November, 2012

The WHO Framework Convention on Tobacco Control as an International Standard under the TBT Agreement?

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The WHO Framework Convention on Tobacco Control as an International Standard under the TBT Agreement?

Lukasz Gruszczynski

Abstract

In this article Lukasz Gruszczynski argues that there are good grounds for considering the Guidelines to the Framework Convention on Tobacco Control (‘FCTC’) relevant international standards under the Agreement on Technical Barriers to Trade (‘TBT Agreement’). The structure of the article is as follows: (1) Part I provides an overview of the relevant sections of the TBT Agreement and its ambiguities with respect to defining an international standard; (2) Part II sets out the aims, purpose and governance structure of the FCTC; (3) In light of the overviews of the TBT Agreement and the FCTC, Part III then considers whether the FCTC and its Guidelines are likely to satisfy criteria developed by relevant World Trade Organization (‘WTO’) jurisprudence regarding what constitutes an international standard under the TBT Agreement; and, finally (4) Part IV draws out the significance of having the FCTC/Guidelines recognised as an international standard under the TBT Agreement.

Introduction

The legality of national tobacco control measures is increasingly being tested in different international fora. A local subsidiary of Phillip Morris recently initiated an arbitration under a bilateral investment treaty (‘BIT’) against Australia, seeking compensation for unlawful expropriation resulting from the introduction of a new law on plain packaging. A similar complaint was lodged against Uruguay under the Swiss-Uruguay BIT concerning the size of mandatory pictorial warnings on cigarette packages. The WTO has also become an important arena wherein international tobacco companies indirectly challenge various municipal health measures. At the beginning of 2012, the WTO dispute settlement bodies were required to decide a dispute relating
to a United States ban on the production, sale and importation of flavoured cigarettes (including clove cigarettes). More recently, a number of WTO Members initiated a formal dispute settlement proceeding against Australia in further response to its plain packaging law. Other disputes relating to the contents of cigarettes lie ahead.

The TBT Agreement is probably the most important piece of WTO law when it comes to the assessment of any national tobacco control measures. Although it acknowledges that a broad regulatory discretion is enjoyed by WTO Members, it also establishes certain parameters for national technical regulations, having regard to their effect on international trade. As part of this overall framework, the TBT Agreement encourages the international harmonisation of technical standards by offering certain legal advantages to those measures which comply with international standards. Insofar as concerns tobacco control measures, the major potential source of such standards is the FCTC and its Guidelines. This is also the main focus of this article, which is aimed at enquiring into whether the FCTC and its Guidelines can be regarded as relevant international standards under the TBT Agreement.

The first section of this article gives a short overview of relevant provisions of the TBT Agreement. The second section moves on to the FCTC and explains its basic disciplines. The third section connects both instruments by examining the FCTC and its Guidelines in the light of the criteria proposed by the Appellate Body in one of its recent reports. The aim of this part is to determine whether the FCTC (and/or accompanying Guidelines) could qualify as relevant international standards under the TBT Agreement. The last section briefly outlines the practical consequences of qualifying the FCTC and its guidelines as international standards for current and future WTO disputes.

I. The TBT Agreement

The TBT Agreement is a part of the WTO law that aims at disciplining national technical standards. This broad category encompasses technical regulations, standards and conformity assessments, but excludes sanitary and phytosanitary measures (Art. 1.5), which are regulated by the Agreement on the Application of Sanitary and Phytosanitary Measures (‘SPS Agreement’). In practice, the majority of national tobacco control measures qualify as technical regulations. A ‘technical regulation’ is defined by the TBT Agreement as a ‘document which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory.’ It may include such aspects as terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method (Annex 1.1).

The TBT Agreement includes its own variations of basic principles of international trade law, such as most favoured nation status and national treatment principles (Art. 2.1) or the necessity requirement (Art. 2.2). The latter means that a measure cannot be more trade-restrictive than necessary to achieve a legitimate objective. The list of such objectives is open-ended and includes national security requirements, the prevention of deceptive practices, protection of human health or safety and animal or plant life or health,
as well as environmental protection. The above requirements are supplemented with an elaborated set of procedural rules intended to increase the transparency of national regulatory processes (Art. 2.9). Consequently, WTO Members are expected to publish a notice of a proposed technical regulation, notify other Members about a draft, and allow a reasonable time for other Members to make comments and discuss them. Comments as well as the outcomes of the discussion need to be taken into account (but not necessarily reflected) when adopting a final measure.

