

The High Court of Justice Decision Upholding the UK's Standardized Packaging Laws: Key Points for Other Jurisdictions

1. Background

On 19 May 2016, the High Court of Justice of England and Wales handed down its [decision](#) dismissing the legal challenges to the United Kingdom's tobacco standardized packaging (or plain packaging) laws brought by the four major multinational tobacco companies British American Tobacco, Imperial Tobacco, Japan Tobacco and Philip Morris, and a tipping manufacturer (manufacturer of paper for cigarette filter tips).¹

The High Court of Justice's decision is a remarkable document. It runs to 386 pages, dealing meticulously with an enormous volume of evidence and a wide range of legal claims.

In our WHO Framework Convention on Tobacco Control (WHO FCTC) Knowledge Hub capacity, we work with a number of countries that are responding to legal challenges or threats of legal challenges to their tobacco control measures, and/or working to develop or implement tobacco control measures in ways that will strengthen them in the event that they do face legal challenge. We summarise and link to a number of relevant court decisions on our [Knowledge Hub website](#).

While each legal challenge to tobacco control measures is unique, in the sense that laws, legal processes and litigation practice vary across jurisdictions, there is much that countries can learn from others' cases – including through the similarities and differences in the ways in which legal issues are framed and argued, evidence is presented and considered, and international instruments (such as the WHO FCTC, WTO law and human rights law) are invoked and applied.

In this paper, we draw out what we consider to be the aspects of the High Court of Justice decision of widest relevance to litigation and policy development in other jurisdictions, highlighting concepts or arguments likely to feature in similar legal challenges, or that might inform governments' consideration of how to develop and implement plain / standardized packaging (or other tobacco control measures).

This paper is not intended to provide a comprehensive summary of the High Court of Justice decision, or of the wide range of legal claims that were made under UK and European law. Rather, we focus on the following aspects, which are likely to have widest relevance to other jurisdictions around the world, and to other tobacco control measures:

¹ The High Court of Justice's decision is being appealed to the Court of Appeal.

- the Court’s explanation of what the standardized packaging laws do and do not do
- the Court’s articulation of the competing values and interests at stake
- the Court’s recognition of the complementarity of individual tobacco control measures
- the Court’s recognition of the importance of tobacco control continuing to evolve in light of new research and changing circumstances
- the Court’s treatment of the ‘margin of appreciation’ to be afforded to governments’ regulatory measures, and the way in which the standard of review should be approached in the context of economic, social and scientific complexity
- the Court’s articulation of the nature and extent of property rights, particularly trade mark rights
- the Court’s findings that any infringement of rights effected by the laws under challenge is justified, and that no compensation is payable
- the many ways in which the Court cited and invoked the WHO Framework Convention on Tobacco Control (WHO FCTC) as relevant to the determination of the challenges

2. The UK’s standardized packaging scheme

The UK standardized packaging laws under challenge are summarised by the High Court of Justice (para 57):

‘The Regulations standardise the material, shape, opening and content of the packaging of readymade cigarettes. Similar controls are applied in relation to roll your own 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 achieve this end by mandating the design elements of a package. The only permitted colour for the packaging of a tobacco product what is described as “*a drab brown with a matt finish*”. The Regulations prescribe the text that may be lawfully printed on packs. Other than standardised text as to the number of cigarettes and the producer only the brand name and the variant of the cigarette is permitted. And, moreover, this is permitted only in a uniform presentation with a specified Helvetica font, case, colour, type face, orientation, and size (font size 14 for brand name and 10 for variant name). The surface of the packaging must be smooth and flat with no ridges, embossing or similar distinguishing features. The package must contain uniform lining. The appearance of the cigarettes must be plain white with a matt finish with white or imitation-cork coloured tipping paper. Permitted text must adopt a uniform presentation with a specified font, case, colour, type face, orientation and placement identifying the brand and variant name. Packaging which makes a noise, produces a smell or changes after retail sale is prohibited.’

These requirements operate in conjunction with large graphic health warnings (covering 65% of the external front and back surface of tobacco packs) mandated by the [European Union Tobacco Products Directive](#).

The laws were introduced by way of Regulations, *The Standardised Packaging of Tobacco Products Regulations 2015*, which were laid before the Parliament by the Secretary of State for Health, and adopted by the Parliament by affirmative resolution. The Regulations were developed under Section 94 of the *Children and Families Act 2014*, which allows the making of such Regulations in order to ‘contribute at any time to reducing the risk of harm to, or promoting, the health or welfare of people under the age of 18’: s.94(1). The Regulations’ contribution ‘at any time to reducing the risk of harm to, or promoting, the health or welfare of people aged 18 or over’ may also be taken into account: s.94(2). Such Regulations could be treated as ‘capable of contributing to reducing the risk of harm to, or promoting, people’s health or welfare if (for example) they may contribute to any of the following:

- (a) discouraging people from starting to use tobacco products;
- (b) encouraging people to give up using tobacco products;
- (c) helping people who have given up, or are trying to give up, using tobacco products not to start using them again;
- (d) reducing the appeal or attractiveness of tobacco products;
- (e) reducing the potential for elements of the packaging of tobacco products other than health warnings to detract from the effectiveness of those warnings;
- (f) reducing opportunities for the packaging of tobacco products to mislead consumers about the effects of using them;
- (g) reducing opportunities for the packaging of tobacco products to create false perceptions about the nature of such products;
- (h) having an effect on attitudes, beliefs, intentions and behaviours relating to the reduction in use of tobacco products.’ (s.94(4))

3. Notable features of the High Court of Justice decision

Legal claims made against the UK laws included (but were far from limited to) that standardised packaging constitutes:

- a disproportionate restriction on the tobacco companies’ fundamental rights and freedoms;
- expropriation of property without compensation;
- a breach of the freedom to conduct a business

Below we identify a number of notable features of the decision. As noted above, we focus on aspects that we consider to have the widest relevance to litigation and policy development in other jurisdictions. We include lengthy quotes from the decision where appropriate.

A. What the laws do and do not do	
Key points	<p>The Court pointed out that the laws:</p> <ul style="list-style-type: none"> (i) ‘do not ban the sale of cigarettes altogether’ (ii) ‘permit the brand name to be placed on the package’ (iii) ‘permit new brand names to be developed and placed on packaging’ (iv) ‘permit the identity of the producer to be placed on the packet’ and (v) ‘permit promotion at the wholesale level’: para 59 <p>The Court noted that while the laws do involve ‘a substantial limitation being imposed upon the ability of manufacturers to advertise or place branding upon the outer packaging or the tobacco product itself’, ‘in order, in effect, to strip away as much of the attractiveness of the branding or advertising as possible’, they do not ‘involve all tobacco products being sold in a homogeneous, undifferentiated manner’: para 2. Manufacturers may ‘still place the brand name and variant name upon the box and in this way they can still communicate their identities to consumers and differentiate themselves from their competitors’: para 2; see also para 785.</p>
Additional comments	<p>Here the Court points out that tobacco companies overstate the restrictive effects and implications of standardized packaging legislation.</p> <p>Similar points were made by the High Court of Australia in its decision dismissing the tobacco companies’ constitutional challenge to Australia’s plain packaging laws. For example, Justice Crennan noted that, after implementation of the plain packaging scheme, ‘the visual, verbal, aural and allusive distinctiveness, and any inherent or acquired distinctiveness, of a brand name can continue to affect retail consumers’: para 290. She observed that it ‘was not suggested by the [tobacco companies] that their tobacco products were ordered by consumers in the retail trade without reference to their brand names’ or ‘that relevant goodwill was not significantly attached to their brand names’: para 291. She wrote that ‘an exclusive right to generate a volume of sales of goods by reference to a distinctive brand name is a valuable right’: para 293.</p>

B. The values and interests at stake	
Key points	<p>The Court noted that the interests at stake ‘collide in the most irreconcilable of ways’: para 683. On one side is the protection of public health which ‘is recognised in law as one of the highest of all public interests that can be prayed in aid’: para 682. Health measures represent ‘an area of legislative</p>

	<p>activity to which immense importance is attached ... Health is recognized as a fundamental right.’: para 438. ‘Smoking is the primary cause of preventable morbidity and premature death’ in the UK, ‘accounting each year for over 100,000 deaths’: para 62. Smoking is most commonly taken up during childhood or young adolescence, and approximately 207,000 children aged between 11 and 15 are estimated to start smoking each year in the UK, i.e. 600 each day: para 63.</p> <p>The ‘unchallenged facts about the specific adverse health consequences of tobacco consumption place the suppression of tobacco usage towards the top end of the public health category. Put shortly, the public interest weighs heavily in the scales.’: para 682. There is ‘a significant moral angle’ embedded in the laws ‘which is about saving children from a lifetime of addiction, and children and adults from premature death and related suffering and disease’: para 36.</p> <p>On the other side ‘are the rights of the tobacco manufacturers in their trade marks and other property rights to use those marks to promote the consumption of tobacco. The bottom line interest of the tobacco companies in the right to promote their property is “<i>profit</i>”. The benefit to shareholders is at the expense of the public purse.’: para 683. (emphasis in original) The tobacco companies ‘seek compensation for the loss of the ability to promote a product that is internationally recognised as pernicious and which leads to a health “epidemic”’: para 794. The property rights at issue ‘directly serve the promotion of a trade which is profoundly adverse to the public interest, and acknowledged by all concerned to be so because of the harm the products cause to health’.: para 797.</p>
Additional comments	<p>Here the Court outlines the context in which it must perform its task. The determination it is called upon to make is not to be made in a vacuum. The Court notes that not all rights and interests are of equal value or worth. The protection of public health is one of the highest of all public interests. Health is a fundamental right.</p>

