public policy needs to enact a law to regulate certain kinds of goods (tobacco in this case) which have trademarks.²⁷⁾ Hence, if the regulation on the use of trademarks under the Plain Packaging Act falls within the scope of the chapeau of Article 6quinquies B, the regulation would breach the obligation under the chapeau since it would be impossible to interpret that the regulation is within the exception provided in items 1 to 3 in Article 6quinquies B. However, as stated above, the argument in this paper does not support the interpretation of

26) BODENHAUSEN, *supra* note 24, at 116. Bodenhausen raised examples of trademarks which contain a religious symbol or the emblems of a forbidden political party. About the application of the provision in major countries, *see* Article 7 (1) (f) and (g) of COUNCIL REGULATION (EC) No 207/2009 of 26 February 2009 on the Community trade mark (which is equal to Article 3.1 (f) and (g) of EC trademarks directive) which is construed as to mean the situation where the character of trademarks itself is contrary to the public policy and not to take in to circumstances relating to the act of applicants themselves. *See, e.g.,* KERKY'S LAW OF TRADE MARKS AND TRADE NAMES 8-196 (14 ed. 2005). CONCISE EUROPEAN TRADE MARK AND DESIGN LAW 41 (Gielen & von Bomhard eds., 2011) clearly states that "restrictions regarding promotion of tobacco, alcoholic beverages, medical or legal services, play no role [in the application of the provision]." In addition, though section 2 of the Lanham Act (15 U. S. C. §1052) raises "immoral, deceptive, or scandalous matter" as one of the causes to reject trademark registration, the wording is construed as referring to the characteristics of the trademarks themselves and not those of the goods or services for which the trademarks are used. *See, e.g.,* 1-3 GILSON ON TRADEMARKS §3.04 [6] (a) [i]. In contrast, regarding the Trademark Act of Japan, the reason for refusal which is relevant to public policy (Article 4.1.7 of the Act) has been applied flexibly as if it is a general provision to bar trademark registration. However, at present, cases which indicate necessity to interpret the wording more strictly have emerged. *See, e.g.,* Decision by the Intellectual Property High Court, June 26, 2007 (Gyo-Ke) 10391), Decision by the Intellectual Property High Court, May 27, 2009 (2009 (Gyo-Ke) 10032). It also should be noted that even under the flexible interpretation which was formerly prevailing, reasonableness (inconsistency with public policy) of application for trademark registration was examined only with regard to a specific trademark that is the subject of the application. In any case, taking into account the fact that certain goods or services which have trademarks, in case deciding acceptability of trademark registration, is not permitted because of Article 7 of the Paris Convention and Article 15.4 of the TRIPS Agreement. Besides, Article 6quinquies 3 of the Paris Convention must also be construed with consistency with these provisions.

27) The wording "general restriction" appeared in this article because there is the possibility of justifying the restrictions like to trademarks which causing misunderstanding as if the harm of nicotine is not so serious against the truth as "the case that deceive public" in the light of exceptions under Article 6quinquies 3 of the Paris Convention.

Article 6*quinquies* B as extending to the use of trademarks.

With regard to Article 7 of the Paris Convention and Article 15.4 of the TRIPS Agreement, if these provisions can be interpreted as covering not only measures relating to the trademark registrations but also the use of trademarks, then the Plain Packaging Act would be in breach of these provisions as it is the very act which restricts the use of trademarks based on the character of tobacco products. However, as mentioned above, it is difficult to believe that this supposition would hold true.

(2) Consistency with the rules concerning the use of trademarks (the TRIPS Agreement)

(a) Provisions of related conventions

Article 20 of the TRIPS Agreement provides as follows: “The use of a trademark in the course of trade shall not be unjustifiably encumbered by special requirements, such as use with another trademark, use in a special form or use in a manner detrimental to its capability to distinguish the goods or services of one undertaking from those of other undertakings.”

