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TOBACCO LABELLING AND ADVERTISING RULES: LESSONS FROM OTHER COUNTRIES FOR ZIMBABWE

Christopher Munguma^{*}

Abstract

This paper analysed the approach that has been taken by four countries in controlling tobacco usage through advertising and labelling rules. The paper is a documentary analysis and literature review of primary and secondary legal sources. The paper considered the national approaches adopted by the Commonwealth of Australia, the United Kingdom (UK), Thailand and Zimbabwe. The first three nations were used as examples that can offer lessons to Zimbabwe on how international tobacco control obligations are met. Australia and the UK were the first two countries to adopt plain packaging and hence offer some best practices. Thailand, on the other hand, was the first developing country to adopt plain packaging rules. Thailand's case shows that developing countries can also adopt sound tobacco control rules. The Australian law led to several national and international legal challenges that were resolved in favour of Australia. The legal domestic challenges against standardised packaging in the United Kingdom were also resolved in favour of the British government. It was established in the study that, despite acceding to the World Health Organisation Framework Convention for Tobacco Control (WHO FCTC), the Zimbabwean national legal framework is not yet compliant with the FCTC international treaty obligations. The laws of Zimbabwe are scanty and leave a lot of gaps in the control framework which have been exploited by tobacco manufacturers. This is unsatisfactory and calls for action on the part of the government.

Keywords: tobacco control; trademarks; labelling; plain packaging; advertising

Résumé

Ce document analyse l'approche adoptée par quatre pays pour contrôler la consommation de tabac par le biais de règles en matière de publicité et d'étiquetage. Il s'agit d'une analyse documentaire et d'une revue de la littérature des sources juridiques primaires et secondaires. Il examine les approches nationales adoptées par le Commonwealth d'Australie, le Royaume-Uni (RU), la Thaïlande et le Zimbabwe. Les trois premiers pays ont été utilisés comme exemples pouvant servir de leçons au Zimbabwe sur la manière dont les obligations internationales en matière de lutte antitabac sont respectées. L'Australie et le Royaume-Uni ont été les deux premiers pays à adopter l'emballage neutre et offrent donc quelques bonnes pratiques. La Thaïlande, quant à elle, a été le premier pays en développement à

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adopter des règles en matière d'emballage neutre. Le cas de la Thaïlande montre que les pays en développement peuvent également adopter de bonnes règles de lutte antitabac. La loi australienne a donné lieu à un certain nombre de contestations juridiques nationales et internationales qui ont été résolues en faveur de l'Australie. Les contestations juridiques nationales contre l'emballage standardisé au Royaume-Uni ont également été résolues en faveur du gouvernement britannique. L'étude a établi que, malgré l'adhésion à la CCLAT de l'OMS, le cadre juridique national zimbabwéen n'est pas encore conforme aux obligations du traité international de la CCLAT. La législation zimbabwéenne est lacunaire et laisse de nombreuses lacunes dans le cadre de contrôle, lacunes qui ont été exploitées par les fabricants de tabac. Cette situation n'est pas satisfaisante et appelle une action de la part du gouvernement.

Mots clés: lutte antitabac; marques déposées; étiquetage; emballages neutres et publicité

Introduction

Several measures have been taken by different countries to deal with the tobacco epidemic, which refers to the loss of human life and other human health challenges caused by tobacco consumption.¹ The promulgation of an international tobacco control instrument in the form of the World Health Organisation Framework Convention on Tobacco Control (hereinafter referred to as the “WHO FCTC”) has had a lasting impact on tobacco control. Prior to the adoption of the Convention, many deaths were recorded, and more were predicted in the coming years.² Peter Delobelle notes that national control measures alone had been easily overridden by the big tobacco producers.³ This was in part because governments had a huge burden of proof in the courts where they had to provide the robust health evidence and surmount constitutional and intellectual property arguments that protect property and intellectual property rights.

From an economic perspective, tobacco production creates employment and export earnings for some countries.⁴ This economic factor gave

¹ The Global Burden of Disease database, Washington, DC: Institute of Health Metrics (2019) states that tobacco kills over 8 million people a year around the world. More than 7 million of those deaths are the result of direct tobacco use while around 1.3 million are the result of non-smokers being exposed to second-hand smoke. See also Egbe, C.O. et al ‘Landscape of tobacco control in sub-Saharan Africa’ (2022) *Tobacco Control* DOI: 10.1136/tobaccocontrol-2021-056540.

² Ibid. The predicted deaths were subsequently reduced by 2 million from 10 million by 2020 to 8 million.

³ See, for example, Delobelle, P. ‘Big tobacco, alcohol, and food and NCDs in LMICs: An inconvenient truth and call to action’ (2019) *International Journal of Health Policy and Management* at 727–731. In decisions such as *JT International SA; British American Tobacco Australasia Limited v The Commonwealth* [2012] HCA 43 and *BAT (UK) Ltd and Ors v Secretary of State for Health* [2016] EWHC 1169 (Admin) the measures being challenged were justified by the courts based on the WHO FCTC obligations in respect of the two countries.

⁴ See Lown, A.E., McDaniel, P.A. & Malone, R.E. ‘Tobacco is “our industry and we must

tobacco producers some support and credibility in the eyes of the public. Without the backing of an international instrument supporting control measures, tobacco producers had a better chance of resisting controls through domestic litigation. In *Philip Morris Products SA & Abal Hermanos SA and Oriental Republic of Uruguay*⁵ an international arbitral tribunal held that the WHO FCTC established an evidence basis for tobacco control measures. The tribunal went on to say that where evidence has been established internationally, states do not need to establish that evidence at a domestic level. The same principle applies to tobacco control objectives. For example, one of the key objectives of the WHO FCTC is to remove some of the factors that make tobacco appealing to the youth.

The purpose of this article is to analyse the labelling and advertising rules of the WHO FCTC, and consider how jurisdictions like Australia, the United Kingdom (UK), Thailand and Zimbabwe have applied those provisions in their domestic law. The approaches in the first three countries have served to provide lessons for Zimbabwe and have therefore been chosen because of the leading role they played in establishing their tobacco control rules. As the first developing country to adopt plain packaging, Thailand offers valuable insights for developing countries. The review of the three countries is followed by an inquiry into Zimbabwe's labelling and advertising rules. Some lessons for Zimbabwe are set out in the conclusion of the article.

The World Health Organisation Framework Convention on Tobacco Control

Several articles in the Convention deal with trademarks and design rights. The provision that has a direct bearing on trademarks is found in article 11. Article 11 provides that members shall adopt packaging and labelling measures that ensure that tobacco packaging does not promote tobacco products in any manner that is false or misleading. Article 11(1)(a)–(b) provides 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, including any term, descriptor, trademark, figurative or any other sign that directly or indirectly creates the false impression that a particular tobacco product is less harmful than

support it": Exploring the potential implications of Zimbabwe's accession to the Framework Convention on Tobacco Control' (2016) *Globalization and Health* at 12–21. In addition, tobacco companies carry out some corporate social responsibility programmes in local communities that increase these communities' level of goodwill. The issue is discussed by Fooks, J. & Gilmore, A.B. 'Corporate philanthropy, political influence' (2013) 8(11) *Health Policy* at 80–86.

⁵ ICSID Case No. ARB/10/7.

- other tobacco products. These may include terms such as “low tar”, “light”, “ultra-light”, or “mild”; 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.

Two issues are dealt with in article 11, namely tobacco labelling and health warnings. Raslan notes that the FCTC provides for the prevention of any false, misleading, deceptive tobacco packaging and labelling or packaging and labelling which is likely to cause confusion about the product characteristics or health effects.⁶ Article 11 also provides for the inclusion of health warnings in a particular font and size on tobacco packages. Health warnings are a key preventative measure in helping to curb the tobacco epidemic.

