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THE IMPLICATIONS OF THE WTO TOBACCO PLAIN PACKAGING DISPUTES FOR PUBLIC HEALTH MEASURES

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Abstract Australia became the first country to introduce standardised or plain packaging laws for tobacco products in 2011. However, they immediately came under direct and indirect challenge from the tobacco industry in various domestic and international fora, including at the World Trade Organization (WTO). The WTO-consistency of Australia's measures was not settled until June 2020, when the Appellate Body upheld two WTO panels' earlier findings that Australia had acted consistently with its obligations under certain WTO agreements. This article critically analyses the Appellate Body's key findings and their implications for implementing other public health measures. It is shown that these implications are multifaceted, have political, practical and legal dimensions and are likely to reach beyond the WTO dispute resolution system's bounds into other international trade and investment law contexts.

Keywords: public international law, public health, tobacco plain packaging, World Trade Organization, Technical Barriers to Trade, Trade-Related Aspects of Intellectual Property Rights.

I. INTRODUCTION

In December 2011, Australia was the first country to introduce standardised or plain packaging laws for tobacco products (TPP). Drawn-out litigation in multiple domestic and international fora followed, part of a strategy by the tobacco industry to dissuade, or at least delay, other countries from following Australia's example. The most extended of this litigation was at the World Trade Organization (WTO), which ran for eight years. The litigation ended with the Appellate Body (AB) upholding two panels' overall conclusions that Australia's TPP measures were consistent with its WTO obligations. This article analyses the AB's key findings and their implications for implementing public health measures within the context of WTO law and international economic law (IEL). Significantly, the decision clears the air for more countries to adopt similar tobacco packaging requirements to address the tobacco pandemic. It also has important implications for other public health measures

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governments may wish to introduce, such as managing the non-communicable disease (NCD) risk factors of unhealthy diet and alcohol consumption.

II. THE WTO DISPUTES

In 2014, a WTO Panel was composed to hear all four disputes between Australia and Honduras, the Dominican Republic, Indonesia and Cuba regarding Australia's TPP measures.[1] On 28 June 2018, the Panel circulated a document consolidating four panel reports (the Panel report), in which it dismissed all claims brought by the complainants. Shortly thereafter, Honduras and the Dominican Republic notified the Dispute Settlement Body of their intention to appeal the Panel report to the AB. The AB circulated its report on 9 June 2020.

The complainants had argued that Australia's TPP measures were inconsistent with its obligations under three WTO agreements: the General Agreement on Tariffs and Trade (GATT), the Agreement on Technical Barriers to Trade (TBT Agreement), and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement). The appellants limited their appeals to the Panel's findings concerning Article 2.2 of the TBT Agreement, and Articles 16.1 and 20 of the TRIPS Agreement.

A. The TBT Agreement

Article 2.2 of the TBT Agreement requires that 'technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective' such as the 'protection of human health or safety'.[2]

The appellants did not challenge the Panel's findings that the TPP measures constitute a 'technical regulation' and that their legitimate objective is 'to improve public health by reducing the use of, and exposure to, tobacco products'.[3] There was also no appeal of the Panel's finding that the Guidelines for Implementation of Articles 11 and 13 of the World Health Organization Framework Convention on Tobacco Control (FCTC) (the TPP Guidelines) are not an 'international standard' under Article 2.5 of the TBT Agreement.[4]

The appellants' claims focused primarily on whether the TPP measures are 'more trade-restrictive than necessary' to fulfil their objective. The Panel had concluded that this assessment involves a 'relational analysis', or a weighing and balancing of (i) the degree of the measure's *contribution* to the objective; (ii) the measure's *trade-restrictiveness*; (iii) the nature and gravity of the *consequences that would arise from*

[1] The Ukraine, the first to request a panel, later withdrew its complaint.

[2] Marrakesh Agreement Establishing the World Trade Organization (adopted 15 April 1994, entered into force 1 January 1995) 1867 UNTS 3 (Marrakesh Agreement) Annex 1A (Agreement on Technical Barriers to Trade) art 2.2.

[3] Panel Report, *Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WT/DS457/R, adopted 28 June 2018 (Panel Report) paras 7.182–232.

[4] ibid paras 7.403–5.

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non-fulfilment of the objective; and (iv) the existence of less trade-restrictive *alternative measures*.[5] The Panel's findings on non-fulfilment were left unchallenged.

1. Contribution to the legitimate objective

The evidence analysed by the Panel to determine the TPP measures' contribution included pre- and post-implementation evidence of the measures' *proximal outcomes* (eg reduction in appeal, increased effectiveness of graphic health warnings, and reduced capacity of packaging to mislead), pre- and post-implementation evidence of *distal outcomes* (eg intentions or attempts to quit), and post-implementation evidence of the actual impact on smoking behaviours (eg initiation and cessation).[6]

Having considered the 'totality' of the evidence, the Panel found that 'the TPP measures, in combination with [Australia's] other tobacco control measures … are apt to, and do in fact, contribute to Australia's objective'.[7]

In challenging the Panel's examination of the 'totality of the evidence', the appellants resorted in part to Article 11 of the Dispute Settlement Understanding (DSU), which states that a panel must 'make an objective assessment of the matter before it, including an objective assessment of the facts of the case'.[8] The AB noted that the 'sheer volume' of the appellants' claims under Article 11 was 'unprecedented', and recalled that an Article 11 claim is a 'serious allegation' that requires a claimant to show an 'egregious error' was made by a panel. It emphasised that it would not 'entertain attempts by the appellants to resubmit their factual arguments under the guise of challenging the objectivity of the Panel's assessment of the facts of the case'.[9]