C. The complementarity of individual tobacco control measures	
Key points	<p>The Court recognised that, rather than constituting ‘alternatives’, tobacco control programmes ‘apply a mix of complementary and mutually reinforcing educational, clinical, regulatory, fiscal, economic and social strategies in the effort to reduce smoking prevalence and use’: para 68. Individual policies or measures that form part of a comprehensive programme may have their own aim or aims’: para 69. For example, a ban on tobacco advertising will have some different goals to the imposition of a specific tax, ‘while having common objectives such as helping or incentivising people to quit smoking’. Policies directed to prevent youth uptake will be different to those that aim to encourage existing smokers to quit: para 69; see also para 670. Tobacco</p>

	<p>control policies or measures are aimed at reducing smoking ‘to the maximum degree in order to improve health. ... The goal is not to reduce smoking by any particular percentage figure.’: para 68.</p> <p>The Court noted that individual measures, such as standardised packaging, ‘act in a complementary manner with a series of parallel counter-measures’, meaning there is ‘an inherent masking effect on the potency of each measure created by the combined effect of the suite of other measures acting simultaneously’: para 614.</p> <p>‘The efficacy of each individual measure in this suite is uncertain: some have been in force longer than others and their principal effects may taper off over time yet they will still work in parallel with newer measures which might be at their most potent but which might themselves taper in due course. The rate of overall decline in prevalence and use is not therefore guaranteed to be either stable or durable. Accordingly, a new measure, such as standardised packaging, can be expected to affect (one way or another) the overall downward pressure on usage but, again, the impact of the new measure might not become evident immediately and even when it does kick in its effect might evolve over time and that evolution itself might be variable.’: para 614.</p>
Additional comments	<p>Here the Court notes that effective tobacco control requires the implementation of a number of complementary, mutually reinforcing measures, and that it can be difficult (if not impossible) to evaluate the contribution of individual measures in isolation to the reduction of tobacco use.</p> <p>This is important for two major reasons. First, the tobacco industry routinely argues that governments should have adopted ‘alternative’ measures to the specific measure under legal challenge – measures that would purportedly impose lesser restrictions upon the tobacco industry’s rights and interests. Second, the tobacco industry routinely claims that the particular measures under legal challenge are, have been or will be ineffective. It routinely advances these kinds of arguments both in relation to domestic law and international trade and investment law.</p> <p>The Court’s approach here has similarities to that adopted by the World Trade Organization’s Appellate Body in the Brazil – Retreaded Tyres case, in which the Appellate Body said, inter alia:</p> <p>‘[C]ertain complex public health ... problems may be tackled only with a comprehensive policy comprising a multiplicity of interacting measures. In the short-term, it may prove difficult to isolate the contribution to public health ... objectives of one specific measure from those attributable to the other measures that are part of the same comprehensive policy. Moreover, the results obtained from certain actions — for instance ... certain preventive actions to reduce the incidence of diseases that may manifest themselves only after a</p>

	<p>certain period of time — can only be evaluated with the benefit of time.’: para 151.</p> <p>For further discussion of these issues, we recommend the paper Australia's plain packaging of tobacco products: Science and health measures in international economic law by Andrew Higgins, Andrew Mitchell and James Munro published in Mercurio B, Ni K-J (editors), <i>Science and technology in international economic law: Balancing competing interests. London and New York (NY): Routledge; 2013:117-33.</i></p>
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D. The ongoing evolution and development of tobacco control	
Key points	<p>The Court noted that effective tobacco control requires continuing evolution and development:</p> <p>‘Tobacco control programmes evolve and develop in the light of new research and changing circumstances. In the absence of a continuous effort to maintain pressure on supply and demand prevalence rates increase or previous rates of decline may stagnate’: para 70.</p>
Additional comments	<p>Here the Court recognises that tobacco control does not and cannot stand still if it is to be effective.</p> <p>This recognition is embodied in the WHO FCTC, throughout which obligations are to adopt and implement ‘<i>effective</i>’ measures, and in the preambular paragraph which records parties’ determination ‘to promote measures of tobacco control based on current and relevant scientific, technical and economic considerations’. These considerations continue to evolve as scientific knowledge develops, new interventions are introduced and evaluated, and the tobacco industry adapts its behaviour in response to government regulation and consumer behaviour.</p> <p>For discussion of the obligation to implement ‘effective’ measures in the WHO FCTC, see Jonathan Liberman, ‘The Power of the WHO FCTC: Understanding its Legal Status and Weight’ in Andrew Mitchell and Tania Voon (editors), <i>The Global Tobacco Epidemic and the Law</i> (Edward Elgar, 2014)</p>

E. Judicial review of government decision-making in the context of complexity and scientific uncertainty	
Key points	<p>The Court noted the importance of affording the Government a ‘margin of appreciation’, and held that the margin of appreciation should be ‘broadened’ where ‘there are uncertainties in the state of scientific knowledge ... and this is especially the case in the area of public health’: para 445. Similarly, it held that:</p> <p>‘Where the evaluation is a complex economic or social or scientific one this also feeds into the breadth of the margin of appreciation. To</p>

