

**MCCABE
CENTRE
FOR LAW & CANCER**



Overview

- Plain packaging
- Trans-Pacific Partnership Agreement
- WHO FCTC

Plain packaging - timeline

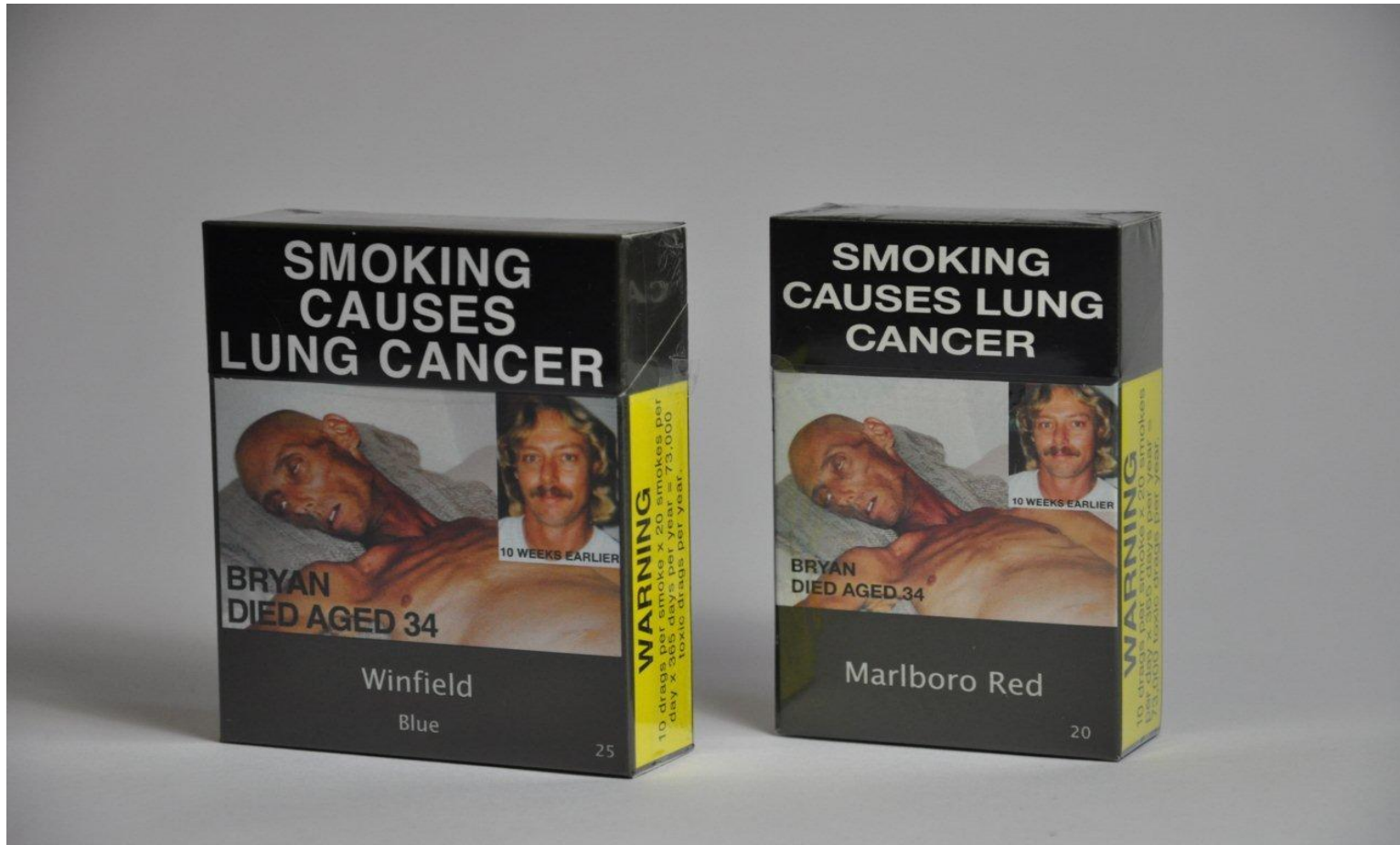
- first proposed 1986 ...
- announced April 2010
- legislated November 2011
- upheld by High Court August 2012
- full implementation 1 December 2012
 - sky has not fallen in
- ongoing international challenges

Plain packaging

- no logos, brand imagery, symbols, other images, colours or promotional text on tobacco products or tobacco product packaging
- brand and product name in a standard colour, position, font size and style
- packaging must be a standard drab dark brown colour in matt finish
- standardization of the packaging (material, size, shape)

But far from plain

- graphic health warnings required on 75% of the front and 90% of the back of tobacco packaging
 - ‘standardized packaging’ might be a better term



Australia's no. 1 brand, Winfield and World's no. 1 brand, Marlboro, in plain packaging