The AB rejected the appellants' claims and noted that the complainants bore the burden of providing credible evidence to prove that Australia's TPP measures are incapable of contributing to their objective.[10] The Panel had considered that the studies' focus on non-behavioural outcomes 'does not … constitute an inherent flaw, provided … [it] is understood as constituting one component of a broader evidence base' and that the measures were designed to act on these 'non-behavioural' or 'proximal' outcomes in order to affect smoking behaviours.[11] The AB noted that the Panel had considered independent, expert evidence in assessing the strength of the main body of evidence.[12]

The AB also rejected numerous discrete claims made about the Panel's treatment of the post-implementation evidence, noting that many of these claims were based on a misapprehension of the Panel's findings, that they depended on the onus being

[5] ibid para 7.31, citing Appellate Body Report, *United States – Certain Country of Origin Labelling (COOL) Requirements*, WT/DS384/39, WT/DS386/40, adopted 11 December 2015 (*US–COOL*) para 374; Appellate Body Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R, adopted 16 May 2012 (*US–Tuna II (Mexico)*) para 318.

[6] ibid paras 7.491, 7.493, 7.495–8.

[7] ibid paras 7.1025, 7.1043.

[8] Marrakesh Agreement (n 2) Annex 2 (Understanding on Rules and Procedures Governing the Settlement of Disputes) art 11.1.

[9] Appellate Body Report, *Australia – Measures Concerning Trademarks, Geographical Indications and other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WT/DS435/AB/AR, WT/DS441/AB/R, adopted 9 June 2020 (Appellate Body Report) paras 6.48–50.

[10] ibid para 6.77.

[11] ibid para 6.70, quoting Panel Report (n 3) para 7.555.

[12] ibid paras 6.73–7.

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incorrectly placed on Australia rather than the complainants, and that they concerned the accuracy or merit of the Panel's factual findings rather than the objectivity of its analysis.[13]

One Division Member agreed with these ultimate conclusions but disagreed that it was necessary to 'examine in detail' the appellants' claims. The Member reasoned that the appellants' arguments could call into question the Panel's finding that the TPP measures *are apt* to contribute to their objective. However, they could not vitiate the Panel's other finding that the complainants *had not demonstrated* that the measures are *not apt* to contribute to their objective.[14]

2. *Trade-restrictiveness*

The AB agreed with the Panel that a mere modification in the conditions of competition will not necessarily be sufficient for a conclusion about the degree, if any, of a measure's trade-restrictiveness. The AB confirmed that, where a measure discriminates between imported and non-imported products (national treatment) or between the products of different Members (most-favoured-nation treatment), a modification in the conditions of competition alone may be sufficient to establish trade-restrictiveness. However, where the measure is non-discriminatory (as with Australia's TPP measures), further evidence of 'actual trade effects' or quantifiable evidence of a 'limiting effect on international trade' may be required. The Panel's interpretation was consistent with these principles; it did not interpret Article 2.2 such that evidence of 'actual trade effects' is *always* required.[15]

The AB also confirmed that panels may take into account all relevant evidence before concluding on trade-restrictiveness, rather than focusing on a subset of evidence (eg about a measure's design, structure, or anticipated impact).[16] In any case, the Panel had found the TPP measures to be trade-restrictive simply in so far as a decrease in the demand for tobacco products would reduce the total volume of tobacco imports.[17]

The AB rejected the appellants' arguments concerning the Panel's *application* of Article 2.2 on the basis that the Panel's findings were correct, or that the Panel—in its role as factfinder—was entitled to choose the weight it gave to different evidence in making the conclusions it did.[18]

3. *Alternative measures*

The Panel observed that a measure's trade-restrictiveness may be established on the basis of a 'comparative analysis' between the measure and one or more less trade-restrictive alternative measures that make an equivalent contribution to the measure's objective.[19]

[13] ibid paras 6.103–345, 6.269, 6.278–9, 6.287, 6.295.
[14] ibid paras 6.524, 6.531–6.
[15] ibid paras 6.385, 6.389, 6.391.
[16] ibid paras 6.393, 6.406.
[17] Panel Report (n 3) paras 7.1200, 7.1204, 7.1207.
[18] Appellate Body Report (n 9) paras 6.408, 6.423.
[19] Panel Report (n 3) para 7.1324, citing Appellate Body Report, *US–Tuna II Mexico*, para 322; Appellate Body Report, *US–COOL*, paras 374–8; Appellate Body Report, *US–COOL: Recourse to Article 21.5*, para 5.197.

The appellants made two claims in challenging the Panel's finding that each of the four alternative measures proposed would not make an equivalent contribution to the TPP measures' objective.[20] The AB accepted both of the appellants' claims and agreed that the Panel had erred.

First, the AB noted the principle that '[an] alternative measure may achieve an equivalent degree of contribution in *ways different* from the technical regulation at issue' and confirmed that what is relevant is 'the overall degree of contribution that the technical regulation makes to the objective'.[21]

The Panel erred by finding that the alternative measures would make a lesser contribution because they would contribute to Australia's objectives through mechanisms different to those employed by the TPP measures. As these mechanisms did not constitute the TPP measures' objectives, they could not form a proper basis for the finding that the alternative measures made a lesser contribution. It was irrelevant to the alternative measures' overall contribution that they did not address the design features of the TPP measures.[22]

Second, the AB found that the Panel erred by considering the synergies that the TPP measures would create with other existing tobacco control measures, without considering the synergies that the alternative measures would create with the existing measures. The AB concluded that whether, and to what extent, a measure creates 'synergies' with other measures is just one factor informing a measure's 'overall' degree of contribution; it is relevant but not decisive.

