The FCTC and its Role in WTO Law: Some Remarks on the WTO Plain Packaging Report

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I. INTRODUCTION

A panel, in a proceeding launched within the World Trade Organization (WTO), has recently issued its report\(^1\) in a very controversial dispute concerning several Australian measures that require use of plain packaging for all tobacco products. The 884-page report contains a lot of food for thought, and it will take some time for scholars to digest all its findings and analyse all the intended and unintended consequences of the various interpretative choices made by the panel in the course of the proceeding.\(^2\)

The objective of this paper is very modest, as it only plans to provide a concise summary of the most important findings of the panel and offer some initial comments on one specific problem, ie the approach of the panel to the WHO Framework Convention on Tobacco Control (FCTC)\(^3\) and its guidelines.

This paper is structured as follows: Section II provides a brief description of the contested measures and summarises the WTO proceeding. Section III reviews the panel’s findings, while Section IV discusses two interrelated issues that were dealt with by the panel: (i) the possibility of classifying the FCTC guidelines as international standards; and (ii) the broader relevance of the FCTC and its guidelines in the context of WTO law. The final part offers conclusions.

II. FACTUAL BACKGROUND

Australia has one of the most developed and comprehensive tobacco control regulatory regimes. As a part of its national strategy, in 2011 it adopted the Tobacco Plain Packaging Act (TPP Act).\(^4\) The law, which entered into force in 2012, requires the use of

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\(^1\) Formally speaking, there were four panels that issued four reports. However, for simplicity all the four panels are collectively referred to here as "the panel" or "the TPP panel"; the same applies to their reports. For more details, see Section II.

\(^2\) Panels Reports, Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging, 28 June 2018, WT/DS435/R, WT/DS441/R, WT/DS458/R, and WT/DS467/R.

\(^3\) WHO Framework Convention on Tobacco Control, opened for signature 16 June 2003 (entered into force 27 February 2005), 2302 UNTS 166. It currently has 181 parties.

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uniform packaging for all tobacco products. Details and technical rules for unitary packaging are set out in a separate act – the Tobacco Plain Packaging Regulations (TPP Regulations). In addition, Australia also adopted the Trade Marks Amendment (Tobacco Plain Packaging) Act 2011, which allows the government to take executive actions if this is necessary for the harmonious coexistence of the intellectual property rights protection regime and the plain packaging requirements (all those acts are referred to collectively here as TPP measures).

The objective of the TPP measures is to improve the level of public health by discouraging potential users from starting or returning to the use of tobacco products, encouraging those who already use these products to quit, and reducing people’s exposure to smoke from tobacco products (TPP Act, s 3). This objective is achieved by increasing the effectiveness of health warnings on packaging, thereby limiting the attractiveness of tobacco products to consumers, and guaranteeing that they are not misled by packaging as to the risks posed by tobacco consumption.

To this end, the TPP Act and Regulations specify in great detail the appearance of tobacco product packaging, including its colour, shape and size, as well as its layout. In particular, all tobacco product packaging must have a dark drab brown background (in the technical nomenclature – Pantone 448C). The Act also prohibits the placing on the packaging of tobacco products of any trademarks or other marks, except for the brand name, the name of the manufacturer, and the specification of the product variant (e.g. menthol, gold or blue). These elements can be located only in specific areas and using the obligatory font (i.e. Lucida Sans). The font size and its colour are also regulated. Non-compliance with those requirements is subject to criminal and civil sanctions (TPP Act, ch 3).

The TPP Act confirms that its provisions do not prevent the registration of new trademarks for tobacco products and do not affect existing registrations. In this context, the act creates a legal fiction, stating that for the purposes of registration it is assumed that an applicant intends to use a trademark in the future (the existence of such an intention is a necessary element for registration), and adds that the lack of subsequent use of a trademark does not constitute a basis for expiration of the right to the mark (s 28).

The Competition and Consumer (Tobacco) Information Standard 2011 should be also mentioned here. It provides new requirements as to the size and content of health warnings on the packaging of tobacco products. According to this Standard, the space dedicated for health warnings on cigarette packs has been increased from 30% to 75% on the front of the packaging and maintained at the same level on the back part (90%). Slightly lower requirements apply to other tobacco products.