Source: Quit Victoria collection, packs purchased Melbourne 29 November 2012



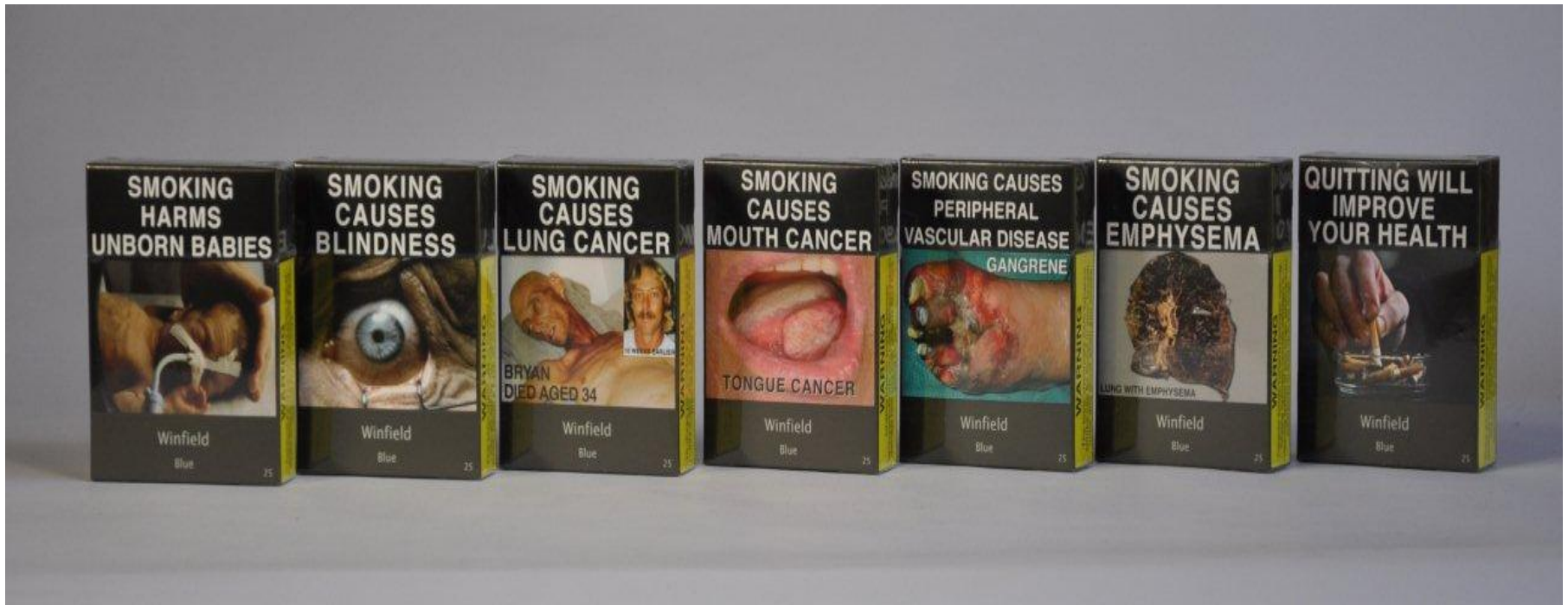
Marlboro packs from the late 1980s, late 1990s, late 2000s and December 2012

Source: Quit Victoria collection



Winfield packs from the late 1980s, late 1990s, late 2000s and December 2012

Source: Quit Victoria collection



Winfield Blue 25s with each of the 7 rotating health warnings required under Part 3 of the 2012 Standard

Source: Quit Victoria collection, 7 further warnings required under Part 4 from August 2013



2010-2011

The Parliament of the
Commonwealth of Australia

HOUSE OF REPRESENTATIVES

Tobacco Plain Packaging Bill 2011

No. , 2011

(Health and Ageing)

A Bill for an Act to discourage the use of tobacco products, and for related purposes

3 Objects of this Act

- (1) The objects of this Act are:
 - (a) to improve public health by:
 - (i) discouraging people from taking up smoking, or using tobacco products; and
 - (ii) encouraging people to give up smoking, and to stop using tobacco products; and
 - (iii) discouraging people who have given up smoking, or who have stopped using tobacco products, from relapsing; and
 - (iv) reducing people's exposure to smoke from tobacco products, and
 - (b) to give effect to certain obligations that Australia has as a party to the Convention on Tobacco Control.

- (2) It is the intention of the Parliament to contribute to achieving the objects in subsection (1) by regulating the retail packaging and appearance of tobacco products in order to:
 - (a) reduce the appeal of tobacco products to consumers; and
 - (b) increase the effectiveness of health warnings on the retail packaging of tobacco products; and
 - (c) reduce the ability of the retail packaging of tobacco products to mislead consumers about the harmful effects of smoking or using tobacco products.

Tobacco industry not all that
happy ...

FOI assault

- industry unleashes freedom of Information assault on government
 - tying up government resources
 - increasing the pressure on government and department
 - searching for ‘embarrassing’ material

New retailer association

- Alliance of Australian Retailers established
 - BAT \$2.2M
 - PMA \$2.1M
 - ITA \$1M
- TV and radio advertisements saying plain packaging won't work AND will damage their businesses

Main industry arguments

- won't work
- will result in increased serving time
- nanny state out of control
- will result in increase in illicit trade
- will violate the Constitution
- will violate Australia's international obligations

WHERE'S THE PROOF?



The Government has no real evidence to support its tobacco plain packaging plans.

It is an idea unproven anywhere in the world. So why is our Government pushing ahead with a Bill that could cost them millions to implement and defend?

The UK Government recently stated it would need "evidence to demonstrate that plain packaging would have an additional public health benefit" before considering legislation.

Why is Australia any different?

**Don't let the taxpayer
foot the bill for a bad Bill**
PlainPack.com

British American Tobacco
Australia Limited

Authorised by B. O'Connell for British American Tobacco
Australia, Westfield Drive, Eastgardens, Sydney, NSW

WHAT COMPANY WOULD STAND FOR THIS?



The Tobacco Plain Packaging Bill could destroy brands that are worth millions, if not billions, of dollars.

No company would stand for having its brands taken away and we're no different. And it may infringe international trademark and intellectual property law.

The Government could also end up spending millions in legal fees defending an idea unproven anywhere in the world.

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PlainPack.com

British American Tobacco
Australia Limited

Don't let the taxpayer foot the bill for a bad Bill

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Search

Plain Packaging – Intellectual Property

Our branding is our intellectual property. Taking away our branding may infringe international copyright and intellectual property law.

- Many Governments around the world have investigated plain packaging, but it has never been implemented anywhere.
- It's a serious concern when a Government announces legislation but cannot provide any proof to back it up.
- Plain packaging infringes the rights of tobacco companies.
- With any attempt to introduce plain packaging, as a legal business we will defend our intellectual property and our right to compete as a legitimate business selling a legal product.
- If that requires us to take legal action, then we will do so.
- Like with any product, our branding allows consumers to differentiate between us and our competitors. Cigarettes are a legal product, and adult consumers, aware of the risks, should have the right to choose the brand they want.
- No company would stand for having its brands stripped away from them. Why would we be any different?



British American Tobacco Australia has made various requests of Government departments and bodies under Freedom of Information legislation for documents relating to issues surrounding the proposed tobacco plain packaging legislation. [Click here](#) to view an FOI from IP Australia.

Watch David Crow, CEO of British American Tobacco Australia talk about [defending the business](#)



Follow [@BATA_Media](#) on twitter to receive real time updates on British American Tobacco Australia's response to the Tobacco Plain Packaging Bill 2011.

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Latest media release

[Click here](#) to view our latest media release.

