TOBACCO PLAIN PACKAGING IN AUSTRALIA

IMPLICATIONS OF THE WTO DISPUTES

Professor Andrew D Mitchell
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While most of the tobacco industry’s claims and predictions have been duly discredited, its greatest concern – the domino effect – has been justified. Once even one country with a population of 23 million showed that plain packaging could be implemented, others would see it as something feasible.¹

¹ Simon Chapman and Becky Freeman, Removing The Emperor’s Clothes: Australia and Tobacco Plain Packaging (Sydney University Press, 2014) vii.
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Acknowledgements

This report was authored by Professor Andrew D Mitchell, Faculty of Law, Monash University.

The report reflects the joint work of the WHO Tobacco Free Initiative in the Regional Office for the Eastern Mediterranean and the Public Health Law and Policies team in the Health Promotion Department at WHO Headquarters. Editorial inputs were provided by Benn McGrady and Fatimah El-Awa of WHO. Professor Andrew D Mitchell also gratefully acknowledges comments and suggestions from Lauro Locks, Hannu Wager and Maryam Aldoseri of the World Trade Organization.
The introduction of Australia’s plain packaging measures

In 2011, the Australian Government introduced Tobacco Plain Packaging measures (TPP measures) as part of a comprehensive suite of new and existing tobacco-control measures. The TPP measures were implemented through the Tobacco Plain Packaging Act 2011 (Cth) (TPP Act), which became law on 1 December 2012.2 The TPP measures fully standardise the appearance of tobacco products and their retail packaging. The measures affect all types of tobacco products sold in Australia, including cigarettes, little cigars (also known as ‘cigarillos’) and bidis.3 Broadly speaking, the TPP measures implemented under the TPP Act prescribe two categories of requirements:4

Trademark and other marking requirements
which ban or limit the use of certain logos, brand imagery, symbols, images, colours and promotional text on tobacco products and their packaging; and

Physical packaging requirements
which require all tobacco packaging and products to be of certain prescribed shapes, dimensions, colours and finishes, and to be made of certain prescribed materials.

Under the TPP measures, the use of certain trademarks and other marks used on tobacco products and their packaging (e.g. stylized word marks, composite marks and figurative marks) is prohibited. The TPP Act permits the brand, company or business name and the variant name of the tobacco product (including where they are trademarks) to be printed on the packaging, but only in a typeface, colour, style and font size prescribed by the regulations.5 The appearance of tobacco packs is fully standardised. For instance, cigarette packs and cartons must be made of cardboard and be in a matte finish and drab dark brown colour (Pantone 448C). Embellishments, coloured glues or adhesives, and noises or scents that could constitute advertising, are not permitted. The appearance of tobacco products themselves is also fully standardised. For example, cigarette paper casing must be white, or white with an imitation cork tip, and may only feature an alphanumeric code.

Australia’s suite of measures

The TPP measures operate in conjunction with other legislative requirements that were not challenged in the WTO disputes. As part of its ‘comprehensive suite’ of tobacco-control measures, the Australian Government also introduced a 25% increase to tobacco excise, increased its investment in anti-smoking campaigns, and introduced restrictions on tobacco advertising on the internet.6 At the same time as it introduced the TPP measures, the Australian Government increased the size of graphic health warnings (GHWs) on tobacco packaging.7 These measures were introduced in addition to existing tobacco-control measures in Australia, including high

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2 Tobacco Plain Packaging Act 2011 (Cth) (‘TPP Act’). The TPP measures were also implemented through the Tobacco Plain Packaging Regulations 2011 (Cth) and the Trade Marks Amendment (Tobacco Plain Packaging) Act 2011 (Cth).
3 TPP Act (n 2), Section 4(1); TPP Bill Explanatory Memorandum, p. 9; and TPP Regulations, Regulation 1.1.3.
4 See TPP Act (n 2) ss 18-19, 20-22.
5 Ibid s 20(3); Tobacco Plain Packaging Regulations 2011 (Cth) rr 2.4.1-2.4.2.
7 The Competition and Consumer (Tobacco) Information Standard 2011 (Cth) requires that GHWs feature on 75% and 90% of the front and back of the pack respectively: ss 9.13, 9.19.
rates of tobacco excise, media campaigns, smoke-free workplace and public spaces legislation, bans on the retail display and point-of-sale promotion of tobacco products, prohibitions on the use of the deceptive cigarette descriptors ‘light’ and ‘mild’, limits on duty-free imports, government subsidies of smoking cessation medications, and Quitline funding (a telephone helpline offering assistance with tobacco cessation).8

The rationale of the TPP measures
The TPP Act states that its objective is to ‘improve public health’ by discouraging people from taking up smoking or using tobacco products, encouraging people to stop using tobacco products, discouraging people from relapsing, and reducing people’s exposure to tobacco product smoke. The TPP measures are intended to achieve these objectives by reducing the appeal of tobacco products to consumers, increasing the effectiveness of GHWs on retail packaging of tobacco products, and reducing the ability of such packaging to mislead consumers about the harmful effects of using tobacco.9 The TPP Act also states that it seeks to give effect to Australia’s obligations under the World Health Organization Framework Convention on Tobacco Control (WHO FCTC).10 The Guidelines for Implementation of Articles 11 and 13 of the FCTC recommend that Parties consider adopting tobacco plain packaging (TPP) as part of a comprehensive approach to tobacco control.11

The TPP measures fully standardise the appearance of tobacco products and their retail packaging. The measures affect all types of tobacco products sold in Australia.

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8 Chapman and Freeman (n 1) xiv-xv.
9 TPP Act (n 2) ss 3(1)(a), 3(2).
10 Ibid s 3(1)(b).
The WTO disputes

The now-concluded disputes between Australia and various other countries at the World Trade Organization (hereafter the WTO Dispute) are the only WTO disputes thus far to consider TPP measures. The WTO dispute lasted over 8 years and was one of three unsuccessful legal challenges to Australia’s TPP measures.12

The dispute settlement process

The WTO dispute settlement process is governed by the Dispute Settlement Understanding (DSU), an agreement between members of the WTO (Members) containing the rules for dispute settlement.13 WTO Members may make a complaint that another Member has acted inconsistently with its obligations under a WTO Agreement. The first stage of the dispute settlement process is a bilateral consultation process between the parties, which is aimed at resolving the dispute without recourse to litigation.14

Only after the parties have failed to resolve the dispute through consultations may a Member make a request to the Dispute Settlement Body (DSB) for the establishment of a panel to hear its claim.15 On 13 March 2012, Ukraine made such a request in relation to Australia’s TPP measures, which was followed by further requests by Honduras, the Dominican Republic, Indonesia and Cuba.16 On 5 May 2014, the panels were ‘composed’, meaning that the panellists were selected. The same panellists were appointed to hear all five disputes, which were resolved to be heard together on a single harmonised timeline.17

Any WTO Member that has a substantial interest in a matter may join a dispute as a third party. Third parties may make written and oral submissions and attend third party sessions. A record 41 WTO Members requested to join the disputes as third parties.18

Once a panel report has been circulated, the parties to the dispute (but not third parties) may appeal that report. Such appeals are heard by the Appellate Body.19 Unlike a panel, the Appellate Body is a permanent body that is not reconstituted to hear each individual dispute. Article 17.6 of the DSU provides that appeals may only relate to questions of law, rather than a panel’s factual findings.20 However, a party may challenge the way in

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12 In 2012, the High Court of Australia dismissed claims by tobacco companies that the TPP measures are inconsistent with the Australian Constitution because they constitute an acquisition of property otherwise than on just terms: JT International SA v Commonwealth and British American Tobacco Australasia Limited v Commonwealth of Australia (2012) 250 CLR 1. In 2015, a challenge was brought by Philip Morris Asia under the 1993 bilateral investment treaty between China SAR, Hong Kong and Australia, but was dismissed because Philip Morris engaged in an ‘abuse of process’: Philip Morris Asia Limited (Hong Kong) v The Commonwealth of Australia (Award on Jurisdiction and Admissibility) (Permanent Court of Arbitration, Case No. 2012-12, 17 December 2015).