The TBT Agreement also promotes standardization in the field of technical regulations by requiring WTO Members to use international standards as a basis for their measures. This obligation arises whenever relevant international standards exist or their completion is imminent. The obligation is not absolute, however, and a WTO Member may deviate from international standards if ‘such international standards or relevant parts would be an ineffective or inappropriate means for the fulfillment of the legitimate objectives pursued’ (Art. 2.4). Nonetheless, a Member that conforms to international standards obtains the benefit of a rebuttable presumption that the measure is in conformity with Art. 2.2. In addition, according to Article 2.9, such a measure is also relieved from the procedural obligations discussed above.

Unfortunately, the TBT Agreement is rather opaque with respect to the issue of what should be considered an international standard. In contrast to the SPS Agreement, it does not enumerate any specific organizations whose standards are relevant within its context. Instead it includes two separate definitions of an ‘international body or system’ and a ‘standard’. The first is understood as a body or system whose membership is open to the relevant bodies of at least all WTO Members (thus the list of relevant international standard-setting bodies is open-ended). A standard, on the other hand, is described as a ‘document approved by a recognized body that provides, for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods, with which compliance is not mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method.’

This definition is supplemented by the Explanatory Note, which provides, inter alia, that ‘[f]or the purpose of this Agreement[,] standards are defined as voluntary (...). Standards prepared by the international standardization community are based on consensus. This Agreement covers also documents that are not based on consensus.’ Moreover, an introductory note to Annex 1 stipulates that its terms, unless defined otherwise in the TBT Agreement, shall have the same meaning as those included in the 6th edition of the ISO/IEC Guide 2: 1991 (General Terms and Their Definitions Concerning Standardization and Related Activities). The latter includes a definition of an ‘international standard’ and characterizes it as a standard that is adopted by an international standardizing/standards organization and made available to the public.’ In addition, the Committee on Technical Barriers to Trade (‘TBT Committee’), an entity created in order to give WTO Members an opportunity for consultation on any matters relating to the operation of the TBT Agreement and the furtherance of its objectives, adopted the
Decision on Principles for the Development of International Standards (‘Decision on International Standards’, or ‘Decision’), which elaborates on some of the above requirements. In particular, the Decision enumerates certain principles and procedures that should characterise the work of an international standard-setting body.

This complex and multi-layered structure is not easily translatable into one operational definition. To some extent this was accomplished by the Appellate Body in its US – Tuna II (Mexico) report, where a number of criteria for qualifying a specific rule as an international standard were identified. These requirements will be examined in more detail in Section 3. For the moment it is sufficient to note that the Appellate Body identified the Decision as a ‘subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions’ as provided for in Article 31.3(a) of the Vienna Convention on the Law of Treaties (‘VCLT’). Consequently, WTO dispute settlement bodies are obliged under Article 3.2 of the Dispute Settlement Understanding to take this Decision into account when interpreting specific TBT provisions (i.e. definitions of an ‘international body’ and ‘standard’).

II. Framework Convention on Tobacco Control

The FCTC is a legally binding international treaty adopted in 2003 under the auspices of the World Health Organization (‘WHO’). The Convention entered into force on 27 February 2005 after the necessary number of ratifications (40 countries) was reached. It is a framework agreement, meaning that it only establishes general rules, which require further elaboration in subsequent instruments such as protocols or guidelines. The FCTC currently has 176 parties and is one of the most widely accepted UN treaties. It should be noted, however, that countries which have not ratified the Convention include the USA and Switzerland.