The adoption of the TPP measures did not take place in isolation from the international context. Australia saw the adoption of the TPP measures as part of its effort to implement the FCTC into domestic law. The FCTC sets forth global standards for tobacco control measures, addressing both the demand and supply sides. While the text of the FCTC

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5 Tobacco Plain Packaging Regulations 2011 (SLI 2011, No. 263, as subsequently amended).
7 Competition and Consumer (Tobacco) Information Standard 2011 (F 2011 L 02766, as subsequently amended).
does not require the adoption of a measure such as the TPP, the guidelines to Art 11 (Art 11 FCTC guidelines)\(^8\) and to Art 13 (Art 13 FCTC guidelines)\(^9\) of the FCTC recommend plain packaging as a means to increase the effectiveness of health warnings and to eliminate the effects of packaging advertising.

The TPP Act (and its implementing laws) has been contested in several different legal venues. At the national level, the act was unsuccessfully challenged by several tobacco companies in the Australian High Court, wherein they claimed that it constituted a form of indirect expropriation of their trademark rights.\(^10\) Equally unsuccessful was an international investment proceeding initiated by Philip Morris Asia Limited against Australia under a bilateral investment treaty with Hong Kong. The tribunal found the claim to be inadmissible as the commencement of an arbitration proceeding was regarded as an abuse of a right by the investor.\(^11\)

The TPP measures have been also challenged in the WTO by several of its Members. The first complaint, filed in 2012 by Ukraine, was followed by four others, ie by Honduras, the Dominican Republic, Cuba, and Indonesia.\(^12\) After unsuccessful consultations, eventually four panels were established (Ukraine ultimately decided to drop the case\(^13\)). Due to the similarity of the complaints, all four panels were composed of the same people; the parties also decided to harmonise the timetable for all panel proceedings; and physically only one report was issued (although with four different docket numbers). The complainants argued that the TPP measures are incompatible with several provisions of the Agreement on Technical Barriers to Trade (TBT), the General Agreement on Tariffs and Trade (GATT 1994), and most importantly the Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS).\(^14\) In particular, they submitted that the TPP measures violate:

- Art 2.2 TBT (because they limit trade to a greater extent than is necessary to achieve the objective of protecting public health);
- Art 2.1 TRIPS (because of the violation of several provisions of the Paris Convention for the Protection of Industrial Property (1967));
- Art 15.4 TRIPS (because the nature of the goods to which a trademark is to be applied forms an obstacle to the registration of the trademark);

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\(^8\) Guidelines for implementation of Article 11 of the WHO Framework Convention on Tobacco Control, *Packaging and Labelling of Tobacco Products*, decision FCTC/COP3(10), November 2008, para. 46.


\(^11\) *Philip Morris Asia Ltd v Commonwealth of Australia*, Award on Jurisdiction and Admissibility, 17 December 2015.

\(^12\) Private entities are not authorised to file complaints in the WTO and this right is only granted to the members of the organisation. It is, however, common knowledge that both British American Tobacco and Philip Morris International have provided support for the complainants (see eg A Martin, “Philip Morris Leads Plain Packs Battle in Global Trade Arena”, 22 August 2013, <bloom.bg/2pXQe3x>, accessed 31 July 2018).

\(^13\) It is not clear why Ukraine took this decision. Most probably security consideration connected with the annexation of Crimea by Russia and the need to find allies played an important role (note that Australia is a NATO member).

\(^14\) Note that the complainants’ requests are not identical. While they mostly identify the same provisions, there are also claims which are unique for specific WTO Members (for more details, see paras. 3.1–3.9 of the TPP panel report).
— Art 16.1 TRIPS (because they prevent owners of registered trademarks from enjoying the rights conferred by their trademarks);
— Art 16.3 TRIPS (because they prevent owners of registered trademarks that are “well known” from enjoying the rights conferred by their trademarks);
— Art 20 TRIPS (because the use of a trademark is unjustifyably encumbered by special requirements);
— Art 22.2(b) TRIPS (because Australia does not provide effective protection against acts of unfair competition with respect to geographical indications (GIs) and creates confusion among consumers related to the origin of the good);
— Art 24.3 TRIPS (because Australia is diminishing the level of protection it affords to GIs as compared with the level of protection that existed prior to 1 January 1995).15

The panel issued its report on 28 June 2018, finding in favour of Australia with respect to all the claims. The subsequent section concisely summarises the panel’s main findings.