This provision was enacted to reflect the concerns of developed countries about the fact that a part of the developing countries had or were planning to introduce such regulations of the use of trademarks on products that had favorable effects on domestic businesses.²⁸⁾ The purpose of the provision is not to recognize the right to use trademarks as a part of the rights of individual trademark owners, but rather to impose certain restrictions on domestic measures relating to the use of trademarks.²⁹⁾ Namely, while the TRIPS Agreement provides only exclusive rights of registered trademarks (*see* Article 16), the scope of Article 20 is not limited to registered trademarks. In addition, Article 20 cannot be misconstrued to confer certain rights to an individual who uses trademarks or create some right which is different from trademark rights. If a measure conducted by a country is found to breach Article 20,

28) NUNO PIRES de CARVALHO, *THE TRIPS REGIME OF TRADEMARKS AND DESIGNS* 418–422 (2nd ed. 2011); DANIEL GERVAIS, *THE TRIPS AGREEMENT: DRAFTING HISTORY AND ANALYSIS* 285–286 (3d ed. 2008).

29) As the same opinion, *see*, de CARVALHO, *supra* note 28, at 417.

consistency of the measure with the TRIPS Agreement will be ensured through the system of dispute resolution between parties of the WTO without each user of trademarks claiming any right.

(b) Analysis

(i) Main issue

The Plain Packaging Act requires use of trademarks for commercial purposes to follow the manner provided in the act while also placing sanctions on violations. Such a regulation is considered to encumber (a free use of trademarks) in accordance with “special requirements” such as “use in a special form” as provided in Article 20 of the TRIPS Agreement. The problem then is whether or not the regulation “unjustifiably” encumbers the use of trademarks.

(ii) Interpretation of “unjustifiable”

There seems to be no precedent in the course of dispute resolution which construes the term “unjustifiable” under Article 20 of the TRIPS Agreement.³⁰⁾ The general meaning of “unjustifiable” is defined as “not able to be shown to be right or reasonable,”³¹⁾ and the term in the above provision should be construed in this manner. Definitely, “unjustness” in the above provision is that the measures which restrict the use of trademarks by imposing the special requirements is not supported by justifiability or reasonableness. In other words, the policy of these measures is considered not accepted as justifiable under the WTO Agreement, or, the measures are considered to be unjustifiable or unreasonable to achieve the policy even if the policy is justifiable.

One view holds that, under the WTO Agreement, while “necessity” is required for some exceptions (*see* Article 8.1 and 8.2 of the TRIPS Agreement

30) The WTO dispute case *Indonesia - Autos* dealt with the applicability of Article 20 of the TRIPS Agreement. In this case, the applicant, the United States, argued that a foreign company is encumbered in using the trademark of its own by the National Car Programme. However, the Panel Report dismissed the claim with reasoning that the Programme does not fall within the “requirement” of Article 20. Hence, interpretation of “unjustifiable” in the Article was not discussed. *See* Panel Report, *Indonesia - Autos*, WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R, paras. 14. 275–279.

31) OXFORD DICTIONARY OF ENGLISH (2d ed. 2003).

and Article 20 (a), (b) and (d) of GATT), requirements of justifiableness are more flexible than “necessity” and do not require reasonableness of the measures or proportionality which are required for “necessity.”³²⁾ However, with regard to “justifiableness,” there is no basis to construe that reasonableness of the measures is not required. Under the view mentioned above, a measure would be accepted as long as its aim or policy is justifiable; however, such an interpretation is unpersuasive. Reasonableness of the measures should be required in relation to the policy. Generally, “necessity” asks whether a measure is “necessary” to implement some policy.³³⁾ However, the term justifiableness seems to relate to the justifiableness of the policy as well as the justifiableness and reasonableness of the measures to implement the policy. On the other hand, there may be no reason to consider criteria of justifiableness to require proportionality. On the last point, the view quoted above is understandable.