The aim of the Convention is to contribute to the protection of human health from the consequences of smoking and exposure to tobacco smoke. This is accomplished through the establishment of a set of framework rules to be implemented by the State-Parties. The Convention includes provisions aimed at reducing both the demand for, and supply of, tobacco products. The first group, aimed at reducing demand, encompasses price and tax measures (Art. 6), regulations protecting against exposure to tobacco smoke (Art. 8), measures on the contents of tobacco products (Art. 9) and their disclosure (Art. 10), packaging and labelling requirements (Art. 11), as well as rules on tobacco advertising, promotion, and sponsorship (Art 13). The supply-related provisions concern illicit trade in tobacco products (Art. 15), sales to minors (Art. 16) and the provision of support for economically viable alternative activities for tobacco workers and growers (Art. 17).

The FCTC also establishes two bodies: a permanent Secretariat and a Conference of the Parties to the FCTC (‘COP’). The Secretariat takes care of the daily management of the Convention. The COP, composed of all Parties to the Convention, is responsible for supervising the implementation of the Convention. It may also adopt additional protocols to the Convention (Art. 33), which may regulate specific aspects of tobacco control.
policies and develop Guidelines for the implementation of different provisions of the FCTC (Art. 7). Until now, the COP has adopted seven Guidelines. In the context of this article, of particular importance are the Partial Guidelines for implementation of Articles 9 and 10 (contents of tobacco products and tobacco product disclosures), Guidelines for implementation of Article 11 (packaging and labelling of tobacco products) and Guidelines for implementation of Article 13 (tobacco advertising, promotion and sponsorship). Contrary to the Convention itself, however, the Guidelines are non-binding and are only aimed at assisting the Parties in meeting their obligations under the FCTC.

III. The FCTC as an International Standard under the TBT Agreement

The WTO dispute settlement bodies have not yet analysed whether the FCTC could be considered a ‘relevant international standard’ within the framework of the TBT Agreement. The only case that touched upon the relevance of the FCTC rules under the TBT Agreement was US – Clove Cigarettes. The panel, however, did not discuss them in the context of Article 2.4, but rather used them as evidence of international consensus on specific aspects of tobacco control policies and the existence of underlying concerns (e.g. risks connected with the use of flavoured cigarettes). This was not a legal omission on the part of the panel inasmuch as none of the parties maintained that there were relevant international standards applicable to the measure at hand. However, while there is no case law which has determined whether the FCTC (and its Guidelines) are relevant international standards, the recent report of the Appellate Body in US – Tuna II (Mexico) may be nevertheless helpful in this regard. One of the issues that was extensively discussed by the Appellate Body was whether two resolutions adopted within the framework of the 1999 Agreement on the International Dolphin Conservation Program could qualify as an international standard. In this context, the Appellate Body set out some general criteria that need to be met in order to consider a particular rule as an international standard for the purpose of the TBT Agreement:

a) a rule is adopted by a body that has recognized activities in standardization (although those activities could be its secondary function);

b) a ‘body’ is understood as ‘a legal or administrative entity that has specific tasks and composition.’ While it does not need to be an international organization, it needs to be of an international character;

c) ‘standardization activity’ means an activity of establishing provisions for common and repeated use. Such provisions can take the form of rules, guidelines or characteristics for products, or related process and production methods (including packaging, marking and labelling requirements); and

d) membership in such a body is open to the relevant bodies of at least all WTO Members. As explained by the Appellate Body, in order to consider such a body ‘open’, it must be open at every stage of the development of standards on a non-discriminatory basis (e.g. provisions for accession cannot disadvantage the bodies...
of some WTO Members as compared to other Members).²³

A high level of participation of WTO Members in a particular body may suggest that its activities in standardization are recognized.²⁴ Moreover, when determining whether a body is open to the relevant bodies of WTO Members and whether it has ‘recognized activities’, one should also consider the extent to which such a body follows the principles and procedures established by the TBT Committee in its Decision on International Standards. In particular:

- a standardizing body needs to be open to WTO Members (as explained above);²⁵

- a standard-setting process has to be transparent (i.e. provision of essential information to members at all stages, the possibility of making comments, publication of a standard upon its adoption), impartial (with respect to access to participation in working groups, submission of comments on drafts, revision of standards) and based on consensus (but only in the sense that the views of all parties are taken into account and conflicting arguments are reconciled);