III. THE PANEL’S FINDINGS

The TPP panel first dealt with the claim of violation of Art 2.2 TBT. This provision envisions a proportionality test, according to which the technical regulations adopted by WTO Members should not be “more trade-restrictive than necessary to fulfil a legitimate objective, taking into account the risks that non-fulfilment would create”. In assessing this claim, the panel followed the approach taken by the previous case law (para. 7.30).16 The bulk of its analysis focused on the degree of contribution of the measures to the objective (pp 253–419), and the existence of less trade-restrictive alternatives (pp 489–586). The panel found that in spite of the difficulties in ascertaining their precise effects, the TPP measures, applied within the context of a broad comprehensive strategy, are “apt to” contribute to the objective of reducing smoking prevalence (para. 7.1043). Moreover, it found that none of the less trade-restrictive measures identified by the complainants as alternatives would be a perfect substitute for the TPP measures, but that, on the contrary, tobacco control policies are conceived as part of a broad comprehensive strategy (paras. 7.1726–7.1728).

However, before engaging in the above analysis, the panel considered whether the TPP measures followed the relevant international standards. Under Art 2.5 TBT, if a measure is “in accordance with relevant international standards”, it is “rebuttably presumed” to be consistent with Art 2.2 TBT (meaning that there is no need to analyse its necessity). Australia submitted that the Art 11 and Art 13 FCTC guidelines are the relevant international standards, insofar as they recommend the FCTC Parties to consider

15 See eg Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging – Request for Consultations by Indonesia, 25 September 2013, WT/DS467/1, G/TBT/D/46, IP/D/34, G/L/1041.
16 The panel particularly quoted Appellate Body Report, United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products (16 May 2012), WT/DS381/AB/R, para. 322.
the adoption of plain packaging. The panel disagreed and found that those guidelines cannot be considered as an international standard within the meaning of the TBT, because they neither constitute a “document” nor they are sufficiently precise to meet the requirement of “common and repeated use” (para. 7.396).

Under TRIPS, the analysis of Art 20 seems to be particularly interesting. This provision foresees that “[t]he use of a trademark in the course of trade shall not be unjustifiably encumbered by special requirements...”. The panel found that, unlike the term “unjustifiable” in the chapeau of Art XX GATT 1994, the term “unjustifiably” in Art 20 TRIPS does not call only for an assessment of whether there is a “rational connection” between an encumbrance and the “reasons for its adoption” (para. 7.2422). Rather, it requires a more complex balancing exercise between “the legitimate interests of the trademark owners in using their trademarks” and the “right of WTO Members to adopt measures” in the public interest that may result in an encumbrance on the use of such trademarks (para. 7.2429). After carrying out an analysis not very dissimilar from that under Art 2.2 TBT (but in far fewer pages), the panel found that the TPP measures are not an unjustifiable encumbrance on the use of trademarks (para. 7.2605).

Concerning the other alleged violations of TRIPS and GATT 1994, the findings can be grouped into three main categories, addressing the claims related to: (1) the protection of the use of trademarks; (2) the protection against unfair competition; and (3) the protection of GIs.