It is apparent from article 11 that the Convention alone does not compel the immediate adoption of plain packaging rules.⁷ What is proscribed in the Convention is the use of a misleading, false or deceptive “term, descriptor, trademark, figurative or any other sign”. Examples of such terms are “mild”, “low tar” and “soft”. The article does not cover the language on plain packaging or related wording. Liberman observes that on their own, the WHO FCTC packaging and labelling provisions do not appear as restrictive as the plain packaging legislation turns out to be.⁸

However, the guidelines on the implementation of article 11 recommend that parties consider the adoption of plain packaging. The guidelines are an extension of article 11 and are more restrictive. In addition, the guidelines encourage members to adopt plain packaging rules in tobacco marketing.⁹ It has been noted that the guidelines for the implementation of article 11 demonstrate how rigorous and restrictive

⁶ Raslan, R.A.A. ‘Are trade interests shaping intellectual property law? The example of plain-packaging of tobacco products and trademark law’ (2016) 1(1) *African Journal of Intellectual Property* at 14.

⁷ According to Zvolška, K. & Kralikova, E. ‘Cigarette plain packaging – facts and myths’ (2019) 64(2) *Hygiene* at 60. A plain or generic cigarette package refers to a package with a standardised design without any unregulated space and a dominant pictorial warning. It does not restrict the number of brands, but company and product names must be printed in the same font, the same size and same colour. These measures require that tobacco products must be without any form of other markings except the name of the manufacturer, health warnings and a few other regulated messages on the tobacco package.

⁸ Liberman, J. ‘Plainly constitutional: The upholding of plain tobacco packaging by the High Court of Australia’ (2018) *American Journal of Law and Medicine* 36.

⁹ In paragraph 16 of the guidelines to implementing article 11.

plain packaging measures can be.¹⁰ Australia,¹¹ Ireland, France and the United Kingdom are examples of countries that have followed the route provided for in the guidelines.

Article 13 is related to the branding rules in article 11, which deals with tobacco advertising, promotion and sponsorship. Article 13 introduces an immediate ban on advertising, promotion and sponsorship by the tobacco industry. Furthermore, article 13 is rooted in the understanding that packaging and product design are important elements of advertising and promotion. Over and above that, article 13(4)(b)–(c) requires that minimum health warnings or messages accompany all tobacco advertising and, where appropriate, promotion and sponsorship. Misleading and deceptive advertisements are prohibited just like advertisements that create an erroneous impression about the character or health effects of the product. The use of direct or indirect incentives to encourage the purchase of tobacco products by the public is also restricted.

These measures are justifiable within the meaning of article 20 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) as they still allow a trademark holder to prevent unauthorised use of their rights.¹² The tobacco epidemic has grave consequences for the health of the public and negates a number of human rights recognised by law through various international instruments, such as the right to health, life, education and the right to a clean environment.¹³ By taking away the appeal and attraction power of tobacco packaging through preventing advertisements and promotion, the law takes a necessary public health step.¹⁴

The following sections look at some case studies of how the above measures have been implemented at national level in Australia, the UK and Thailand. These countries provide useful lessons for Zimbabwe and other developing countries grappling with tobacco control concerns. Australia was a plain-packaging pioneer, followed by the UK. The UK also has historical connections to Zimbabwe, and some of Zimbabwe's

¹⁰ See, for example, Cohen, J.E., Zhou, S., Goodchild, M. et al 'Plain packaging of tobacco products: Lessons for the next round of implementing countries' (2020) 18 *Tobacco Induced Diseases* at 1–3; Nyatsanza, S. 'Plain packaging of tobacco products and the South African trademark system' (2016) *Queen Mary Journal of Intellectual Property* 9.

¹¹ Through the Tobacco Plain Packaging Act 148 of 2011 and related legislation.

¹² Authorities agree that a trademark right is a negative right to prevent others from using the mark and not a positive right to use. See, for example, Bonadio, E. 'Bans and restrictions on the use of trademarks and health' (2014) *Intellectual Property Quarterly* at 60–82 and Davison, M. & Emerton, P. 'Rights, privileges, legitimate interests, and justifiability: Article 20 of TRIPS and plain packaging of tobacco' (2014) 29 *Am U Int'l L. Rev* at 505.

¹³ Smith, C., Kraemer, N., Johnson, D. et al 'Plain packaging of cigarettes: Do we have sufficient evidence?' (2015) *Risk Managing Health Policy* at 21–30; Anderson, A. 'The legality of plain packaging under international law' (2014) 49(11) *Economic and Political Weekly*.

¹⁴ Bonfrer, A., Chintagunta, P. K., Roberts, J. H. et al 'Assessing the sales impact of plain packaging regulation for cigarettes: Evidence from Australia' (2020) 39(1) *Marketing Science* at 1164.

statutes are modelled along those of the UK. Thailand, as a developing country, shows that developing countries can effectively implement the tenets of the WHO FCTC despite resistance from big tobacco.

The Australian plain packaging laws

Australia was the first country in the world to implement standardised tobacco packaging with plain packs appearing on retailer shelves in December 2012.¹⁵ This process was carried out in terms of the Tobacco Plain Packaging Act (TPPA) 148 of 2011, and related legislation that operationalised this law, such as the Tobacco Plain Packaging Regulations of 2011¹⁶ and the Trade Marks Amendment (Tobacco Plain Packaging) Act of 2011.¹⁷ According to Cohen et al, plain packaging laws standardise the appearance of packs by prohibiting all design features (including colours, shapes, images, logos, textures/finishes, scents and promotional text) other than those explicitly permitted by the law.¹⁸ These Australian laws have been termed “landmark legislation”.¹⁹

The objects of the Australian TPPA are set out in section 3 of the Act. These are to improve public health by discouraging people from taking up smoking or using tobacco products, to encourage people to give up smoking, and to stop people from using tobacco products. Section 18 of the Act deals with the physical features of retail packaging of all tobacco products. It states that:

1. The retail packaging of tobacco products must comply with the following requirements:
 - a. the outer surfaces and inner surfaces of the packaging must not have any decorative ridges, embossing, bulges or other irregularities of shape or texture, or any other embellishments, other than as permitted by the regulations.
 - b. any glues or other adhesives used in manufacturing the packaging must be transparent and not coloured.²⁰

In addition to the above, the colours are regulated by the law. The colour must be a matt finish, a prescribed colour or “must be drab dark brown”. The Tobacco Plain Packaging Regulations of 2011 further prescribe the colour of the primary and secondary packaging which “must be the colour known as Pantone 448C which is a drab green/brown colour”,

¹⁵ Cohen et al op cit note 10.

¹⁶ Select Legislative Instrument 2011, No. 263.

¹⁷ Act 149 of 2011.

¹⁸ Cohen et al op cit note 10.

¹⁹ For example, Rimmer, M. ‘Plain packaging of tobacco products: Landmark ruling’ (2018) *WIPO Magazine* 6 at 6.

²⁰ See section 18(1) of the TPPA.

while the inner surface of a cigarette pack or cigarette carton must be white. This is provided by section 22(1) of the Act.

Section 20(1) states that no trademarks must be affixed on tobacco packaging. The section provides that:

1. No trademark may appear anywhere on the retail packaging of tobacco products, other than as permitted by subsection (3).
2. No mark may appear anywhere on the retail packaging of tobacco products, other than as permitted by subsection (3).

What may appear on the retail packaging of tobacco products is:

- The brand, business or company name for the tobacco products.
- The relevant legislative requirements.
- Any other trademark or mark permitted by the regulations.

Trademarks, logos or any other elements of IP are restricted by section 20 on tobacco packages unless permitted by the regulations. The regulations merely permit brand names, company names or the business name of the producer of the product. There is a prohibition against the use of gloss colours in the product packaging. The prohibition on the use of gloss colours seems to be intended to diminish the attraction and appeal of the tobacco package. The font and print type to be used are strictly regulated. The permitted print typeface is Lucida Sans; and for a brand, business or company name it must be in a 14 points size with any variant name being no larger than 10 points in size. In essence, the rules standardise the packaging of the tobacco product.