15 DSU (n 13) article 4.7.


17 World Trade Organization, ‘Procedural agreement between Australia and Ukraine, Honduras, The Dominican Republic, Cuba and Indonesia: WTO Docs WT/DS434/12, WT/DS435/17, WT/DS441/16, WT/DS458/15, WT/DS467/16 (28 April 2014).

18 This number counts the European Union and its then 28 Member States as one.

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which a panel has approached its assessment of facts under Article 11 of the 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'. A panel’s compliance with Article 11 is a legal question and can therefore be appealed.

The Panel and Appellate Body decisions

On 28 June 2018, the Panel circulated a document that consolidated four panel reports, containing the Panel’s findings in relation to each dispute (hereafter the Panel report). It dismissed all claims brought by the complainants. On 19 July 2018 and 23 August 2018 respectively, Honduras and the Dominican Republic notified the DSB of its intention to appeal certain issues of law in the Panel report. The Appellate Body circulated its report on 9 June 2020.

Before the Panel, the complainants argued that Australia’s TPP measures were inconsistent with its obligations under two WTO Agreements: the Agreement on Technical Barriers to Trade (TBT Agreement), and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement). On appeal, Honduras and the Dominican Republic 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. The findings of the Panel and the Appellate Body in relation to these provisions are summarised below.

The TBT Agreement: Article 2.2

The complainants argued that the TPP measures are inconsistent with Australia’s obligations under Article 2.2 of the TBT Agreement, which requires that technical regulations shall not be more trade-restrictive than necessary to fulfill a legitimate objective such as the protection of human health or safety.

1. Technical regulations

Both parties agreed that the physical packaging requirements constitute technical regulations. However, Australia argued that the trademark and other marking requirements fall outside the scope of the TBT Agreement and are strictly relevant to the TRIPS Agreement. The Panel found, however, that all of the TPP measures are covered by the TBT Agreement. For the Panel, the TPP measures ‘constitute a technical regulation, because they lay down characteristics for the appearance and packaging of tobacco products (including requirements relating to the manner in which trademarks may be displayed on tobacco products and packaging), [mandate] compliance with those characteristics.’ With respect to trademarks in particular, the Panel noted that the definition of ‘technical regulation’ in the TBT Agreement covers regulations dealing with symbols, packaging, marking or labelling requirements as they apply to a product. Contrary to Australia’s argument, the Panel concluded that the mere fact that the regulations affect the use of signs also protected as trademarks was not a valid reason to exclude the TPP measures’ trademark and other marking requirements from the scope of the TBT Agreement.

Ibid. article 11.
22 Cuba and Indonesia did not appeal and their respective panel reports were adopted by the DSB on 27 August 2018.
23 Cuba also claimed that the TPP measures were inconsistent with Australia’s obligations under Article IX:4 of the General Agreement on Tariffs and Trade, which deals with geographical indications. The Panel’s dismissal of this claim was not challenged on appeal.
24 The Panel made various findings on various other provisions of the TRIPS Agreement that were not appealed. These include provisions relating to the protection of the use of trademarks (Article 4quinquies of the Paris Convention (1967) as incorporated by Article 2.1 of the TRIPS Agreement, and Articles 15.4 and 16.3 of the TRIPS Agreement), provisions relating to unfair competition (Article 10bis paragraphs (1), (3)(1) and (3)(2) of the Paris Convention (1967) as incorporated by Article 2.1 of the TRIPS Agreement), and provisions relating to the protection of geographical indications (Articles 22.2b) and 24.3 of the TRIPS Agreement). Discussion of these findings is beyond the scope of this paper, but has been explored elsewhere: Ernst-Ulrich Petersmann, ‘How to Reconcile Human Rights, Trade Law, Intellectual Property, Investment and Health Law?’ WTO Dispute Settlement Panel Upholds Australia’s Plain Packaging Regulations of Tobacco Products’ (European University Institute, Department of Law, Working Paper LAW 2018/19) 14-24. https://cadmus.eu.eu/bitstream/handle/1814/40064/4/2018-19.pdf?sequence=1&isAllowed=y
25 Marrakesh Agreement Establishing the World Trade Organization, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1A (‘Agreement on Technical Barriers to Trade’) article 2.2 (‘TBT Agreement’).
26 Ibid.
28 Ibid [7.182]. See also [7.138], [7.142]-[7.143], [7.163]-[7.164].
29 Ibid [7.143].
30 Ibid [7.106]. See also [7.153], [7.158].
2. Legitimate objective and Article 2.5 of the TBT Agreement

The parties to the dispute agreed that the objective of the TPP measures is the protection of public health in relation to the use of tobacco products in Australia.31 However, the parties’ precise characterisation of the objective differed. The complainants characterised the objective as ‘the improvement of public health by reducing smoking prevalence’.32 Australia characterised it as the reduction in smoking rates by reducing the appeal of tobacco products, increasing the effectiveness of GHWs, and reducing the ability of packages to mislead consumers.33 The Panel agreed with Australia that a characterisation based on smoking prevalence alone would not capture the TPP Act’s broader objectives. However, it agreed with the complainants that Australia had sought to confute its policy objectives with the means or mechanisms by which those objectives could be fulfilled. Nevertheless, the Panel indicated that these mechanisms could be ‘highly relevant’ to its analysis of the TPP measures’ contribution to their objective.34 Ultimately, the Panel determined that the TPP measures’ legitimate objective was ‘to improve public health by reducing the use of, and exposure to, tobacco products’.35

Article 2.5 of the TBT Agreement creates a rebuttable presumption that a technical regulation does not create an unnecessary obstacle to international trade whenever that technical regulation is ‘prepared, adopted or applied for’ one of the legitimate objectives mentioned in Article 2.2, and ‘is in accordance with relevant international standards’.36 The purpose of Article 2.5 is to promote international harmonisation of technical regulations and facilitate trade.37 Australia argued that the Guidelines for Implementation of Articles 11 and 13 of the WHO FCTC (hereafter the TPP Guidelines) are an international standard, and that the complainants had not rebuted the presumption provided for by Article 2.5.38 Australia argued that the TPP measures were adopted ‘in accordance with’ the TPP Guidelines because they were adopted to ‘give effect’ to Australia’s obligations under the WHO FCTC.39 The Panel was therefore required to determine whether the TPP Guidelines constitute an ‘international standard’ for the purposes of Article 2.5.