As regards protection of the use of trademarks, several claims revolved around the idea that the protection of trademarks granted under TRIPS encompasses the protection of their use – or, as was discussed at length in the academic debate, the “right to use”.17 It should be noted that no provision other than Art 20 TRIPS explicitly addresses the use of trademarks. However, under the “right to use” interpretation, the right to use a trademark is inextricably linked to the right to register a trademark and to the right to prevent others from using the same trademark. With respect to these claims, the TPP panel ruled as follows:

— Art 6quinquies of the Paris Convention, as incorporated by Art 2.1 TRIPS, is not violated because the TPP measures do not affect the protection of a trademark “as is” in the country where it has been registered (para. 7.1774); the protection of a trademark, in fact, does not include a protection of the use of a trademark (para. 7.1772);

— Art 15.4 TRIPS is not violated because the protection on the right of registration provided by this provision does not extend to the “protection that flows from such registration” (para. 7.1908);

Art 16.1 TRIPS is not violated because “the obligation to provide the right to prevent trademark infringements … does not require Members to refrain from regulatory measures that may affect the ability to maintain the distinctiveness of individual trademarks” (para. 7.2031);

Art 16.3 TRIPS is not violated because this provision “does not require Members to refrain from taking measures that may affect the ability of right owners to maintain the well-known trademark status of individual trademarks” (para. 7.2123).

Category 2 (ie protection against unfair competition) concerns the findings related to the allegations that compliance with the TPP measures would compel tobacco manufacturers to engage in acts of unfair competition. In this respect, the panel found that Art 10bis of the Paris Convention, as incorporated by Art 2.1 TRIPS, is not violated because the TPP measures do not require the tobacco manufacturers to engage in acts “of such a nature as to create confusion” (para. 7.2724), or “amounting to misleading indications or allegations” (para. 7.2765), or in any other acts of unfair competition (para. 7.2795). Among the reasons it gave, the panel recalled that the TPP measures apply to all tobacco manufacturers, and they have been widely publicised (paras. 7.2721, 7.2760). Moreover, consumers have access to some information, as the TPP measures allow tobacco packages to include the brand, the variant name, and the country of origin (paras. 7.2722, 7.2761, 7.2794).

Finally, category 3 concerned the alleged violations of the protection of GIs. Some of these claims echo the claims made with respect to trademarks. The panel found that:

Art 22.2(b) TRIPS is not violated because the TPP measures “do not compel market actors to engage in acts of unfair competition” with respect to GIs (para. 7.2870);

Art 24.3 TRIPS is not violated because the TPP measure does not diminish “the protection that GIs enjoyed under the Australian law … immediately before 1 January 1995” (para. 7.2957); in fact, the use of GIs was not protected by the relevant Australian law (paras. 7.2952-7.2956);

Art IX:4 GATT 1994 is not violated because the TPP measures are not a law or a regulation “relating to the marking of imported products” that would “materially reduc[e] their value” by limiting the use of GIs. The panel found that the expression “marking of imported products” is to be interpreted as referring to the mark of origin (para. 7.3021). Since the TPP measures do not constitute measures on the marking of origin, and they also allow for the indication of the country of origin, they do not fall within the scope of Art IX:4 (para. 7.3028).

IV. SOME CRITICAL COMMENTS: THE FCTC AND WTO LAW

The TPP panel report could (and probably will) be the basis of many interesting discussions. This section outlines a preliminary analysis of the two interrelated issues that we deem particularly interesting: (i) classification of the FCTC guidelines as international standards; and (ii) the broader relevance of the FCTC and its guidelines in the context of WTO law.
1. The FCTC guidelines as international standards

The discussion as to whether FCTC guidelines could constitute a relevant international standard under the TBT has been ongoing in the literature for some time.\(^{18}\) The TBT, unlike its counterpart (ie the Agreement on the Application of Sanitary and Phytosanitary Measures), does not identify any specific international standard-setting bodies, but rather indicates some general conditions that need to be met by such standards. Accordingly, a particular instrument can be considered an international standard if it: (i) constitutes a standard (which requires meeting certain additional conditions\(^{19}\)); and (ii) is adopted by an international standardising body (para. 7.286). The TPP panel was the first one to address this problem. Since the panel found that the relevant FCTC guidelines are not standards, there was no need for it to analyse the second element (ie whether a standard is international).