The TPPA creates offences and civil penalties for various actions, including selling or supplying tobacco products in non-conforming retail packaging, manufacturing non-compliant retail packaging and manufacturing tobacco products packaged in a non-compliant manner.²¹ Australia implemented these measures in line with the requirements of the WHO FCTC. Article 2(1) of the WHO FCTC makes it clear that the measures laid down in the convention represent the minimum requirements and do not preclude the adoption of stricter measures, provided they are consistent with the convention and with international law (parties are “encouraged to implement measures beyond those required by this Convention”).²²

Litigation against the Australian measures

The above-mentioned Australian legislation led to several court battles, such as *Philip Morris Asia Limited v The Commonwealth of Australia PCA*²³

²¹ See sections 31 to 45 of the TPPA.

²² Article 2(1) of the convention.

²³ Case No. 2012-12-2015.

and *JT International SA; British American Tobacco Australasia Limited v The Commonwealth*.²⁴

In the *Philip Morris* case, the dispute was in respect of the TPPA and the implementation of the Tobacco Plain Packaging Regulations of 2011 which are collectively referred to as the “plain packaging measures”. The claimant, PML, averred that it had rights with respect to certain intellectual property in Australia, including registered and unregistered trademarks, copyright works, and registered and unregistered designs. It contended that its entire business, and that of PML and PM Australia, rested on its intellectual property, and on the recognition of its brands. It was PML’s allegation that the plain packaging legislation barred the use of intellectual property on tobacco products and packaging, transforming it from a manufacturer of branded products to a manufacturer of commoditised products with the effect of substantially diminishing the value of its investments in Australia. Since the matter was not decided on the merits but was finalised on grounds of admissibility, the IP issues were not fully ventilated in the case.

In *JT International SA v Commonwealth of Australia*,²⁵ the plaintiffs argued that the plain packaging measures amounted to an appropriation of the goodwill embodied in their brands and that by enacting them, the Commonwealth of Australia had “acquired their intellectual property rights and goodwill other than on just terms”. The High Court found that “although the Act regulated the plaintiff’s IP rights and imposed controls on the packaging and presentation of tobacco products, it did not confer a proprietary benefit or interest on the Commonwealth or any other person”.²⁶ Therefore, there was no expropriation of any of the plaintiff’s rights. The finding was in line with several other decisions²⁷ that ruled that trademark rights are negative rights which give an exclusive right to exclude others from use, not an absolute right of use. Hence, when the state uses its regulatory power²⁸ over trademark rights it is not expropriating private property.

Crosbie et al assert that these legal suits filed in Australia were part of a multipronged trade strategy to prevent the global diffusion of progressive tobacco packaging and labelling proposals, including standardised packaging.²⁹ The other strategies consisted of raising trade and investment violations, raising alleged legal violations concerning

²⁴ *JT International SA; British American Tobacco Australasia Limited v The Commonwealth of 2012*.

²⁵ *Ibid*.

²⁶ Per French CJ paras 42 and 44 of the judgment.

²⁷ Such as *Philip Morris Products SA and Abal Hermanos SA (The Claimants) and Oriental Republic of Uruguay (The Respondent)* ICSID Case No. ARB/10/7.

²⁸ *Ibid* para 271 of the judgment.

²⁹ Crosbie, E., Eckford, E. & Bialous, S. ‘Containing diffusion: The tobacco industry’s multipronged trade strategy to block tobacco standardised packaging’ (2019) 28 *Tobacco Control* BMJ at 195.

trade barriers and intellectual property, as well as threatening legal suits based on reputational damage.³⁰ The legal route failed on the domestic front in Australia. Despite that failure, the tobacco companies supported by tobacco producing countries took the dispute to the international level on trade and investment grounds.

Decision of the World Trade Organization (WTO) dispute settlement body

The landmark tobacco plain packaging laws initiated by Australia sparked a dispute at the WTO.³¹ The dispute was initiated by Indonesia, which³² on 20 September 2013 requested consultations with Australia concerning certain Australian laws and regulations that imposed restrictions on trademarks, geographical indications, and other plain packaging requirements on tobacco products and packaging. Indonesia challenged several Australian measures as being inconsistent with TRIPS and related laws. Indonesia argued that the national measures were inconsistent with articles 2.1, 3.1, 15.4, 16.1, 16.3, 20, 22.2(b) and 24.3 of TRIPS, articles 2.1 and 2.2 of the Technical Barriers to Trade (TBT) Agreement, and Article III: 4 of the General Agreement on Tariffs and Trade (GATT) of 1994. In its decision, the Dispute Settlement Body made a fundamental decision concerning tobacco and tobacco control rules.³³

In the dispute, Australia justified its legislation as a legitimate public health measure to address Australia's tobacco-related problems. It indicated that a total of 25 000 people died annually because of tobacco usage. This was in addition to arguments that the measures were not contrary to TRIPS and the Paris Convention. The WTO panel agreed, asserting that the law would help reduce the use of tobacco products in Australia. The panel pointed to evidence that "overall smoking prevalence in Australia continued to decrease following the introduction of the [plain packaging] measures".³⁴ The panel found against the complainants on all the arguments raised. The panel noted that the complainants had not demonstrated that Australia's tobacco plain packaging measures were inconsistent with article 2.2 of the TBT Agreement on the basis that they are more trade-restrictive than necessary to achieve a legitimate objective;

³⁰ Ibid.

³¹ Australia – Certain measures concerning trademarks, geographical indications and other plain packaging requirements applicable to tobacco products and packaging – panel report – action by the Dispute Settlement Body WT/DS467/23. See also Rimmer op cit note 19.

³² Other parties were involved in the case, including Ukraine, Honduras, Cuba and the Dominican Republic. Ukraine later withdrew. Indonesia did not argue the GATT contravention.

³³ Liberman op cit note 8. See also, Moodie, C., Scheffel, J., Gallopel-Morvan, K. et al 'Plain packaging: Legislative differences in Australia, France, the UK, New Zealand and Norway, and options for strengthening regulations' (2018) 28 *Tobacco Control* at 485–492.

³⁴ Liberman op cit note 8; Scollo, M., Bayly, M., White, S. et al 'Tobacco product developments in the Australian market in the four years following plain packaging' (2018) 27 *Tobacco Control* at 580–584. See also paragraph 19 of Australia's submissions to the panel.

neither had the complainants demonstrated that the TPP measures were inconsistent with article 6 of the Paris Convention, as incorporated into the TRIPS Agreement by article 2.1 on the basis that Australia did not accept for filing and protect “as is” every trademark duly registered in the country of origin.³⁵ The approach used by a country is a matter of domestic choice.

It was further noted by the panel that the nature of the goods to which the TPP measures apply (*in casu* tobacco products) did not form an obstacle to the registration of trademarks in violation of article 15.4 of TRIPS.³⁶ A trademark cannot be denied registration for the sole reason that it is used in connection with tobacco products.³⁷ Prior to the TPP decision, the WTO panel had made a finding that TRIPS does not provide for the granting of positive rights to use or exploit trademark rights but grants negative rights to prevent certain acts.³⁸ The right grants the owner the exclusive right to prevent third parties from carrying out unauthorised acts over a registered trademark.³⁹ This position was reiterated in the Uruguay case where the tribunal stated that:

The trademark holder does not enjoy an absolute right of use, free of regulation, but only an exclusive right to exclude third parties from the market so that only the trademark holder has the possibility to use the trademark in commerce, subject to the State’s regulatory power.⁴⁰

As a result, the TPP measures were not inconsistent with article 16.1 of TRIPS on the basis that they did not stop the owner of registered tobacco trademarks from preventing unauthorised use of identical or similar tobacco trademarks on identical or similar products where such use would result in a likelihood of confusion.⁴¹

The complainants were again found to have failed to demonstrate that the TPP measures were inconsistent with article 20 of TRIPS on the basis that the measures unjustifiably encumber the use of tobacco trademarks during trade.⁴² The panels used article 8 of TRIPS as one of the areas

³⁵ Panel report para 6.586.