	<p>the extent that the Member State exercises a discretion involving political, economic or social choices, especially where a complex assessment is required, the reviewing Court may be slow to interfere with that evaluation.’: para 448; see also para 472.</p> <p>The Court also invoked the ‘precautionary principle’, which ‘states that where the public interest concerns the protection of the public from harm the decision maker may justifiably take a decision to act now rather than to await further information’: para 467. The Court held that the precautionary principle also ‘magnifies the margin of appreciation’: para 472.</p> <p>‘I can briefly summarise the main reasons: (i) the objective of the measures is public health; (ii) the aim is to reduce the prevalence and use of a product that is recognised at the international law level to be causative of a health epidemic (so the risk of causation is high); (iii) the Secretary of State acknowledges that there are uncertainties about the way in which the Regulations will work in practice and as to their impact but, on balance, considers that, upon the basis of the evidence as it stands the number of young lives saved or improved will be significant and that this societal gain warrants the introduction of the curative measures now rather than later. In such cases the margin of appreciation extends “... <i>not only in choosing an appropriate measure but also in deciding on the level of protection to be given to the public interest in question</i>” (Lumsdon (ibid) paragraph [64]): para 472.</p>
Additional comments	<p>Cases in which courts are asked to rule on the lawfulness of regulatory measures adopted by governments inevitably raise important considerations about the relationships between different branches of government. It is common for courts and tribunals to afford a degree of ‘deference’ or a ‘margin of appreciation’ to the regulatory choices of other arms of government, recognising that legislative and executive branches of government have very different responsibilities for lawmaking from those of courts.</p> <p>Here the Court affirms the importance of applying a deferential standard of review, taking into account in particular the economic, social and scientific complexity of the regulatory choices under challenge, and the fact that the measures are designed to protect the public from harm.</p>

F. The nature and extent of the tobacco companies’ property rights	
(a) The nature of trade mark rights	
Key points	<p>The Court noted that the trade marks of the tobacco companies are ‘negative rights’, ie they grant trade mark owners the right to prevent others from using the trade mark, rather than the right to use the trade mark: see paras 40, 177-178, 745, 832, 837, 916. The Court held: ‘It is <i>no</i> part of international, EU or domestic common law on intellectual property that the legitimate function of a trade mark (i.e. its essence or substance) should be defined to <i>include</i> a</p>

	<p>right to <i>use</i> the mark to <i>harm</i> public health’ (emphasis in original): para 40. It held that even if the ‘essence’ of trade mark rights ‘were defined more broadly to include use rights there is no conceivable basis in TRIPS for saying that the “<i>essence</i>” of a trade mark includes a right to <i>use</i> that property right to facilitate a lethal health epidemic’: para 832. (emphasis in original)</p>
<p>Additional comments</p>	<p>The characterisation of the interests and rights that are engaged is significant for the way in which cases of this nature are argued and resolved. Courts cannot protect and balance rights and interests without first identifying precisely what those rights and interests are. Courts will have to examine a range of questions. For example, have any rights been infringed at all? If so, which rights have been infringed and how? In what ways can the exercise of these rights be justifiably limited or restricted?</p> <p>The Court’s conclusion that trade marks are essentially ‘negative rights’ – ie rights to exclude others from use rather than rights to use – reflects the approach embodied in the TRIPS Agreement. For example, in European Communities — Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs, the WTO Panel wrote: ‘These principles reflect the fact that the TRIPS Agreement does not generally provide for the grant of positive rights to exploit or use certain subject matter, but rather provides for the grant of negative rights to prevent certain acts.’: para 7.210. It is also the position under Australian law, as held by a majority of the High Court of Australia in the Court’s decision dismissing the tobacco companies’ constitutional challenge to Australia’s plain packaging laws: see Jonathan Liberman, ‘Plainly Constitutional: The Upholding of Plain Tobacco Packaging by the High Court of Australia’, <i>American Journal of Law and Medicine</i>, vol 39 (2013): 361-381 at p 372.</p> <p>For further discussion of these issues, we recommend Mark Davison and Patrick Emerton, ‘Rights, Privileges, Legitimate Interests, and Justifiability: Article 20 of TRIPS and Plain Packaging of Tobacco.’ <i>American University International Law Review</i> 29 no. 3 (2014):505-580 http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2322043</p>
<p>(b) The nature and extent of property rights</p>	
<p>Key points</p>	<p>Drawing on the TRIPS Agreement, the Court noted that intellectual property rights:</p> <p style="padding-left: 40px;">‘are not absolute and must be balanced against other competing public interests. ... There is no canonical list of the public interests that may or may not be resorted to on the part of contracting states to limit intellectual property rights and a good deal of discretion is accorded to the signatories. What <i>is</i> however clear is that intellectual property rights can be derogated from in the name of public health since this is one of the few public interests which is explicitly identified.’ (emphasis in original): para 186; see also paras 829 and 916.</p> <p>The Court found that:</p> <p style="padding-left: 40px;">‘TRIPS and the FCTC can be read together without any risk of them</p>

