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Panel report in *Australia – Plain packaging*: A "healthy" verdict

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Introduction

On 28 June 2018, the WTO circulated the much-awaited panel report in the *Plain Packaging* complaints brought against Australia by five WTO members. The measures at issue were Australia's domestic laws and regulations concerning the retail packaging of tobacco products. The measures require that*, inter-alia*, the retail packaging have physical features that are plain, and be drab dark brown in colour. The measures also prohibit the appearance of trademarks and marks anywhere on the retail packaging of tobacco products, with the exception of the brand name, business or company name, etc. The purpose of the measures is to discourage tobacco consumption by making the retail packages unattractive to consumers.

The complainants' claims primarily centered on the consistency of these measures with provisions of the TRIPS Agreement and the TBT Agreement. Much to the delight of anti-tobacco activists, the panel dismissed *all* the claims and ruled in favour of Australia's measures. Besides establishing critical jurisprudence on issues concerning the intersection of IPR and trade-related measures, the ruling has important implications for designing of public health policy.

The implication of the ruling is that other countries are likely to follow suit not just in adopting anti-tobacco measures in their respective countries, but it may also encourage similar measures against other consumable products that may be harmful to human health such as carbonated drinks, alcohol, junk food, etc. This article is aimed at discussing how some of the jurisprudence in *Plain Packaging* may be relevant in shaping public policy aimed at protecting public health.

Claims under the TBT Agreement

The TBT Agreement enables countries to institute non-tariff measures such as labelling, technical specifications, packaging, etc. as long as these measures are taken for achieving legitimate objectives such as public health. In *Plain Packaging*, the complainants claimed that the impugned measures violated Article 2.2 of the TBT Agreement as they were more trade-restrictive than necessary in fulfilling the legitimate objective of protection of public health. The panel however rejected this claim on the basis that the objective of the plain packaging measures was to improve public health by reducing the use of, and exposure to, tobacco products and that the plain packaging measures made a material contribution to this objective.

The panel further stated that the nature of the risks that would arise from non-fulfilment of this objective was that public health would not be improved and would in fact be jeopardized. The complainants proposed alternative measures such as social marketing campaigns, increased taxation, that they claimed would be less trade restrictive than the plain packaging measures.

These alternative measures were, however, rejected by the panel on the ground that the complainants did not demonstrate that they would make a contribution equivalent to that made by the plain packaging measures, to Australia's regulatory objectives. The panel thus held that these measures were not more trade restrictive than necessary.

An important determination that the panel made under the above issue pertains to those provisions of the WHO's Framework Convention on Tobacco Control (FCTC) which pertain to plain packaging. Australia had claimed the measures to be based on the FCTC, which it claimed to be the relevant international standard. It thus argued that under Article 2.5 of the TBT Agreement the measures were presumed to not create an unnecessary obstacle to international trade. The panel however held that these FCTC provisions did not constitute a "standard" as they were not intended to provide a unified document "for common and repeated use" in respect of tobacco plain packaging, which is one of the attributes of a "standard" within the meaning of Annex 1.2 to the TBT Agreement. In its analysis, the panel found an absence of uniformity in the different features of plain packaging measures as recommended under the FCTC.

The implication of the above finding is that in case a WTO Member takes measures aimed at reducing the consumption of, and exposure to, products such as carbonated drinks, etc., it would be imperative for such a Member to prove that the measures are not more trade restrictive than necessary. This is an *extra burden* that would arise for defending Members as, international legal frameworks on health issues on products such as junk food, that are in the nature of a standard, are largely absent. This is an important point that must be kept in mind when the international community engages in decision-making in this field.

Claims under TRIPS Agreement

At the heart of the dispute were the claims made by the complainants under the TRIPS Agreement, particularly pertaining to trademark since the usage of trademarks was directly affected by the measures. Out of the nine TRIPS-related claims, only the claim under Article 20 is discussed in this article as it pertains to the encumbrance, by the measures, of the use of trademarks *in the course of trade*.

The complainants claimed that the plain packaging measures were inconsistent with Article 20 of the TRIPS Agreement as they *unjustifiably* encumbered the use of tobacco trademarks in the course of trade. The complainants stated that trademarks played an important role in differentiating goods and services for facilitating competition. Article 20 thus played a crucial role by seeking to ensure that trademarks performed this basic function of distinction in commerce.