³⁶ Panel report para 6.587.

³⁷ Anderson *op cit* note 13.

³⁸ WTO 2005, para 7.246. See too the *European Communities – Trademarks and Geographical Indications for Agricultural Products and Foodstuffs* decision.

³⁹ Anderson *op cit* note 13.

⁴⁰ *Op cit* note 31 at para 271 of the award.

⁴¹ Panel report para 7.

⁴² Panel report para 7.2029. This is supported by many academic commentators such as Bonadio, E. ‘Bans and restrictions on the use of trademarks and health’ (2014) *Intellectual Property Quarterly* at 60–82, Davison, M. & Emerton, P. ‘Rights, Privileges, legitimate interests, and justifiability: Article 20 of TRIPS and plain packaging of tobacco’ (2014) 29 *Am U Int’l L. Rev* at 505.

that could encumber trademark rights. The Appellate Body⁴³ noted that: “we agree with the Panel that encumbrances on the use of trademarks by special requirements under Article 20 may also be imposed in pursuit of public health objectives.” Davison and Emerton⁴⁴ observe that article 20 requires that encumbrances on the use of a trademark by special requirements must be justifiable. To be justifiable the encumbrance must meet an internationally recognisable legitimate government aim. Such a legitimate interest of government must be sufficient to defeat what would otherwise be the privilege of the use of a trademark. Both WTO panels found that dealing with the tobacco epidemic was sufficiently in the public health interest to justify interference with trademark rights.

In the wake of the first decision, Honduras and, subsequently, the Dominican Republic, appealed the ruling, while Indonesia and Cuba decided not to do so.⁴⁵ Ukraine suspended its case against Australia in writing. Smith et al⁴⁶ note that while the WTO dispute was between countries, that was in name only. The real claimants and appellants were the big tobacco companies which funded and provided counsel during the entire process. The American Legislative Exchange Council provided funds and counsel to several countries, including Honduras, the Dominican Republic and Ukraine to contest the legality of the TPPA in Australia.⁴⁷

In June 2020, the final remaining legal challenge to Australia’s tobacco plain packaging laws was decided in favour of Australia.⁴⁸ The WTO’s Appellate Body found that tobacco plain packaging contributed to the WHO FCTC’s objective of reducing tobacco use and exposure, that it was not more trade restrictive than necessary to achieve that public health objective, and that it did not infringe any intellectual property rights under the WTO Agreements.⁴⁹ The Appellate Body’s decision ended a decade of furious litigation against Australia’s tobacco plain packaging laws.⁵⁰ By the time of the final decision other countries had followed the Australian route of adopting plain packaging measures.⁵¹ Scollo et al see the Appellate Body’s decision as providing the impetus for other

⁴³ Appellate Body Reports, Australia – Tobacco Plain Packaging, para 6.649.

⁴⁴ Davison & Emerton op cit note 42 at 539.

⁴⁵ Rimmer op cit note 19.

⁴⁶ Smith, CN., Kraemer, JD., Johnson, AC. et al ‘Plain packaging of cigarettes: Do we have sufficient evidence?’ (2015) 8 *Risk Managing Health Policy* at 21–30.

⁴⁷ Ibid.

⁴⁸ Cohen et al op cit note 10.

⁴⁹ Para 6.649 of the report. See also Moodie, C., Scheffél, J., Gallopel-Morvan, K. et al ‘Plain packaging: Legislative differences in Australia, France, the UK, New Zealand and Norway, and options for strengthening regulations’ (2018) 28 *Tobacco Control* at 485–492.

⁵⁰ Ibid.

⁵¹ England and Norway as examples.

countries to move ahead with their own tobacco control measures.⁵² This view is supported by several other writers.⁵³

Plain packaging laws in the United Kingdom

In response to its convention obligations, the UK introduced standard tobacco packaging measures. In doing so, the UK became the second country after Australia to introduce such measures.⁵⁴ These measures, while not as drastic as the plain packaging measures in Australia, had a similar impact and were meant to achieve the same result. The Standardised Packaging of Tobacco Products Regulations of 2015 were meant to reduce the attraction and appeal of tobacco products. The law came into force in the UK on 20 May 2016.⁵⁵ The Regulations standardise the material, shape, opening and content of the packaging of ready-made cigarettes. Similar controls are applied in relation to roll-your-own (RYO) cigarettes. The Regulations also include specific prohibitions in relation to the labelling of tobacco products. The objective of the Regulations is to introduce plain or standardised packaging and, in substantial measure, to restrict the branding permitted on tobacco packaging. The Regulations achieved this end by mandating the design elements of a package. Other than standardised text as to the number of cigarettes and the producer, only the brand name and the variant of the cigarette are permitted. Permitted text must adopt a uniform presentation with a specified font, case, colour, typeface, orientation and placement identifying the brand and variant name.⁵⁶

Packaging which makes a noise, produces a smell or changes after retail sale is prohibited.⁵⁷ Some of these additional requirements came from lessons learnt after the Australian experience. After the Australian law in 2012, British tobacco companies responded with more evocative and descriptive tobacco product names, including colours to represent the previous pack colour, thereby continuing the connotations associated with these colours.⁵⁸

Litigation relating to plain packaging in the United Kingdom

Several court cases were initiated to challenge plain packaging regulations in the UK as being unlawful and contrary to the right to property of

⁵² Scollo et al op cit note 34.

⁵³ Cohen et al op cit note 10; Yadav, A., Nazar, G.P. et al 'Plain packaging of tobacco products: The logical next step for tobacco control policy in India' (2019) *BMJ Glob Health* at 3.

⁵⁴ Crosbie et al op cit note 29.

⁵⁵ Evans-Reeves, K.A., Hiscock, R., Lauber, K. et al 'Prospective longitudinal study of tobacco company adaptation to standardised packaging in the UK: Identifying circumventions and closing loopholes' (2019) *BMJ Open* 9.

⁵⁶ Arts 3, 4 and 6 of the Regulations.

⁵⁷ Schedule 2 of the Regulations.

⁵⁸ Evans-Reeves et al op cit note 54.

tobacco manufacturers. One such case was *BAT (UK) Ltd and Ors v Secretary of State for Health*.⁵⁹ In the case, four major tobacco manufacturers made applications for judicial review. The challenge was against the restriction on the ability of the tobacco companies to advertise their brands on tobacco packaging or upon tobacco products themselves. The British government's stance was that the decision by parliament to introduce the Regulations was in large measure in furtherance of the policy laid down by the WHO FCTC. The claimants challenged the Regulations as unlawful under international law, European Union law and domestic common law. They contended that under the Fundamental Charter and under domestic common law, they had a property right (their intellectual property and goodwill) which had been unlawfully expropriated from them by the Regulations without compensation. In its decision, the court accepted that their trademarks and other relevant intellectual property amount to "possessions" or "property".⁶⁰ It also accepted in principle that certain types of goodwill can also amount to a protectable interest.⁶¹ The court rejected the contention that there was any expropriation of the trademark rights. It said:

I reject the submission however that the rights have been expropriated. Title to the rights in issue remains in the hands of the tobacco companies; the Regulations curtail the use that can be made of those rights, but they are not expropriated. Indeed, the rights remain important in the hands of the tobacco companies because the word marks can still be used on packaging and will serve their traditional function as an identifier of origin. I accept that the figurative marks cannot be used in this manner, but they still have certain, admittedly very limited, vestigial uses, which the Regulations do not curtail. Further the restrictions imposed pursue a legitimate public health-based interest.⁶²

The court agreed that there was some interference with trademark rights. However, that interference was for a legitimate public health purpose.⁶³ This public interest made the interference with the trademark rights legitimate. The court observed that the case was not a case of expropriation. In particular, the right to prevent third parties from interfering with a trademark right remained in the hands of the right holder. It reasoned that no one was taking away the rights of tobacco trademark owners. The

⁵⁹ *BAT (UK) Ltd and Ors v Secretary of State for Health* [2016] EWHC 1169 (Admin). The decision can be compared with the South African case of *BAT SA v Minister of Health* (463/2011) [2012] ZASCA 107 where an attempt to challenge a tobacco advertising ban failed.

