In June 2018, the World Trade Organisation (WTO) Panel in Australia – Plain Packaging affirmed that Australia’s tobacco plain packaging laws are consistent with its WTO obligations. The law and its accompanying regulations prohibit the use of colours, imagery, logos, fonts, scents, textures, pack shapes and promotional text (other than brand and variant name and consumer information) on tobacco packaging.

The Panel rejected claims by Cuba, the Dominican Republic, Honduras and Indonesia that Australia’s tobacco plain packaging laws violated the World Trade Organisation’s Agreement on Technical Barriers to Trade (TBT) and Agreement on Trade-Related Aspects of Intellectual Property Rights.
It found that plain packaging is ‘apt to, and does, contribute’ to the goal of reducing tobacco use and exposure to tobacco smoke, and that it is not more trade-restrictive than necessary to protect public health under article 2.2 of the TBT, nor does it infringe on any relevant intellectual property protections under TRIPS.

In reaching its conclusions, the Panel extensively cited the **WHO Framework Convention on Tobacco Control** (FCTC), a multilateral treaty whose objective is to ‘protect present and future generations from the devastating health, social, environmental and economic consequences of tobacco consumption and exposure to tobacco smoke’. What the Panel says about the WHO FCTC has major significance for WHO FCTC parties – who, through the Conference of the Parties to the treaty, have adopted seven decisions about the potential impact of trade and investment law on parties’ ability to implement the treaty – and for the place of non-trade interests in the WTO (such as those relating to health and the environment) more broadly.

In this post, I focus on one aspect of the Panel’s findings on the WHO FCTC – its use to confirm that plain packaging’s restrictions on the use of trademarks were not ‘unjustifiable’. The Panel’s decision on this point, like the use of the WHO FCTC ‘as a point of reference’ for ‘reasonableness’ by an ICSID tribunal in the case brought by **Philip Morris International against Uruguay**, shows the potential significance of health and environmental treaties and their subsidiary instruments in the application of reasonableness and proportionality standards in international trade and investment agreements.

**The Panel’s references to the WHO FCTC**

The WHO FCTC implementation guidelines on **tobacco packaging and labelling** and on **the restriction of tobacco advertising, promotion and sponsorship**, both recommend the adoption of tobacco plain packaging. The guidelines, which are adopted by the Conference of the Parties to the WHO FCTC to assist parties in the treaty’s implementation, also discuss the role played by packaging in the promotion of tobacco products, and the role of industry packaging design techniques in undermining the impact of health warnings. Australia’s tobacco plain packaging legislation and accompanying **explanatory memorandum** state that implementing the WHO FCTC is one of the objectives of the Tobacco Plain Packaging Act.

The WHO FCTC was extensively cited by Australia during the proceedings, and the Panel was called upon at several points to consider the significance of the WHO FCTC and its guidelines to the resolution of the case.

To summarise the Panel’s reasoning on the WHO FCTC, it:

- extensively considered whether or not the WHO FCTC guidelines were ‘international standards’ under article 2.5 of the TBT Agreement, which states that measures based on an international standard shall be ‘rebuttably presumed’ not to violate TBT article 2.2. The Panel concluded that they were not a ‘standard’ because they were not for ‘common and repeated use’ - they were
intended to provide guidance on the implementation of a binding legal obligation rather than to create a ‘maximum degree of order’ across WTO members (7.386-7.388);