Plain Packaging – Compensation

There could be many costly unintended consequences of the **Plain Tobacco Packaging Bill**, and Australian taxpayers may have to foot the bill.

- We have an obligation to protect our intellectual property on behalf of our shareholders
- Our brand and our packaging identity are our intellectual property.
- Taking away our branding may infringe international trademark and intellectual property law.
- The Government plans to spend millions of dollars in legal fees defending the Bill.
- The Government could be forced to pay billions of dollars compensation to tobacco companies for taking away their intellectual property.
- Australian taxpayers will bear the brunt of a Government decision unproven anywhere in the world.

Watch David Crow, CEO of British American Tobacco Australia talk about compensation.



Follow [@BATA_Media](#) on twitter to receive real time updates on British American Tobacco Australia's response to the Tobacco Plain Packaging Bill 2011.

For consumers

Sustainable Business Partners

Marketing

Youth smoking prevention

Public place smoking

Trade Marketing and Distribution

Tobacco

Regulation

Tobacco

Illicit

Home > Consumers and trade > Illicit trade in Australia

Illicit trade in Australia

The trade in illegal tobacco has grown in response to increasing taxation and the consequent price rises for tobacco products.



The market size of illegal tobacco in Australia is equivalent to 13.4% of the legal market and a loss of close to \$1 billion in tobacco excise. Download the full report below.

How does it affect me?

A total of 407,000 kilograms was estimated to be consumed in 2011 compared to an estimated 116,000 kilograms in 2010. Counterfeit cigarettes are fake and are not produced by criminals instead of legal tobacco manufacturers. Contraband cigarettes on the other hand are counterfeit or genuine packs but have been smuggled into the country and tobacco excise has not been paid on them.

An estimated 100,000 counterfeit cigarettes were seized by the Australian Customs and Border Protection Service.

The market size of illegal tobacco in Australia is equivalent to 13.4% of the legal market and a loss of close to \$1 billion in tobacco excise. Download the full report below.

 - 2011 illegal tobacco report by Deloitte (2.525 kb) 

To assist the industry and authorities to deal with the rapid growth of illegal tobacco in Australia the tobacco industry developed a website which outlines the size and scope of the problem in each electorate.

The website ranks all electorates, shows the excise lost and the amount of illegal tobacco sold in each area as well as further information on the issue.

Visit www.illegaltobacco.com.au  to find out the scale of the problem in an Australian electorate you are interested in.

Naturally, British American Tobacco Australia has a commercial interest in protecting our market share and sales volume; however, we are equally committed to safeguarding the interests of other affected stakeholders including suppliers, government, law-abiding retailers, consumers and the broader community.

We are working with these stakeholders to ensure that we are doing everything possible to reduce the current illegal activity and prevent any increase in the future.

WHO Protocol

The World Health Organisation is drafting an Illicit Trade Protocol as part of its Framework Convention on Tobacco Control (FCTC). British American Tobacco, which for many years has used its expertise and knowledge of the tobacco supply chain to help governments and law-enforcers combat illicit trade, supports the measures they wish to include.

You can read more about British American Tobacco's views on the Protocol on bat.com 

Source

(1) Australian Crime Commission, 2011, Organised Crime in Australia 2011, p90.

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Page last updated: 02/09/2012 12:22:52 GMT

Welcome to ITMAC

Press Releases

Submissions

Information Leaflets

Legislation Downloads

Whiff Trade

What is it?

What is the problem?

How does this affect you?

How can we help?

Price Comparison of cigarettes in Europe

Irish Total Cigarette Market

Revenue Tobacco Seizure Rates

Revenue Losses From Non Irish Duty Paid Tobacco

Useful Links

Contact Us

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Tel: +353 1 952 3600
e-mail: info@itmac.ie
Media Enquiries: +353 1 952 3744

Great day for Irish Criminals as Tobacco Smuggling receives huge boost

The illegal tobacco industry has received a huge boost today as Minister Reilly announced his intention to make Ireland only the second country in the world to adopt plain packaging for tobacco products. The proposed legislation will make all packs look the same ensuring tobacco counterfeiters will be able to produce all brands of illegal cigarettes with greater ease and at a lower cost for the black marketers.

A spokesperson for the Irish Tobacco Manufacturers Advisory Committee said, "Ireland is very much in the grip of the illegal tobacco trade, this proposed legislation will only make it easier for criminals to reproduce counterfeit packs, saving them time and resources. Ireland would become only the second country in the world to adopt this after Australia, but the massive difference is the rate of non duty paid cigarettes in Australia is just 3% whereas in Ireland one-in-every-four (28%) cigarettes smoked in Ireland is non Irish duty paid. All of this and no research to prove it will have any impact at all is only going to prove more enticing for smugglers."

"Ireland is already a haven for illegal tobacco smugglers and sellers and this legislation will simply increase the appeal of the market to international crime gangs. Packs which are

criminals to reproduce counterfeit packs, saving them time and resources. Ireland would become only the second country in the world to adopt this after Australia, but the massive difference is the rate of non duty paid cigarettes in Australia is just 3% whereas in Ireland one-in-every-four (28%) cigarettes smoked in Ireland is non Irish duty paid. All of this and no

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Irish Tobacco Regulation vs Tobacco Consumption*

- 2005 - Tobacco consumption in Ireland - 29%
- 2007 - Ban on sale of 10 pack of cigarettes
- 2008 - Dual health warnings introduced on packs
- 2008 - Tobacco consumption in Ireland - 31%
- 2009 - In-store ban on advertising, display ban, sponsorship ban, vending restrictions
- 2011 - Tobacco consumption in Ireland - 29%
- 2012 - Graphic health warnings introduced
- 2012 - Tobacco consumption rate - 28%

*Figures compiled from the EU Eurobarometer Survey

Ends

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RTÉ ONE

15.9%
illegal

RTÉ.ie



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foot the bill for a bad Bill**

PlainPack.com

MEDIA RELEASE

Thursday, 10 November 2011

Plain packaging now heads to High Court

British American Tobacco Australia (BATA) confirmed it will commence proceedings in the High Court against the Federal Government immediately after plain packaging gains Royal Assent, if the legislation passes through the Senate today.

BATA believes it is unconstitutional for the Federal Government to remove a legal company's valuable property without compensation and feels the High Court will agree.