The Panel found that the TPP Guidelines do not constitute an ‘international standard’ because the ‘guidelines’ that they provide are not intended for ‘common and repeated use’.40 The Panel concluded that the WHO FCTC Guidelines are intended to ‘assist Parties in meeting their obligations under the WHO FCTC and that they provide important guidance in that respect.41 However, WHO FCTC Parties intending to devise plain packaging measures ‘in accordance with’ the TPP Guidelines would have a range of options available to them, and two Members may implement plain packaging measures that are significantly different in terms of their requirements but that are still both consistent with the Guidelines.42 For the Panel, the different ways in which plain packaging is recommended under the two TPP Guidelines reflects the flexibility accorded to WHO FCTC Parties in determining the most appropriate manner of addressing packaging as a component of effective tobacco control measures under the WHO FCTC.43 The Panel also concluded that the TPP Guidelines are not an ‘international standard’ because, taken in isolation from their context as part of the WHO FCTC, they do not constitute a ‘document’ containing a ‘standard’.44 These findings were not challenged on appeal.45

The Panel clarified that these conclusions would have no bearing on the relevance of the WHO FCTC and the Guidelines to other aspects of its analysis, and no adverse implications for the other aspects of Australia’s defence.46 As explained in more detail below in Part III, the Panel repeatedly referred to the WHO FCTC throughout its report and used it as evidence in various parts of its analysis.
3. More trade restrictive than necessary

The parties and the Panel agreed that an assessment of whether a technical regulation is ‘more trade-restrictive than necessary’ involves a ‘relational analysis’, or a weighing and balancing of the following factors:47

- the degree of contribution made by the measure to the legitimate objective;
- the trade-restrictiveness of the measure;
- the nature of the risks and the gravity of consequences that would arise from non-fulfilment of the objective pursued through the measure; and
- the existence of reasonably available, less trade-restrictive, alternative measures.

3.1 Contribution to the legitimate objective

3.1.1 The Panel

The complainants argued that the measures do not, and would not, contribute to the reduction in the use and exposure to tobacco products. The Panel’s summary and analysis of the evidence of the TPP measures’ contribution occupied 166 pages of its report.48 This evidence included studies undertaken prior to the implementation of the TPP measures about the hypothesised effects of the TPP measures (pre-implementation evidence), and evidence of the TPP measures’ actual effects since implementation (post-implementation evidence).49

The evidence included:

- Pre- and post-implementation evidence of distal outcomes, which was intended to demonstrate the impact on behavioural outcomes that the above mechanisms were designed to bring about (e.g. intentions or attempts to quit);51 and
- Post-implementation evidence of the actual impact on smoking behaviours (e.g. initiation and cessation).52

The Panel disagreed with the complainants’ arguments that various methodological limitations in the pre-implementation evidence meant that the conclusions drawn from such evidence was flawed.53 The Panel’s conclusion was supported by various independent reviews of the studies and literature.54 The Panel also considered that post-implementation evidence suggested that the TPP had had some impact on the effectiveness of GHWs, and that actual smoking behaviours had changed since implementation.55 Having considered the ‘totality’ of the evidence, the Panel ultimately found that ‘the TPP measures, in combination with other tobacco-control measures maintained by Australia… are apt to, and do in fact, contribute to Australia’s objective of reducing the use of, and exposure to, tobacco products’.56

3.1.2 The Appellate Body

On appeal, the appellants argued that the Panel erred in its findings about the TPP measures’ contribution to Australia’s objective. They argued that the Panel erred in its application of Article 2.2 and challenged the Panel’s examination of the ‘totality of the evidence’.57 As a number of the appellants’ arguments made in relation to the Panel’s application of Article 2.2 entirely overlapped with their arguments under Article 11 of the DSU, the Appellate Body addressed those arguments together.58

The Appellate Body noted that the ‘sheer volume’ of the appellants’ claims under Article 11 was ‘unprecedented’.59 It recalled that a claim that a panel has failed to conduct an objective assessment is a ‘serious allegation’ and that an ‘egregious error’ by a panel is required to satisfy it.60 It emphasised that

50 See Panel Report, Australia – Tobacco Plain Packaging [7.491], [7.498].
51 See Ibid [7.491], [7.495]-[7.498].
52 See Ibid [7.493], [7.497].
53 Ibid [7.232], [7.1027].
54 Ibid [7.1028].
55 Ibid [7.1036]-[7.1037].
56 Ibid [7.1025], [7.1043].
57 Appellate Body Report, Australia – Tobacco Plain Packaging [6.20].
58 Ibid [4.24], [4.26].
59 Ibid [6.48].
60 Ibid.
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'. Broadly, the appellants argued that the Panel’s intermediate conclusions based on the pre-implementation evidence, and their ultimate conclusions based on the pre- and post-implementation evidence, were reached in error.

Honduras argued that the Panel erred because it failed to offer a reasoned and adequate explanation of the evidence or treated evidence in a one-sided manner. It argued that the Panel was incorrect in concluding that the methodological limitations of the post-implementation evidence (e.g. a focus on 'non-behavioural' and 'proximal' outcomes) were not 'fatal'. The Dominican Republic argued that the Panel failed to consider certain evidence that directly contradicted Australia’s argument and the Panel’s own conclusion that tobacco packaging conveyed positive messages.

The Appellate Body rejected Honduras’ claim and noted that the complainants bore the burden of providing credible evidence to prove that the TPP measures are incapable of contributing to its objective. 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 TPP measures were designed to act on these ‘non-behavioural’ or ‘proximal’ outcomes in order to affect smoking behaviours. The Appellate Body noted that the Panel had considered independent, expert evidence in assessing the strength of the main body of evidence. The Dominican Republic’s argument was also rejected; there was no direct contradiction between the Dominican Republic’s evidence, which concerned perceptions of tobacco product packaging as a whole, and the evidence considered by the Panel, which concerned the perceptions of branding elements on the package alone.

The appellants made numerous discrete and complex claims about the Panel’s treatment of the post-implementation evidence. The Appellate Body rejected these claims, noting that many of them were based on a misapprehension of the Panel’s findings, that they depended on the onus of proof being 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.

3.2 Trade-restrictiveness
3.2.1 The Panel
The complainants presented numerous arguments before the Panel concerning the trade-restrictiveness of the TPP measures. The Panel found the TPP measures to be trade-restrictive in so far as a decrease in the demand for tobacco products would reduce the total volume of imported tobacco products. The arguments that later became relevant to the Appellate Body’s decision are summarised in the table below.

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61 Ibid [6.50].
62 Ibid [6.57].
63 Ibid [6.91].
64 Ibid [6.77].
66 Ibid [6.73].
67 Ibid [6.91].
68 Ibid [6.103].
69 Ibid [6.269].
70 Ibid [6.278].
71 Ibid [6.287], [6.295]. One Division Member agreed with the majority’s ultimate findings and conclusions, but disagreed that ‘it was necessary to examine in detail the appellants’ claims that the Panel erred in determining the degree of contribution of the TPP measures to Australia’s objective’: at [6.524], [6.536]. The Member reasoned that the appellants’ arguments about the Panel’s assessment, if made out, could call into question the Panel’s finding that the TPP measures are apt to contribute to their objective, but that they could not vitiate the Panel’s finding that the complainants had not demonstrated that the TPP measures are not apt to contribute to their objective: at [6.531]. For the dissenting Member, this latter finding remained undisturbed on appeal: at [6.534].
72 Panel Report, Australia – Tobacco Plain Packaging [7.120], [7.1204], [7.1207].
Complainants’ arguments

TPP measures alter the competitive environment of producers in the Australian market

Panel’s findings

Mere modification of the competitive environment did not show trade-restrictiveness. As the TPP measures are not discriminatory, evidence of actual trade effects was required.

