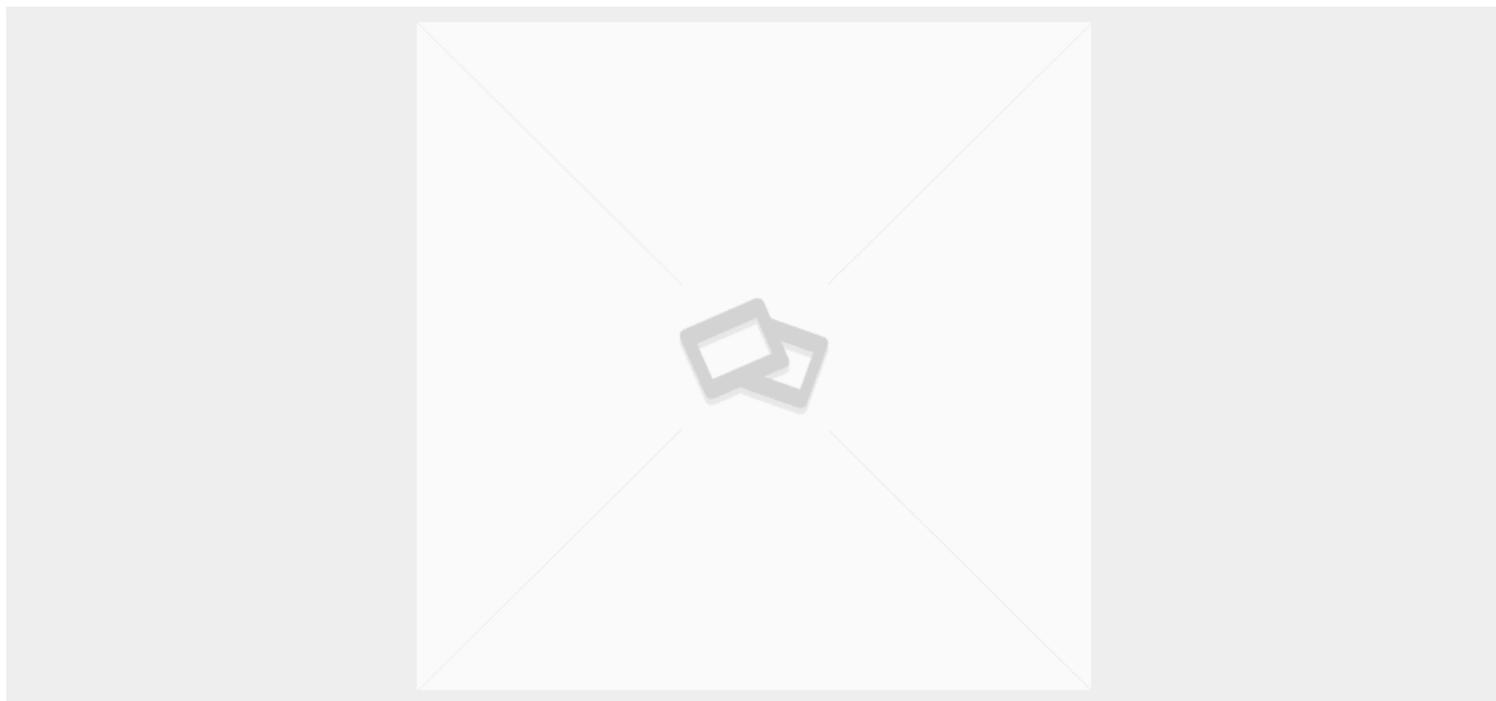


CHALLENGES IN DOMESTIC AND REGIONAL COURTS TO LARGE GRAPHIC HEALTH WARNINGS (WHO FCTC ARTICLE 11)

Posted on April 18, 2017 by Suzanne Zhou



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to landing page" link="https://untobaccocontrol.org/kh/legal-challenges/domestic-courts" target="" animate=""] 2 40 default wide Intro

This page looks at common arguments made in challenges to large graphic health warnings in domestic courts. You can also look at our post on the [investment treaty challenge to Uruguay's large graphic health warnings](#). Graphic health warnings may also be challenged in connection with challenges to [plain \(standardised\) packaging](#).

40 default wide line Introduction

One of the guiding principles of the WHO FCTC is that '[e]very person should be informed of the health consequences, addictive nature and mortal threat posed by tobacco consumption and exposure to tobacco smoke'. Under article 11(b) of the WHO FCTC, each party must adopt and implement effective measures to ensure that 'each unit packet and package of tobacco products and any outside packaging and labelling of such products ... carry health warnings describing the harmful effects of tobacco use, and ... other appropriate messages'. These warnings should rotate, should cover 50% or more of the principal display areas (and shall cover no less than 30% of the principal display areas), shall be large, clear, visible and legible, and may be in the form of pictures or pictograms.