The result of BATA's legal challenges could force Minister Roxon to pay tobacco companies billions of dollars for the removal of trademarks, brands and pack space. She will then pay a much higher price for an increase in smoking rates and a huge growth in the illegal cigarette black market.

BATA spokesperson Scott McIntyre said it is no secret that legal experts believe the Federal Government is on shaky legal ground with plain packaging.

JT International SA v Commonwealth of Australia
British American Tobacco Australasia Limited v The Commonwealth
[2012] HCA 43

Date of Order: 15 August 2012

Date of Publication of Reasons: 5 October 2012

S409/2011 & S389/2011

ORDER

Matter No S409/2011

- 1. The demurrer by the plaintiff to the defence of the defendant be overruled.*
- 2. Judgment be entered in the action for the defendant.*
- 3. The plaintiff pay the defendant's costs in this action, including the demurrer.*



TANDBERG

MY CLIENT'S BUSINESS WILL DIE
A PAINFUL AND LINGERING DEATH
AND HE DESERVES COMPENSATION!



OUR CUSTOMERS HAVE A RIGHT
TO DIE WITH A COLOURFUL
PACKAGE IN THEIR HAND!

High Court decision

- ‘A majority of the Court held that to engage s 51(xxxi) an acquisition must involve the accrual to some person of a proprietary benefit or interest. Although the Act regulated the plaintiffs' intellectual property 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. As a result, neither the Commonwealth nor any other person acquired any property and s 51(xxxi) was not engaged.’
 - 6-1 victory to the Government

High Court decision

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 - 6-1 victory to the Government

High Court's reasons

- Justices Hayne and Bell
 - requirements of the Act 'are no different in kind from any legislation that requires labels that warn against the use or misuse of a product, or tell the reader who to call or what to do if there has been a dangerous use of a product. Legislation that requires warning labels to be placed on products, even warning labels as extensive as those required by the TPP Act, effects no acquisition of property.'

Themes / narratives in reasoning

- the relevant rights of the tobacco companies were ‘negative rights’
 - ie rights to exclude others, rather than positive rights to use
- tobacco companies may have lost something of commercial value but commercial value is not the object of constitutional protection

Themes / narratives in reasoning

- regulatory scheme no different in kind from other legislation requiring health or safety warnings
- requirements of the scheme are conditions on the sale of tobacco products – the Cth does not use tobacco packaging or tobacco products

Themes / narratives in reasoning

- the scheme allows the continued use of brand names (including trademarked brand names) – the ability to use such names is valuable
- intellectual property rights are created to serve public purposes, but they are not sacrosanct and they do not operate above or in isolation from other laws created to serve other public purposes

Dissenting judgment

- ‘After a "great" constitutional case, the tumult and the shouting dies. The captains and the kings depart. Or at least the captains do; the Queen in Parliament remains forever. Solicitors-General go. New Solicitors-General come. This world is transitory. But some things never change. The flame of the Commonwealth's hatred for that beneficial constitutional guarantee, s 51(xxxi), may flicker, but it will not die. That is why it is eternally important to ensure that that flame does not start a destructive blaze.’
(Justice Heydon)



Evaluation under way

Wakefield et al

- compared with branded pack smokers, those smoking from plain packs:
 - perceived their cigarettes to be of lower quality
 - tended to see cigarettes as less satisfying than a year ago

Evaluation under way

Wakefield et al

- compared with branded pack smokers, those smoking from plain packs:
 - more likely to have thought about quitting at least once a day in the past week
 - more likely to rate quitting as a higher priority in their lives

Why did it happen?

1. Political leadership



Why did it happen?

2. Whole-of-government engagement



Australia's landmark tobacco packaging laws face world trade challenge

LATASH YAGGER, The Australian, April 26, 2012 2:22PM

Trade Minister Craig Emerson said Australia was prepared to defend any challenge to its laws.

"The government is pursuing tobacco plain packaging as a public health measure and is confident that this is consistent with Australia's WTO obligations. The measure is not anti-trade; it is anti-cancer.

"The government has consistently engaged with WTO members with regard to plain-packaging, and will participate in consultations in a constructive manner."

Attorney General Nicola Roxon is ready for a fight over plain tobacco packaging laws. Source: The Courier-Mail

THE Gillard government's plain packaging tobacco laws have been challenged by Honduras and the Ukraine, who have both lodged official complaints with the World Trade Organisation.

As tobacco companies prepare to fight the government's legislation in the High Court later this month, the WTO said two separate disputes had been filed against Australia over the move.

Australia's landmark legislation will from December 1 force all cigarettes to be sold in standardised packets with no company logos.

Both tobacco exporters, Honduras and the Ukraine complain the Australian laws are an unnecessary obstacle to trade.

In a statement, the peak trade body said Honduras made an official complaint about plain packaging on Wednesday following a similar move by the Ukraine last month.

The WTO said both nations had "requested consultations with Australia under the dispute settlement system".

"The argument is unsustainable," the commonwealth said.

"What an owner gains by registration of a trademark is relatively no more than a monopoly right to exclude others from using the mark without the owner's authority."

The submissions rebuked British American Tobacco Australia for downplaying the harm of tobacco.

Trade Minister Craig Emerson said Australia was prepared to defend any challenge to its laws.

"The government is pursuing tobacco plain packaging as a public health measure and is confident that this is consistent with Australia's WTO obligations. The measure is not anti-trade; it is anti-cancer.

"The government has consistently engaged with WTO members with regard to plain-packaging, and will participate in consultations in a constructive manner."



Gillard commits to full term
Julie Gillard commits to serving a full term after the September federal election.

27 May 2012 Sky News

Live with Sam To be in place in week
27 May 2012 1:53

Gaming critics urge transparency from PIR
26 May 2012 2:15

Garnett doesn't expect federal win
26 May 2012 2:01

Government in office
Location: Sydney, ACT
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Why did it happen?

3. Sound research base
4. Strong legal capacity

Why did it happen?

5. Civil society advocacy

6. 40+ years of tobacco control

Why did it happen?