In this context, the panel held that the FCTC guidelines could not be regarded as standards because they did not meet two conditions. First, Australia failed to show that the relevant FCTC guidelines (or their parts) could be regarded as a “document”. In particular, the panel stated that the interrelated nature of the FCTC obligations and their guidelines “makes difficult to isolate the specific elements of the Guidelines that … form a ‘document’” (para. 7.328). On that basis the panel found that it was unable to identify all the relevant rules that would constitute a plain packaging standard (para. 7.330). Second, the panel interpreted the expression “for common and repeated use” as requiring a certain degree of precision and prescriptiveness with respect to the instrument under investigation in order to allow it “to be implemented in a consistent and predictable manner” (para. 7.370). Since there were certain discrepancies between different parts of the guidelines as to what is to be understood as plain packaging, the panel concluded that the guidelines lacked sufficient precision and clarity.

The conclusions reached by the panel in the context of the above examination are disappointing. Although the panel’s findings were limited to the particular measure (ie the Australian plain packaging law) and specific parts of the two guidelines (cf. para. 7.397), its rigid interpretation of the word “document” may have consequences that go beyond this individual dispute. The panel itself admitted in another part of the report that the FCTC and its guidelines form a comprehensive and interrelated net of obligations and policy recommendations (para. 7.327). Consequently, rules on specific tobacco control measures always need to be read in the context of other FCTC obligations/guidelines. In practice it may be impossible, under the panel’s approach, to identify a “document” that could serve as an international standard for any national tobacco control measure. This is because the FCTC advocates for a comprehensive approach to the tobacco epidemic and generally relies on a similar structure, which was fatal in the TPP dispute. This, in turn, may entirely remove the FCTC and the guidelines from the scope of Art 2.5 TBT (despite the fact that countries do see the Convention and its guidelines as


\(^{19}\) The panel identified four such conditions: (i) an instrument is a document, (ii) that provides rules, guidelines or characteristics for products or related process and production methods, (iii) for common and repeated use, and (iv) compliance with these rules, guidelines or characteristics is not mandatory (para. 7.281).
providing relevant tobacco control standards). We believe that the better approach would be to concentrate on the core of a particular standard. The fact that such a core is informed by other provisions/guidelines should not affect a panel’s determination as to the existence of a standard.

The findings of the panel with respect to the “for common and repeated use” requirement is less problematic. One must agree with the panel’s observation that a standard should be sufficiently precise in order to provide certain specific instructions for WTO Members. The FCTC Parties apparently did not pay sufficient attention when they drafted Arts 11 and 13 of the FCTC guidelines. As a consequence, there are some differences in the formulation of the plain packaging recommendation. For example, Art 11 FCTC guidelines states that plain packaging may merely require restricting use of logos, colours, and brand images (para. 46). On the other hand, Art 13 FCTC guidelines employs much stronger language and speaks about completely prohibiting their use (para. 16). At the same time, Art 11 FCTC guidelines also indicates standardised shapes, sizes and materials of the packaging as constitutive elements of plain packaging, while Art 13 FCTC guidelines remains completely silent on these issues. It would therefore be advisable for the FCTC Parties to revise the relevant texts of the two guidelines and ensure that their recommendations are consistent. Having said this, it is also not difficult to imagine the panel taking a more FCTC-friendly and active approach. In particular, the panel could have tried to reconcile both definitions of plain packaging by identifying those elements that may co-exist without creating any contradictions.

Finally, it is regrettable that the panel did not decide to complete its analysis on the FCTC guidelines as potential international standards (ie to examine the second condition). Of course, such an approach should not come as a surprise – many panels have taken the same approach in the past, relying on the principle of judicial economy. However, such a decision does not help to remove existing legal uncertainties. It may also create problems during the appellate proceeding. If the two specific findings of the panel are overturned by the Appellate Body, it might be difficult to complete the analysis if there are not enough factual findings made by the panel.

2. The broader relevance of the FCTC and its guidelines

Once the panel concluded its analysis regarding the FCTC guidelines as international standards, it clarified that both the FCTC and its guidelines could nonetheless be relevant to the disputes in issue. It noted that “it is not uncommon in WTO disputes for parties to refer to, and panels and the Appellate Body to rely on, non-WTO international instruments as [(a)] evidence of fact”, or (b) “to inform the interpretation of specific provisions under a covered agreement” (para 7.412; emphasis added). Both options are very interesting and deserve some attention.