In addition, a typical example of providing the requirement of “necessity” in the WTO Agreement is one which justifies a certain measure which breaches the provisions of the agreement in cases where the measure is necessary to implement a certain policy,³⁴⁾ such as Article 20 of GATT. Moreover, for “necessity” to be found as requirement of justification, it is required that other measures whose effect of restricting trade (or, degree of inconsistency with GATT) is smaller for the purpose of implementing the same policy must not be “reasonably available.”³⁵⁾

32) de CARVALHO, *supra* note 28, at 424–425.

33) Each specific provision which requires “necessity”, contents of that may be different. Hence, general discussion about that is not so important. Regarding the above opinion, for example, whether or not the “necessity” under Article 20 of GATT includes reasonableness or proportionality of the measures as stated by de CARVALHO, *supra* note 28, at 424–425 is controversial. However, the point will not be examined further since it is not in subject matter of this article.

34) Article 20 of GATT is the general exceptions which permit taking measures that may be considered to breach obligation under GATT. The provision provides that measures for implementing specific policy is permitted under GATT as long as the provision is not applied in a way which can be “a manner which would constitute a means of arbitrary or unjustifiable discrimination” or “a disguised restriction on international trade.” Moreover, as other example which requires “necessity” as a bar, *see* Article 11.2 (b) and (c) of GATT which is relevant to quantitative restrictions.

35) The interpretation is accepted in dispute resolution. *See, e.g.*, GATT Panel Report, *U.S. - Section 337*, L/6439–36S/345, para. 5.26; GATT Panel Report, *Thailand - Cigarettes*,

In contrast, Article 20 of the TRIPS Agreement constructs an independent rule. Hence, the purpose of the article is to make it possible to justify preventing the use of trademarks by providing special requirements, although it prohibits such measures in principle. Furthermore, under the article, the term “unjustifiable” does not suppose the existence of a specific policy. Taking into account the position or structure of Article 20 and the differences between the meaning of “unjustifiable” and “necessary,” it is possible to construe that the TRIPS Agreement permits members to take steps to restrict use of trademarks. Thus, justifiableness (being not “unjustifiable”) is a more flexible standard which permits a certain degree of discretion to the member country without requiring strict grounds to justify, such as the non-existence of alternative measures required under Article 20 of GATT. In other words, even if there is an alternative measure having a smaller impact on the use of trademarks, it should be possible to justify the measure.

To sum up, as an interpretation of Article 20 of the TRIPS Agreement, even if a measure prevents use of trademarks by providing special requirements, the measure can be justifiable and does not breach the above provision in cases where, first, the policy of the measure is reasonable and, second, the measure has certain reasonableness as a means to implement the policy. Here, reasonableness of a measure means the measure has practical effect to implement the policy. If the measure does not have an effect on implementing the policy, justifiableness of the measure should be denied even though a claimed policy is justifiable. The problem arises where a measure has certain

DS10/R-37S/200, para. 75; Panel Report, *U.S. - Gasoline*, WT/DS52/R, para. 6.24; Appellate Body Report, *Korea - Beef*, WT/DS161/AB/R, WT/DS169/AB/R, para. 166. Moreover, after the Appellate Body Report of the *Korea - Beef* case, it is considered that deciding reasonable availability of less restrictive measure or decision which parallel with that involves a process of weighing and balancing a series of factors which prominently include the contribution made by the compliance measure to the enforcement of the law or regulation at issue, the importance of the common interests or values protected by that law or regulation, and the accompanying impact of the law or regulation on imports or exports. See, Appellate Body Report, *Korea - Beef*, WT/DS161/AB/R, WT/DS169/AB/R, para. 164; Appellate Body Report, *U.S. - Gambling*, WT/DS285/AB/R, para. 306; Appellate Body Report, *Brazil - Retreaded Tyres*, WT/DS332/AB/R, para. 145. For analysis of “necessity” of Article 20 of GATT, see, PETER VAN DEN BOSSCHE, *THE LAW AND POLICY AT THE WORLD TRADE ORGANIZATION* 621–634 (2d ed. 2008).

effect to implement the policy though it is less effective, and the negative impact which the measure gives to the user of trademarks is serious. As mentioned above, the purpose of Article 20 of the TRIPS Agreement is not to impose the principle of proportionality, but to moderately permit parties to decide their own domestic policy. However, the provision also aims to protect interests of the user of trademarks. Hence, a measure which has less effect to implement policy and imposes huge negative impact on the use of trademarks should not be permitted under Article 20.