- noted that its findings on the international standard point did not mean that it could not consider the WHO FCTC in relation to other legal issues (7.416);
- noted that it was commonplace for non-WTO treaties, including the WHO FCTC, to be cited in both interpretation and fact-finding (7.412-7.415);
- noted that the complainants themselves had invoked the WHO FCTC in relation to some of their arguments (7.416);
- examined the WHO FCTC to inform its understanding of the objectives of tobacco plain packaging (7.243);
- cited the WHO FCTC to support its characterisation of tobacco plain packaging as part of a comprehensive and multifaceted approach to tobacco control (7.1728);
- cited the WHO FCTC to confirm the gravity and severity of the global tobacco epidemic (7.1309-7.1310, 7.2592);
- cited the WHO FCTC implementation guidelines on articles 11 and 13 to confirm the role of tobacco product marketing in sustaining the use of and exposure to tobacco products (7.664-7.665);
- cited the WHO FCTC article 13 guidelines to support its findings that tobacco packaging is a form of promotion and that plain packaging would reduce the appeal of tobacco packaging (7.664);
- cited the WHO FCTC article 11 guidelines to support its findings that graphic health warnings were an effective public health measure (7.798-7.803)
- cited WHO FCTC articles 6 (on tax and price measures), 12 (on education, communication, training and public awareness), and 16 (on sales to and by minors) to inform its assessment of whether or not increased tax, raising the minimum legal purchasing age, and additional mass media campaigns could serve as less-trade-restrictive alternatives to plain packaging (7.1442, 7.1457, 7.1509, 7.1527, 7.1594);
- referred to the comprehensive approach endorsed in the WHO FCTC in finding that those measures were complements rather than alternatives (7.1457-7.1460, 7.1527-7.1529, 7.1728-7.1731); and
- noted that Australia had followed the recommendations in the WHO FCTC guidelines to confirm its finding that plain packaging was not an ‘unjustifiable encumbrance’ on the use of trademarks in the course of trade (7.2596, 7.2604).

The Panel did not invoke article 31(3)(c) of the Vienna Convention on the Law of Treaties (VCLT) to interpret WTO Agreements in light of the WHO FCTC. It would have been difficult for it to do so given that out of the parties to the dispute, only Australia and Honduras were parties to the WHO FCTC — Cuba has signed but not ratified the WHO FCTC, and the Dominican Republic and Indonesia have neither signed nor ratified the agreement.

**Article 20 of the TRIPS Agreement, justifiability, and the WHO FCTC**
Of these references to the WHO FCTC, one has been specifically appealed by the complainants – the Panel’s use of the WHO FCTC to confirm that the trademark-related special requirements of plain packaging were not an ‘unjustifiable encumbrance’ on the ‘use of trademarks in the course of trade’ under article 20 of the TRIPS Agreement. Honduras (and the Dominican Republic by incorporation) have appealed these findings, claiming, among other things, that by citing the WHO FCTC, the Panel relied on a ‘non-covered agreement’ to justify the plain packaging measures.

In relation to article 20, the Panel had noted that Australia ‘has pursued its relevant domestic public health objective in line with the emerging multilateral public health policies in the area of tobacco control as reflected in the FCTC and the work under its auspices, including the Article 11 and Article 13 FCTC Guidelines’ (para 7.2604). It stated that ‘the importance of the public health reasons for which the are applied is further underscored by the fact that Australia pursues its domestic public health objective in line with its commitments under the FCTC, which “was developed in response to the globalization of the tobacco epidemic” and has been ratified by 180 countries’ (para 7.2596).

Neither of the appellants’ submissions are published, so Honduras’ full arguments are not publicly available. However, Australia’s published appellee submissions include short excerpts from Honduras’ submissions, and from these we can infer that Honduras argues that the Panel gave ‘undue legal weight’ to the WHO FCTC guidelines, and that it considers that the WHO FCTC guidelines were ‘not relevant’ to the case because they cannot ‘justify’ measures that are otherwise inconsistent with the WTO agreements. Australia, for its part, disputes Honduras’ characterisation of the Panel’s references to the WHO FCTC, noting that the Panel referred to the WHO FCTC to ‘further underscore’ findings it had already made on the importance of the public health purposes of plain packaging, and that ‘if anything, the Panel did not give enough weight’ to the WHO FCTC (para 254).