With respect to option (b), the panel referred, by way of “precedent”, to the well-known dispute US – Shrimp (fn 1255), where the panel quoted some environmental treaties to interpret the meaning of the term “exhaustible resources” under Art XX(g) GATT 1994.20 In that case, the panel referred to the treaties following a customary

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principle of interpretation (the principle of effectiveness), but this is not the principle normally used in the WTO case law. The TPP panel did not, however, clarify whether this or another principle could have been applied with reference to the FCTC and its guidelines. In any case, this option remained only theoretical: no references to the FCTC and its guidelines have been made to interpret the provisions of WTO texts.

Conversely, option (a) was extensively used in the TPP report. This option could also rely on some “precedents” in the existing WTO case law, most importantly in two disputes in which the FCTC and its guidelines have been referred to as evidence: *Dominican Republic – Import and Sale of Cigarettes*, and *US – Clove Cigarettes* (paras. 7.412–7.415). However, in the TPP report the references to the FCTC and its guidelines are considerably more frequent and more extensive than in those the two above-mentioned reports. The panel referred to several provisions of the FCTC and its guidelines to support, confirm, or corroborate its findings on: the purpose of the TPP measures (paras. 7.243, 7.250, 7.2589); the outcomes of the TPP measures (para. 7.555); the effectiveness of regulation of packaging and health warnings (paras. 7.664–7.665, 7.798; 7.800; 7.803–7.804; 7.807); the health consequences of tobacco use and exposure (para. 7.1309); the need for a comprehensive approach to tobacco (paras. 7.1388–7.1389, 7.1457, 7.1527, 7.1614, 7.1728); the effectiveness of other tobacco control measures (paras. 7.1442, 7.1457, 7.1509, 7.1594, 7.1660); as well as the fundamental rationale of the TPP measures (paras. 7.1670, 7.2595–7.2596, 7.2604).

It is interesting to note that the panel cited the preamble as well as the text of the FCTC and of the guidelines, irrespective of their different normative value. The only thing that seemed to matter is the evidentiary value embedded in the provisions. What the panel did not clarify, however, is what type of evidence is embedded in these instruments. The above list shows that the references to the FCTC and its guidelines encompass a broad array of topics related to tobacco control, ranging from the clinical/medical evidence on the health effects of tobacco consumption to the economic and social studies on the effectiveness of TPP and other tobacco control measures. Hence, most of the references to the FCTC and its guidelines refer to the scientific evidence embedded in these instruments.

In this respect, the references to the FCTC and its guidelines in the TPP report appear qualitatively different from the references in the precedents cited by the TPP panel (para. 7.412). In *EC – Asbestos*, the panel referred to the ILO Convention concerning Safety in the Use of Asbestos as evidence that regulations restricting the use of asbestos were foreseeable; while in *EC – Seals*, the panel referred to international instruments on the rights of indigenous people as evidence of the “recognized interests of Inuit and indigenous peoples”. By citing these cases as instances in which WTO panels used

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21 ibid, para. 131.
non-WTO international instruments as “evidence of fact”, without making any further distinction, the panel failed to evaluate or appreciate which type of evidence is embedded in the FCTC and its guidelines.

By the same token, the panel did not explain why the FCTC and its guidelines embed (scientific) evidence. In explaining the FCTC’s relevance, the panel only referred to the fact that it has been ratified by more than 180 states (para. 7.416); but this is not necessarily proof of its scientific value. As a matter of fact, the FCTC and its guidelines have been developed following an “evidence-based” approach. The parties’ and third parties’ submissions in the TPP dispute stressed the evidence-based nature of these instruments (see eg para. 7.2381, fn 1253). Nonetheless the panel’s analysis does not include any reflections or considerations as to why the FCTC and its guidelines embed scientific evidence.