Because the Panel found that the TPP measures and alternative measures were both apt to make a 'meaningful' contribution to Australia's objective, and because the Panel found that the alternative measures could make such a contribution without considering their interaction with existing measures, it was illogical for the Panel to have found that the TPP measures are necessarily more effective than their alternatives because of their synergies with other existing measures.[23]

The AB rejected the appellants' arguments that the Panel erred in its assessment of the alternative measures' trade-restrictiveness on the same grounds that it dismissed arguments about the TPP measures' trade-restrictiveness.[24] Although the AB found that the Panel erred in assessing the alternative measures' contribution, it agreed with the Panel about their trade-restrictiveness. Therefore, it upheld its overall conclusion that the TPP measures are no more trade-restrictive than necessary under Article 2.2.[25]

B. The TRIPS Agreement

Article 20 of the TRIPS Agreement requires that the 'use of a trademark in the course of trade shall not be unjustifiably encumbered by special requirements'.[26] The appellants did not challenge the Panel's findings that the TPP measures are special requirements that encumber the use of trademarks in the course of trade. They focused primarily on the Panel's interpretation of 'unjustifiably'.

[20] ibid para 7.1721. [21] Appellate Body Report (n 9) para 6.498 (original emphasis).
[22] ibid. [23] ibid paras 6.499, 6.502–3. [24] ibid paras 6.467, 6.475–9. See above (n 18).
[25] Panel Report (n 3) paras 7.1724–32.
[26] Marrakesh Agreement (n 2) Annex 1C (Agreement on Trade-Related Aspects of Intellectual Property Rights) art 20.

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The Panel had concluded that a determination of unjustifiability involves consideration of the following factors:[27]

1. the nature and extent of the encumbrance on trademark use; and
2. the reasons for which the special requirements are applied; and
3. whether these reasons provide sufficient support for the resulting encumbrance.

The Panel noted the importance and legitimacy of public health as a policy concern, as indicated by Article 8 of the TRIPS Agreement, the FCTC, and Paragraph 4 of the Doha Declaration.[28] The Panel concluded that because the TPP measures 'are capable of … and do in fact contribute, to Australia's objective of improving public health', the reasons for the special requirements provide sufficient support for the resulting encumbrances.[29]

In responding to arguments concerning the Panel's interpretation of Article 20, the AB clarified that Article 20 does not proscribe all special requirements that encumber trademark use, but only those that do so unjustifiably. As Article 20 presupposes that there are circumstances in which governments can encumber trademark use justifiably, it disagreed that Article 20 created a general prohibition on 'governmental encumbrances on use' with limited exceptions. Rather, 'Members enjoy a certain degree of discretion in imposing encumbrances on the use of trademarks'.[30]

Importantly, the AB upheld the Panel's finding that something more than a rational connection between the special requirement and its objective must be found: a 'complainant [must] demonstrate that a policy objective … does not *sufficiently support* the encumbrances'.[31] The AB agreed that such a demonstration 'could' include consideration of the three factors set out by the Panel.[32]

The AB also confirmed that a measure need not be necessary in the sense of there being no less-encumbering alternatives. Such an interpretation would overlook the drafters' intention to use the word 'unjustifiably' rather than a term reflecting the notion of necessity. Importantly, however, the AB upheld the Panel's view that alternative measures *may* feature as a factor in an overall determination of whether there is sufficient support for a measure.[33]

The AB found it unnecessary to make a definitive statement on the status of the Declaration as a 'subsequent agreement' under Article 31(3) of the Vienna Convention on the Law of the Treaties (VCLT) because it found that the Panel had correctly relied on the general principle of treaty interpretation reflected in Paragraph 5 of the Declaration: that an Agreement should be interpreted in light of its objectives, which are partly contained in Articles 7–8 of the TRIPS Agreement.[34]

Regarding the Panel's application of Article 20, the AB concluded that it appropriately examined a trademark owner's legitimate interest in extracting economic value from a trademark's promotional function, given that the complainants did not seek to establish that trademarks' distinguishing function would be compromised by the TPP measures.[35] The AB also concluded that the Panel had not erred by giving the FCTC and its Guidelines undue legal weight. These instruments confirmed and provided additional

[27] Panel Report (n 3) para 7.2430.
[28] ibid paras 7.2588–9. See *Declaration on the TRIPS Agreement and Public Health*, WT/MIN (01)/DEC/2, adopted 14 November 2001, para 4.
[29] Panel Report (n 3) para 7.2592.
[30] Appellate Body Report (n 9) paras 6.641–3, 6.659.
[31] ibid para 6.659 (emphasis added).
[32] ibid paras 6.651, 6.659.
[33] ibid paras 6.653–5.
[34] ibid para 6.657.
[35] ibid paras 6.664–72.

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factual support for conclusions that the Panel had already reached about the importance of the measures' objectives.[36] Finally, the AB dismissed the claim that the Panel failed to engage in a weighing and balancing of the measures' objectives and their impact on trademarks in determining whether there was sufficient support for the latter, noting that the Panel had gone further than required by considering whether there were alternative measures that were less trademark-encumbering.[37]

The parties clarified at the panel stage that they were not arguing that Article 16 of the TRIPS Agreement confers a positive right to use.[38] However, the AB understood Honduras to argue at the appeal stage that Article 16.1 confers upon a trademark owner the right to use its trademark, and that certain aspects of Article 16.1 require Members to protect the distinctiveness of a trademark through use.[39] The AB confirmed the Panel's view that Article 16.1 does not confer a positive right to use or preclude a government from regulating or preventing such use. Rather, Article 16.1 ensures each Member provide trademark owners with a means, under domestic law, of exercising their exclusive right to prevent unauthorised use by third parties.[40]

III. IMPLICATIONS FOR TOBACCO CONTROL AND PUBLIC HEALTH MEASURES AT THE WTO

A. General Implications

As was anticipated before the circulation of the AB's report,[41] most of the Panel's findings and conclusions were left undisturbed. This means that countries are likely to follow suit in implementing similar measures, and that they may do so with confidence about the legal status of those measures under WTO law. The Panel's finding that Australia's TPP measures are 'apt to, and do in fact, contribute' to its public health objectives provides a foundation for future findings that other countries' regimes will contribute to similar objectives.