⁶⁰ Para 87.

⁶¹ Per Justice Green, paras 88 and 89 of the judgment.

⁶² Per Justice Green, paras 38 and 88 of the judgment.

⁶³ Para 36.

rights remained in the hands of the trademark owner as they were before, subject to the fact that the state had used its regulatory rights to control tobacco use.⁶⁴

In response to the argument that a trademark proprietor cannot be prevented from using a trademark at all, even when it facilitates a health epidemic, the court concluded that it is “no part of international, EU or domestic common law on intellectual property that the legitimate function of a trade mark should be defined to include a right to use the mark to harm public health”.⁶⁵ In any case, it had been decided that trademark rights grants negative rights as opposed to a positive rights to use the trademark.⁶⁶ There was no interference with the negative right.

Issues in the United Kingdom laws

Evans-Reeves et al note that some loopholes remain in respect of branded packs in the UK law. On the positive side, the UK law prohibits product names that create an erroneous impression about the health effects of certain variants. The law further requires minimum pack sizes for RYO tobacco.⁶⁷ In the Australian context, names creating an erroneous impression were prohibited by consumer law. According to Moodie et al, the current UK legislation permits the use of colour descriptors, bevelled edges on packs, and cigarette filter technology innovations.⁶⁸

A further weakness that has been noted is that some tobacco variants are exempt from the regulation. Evans-Reeves et al⁶⁹ note that cigars, cigarillos and pipe tobacco and RYO filter tips are exempt from the legislation and are still sold in branded packaging, while wholesaler multipacks are still allowed branded “outer” wraps. Beaujet et al note that the rules do not unambiguously cover all emerging products, including heated tobacco products and their devices, and e-cigarettes.⁷⁰

The provision of a long transitional period before the commencement of such laws has been identified as a weakness. Just before the cut-off date of May 2016 for branded tobacco products, tobacco companies produced great volumes of their branded products to keep branded packaging on

⁶⁴ Paras 38 and 39.

⁶⁵ Justice Green, paras 38 and 41.

⁶⁶ Evans-Reeves et al op cit note 54. See also the case of *Philip Morris Products S.A. and Abal Hermanos SA (the claimants) and Oriental Republic of Uruguay (the respondent)* (ICSID Case No. ARB/10/7). This is supported by many academic commentators such as Bonadio op cit note 12; and Davison, M. & Emerton, P. ‘Rights, privileges, legitimate interests, and justifiability: Article 20 of TRIPS and plain packaging of tobacco’ (2014) 29 *Am U Int'l L. Rev* 505.

⁶⁷ Evans-Reeves et al op cit note 54.

⁶⁸ Moodie, C., Hoek, J., Hammond, D. et al ‘Plain tobacco packaging: progress, challenges, learning and opportunities’ (2022) 31(2) *Tobacco Control* at 263–271.

⁶⁹ Evans-Reeves et al op cit note 54.

⁷⁰ European Commission, Directorate-General for Health and Food Safety, Beaujet, H., Dziejawska-Stringer, C., Nierop, P. et al. ‘Study on smoke-free environments and advertising of tobacco and related products: Final report’ (2021) Publications Office.

the market for as long as possible during the sell-through period.⁷¹ Despite these shortcomings, the UK government did a good job in regulating these aspects of tobacco labelling and advertisement in its jurisdiction.

Plain packaging in Thailand

12 September 2019 marked the regulation of plain cigarette packaging in Thailand coming into force by virtue of the Tobacco Products Control Act of 2017 (TPCA). This regulation was officially gazetted on 14 December 2018.⁷² This development made Thailand the first country in Asia and the first middle-income country to implement plain packaging.⁷³ However, this process was not smooth sailing as the law was delayed by seven years due to threats, lobbying and intimidation by big tobacco companies, with Philip Morris International and various front groups arguing that plain packaging was a violation of trademark and intellectual property rights.⁷⁴ As a precaution, the Thai government waited until a decision was rendered by the WTO Dispute Settlement Body in the Australian case.⁷⁵ When the WTO finally found in favour of plain packaging in June 2018, Thailand moved quickly. The Thai plain packaging regulation was drafted over the next few months and came into effect by September 2019.

In terms of this law, a 90-day phase-out period for old cigarette stocks was granted. After that period, all cigarettes in Thailand had to be sold in brown-coloured packs with cigarette brand names printed in a standardised font type, size, colour and location, without brand colours or logos.⁷⁶ The adoption of the new law took place in a country with 11 million smokers. According to WHO, this translated into an estimated one out of every five adult Thais.⁷⁷ Fifty percent of men in the 35–54 age group smoked. Of concern was the persistently high tobacco use among young people, in that one out of every six Thai between the ages of 13 and 17 uses tobacco.⁷⁸ Notwithstanding such evidence, Setiati and Darmawan argue that Thailand's tobacco plain packaging legislation has

⁷¹ Evans-Reeves et al op cit note 54.

⁷² Ministerial Regulations of the Ministry of Health on Plain Packaging of Cigarettes BE 2561 (2018).

⁷³ Jetly, K., Mohammed- Nawi, A., Ghazali, M. et al 'Plain packaging and pictorial warning in Asian countries: Where are we?' (2022) 12(1) *International Journal of Public Health Research*.

⁷⁴ Cohen et al op cit note 10.

⁷⁵ Moodie et al op cit note 67.

⁷⁶ Jetly et al op cit note 72.

⁷⁷ World Health Organization 'Thailand becomes first in Asia to introduce tobacco plain packaging; WHO commends efforts' (2019).

⁷⁸ Ibid.

significantly restricted the use of brand, trademark and trade dress on retail packaging.⁷⁹ Smith agrees with the view.⁸⁰

The TPCA of 2017 is the primary piece of legislation governing tobacco control in Thailand. The legislative regime makes 20 years of age the minimum age for purchasing tobacco,⁸¹ bans single stick sales and tobacco advertisements, promotion and sponsorship.⁸² The TPCA also introduces plain packaging of tobacco products which prohibits the use of logos, colours, brand images or promotional information on packaging other than brand names and product names displayed in a standard colour and font style. Plain packaging was introduced by the Ministerial Regulations of the Ministry of Health by virtue of sections 5(1) and 38(1) of the TPCA.⁸³

Article 38 of the Act controls the use of trademarks and symbols on tobacco packages. In addition to this, Thai law mandates graphic health warnings covering 85 percent of the packaging of tobacco products.⁸⁴ These measures are in line with the WHO FCTC.⁸⁵ The law bans the use of words or terms which convey attractiveness such as “mild”, “light” “cool”, “ice” and other terms with similar meaning from appearing on tobacco packages.

Enforcement of the law

The tobacco enforcement provisions in the Act are very well intentioned and robust. For example, the law is enforced at the national to local levels.⁸⁶ The composition and qualifications of the members of the control bodies clearly show that they are there to control tobacco use and not to promote it. For example, article 6 of the TPCA provides for the Minister of Public Health and their deputy and 12 other deputy ministers from diverse portfolios such as finance, commerce, justice and agriculture to be members of the body.⁸⁷ This approach has been classified by Labonte et al

⁷⁹ Setiati, M. & Darmawan, A. ‘Intellectual property rights in ASEAN: Developments and challenges case Studies in Singapore, Malaysia, Indonesia, Thailand and the Philippines’ (2016) 49 *Policy Ideas* at 1–27.