7. Decades of tobacco industry denormalization

8. Public support

Plainly, the public backs smokes plan

CAMERON HOUSTON
JILL STARK

SMOKING: Plain pack support

THE majority of Australians support the introduction of plain cigarette packets, with only about a quarter opposing the plan, a new survey shows. Commissioned by the Cancer Council, the Newspoll telephone survey of 1200 people found almost 59 per cent approved of the Federal Government's push for plain cigarette packaging. About 24 per cent disapproved of the measure.

Plain packs backed

Brittany Stack

THE fight between big tobacco

Government faces an uphill battle to convince the Coalition to support its legislation, which

THE majority of Australians support the introduction of plain cigarette packets, with only about a quarter opposing the plan, a new survey shows.

Commissioned by the Cancer Council, the Newspoll telephone survey of 1200 people found almost 59 per cent approved of the Federal Government's push for plain cigarette packaging.

Almost a quarter (24 per cent) of respondents disapproved of the measure.

Cancer Council spokeswoman Caroline Miller said plain cigarette packets were backed by the



SUPPORT: Example of the plain cigarette packaging

she said. "The evidence is there, the community support is there and the desperate campaign being waged by the tobacco industry is further indication that it should work."

Labor wants to introduce plain packaging for all cigarettes from mid-2012, but the Opposition is yet to declare whether

science and the public. "From what we know now, there is no valid

er it will support the move.

AAP

Why did it happen?

9. FCTC

Ongoing legal challenges

- World Trade Organization
 - State-to-State dispute settlement
 - Ukraine, Honduras, Dominican Republic and Cuba

Ongoing legal challenges

- allege violations of
 - General Agreement on Tariffs and Trade (GATT)
 - discrimination
 - Agreement on Technical Barriers to Trade (TBT)
 - technical regulations that are more trade restrictive than necessary

Ongoing legal challenges

- allege violations of
 - Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS)
 - infringement of trademark rights including use being unjustifiably encumbered by special requirements

Welcome to FT.com, the global source of business news and analysis. Register now to receive 8 free articles per month.

April 29, 2012 4:06 pm

Big Tobacco backs Australian law opposers

By Christopher Thompson

Two of the world's biggest tobacco companies are providing legal support to member countries at the World Trade Organisation that are threatening to take Australia to international court over the world's toughest antismoking laws.

Philip Morris International and British American Tobacco, the two largest publicly listed tobacco companies by volume outside China, told the FT they were advising several countries that had complained that Australia's plain packaging laws – in which tobacco companies will have to sell their products in identical drab packaging – violate international trade agreements.

How long to settle a dispute? [back to top](#)

These approximate periods for each stage of a dispute settlement procedure are target figures – the agreement is flexible. In addition, the countries can settle their dispute themselves at any stage. Totals are also approximate.

60 days	Consultations, mediation, etc
45 days	Panel set up and panellists appointed
6 months	Final panel report to parties
3 weeks	Final panel report to WTO members
60 days	Dispute Settlement Body adopts report (if no appeal)
Total = 1 year	(without appeal)
60-90 days	Appeals report
30 days	Dispute Settlement Body adopts appeals report
Total = 1y 3m	(with appeal)

Ongoing legal challenges

- Bilateral investment treaty between Australia and Hong Kong
 - Philip Morris Asia – which acquired its interest in PM Australia on 23 February 2011 (ie 10 months after plain packaging had been announced) has brought proceedings

Ongoing legal challenges

- expropriation
 - indirect expropriation
- treatment that is not fair and equitable
 - investor's legitimate expectations
 - procedural fairness
 - transparent and stable environment

OUR LAWYERS HAVE COME UP
WITH A GREAT TRADE AGREEMENT



IS THAT THE ONE WHERE WE
TRADE OUR SOUL WITH THE DEVIL?

BIT claim

- ad hoc tribunal
 - each party proposes one arbitrator, a process for selecting the third
- no appeals
- no unified body of law
- all hearings, meetings and conferences are to be held in camera, and their transcripts kept in confidence

BIT claim

- each Party may publish the documents it has filed in the proceedings – as long as it first notifies the other Party of its intention and allows the Party to designate parts of such documents as ‘Confidential Information’

BIT claim

- timing
 - hearing of Australia's request for bifurcation (ie hear jurisdictional objections first rather than together with the merits) February 2014 in Singapore
 - this is only on the question whether it should be bifurcated

BIT claim

- still to come after a decision on that (that decision possibly in second half of 2014)
 - the hearing on jurisdiction
 - then possibly a hearing on merits if ...
 - OR
 - the hearing on merits
- ...
- 2015 / 2016 / 2017?

BIT claim

- PMI filed its notice of claim on 27 June 2011
- PMI filed its notice of arbitration on 21 December 2011

The merits of the claims?

- Australia is confident in its position
- the overwhelming majority of expert opinion expects Australia to win

The merits of the claims?

- Australia unlikely to have to ‘prove’ that plain packaging will work / worked
 - eg WTO jurisprudence
 - multiple measures may be needed to address a particular goal
 - it may not be possible to quantify the contribution
 - use of quantitative projections or qualitative reasoning to demonstrate that a measure is ‘apt to produce a material contribution to the achievement of its objective’

Some of the things at stake

- Governments' right to regulate
 - tobacco
 - public health
 - FCTC
- how (non-health-expert) tribunals approach public health evidence
- the 'integrity' of the international system

Next steps

- 10 **invited** the Associate Minister of Health (Hon Tariana Turia) to report to SOC by 31 May 2013 with detailed proposals for a plain packaging regime and associated health warnings, including proposals for legislative amendment;
- 11 **11.1** **noted** that the risk of international legal proceedings being brought against New Zealand under trade and investment agreements remains, but that greater legal certainty may be evident by the time that legislation is enacted in New Zealand if World Trade Organisation (WTO) disputes against Australia advance in good time;
- 11.2 **noted** that, if necessary, the enactment of the legislation or the making of regulations could be delayed until the Australian cases conclude and certainty regarding WTO legal implications is obtained;
- 12 **noted** that once Cabinet has made a decision to introduce plain packaging, MoH intends to publish on its website the analysis of submissions to the consultation process.

Smoke-free nation by 2025.

“There is a risk that tobacco companies will try and mount legal challenges against any legislation, as we have seen in Australia.”

“In making this decision, the Government acknowledges that it will need to manage some legal risks. As we have seen in Australia, there is a possibility of legal proceedings.”