Importantly, the decisions confirm that the protection of public health is well recognised as a legitimate objective for the purposes of WTO agreements. WTO bodies have demonstrated such recognition in the past,[42] but trade law has at times been seen to be at odds with public health initiatives.[43] The AB did not object to the Panel's findings that the objective of protecting public health is a legitimate objective for the purposes of the TBT Agreement and a valid reason for imposing special requirements under Article 20 of the TRIPS Agreement.

The decisions also highlight the importance of public health and its relatively strong weight in the evaluative assessments required to be undertaken by WTO bodies. Significantly, public health weighed particularly heavily in the Panel's assessment of

[36] ibid paras 6.700, 6.706–7.
[37] ibid paras 6.677, 6.680–1.
[38] Panel Report (n 3) paras 7.1923–34.
[39] Appellate Body Report (n 9) para 6.574.
[40] ibid paras 6.582–8, 6.599.
[41] See eg T Voon, 'Third Strike: The WTO Panel Reports Upholding Australia's Tobacco Plain Packaging Scheme' (2019) 20 Journal of World Investment and Trade 146, 152.
[42] Appellate Body Report, *US – Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/AB/R, adopted 4 April 2012, paras 235–6; Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, adopted 12 March 2001, paras 162–81.
[43] See eg B McGrady, *Confronting the Tobacco Epidemic in a New Era of Trade and Investment Liberalization* (WHO 2012); D McNeill *et al.*, 'Trade and Investment Agreements: Implications for Health Protection' (2017) 51 JWT 159.

unjustifiability, where it was a key determining factor in the conclusion that there was sufficient support for the measures. The AB's affirmation of this approach reveals that WTO agreements are being interpreted in a way that leaves significant latitude for public health measures.[44]

B. Evidentiary and Practical Implications

1. Evidence and the FCTC as an evidentiary tool

a) Evidence in WTO disputes

The WTO decisions highlight the central role that evidence plays in fact-based WTO analyses such as those under Article 2.2 of the TBT Agreement and Article 20 of the TRIPS Agreement. This has significance not only for tobacco control measures but also other public health measures, the development of which will require interdisciplinary collaboration between experts and policymakers.[45]

The AB decision confirms that a panel is entitled to examine the totality of the evidence in determining a challenged measure's contribution to its objective. This means that other countries may use already-available pre-implementation evidence of Australia's TPP measures' proximal and distal outcomes to establish the efficacy of TPP. It also means that pre-implementation evidence in aid of other novel public health measures, such as alcohol labelling, would likely provide substantial support for the WTO consistency of such measures in a WTO challenge.

Other countries may also rely on post-implementation evidence of the actual impact of TPP in Australia, as well as countries where such measures have already been implemented. As this body of post-implementation evidence continues to grow, it is likely to carry more normative weight than the available pre-implementation evidence.

Importantly, the AB decision confirms that a panel's role as factfinder gives it some margin of discretion in how it approaches the evidence available. In turn, the Panel's approach confirms that a degree of flexibility is likely to be afforded to parties concerning the limitations of certain evidence.[46] This is important, because a lack of evidence is a common challenge made by complainants about health measures in WTO and other legal disputes.[47]

[44] See S Zhou and J Liberman, 'Public Health, Intellectual Property, and the Trade and Investment Law Challenges to Australia and Uruguay's Tobacco Packaging Laws' in DR Rothwell, I Saunders, and E Shirlow (eds), *The Australian Year Book of International Law Online* (Brill 2020).

[45] AD Mitchell and J Casben, 'Trade Law and Alcohol Regulation: What Role for a Global Alcohol Marketing Code?' (2016) 112 Addiction 109, 110.

[46] A Higgins, AD Mitchell and J Munro, 'Australia's Plain Packaging of Tobacco Products: Science and Health Measures in International Economic Law' in B Mercurio and K Ni (eds), *Science and Technology in International Economic Law: Balancing Competing Interests* (Taylor and Francis 2013) 122–3. As T Voon notes, this 'standard of review' is likely to change depending on the particular agreement and the obligation said to be breached (eg discrimination-based provisions): 'Evidentiary Challenges for Public Health Regulation in International Trade and Investment Law' (2015) 18 JIEL 795, 825–6.

[47] B McGrady, 'Tobacco Plain Packaging and the Expanding Role of the WTO in Regulatory Oversight' in DR Rothwell, I Saunders, and E Shirlow (eds), *The Australian Year Book of International Law* (Brill 2020) 78.

b) The FCTC and its Guidelines

The AB's decision reinforces the particular role that the FCTC can play in WTO disputes. The FCTC cannot be used to legally justify a measure that would otherwise be inconsistent with a Member's WTO obligations. However, it can be used as evidence to assess or characterise the measure in question.[48] The FCTC can provide a firm evidentiary basis for the importance of addressing the tobacco epidemic, tobacco control as a legitimate health objective, and the acceptance and recognition of TPP and other measures as effective tobacco control measures.[49] This is consistent with the use of the FCTC in legal challenges at the WTO and in other fora.[50] Therefore, the decisions also confirm the ability and the growing tendency of WTO bodies to utilise non-trade law treaties and acknowledge the recognition already given to public health within the interpretative provisions of trade agreements and other instruments (eg Article 8 of the TRIPS Agreement and the Doha Declaration). This may further increase the recognition of public health in other IEL contexts,[51] where health flexibilities are being used to increase States' regulatory autonomy.

The legal status of the FCTC and its Guidelines under WTO law did not, for the Panel, affect the use of those instruments for other purposes (eg as the basis for factual findings) or under other provisions. Thus, the Panel used the FCTC and its Guidelines to support its factual findings even though the latter was found not to constitute an 'international standard' under Article 2.5 of the TBT Agreement.