TPP measures harm the competitive opportunities of imported tobacco products by restricting producers’ ability to differentiate their products

The TPP measures were likely to limit the opportunity of producers to differentiate their products, but this modification of the competitive environment would not, by itself, constitute a restriction on ‘competitive opportunities’ that would have a limiting effect on international trade.

The TPP measures would not necessarily make it more difficult for new brands to enter the market. The TPP measures would likely make market-entry easier by diminishing brand loyalty, and the opportunity for brand awareness was already relatively low in Australia.

TPP measures have a limiting effect on the volume and value of trade in tobacco products

The TPP measures had not resulted in a reduction in the total value of trade (because, as the complainants argued, consumers were likely to ‘downtrade’ or switch from premium to non-premium products), but this reduction in value may occur in the future because of a reduction in consumption or a fall in prices.

3.2.2 The Appellate Body

On appeal, the appellants argued that the Panel erred in both its interpretation and application of Article 2.2.

Interpretation of Article 2.2: Trade-Restrictiveness of the TPP Measures

The appellants argued that the Panel should have interpreted Article 2.2 such that any limitation on ‘competitive opportunities’ is sufficient to demonstrate trade-restrictiveness, and that it erred by requiring that, where a challenged measure is not discriminatory, evidence of ‘actual trade effects’ is necessary to demonstrate trade-restrictiveness.

The Appellate Body 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 Appellate Body 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 may be sufficient to establish trade-restrictiveness. However, where the measure is not discriminatory (as with the TPP measures), further evidence of ‘actual trade effects’ may be required to demonstrate the measure’s trade-restrictiveness. The Panel’s interpretation was consistent with these principles and it did not interpret Article 2.2 such that evidence of ‘actual trade effects’ is always required. The Appellate Body also confirmed that panels may take into account all relevant evidence before concluding on the degree of trade-restrictiveness, rather than focusing on a subset of evidence (e.g. about a measure’s design, its structure or its anticipated impact).

Application of Article 2.2: Trade-Restrictiveness of the TPP Measures

In relation to the Panel’s application of Article 2.2, the appellants claimed that the Panel should have found:

- that a reduced opportunity for consumers to differentiate products on the basis of brands demonstrated that the TPP measures are trade-restrictive;
- that the TPP measures would result in a reduction in the value of imported tobacco products because of ‘downtrading’, or consumers shifting from premium to non-premium products in response to the TPP measures.

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73 Ibid [7.1163]-[1164], [7.1172]-[7.1175], [7.1188]-[7.1192], [7.1226]-[7.1228], [7.1247].
74 Ibid [7.1167].
75 Ibid [7.1179].
76 Ibid [7.1187].
77 Ibid [7.1225].
78 Ibid [6.389].
79 Ibid [6.385].
80 Ibid [6.391].
81 Ibid [6.393], [6.406].
82 Ibid [6.403].
The WTO disputes

The Appellate Body rejected the first argument on the basis that the Panel correctly found that some imported products would benefit from a reduced opportunity for brand-differentiation, because consumer loyalty to other, competing imported products would be reduced. It rejected the second argument on the basis that the Panel, in its role as fact-finder, was entitled to choose the weight it gave to the evidence in concluding that the evidence did not show that the TPP measures did, or necessarily would, lead to a reduction in value.

### 3.3 The Risks of non-fulfilment

Article 2.2 of the TBT Agreement provides that technical regulations shall not be more trade-restrictive than necessary... taking account of the risks non-fulfilment would create. The harmful effects and health risks associated with tobacco use were not contested by the parties. Australia referred to various World Health Organization documents in pointing out that the magnitude of the global tobacco epidemic and the serious harms caused by tobacco use (including in Australia) are well-established, that all tobacco products are highly addictive, that there is no safe level of tobacco use or safe level of exposure to second-hand or environmental tobacco smoke, and that tobacco use harms nearly every organ in the body. Australia pointed out that tobacco use is the world’s leading cause of preventable morbidity and mortality, and is responsible for the deaths of nearly 6 million people annually. The Panel found that the risk of the TPP measures not fulfilling their objective is that public health would not be improved because the use of, and exposure to, tobacco products would not be reduced.

In relation to the gravity of these consequences, it found that ‘it is widely recognized, and undisputed in [the] proceedings, that the public health consequences of the use of, and exposure to, tobacco... are particularly grave’ and are ‘especially grave for youth’. In reaching these conclusions, the Panel made particular reference to the recognition given to the gravity of these consequences in the WHO FCTC. These findings were not challenged on appeal.

### 3.4 Alternative measures

#### 3.4.1 The Panel

As observed by the Panel, whether a measure is more trade-restrictive than necessary to achieve a particular objective and therefore creates an unnecessary barrier to trade may be established on the basis of a ‘comparative analysis’ between the challenged measure and alternative measures. The existence of one or more alternative measures that make an equivalent contribution to achieving the same objective as the challenged measure, that are less trade-restrictive (taking account of the risks that non-fulfilment would create), and that are reasonably available to the Member implementing the challenged measure, may show that the challenged measure is more trade-restrictive than necessary to achieve its objective. Before the Panel, the complainants identified four alternative measures it said were reasonably available to Australia. The Panel found that each alternative, either individually or in combination, would not make an equivalent contribution to Australia’s health objective and/or would not be less-trade restrictive than the TPP measures. The alternatives and the Panel’s corresponding findings are summarised in the table below.
### The alternative measures and the Panel’s corresponding findings

<table>
<thead>
<tr>
<th>Alternative measures</th>
<th>Panel’s findings</th>
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| 1. Raising the minimum legal purchase age for tobacco from 18 years to 21 years. | **a** Would only affect the availability of tobacco products to individuals below the purchasing age of 21, whereas the TPP measures would address all age groups and other aspects of tobacco demand.  
**b** Unclear that the measure would have less of a limiting effect on trade. |
| 2. Raising the level of taxation for tobacco products. | **a** Would not address the promotional effects of tobacco packaging that the TPP measures seek to address.  
**b** Not necessarily less trade-restrictive, because it would be targeted at reducing tobacco consumption, and therefore tobacco imports, to the same extent as the TPP measures. |
| 3. Raising the minimum legal purchase age for tobacco from 18 years to 21 years. | **a** Was not less trade-restrictive and would not make an equivalent contribution for similar reasons as those given in respect of the alternative taxation measure. |
| 4. Pre-vetting individual tobacco packages and products before allowing them entry into the Australian market. | **a** The use of discretion and the potential for error would leave regulatory gaps that the TPP measures would otherwise fill (e.g. the possibility of differentiation and packaging elements that could lead to greater consumer appeal, a likelihood of consumers being misled, distraction from GHWs).  
**b** Not less trade-restrictive because it would have similar effects on international trade and lead to increased implementation and compliance costs. |
3.4.2 The Appellate Body

Application of Article 2.2: Contribution of Alternative Measures

On appeal, the appellants argued that the Panel erred in finding that the alternative measures would not make an equivalent contribution to Australia’s objective. The appellants made two claims in this respect:\textsuperscript{102}

- that the Panel incorrectly rejected an equivalent contribution by finding that the alternative measures would contribute to Australia’s objective through mechanisms different to those employed by the TPP measures, and that the alternative measures do not address the design features of the TPP measures; and

- that the Panel took into account the synergies that the TPP measures would create with other existing tobacco-control measures, but did not take into account the synergies that the alternative measures would create with the existing measures.

