

AUSTRALIA — PLAIN PACKAGING

- **Australia — Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging (*Australia – Plain Packaging*)**; Complainant: Honduras, Indonesia, Dominican Republic, Cuba; Respondent: Australia; Panel report circulated: **28 June 2018 (adopted 27 August 2018)**
- **Legalities involved – extra-systemic**: World Health Organization conventions, WIPO regulations, TRIPS and TBT obligations (WTO law).
- **Tool to deal with extra-systemic inter-legality**: focus on WTO law, using external sources of law to interpret WTO provisions.
- **Legalities involved – intra-systemic**: potential clashes between TRIPS and TBT (i.e. within WTO law).
- **Tool to deal with intra-systemic inter-legality**: determination that the WTO regime is a ‘single undertaking; use of the principle of effectiveness and *lex specialis*.

SUMMARY

In this case, some Australian measures were contested before the WTO dispute settlement as violating TRIPS and TBT obligations. There are two levels of potential questions of interlegality in this dispute. First, Australia invoked WHO conventions to support the objectives of its trade restriction measures. Second, Australia invoked potential clashes between different WTO Agreements (the TRIPS and the TBT), claiming that these agreements had different objectives.

With respect to the interaction between WIPO and the WTO, the panel found that the WIPO Conventions had been incorporated by the TRIPS agreement in the framework of the WTO.

With respect to the interaction between WHO and the WTO, Australia claimed that the measures followed FCTC guidelines, and therefore would be ‘relevant international standards’ under Article 2.5 of the TBT Agreement which set out legitimate objectives for the determination of technical barriers in accordance with Article 2.2 of the same agreement.

The panelists took a restrictive approach in examining the FCTC's relevance to the dispute under the strict wording of Articles 2.5 and 2.2 of the TBT. The adjudicators however found that “[...] *while the Article 11 and Article 13 FCTC Guidelines provide important guidance to FCTC parties in addressing packaging, and, as relevant, implementing plain packaging as an element of a comprehensive scheme of effective tobacco control policies, Australia has not demonstrated that they constitute a "standard" under Annex 1.2 of the TBT Agreement with respect to tobacco plain packaging*’ (para 7.397)”. At the same time, the panelists carefully considered that “*the fact that a given instrument is not relevant or persuasive for one purpose under a given claim does not, in our view, render it ipso facto irrelevant for another purpose, including in the context of other aspects of the same claim. Rather, its relevance, if any, must be assessed in the context of each specific claim and the purpose for which it has been raised in that context*” (para 7.405). In other words, they reasserted the importance that non-WTO instruments could bear on the interpretation of the legality of other elements of a measure, such as its contribution to the stated objective (in this case, public health) (para 7.421).

While the findings were very WTO-oriented (i.e., did not go in much detail regarding the legal value of other sources of law), it is interesting to note a procedural element to deal with interlegality in this case: during the proceedings, the panelists requested information from WHO and FCTC (WHO Framework Convention on Tobacco Control) Secretariat and assistance of the International Bureau of WIPO.

To deal with the argument raised by Australia that there were clashes of interests between different WTO Agreements, the Panel found that “[...] *the various covered agreements co-exist and apply cumulatively, and it is possible, therefore, for a measure to be simultaneously covered by the disciplines of one or more covered agreements. This is also consistent with the well-established tenet of treaty interpretation that, "[i]n light of the interpretive principle of effectiveness, it is the duty of any treaty interpreter to 'read all applicable provisions of a treaty in a way that gives meaning to all of them, harmoniously*” (para 7.79).