- standards must be effective and relevant, meaning that they need to respond to the regulatory and market needs of WTO Members; this also requires that they be up-to-date and can be reviewed if necessary, and that an international standardizing body has procedures in place aimed at improving its communication with the WTO;

- the standardizing process is coherent and consistent with the work of other standardizing bodies;

- a standardizing body undertakes efforts to ensure the effective participation of developing countries in the development of standards.²⁶

It should be noted that the Appellate Body did not address in its report two questions that may also be relevant when determining what should be regarded as an international standard under the TBT Agreement: (i) whether an international standard must be based on consensus; and (ii) whether it has to be made available to the public.²⁷ This was done by the panel in the same case which concluded, with reference to the Explanatory Note, that consensus was not an element of an international standard.²⁸ With regard to the availability of a standard to the public, the panel stated rather generally that this required the dissemination of information on adopted standards to market operators and other interested entities.²⁹

The question thus arises: to what extent do the FCTC and its Guidelines meet the above criteria? Although the FCTC probably falls short of some of the conditions set out by the Appellate Body,³⁰ the Guidelines appear to be compatible with the prescribed requirements. What seems to be the most problematic in the context of the FCTC is regarding a meeting of the parties that initially signed the Convention as a ‘body’. This problem, however, disappears when it comes to Guidelines. As explained above, Guidelines are adopted by the COP – an entity that has specific tasks (e.g. to adopt protocols and guidelines necessary for the implementation of the Convention) and composition (i.e. all parties to the Convention). The latter also indicates that the COP is of an international character (i.e. it solely consists of countries). Moreover, it is worth noting
that the Appellate Body has already identified a similar type of entity (i.e. a meeting of the parties to the Agreement on International Dolphin Conservation Program) as a ‘body’.

In addition, the development of Guidelines by the COP can be regarded as a form of standardizing activity. The activities of the COP consist of establishing common provisions (i.e. by all State-Parties) for repeated (permanent) use, and take the form of guidelines for products (i.e. cigarettes). Various guidelines relate to both the characteristics for products and packaging, marking and labelling requirements as they apply to the products. The first group includes those provisions which require the Parties to prohibit or restrict ingredients that may be used to increase the palatability of tobacco products and those with colouring properties or which create the impression that tobacco products have some health benefits. The second group encompasses those provisions which require the disclosure of various properties of tobacco products, and specific packaging and labelling of tobacco products, i.e. size of health warnings; use of pictures and pictograms on tobacco products packing; content and language of warning messages; information on constituents and emissions of tobacco products; prevention of packaging and labelling that is misleading or deceptive (e.g. low tar or ultra light); and plain packaging. At the same time, however, it seems that some of the Guidelines will not pass this requirement. For example, the Guidelines for implementation of Article 5.3 are concerned with the protection of public health policies with respect to tobacco control from commercial and other vested interests of the tobacco industry. As a consequence, they do not deal with characteristics for products, or packaging, marking and labelling requirements. The same is true for the Guidelines for implementation of Article 12, which regulate issues such as education, communication, training, and public awareness.

In this context, one may also ask whether the legal status of the Guidelines is relevant when it comes to their assessment under the TBT Agreement. As mentioned above, the Guidelines, contrary to the FCTC, are of a non-binding nature – they are issued in order to assist the State-Parties in the implementation of the specific provisions of the Convention. From the perspective of general international law they can be regarded at best as a form of soft law and do not impose any binding obligations on the Parties. This, however, is irrelevant under the TBT Agreement. In fact, standards are specifically defined as non-binding documents (‘... with which compliance is not mandatory’) and it is only the TBT Agreement which confers on them a quasi-normative authority by recognizing them as a reference point for national regulatory measures.

In addition, the above standardization activities are arguably ‘recognized’ by WTO Members (irrespective of whether those activities are a primary or secondary function of the COP). In particular, there are currently 176 State-Parties to the Convention, the vast majority of which are WTO Members (only 12 of the 155 WTO Members are not parties to the FCTC). As has been stated, all the Parties are also members of the COP. This high level of participation strongly suggests that the COP’s activities are widely recognized.