Based on the above analysis, Article 20 of the TRIPS Agreement should be applied to actual cases in the following way. First, if a claiming country proves that a measure by the claimed country restricts the use of trademarks with special requirements, the measure is presumed to be violating the article. If the claimed country successfully proves that the policy of the measure is justifiable and the measure is effective to achieve the policy, then the measure is presumed to be justifiably preventing the use of trademarks. Furthermore, if the claiming country proves that the measures' effect on implementing the policy is relatively small and the restriction to the use of trademarks is large, the measure is found to be unjustifiably restricting the use of trademarks.

(iii) Justifiability of the Plain Packaging regulation

There is no dispute that the policy to improve public health by controlling smoking is justifiable in principle.³⁶⁾ The actual problem is the reasonableness and justifiableness of the measures or methods of the anti-smoking regulation. On this point, supposing the above interpretation of Article 20 of the TRIPS Agreement, if the Plain Packaging regulation has an effect on policies to improve public health, the regulation can be considered a *prima facie* justifiable measure. However, where the effect is weak and the degree of

36) Article 8.1 of the TRIPS Agreement confirms that members "may ... adopt measures necessary to protect public health and nutrition." Moreover, *Thailand - Cigarettes* case confirmed that a measure to aim to reduce consumptions of tobacco falls within the scope of "measures necessary to protect human ... life or health" in Article 20 (b) of GATT. See, GATT Panel Report, *Thailand - Cigarettes*, DS10/R-37S/200, para. 73. Moreover, the existence of the WHO FCTC can be invoked as a ground for just policy.

restrictions which the measures give to the users of trademarks is strong (in cases where the positive effect for the policy is relatively weak compared to the negative effect on the use of trademarks), then the restrictions will be construed as “unjustifiable” measures.

The effect of the Plain Packaging regulation is controversial. Namely, although proponents of the regulation claim that it has the effect of reducing smoking, opponents argue that the effect of the regulation on the consumption of tobacco is doubtful. Some people also argue that bootleg or smuggled tobacco will increase and there is also a concern about the side effect of damaging consumer interests by causing confusion with regard to tobacco products.³⁷⁾ Ultimately, analysis based on experimental study is necessary to evaluate the effect of such measures.

As to the effect on individual owners of trademarks, the Plain Packaging regulation is expected to affect them. Since the regulation limits the use of trademarks to the manner to print brand name or company name in specified places and ways on retail packaging, it greatly restrict the general use of trademarks. Moreover, picture trademarks will not be able to be used. In addition, in cases where trademarks have distinctiveness not in the word but in the style of types, they cannot be used in a way to show distinctiveness, that is, realize a function as trademarks.

For these reasons, the Plain Packaging regulation imposes serious limitations on users of trademarks. When the effect of the regulation to implement the policy is small, it must be evaluated as inconsistent with Article 20 of the TRIPS Agreement. However, if there is a substantial effect to implement the policy, then the measure may be justifiable and consistent with the provision.³⁸⁾

37) See, e.g., “Public consultation on the exposure draft of the Tobacco Plain Packaging Bill 2011: Summary of submissions” at 30–42, *available at* <http://www.yourhealth.gov.au/internet/yourhealth/publishing.nsf/Content/plainpack-tobacco> (last visited September 24, 2012).

38) If it is difficult to evaluate the effect to implement the policy, then the legitimate process of the policy making, specifically the fact that the Plain Packaging Act was enacted in accordance with legal procedure of Australia, should be taken into account in determining the justifiability of the measure. In addition, the global support for such a measure as shown in the guideline of the WHO FCTC should also be a positive ground for justifying the measure.