	<p>colliding or being mutually inconsistent’: para 186.</p> <p>In its discussion of the nature and extent of intellectual property rights, the Court referred to:</p> <p>(a) Article 7 (Objectives) of TRIPS</p> <p>This Article provides: ‘The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and <i>in a manner conducive to social and economic welfare, and to a balance of rights and obligations</i>. ... ([e]mphasis added)’: para 178.</p> <p>(b) Article 8 (Principles) of TRIPS, para 1</p> <p>This para provides: ‘Members may, in formulating or amending their laws and regulations, <i>adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement</i>. ... ([e]mphasis added)’: para 179.</p> <p>(c) The Doha Declaration on the TRIPS Agreement and Public Health (Doha Declaration)</p> <p>The Doha Declaration was adopted by the WTO Ministerial Conference on 14 November 2001. It was adopted in recognition of the ‘gravity of the public health problems afflicting many developing and least developed countries, especially those resulting from HIV/AIDS, tuberculosis, malaria and other epidemics’. Member States declared:</p> <p style="padding-left: 40px;">‘We agree that the TRIPS Agreement does not and should not prevent Members from taking measures to protect public health. Accordingly, while reiterating our commitment to the TRIPS Agreement, we affirm that the Agreement can and should be interpreted and implemented in a manner supportive of WTO Members' right to protect public health and, in particular, to promote access to medicines for all.’</p> <p>The Court noted that while the Doha Declaration ‘was primarily focused upon the conflict between intellectual property (patents) and the price of pharmaceuticals to national health services ... it was deliberately drafted in much broader terms’: para 181. The Court held that it ‘is significant that in the FCTC the prevalence and use of tobacco is described as an “epidemic” which is the term used in Paragraph 1 of the Declaration’.: para 182.</p>
Additional comments	Here the Court recognises the fundamental reality of intellectual property rights – they are created and protected to serve public purposes and interests,

	<p>and are not absolute. Their exercise can be limited or restricted to serve other public purposes and interests. Public health is universally recognised as a public purpose and interest which justifies limitations and restrictions on the exercise of intellectual property rights. The importance of public health is specifically recognised in the TRIPS Agreement itself, and through the Doha Declaration.</p> <p>As the Court notes, while the Doha Declaration was developed primarily in the context of concerns about the relationships between intellectual property protection and access to medicines, it is drafted more broadly, applying to the relationship between intellectual property and public health more generally. This has been confirmed by the Conference of the Parties to the WHO FCTC. The TRIPS Agreement, Article 8, and the Doha Declaration are all included in the Punta del Este Declaration on the Implementation of the WHO Framework Convention on Tobacco Control (Punta del Este Declaration), which was adopted by the Conference of the Parties (COP) to the WHO FCTC at its fourth session, held in 2010. In the Punta del Este Declaration, the COP, inter alia, ‘recogniz[ed] that measures to protect public health, including measures implementing the WHO FCTC and its guidelines fall within the power of sovereign States to regulate in the public interest, which includes public health’ and declared the Parties’ ‘firm commitment to prioritize the implementation of health measures designed to control tobacco consumption in their respective jurisdictions’. The Punta del Este Declaration reflects the position of the WHO FCTC Parties that, in the words used by the Court, ‘TRIPS and the FCTC can be read together without any risk of them colliding or being mutually inconsistent’.</p>
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G. Examining, protecting and balancing competing rights and interests	
(a) Expropriation, control of use and compensation	
Key points	<p>(i) <i>Not an expropriation</i></p> <p>The Court found that the standardized packaging laws ‘amount to a control of use, not an expropriation of property’: para 784. In reaching this finding, the Court took into account four factors:</p> <ol style="list-style-type: none"> 1. The trade marks ‘remain unequivocally the property of the [tobacco companies]; the state has not expropriated or taken away the rights for itself or to be handed to some third party’: para 785. The laws preserve rights to registration. They: <ul style="list-style-type: none"> ‘impose substantial restrictions on the freedom of the tobacco companies to use their property rights, and in particular their trade marks. However, the restrictions are far from being total and the Claimants remain entitled to market themselves though the affixing of a brand name and their own manufacturer’s name. Self-evidently this is not optimal use of the trade marks for the Claimants; but it also far from the