The [Guidelines for implementation of Article 11](#) adopted by the Conference of the Parties at its third session note that:

- 'Globally, many people are not fully aware of, misunderstand or underestimate the risks for morbidity and premature mortality due to tobacco use and exposure to tobacco smoke.' (para 3)
- 'Well designed health warnings and messages on tobacco product packages have been shown to be a cost-effective means to increase public awareness of the health effects of tobacco use and to be effective in reducing tobacco consumption.' (para 7)
- 'Evidence demonstrates that the effectiveness of health warnings and messages increases with their prominence. In comparison with small, text only health warnings, larger warnings with pictures are more likely to be noticed, better communicate health risks, provoke a greater emotional response and increase the motivation of tobacco users to quit and to decrease their tobacco consumption.' (para 7)
- 'Larger picture warnings are also more likely to retain their effectiveness over time and are particularly effective in communicating health effects to low-literacy populations, children and young people. Other elements that enhance effectiveness include locating health warnings and messages on principal display areas, and at the top of these principal display areas; the use of colour rather than just black and white; requiring that multiple health warnings and messages appear concurrently; and periodic revision of health warnings and messages.' (para 7)
- 'Given the evidence that the effectiveness of health warnings and messages increases with their size, Parties should consider using health warnings and messages that cover more than 50% of the principal display areas and aim to cover as much of the principal display areas as possible.' (para 12)

'Evidence shows that health warnings and messages that contain both pictures and text are far more effective than those that are text-only. They also have the added benefit of potentially reaching people with low levels of literacy and those who cannot read the language(s) in which the text of the health warning or message is written.' (para 14)

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20 default 2. Common grounds of challenge and responses line Item 1

Common arguments made by the tobacco industry in legal challenges to graphic health warnings include

- That requirements for graphic health warnings made under regulations are not authorised by parent legislation (for example, if the parent legislation provides for health warnings without specifying that it provides for pictorial warnings)
- That requirements for graphic health warnings interfere with freedom of commercial speech
- That requirements for graphic health warnings interfere with intellectual property or other property interests

Responses which parties have successfully used against such challenges include

- The parent legislation does provide authority when read in light of obligations of the WHO FCTC and the aim of ensuring that health warnings are effective (see below *Ceylon Tobacco v Minister of Health*)
- Graphic health warnings do not fall within the scope of freedom of commercial speech or property/intellectual property rights (See *In the matter of Article 122(b) of the Constitution*)
- Graphic health warnings are justified on the grounds of public health; in particular, they are supported by WHO FCTC article 11 and its guidelines. (See *Canada v JTI, Philip Morris Brands Sarl and Others*)

There are significant overlaps between challenges to [plain packaging](#) and challenges to graphic health warnings; certain arguments regarding plain packaging will also be relevant to challenges to large graphic health warnings.

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20 default 3. Illustrative case examples line Item 2

The cases below illustrate how graphic health warnings have been challenged since the WHO FCTC came into force; how parties have framed their defences to such challenges; and how courts have considered the issues at stake. The list is not exhaustive but rather shows examples of how issues have been framed in different legal challenges.

Ceylon Tobacco v. Minister of Health (Sri Lankan Court of Appeal, 2014)

The Court of Appeal of Sri Lanka upheld regulations (made under the National Authority on Tobacco and Alcohol Control Act) requiring pictorial health warnings on tobacco packaging. However, it ordered that the size of the warnings be reduced from the 80% prescribed to between 50% and 60%.

The Court of Appeal found that the primary legislation provided authority to require pictorial health warnings, not just textual warnings as the tobacco company had argued. The Court held that 'all necessary and relevant background facts need to be ascertained not only from within our country, but from also a global point of view since pictorial warnings on cigarette packs are accepted displayed and adopted all over the world, both in developed and developing countries'. It considered that '[i]t would never have been the intention of Parliament to exclude pictorial health warning since such a pictorial warning need to reach all category of persons. i.e the poor, rich, middle class, literate and illiterate, disabled and as well as children.' The Court took the WHO FCTC and the Article 11 Guidelines into account, stating that: 'Our courts recognize international commitments and [relevant articles] of the Constitution endeavour to foster respect for international law and treaty obligation.' The Court held that '[h]ealth of each and every citizen of our country and all those living in Sri Lanka permanently or in a temporary capacity is paramount and need to be protected'. However, it decided that '20% of the space is not reasonably sufficient to present and exhibit a trademark', and ordered that the warning size be reduced, as subordinate legislation such as the challenged regulations needed to be consistent with statutory provisions contained in Sri Lanka's domestic intellectual property statute.