The Appellate Body agreed with the appellants that the Panel had erred. In addressing the first issue, the Appellate Body noted the principle that ‘[a]n 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 pursued’.\textsuperscript{103} The Panel had erred by focusing on the TPP measures’ mechanisms in order to find that the alternative measures would not make an equivalent contribution to the TPP measures’ objectives. As these mechanisms did not constitute objectives of the TPP measures, they could not form a proper basis for the finding that the alternative measures made less of a contribution. It was irrelevant to their overall contribution that they did not address the design features of the TPP measures.\textsuperscript{104}

In relation to the second issue, the Appellate Body 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.\textsuperscript{105} 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 its alternatives because of the TPP measures’ synergies with other existing measures.\textsuperscript{106}

Application of Article 2.2 Trade-Restrictiveness of Alternative Measures

The appellants argued that the Panel erred in its assessment of the trade-restrictiveness of the alternative measures because of the same errors the Panel was alleged to have made in relation to the trade-restrictiveness of the TPP measures. However, the Appellate Body rejected these arguments on the same grounds.\textsuperscript{107}

4. Consistency with Article 2.2

Having weighed each of these considerations against one another, the Panel concluded that Australia’s TPP measures are no more trade-restrictive than necessary to fulfill their legitimate objective of protecting public health.\textsuperscript{108} It therefore concluded that the TPP measures are consistent with Australia’s obligations under the TBT Agreement. In reaching this conclusion, the Panel noted that the ‘TPP measures are... not intended to operate as a stand-alone policy, but... were implemented as part of “a comprehensive suite of reforms to reduce smoking and its harmful effects” in Australia’ and that it had given ‘due weight... to the fact that the TPP measures operate in conjunction with a number of other wide-ranging tobacco control measures’.\textsuperscript{109}

Although the Appellate Body found that the Panel had erred in reaching its conclusion about the contribution of the alternative measures, it agreed with the Panel about their trade-restrictiveness. It therefore upheld the Panel’s overall conclusion that the TPP measures are no more trade-restrictive than necessary, and that they are consistent with Australia’s obligations under the TBT Agreement.

The TRIPS Agreement: Article 20

The complainants made several claims about the consistency of the TPP measures with various provisions of the TRIPS Agreement.\textsuperscript{110} The most significant of those claims was that the TPP measures violated Article 20 of the TRIPS Agreement. Article 20

\textsuperscript{102} Appellate Body Report, Australia – Tobacco Plain Packaging [6.481].
\textsuperscript{103} Ibid [6.498] (original emphasis).
\textsuperscript{104} Ibid [6.499], [6.502].
\textsuperscript{105} Ibid [6.503].
\textsuperscript{106} Ibid [6.503].
\textsuperscript{107} Ibid [6.467], [6.475]-[6.479].
\textsuperscript{108} Panel Report, Australia – Tobacco Plain Packaging [7.1724]-[7.1732].
\textsuperscript{109} Ibid [7.1729].
\textsuperscript{110} See above n 24.
requires that the ‘use of a trademark in the course of trade shall not be unjustifiably encumbered by special requirements.’

The following elements must be established in order to find that a measure is inconsistent with Article 20:

1. Special requirements and encumbrance

The Panel found that the TPP measures fall within the legal meaning of the term ‘special requirement’ because they must be complied with, have a close connection with and specifically address the use of trademarks, and are limited in application to the use of trademarks on tobacco retail packaging and products. The Panel found that the TPP measures also encumber the use of trademarks in the course of trade to the extent that they restrict the manner in which certain word marks may be displayed on tobacco products and packaging, and expressly disallow (and thereby hinder and obstruct) the use of stylized word marks, composite marks and figurative marks. The Panel therefore rejected Australia’s argument that a total prohibition on certain trademarks (such as that on figurative trademarks), rather than a requirement that merely controls the way in which they may be used, does not engage Article 20 of the TRIPS Agreement.

2. Unjustifiability

The parties took different approaches to the meaning of ‘unjustifiably’ under Article 20. The complainants argued that the measure in question must have more than merely a ‘rational connection’ to the objective sought to be achieved by the measure. They also argued that the term ‘unjustifiably’ means that the measure must be necessary, in the sense that there are no alternative measures that would achieve the same level of contribution to the objective, but which would be less encumbering on trademark use. Australia argued that only a rational connection between the measure and objective must be shown, and disagreed that notions of necessity are imported into Article 20 by the term ‘unjustifiably.’

The Panel concluded that a determination of unjustifiability involves consideration of the following factors:

- the nature and extent of the encumbrance resulting from the special requirements, bearing in mind the trademark owner’s legitimate interest in using its trademark and thereby allowing the trademark to fulfil its intended function;
- the reasons for which the special requirements are applied, including any societal interests they are intended to safeguard; and
- whether these reasons provide sufficient support for the resulting encumbrance.

The Panel therefore accepted the complainants’ arguments that something more than a ‘rational connection’ is required; the reasons for the measure must also provide ‘sufficient support’ for the encumbrance. The Panel, however, also accepted Australia’s argument that determination of unjustifiability sets a lower threshold than the test of necessity set by other WTO provisions, and does not require consideration of alternative measures. However, the Panel indicated that the availability of alternative measures could, in a particular case, ‘call into question’ whether the reasons for a measure sufficiently support the resulting encumbrance.

112 Panel Report, Australia – Tobacco Plain Packaging [7.2241], [7.2243].
113 Ibid [7.2242], [7.2244].
114 Ibid [7.2246].
115 Ibid [7.2236].
116 Ibid [7.2286].
117 Ibid [7.2252], [7.2261]-[7.2263].
118 Ibid [7.2295]-[7.2296], [7.2309], [7.2322], [7.2324]-[7.2326].
119 Ibid [7.2329], [7.2332].
120 Ibid [7.2530].
121 Ibid [7.2598].
2.1 Nature and extent of encumbrance
The Panel found that the TPP measures prevent a trademark owner from using the promotional function of the figurative elements of trademarks to convey any message about the product, and from thereby extracting economic value from the use of such design features. It noted that the TPP measures’ prohibitions in this respect are ‘far-reaching’. However, the Panel noted that this effect is partly mitigated by word marks (brand names and variants) being allowed in a restricted form, and that the complainants had not sought to demonstrate that consumers had been unable to distinguish products from one another.

2.2 Reasons for the special requirement
The Panel recalled its earlier finding about the objective pursued by Australia through the TPP measures, and noted that ‘the Appellate Body has recognized the preservation of human life and health as a value that is “both vital and important in the highest degree”’. It also noted the importance and legitimacy of public health as a policy concern, as indicated by Article 8 of the TRIPS Agreement, the WHO FCTC, and the Doha Declaration.

2.3 Sufficient support
2.3.1 The Panel
The Panel noted that the TPP measures ‘address an exceptionally grave domestic and global health problem involving a high level of preventable morbidity and mortality’. It concluded that because the TPP measures ‘in combination with other tobacco-control measures maintained by Australia, are capable of contributing, 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. It also found it significant that Australia is, through the TPP measures, pursuing its public health objective in line with its commitments under the FCTC.

The Panel concluded that the TPP measures are not inconsistent with Australia’s obligations under Article 20 of the TRIPS Agreement.

2.3.2 The Appellate Body
On appeal, the appellants claimed that the Panel erred in its interpretation and application of Article 20.