More problematic is the question of ‘openness’. According to Article 35, the FCTC is open for accession from the day after the date on which the Convention is closed for signature. There is no precondition for accession, nor any need to obtain prior consent from the COP (an element that was fatal in the US – Tuna II (Mexico) dispute, where a formal invitation was required). In the context of the FCTC, the whole process is
automatic, and participation in the Convention is wholly dependent on the decision of an acceding state. Having said this, it must be conceded that not every WTO Member can become a State-Party to the Convention because WTO Members are not all States – WTO membership is also open to customs territories. Although regional integration organizations can participate in the FCTC (the European Union is in fact one of the Parties), special administrative regions (e.g. Hong Kong) or non-state territorial entities (e.g. Taiwan), which are separate custom territories, are excluded. To some extent, the inability of Hong Kong to be a Party to the Convention was remedied by the notification of the People’s Republic of China (‘ChRL’) that was deposited on 11 October 2005 with the Secretary-General of the United Nations (the Depositary of the Convention) and which extended applicability of the FCTC (and corresponding Guidelines) to the Hong Kong and Macao Special Administrative Regions. As far as Taiwan is concerned, the ratification process was completed as early as March 2005. However, the instrument of accession that was sent to the Secretary-General was left without any further consideration, due to the general opposition from the ChRL. As a consequence, Taiwan is currently not a Party to the Convention. An attempt to grant it observer status at the meetings of the COP also failed. At the same time, one should mention that Taiwan has adopted one of the most stringent regulations in the world in order to comply with the FCTC.

Thus, although from a formal point of view the FCTC is not open to all WTO Members, a certain degree of flexibility and pragmatism is required here. A literal interpretation of the openness requirement would remove the majority (if not all) international standardizing bodies from the scope of the TBT Agreement. Note that usually intergovernmental organizations and standardizing bodies are not open to non-state actors while the WTO is one of the rare organizations that accept separate customs territories as members. Therefore, narrow reading will clearly go against the spirit of the agreement, which is the promotion of international harmonization in the TBT field. Moreover, the practice of WTO Members in the TBT Committee (e.g. when it comes to notifications of technical regulations that deviate from ISO/Codex standards) seems to indicate that the open membership requirement is not absolute. The International Organization for Standardization and the Codex Alimentarius Commission (Codex) are generally regarded by WTO Members as relevant standard-setting bodies, and yet Taiwan is not a member of either of them. In addition, a parallel treaty – the SPS Agreement – explicitly recognizes certain entities, including the Codex, as relevant international standard setting bodies. None of them is open for Taiwan. It would be odd to consider Codex standards as relevant under one WTO agreement and to refuse such recognition under the other.

The above conclusions as to the recognized character of standardization activities and the openness of the COP find additional support if one tests the COP’s operations against the various principles and procedures contained in the Decision on International Standards. The whole process of adopting guidelines is fully transparent and open to all the Parties. Technical drafting is done within special working groups that are established by the COP, and each State-Party may join a particular group on an equal basis. The outcome of their work is reported to the COP, where additional discussion takes place. The COP can make any and all necessary suggestions, ask for amendments, and limit or extend the
mandate of a particular working group. It is also the COP which formally adopts Guidelines, so in this sense, it has the final word. All adopted Guidelines are subsequently published in hard copy and on the FCTC webpage, which also suggests that the FCTC complies with the requirement of making standards available to the public. The decision-making process in working groups is informal and based on consensus. Although a decision of the COP can be taken by a three-fourths majority vote of the Parties present and voting, the consensual nature of its decision-making process is highlighted in the Rules of Procedure of the COP. In particular, Rule 50.2 provides that ‘the Conference of the Parties shall make every effort to reach agreement by consensus’ while Rule 50.3 envisages majority voting only if all efforts to reach consensus have been exhausted and no agreement has been reached.34 This clearly meets the requirement of the Decision of the TBT Committee, which only calls for taking into account the views of all parties and reconciling conflicting arguments. In any case, to date all Guidelines have been adopted by consensus.