	<p>situation that would prevail if the Claimants were not entitled to use <u>any</u> identifying marks at all and were forced to sell their cigarettes and tobacco products as a homogenous unidentified commodity.’ (emphasis in original): para 785.</p> <ol style="list-style-type: none"> 2. The trade marks can still perform their roles in preventing unauthorised use and serving as an identifier of origin: para 786. 3. The ‘curtailment of the use of the trade marks does not result in the [tobacco companies] being unable to conduct their business’: para 787. 4. The ‘interference was unequivocally in the public interest and there is no challenge to the legitimacy of the objective pursued by Parliament in promulgating the [laws]’: para 788. <p>The Court indicated that the ‘two most important criteria for differentiating between an expropriation and a control of use are’:</p> <p style="padding-left: 40px;">‘(a) whether the measure pursues a legitimate objective and (b) whether title transfers to the State. If the measure serves a legitimate end and title does not transfer to the State then, invariably, the measure is classified as control of use and not expropriation.’: para 783; see also para 38.</p>
Additional comments	<p>Here the Court explains why standardized packaging constitutes a control of the use of property, rather than an ‘expropriation’ of property, highlighting in particular the objective of the laws and the fact that ownership of the tobacco companies’ property does not pass to the State or a third party. The tobacco industry commonly argues, both under domestic law and international investment law, that plain packaging laws ‘expropriate’ or ‘acquire’ its property, and that States cannot expropriate or acquire its property without fully compensating it for the loss suffered. While expressed differently in different jurisdictions, at heart the question is whether standardized packaging constitutes expropriation of property requiring compensation or government regulation that does not require compensation. The High Court of Australia reached essentially the same position as the High Court of Justice, applying the concept of ‘acquisition of property’, the relevant concept in the Australian Constitution. Justices Hayne and Bell cited the ‘bedrock principle’ in the Australian Constitution that ‘[t]here can be no acquisition of property without “the [Government] or another acquir[ing] an interest in property, however slight or insubstantial it may be”’: para 169. See also Jonathan Liberman, ‘Plainly Constitutional: The Upholding of Plain Tobacco Packaging by the High Court of Australia’, <i>American Journal of Law and Medicine</i>, vol 39 (2013): 361-381 at pp.370-72, particularly the discussion of the theme reflected in the High Court of Australia’s decision that the plain packaging scheme was no different in kind from other legislation requiring health or safety warnings.</p>
	<p style="text-align: center;">(ii) <i>Even if an ‘expropriation’, no compensation payable</i></p>

	<p>The Court found that even if the standardized packaging laws did amount to an expropriation, the circumstances would fall within the category of ‘exceptional’ circumstances, in which compensation would not be payable:</p> <p>‘In my judgment it is quite obvious that the circumstances are exceptional. Tobacco usage is classified as a health evil, albeit that it remains lawful. There is no precedent where the law has provided compensation for the suppression of a property right which facilitates and furthers, quite deliberately, a health epidemic. And moreover, a health epidemic which imposes vast negative health and other costs upon the very State that is then being expected to compensate the property right holder for ceasing to facilitate the epidemic.’: para 38.</p> <p>...</p> <p>‘In this case the trade marks are being used to promote what is universally recognised as an ill and a drain on society’s resources. The Secretary of State encapsulated the nub of the issue when he stated that the present case was exceptional because: “<i>There is no other widely used consumer product in the world which kills half of its long term users prematurely</i>”. The 2014 Impact Assessment sets out compelling evidence for the conclusion that the Regulations will generate a vast net benefit for the State because it will reduce the negative costs smoking imposes on the State. It is hard to avoid the conclusion that the suppression of rights which promote a health epidemic and impose huge costs on the taxpayer is precisely the sort of circumstance where exceptionality <u>does</u> apply.’ (emphasis in original): para 808.</p> <p>‘There are no cases where compensation has been paid for the curtailment of an activity which is unequivocally contrary to the public interest. In my judgment the facts of the case are exceptional such that even if this were a case of absolute expropriation no compensation would be payable.’: para 811.</p> <p>The Court stated ‘[f]or the avoidance of doubt’ that its ‘conclusion that <u>no</u> compensation should be payable’ covered ‘even an obligation to pay <u>partial</u> compensation. I simply cannot see a justification for compensation at <u>any</u> level.’ (emphasis in original): para 812.</p>
Additional comments	<p>Here the Court explains why, even if standardized packaging laws did constitute an expropriation of property, standardized packaging would fall within the category of ‘exceptional’ circumstances in which it would not be appropriate to require the payment of compensation. The primary feature of the ‘exceptional’ circumstances is the nature and degree of harm caused by tobacco products when used as intended by the manufacturer. There is no precedent for requiring compensation in such circumstances.</p>
	<p>(iii) <i>No compensation for control / curtailment of use</i></p>

The Court held that there can be an obligation to pay compensation in cases of ‘curtailment of use’: para 39. The test is one of ‘fair balance’. The Court rejected the claim for compensation:

‘It is “fair” not to compensate the tobacco companies for requiring them to cease using their property rights to facilitate a health epidemic. In my judgment it would not be right to expect the State to pay any compensation for the restrictions imposed upon the use of the rights in question.’ (emphasis in original): para 39.

...

‘The Claimants seek compensation for the loss of the ability to promote a product that is internationally recognised as pernicious and which leads to a health “epidemic”. It is as such unlike any other case in which the Courts have granted compensation. ...’: para 794.

‘The Claimants could not identify a case where compensation had been paid for the suppression or control of a private activity that pursued an end or objective recognised as a public vice. ...’: para 795.

...

‘The property rights in the present case are the antithesis of the property rights which have been in issue in prior decided case. The property rights in the present cases directly serve the promotion of a trade which is profoundly adverse to the public interest, and acknowledged by all concerned to be so because of the harm the products cause to health. ...’: para 797.