Interpretation of Article 20
In respect of the Panel’s interpretation, Honduras argued that:

- the Panel, by interpreting ‘unjustifiably’ as the absence of good reasons for a measure, incorrectly interpreted Article 20 as a broad policy exception; and
- the Panel erred by approaching the issue of unjustifiability by considering the three factors outlined above; and
- the Panel should have interpreted Article 20 such that a measure must be at least shown to be necessary before it can be said to be justifiable; and
- the Panel erred by relying on the Doha Declaration to inform its interpretation of Article 20.

The Appellate Body 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 rejected Honduras’ view 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 under Article 20’. Importantly, the Appellate Body 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’. The Appellate Body agreed with the Panel that such a demonstration ‘could’ include...
consideration of the three factors set out by the Panel (outlined above at the beginning of this section).\textsuperscript{134} The Appellate Body 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 present in other WTO Agreement provisions.\textsuperscript{135} Importantly, the Appellate Body also agreed with 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.\textsuperscript{136}

The Appellate Body found it unnecessary to make a definitive statement on the legal status of the Doha Declaration because it found that the Panel had correctly relied on the general principle of treaty interpretation reflected in the Doha Declaration: that an Agreement should be interpreted in light of its objectives, which are partly contained in Article 8 of the TRIPS Agreement.\textsuperscript{137}

Application of Article 20

Honduras argued that the Panel erred in assessing the nature and effect of the encumbrance by not focusing on the distinguishing function of trademarks.\textsuperscript{138} However, the Appellate Body concluded that the Panel appropriately examined a trademark owner’s legitimate interest in extracting economic value from the promotional function of a trademark, given that the complainants did not seek to establish an actual or potential inability in consumers to distinguish between tobacco products as a result of the TPP measures.\textsuperscript{139} Finally, Honduras argued that the Panel erred by giving the WHO FCTC and its Guidelines undue legal weight in concluding that the encumbrances on trademark use are sufficiently supported.\textsuperscript{140} However, the Appellate Body concluded that the the WHO FCTC and its Guidelines simply provided additional factual support and confirmed conclusions that the Panel had already reached about the importance of the TPP measures’ objectives.\textsuperscript{141}

The TRIPS Agreement: Article 16

The parties made it clear at the panel stage that they were not arguing that Article 16 of the TRIPS Agreement confers a positive right to use.\textsuperscript{142} However, following further submissions at the appeal stage, the Appellate Body understood Honduras to argue that Article 16.1 confers upon a trademark owner the right to use its trademark, that certain aspects of Article 16.1 require Members to protect the distinctiveness of a trademark through use, and that Members must guarantee a minimum level of protection relating to the distinctiveness and use of trademarks.\textsuperscript{143} The Appellate Body confirmed the Panel’s view that Article 16.1 of the TRIPS Agreement does not confer on a trademark owner a positive right to use a trademark or preclude a government from regulating or preventing such use.\textsuperscript{144} Rather, Article 16.1 ensures that each WTO Member provide trademark owners with a means, under domestic law, of exercising their exclusive right to prevent unauthorised parties from using their trademark.\textsuperscript{145}

\begin{itemize}
\item \textsuperscript{134} Ibid \[6.651\], \[6.659\].
\item \textsuperscript{135} Ibid \[6.653\]-\[6.655\].
\item \textsuperscript{136} Ibid \[6.653\].
\item \textsuperscript{137} Panel Report, Australia – Tobacco Plain Packaging \[7.2407\]-\[7.2411\], Appellate Body Report, Australia – Tobacco Plain Packaging \[6.657\]. See Doha Declaration \(n\ 102\) paragraph 5(a).
\item \textsuperscript{138} Ibid \[6.664\].
\item \textsuperscript{139} Ibid \[6.672\].
\item \textsuperscript{140} Ibid \[6.700\].
\item \textsuperscript{141} Ibid \[6.706\]-\[6.707\].
\item \textsuperscript{142} Panel Report, Australia – Tobacco Plain Packaging \[7.1923\], \[7.1934\].
\item \textsuperscript{143} Appellate Body Report, Australia – Tobacco Plain Packaging \[6.574\].
\item \textsuperscript{144} Ibid \[6.587\]-\[6.588\].
\item \textsuperscript{145} Ibid \[6.582\]-\[6.586\], \[6.599\].
\end{itemize}
Australia’s WTO dispute has various implications for other WTO Members seeking to introduce similar TPP measures, as well as for the WTO-consistency of other tobacco-control measures. As was anticipated prior to circulation of the Appellate Body’s report, 146 most of the Panel’s findings and conclusions were left undisturbed.

Since the introduction of Australia’s TPP measures, 16 other WTO Members have introduced and partially or fully implemented their own TPP measures. They are France, the United Kingdom, New Zealand, Norway, Ireland, Saudi Arabia, Hungary, Turkey, Thailand, Uruguay, Slovenia, Israel, Canada, Singapore, Belgium, and the Netherlands. 147 13 of those Members have done so since the Panel’s report was circulated. Singapore’s and the Netherlands’ TPP measures came fully into force as recently as 1 July 2020 and 1 October 2020 respectively, shortly after the Appellate Body handed down its decision. 148 Three other countries have passed TPP laws that will come into force at later dates, and TPP laws are being considered at various levels of government in numerous other countries.

These developments show that the world is following Australia’s lead in the implementation of new and more effective tobacco-control measures. The Appellate Body’s affirmation of the legality of Australia’s TPP measures under WTO law 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. This confidence has become increasingly important, as many governments who consider or seek to propose new TPP and other tobacco-control measures are subject to a ‘chilling’ effect, where the threat of legal action discourages them from implementing regulatory changes. 149 The next sections explore the practical and legal implications of the WTO dispute in greater depth.

A. EVIDENTIARY AND PRACTICAL IMPLICATIONS

The relationship between health and trade law

The Panel and Appellate Body decisions confirm that the promotion of public health, sought to be achieved by tobacco-control measures, is well-recognised as a legitimate objective for the purposes of WTO Agreements. Such recognition has been demonstrated by WTO bodies in the past, 150 but trade law has at times been seen to be at odds with public health initiatives. 151 The Appellate Body did not object to the Panel’s findings that the TPP measures’ overall objective of protecting public health is a legitimate objective for the purposes of the TBT Agreement and is a valid reason for imposing special requirements under Article 20 of the TRIPS Agreement.

As well as demonstrating that public health and tobacco-control are legitimate objectives, the decisions also confirm the importance of those objectives and their relatively strong weight in the evaluative assessments required to be undertaken by WTO

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147 For a more detailed overview of these developments, see Cancer Council Victoria, “Timeline, international developments & major news stories” <https://www.cancervic.org.au/plainfacts/timelineandinternationaldevelopments>

148 See eg Tobacco (Control of Advertisements and Sale) (Appearance, Packaging and Labelling) Regulations 2019 (Singapore).


150 See eg Appellate Body Report, United States – Measures Affecting the Production and Sale of Clove Cigarettes, WTO Doc WT/DS406/AB/R (4 April 2012) [235]-[236].

bodies. Significantly, the Panel concluded that the likely health consequences that would follow from the TPP measures’ non-fulfilment are ‘exceptionally grave’, and it noted the Appellate Body’s previous recognition that those health objectives are ‘vital and important in the highest degree’. The importance of public health and tobacco-control weighed particularly heavily in the Panel’s assessment of unjustifiability. The dispute therefore reveals that WTO Agreements are being interpreted in a way that leaves significant latitude for public health measures.