“To manage this, Cabinet has decided that the Government will wait and see what happens with Australia’s legal cases, making it a possibility that if necessary, enactment of New Zealand legislation and/or regulations could be delayed pending those outcomes.”

“The Ministry of Health will now begin developing the detailed policy which will include the size and content of health warnings. I intend to introduce the legislation to Parliament before the end of this year.”

“Once again, I would like to acknowledge the community health workers, the NGO’s, medical practitioners and government agencies for their work on reducing the extreme harm caused by tobacco consumption and in achieving our long term goal of a Smoke-Free Aotearoa. I know that when we look back in 20 years this decision will be the right one.”



[Tariana Turia](#) [Health](#)

2010-2011

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 - (ii) encouraging people to give up smoking, and to stop using tobacco products; and
 - (iii) discouraging people who have given up smoking, or who have stopped using tobacco products, from relapsing; and
 - (iv) reducing people's exposure to smoke from tobacco products, and
 - (b) to give effect to certain obligations that Australia has as a party to the Convention on Tobacco Control.

TOBACCO PLAIN PACKAGING BILL 2011

EXPLANATORY MEMORANDUM

International framework

The introduction of plain packaging for tobacco products is one of the means by which the Australia Government will give effect to Australia's obligations under the World Health Organization *Framework Convention on Tobacco Control* [2005] ATS 7 (WHO FCTC).

Article 5 of the WHO FCTC requires each Party to develop and implement comprehensive national tobacco control strategies, plans and programs, and to take effective legislative and other measures for preventing and reducing tobacco consumption, nicotine addiction and exposure to tobacco smoke.

Article 11 of the WHO FCTC requires Parties to implement effective measures to ensure that tobacco packaging does 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.

Article 13 of the WHO FCTC requires Parties to implement comprehensive bans on tobacco advertising, promotion and sponsorship.

Guidelines adopted by the Conference of the Parties to the FCTC for Article 11 and Article 13 recommend that Parties consider introducing plain packaging.

**Conference of the Parties to the
WHO Framework Convention
on Tobacco Control**Third session
Durban, South Africa, 17-22 November 2008**FCTC/COP3/DIV/3**
16 February 2009**DECISIONS**

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FCTC/COP3(10) Guidelines for implementation of Article 11 (*Packaging and labelling of tobacco products*)

The Conference of the Parties,

Recalling Article 7 (*Non-price measures to reduce the demand for tobacco*) of the WHO Framework Convention on Tobacco Control, which states that the Conference of the Parties shall propose appropriate guidelines for the implementation of Articles 8 to 13 of the Convention;

Recalling its decision FCTC/COP2(14) to establish a working group to elaborate guidelines on the implementation of Article 11 (*Packaging and labelling of tobacco products*) of the Convention and to present draft guidelines to the Conference of the Parties at its third session;

Emphasizing that the aim of these guidelines is to assist Parties to meet their obligations under Article 11 of the Convention and that they are not intended to increase Parties' obligations under this Article,

1. ADOPTED the guidelines for implementation of Article 11 (*Packaging and labelling of tobacco products*) of the Convention contained in the Annex to this decision;

Plain packaging

46. Parties should consider adopting measures to restrict or prohibit 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). This may increase the noticeability and effectiveness of health warnings and messages, prevent the package from detracting attention from them, and address industry package design techniques that may suggest that some products are less harmful than others.

FCTC/COP3(12) Guidelines for implementation of Article 13 (*Tobacco advertising, promotion and sponsorship*)

The Conference of the Parties,

Taking into account Article 7 (*Non-price measures to reduce the demand for tobacco*) and 13 (*Tobacco advertising, promotion and sponsorship*) of the WHO Framework Convention on Tobacco Control;

Reaffirming the Tobacco Control, which promotion and sponsors

Emphasizing that Article 13 of the Conven

ADOPTED the g and sponsorship) of the

Packaging and product features²

15. Packaging is an important element of advertising and promotion. Tobacco pack or product features are used in various ways to attract consumers, to promote products and to cultivate and promote brand identity, for example by using logos, colours, fonts, pictures, shapes and materials on or in packs or on individual cigarettes or other tobacco products.

16. The effect of advertising or promotion on packaging can be eliminated by requiring plain packaging: black and white or two other contrasting colours, as prescribed by national authorities; nothing other than a brand name, a product name and/or manufacturer's name, contact details and the quantity of product in the packaging, without any logos or other features apart from health warnings, tax stamps and other government-mandated information or markings; prescribed font style and size; and standardized shape, size and materials. There should be no advertising or promotion inside or attached to the package or on individual cigarettes or other tobacco products.

17. If plain packaging is not yet mandated, the restriction should cover as many as possible of the design features that make tobacco products more attractive to consumers such as animal or other figures, "fun" phrases, coloured cigarette papers, attractive smells, novelty or seasonal packs.

Recommendation

Packaging and product design are important elements of advertising and promotion. Parties should consider adopting plain packaging requirements to eliminate the effects of advertising or promotion on packaging. Packaging, individual cigarettes or other tobacco products should carry no advertising or promotion, including design features that make products attractive.

Trans-Pacific Partnership Agreement

Trans-Pacific Partnership Agreement

- agreement under negotiation between Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, USA, Vietnam
 - essentially in secret, though there have been some leaks
 - negotiating texts confidential until 4 years after agreement reached
 - US corporate representatives serve as advisors and have access to the text

Trans-Pacific Partnership Agreement

- concerns about the process
 - essentially in secret, though there have been some leaks
 - negotiating texts confidential until 4 years after agreement reached
 - US corporate representatives serve as advisors and have access to the text



PHILIP MORRIS
INTERNATIONAL

**Submission of Philip Morris International in Response to the Request for
Comments Concerning the Proposed Trans-Pacific Partnership Trade
Agreement**

Pursuant to the *Federal Register* notice of December 16, 2009, the Office of the United States Trade Representative (USTR) announced its intention to enter into negotiations on a Trans-Pacific Partnership (TPP) trade agreement and invited comments on all elements of the proposed agreement in order to develop U.S. negotiating positions. According to the notice, the U.S.' initial TPP negotiating partners will include Australia, Brunei Darussalam, Chile, New Zealand, Peru,

the impact on products deemed “sensitive” by participating national governments.