‘The Regulations bear the same characteristics as other regulatory measures designed to further the public interest which, in so doing, impose burdens and costs on the regulated community. Public policy evolves. Political thinking evolves. No individual or company can have an expectation that if it produces and supplies a product that is, or becomes recognised as, contrary to the public interest that it will be entitled to continue to produce and sell that product, or that if the State comes to prescribe or curtail the product in issue that it will be entitled to compensation. There can be no sensible argument based upon a reasonable or legitimate expectation ... Manufacturers have been well aware for some years that across the world States have been obliged under international law to prohibit marketing and that this necessarily would bite down hard upon the use of trade marks. Markets are complex and the freedom to trade which is the hallmark of most world economies is almost inevitably accompanied by regulation which is the essential quid pro quo of the liberty. The law is awash with examples of the introduction of unwelcome regulation which causes equally unwelcome costs and burdens for traders. The use of asbestos for construction was commonplace but is now acknowledged to be dangerous and building rules and regulations prohibit its use. When these were introduced manufacturers were not compensated for ceasing production even though expensive plant and

	<p>equipment might have been stripped of its value as a result. When thalidomide no longer came to be viewed as a wonder drug and instead became a pariah medicine the manufacturer did not receive compensation for the wasted research and investment or the trade marks used to promote the product (and on the contrary became subject to a slew of civil claims).’: para 798.</p>
Additional comments	<p>Here the Court explains why no compensation should be payable to the tobacco companies for the losses alleged to be suffered as a result of the curtailment of use of their property effected by the standardized packaging laws. Essentially, the Court is expressing the common sense position that if an industry suffers loss as a result of laws implemented to reduce the consumption of its products, on the basis that those products cause harm to those who consume them (and/or others), that is simply a consequence of the laws. It is not something that should form the basis of a claim for compensation. As Justice Crennan wrote of the relevant provision in the Australian Constitution: it ‘is not directed to preserving the value of a commercial business or the value of an item of property’: para 295. The Court’s approach here also reflects the theme that can be discerned in the High Court of Australia’s decision mentioned above – that the laws are analogous to other laws that promote and protect public health and safety.</p>
(b) Right to conduct business circumscribed	
Key points	<p>The Court noted that the right to conduct business, recognised in the Charter of Fundamental Rights of the European Union ‘is (for obvious reasons) a highly circumscribed right and all manner of different laws and regulatory measures (tax, environmental, health and safety, etc) limit the freedom that business otherwise enjoys to do as it pleases’: para 41. The right to conduct business is ‘manifestly ... not an absolute right and in ways far too numerous to mention that right is and always has been subjected to limitation: competition law, environmental law, health and safety law etc, all curtail in myriad ways a traders’ freedom to act without limit’: para 860. The right ‘is a heavily circumscribed right which is at all times subject to curtailment according to a more or less unlimited range of different public interests’: para 862. This ground ‘add[ed] nothing new to the other legal challenges’: para 41. Since the Court did not accept the tobacco companies’ arguments ‘under other, more precise and sharper edged tests, there [was] no basis upon which [it] could find a violation of this right’: para 864.</p>
Additional comments	<p>Here the Court underlines the ‘obvious’ and ‘manifest’ point that rights to conduct business are routinely limited and restricted to serve a range of public purposes, such as revenue collection, promotion of competition, and protection of the environment, health and safety. If the tobacco companies are unable to prevail in their claims based on other rights, this general ‘right to conduct business’ does not operate to provide some kind of additional protection that would make standardized packaging unlawful and/or require the payment of compensation.</p>

H. The relevance of the WHO FCTC

Key points

The Court cited, and relied upon, the WHO FCTC in a number of ways.

In setting out the relevant legislative framework for standardised packaging, the Court highlighted the WHO FCTC as ‘the starting point’: para 151. The Court stated that the WHO FCTC ‘is important for a wide variety of reasons’:

- as a Convention with 180 Parties, including all of the Member States of the European Union and the EU itself
- as a basis for the EU Tobacco Products Directive, another crucial part of the legislative framework (see also paras 225-240)
- as having been ‘accepted by the European Court of Human Rights as a legitimate basis upon which States may, in principle, derogate from property rights’
- as one of the ‘principal reasons leading the Secretary of State to lay the Regulations before Parliament’
- the ‘long established case law’ of the European Court of Justice attaching ‘considerable weight to policies adopted by the WHO’
- the European Commission’s response to the UK’s notification of the Regulations, which was ‘to the effect that the [Commission] would monitor implementation and take account of [FCTC] developments’
- as ‘the basis for the principle that FCTC contracting states should ensure that evidence submitted by tobacco companies should meet high standards of transparency and accountability’.

The Court found the WHO FCTC to contain ‘at its heart two propositions of real significance for the present case’ (para 18):

The first is that tobacco use is an “epidemic” of global proportions which exerts a catastrophic impact upon health. The tobacco companies do not dispute or seek to undermine the universal medical consensus as to the profound harm caused by smoking. The second, and most controversial in the context of the present proceedings, is that the tobacco companies have over multiple decades set out, deliberately and knowingly, to subvert attempts by government around the world to curb tobacco use and promote public health.

In addition to these general observations, the Court relied upon the WHO FCTC and its guidelines in relation to specific findings and lines of reasoning:

- The WHO FCTC ‘affects and broadens the margin of appreciation’ to be afforded to the UK Government:
‘[T]he message conveyed by the Guidelines to the FCTC is clear: standardised packaging is a positive step in the fight to reduce smoking. It is EU policy to reflect the FCTC and the Guidelines. This is a factor which affects and broadens the margin of appreciation.’ (emphasis in original): para 464.