The WHO FCTC and TPP as an effective tobacco-control measure

Perhaps most importantly, the decisions also make it clear that TPP is recognised as an effective tobacco-control measure and that it may be implemented by Members without necessarily being inconsistent with their WTO obligations. 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’ TPP regimes will contribute to similar objectives.

The decisions also confirm that the WHO FCTC can provide a firm evidentiary basis for the importance of addressing the tobacco epidemic, for tobacco-control as a legitimate health objective, and for the acceptance and recognition of TPP and other measures as effective tobacco-control measures. This is consistent with use of the WHO FCTC in the context of other legal challenges at the WTO and in other fora. The Panel 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 evidence of fact’ and that ‘the FCTC and certain FCTC Guidelines have been specifically discussed and relied upon as evidence in at least two previous WTO disputes’. The Panel used the WHO FCTC to inform itself about the seriousness of the tobacco epidemic and the consequences of failing to address tobacco use and exposure, as well as to aid its findings that tobacco packaging is a form of promotion, that TPP is a recommended way to reduce the appeal of tobacco products, and that TPP may increase the effectiveness of GHWs.

The Appellate Body’s affirmation of the Panel’s approach reinforces the particular role that the WHO FCTC can play in WTO disputes. The WHO 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 tobacco-control measure in question. As explained above, the legal status of the WHO FCTC and its Guidelines did not, for the Panel, affect the use of those instruments for other purposes (e.g. as the basis for factual findings) or in others contexts (e.g. under other provisions). Thus the Panel used the WHO 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 the WHO FCTC is further underscored by the Appellate Body’s rejection of Honduras’ argument that the Panel placed undue legal weight on the WHO FCTC and its Guidelines in the Panel’s analysis of ‘sufficient support’ under Article 20 of the TRIPS Agreement. The Panel properly used the WHO FCTC to support its factual findings and did not use the WHO FCTC as a binding legal instrument or an interpretative tool. 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.

The importance of evidence

The Appellate Body decision also confirms that a panel is entitled to look at the totality of the evidence in determining the contribution of a challenged measure to its objective. This means that other countries may use already-available pre-implementation evidence
of the TPP measures’ proximal and distal outcomes to establish the efficacy of TPP. Other countries may also rely on post-implementation evidence of the actual impact of TPP measures in Australia, as well as other countries where such measures have already been implemented. This particular body of evidence continues to grow.\(^\text{164}\) Importantly, the Appellate Body decision confirms that a panel’s role as fact-finder gives it some margin of discretion in how it approaches the evidence available. The Panel’s approach in Australia’s case confirms that a degree of flexibility is likely to be afforded to parties in relation to the limitations of certain evidence.\(^\text{165}\) The accepted role of the WHO FCTC also means that less resourceful Members may rely on it to support what little evidence those Members are able to gather.\(^\text{166}\) As a lack of evidence is a common challenge made by complainants about TPP in WTO and other legal disputes,\(^\text{167}\) and substantial evidence is generally required to contradict the evidence presented by complainants, these findings are especially important for countries seeking to implement TPP.

### The TBT Agreement and scientific evidence

Another implication relates to 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, for the purposes of establishing the TPP measures’ contribution to Australia’s objective, 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’.\(^\text{168}\) The Panel borrowed these considerations directly from the Appellate Body, which had outlined them in the context of another WTO Agreement, the Agreement on the Application of Sanitary and Phytosanitary Measures.\(^\text{169}\) The Panel said that these types of considerations for assessing scientific evidence may also apply, with necessary modification, to the TBT Agreement.\(^\text{170}\) The Appellate Body in this dispute did not deal directly with the legality or propriety of this approach,\(^\text{171}\) which means that future panels may seek to adopt it. In any case, it is possible that the approach falls under the margin of discretion afforded to a panel in its role as fact-finder, and indeed, may contribute to a finding under Article 11 that a panel has made an objective assessment of the facts before it.\(^\text{172}\)

### The importance of a robust and comprehensive policy framework

The fact that a panel is entitled and likely to consider the totality of the evidence means that a suite of tobacco-control measures will be important in defending the legality of a TPP regime, especially under provisions where alternative measures must be considered (e.g. Article 2.2 of the TBT Agreement). The Appellate Body 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.\(^\text{173}\) The decisions therefore give recognition to the general view that a comprehensive suite of measures increases the effectiveness of a tobacco-control framework.\(^\text{174}\)

The Panel emphasised that Australia’s broader suite of comprehensive measures was relevant to its assessment of the way in which the TPP measures are applied and operate.\(^\text{175}\) The Appellate Body 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 Appellate Body questioned the Panel having concluded that the alternative measures made less of a contribution without having considered the interaction of those alternatives with other measures.\(^\text{176}\) The Appellate Body confirmed the principle that what is
relevant is the overall degree of contribution, which it found the Panel had misapplied.\(^{177}\) This means that the extent to which a measure features as part of a broader suite of measures, and the way in which 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 be a final resort, or feature as a last step in a country’s regulatory framework, especially under Article 20 of the TRIPS Agreement. However, the dispute reveals that countries should ensure that other, less trade-restrictive measures are in place before implementing TPP. The implications of the Appellate Body’s decision in relation to alternative measures is further discussed below.

**Characterising the objective**

The way in which 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 Appellate Body found that the Panel had 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 the Panel’s assessment of the TPP measures’ contribution to their objective. The Appellate Body 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. It is therefore important that TPP measures are framed in their proper regulatory context, and the means by which they are intended to achieve their overall objective is made clear in legislation and policy materials.

**Legal challenges will be less likely, but may be resource-demanding**

Although the dispute has shown that the evidence available supports TPP, and other Members may use that evidence, it also reveals that defending legal challenges by the tobacco industry may nevertheless be costly, resource-demanding and time-consuming. The Panel and Appellate Body decisions are likely to dissuade tobacco companies from bringing similar claims, and Members should continue to be encouraged to introduce their own TPP measures. However, WTO Members, particularly developing and low-income countries, should remain aware of the prospect of having to defend complex claims at the panel and appellate stages.\(^{179}\) In light of other tobacco-control disputes, governments should also be aware of the possibility of other challenges under international and domestic laws.\(^{179}\)

Despite the Appellate Body’s apparent dissatisfaction with the voluminous and complex nature of the appellants’ claims, there is no indication that future complainants and appellants 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 the ‘separate opinion’ of one Division Member,\(^{180}\) 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.\(^{181}\)

**B. LEGAL IMPLICATIONS**

The WTO decisions also have certain legal implications which may be significant for the practical implementation of tobacco-control measures generally, as well as non-tobacco-control measures aimed at protecting public health, such as those relating to food, alcohol and pharmaceuticals.\(^{182}\)

Only the threshold requirements under WTO Agreements are likely to be engaged

The Panel’s and Appellate Body’s decisions in the WTO dispute indicate that TPP measures (and other tobacco-control measures) will generally engage certain WTO provisions (such as Article 2.2 of the TBT Agreement and Article 20 of the TRIPS Agreement) because they will satisfy the initial or threshold stages of the relevant legal tests (i.e. 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’ for the purposes of the TBT Agreement and a ‘special requirement’ for the purposes of the TRIPS Agreement. It has been pointed out that the Panel’s ‘broad’ interpretation of

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\(^{177}\) Ibid. See Panel Report, Australia - Tobacco Plain Packaging [7.1348](7.1349), [7.1731].