(3) Consistency with the rules concerning exceptions to trademark rights (the TRIPS Agreement)

(a) Provisions of relevant conventions

Article 17 of the TRIPS Agreement notes some exceptions related to trademark rights. This article provides as follows: “Members may provide limited exceptions to the rights conferred by a trademark, such as fair use of descriptive terms, provided that such exceptions take account of the legitimate interests of the owner of the trademark and of third parties.”

(b) Analysis

With regard to Article 17 of the TRIPS Agreement, if the Plain Packaging regulation falls within a measure to provide exceptions to “the rights conferred by a trademark,” then the issue becomes whether or not the regulation fulfills the requirements of the article; that is, whether the exception is limited and whether it takes into account the legitimate interests of the owner.

First, it is necessary to examine whether or not the Plain Packaging regulation is a measure to provide exception to “the rights conferred by trademarks.” “[T]he rights conferred by a trademark” under Article 17 of the TRIPS Agreement are not equal to the trademark rights provided in domestic law of members. The Australian Trade Marks Act appears to provide that trademark rights have a positive effect (Article 20 of the act).³⁹⁾ However, the problem concerns the trademark rights under the TRIPS Agreement.

Article 16 of the TRIPS Agreement provides trademark rights as including the owner’s right to prevent the certain use of trademarks by third parties. However, the question arises as to whether or not the agreement accepts the positive right, namely, the right of owners to use their own trademarks. As discussed above, Article 20 of the TRIPS Agreement is not construed as a provision which provides such positive rights to trademark owners.

Under the trademark system, such marks are worth protecting because they

39) “If a trade mark is registered, the registered owner of the trade mark has, subject to this Part, the exclusive rights ... to use the trade mark; and ... to authorize other persons to use the trade mark ... in relation to the goods and/or services in respect of which the trade mark is registered.”

are actually used by the owners. The purpose of the system is to protect the goodwill of business entities that has been accumulated to trademarks through their use of the mark. Thus, one view considers that the positive effect of trademark rights is essential for the system, and the TRIPS Agreement should be interpreted in accordance with such an understanding.⁴⁰⁾

However, the text of the Article 17 of the TRIPS Agreement clearly deals with only negative rights, and there seems to be no ground to interpret this article in an expansive way. Of course, member countries may possibly recognize positive rights as well, since giving more extensive protection for intellectual properties than is required by the TRIPS Agreement is allowed (Article 1.1 of the TRIPS Agreement). In fact, the panel for the case in *EC - Trademarks/GIs* supported this position.⁴¹⁾

40) Kur, *The Right to Use*, *supra* note 22, at 202. Kur argues that under Article 20 of the TRIPS Agreement, taking into account the significance of protection for trademark rights in practice and economy, it shall be in breach of the article to deny the right of owners to use trademarks, by expanding the fact that the article prohibit the restriction to use trademarks in principle. However, as discussed above, the provision is to prohibit unjustifiable restrictions to trademarks. In other words, it is the provision which permits justifiable restrictions to use of trademarks and its purpose is not to give each individual the rights relating to the use of trademarks. The provision actually protects the interests of the user of trademarks, but, it is unreasonable to construe that “the rights conferred by a trademark” under Article 17 of the TRIPS Agreement include the right to use trademarks based on Article 20 of the Agreement.

41) *See, e.g.*, Panel Report, *EC - Trademarks/GIs*, WT/DS174/R, paras. 7.210 and 7.611 (“These principles reflect the fact that the TRIPS Agreement does not generally provide for the grant of positive rights to exploit or use certain subject matter, but rather provides for the grant of negative rights to prevent certain acts. This fundamental feature of intellectual property protection inherently grants Members freedom to pursue legitimate public policy objectives since many measures to attain those public policy objectives lie outside the scope of intellectual property rights and do not require an exception under the TRIPS Agreement.” “The right to use a trademark is a right that Members may provide under national law.”). Moreover, Appellate Body Report, *U.S. - Section 211*, WT/DS176/AB/R, para. 186 claims that “As we read it, Article 16 confers on the *owner* of a registered trademark an internationally agreed minimum level of ‘exclusive rights’ that all WTO Members must guarantee in their domestic legislation. These exclusive rights protect the owner against infringement of the registered trademark by unauthorized third parties.” *See also* de CARVALHO, *supra* note 28, at 397; WTO-TRADE-RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS 317 (Peter-Tobias Stoll, Jan Busche & Katrin Arend eds., 2009).