The precise role of these instruments is further underscored by the AB's rejection of Honduras' argument that the Panel placed undue legal weight on them in its analysis of 'sufficient support' under Article 20 of the TRIPS Agreement. The AB emphasised that the Panel used the FCTC to support its factual findings and did not use the FCTC as a binding legal instrument or an interpretative tool.[52] Importantly, parties to a dispute need not be bound to a particular agreement or treaty for that agreement to be used as evidence to aid a dispute body's factual assessments.[53]

Despite these implications, the Panel's conclusion that the TPP Guidelines do not constitute an 'international standard' reduces certainty about the WTO-consistency of

[48] See Appellate Body Report (n 9) para 6.707; Panel Report (n 3) paras 7.412–17.

[49] See eg Panel Report (n 3) paras 7.663–6, 7.800, 7.1309–10, 7.1507–8, 7.2595. See generally L Gruszczynski and M Melillo, 'The FCTC and Its Role in WTO Law: Some Remarks on the WTO Plain Packaging Report' (2018) 9 EJRR, 572.

[50] Panel Report (n 3) para 7.412. See generally S Zhou, J Liberman and E Ricafort, 'The Impact of the WHO Framework Convention on Tobacco Control in Defending Legal Challenges to Tobacco Control Measures' (2019) 28 Tobacco Control s113; N Devillier and T Gleason, 'Consistent and Recurring Use of External Legal Norms: Examining Normative Integration of the FCTC post-Australia – Tobacco Plain Packaging' (2019) 53 JWT 533, 561–4.

[51] See eg *Philip Morris Brands Sàrl v Uruguay*, ICSID Case No ARB/10/7, Award (8 July 2016); *Methanex Corporation v United States of America* (2005) 44 ILM 1345.

[52] See Appellate Body Report (n 9) paras 6.700–7. Notably, the Panel said that 'it is not uncommon in WTO disputes for … panels and the Appellate Body to rely on, non-WTO international instruments … *to inform the interpretation of specific provisions under a covered agreement*' but did not use the FCTC in this way: at para 7.412 (emphasis added).

[53] S Zhou, 'The WHO Framework Convention on Tobacco Control in the WTO Panel's decision in Australia – Plain Packaging' (*ILA Reporter*, 27 February 2019) <http://ilareporter.org.au/2019/02/the-who-framework-convention-on-tobacco-control-in-the-wto-panels-decision-in-australia-plain-packaging-suzanne-zhou/>. See eg Panel Report, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/R, adopted 2 September 2011, paras 2.29–32.

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other Members' measures by depriving them of a more direct way to defend TPP under the TBT Agreement. Future WTO defendants cannot resort to the FCTC and the TPP Guidelines to invoke the rebuttable presumption under Article 2.5, at least in respect of TPP.

Nevertheless, the fact that the FCTC and its Guidelines do not constitute international standards under Article 2.5 does not speak directly of the legality of using the FCTC as a binding and normative legal instrument or an interpretative tool. The AB's limited discussion of this precise issue leaves open the treaty's proper role in WTO law. The AB pointed out that the Panel did not use the FCTC in this way to reject the appellants' claims. However, probably because it was unnecessary in this dispute, the AB did not expressly delimit the status of the FCTC and its Guidelines under WTO law. It merely concluded the Panel had used the Guidelines to support its factual findings. Some have posited Article 3(2) of the DSU together with Article 31 of the VCLT as providing the legal basis for consideration of the FCTC as a rule of international law, rather than merely an evidentiary tool. Devillier and Gleason observe that, when used in this way, the facts supported by the FCTC cannot simply be rebutted or disproved by conflicting evidence.[54]

c) Scientific and health-based evidence

A related implication concerns the approach to scientific evidence in particular, especially in the context of the TBT Agreement. In its report, the Panel said that its assessment of scientific evidence may include consideration of whether such evidence 'comes from a qualified and respected source', whether it has the 'necessary scientific and methodological rigor to be considered reputable science' or reflects 'legitimate science according to the standards of the relevant scientific community', and 'whether the reasoning articulated on the basis of the … evidence is objective and coherent'.[55]

The Panel borrowed these considerations, as the panel in *US–Clove Cigarettes* had done,[56] directly from the AB, which had outlined them in the context of the Agreement on the Application of Sanitary and Phytosanitary Measures.[57] The Panel said that these types of considerations for assessing scientific evidence may also apply, with necessary modification, to the TBT Agreement.[58] The AB in this dispute did not deal directly with the legality or propriety of this approach,[59] which means that future panels may seek to adopt it. In any case, it is generally reminiscent of the approach endorsed by the AB in other WTO cases, in which 'scientific findings are evaluated on the basis of the standards of the scientific community concerned'.[60]

[54] Devillier and Gleason (n 50) 536, 538.

[55] Panel Report (n 3) para 7.516, quoting Appellate Body Report, *United States – Continued Suspension of Obligations in the EC – Hormones Dispute*, WT/DS320/AB/R, adopted 16 October 2008, paras 591–2.

[56] Panel Report, *US–Clove Cigarettes* (n 53) para 7.401, fn 715.

[57] Appellate Body Report, *European Communities – Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 16 January 1998, para 109.

[58] Panel Report (n 3) para 7.517. The Panel's assessment of the TPP measures' contribution under the TBT Agreement was adopted later in its analysis under art 20 of the TRIPS Agreement: para 7.2593.

[59] See Appellate Body Report (n 9) para 6.22 and fn to para 6.23.