⁸⁰ Smith et al op cit note 46.

⁸¹ Art 26 of the TPCA.

⁸² Arts 27(7), 28, 30 and 31 of the TPCA.

⁸³ Plain Packaging of Cigarettes BE 2561 (2018) issued by virtue of section 5, para 1 and section 38, para 1 of the Tobacco Products Control Act BE 2560 of 2017; Mirandah, D. ‘Thailand: Plain cigarette packaging law takes effect’ (2019) *Lexicology*.

⁸⁴ Ministerial Regulations BE 2561 of 2018.

⁸⁵ See arts 11 and 13 of the WHO FCTC as read with the guidelines.

⁸⁶ See arts 6, 16 and 21 of the Tobacco Control Act. The law creates a national enforcement body, several regional bodies and a special body for the nation’s capital city to enforce the law.

⁸⁷ Art 6(3) of the TPCA.

as total government involvement.⁸⁸ Such a coordinated approach allows for easier coordination of government departments. Further, article 6(2) provides that the Minister of Public Health and their deputy are the chair and vice chairpersons of the board respectively. In addition, five specialists in the fields of medicine, health, law and children's rights are required to be part of the board.⁸⁹ In addition, civic society nominates four members engaged in the fields of public health and the rights of women and children.⁹⁰ The above composition is broad and multi-sectoral in nature thereby creating buy-in from all sectors of government and the economy. This is progressive and prevents the narrow pursuit of sectoral interests. The involvement of various specialists and the non-governmental sector enables the public's views to be considered.

The powers and duties of the board are listed in article 10 of the Act. These are as follows:

1. To propose policy and strategy relating to tobacco product control, health protection for non-smokers, and treatment and health recovery measures for persons addicted to tobacco products....
2. To establish measures for the control of tobacco products, for health protection for non-smokers, and for the treatment and recovery of persons addicted to tobacco products.
3. To advise and consult with the Minister, the Bangkok Tobacco Products Control Board, Tobacco Products Control Boards in the provinces, the government at large, government agencies, government enterprises, private organizations, and individual officials engaged in carrying out the provisions of this Act.
4. To advise and consult with the Minister.⁹¹

The article shows that the board has power to make policy and regulations dealing with tobacco control and to propose measures for the protection of non-smokers and those already suffering the effects of tobacco use. The national board also has powers to direct, advise and consult with the other boards.

Litigation related to plain packaging in Thailand

*Philip Morris (Thailand) Limited et al v Ministry of Public Health*⁹² was the first of many disputes by big tobacco manufacturers against the Thai government's move to control tobacco products. In the case, the two

⁸⁸ Labonté, R., Lencucha, R. Drope, J. et al 'The institutional context of tobacco production in Zambia' (2018) 14 *Globalization and Health* at 5–12; Delobelle op cit note 3.

⁸⁹ Art 6(4) of the TPCA.

⁹⁰ Art 6(5) of the TPCA.

⁹¹ Art 10 of the TPCA.

⁹² Black Case No. 1324/2556 of 2013.

plaintiffs (PML and JTI) challenged a requirement to include pictorial and text health warnings on tobacco packs. The Ministerial Health order required tobacco producers to display both a picture and text health warnings covering at least 85 percent of at least two of the largest surfaces of the cigarette packs and cartons.⁹³ The plaintiffs claimed it was technically impossible to comply with the law. In the lower court, JTI and PML sought and obtained an order that temporarily suspended the implementation of the pack warnings while the case was ongoing.

On appeal to the Supreme Administrative Court in *JT International (Thailand) and Anor v Minister of Public Health*,⁹⁴ the Supreme Administrative Court reversed the lower court's temporary order. The Supreme Administrative Court found that the requirements issued by the Minister were not outside the intended scope of the tobacco control law and noted that the implemented requirements were issued to "protect the people and our youth".⁹⁵ The court considered the fact that other producers had complied with the disputed regulations showing that it was not technically impossible or too difficult to do so. After the adverse appeal judgment, the two companies withdrew their court proceedings against the government.

In the *WTO Philippines v Thailand*, "Panel Report, Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines", WT/DS371/R,⁹⁶ trade-related issues triumphed over Thailand's attempts to charge higher value added tax on imported tobacco cigarettes than on locally manufactured ones. The WTO panel found the approach discriminatory and contrary to GATT 1994. The WTO panel report concluded that Thailand had acted inconsistently with GATT 1994 by subjecting imported cigarettes to more value added tax liability than that applied to domestic cigarettes and in other ways treating imported cigarettes less favourably than similar domestic cigarettes. Indeed, there was a case of unfair discrimination in the practice and the decision cannot be faulted in any way.

Zimbabwean tobacco control measures

In March 2015, Zimbabwe became the 180th party to the WHO FCTC.⁹⁷ Prior to this development, in 2002 Zimbabwe had crafted the Public Health (Control of Tobacco) Regulations, SI 164 of 2002. This statutory instrument integrated demand reduction strategies into Zimbabwean law

⁹³ The order was made in terms of the Public Health Notice on Rules, Procedures, and Conditions for the Display of Images, Warning Statements, and Contact Channels for Smoking Cessation on Cigarette Labels of 2013.

⁹⁴ Order No. 269/2557 of 2014.

⁹⁵ At 58 of the judgment.

⁹⁶ Circulated to WTO members in 2010.

⁹⁷ Ruckert, A., Ciurlia, D., Labonte, R. et al *The Political Economy of Tobacco Production and Control in Zimbabwe: A Documentary Analysis* (2022).

including health warnings, smoke-free environments⁹⁸ and the regulation of tobacco packaging. However, the regulations do not impose a total ban on tobacco advertising, nor do they impose a ban on the use of trademarks on tobacco products.

In the Zimbabwean context, tobacco production and tobacco exports contribute significantly to employment and foreign currency earnings.⁹⁹ As a result of tobacco's status as a major foreign currency earner, tobacco is nationally referred to as the "the green gold" of Zimbabwe. On this basis, the Zimbabwean government regard tobacco production¹⁰⁰ as a key industry which must be supported.

The Zimbabwean tobacco control legal framework

Section 8(5) of the regulations provides that trademarks, logos or other identifiable associated features of tobacco product packaging may not be used except where the product itself is identified and promoted, with the appropriate health warnings. This means that trademarks of tobacco products are prohibited from being used without the required health warnings. Tobacco advertising is still permitted in Zimbabwe in terms of the Public Health (Control of Tobacco) Regulations SI 264 of 2002 (hereinafter referred to as "SI 164 of 2002"). The only control placed on advertising is provided by section 7 which requires that tobacco products must carry mandatory health messages. Section 7 provides that tobacco products shall be sold or distributed in a container on which is prominently displayed messages that:

- a. Smoking is harmful to health – for cigarettes, cigars and loose tobacco.
- b. Smoking causes cancer- for nasal and oral snuff: or
- c. Tobacco is addictive – for sinus tobacco.

Advertising, promotion or commending the use of tobacco without the health message is a crime in terms of section 7(2). However, this requirement does not go far enough. In Botswana, for example, the Control of Smoking Act¹⁰¹ totally prohibits tobacco promotion and advertising.¹⁰² Neither direct nor indirect advertising of tobacco products is permitted

⁹⁸ See, for example, s 8(5) of SI 164 of 2002.

⁹⁹ Lown, E.A., McDaniel, P.A. & Malone, R.E. "Tobacco is "our industry and we must support it": Exploring the potential implications of Zimbabwe's accession to the Framework Convention on Tobacco Control, Globalization and Health" at 13-19; Rusere, C.Y. *Tobacco control in Zimbabwe and the WHO Framework Convention on Tobacco Control (WHO FCTC): State of affairs* (unpublished Master's thesis, University of Cape Town, 2019).

¹⁰⁰ Lown et al op cit note 98.

¹⁰¹ Control of Smoking Act of 1992.