	<ul style="list-style-type: none"> - The WHO FCTC demonstrates the complementarity of individual tobacco control measures: ‘In the case of standardised packaging it is a core tenet of the FCTC that contracting states should use a range of different measures to attack tobacco supply and demand from all angles.’: para 670. - The WHO FCTC ‘specifically identifies advertising on packaging and product as causative of a health risk’: para 672. - The WHO FCTC ‘has a high status in EU law’: para 153. ‘EU legislation in the field of tobacco advertising must be construed in the light of the FCTC.’: para 153. - The WHO FCTC Article 13 Guidelines ‘emphasise the need for a comprehensive, all embracing, and multifaceted approach to curbing advertising’: para 167. - ‘Manufacturers have been well aware for some years that across the world States have been obliged under international law to prohibit marketing and that this necessarily would bite down hard upon the use of trade marks.’: para 798. - The WHO FCTC is significant in the application of the Doha Declaration: para 182. - The WHO FCTC Article 13 guidelines support the application of restrictions to individual tobacco products, ie not only outer retail packaging: paras 966-977.
Additional comments	<p>Through our examination of cases from many jurisdictions, we have previously identified a number of ways in which the WHO FCTC has added significant weight to the defence of tobacco control measures under challenge. Invocations of the WHO FCTC by courts have included:</p> <ul style="list-style-type: none"> • as a source of governments' legal power to implement a measure • as a source of governments' legal obligation to implement a measure • as relevant to the interpretation or application of domestic constitutions or other laws including <ul style="list-style-type: none"> • rights or duties that might be invoked in support of tobacco control measures (such as rights to health and rights to life) • restrictions on rights or interests claimed by the tobacco industry (such as public interest or public health limitations or exceptions to property rights, freedom of expression or economic freedom) • legal concepts such as necessity or proportionality that limit or condition exercises of government power • to support the interpretation or application of international human rights law in domestic law • as evidence of the harms of tobacco use

	<ul style="list-style-type: none"> • as evidence of the legitimacy or importance of a specific tobacco control measure or tobacco control measures in general • as evidence of the effectiveness of a measure • as evidence that tobacco control measures are to be implemented as part of a comprehensive set of measures <p>As the above extracts show, the High Court of Justice’s decision represents an enormously rich treatment of the WHO FCTC, providing examples of each of these invocations (invocations we have drawn from a large number of cases). We are not aware of any other case in which the treatment of the WHO FCTC has been so comprehensive.</p>
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4. A brief note on evidence before the Court

One of the most outstanding features of the High Court of Justice decision is its meticulous consideration and assessment of an enormous volume of evidence of many different kinds and from many different sources. In this paper, we do not seek to exhaustively summarise this evidence or the Court’s findings in relation to the evidence – to do so adequately would require an additional paper dedicated solely to the presentation and consideration of the evidence. Yet it is important to note that on evidentiary aspects, the Court found comprehensively in favour of the UK Government and was highly critical of the tobacco industry’s evidence and experts. For example, the Court found (para 23):

‘As a generality, the Claimants’ evidence *is* largely: not peer reviewed; frequently not tendered with a statement of truth or declaration that complies with the [Civil Procedure Rules]; almost universally prepared without any reference to the internal documentation or data of the tobacco companies themselves; either ignores or airily dismisses the worldwide research and literature base which contradicts evidence tendered by the tobacco industry; and, is frequently unverifiable. I say “largely” because the quality of the evidence submitted to this Court (which included all of that tendered during the consultation) was sometimes of remarkably variable quality. Some of it was wholly untenable and resembled diatribe rather than expert opinion; but some was of high quality, albeit that I am still critical of it, for instance, because it ignores internal documents or was unverifiable.’

The Court also made a number of important observations about the challenges faced by courts in dealing with ‘voluminous and highly complex’ technical evidence (paras 633-649 in particular).

5. Conclusion

As noted above, while each legal challenge to a domestic tobacco control measure is unique, there is much that can be learned across jurisdictions. Though legal challenges might be

argued and counter-argued in different ways, in accordance with differences in laws, legal processes and litigation practice, many parts of the High Court of Justice's reasoning and many of its conclusions will resonate in other jurisdictions, both in relation to tobacco standardized / plain packaging in particular, and tobacco control measures in general.

The High Court of Justice decision represents an incredibly rich piece of jurisprudence that engages with a wide range of legal issues, considering them thoughtfully and methodically in the context in which they presented themselves to the Court – a legal challenge to laws designed to reduce the harm caused by a uniquely dangerous product; laws supported by an international treaty with 180 Parties.

We anticipate that this kind of jurisprudence will continue to develop rapidly, as many other countries proceed to implement tobacco plain / standardized packaging (and other effective tobacco control measures) in the face of tobacco industry legal threats and challenges, and with decisions at the international level – in the WTO challenges to Australia's plain packaging laws, and the investment treaty challenge to Uruguay's tobacco packaging laws – to be handed down in the months ahead.

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