(4) Consistency with the rules concerning other forms of intellectual property rights (the Paris Convention and the TRIPS Agreement)

Other than trademark rights, design rights can also be an issue in connection with the Plain Packaging regulation. That is, if the Plain Packaging regulation has the effect of limiting the use of designs, the relationship between the regulation and the provisions for protecting design rights in conventions may be controversial. Specifically, the relationship of the regulation to Article 5*quinquies* of the Paris Convention, which provides that designs shall be protected in all the countries of the union, and is incorporated into the TRIPS Agreement (Article 2.1), and Article 26.2 of the TRIPS Agreement (dealing with exceptions of the design rights).

To solve the issue, the scope of protection for a design under the Paris Convention and the TRIPS Agreement should be clarified as to whether it includes the use of designs. In other words, whether the design right which shall be protected under the agreements includes positive rights must be answered. On this point, Article 26.1 of the TRIPS Agreement provides only a negative right (a right to prevent third parties' use of the design), and as to the protection of designs, there is no provision equivalent to Article 20 in the TRIPS Agreement. Therefore, it is clear that the TRIPS Agreement obligates members to recognize negative rights as design rights, and it is simply up to the discretion of members whether or not they also give positive rights as a part of design rights. As a conclusion, from the viewpoint of the protection of design rights, there is no inconsistency between the Australian Plain Packaging regulation and the TRIPS Agreement.⁴²⁾

(5) Consistency with the rules concerning technical standards (the TBT Agreement)

(a) The provisions of related conventions

Article 2 of the TBT Agreement is the provision for “preparation,

42) Of course, this statement does not preclude the possibility of a specific situation where a breach of a general provision like principle of national treatment (Article 3 of the TRIPS Agreement) or obligations related to enforcement of rights (Article 41 and following provisions of the Agreement) might be a problem.

adoption and application of technical regulations by central government bodies.” Subsection 1 of the article provides principles of national treatment. Furthermore, subsection 2 of the article provides as follows:

“Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create. Such legitimate objectives are, *inter alia*: national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment.”

Moreover, Annex 1 of the TBT Agreement provides the definition of “technical regulations” as follows:

“Document which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method.”

(b) Analysis

Taking into account the above provisions on technical regulations in the TBT Agreement, the Plain Packaging regulation should be recognized as technical regulations.⁴³⁾ Hence, the consistency of the Plain Packaging Act with

43) The Panel in *U.S. - Clove Cigarettes* found that the measure to restrict the sale of tobacco which has characterizing flavor is “technical regulations.” See Panel Report, *U.S. - Clove Cigarettes*, WT/DS406/R, paras. 7.22–41. In this case, the issue was whether a restriction in the US to prohibit sale of tobacco which has “characterizing flavours, except menthol,” is consistent with the WTO Agreement. Namely, Indonesia claimed that the circumstance in which clove cigarettes are prohibited to sale although menthol cigarettes are permitted to sale is in breach of Article 2.1 (national treatment) and other provisions

the TBT Agreement is disputable in the situation where, first, the regulation accords relatively more favorable treatment to products of national origin than that accorded to imported products (breach of Article 2.1 of the Agreement), and second, the regulation is more trade-restrictive than necessary to fulfill a legitimate objective (breach of Article 2.2 of the Agreement).

Regarding a breach of the principle of national treatment, the Plain Packaging Act seems to have no provision to treat imported products in a discriminatory manner compared to products of national origin and thus has no *de jure* discrimination. However, the national treatment principle under the WTO Agreement prohibits not only *de jure* discrimination but also *de facto* discrimination. In order to decide whether or not the Plain Packaging regulation results in *de facto* discrimination, the effect of the regulation on trade should be examined. For example, hypothetically, when the brands of imported tobacco products are much more competitive than those products of national origin, then the appeal of the imported goods is restricted relatively more severely by the Plain Packaging regulation. In such a case, the regulation may be considered to accord unfavorable treatment; that is, *de facto* discrimination to imported tobacco products.