In the matter of Article 122(1)(b) of the Constitution (Sri Lankan Supreme Court, 2015)

Following the decision in *Ceylon Tobacco v Minister of Health*, Sri Lanka's National Authority on Tobacco and Alcohol Control Act was amended to authorise graphic health warnings covering 80% of the front and back of tobacco product packaging in the parent legislation (rather than the regulations). Ceylon Tobacco again challenged the graphic health warning requirements, arguing that the amendment was inconsistent with its intellectual property rights and that it was arbitrary. The Supreme Court of Sri Lanka upheld the legislation, finding no violation of the constitution. It considered that the legislative amendment did not affect Ceylon Tobacco's intellectual property rights, that the legislature's decision to adopt 80% graphic health warnings was not arbitrary but part of the government's general power and discretion to set policy, and that the 'maintenance and improvement of public health [was] indispensable to the very physical existence of the community' and of 'high priority'. It concluded that the legislation was within the power of Parliament and consistent with the Constitution.

Canada (Attorney-General) v. JTI-Macdonald Corp., et al. (Canada, 2007)

The Supreme Court of Canada upheld a law increasing the size of graphic health warnings on tobacco packaging from 33% to 50% and banning misleading promotional statements on packaging, as well as

restricting tobacco advertising, promotion, and sponsorship more generally, discussed [here](#). Several tobacco companies challenged these regulations, arguing amongst other things that the graphic health warnings requirements and ban on misleading statements unjustifiably limited their rights to freedom of expression under the Canadian Charter of Rights and Freedoms. The Court found that the ban on 'false, misleading or deceptive' promotion and promotion 'likely to create an erroneous impression about the characteristics, health effects or health hazards of the tobacco product or its emissions', did interfere with the guarantee of freedom of expression, but was justified as it was in the interest of public health and consumer protection. In doing so, the Court noted that the 'exact wording of the impugned phrase' appears in the WHO FCTC, and held that the law did not go further than necessary to achieve the Government's objective. The Court considered that the 50% graphic health warning requirements did interfere with the freedom of expression but were justified, as the Government's goal was 'pressing and substantial', there was a rational connection between the regulation and its objects, and the warnings fell within a range of reasonable alternatives. In finding that the requirements were reasonable, the Court noted that the WHO FCTC 'stipulates that warning labels "should" cover at least 50 percent and "shall" cover at least 30 percent of the package' (note: this case predates the adoption of the WHO FCTC guidelines on article 11).

C-547/14 - Philip Morris Brands SARL and Others (European Union, 2016)

The Court of Justice of the European Union upheld the validity of the Tobacco Products Directive (Directive 2014/40), which created a regime regulating, among other things, the packaging, labelling, and product contents and disclosure rules for tobacco products. The Directive included requirements for large graphic health warnings covering 65% of both the front and back of the external pack surface. In relation to the packaging and labelling requirements of the Directive, the Court found they were proportionate to the aim of the regulation in partially harmonising tobacco product regulation across the internal market while ensuring a high level of health protection, and to any interference with freedom of expression. In finding that the warnings were proportionate, the Court stated that 'human health protection - in an area characterised by the proven harmfulness of tobacco consumption, by the addictive effects of tobacco, and by the incidence of serious diseases caused by the compounds those products contain that are pharmacologically active, toxic, mutagenic and carcinogenic - outweighs the interests put forward by the [tobacco companies].' It noted that the Guidelines to Article 11 of the WHO FCTC recommended that Parties adopt warnings that cover 'more than 50%' of the pack, and that the choice of warning size in the Directive had been based on criteria derived from those recommendations. The Court considered that the WHO FCTC guidelines were based on the 'best available scientific evidence', and were 'intended to have a decisive influence on the content of the rules adopted in the area under consideration'. The Court also ruled that Parties were free to adopt stricter regulations regarding those areas of the pack that were not harmonised by the Directive, including standardized packaging and colour restrictions on the remainder of the pack surface. The remaining aspects of this case are discussed [here](#)

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- Guidelines for implementation of Article 11 (packaging and labelling of tobacco products)
http://www.who.int/fctc/guidelines/adopted/article_11/en/
- WHO Regional Office for Europe, 'Large pictorial pack warnings and plain packaging work', Tobacco Control Playbook, <https://tobaccoplaybook.net/en/002-packaging.html>
- See also the [challenge to Uruguay's large graphic health warnings regulations under investment law](#)
- For more on the basis for large graphic health warnings under the WHO FCTC, see Jonathan Liberman, [The Power of the WHO FCTC: Understanding its Legal Status and Weight](#), in Andrew Mitchell and Tania Voon (eds), *The Global Tobacco Epidemic and the Law* (Edward Elgar, UK, 2014)
- WHO maintains a database of [pictorial health warnings](#) adopted by parties
- The Canadian Cancer Society publishes an overview of all jurisdictions with pictorial health warnings, titled '[Cigarette Package Health Warnings - International Status Report](#)'

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