[60] J d'Aspremont and MM Mbengue, 'Strategies of Engagement with Scientific Fact-finding in International Adjudication' (2014) 5 JIDSt 240, 253–4. See eg Appellate Body Report, *Canada –*

Therefore, it is possible that the approach falls under the margin of discretion afforded to a panel in its role as factfinder, and indeed, may contribute to a finding under Article 11 of the DSU that a panel has made an objective assessment of the facts before it.[61]

2. *The importance of a robust and comprehensive policy framework*

The fact that a panel is entitled and likely to consider the totality of evidence means that a suite of tobacco control measures will be important in defending a TPP regime, especially under provisions where alternative measures may be considered. The AB did not question or object to what has been described as a 'key theme of the panel's reasoning': consideration of the TPP measures in their regulatory context.[62] Therefore, the decisions give recognition to the general view that a comprehensive suite of measures increases the effectiveness of a tobacco control framework.[63]

The Panel emphasised that Australia's broader suite of comprehensive measures was relevant to its assessment of how the TPP measures are applied and operate.[64] The AB did not question the Panel's consideration of the extent to which the TPP measures created 'synergies' with other measures in assessing their contribution. Rather, the AB questioned the Panel having concluded that the alternative measures made less of a contribution without considering the interaction of those alternatives with other measures.[65] The AB confirmed the principle that what is relevant is the *overall* degree of contribution, which it found the Panel had misapplied.[66] This means that the extent to which a measure features as part of a broader suite of measures and how it interacts with those measures will still be important in defending a measure before a WTO body.

It is not clear that TPP would need to feature as a final resort in a country's regulatory framework, especially under Article 20 of the TRIPS Agreement. However, as the discussion below in Part III.C reveals, ensuring that other less trade-restrictive measures are in place before implementing TPP may be a judicious step for States to take in averting challenges to TPP.

3. *Other practical implications*

The dispute demonstrates that how the legitimate objective of a measure is formulated and characterised is important, because that characterisation may influence a panel's assessment of whether a measure contributes to its objective. The AB found that the Panel erred in using the TPP measures' mechanisms to assess the overall contribution of the alternative measures. However, those mechanisms provided important and valid context for its assessment of the TPP measures' contribution. The AB upheld the Panel's focus on the TPP measures' intermediate effects (such as proximal and distal outcomes), in addition to behavioural outcomes regarding smoking prevalence. Therefore, it is important that proposed TPP measures are framed in their proper regulatory context,

Continued Suspension of Obligations in the EC – Hormones Dispute, WT/DS321/AB/R, adopted 16 October 2008, para 591.

[61] This appears to have been the case in this dispute: see eg Appellate Body Report (n 9) paras 6.73–7.

[62] See ibid para 6.17; Panel Report (n 3) paras 7.1529, 7.1727, 7.2592.

[63] Higgins, Mitchell and Munro (n 46) 121.

[64] Panel Report (n 3) para 7.506.

[65] Appellate Body Report (n 9) para 6.502.

[66] ibid. See Panel Report (n 3) paras 7.1368–9, 7.1731.

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and the means by which they are intended to achieve their overall objective is made clear in legislation and policy materials.

Although the dispute has shown that the evidence available supports TPP, it also reveals that defending legal challenges can be costly, resource-demanding and time-consuming, particularly where complex claims are made.[67] Despite the AB's apparent dissatisfaction with the appellants' claims' voluminous and complex nature, there is no indication that Members will not necessarily seek to bring claims of a similar character and magnitude in the future. It is noteworthy that Article 11 of the DSU, notwithstanding one Division Member's separate opinion, provided the appellants with the opportunity to make additional challenges to the Panel's findings of fact. Similar challenges in the future may involve large amounts of evidence and require a thorough re-examination of a panel's assessment of that evidence. This approach to WTO litigation has become increasingly common.[68] Notably, the AB's alleged countenance of this approach is at the centre of the ongoing impasse instigated by the United States, which has expressed its agreement with the dissenting Member's separate opinion.[69]

C. Legal Implications

The Panel and AB decisions indicate that measures such as TPP will generally engage certain WTO provisions because they will satisfy the initial or threshold stages of the relevant legal tests (ie those that determine whether a particular measure is captured by a provision). For example, Australia's TPP measures were found to constitute both a 'technical regulation' under the TBT Agreement and a 'special requirement' under the TRIPS Agreement.

It has been pointed out that the Panel's 'broad' interpretation of these steps has the potential to subject more measures to WTO challenge.[70] However, in light of the implications outlined above, tobacco control measures are less likely to fall foul of the more substantive requirements within relevant provisions, such as the requirement that a technical regulation be no more trade-restrictive than necessary or that a special requirement shall not unjustifiably encumber trademark use. Therefore, provided there is sufficient evidentiary support for public health measures such as TPP, the consistency of those measures with WTO obligations is likely to be upheld.[71] The AB decision has nevertheless clarified the content of substantive requirements under the relevant legal tests.

1. TBT Agreement Article 2.2: trade-restrictiveness

On the one hand, the AB did not overturn the Panel's interpretation of trade-restrictiveness, by confirming that 'actual trade effects' may be relevant where a

[67] B McGrady, 'Health and International Trade Law' in GL Burci and B Toebes (eds), *Research Handbook on Global Health Law* (Edward Elgar 2018) 107.

[68] T Voon and A Yanovich, 'The Facts Aside: The Limitation of WTO Appeals to Issues of Law' (2006) 40 JWT 239, 247; Voon (n 41) 155.

[69] See Office of the United States Trade Representative, 'Statements by the United States at the Meeting of the WTO Dispute Settlement Body' (29 June 2020) 17–18.

[70] Zhou and Liberman (n 44) 74–5.

[71] McGrady, 'Tobacco Plain Packaging and the Expanding Role of the WTO in Regulatory Oversight' (n 47) 76.

