

Hi Karen!

Following from your comments yesterday about tobacco a few quick things come to mind. Hope they help in your research.

Trips A 20.

I'm not surprised that (was it Health?) are arguing that Article 20 is ambiguous - it suits their purposes for that. However:

- It is pretty clear from (people I've spoken to who were TRIPS negotiators and) the negotiation documents that this is exactly the issue that A20 was targeted at. You could look at the negotiating documents.
- "shall not be unjustifiably encumbered" - it is perhaps possible to argue that there is justification - but that is a long bow I think.
- "by special requirements such as ... use in a special form or use in a manner detrimental to capacity to distinguish". Perhaps if there is a uniform requirement that the trade mark will sit in the bottom quarter and otherwise the packet is blank it may be possible to argue that that space is where consumers will look. However, this is an argument that would need to be made rather than the other way around.

WTO

There was a WTO panel dispute last year (Indonesia defending against a US action). Whilst it related to branding for cars, it touched on Article 20 encumbrances.

My memory is that it suggested that anything that which precluded use of a trade mark (as alleged by the USA) would be a serious breach of A 20 but that was not supported by the facts of the case.

WT/DS54/R dated 2nd July 1998

Paris Convention Article 7

We would need to be careful that the provisions relating to advertising were not so comprehensive that "use would be contrary to law" or we would be forced to refuse registration in contravention of this article.

EC and UK

My memory is that the EC Health Regulation (sorry don't have the number) addresses this in some way that would preclude Europe from a "plain packaging policy".

The UK reviewed their policy last year with a Bill introduced in January this year. The Department of Health decided it was not practical (legal?) to introduce a plain packaging requirement and it is not I think in the Bill. I understand however, that it was raised in the debate in the House of Lords but that the Government are not supporting it.

The UK Bill is:

http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsLegislation/DH_093278