Guidelines are effective and respond to the regulatory and market needs of WTO Members. This is evidenced by the high level of participation of countries in the activities of specific working groups (e.g. 56 countries take part in the working group on Article 6)35 and in the Convention as such. The Guidelines do not seem to unnecessarily ‘distort the global market, have adverse effects on fair competition, or stifle innovation and technological development.’36 They are based on solid scientific evidence and can be reviewed if the Parties consider that they are obsolete, inappropriate or ineffective. For example, the preamble to the Partial Guidelines for implementation of Articles 9 and 10 stresses ‘the provisional nature of the guidelines and the need for periodic reassessment in light of the scientific evidence and country experience.’ The FCTC Secretariat also maintains a number of communication channels with the WTO. A representative of the WTO Secretariat is always present at the meetings of the COP, while a representative of the WHO (representing the FCTC) attends the meetings of the TBT Committee. In addition, the COP, during its fourth session, adopted a special decision on the cooperation between the FCTC and the WTO.37 This decision, among other things, calls for the Convention Secretariat to prepare a report on the possible modes of cooperation with the WTO on trade-related tobacco control issues, cooperate with the WTO Secretariat, and monitor disputes regarding trade-related issues of relevance to the implementation of the FCTC.

The standardizing process run by the COP does not seem to be incompatible with the work of other standardizing bodies. There is no duplication or overlap with the work of other international standardizing bodies. To this end, Article 24.3(e) of the FCTC obliges the FCTC Secretariat to ensure that the necessary coordination between relevant international and regional intergovernmental organizations and other bodies takes place.

The FCTC also undertakes efforts to ensure the effective participation of developing countries in the development of standards. The operation of the Convention is financed through voluntary payments by the State-Parties, with the developed countries responsible for a majority of contributions. Participation in the COP’s meetings of
delegates from low- and lower-middle income countries is financed from the FCTC budget. If one looks at the composition of specific working groups, the developing countries constitute a majority of their members.

### IV. Consequences for Current and Future Disputes

The above analysis shows that there are good grounds for considering the FCTC Guidelines as ‘relevant international standards’ for the purpose of the TBT Agreement. Accordingly, it is worthwhile to look at the practical consequences of such recognition for both ongoing and future WTO disputes. This issue can be particularly relevant in the context of the Canadian and Brazilian measures regulating the content of cigarettes and the Australian law on plain packaging. While all those measures have been notified as required by the TBT Agreement, which suggests that Members do not yet recognize the existence of relevant international standards, this cannot be decisive in deciding whether the FCTC and its Guidelines should be qualified as such.

The notification undertaken can be viewed as a response to the fact that no formal recognition (e.g. from the WTO dispute settlement bodies) of international standards in the field has yet taken place. The Canadian Bill C-32, which was introduced in 2010, prohibits the use of certain additives in tobacco products (e.g. colouring agents, sweeteners, and certain flavouring substances, but not menthol). The aim of the regulation is to eliminate those additives that are either harmful by themselves or which make tobacco products more addictive, as well as to reduce the attractiveness of tobacco products (in terms of their taste), particularly to young and first-time consumers. The Brazilian measure is even more stringent as it establishes a complete ban on the use of almost all types of additives, including flavouring agents and menthol, in tobacco products. The rationale is the same as in the case of the Canadian law, but the list of prohibited additives is far more comprehensive (in principle, the only permitted ingredients are tobacco itself, water and sugar). Both drafts have been heavily criticized by other WTO Members at the meetings of the TBT Committee. In particular, it is argued that the measures could violate Articles 2.1 and 2.2 of the TBT Agreement.

The third measure which would likely be affected by recognition of the FCTC and its guidelines as relevant international standards is the plain packaging law that has recently been passed by Australia and will enter into force on 1 December 2012. This law establishes that cigarettes can be sold only in plain packs without any graphic elements that would make them distinguishable. This prohibition encompasses logos and stylized brand names as well as the graphical design of packs and use of colour (including those which are associated with particular brands). According to Australia, the plain packaging requirement will diminish the attractiveness of cigarettes, particularly to young people, and make the health warnings more visible, thus increasing their deterrence effect. However, the main concerns with respect to the plain packaging regulation arise out of the Agreement on Trade-Related Aspects of Intellectual Property Rights, the TBT Agreement is also relevant. In particular, three WTO Members (Ukraine, Honduras and the Dominican Republic) have initiated formal dispute settlement proceedings, claiming that the measure
violates Articles 2.1 and 2.2 of the TBT Agreement.