Compared to the TPP report, the panel in US – Clove Cigarettes was slightly clearer on the nature of the FCTC guidelines: it explained their relevance by quoting the part in which the relevant guidelines state that they “dra[w] on the best available scientific evidence and the experience of Parties”. It is hard to speculate on why the TPP panel refrained from making a similar statement. It certainly did not overlook this issue: it specifically requested additional information from the WHO and FCTC Secretariats on how the FCTC guidelines were drafted, and on their preparatory materials.

While the references to the FCTC and its guidelines were useful to the outcome of the dispute, they add more confusion than clarity with respect to the nature of these instruments, including the issue of their potential and limitations for use in international adjudication. It would have been interesting if the panel had discussed to what extent an international instrument, adopted by states, can be referred to as evidence: Is it like any other piece of evidence, or does it have more, less, or a different value? To the best of our knowledge the only WTO report that relied on an international instrument as evidence of scientific facts (in addition to the above-mentioned cases that relied on the FCTC) is Brazil – Retreaded Tyres. However, none of these cases offer answers to our questions.

V. CONCLUSIONS

The TPP panel report as a whole should be applauded. By rejecting all the claims made by the complainants, the panel confirmed the sovereign right of each WTO Member to implement appropriate tobacco policy measures, even if they have an experimental character. The panel also affirmed the central role played by the FCTC in all trade disputes that have a tobacco control aspect. In this context the FCTC and its guidelines constitute an indispensable source of evidence with respect to the existence of health

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risks, the effectiveness of specific measures, and the gravity of the consequences of not reducing the use of, and exposure to, tobacco products. This obviously makes the task of defendants in future cases much easier and potentially reduces the regulatory chilling effect that may be produced by international trade rules.\footnote{For details on regulatory chilling effect in the context of disputes over legality of plain packaging see L Gruszczynski, “Australian Plain Packaging Law, International Litigations and Regulatory Chilling Effect” (2014) 2 European Journal of Risk Regulation 160. Note also that the effect of the report may be more limited than one could initially expect. Some of the complaints have already announced that they will appeal the panel report. Considering the progressive paralysis of the operations of the appellate body, we may wait for a final report for a while. Tobacco companies will certainly try to exploit this fact.}

At the same time, one also has to acknowledge some limitations of the interpretative decisions made by the panel. Its overly narrow interpretation of the notion of an “international standard” is one good example, and its vague assessment of why the FCTC and its guidelines embed evidence is another.

Lastly, one can attempt to assess what overall conclusions regarding the FCTC (or any other evidence-based international instrument) can be drawn from the TPP report. In the panel’s view, the FCTC and its guidelines synthesise the existing evidence on tobacco control policies, but they do not constitute a standard for such policies. In this respect one could ask whether it is not contradictory to find that some guidelines are not a standard, but that they nonetheless represent the evidence underlying such a hypothetical standard? If we believe in the objectivity of science (as international law often postulates\footnote{See generally J Peel, \textit{Science and Risk Regulation in International Law} (Cambridge University Press 2010).}), we should conclude that one cannot draw two different policy conclusions (or standards) from the same body of evidence. While the FCTC guidelines on plain packaging fall short in terms of their clarity and precision, taken as a whole they embed a number of scientific findings sufficient to draw conclusions about the measures that should be taken to combat the tobacco epidemic, and plain packaging is one of them.

Accordingly, the panel’s findings on the FCTC guidelines as international standards seem rather formalistic, ie they take account only of their form, but not of their substance. The panel’s conclusion is, in fact, in apparent contrast with the evidentiary value given to the FCTC and its guidelines throughout the report. It is also interesting to contrast the panel’s rigorous analysis of international standards with the fact that, in order to refer to the FCTC and its guidelines as evidence, the panel did not deem it necessary to carry out an assessment of why the FCTC and its guidelines could be considered as evidence-based, or of how they have been developed, even though the result in both instances was very similar, eg the panel extensively referred to the FCTC and its guidelines to confirm its findings that the TPP measures were not more trade-restrictive than necessary.

The TPP dispute shows that the test for international standards can be very difficult to meet for international instruments that, although evidence-based, are not primarily conceived for standardisation. At the same time, referring to these instruments as evidence is much easier and can lead to a similar outcome.