**Interpretation, evidence and points of reference**

Honduras’ appeal on this point echoes claims made by several complainants at the panel level, where they argued that the WHO FCTC and the recommendations for plain packaging under the guidelines were not a ‘relevant rule of international law’ under article 31(3)(c) of the VCLT and were therefore not pertinent to the interpretation of any of the relevant WTO provisions (paras 7.406-7.409, fn 1274). At the panel level, the complainants’ arguments focused on whether there was a conflict between the WHO FCTC and the WTO Agreements, and the extent to which the WHO FCTC could modify or affect the interpretation of the obligations under the WTO Agreements if that were the case.

As noted by the arbitral tribunal in *Philip Morris v. Uruguay*, however, there is a distinction between using the WHO FCTC to ‘excuse non-performance of distinct obligations’, and examining the WHO FCTC and its guidelines as a ‘point of reference on the basis of which to determine the reasonableness’ of challenged tobacco control measures (para 401). The first is a question of the law of treaties. The second, however, is predominantly a factual question. The WHO FCTC is not being used in the second instance as a conflicting treaty, or even to interpret terms such as ‘arbitrary’ or
‘unjustifiable’ per se. Rather, it is important because when we apply those terms to the facts, the fact that a measure implements another treaty is an integral part of the factual context of that measure, and therefore to be taken into account in how we assess or characterise that measure. The WTO panel appears to have implicitly taken this approach in its references to the WHO FCTC in TRIPS article 20 as well.

There are a number of implications arising from this distinction. First, it suggests that, to use the WHO FCTC in factual assessments, unlike under article 31(3)(c) of the VCLT, it is not necessary for all parties to the dispute or treaty to be bound by the obligation (as was explicitly stated in the Uruguay case and implicit in the Australian case), nor is it necessary for the Panel to find a multilateral ‘common intention’ between the parties. The WHO FCTC and its guidelines are necessarily part of the evidence base and rationale for the respondent state’s implementation of WHO FCTC obligations, even if not all of the members of the trade agreement are party to the same agreements.

Second, the use of external instruments in fact-finding raises the question of what facts these instruments are significant to. Are panels/tribunals citing such instruments as evidence of the scientific consensus supporting the measure? Or are they really indicative of something else, such as the good faith of the respondent, the overall rationality of its conduct, or a panel’s recognition that other multilateral institutions are better placed to make such assessments of the evidence? Each of these has different implications for whether or not, for example, a panel looks at the process and inputs behind a particular normative instrument, the standard of review, the kind of instruments one can invoke as evidence, and the extent to which those instruments can stand alone as proof of a given fact. Many of these were hard fought questions at the panel level and are likely to also be relitigated before the Appellate Body.

These differences may not necessarily be critical to the plain packaging dispute itself, given that the evidence before the Panel in this case also included 1600 exhibits and 80 reports from expert witnesses. The Panel largely invoked the WHO FCTC to confirm its own assessment of this large body of evidence. However, they have major importance for other WHO FCTC parties, particularly lower resource settings where local data or studies are much more difficult to compile. In such settings, recommendations by bodies such as WHO or the WHO FCTC Conference of the Parties often form an important basis for regulation, as local research may be limited (as the tribunal in Philip Morris v. Uruguay recognised (para 393)). What the Appellate Body says (if anything) about Honduras’ appeal point on the WHO FCTC therefore may have a wider systemic significance than its role in resolving the TRIPS article 20 claims against Australia might suggest.

**Conclusion**

The Australia – Plain Packaging case is another example of the effect of the WHO FCTC’s impact on litigation concerning tobacco control measures. Like much of this litigation, it demonstrates the ways in which treaty regimes can interact beyond the ways contemplated by the principle of systemic
integration, many of which have received comparatively less attention from scholars of the fragmentation of international law than VCLT article 31(3)(c). As the number of multilateral and plurilateral treaties with overlapping membership continues to increase, we may well see these other forms of treaty interactions take on more significance in international dispute settlement.

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