\(^{178}\) McGrady, ‘Health and International Trade Law’ (n 151) 107; Becky Freeman, ‘Australia’s decisive win on plain packaging paves way for other countries to follow suit’, The Conversation (Web Page, 16 June 2020); Genevieve Wilkinson, ‘Big Tobacco’s decisive defeat on plain packaging laws won’t stop its war against public health’, The Conversation (Web Page, 6 July 2020).

\(^{179}\) McGrady (n 148) 77-78; See eg R (British American Tobacco & Ors) v Secretary of State for Health [2016] EWHC 1169 (Admin); Philip Morris Brands Sàrl v Uruguay (ICSID Arbitral Tribunal, Case No ARB/10/7, 8 July 2016); British American Tobacco v Attorney-General, Constitutional Court of Uganda, 28 May 2019; Swedish Match v Ministry of Health and Care Services, Case no 17-110415TVI-08BYF (Oslo District Court and Court of Appeal, 6 November 2017).

\(^{180}\) See above n 71.


\(^{182}\) See generally Alberto Alemanno and Enrico Bonadio (eds), The New Intellectual Property of Health: Beyond Plain Packaging (Edward Elgar Publishing, 2016).
these steps has the potential to subject more measures to WTO challenge.\textsuperscript{183} However, in light of the evidentiary implications outlined above, TPP measures and other tobacco-control measures are unlikely to fall foul of the more substantive requirements within relevant provisions, such as the requirement under the TBT Agreement that a technical regulation be no more trade-restrictive than necessary or that under the TRIPS Agreement that a special requirement shall not unjustifiably encumber trademark use. Although the TPP measures constituted ‘technical regulations’ and ‘special requirements’, they were found to be neither more trade-restrictive than necessary, nor unjustifiable. 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.\textsuperscript{184} It remains to be seen whether a reduction in the ‘chilling’ effect on governments brought about by Australia’s success will reduce the number of challenges that these threshold elements allow WTO bodies to entertain.\textsuperscript{185}

The content of WTO Legal tests has been clarified

Although TPP is likely to satisfy only the threshold stages of WTO tests, the Panel and Appellate Body decisions have nevertheless clarified certain aspects of the more substantive requirements within WTO provisions. This has implications for the way in which tobacco-control and other health measures might be assessed in the future. Such implications are important, because assessments by WTO bodies are coming to take an increasingly central role in the control and regulation of public health measures. This is reflected in the increased integration of different public international law rules and frameworks (including the WHO FCTC) into the multilateral trading system, as well as panels’ wider focus on the broader question of whether a measure is proportionate and their role in thereby confirming the regulatory autonomy of countries to develop tobacco control and other health related measures.\textsuperscript{186}

Trade-restrictiveness under Article 2.2 of the TBT Agreement

On the one hand, the Appellate Body did not overturn the Panel’s interpretation of trade-restrictiveness, by confirming that ‘actual trade effects’ may be relevant. This means that it may be harder for future complainants to characterise TPP as trade-restrictive. Complainants will need to show that a measure will have negative effects on competitive opportunities, rather than show that they merely modify the competitive environment.\textsuperscript{187} Measures may also affect brand-differentiation, provided this does not disadvantage imported products compared to competing domestic products as a whole.\textsuperscript{188}

On the other hand, the Panel found that the TPP measures are trade-restrictive simply because they would reduce demand for tobacco products and such demand in Australia is exclusively met by imports.\textsuperscript{189} 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 Appellate Body 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.\textsuperscript{190} Again, this will likely depend on the extent to which a Member has a robust and comprehensive tobacco-control framework.

Equivalent contribution under Article 2.2 of the TBT Agreement

The Appellate Body 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 approaches of the Panel and the Appellate Body. The Panel took a qualitative approach to a measure’s contribution, while the Appellate Body took a more quantitative approach.\textsuperscript{191} The Appellate Body’s approach makes it theoretically easier to formulate reasonably available alternative measures, because such alternatives may still make a contribution

\textsuperscript{183} Zhou and Liberman (n 154) 74.
\textsuperscript{184} McGrady (n 168) 76.
\textsuperscript{185} Wilkinson (n 179).
\textsuperscript{186} McGrady (n 168) 81; Petersmann (above n 24) 24-29. See also McGrady, ‘Health and International Trade Law’ (n 151) 104.
\textsuperscript{187} See Appellate Body Report, Australia – Tobacco Plain Packaging [6.389].
\textsuperscript{188} Appellate Body Report, Australia – Tobacco Plain Packaging [6.386]; [6.387], [6.408].
\textsuperscript{189} Panel Report, Australia – Tobacco Plain Packaging [7.1200], [7.1204], [7.1207].
\textsuperscript{190} Voon (n 146) 171.
even if they do not address the same mechanisms or aspects that the challenged measure seeks to address. However, the dispute demonstrates that this is unlikely to have a significant practical impact on the successful defence of TPP measures, because any such alternative is likely to be as equally trade-restrictive as the challenged measure.

**Article 16.1 of the TRIPS Agreement confers no positive right to use**
The Appellate Body decision confirms that Article 16.1 cannot be used by the tobacco industry to challenge TPP on the ground that it infringes a WTO Member’s supposed positive right to use their intellectual property. The provision only requires that Members provide trademark owners the legal right, under domestic law, to prevent others from using their trademarks. It does not stop governments from preventing a trademark owner from using their own trademark. This removes a major avenue for any future legal challenges to TPP measures.

**‘Unjustifiability’ under Article 20 of the TRIPS Agreement**
The WTO dispute is the first case in which the scope and content of the term ‘unjustifiably’ under Article 20 has been explored.\(^{192}\) In contrast to the Panel’s interpretation of the threshold requirements under Article 20, its interpretation of ‘unjustifiably’ has been seen to favour Members seeking to implement measures.\(^{193}\) It is unclear what the requirement of ‘sufficient support’ requires, except that it is something less than necessity and something more than a ‘rational connection’.\(^{194}\) However, for the Panel and the Appellate Body, it was enough that the TPP measures’ health objectives were highly important, and that the TPP measures would contribute to achieving those objectives. In this regard, the importance of tobacco-control generally outweighed the extensive effects on trademark use brought about by the TPP measures.

The Appellate Body’s confirmation that Article 20 does not require Members to demonstrate that a measure is necessary (in the sense of there being no reasonably available, less trademark-encumbering alternatives that provide an equivalent contribution to the objective) should further encourage Members to implement TPP measures. However, Members should remain cognisant that the availability of such alternative measures may play a role in determining the justifiability of TPP or other tobacco-control measures. This is because 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.\(^{195}\) Whether this is so in any particular case may depend on whether the Member has already taken significant steps to developing its tobacco-control framework. Nevertheless, the Appellate Body decision indicates that TPP measures may in any case be justifiable, provided the measures would contribute to the particular Member’s health objective.\(^{196}\) As the Panel’s three-step approach frames a panel’s task as a broad evaluative analysis in which the focus is no longer primarily on particular trade effects,\(^{197}\) tobacco companies are likely to be further dissuaded from bringing claims under Article 20, and any claims that are brought are less likely to be successful.

Since the introduction of Australia’s TPP measures, 16 other WTO Members have introduced and partially or fully implemented their own TPP measures.

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193 Diamond (n 151).
194 Voon (n 146) 183; Zhou and Liberman (n 154) 74.
197 McGrady (n 168) 81.