In its analysis, the panel noted that by disallowing the use of the design features of trademarks, the measures prevented a trademark owner from using such features to convey any information (whether functional or intangible) about the product to the market and thereby deriving any economic benefit from the use of such features. In principle, therefore, the panel was in agreement with the complainants that the measures encumbered the use of the trademarks.

The panel however noted that the practical implications of these prohibitions were partly mitigated by the fact that the measures allow

tobacco manufacturers to use wordmarks such as brand names, company names, product and variant names, to distinguish their products from each other. Further, the complainants had not demonstrated that as a result of these encumbrances, consumers were unable to distinguish between the various tobacco products, which is the key function performed by trademarks.

The panel then proceeded to examine the *justifiability* of the encumbrances. The panel found justification in Australia's objective to protect public health by curbing use of, and exposure to, tobacco products. The panel drew strength from Article 8.1 (general principle that allows Members to protect public health when formulating measures) of the TRIPS Agreement in support of the justification of the measures under Article 20, and also from the Doha Declaration on TRIPS and Public Health. The panel noted that the use of the term "unjustifiably" under Article 20 provides a degree of latitude to a Member to choose an intervention to address a policy objective, which in this particular case was public health. In sum, the panel determined that the complainants had not proved that the plain packaging measures unjustifiably encumbered the use of tobacco trademarks by their respective owners.

Conclusion

The panel report is a shot in the arm for governments who are interested in taking measures similar to the scale, design and effect of plain packaging for curtailing consumption of, and exposure to, consumables such as junk food and carbonated beverages. The panel report has shown how balance can be achieved between protection of public health objectives and private rights of trademark owners. The panel did not straight away dismiss the complainants' claims. Rather the panel took care to intricately assess each of their claims and in the process, has generated crucial jurisprudence under both the TBT Agreement and the TRIPS Agreement. The case serves as an important precedent for governments who wish to utilize the policy space available under the various WTO agreements and enact measures aimed at achieving public health objectives but are wary of doing so.

Even though the panel has upheld the right to encumber the use of tobacco trademarks (on justifiable grounds), the panel has noted the right to use word marks such as brand names, company names, product names, etc. If the measures would have constrained the owners' right to use these marks as well, then it is possible that the panel would have struck down this aspect of the measures. Therefore, the wiggle room available to tobacco manufacturers is to innovate with their wordmarks in order to add weight to the distinction between different tobacco brands.

Given the importance of the findings for the interface between international trade rules and public health objectives, *Australia – Plain Packaging* is definitely a landmark ruling. The verdict is however yet to see some finality since Honduras has filed an appeal. It now remains to be seen how the panel findings will be analysed by the Appellate Body (or what is left of it).

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Trade Remedy News

Trade Remedy measures by India

Product	Country	Notification No.	Date of Notification	Remarks
4, 4 Diamino Stilbene 2, 2 Disulphonic Acid (DASDA)	China	F.No.7/22/2018-DGAD	26-6-2018	Initiation of Sunset Review investigation
Acetone	European Union, Singapore, South Africa, United States of America	F.No.7/26/2018-DGAD	6-7-2018	Initiation of Sunset Review investigation
Belting Fabric	China	F.No.14/35/2016-DGAD	30-6-2018	Final Findings issued terminating the ADD investigation
Grinding Media Balls	China, Thailand	37/2018-Cus. (ADD)	13-7-2018	Notification No. 36/2012-Cus. (ADD) rescinded
		36/2018-Cus. (ADD)	13-7-2018	Definitive anti-dumping duty imposed
High Tenacity Polyester Yarns (HTPY)	China	35/2018-Cus. (ADD)	9-7-2018	Definitive anti-dumping duty imposed
Jute Products viz– Jute yarn/ Twine (multiple folded/ cabled and single), Hessian Fabric and Jute Sacking Bags	Bangladesh	F.No.7/25/2018-DGAD	2-7-2018	Initiation of New Shipper Review - M/s Aziz Fibres Limited
Jute Products viz– Jute yarn/ Twine (multiple folded/ cabled	Bangladesh	F.No.7/24/2018-DGAD	2-7-2018	Initiation of New Shipper Review investigation - M/s Natore Jute Mills (Producer), Bangladesh and M/s PNP Jute Trading LLC