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measure is non-discriminatory. In so doing, the AB upheld its previous statement that 'a detrimental modification of competitive opportunities may be self-evident in respect of certain *de jure* discriminatory measures, whereas … evidence … of actual trade effects might be required … in respect of non-discriminatory internal measures'.[72] This means that it may be harder for future complainants to characterise TPP and similar non-discriminatory measures as trade-restrictive. Complainants will need to show that a non-discriminatory measure will negatively affect competitive opportunities, rather than show that they merely modify the competitive environment.[73] Measures may also affect brand differentiation, provided this does not disadvantage imported products compared to competing domestic products as a whole.[74]

On the other hand, the Panel found that the TPP measures are trade-restrictive simply because they would reduce demand for tobacco products (such demand in Australia being exclusively met by imports).[75] This direct and uncomplicated approach to trade-restrictiveness indicates that other TPP measures are likely to be trade-restrictive to some degree, and much will depend on the market conditions for tobacco products in the relevant country, as well as other factors in the 'relational analysis' (the degree of contribution, the consequences of non-fulfilment, and the comparative contribution and trade-restrictiveness of alternative measures).

Importantly, the AB did not overturn the Panel's approach to the trade-restrictiveness of alternative measures. This means that those alternatives are likely to be as equally trade-restrictive as the challenged TPP measure, and that TPP measures are therefore likely to be no more trade-restrictive than necessary.[76] Again, this will likely depend on the extent to which a Member has a robust and comprehensive tobacco control framework.

2. *TBT Agreement Article 2.2: equivalent contribution*

The AB decision confirms that whether an alternative measure can achieve an equivalent contribution will be measured by reference to that measure's *overall* contribution, and not by reference to the specific mechanism(s) chosen by a Member to achieve its objective. This is because a measure may make a contribution through ways different to those in which the challenged measure makes its contribution. In this respect, there seems to be a divergence in the Panel and the AB's approaches. The Panel took a qualitative approach to a measure's contribution, while the AB took a more quantitative approach.[77]

The AB's approach makes it theoretically easier for complainants to formulate reasonably available alternative measures, because such alternatives may still make a contribution even if they do not address the same mechanisms or aspects that the challenged measure seeks to address (eg the design features of tobacco packaging).

[72] Appellate Body Report, *United States – Certain Country of Origin Labelling (COOL) Requirements: Recourse to Article 21.5 of the DSU by Canada and Mexico*, WT/DS384/AB/RW, WT/DS386/AB/RW, adopted 18 May 2015, 126, para 5.208, fn 643 (US–COOL: Recourse to Article 21.5).

[73] See Voon (n 41) 161, 164.

[74] Appellate Body Report (n 9) paras 6.386–7, 6.408.

[75] Panel Report (n 3) paras 7.1200, 7.1204, 7.1207.

[76] Voon (n 41) 171.

[77] See Appellate Body Report (n 9) para 6.491; Panel Report (n 3) para 7.1731. See, generally, Voon (n 41) 168–70.

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However, the dispute demonstrates that this is unlikely to have a significant practical impact on the successful defence of plain packaging measures, because any such alternative is likely to be as equally trade-restrictive as the challenged measure.

In contrast, the AB's approach may have a detrimental impact on the defence of other, non-tobacco-related regulatory measures. This will particularly be the case where a measure's alternatives are less trade-restrictive, or where a measure has multifaceted objectives and operates through mechanisms that are inseparable from, or share a complex relationship with, those objectives. Under the AB's approach, future panels may be more willing to unduly challenge a State's chosen level of protection by overlooking such measures' qualitative aims where these measures are deemed to make less of a quantitative contribution.

3. *TRIPS Agreement Article 20*

The dispute is the first case in which the scope and content of the term 'unjustifiably' and the other elements of Article 20 have been explored.[78] In contrast to the Panel's broad interpretation of the threshold requirements under Article 20,[79] its interpretation of 'unjustifiably' favours Members seeking to implement public health measures.

It is not entirely clear what the requirement of 'sufficient support' requires, except that it is something less than necessity and something more than a 'rational connection'.[80] However, for the Panel (and the AB), it was enough that the measures' health objectives were highly important, and that the measures would contribute to achieving those objectives. In this regard, the importance of tobacco control and public health generally outweighed the extensive effects on trademark use brought about by the TPP measures.

The shallow nature of the Panel's analysis indicates that the test of sufficient support is essentially the benchmark for a weighing and balancing exercise, which simply involves determination of whether the policy reason for bringing about an encumbrance on trademark use has at least equal or more weight than the extent of the resulting encumbrance. As McGrady notes, the Panel's three-step approach frames a panel's task as a broad evaluative analysis in which the focus is on the proportionality of a measure.[81] Notably, the fact that the AB said unjustifiability 'could' be determined by the Panel's approach reveals the nebulous nature of unjustifiability and leaves it open to future panels to adopt different analytical tools for settling disputes under Article 20.

The AB's confirmation that Article 20 does not require Members to demonstrate that a measure is necessary (in the sense of there being no less trademark-encumbering alternatives) should further encourage Members to implement TPP measures. However, the availability of such alternative measures may play a role in determining the justifiability of TPP or other public health measures. The existence of such alternative measures may 'inform an assessment of' or 'call into question' whether the reasons for the adoption of special requirements sufficiently support the resulting encumbrance on trademark use.[82] Whether this is so in any particular case may

[78] Panel Report (n 3) para 7.2328.
[79] See ibid paras 7.2241–4, 7.2261–3.
[80] Voon (n 41) 183; Zhou and Liberman (n 44) 74.
[81] McGrady, 'Tobacco Plain Packaging and the Expanding Role of the WTO in Regulatory Oversight' (n 47) 81.
[82] Appellate Body Report (n 9) paras 6.654–5, quoting Panel Report (n 3) para 7.2598.