On their face all the above-cited measures seem to be based on the FCTC and its Guidelines. For example, FCTC Article 9 and its Partial Guidelines recognize that ‘from the perspective of public health, there is no justification for permitting the use of ingredients, such as flavouring agents, which help make tobacco products attractive’ (para. 1.2.1.1 of the Guidelines) and that ‘Parties should regulate, by prohibiting or restricting, ingredients that may be used to increase palatability in tobacco products’ (para. 3.1.2.2). The same is true for ingredients that have colouring properties and those which are used to create the impression that products have health benefits (e.g. vitamins). As far as the Australian plain packaging law is concerned, the Guidelines for implementation of Article 13 appear to be particularly relevant. They provide that ‘Parties should consider adopting plain packaging requirements to eliminate the effects of advertising or promotion on packaging’ (para. 17). In a similar vein, the Guidelines for implementation of Article 11 stipulate that ‘Parties should consider adopting measures to restrict or prohibit the use of logos, colours, brand images or promotional information on packaging, other than brand names and product names, played in a standard colour and font style’ (para. 46).

Before speculating whether this will work out in practice, however, one needs to await a decision of the Appellate Body on the status of the FCTC (and its Guidelines) under the TBT Agreement. From a national point of view, such recognition would be more than welcomed. The possibility of relying on Guidelines will guarantee necessary regulatory space for WTO Members when it comes to tobacco control measures, ensuring at the same time a high level of health protection. Allowing FCTC guidelines to qualify as international standards is also beneficial for systemic reasons, as it will improve the predictability of the system created by the TBT Agreement and the consistency between different legal regimes (i.e. the WTO and the FCTC). At the same time, it is also worth adding that if the presumption of Article 2.5 does not apply here, the situation is not fatal for a defending WTO Member. A standard in question could be always used as a ‘fact’ that will help to confirm the legitimacy of the national measure challenged. In other words, if a national measure does not benefit from the presumption, the FCTC Guidelines can remain an important element in the demonstration that the alleged restriction is based on a legitimate objective.

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Legally speaking, only WTO Members themselves can initiate a formal dispute settlement proceeding. In reality however, many complaints are supported and initiated by private operators directly affected by contested measures.

2 Technically speaking there is only one Dispute Settlement Body (DSB), which is composed of all WTO Members. DSB is responsible for overseeing the entire dispute settlement process and this task includes adoption of panels and the Appellate Body reports. However, this article, when referring to dispute settlement bodies, means only panels and the Appellate Body, as they are bodies that are de facto responsible for settlement of disputes.
This article does not discuss other WTO rules which are relevant to tobacco control measures. These would include, among others, the General Agreement on Trade in Services, General Agreement on Tariffs and Trade and the Agreement on Trade-Related Aspects of Intellectual Property Rights.


Article 2.1 provides that ‘Members shall ensure that in respect of technical regulations, products imported from the territory of any Member shall be accorded treatment no less favourable than that accorded to like products of national origin and to like products originating in any other country.’

Article 2.5 specifically provides that such a measure ‘shall be rebuttably presumed not to create an unnecessary obstacle to international trade.’ In order to benefit from the presumption, such a measure also needs to be prepared, adopted or applied for one of the legitimate objectives explicitly elaborated in Article 2.2.

Respectively, Annex 1.4 and 1.2 of the TBT Agreement.


TBT Committee, Decision on Principles for the Development of International Standards, Guides and Recommendations with Relation to Articles 2, 5 and Annex 3 of the Agreement, in: Decisions and recommendations adopted by the WTO Committee on Technical Barriers to Trade since 1 January 1995, G/TBT/1/Rev.10, 9 June 2011, p. 46.


Appellate Body Report, US – Tuna II (Mexico), para. 372. Article 31.3(a) of the VCLT provides: ‘There shall be taken into account [when interpreting a treaty], together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions.’

The list of the countries that are parties to the Convention is available on the FCTC webpage (http://www.who.int/fctc/signatories_parties/en/index.html, last visited 3 September 2012).