Restrictions on Use of Trademarks: PMI is becoming increasingly concerned about government-sponsored initiatives that would effectively cancel or expropriate valuable trademark rights. PMI supports the inclusion of a comprehensive “TRIPs-plus” intellectual property chapter that includes a high standard of protection for trademarks and patents.

Trade restrictive legislation and regulations of the type currently being considered

would unduly limit the freedom of commercial speech, significantly restrict competition and breach Australia's obligations under the WTO TRIPS Agreement.¹ Given, on the one hand, the lack of evidence that plain packaging will achieve its intended public health objectives² and, on the other hand, the wide range of effective measures to reduce smoking incidence, plain packaging is neither an appropriate nor proportionate step to address smoking related issues.³

The consequences of the introduction of plain packaging in Australia are far-reaching and should be examined in the broader context of U.S.-Australia trade relations and in the upcoming TPP negotiations.

Trans-Pacific Partnership Agreement

- concerns for tobacco control
 - protection of IP rights
 - protection against expropriation
 - fair and equitable treatment
 - ‘regulatory coherence’ requirements
 - ‘transparency’ requirements
 - investor-state dispute settlement
 - doesn’t matter if the claim has merit

Trans-Pacific Partnership Agreement

- calls for ‘carve out’ of tobacco
- is this the best approach?
 - what about other public health / environmental measures?
 - ie isn't it a broader problem?
 - what might it imply about policy space for other measures?

Trans-Pacific Partnership Agreement

- resisting the problematic provisions?
- public health exceptions /exemptions?
 - what standard?
- clarification of key terms?
- no ISDS (the Australian position)?
- no ISDS for certain kinds of measures?

A dangerous advocacy game

- Governments already have a large number of trade and investment obligations which they are not going to get out of any time soon
 - TC / public health NGOs / academics contributing to regulatory chill?
 - many different agendas at play

“I think Australia's posture that it can prevail in this case can infer ... that the conflict between trade regimes and public health concerns is negligible, or in any case manageable.”

- what is this saying?

WHO Framework Convention on Tobacco Control

Case study of global health law at work - WHO FCTC

- WHO Framework Convention on Tobacco Control
- first treaty negotiated under WHO's treaty-making power
- entered into force 27 February 2005
- has 177 Parties
 - notable non-Parties: US, Argentina, Indonesia, Malawi, Zimbabwe

The global burden of tobacco

- 6 million deaths a year – one person every 6 seconds
- projected to rise to 8 million a year by 2030
- currently one billion smokers worldwide, 80% in low- and middle-income countries

Need for an FCTC

- foreword to the WHO FCTC:

‘The WHO FCTC was developed in response to the globalization of the tobacco epidemic. The spread of the tobacco epidemic is facilitated through a variety of complex factors with cross-border effects, including trade liberalization and direct foreign investment.’

Need for an FCTC

- Objective:

‘to protect present and future generations from the devastating health, social, environmental and economic consequences of tobacco consumption and exposure to tobacco smoke by providing a framework for tobacco control measures to be implemented by the Parties at the national, regional and international levels in order to reduce continually and substantially the prevalence of tobacco use and exposure to tobacco smoke’

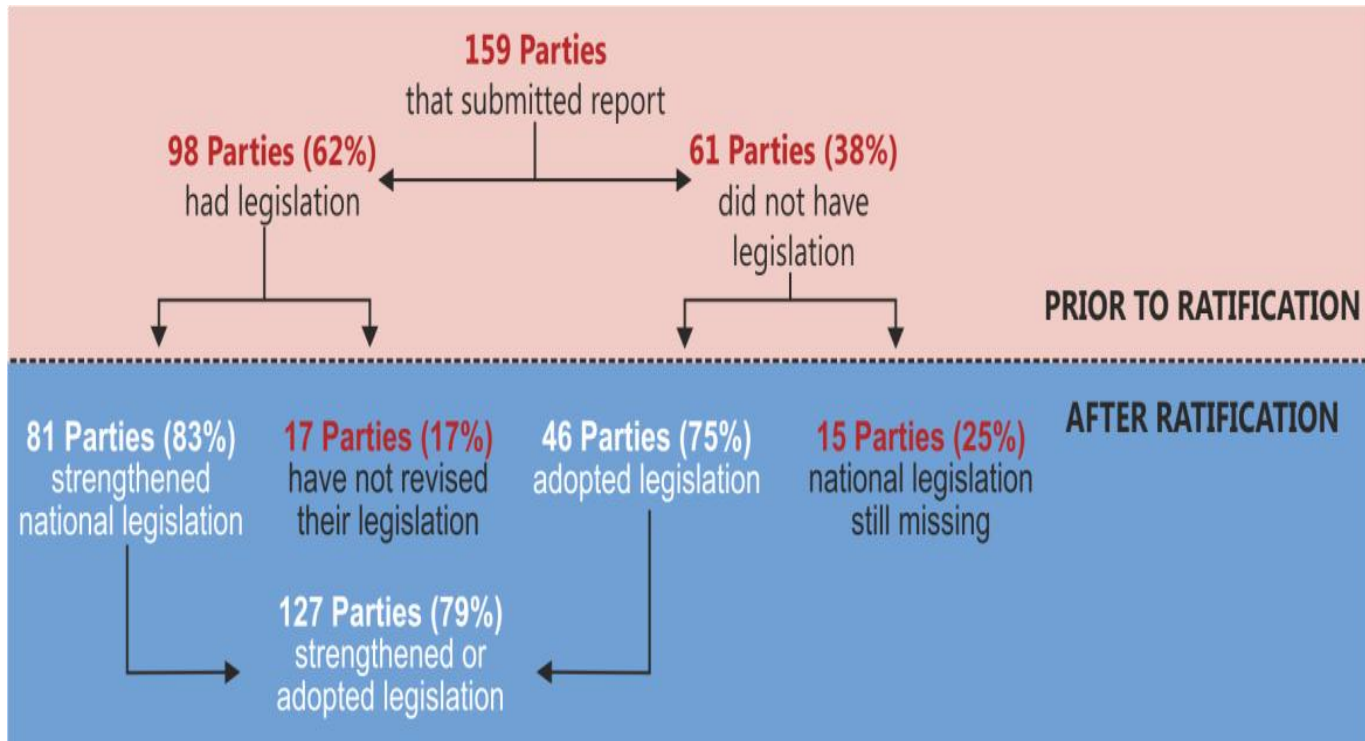
Basic elements of FCTC

- Parties agree to undertake a range of measures including in relation to:
 - taxation
 - protection from exposure to tobacco smoke
 - regulation of contents and emissions
 - tobacco product disclosures
 - packaging and labelling
 - education, communication, training and public awareness
 - tobacco advertising, promotion and sponsorship
 - cessation
 - illicit trade
 - sales to and by children