Product	Country	Notification No.	Date of Notification	Remarks
and single), Hessian Fabric and Jute Sacking Bags				(Exporter/Trader), USA
New/unused Pneumatic Radial Tyres	China	34/2018-Cus. (ADD)	25-6-2018	Notification of Provisional assessment for certain new shippers during pendency of New Shipper Review
Paracetamol	China	F.No.07/16/2018-DGAD	29-6-2018	Extension of time period for the submission of questionnaire response upto 20-7-2018
Saccharin	Indonesia	F.No.6/13/2018-DGAD	16-7-2018	Extension of time-period for the submission of questionnaire response up to 10- 8-2018
			14-6-2018	Initiation of Anti-Dumping investigation
Saturated Fatty Alcohols	Indonesia, Malaysia, Thailand	F.No.14/51/2016-DGAD	13-7-2018	Corrigendum to Final Findings issued vide Notification No. 14/51/2016 -DGAD dated 23.04.2018- Change in the Duty Table
Solar Cells whether or not assembled in modules or panels	All Countries	F.No.22/1/2018-DGTR	16-7-2018	Final Findings issued recommending imposition of Safeguard duty for two years

Trade Remedy measures against India

Product	Country	Notification No.	Date of Notification	Remarks
Fine Denier Polyester Staple Fiber	United States of America	83 FR 34545 [A-533-875]	20-7-2018	Anti-dumping duty orders issued
Large Diameter Welded Pipe	United States of America	83 FR 30690 [C-533-882]	29-6-2018	Preliminary affirmative Countervailing duty determination

Product	Country	Notification No.	Date of Notification	Remarks
				and alignment of final determination with final anti-dumping duty determination
Oxalic Acid	European Union	2018/931 [Case R672]	28-6-2018	Duty maintained after expiry review

WTO News

Tobacco plain packaging requirements - Honduras files appeal against panel report

Honduras has, on 19 July, 2018, filed an appeal against a WTO panel report in the case brought by Honduras in *"Australia — Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging"* (DS435). The request for consultations sought by Honduras is not yet available.

The panel had circulated its report on 28 June 2018. In the dispute, the panel dealt with claims raised by various countries, including Cuba, Dominican Republic and Indonesia, challenging the Australian measure to amend the packaging laws for tobacco products in order to discourage the use of the same. Essentially, the countries challenged the measures as violative of Articles 2.1, 3.1, 15.4, 16.1, 20, 22.2(b) and 24.3 of the TRIPS Agreement; Article 2.1 and 2.2 of the TBT Agreement; and Article III:4 of the GATT 1994. The panel however had rejected the claims of the complainants and held Australia's measures to be compliant with the relevant provisions.

United States initiates disputes against five members over duties on US products

On 19 July, the WTO circulated consultation requests filed by the United States of America seeking consultations with Canada, China, the European Union, Mexico and Turkey regarding additional duties imposed by the five WTO members on imports of certain US products, pursuant to the additional duties imposed by the United States on steel and aluminum products.

Meanwhile Switzerland, Russia, Norway have also initiated WTO dispute complaint against US steel and aluminium duties. While Switzerland's request for consultations with the United States regarding US duties on certain imported steel and aluminium products was circulated in the WTO on 12-7-2018, a similar request was filed by the Russian Federation on 2 July and by Norway on 19 June.

US duties on Canadian paper - Panel report issued

WTO on 5 July circulated the panel report in the case brought by Canada in "*United States — Countervailing Measures on Supercalendered Paper from Canada*" (DS505). In this dispute, Canada had challenged imposition of certain CVD measures by the USA against Canadian SC paper, and the "ongoing conduct of applying adverse facts available (AFA)" during the course of investigation. The panel ruled that the United States acted inconsistently with the provisions of the SCM Agreement with respect to issues pertaining to entrustment or direction by a public body, the benefit conferred through certain programmes including the provision of electricity, disclosure of essential facts, the application of adverse facts available by the US, inclusion of new subsidy allegations in the context of expedited reviews. The panel declined to rule on issues pertaining to specific exporters, and also on issues of prospective application of adverse facts available.

Japan initiates WTO dispute against Korean duties on stainless steel bars

On 21 June, the WTO circulated a request by Japan seeking consultations with Korea regarding Korean anti-dumping duties levied on stainless steel bars from Japan. Japan's claims pertain to the conduct of a third sunset review by Korean authorities which led to a decision to maintain the duties in a manner allegedly inconsistent with the WTO's Anti-Dumping Agreement and the General Agreement on Tariffs and Trade (GATT) 1994.