¹⁰² Ibid. See too Mbongwe, B. Country report on tobacco advertising and promotion ban – Botswana, UCSF WHO Tobacco Control Papers (2004).

in Botswana. As a result of the law, in Botswana all tobacco billboards were removed, and no advertising is allowed in the print media, or on radio or television. The same position prevails in South Africa through the Tobacco Products Control Act 83 of 1993. Legal challenges in South Africa against the advertising ban failed.¹⁰³

The Zimbabwean law specifies that text health warnings must cover a minimum of 15 percent and up to 30 percent of the front of the package. Compared to other jurisdictions, the 15 percent coverage restricted to health warnings is too low. The WHO FCTC through art 11 requires a minimum of 50 percent of the surface area of the tobacco product. In Thailand, for example, the law requires that 85 percent of the package's largest surface area must be used for health warnings which must be in pictorial format.¹⁰⁴ In addition, article 30 of the TPCA imposes a total ban on tobacco advertising in Thailand.¹⁰⁵ In Uruguay, 80 percent of the front and back of the package must be left open for health warnings. In the UK, 65 percent is restricted for that purpose.

Unlike in Thailand,¹⁰⁶ there is no requirement for pictorial warnings nor is there a total ban on all forms of tobacco advertising in Zimbabwe. In the final analysis, these provisions are limited in scope. In many countries in the region and beyond, such as Botswana, South Africa, France, the UK, Australia and Thailand any form of tobacco advertising and promotion is prohibited.¹⁰⁷

Enforcement of the law

In terms of section 11 of the regulations, medical officers, environmental health officers and environmental technicians employed by the Ministry Health and Childcare or by any local authorities have the duty to enforce the law. Further, any police officer or any other person generally authorised by the Minister or by the local authority may carry out inspections and ensure that the provisions of these regulations are complied with. Enforcement of the regulations is also carried out by way of criminal penalties. Section 17 provides that any contravention of sections 3, 4, 5, 6 or 7 attracts a criminal penalty. Those found guilty of an offence are liable to a level-four fine or imprisonment for a period not exceeding six months or to both such fine and such imprisonment.¹⁰⁸

¹⁰³ In *BAT SA v Minister of Health* (463/2011) [2012] ZASCA 107.

¹⁰⁴ This is required in terms of the Thailand Ministerial Regulations BE 2561 of 2018.

¹⁰⁵ See also the dispute in *Philip Morris (Thailand) Limited et al v Ministry of Public Health*, Central Administrative Court (2013).

¹⁰⁶ Jetly et al op cit note 72.

¹⁰⁷ See, for example, s 3(l)(a) of the Tobacco Products Control Act 83 of 1993, South Africa; *British American Tobacco SA v Minister of Health* (463/2011) [2012] ZASCA 107.

¹⁰⁸ See, for example, Munguma, C. 'Criminal enforcement of intellectual property in Zimbabwe' (2019) *AJIP* for an analysis of the role of criminal penalties for breach of intellectual property laws. As of July 2023, the fine was only equivalent to USD25.

Rusere notes that there is poor enforcement of the country's existing tobacco-control regulations.¹⁰⁹ Lown et al attribute this lax approach to inadequate financial and human resources and a lack of government staff to drive tobacco-control efforts.¹¹⁰ The influence of the tobacco industry and its interference in control matters have also been pinpointed as posing a significant challenge to the effective implementation of a tobacco control policy.¹¹¹ An alliance between the government and the tobacco industry has also been blamed for the poor enforcement of tobacco control rules in Zimbabwe. Ruckert et al note that the Zimbabwean government regards the tobacco industry as a key industry and works hand in hand with the industry to the extent of getting loans from it.¹¹²

Another weakness is that the law does not provide for any administrative or civil penalties for the contravention of tobacco control laws. An administrative penalty for contraventions, such as the withdrawal of an operating licence for a defined period or suspension from dealing in tobacco products for a defined period may serve as a deterrent in some cases. Such a remedy may be a better deterrent as it has the threat to take away the livelihood of the errant business operator.

One important feature of SI 164 of 2002 is the creation of a Tobacco Control Committee in terms of section 12 of the statutory instrument. Thailand, Botswana, South Africa and Australia have similar committees.¹¹³ The committee is made up of 12 members appointed by the Minister of Health and Childcare. Of these members, three are appointed to represent health workers (doctors), one to represent health workers in private practice, and one to represent voluntary associations engaged in activities associated with the tobacco industry. A further three are appointed to represent manufacturers and distributors of tobacco products. In addition, there is one member to represent tobacco growers,¹¹⁴ one appointed to represent the Ministry of Industry and International Trade and, finally, one to represent the Ministry of Lands, Agriculture and Rural Resettlement. A representative of the Consumer Council of Zimbabwe is the final appointee to the committee. Members of the committee are appointed for a period of three years but may be removed earlier with just cause.

The functions of the committee are generally advisory in nature.¹¹⁵ Section 13 provides that the committee shall advise the minister on policies for the protection of youth from smoking; and for the development of

¹⁰⁹ Rusere, C.Y. 'Tobacco control in Zimbabwe and the WHO Framework Convention on Tobacco Control (WHO FCTC): State of Affairs' (Master's thesis, University of Cape Town, 2019).

¹¹⁰ Lown et al op cit note 98.

¹¹¹ Lown et al op cit note 98; Ruckert et al op cit note 96.

¹¹² Ruckert et al op cit note 96.

¹¹³ See, for example, Botswana's Control of Smoking Act of 1992, art 6 of Thailand's Tobacco Prevention and Control Act of 2018 and the Tobacco Products Control Act 83 of 1993, South Africa.

¹¹⁴ See ss 12(1)(a)–12(1)(f) of the regulations.

¹¹⁵ Section 13 of the regulations.

informative and educational materials in respect of the protection of youth from smoking. It also advises on the general policy to be adopted in relation to tobacco control. The committee also monitors the enforcement of the regulations and carries out research on matters relating to tobacco control. The committee is required to carry out examinations of products and to screen informative and educational materials and warnings in terms of sections 7, 8 and 11 of the regulations.

The challenges of the Zimbabwean national framework

One major weakness of the enforcement mechanism in the regulations is that the penalties are not a strong enough deterrent.¹¹⁶ The law provides a level-four penalty. This penalty cannot by any standard be said to be deterrent. It is also not in line with the WHO FTC framework which calls for penalties that will lead to a reduction in tobacco usage. The penalties provided do not consider the health impact of contravening the law. The WHO FCTC sets out both criminal and civil liability provisions in art 19(1), which include compensation where appropriate. Unfortunately, the Zimbabwean regulations do not provide for any civil remedies at all.

Section 10 of the regulations allows the minister to exempt anyone from the application of sections 3 and 4 of the regulations, upon an application being made to them. With respect to the drafters of the law, there is no justification why any person or business should be exempted from complying with the demands of this type of law. It must be remembered that this law is meant to protect the public health of society. To then give the minister, a politician, the power to exempt certain players from the ambit of the law sounds unfair. No such discretion should have been given to the minister. In the circumstances it is urged that this power should be removed from the law.

The composition of the committee is skewed in favour of tobacco producer interests and health personnel. There is no representation from the Ministry of Justice which holds the general responsibility for law in Zimbabwe, neither is there any wider representation for the people of Zimbabwe. Several key ministries and stakeholders are left out the committee. There is no adoption of the “total government” approach in the membership of the committee as is seen in the Thai context where over 12 ministries are included in the national tobacco control body. In Zimbabwe, only fragmented and heavily conflicted departments such as agriculture and tobacco manufacturers are included,¹¹⁷ to the exclusion of any representation from the departments of finance, justice and home affairs; the latter is responsible for the police. Since the police act as

¹¹⁶ In 2023, a level-four fine was pegged at USD100 in terms of the Criminal Law Codification and Reform (Standard Scale of Fines) Notice, 2023.