With regard to the second point, the purpose of the Plain Packaging regulation is legitimate since it intends to fulfill “protection of human health or safety” which is provided in Article 2.2 of the TBT Agreement. Therefore, the issue emerges whether or not the regulation is “more trade-restrictive than necessary to fulfill a legitimate objective.”⁴⁴⁾ The Plain Packaging regulation

of the TBT Agreement. The Panel found that the restriction was in the scope of technical regulations and was in breach of Articles 2.1, 2.9.2 (obligation to notify WTO) and 2.12 (interval more than 6 months) of the TBT Agreement. On the other hand, the Panel found that the restriction was not proven to be in violation of Article 2.2.

44) The second sentence of Article 2.5 of the TBT Agreement provides that “[w]henever a technical regulation is prepared, adopted or applied for one of the legitimate objectives explicitly mentioned in paragraph 2, and is in accordance with relevant international standards, it shall be rebuttably presumed not to create an unnecessary obstacle to international trade.” It seems that the above presumption is not applied since there is no “relevant international standards” for the Plain Packaging regulation. Even if the provisions of the WHO FCTC or its guidelines can be considered to be “relevant international standards,” it is possible that the presumption is rebutted by a claim that the Plain Packaging regulation is unnecessarily trade-restrictive.

is trade-restrictive since the regulation prohibits the trade of products which do not follow the regulation. Whether or not the trade restrictions are more restrictive than “necessary” is the point of debate. In order to interpret the word “necessity,” interested parties must refer to Article 20 (b) of GATT. As mentioned in the examination of Article 20 of the TRIPS Agreement, in interpreting “necessity” under Article 20 (b) of GATT, the problem is whether other measures which are more consistent with GATT (or less trade-restrictive) are reasonably available or not. Accordingly, if there are alternative measures to reduce the consumption of tobacco for the purpose of protecting human health, the available alternative measures shall have the effect of reducing the consumption of tobacco (as a result, reduction of import of tobacco) more effectively than that of the Plain Packaging regulation. Otherwise, the measure would not be an “alternative” measure. Therefore, in the end, the alternative measures would be more trade-restrictive.

For the reasons outlined above, in the relationships between the TBT Agreement and the Plain Packaging regulation, the only possible issue of concern is the breach of national treatment under Article 2.1 of the TBT Agreement. This possible issue depends on the actual effects of the regulation.

(6) Consistency with the rules for trade in goods (GATT)

The relationship of the Plain Packaging regulation to GATT can be controversial since it affects trade in goods, namely, tobacco. Particularly, consistency with the national treatment principle under Article III: 4 of GATT may be a problem. An examination essentially similar to that discussed in the context of Article 2.1 of the TBT Agreement is necessary.⁴⁵⁾

IV. Concluding remarks

This paper examined consistency of the Australian Plain Packaging Act with

45) GATT is different from the TBT Agreement because applicability of general exceptions under Article 20 (b) of GATT shall be an issue even if there is a breach of Article 3.4 of GATT.

international conventions from the view of intellectual property law and trade law. In the future, measures to protect human health and safety along with consumer interests and environmental concerns will be strengthened by many countries. In such a situation, discussing the relationships between these non-economic/trade-related measures and international economic rules such as the WTO Agreement will be even more controversial. From this perspective, the examination of the Plain Packaging Act is significant as a case study.

As noted above, this article only showed one rough view on the consistency of the Plain Packaging Act with international rules. In order to establish a more concrete conclusion, analysis of additional details of the legal system and facts will be necessary. Although this article does not attempt to cover all of these issues, the study should assist in better understanding not only this particular issue, but also the tension between non-economic domestic measures and international economic law in general.