



Plain Packaging and Protectionism: What is Free Trade?

JURIST Guest Columnist Simon Lester of the Cato Institute argues that a greater focus on protectionism will expand trade liberalization and help to balance international trade rules...

October 23, 2012

Come December, all cigarettes sold in Australia will be in "plain packages" — stripped of all brand logos, and in drab colors. Other countries, including Britain and Canada, are considering following suit. The Australian high court's decision that plain packaging laws do not violate the Australian constitution is being hailed as a major victory by anti-smoking advocates. However, the battle, far from being over, is moving to the international stage with claims being filed at the World Trade Organization (WTO) and under an investment treaty.

Complaints about a purely domestic regulation in these international fora may seem odd, but they are a direct consequence of the expanding scope of trade agreements and provide a good illustration of the difficulties for domestic policy-making caused by this broad scope. The complaints highlight an important, but often overlooked, question regarding today's trade agreements: what is free trade? Traditionally, practicing free trade simply meant not being protectionist. However, today's trade agreements go beyond anti-protectionism in a number of ways, which leads to the potential conflict between trade agreements and domestic regulation that we see with the plain packaging cases.

The inclusion of intellectual property rules is one of the most obvious ways that trade agreements go beyond issues of protectionism. Modern trade agreements tell countries how much intellectual property protection they must have by establishing binding standards. With plain packaging, a key issue is whether trademark holders have a right to use their trademarks or, instead, whether they simply have a right to prevent others from using them. The Australian law clearly prevents the tobacco companies from using their trademarks, but is that enough to violate the relevant international agreements? Experts are divided on this issue. What is clear, though, is that this issue goes beyond the traditional free trade versus protectionism debate.

There is also a more subtle way in which international rules go beyond protectionism. "National treatment" — which is the idea that foreign products and companies must be treated no worse than domestic competitors — is a core principle of international trade law (this can be thought of as the anti-protectionism provision of trade law). But increasingly blurred together with this principle is another, broader one: domestic laws must not be "more trade-restrictive than necessary to fulfill a legitimate objective". This is one of the rules cited in the WTO complaints on plain packaging. But if there already is a national treatment obligation, one may question the need for this additional obligation, and its scope. These issues are just now being raised in WTO litigation, and a good deal of uncertainty remains as to the breadth of the obligation.

Finally, another area where trade agreements are about more than protectionism is in investment rules, which are sometimes included in trade agreements and other times are part of stand-alone investment agreements. With plain packaging, the focus is on whether the impact on trademarks has undermined the value of the tobacco companies' investment in Australia. Again, such rules go well past the traditional idea of fighting protectionism.

Of course, just because such international rules go beyond protectionism does not mean they are necessarily bad. It may be that putting these broad principles into international agreements provides a useful check on national governments and makes domestic regulation more effective. Some have argued that plain packaging laws will not deter smoking, and perhaps international oversight can make laws of this type work better. Regardless of the merits, though, such rules go beyond the traditional idea of free trade, and could impose potentially broad constraints on domestic policy-making. If plain packaging laws violate international trade and investment rules, it is important to be able to explain why. It is not sufficient to say that the rules are about free trade, because that just leads to a further question: what is free trade?

Existing international trade rules are a balancing of competing concerns and interests, developed over the years through a complex negotiating process. Questioning particular aspects after the fact is not without its dangers. Trade liberalization over the past few decades has benefited the world greatly. At the same time, challenges to laws like the plain packaging one risk undermining support for the broader push for such liberalization. It may not be a coincidence that multilateral trade liberalization has stalled in recent years, just as the scope of these agreements has expanded. No matter what the resolution of the plain packaging cases in international courts, they may be a chance to examine just what the goal of trade agreements should be.

Fighting protectionism is not without its own controversy, but a focus on protectionism, with rules narrowly tailored for that purpose, may avoid sensitive issues relating to health and other social policy regulation, and thus make further trade liberalization, with its accompanying benefits, possible.

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