¹¹⁷ Rusere op cit note 108; Ruckert et al op cit note 96.

enforcement officers in terms of Zimbabwean law,¹¹⁸ the Minister of Home Affairs or a representative from the ministry would have been a sound inclusion in the committee.

Another major challenge is the absence of a sitting Tobacco Control Committee in Zimbabwe.¹¹⁹ This is because the minister has not appointed the committee. This has meant there is a disconnect between the requirements of the law and the situation on the ground. Without the committee, there is no effective enforcement of the law and effective tobacco control in the country.

Conclusion

The approaches adopted by Australia, the UK and Thailand offer valuable lessons for developing countries, in general, and for Zimbabwe, in particular, in their tobacco control efforts. These countries have adopted plain packaging rules to deal with tobacco usage. Through these measures, trademarks, misleading words, words that create erroneous impressions and unregulated content are proscribed from tobacco products packaging. Instead, the packages are supposed to be plain and contain regulated content such as health warnings which may be in the form of text, graphics or pictorial warnings. It must be noted that plain packaging is an additional measure to the requirements of articles 11 and 13 of the WHO FCTC. In short, plain packaging measures exceed the requirements of articles 11 and 13 of the WHO FCTC. Before adopting the extra measures required by plain packaging, Zimbabwe should first comply with the WHO FCTC minimum provisions. These include the prevention of misleading statements on tobacco products, such as “low tar”, “soft”, “mild” or those that create erroneous impressions or health benefits of tobacco product brands.

Second, there is a need to meet the WHO FCTC minimum surface area coverage for health warnings on tobacco products. The minimum is set at 50 percent of the surface area and the coverage of the reviewed countries ranges from 65 to 85 percent. This gives the health message prominence and carries with it adequate warning to consumers. Zimbabwe provides for only 30 percent of the face of the cigarette pack which is too low. The message must be clear and categorical that smoking is harmful and may even lead to death.

Third, to be effective the messages need to take several forms, including pictures and graphic warnings and not just text. Pictures and graphic warnings make a lasting impression compared to text only. Pictorial warnings are easily understandable even by a person who is illiterate. Fourth, it is imperative to impose tobacco advertising and promotion bans

¹¹⁸ Section 17 of the 2002 instrument.

¹¹⁹ Ruckert et al op cit note 96.

in respect of all forms of media. This would require a complete ban on all such advertisements in the media, on the radio, television, the internet, in social media, on billboards and so on. The current approach in Zimbabwe, which, for example, allows all forms of promotion and advertisement is unsatisfactory. Fifth, section 10 of SI 104 of 2002 which permits the minister to exempt some persons from the provisions of the law should be completely removed. Finally, the Tobacco Control Committee needs to be constituted by the authorities if tobacco control is to be taken seriously in Zimbabwe. A situation where key offices created by the law are vacant creates a major challenge for the governance and enforcement of tobacco control.

Finally, as a long-term measure Zimbabwe may consider adopting plain packaging of tobacco products as a way of reducing the appeal of tobacco products to the youth and other members of the population.

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The *Journal of Comparative Law in Africa* (JCLA) aims to promote indigenous African scholarship. It targets researchers, practitioners, and policy makers interested in theories and practice of law in Africa.

The JCLA primarily seeks to publish rigorous research in the field of comparative law in Africa and for this purpose, comparative law is broadly defined to cover public and private law involving more than one jurisdiction.

The JCLA will consider for publication, case studies, empirical findings, and review papers using comparative approaches, methodologies, and viewpoints. Manuscripts without a clear comparative focus will only be accepted if they are significant for broadening understanding of law in Africa.

Rigorous research is understood as work which *expands human knowledge on a subject by presenting original data or introducing new techniques or theories, or by blending, refuting, or contrasting existing ideas in a convincing manner.*

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Manuscripts must be written in standard academic format. One or more members of the JCLA editorial board, consisting of senior researchers conducts an initial review of manuscripts to determine suitability for peer review. The JCLA employs a double-blind peer review system. Since neither authors nor reviewers are identified in the review process, authors are encouraged not to use personal identifiers which cannot be removed from the manuscript such as details in document properties.

Authors are notified officially by the editor if their article is accepted for peer review and publication. Articles returned from peer review are sent to the editorial board for decisions. Authors are required to address reviewers' comments and respond to any issues flagged by the editorial board. Sometimes peer review results may indicate that a manuscript be revised and resubmitted for further review. The decision whether or not to comply with such a recommendation lies with the author.

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All manuscripts submitted to the JCLA must adhere to the specifications and general guidelines below. Article length must be between 8 000–12 000 words, inclusive of footnotes, and must be submitted with an abstract of 100–250 words. Notes and Comments on recent developments such as new judgments and legislation must be between 3 000–5 000 words, inclusive of footnotes. Book reviews must not exceed 2 000 words. Manuscripts that do not comply with these rules may be rejected by the editorial board and will then not proceed to peer review.

- By submitting a manuscript to the JCLA, the author agrees that:
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STYLE GUIDE

The JCLA recommends the use of the *South African Law Journal* (SALJ) style guide, summarised in the following guidelines:

i. General Format

Article Structure	Generally, manuscripts should include an introduction, problem statement, literature review, research design/methodology, findings (results analysis), and recommendations/conclusion.
Title	This should be succinctly worded.
Abstract	The abstract sets out objectives, research design and methods, main results and findings, conclusion and contribution to the body of knowledge.
Keywords	Five to eight words covering the principal themes and geographic focus of the paper.

Item	Description
Title page	This must contain the full title of the paper, full names, affiliation, address and contact information of all authors. Corresponding author should be marked with an asterisk (*).
Body	Appropriate headings and subheadings to be used to segment the manuscript for enhanced readability.
Length	The manuscript length, including abstract and footnotes, but excluding bibliography, must be no less than 8 000 and no more than 12 000 words.
Headings: style	Times New Roman 12, Bold, Justified, 1.5 spacing, Sentence case.
Headings: numbering	Headings and subheadings not to be numbered.
Footnotes	Times New Roman 10, Justified. Endnotes must not be used for reference, clarification or any other purpose.
Tables and figures: placement	Tables and figures to be applied in the text, as close as possible to the appropriate discussion.
Tables and figures: numbering	Tables and figures to be numbered consecutively in Arabic numerals (i, ii, iii, iv v, etc).

Item	Description
Tables and figures: titles	Place titles of tables and figures outside and above the actual table or figure.
Tables and Figures: Captions	Table and figure captions should be placed above the table, and sources below the figure or table.
Bibliography	All publications cited in the text are to be included in the list of references. Authors must ensure that the spelling of names and dates in the text match the corresponding entries in the list of references.
Referencing style	The JCLA uses the <i>South African Law Journal</i> referencing style, accessible at https://www.jutajournals.co.za/wp-content/uploads/2020/09/JCLA_2019_Style-Guide.pdf .
Citations	Use of recent publications is encouraged.
Quotations	Indented and no quotation marks if there are 30 words or more.
Quotation marks	Use double quotation marks (single if quoting within a quote).
En dashes	Use for pages ranges, etc (typed by pressing the CTRL and minus sign key simultaneously, leaving no spaces around it) eg 2000–2001.
Numbers	Use words for numbers one to ten; thereafter use numerals. Use spaces not commas between hundreds, thousands and millions, eg 1 000 and 1 000 000, not 1,000 and 1,000,000. Use a decimal point for numbers, not comma, eg 2.5 not 2,5.

ii. Language Guide

Item	Description
Prescribed Language	Ensure UK English or SA English is selected in spell check.
Common Errors	<p>Language and spelling</p> <p>Among (not amongst); while (not whilst)</p> <p>Data – must be treated as a collective noun with singular verb eg “The data shows ...”, not “the data show ...”</p> <p>Human resource management (not resources)</p> <p>UK (for the United Kingdom)</p> <p>USA (for the United States of America).</p>

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