Conference of the Parties to the FCTC, Partial Guidelines for Implementation of Articles 9 and 10 of the WHO Framework Convention on Tobacco Control, adopted during the fourth session of the COP on 15-20 November 2010, FCTC/COP4(10).

Conference of the Parties to the FCTC, Guidelines for Implementation of Article 11 of the WHO Framework Convention on Tobacco Control, adopted during the third session of the COP on 17-22 November 2008, FCTC/COP3(10).

Conference of the Parties to the FCTC, Guidelines for Implementation of Article 13 of the WHO Framework Convention on Tobacco Control (Tobacco advertising, promotion and sponsorship), adopted during the third session of the COP on 17-22 November 2008, FCTC/COP3(12).


These are: Resolution to Adopt the Modified System for Tracking and Verification of Tuna of 20 June 2001 and Resolution To Establish Procedures For AIDCP Dolphin Safe Tuna Certification of 20 June 2001.

Conference of the Parties to the FCTC, Guidelines for Implementation of Article 13 of the WHO Framework Convention on Tobacco Control (Tobacco advertising, promotion and sponsorship), adopted during the third session of the COP on 17-22 November 2008, FCTC/COP3(12).

Conference of the Parties to the FCTC, Guidelines for Implementation of Article 11 of the WHO Framework Convention on Tobacco Control, adopted during the third session of the COP on 17-22 November 2008, FCTC/COP3(10).


These are: Resolution to Adopt the Modified System for Tracking and Verification of Tuna of 20 June 2001 and Resolution To Establish Procedures For AIDCP Dolphin Safe Tuna Certification of 20 June 2001.


Ibidem, para. 359.
21 Ibidem, para. 360.
22 Ibidem, para. 364.
23 Ibidem, para. 374.
24 Ibidem, para. 363.
26 TBT Committee, Decision on International Standards, paras. 3-13.
28 Panel Report, United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products, WT/DS381/R, adopted 13 June 2012, as modified by the Appellate Body, WT/DS381/AB/R, para. 7.676.
29 Ibidem, paras. 7.694-695.
30 This reflects the approach taken in the US – Tuna II (Mexico) disputes, where none of the parties argued that the 1999 Agreement on the International Dolphin Conservation Program should have been considered as an international standard.
32 See generally, Michael Sheng-ti Gau, The Legal Controversies between China and Taiwan in the WHO From the Perspectives of an International Law Scholar in Taiwan, 1 J. E. Asia & Int'l L. 159 (2008).
33 The relevant international standard setting bodies under the SPS Agreement are: Codex Alimentarius Commission, World Organization for Animal Health and International Plant Protection Convention.
35 This high level of participation reflects the real interest of countries in the development of FCTC tobacco control standards.
36 TBT Committee, Decision on International Standards, para. 10.
37 Conference of the Parties to the FCTC, Cooperation between the Convention Secretariat and the World Trade Organization, decision adopted during the fourth session of the COP on 15-20 November 2010, FCTC/COP4(18).
38 Cf., Conference of the Parties to the FCTC, Harmonization of travel support available to Parties to the WHO Framework Convention on Tobacco Control in line with current World Health Organization administrative policies for travel support, the decision adopted during the fourth session of the COP on 15-20 November 2010, FCTC/COP4(21).
40 TBT Committee, Minutes of the Meeting of 20-21 March 2012, G/TBT/M/56, 16 May 2012, para. 114 (the final version of the act was published on 16 March 2012 as the ANVISA Resolution 14/2012).
41 E.g., TBT Committee, Minutes of the Meeting of 24-25 March 2011, G/TBT/M/53, 26 May 2011, paras. 12 – 13.
42 However, it may be disputed whether the Canadian measure is in accordance with FCTC standards inasmuch as it excludes menthol from the scope of its prohibition.
Partial guidelines for implementation of Articles 9 and 10, paras. 3.1.2.2(ii) and (iii).

One should, however, acknowledge that there could be some negative systemic implications resulting from recognizing the FCTC guidelines as relevant international standards. Many WTO Members may become wary about participating in any similar future activities or become persistent objectors.