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depend on whether a Member has already taken significant steps to develop its tobacco control framework. Nevertheless, the AB's acceptance of the Panel's approach indicates that measures may be justifiable provided they would contribute to the Member's health objectives.[83]

4. *TRIPS Agreement Article 16*

Article 16.1 has featured prominently within the tobacco industry's arsenal of legal claims against tobacco control measures and has been a key source of concern about whether other public health measures may be amenable to legal challenge. However, the AB decision confirms that Article 16.1 cannot be used by the tobacco or other industries to challenge a measure on the ground that it infringes a WTO Member's supposed positive right to use their intellectual property. This removes a major avenue for any future legal challenges to TPP measures, and public health measures generally.

5. *The Doha Declaration*

Although the AB felt it unnecessary to conclude on the Panel's finding that the Doha Declaration is a 'subsequent agreement' under Article 31(3) of the VCLT, the AB's conclusion that Paragraph 5(a) of the Doha Declaration reflects customary international law rules of treaty interpretation reinforces the role that Articles 7–8 of the TRIPS Agreement can play in interpretation of that Agreement. Articles 7–8 contain the objects and purposes of the TRIPS Agreement, which according to ordinary rules of interpretation under Article 31(1) of the VCLT, must inform its interpretation.[84] Therefore, recognition given by Article 8 to public health and other societal interests will continue to inform future interpretations of the TRIPS Agreement.

IV. PUBLIC HEALTH MEASURES AND INTERNATIONAL ECONOMIC LAW

Decisions by WTO bodies are taking an increasingly central role in the control and regulation of public health measures. McGrady has observed that the Panel's analysis is focused less on traditional notions of market access and international trade, and more on the broader question of whether the measure in question is proportionate.[85] For McGrady, this 'casts WTO dispute settlement as a constitutional court of last resort' in the sphere of legal challenges to public health regulation, in which the WTO is a court with broad oversight of regulatory matters.[86]

This characterisation and the legal role that WTO bodies are required to play in performing increasingly constitutionalised adjudicative tasks corresponds with the influence and authority that WTO bodies already have within other IEL frameworks.[87] WTO bodies are frequently cited by other international courts and arbitral tribunals in

[83] ibid paras 6.654–5.
[84] Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 29 April 1996, 16–17.
[85] McGrady, 'Tobacco Plain Packaging and the Expanding Role of the WTO in Regulatory Oversight' (n 47) 81.
[86] ibid 79, 82.
[87] See generally G Shaffer, M Elsig and S Puig, 'The Extensive (but Fragile) Authority of the WTO Appellate Body' (2016) 79 Law and Contemporary Problems 237.

various contexts.[88] Much of the impetus behind this phenomenon is the practical need to use WTO findings to settle legal questions that involve concepts borrowed from, or influenced by, WTO rules.[89]

For example, numerous international agreements are based on the TRIPS Agreement. The general exceptions clause in Article XX of the GATT is frequently used as a foundation for analogous provisions in preferential trade agreements. Therefore, the implications outlined above concerning the scope of Article 16.1 and the interpretation of the TRIPS Agreement are generally significant not only for WTO law but also for other frameworks. The AB's conclusions may provide appropriate guidance to international bodies that are required to interpret agreements based on the TRIPS Agreement, and domestic and supranational courts with jurisdiction in economies that have incorporated the Agreement into domestic law.

WTO decisions have also been referenced authoritatively by international tribunals in aid of factual assessments.[90] This is particularly significant for TPP and other packaging measures (eg those relating to unhealthy foods and alcohol). The Panel's detailed analysis of the evidence supporting plain packaging may be referred to in future disputes outside of the WTO. This may remove the need for economic tribunals to undertake factual assessments they are not necessarily qualified or equipped to make and provide further support for tobacco control measures beyond the support provided by the FCTC and other instruments.[91]

V. CONCLUSION

The *Australia–Tobacco Plain Packaging* reports have clarified numerous aspects of certain WTO Agreements and the status of non-WTO instruments, while at the same time leaving others comparatively less certain. The decisions confirm that there is no positive right to use under Article 16.1 and no strict test of necessity under Article 20 of the TRIPS Agreement, and that claims made against measures under Article 2.2 of the TBT Agreement are less likely to be successful where the challenged measure is not discriminatory in its trade effects. On the one hand, the dispute confirms the vital evidentiary role of the FCTC. On the other, it technically leaves open the legal status of that treaty and the Doha Declaration under WTO law, while confirming that the FCTC TPP Guidelines do not carry legal weight as international standards. For the most part, these less positive outcomes are unlikely to have any substantial adverse impact on the development of public health policy. Rather, most of the WTO's interpretations and clarifications are very likely to bolster the confidence of States to implement public health measures like TPP.

[88] ibid 261–4; G Marceau, A Izaguerri and V Lanavoy, 'The WTO's Influence on Other Dispute Settlement Mechanisms: A Lighthouse in the Storm of Fragmentation' (2013) 47 JWT 481, 531–2; AD Mitchell and J Munro, 'State–State Dispute Settlement under the TPP' in T Voon (ed), *Trade Liberalisation and International Cooperation: A Legal Analysis of the Trans-Pacific Partnership Agreement* (Edward Elgar 2013) 156, 176–7.

[89] Marceau, Izaguerri and Lanavoy (n 88) 531–2; McGrady, 'Tobacco Plain Packaging and the Expanding Role of the WTO in Regulatory Oversight' (n 47) 77–8, 86.

[90] Marceau, Izaguerri and Lanavoy (n 88) 530–1.

[91] Concerns remain about the capacity and competence of economic tribunals to review complex scientific evidence: see eg Voon (n 46) 807.

The WTO plain packaging dispute is likely to have a broad and important effect, both through the dispute's political consequences and the normative standing that WTO bodies' legal and factual analyses have in other legal contexts. Perhaps most significantly, the dispute shows that the WTO system itself is legally and jurisprudentially receptive to public health measures, including innovative public health regulation. There is no inherent conflict between trade law and public health, and governments should feel confident to proceed with bona fide non-discriminatory measures to protect public health.