Basic elements of FCTC

- Parties agree to provide financial support necessary for national activities intended to achieve the objective of the Convention
- Parties agree to exchange relevant information, to cooperate in scientific, technical and legal fields, and to take steps to enable financial support to be provided to developing country Parties and Parties with economies in transition
- Parties agree to report on their implementation of the Convention

Progress



Source: FCTC Secretariat 2012 Global Progress Report

Main constraints and barriers to implementation

- interference by the tobacco industry in tobacco-control policy development
- lack of or insufficient political will
- insufficient level of financial resources for tobacco control
- lack or weakness of intersectoral coordination within the country, including the lack of understanding, interest or commitment of sectors other than health regarding the need for intersectoral action for tobacco control

Source: FCTC Secretariat 2012 Global Progress Report

Punta del Este Declaration - 2010

- recognizes that ‘measures to protect public health, including measures implementing the WHO FCTC and its guidelines fall within the powers of sovereign States to regulate in the public interest, which includes public health’
- recalls WTO Agreements (GATT, TBT, TRIPS)
- recalls Doha Declaration on TRIPS Agreement and Public Health
 - TRIPS does not and should not prevent Members from taking measures to protect public health
 - can and should be interpreted and implemented in a manner supportive of WTO Members’ right to protect public health

Punta del Este Declaration - 2010

- Parties declare:
 - firm commitment to prioritize the implementation of health measures designed to control tobacco consumption in their respective jurisdictions
 - concern regarding actions taken by the tobacco industry that seek to subvert and undermine government policies on tobacco control
 - Parties have the right to define and implement national public health policies pursuant to compliance with conventions and commitments under WHO, particularly with the WHO FCTC

Seoul Declaration - 2012

- acknowledging that the global burden and threat of NCDs constitutes one of the major challenges for sustainable development
- emphasizing the call of the international community to accelerate FCTC implementation by Parties and encouragement of countries that have not yet done so to consider acceding
- noting with concern that the most frequently reported barrier to effective implementation of the FCTC is interference by the tobacco industry
- recalling the fundamental and irreconcilable conflict between the tobacco industry's interests and public health policy interests
- reiterating their determination to give priority to their right to protect public health

Seoul Declaration - 2012

- Parties declare:
 - commitment to accelerate FCTC implementation
 - commitment to continue efforts to mobilize the financial and technical resources needed to support tobacco control activities, especially in developing countries and countries with economies in transition
 - resolve to strengthen action to protect tobacco control policies from commercial and other vested interested of the tobacco industry, as required by Article 5.3 and consistent with Article 5.3 guidelines
 - determination not to allow tobacco industry interference to slow or prevent development and implementation of TC measures in interests of public health and in accordance with Convention and consistent with its guidelines

The FCTC after 8 years

- raised the global profile of tobacco control
- strengthened governments in their fight against the tobacco industry politically and legally
- reinforced the view that tobacco products are not normal consumer products, contributing to the ongoing global denormalisation of the tobacco industry

The FCTC after 8 years

- catalysed the formation and deepening of transnational civil society coalitions
- facilitated the sharing of experiences, expertise and capacity among and between governments and NGOs
- brought new resources – political, financial and human – into the field

To what extent could this have been achieved without a treaty?

- not possible to compare what has happened since the decision to commence negotiations was made with the world as it would have been had we not had a treaty – had we continued with further WHA resolutions, action plans, global strategies etc

To what extent could this have been achieved without a treaty?

but we can say:

- creating a treaty both reflects political will at a point in time and then strengthens and reinforces it
- a treaty (legally binding) does tend to indicate a higher degree of political commitment
- the fact that it was WHO's first such treaty probably added importance to its negotiation and to the standards it was going to set

What its status as a treaty has definitely added

- has created an institutional framework through which governments come together regularly (the Conference of the Parties)
 - ensures that tobacco control remains on the global political agenda and that governments come together regularly to discuss tobacco control specifically
 - COP meets every two years

What its status as a treaty has definitely added

- has created an infrastructure through which treaty instruments are developed, setting new global standards
 - guidelines on Article 5.3 (protection against tobacco industry influence)
 - set of guiding principles and recommendations on Article 6 (taxation)
 - guidelines on Article 8 (protection against exposure to tobacco smoke)
 - partial guidelines on Articles 9 and 10 (product disclosure and regulation)

What its status as a treaty has definitely added

- guidelines on Article 11 (packaging and labelling)
- guidelines on Article 12 (education, training, communication and public awareness)
- guidelines on Article 13 (advertising, promotion and sponsorship)
- guidelines on Article 14 (cessation)

- Protocol to Eliminate Illicit Trade in Tobacco Products
 - adopted by the COP in November 2012
 - 40 ratifications to enter into force

What its status as a treaty has definitely added

- has globalized the domino / leap-frog effect as jurisdictions seek to emulate or outdo other jurisdictions
- has changed the legal situation in many countries
 - obligations automatically incorporated into law in many countries
 - expanded governments' legislative powers
 - has strengthened governments' hand in court challenges by the tobacco industry (and possibly dissuaded challenges)

What its status as a treaty has definitely added

- likely to impact on the implications of trade agreements, strengthening governments' defences to challenges under trade and investment agreements
- has introduced a (some?) greater degree of accountability into governments' tobacco control actions and inaction

The power of treaties

- But ...
- need to beware of magical thinking ...
- treaties do not implement themselves
 - implementation is a battle
 - need resources
 - need appropriate institutional arrangements
 - need expertise
 - need goodwill
 - and tobacco industry is, of course, doing what it can to undermine effective implementation

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