India Customs & Trade Policy Update

Asia Pacific Trade Agreement – India cuts import tariff

India has further reduced Customs duties on specified imports from Bangladesh, China, India, Korea RP, Lao PDR, and Sri Lanka, all signatories to the Asia Pacific Trade Agreement. As per the Indian Ministry of Commerce Press Release dated 2-7-2018, tariff concessions on 3142 tariff lines are available on imports from all member countries while special concessions on 48 tariff lines are there on goods from Bangladesh and Lao PDR. Notification No. 50/2018–Cus., effective from 1-7-2018, has been issued in supersession of Notification No. 72/2005-Cus.

Advance Authorisation on net to net basis - Accountability of inputs

Directorate General of Foreign Trade (DGFT, India) has laid down procedure for issuance of Export Obligation Discharge Certificate (EODC) where Advance Authorisations are issued on net to net basis subject to accountability clause in terms of General Notes Sl. No-4 under Engineering Products and Sl. No-6 in All Export Products Groups under SION. According to recent Policy Circular No. 10/2018-19, certificate in specified format from an independent Chartered Engineer having domain knowledge, certifying that inputs imported are required and used, is essential along with accountability statement. This certificate will be required irrespective of the FTP period involved.

DGFT notifies procedure for 'No incentive certificate under MEIS'

DGFT has notified procedure to obtain a 'No incentive certificate under MEIS' for shipments which are being re-imported. Public Notice No.

17/2015-20, dated 3-7-2018 in this regard inserts Para 3.24 in Handbook of Procedures along with ANF 3E and 3F specifying formats for application and certificate, respectively. Accordingly, MEIS benefit, if utilised, has to be refunded along with interest in order to get the certificate. Scrips not utilised have to be surrendered. If scrips have not been applied for or not yet issued, RA will issue certificate based on undertaking of the exporter.

Export duty on iron ore and concentrates for Japan and South Korea reduced

Effective rate of Customs export duty on iron ore and concentrates, both agglomerated and non-agglomerated, when exported by MMTC Ltd., to Japan and South Korea under a long-term agreement will be 10% till 30th of March 2021, subject to conditions. Notification No. 51/2018-Cus., dated 9-7-2018 has been issued amending Sl. No. 20B of Notification No. 27/2011-Cus. which prescribed reduced rate of duty till 31st of March 2018. Words and figures 'the first day of April, 2018' have been substituted by 'the 31st day of March, 2021' for this purpose.

Ratio Decidendi

Denial of refund of Terminal Excise Duty is detrimental to exporters and economy – Notification restricting refund is not retrospective

Observing that FTP 2009-14 conferred rights on DTA supplier to seek refund of Terminal Excise Duty when supplies made to 100% EOU were not against International Competitive Bidding, Delhi High Court has allowed TED refund for the last quarter of 2011. The assessee had supplied goods to the EOU on payment of duty using Cenvat credit. The Court in this regard observed that Notification No. 4 of 2013, prohibiting such refunds when *ab initio* exemption was available, was not retrospective and that denial was detrimental to cause of the exporters and the Indian economy. It also noted that decision of Policy Relaxation Committee denying refund was not consistent. [*Motherson Sumi Electric Wires* v. *UOI* – Judgement dated 12-7-2018 in W.P. (C) No. 6151/2016, Delhi High Court]

Anti-dumping – Scope of "Ordinary course of trade" – High levels of profitability alone in home market not relevant

The US Court of International Trade has sustained the US Department of Commerce's amended final determination following an anti-dumping duty investigation of certain new pneumatic off-the-road tyres from India. The DoC had determined that the product concerned are being, or are likely to be, sold in the United States at less-than-fair value. DOC took note of high levels of profitability, but explained that "high levels of profitability alone, for sales of merchandise in the home market, are not enough to establish that the sales are outside the ordinary course of trade." The Court noted that despite high levels of profitability, the overall record / evidence supported DoC's conclusion that appellant's home market sales were within the ordinary course of trade. According to the Court department's characterization of the sales as not unusual was supported by substantial evidence.

Further, on the question as to whether department's decision to amend its final determination *sua sponte* was contrary to law, the Court was of the view that since the final findings were amended within the time for judicial review which is typically 30 days after the final determination is published, there was no need to consider the principle of finality. [*ATC Tires Private Ltd.* v. *United States* – Opinion dated 16-7-2018 in Slip Op. 18-88, US CIT]

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