of studies examining the impact of trade and investment liberalization on tobacco consumption.

In a 2005 study, Chih Cheng Hsu et al. sought to determine what the prevalence of tobacco use would have been in Taiwan, China in the absence of market opening *(8)*. Hsu et al. used four sets of data to project what consumption would have been if the market had not been opened. The data included consumer surveys conducted by the Monopoly Bureau between 1965 and 1996, a Health Interview Survey conducted in 2001, annual tobacco consumption reports published by the Directorate-General of Budget, Accounting and Statistics over a 40-year period and annual official statistics for domestic cigarette production and tobacco import data from the Directorate-General of Customs.

The authors concluded that, if the market had not been opened in 1987, smoking prevalence rates would have been 12% and 202% lower for males and females respectively in the year 2001 *(9)*. In respect of female smokers, the increase was small in absolute terms but large in percentage terms, owing to the low prevalence of smoking among females as compared with males. For example, in the case of adult females, there was an increase in the prevalence of tobacco consumption from 2.5% in 1986 to 4.2% in 2001 *(10)*. On a per capita basis, significant increases in consumption were also observed after market opening, although these were consistent with pre-market-opening trends.

The data used by the authors also showed that there was a spike in the prevalence of consumption after market opening, but that after a few years prevalence resumed a downward trend. This was attributed partly to implementation of tobacco control policies.

In another 2005 study, CP Wen et al. examined the impact of the opening of the cigarette market in Taiwan. China *(11)*. Using the same datasets as the study conducted by Hsu et al., the authors observed that smoking prevalence among men aged over 35 increased by 6% within three years of market opening.[1] The authors also observed an increase in female smoking prevalence (across all age groups) from 3.6% in 1986 to 5.1% in 1990. The authors noted other factors that

1 The authors refer to the years 1986–1990, so it is unclear exactly which years they studied, since they also identify the period as a three-year period.

may have contributed to increased prevalence of tobacco consumption, such as aggressive advertising and promotion *(12,13)*. Unlike the earlier study, the authors did not seek to quantify the impact of market opening on tobacco consumption. Rather, the approach merely observes a correlation between market opening, other factors such as aggressive advertising, and increases in the prevalence of tobacco consumption.

Another 2005 study of the Taiwan, China market conducted by Chih Cheng Hsu et al. *(14)* found similar results. The study observed that smoking prevalence rates rose 7–10% for males and 39–75% for females in the first three years after market opening. As with the study by Wen et al., this study observed the increases from pre-existing prevalence figures and did not ascribe causation to market opening.

In another study from 2005, Anna Gilmore and Martin McKee examined the correlation between foreign direct investment by the tobacco industry and changes in per capita tobacco consumption in countries of the former Soviet Union between 1991 and 2000 *(15)*. The authors observed significant increases in tobacco consumption in countries where the tobacco industry engaged in foreign direct investment. Increases in consumption of approximately 56% were recorded for countries that received major tobacco industry investment, whereas a 1% drop in consumption was recorded in those countries that did not receive any such investment *(16)*. There were a number of limitations on the study, which was a descriptive study that set out to identify a correlation between foreign direct investment and per capita consumption rather than to attribute causation. Accordingly, as the authors themselves noted, the study did not control for other variables such as changes in price, incomes, advertising and the limited supply of tobacco products prior to market opening (which might have created artificially low consumption). Nonetheless, Gilmore and McKee provide a useful descriptive account of the correlation between foreign direct investment by the tobacco industry and market opening in the former Soviet Union.

In an earlier (2004) and related study, Gilmore and McKee examined foreign direct investment by the tobacco industry in the former Soviet Union as an indicator of the political and economic leverage of tobacco companies.*(17)*. The authors observed a correlation between foreign di-

rect investment by the tobacco industry and tobacco control laws. In those countries where foreign direct investment was relatively large, tobacco control laws were observed to be relatively weak. This study only observed a correlation between foreign direct investment and weak tobacco control laws and did not seek to establish causality. Nonetheless, the observations made tend to corroborate the theory that significant foreign direct investment by the tobacco industry may increase the industry's political leverage in respect of public health policy.

Although each of these studies tends to confirm the existing theories of trade and investment liberalization identified above, it appears that there is still much to learn about the impact of these processes on tobacco consumption and tobacco control. This raises the question why so few studies have been conducted. Without doubt, one answer lies in the difficulty of gathering reliable information about economies in transition. This problem also increases the difficulty of controlling for other factors, such as tobacco advertising or tobacco control measures. Another possible explanation is that further studies may provide limited predictive value for policy-makers beyond that already offered by pre-existing theory. Put another way, the literature has reached a point where it is safe to assume that there is a risk that trade liberalization and foreign direct investment may stimulate competition and consumption in the tobacco sector and consumer demand. Governments may rely on this general conclusion as they go about making policy specific to their own circumstances.

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B. Update of legal issues concerning domestic regulatory autonomy

This part examines application of the legal provisions of international trade and investment agreements and considers how these agreements restrict the autonomy of States to implement tobacco control measures. Section 1 examines the extent of domestic regulatory autonomy under WTO law by reference to case-law and other developments since the issues were explained in the 2001 paper. Section 2 outlines the emergence of international investment agreements and

their implications for tobacco control. Section 3 discusses the coming into force of the WHO FCTC and its implications for trade and investment law. Section 4 then identifies other normative developments that have affected the trade and health landscape more generally.

This part is not intended to constitute a comprehensive treatment of how international trade and investment laws apply to tobacco control. Many of these issues have been addressed in more detail elsewhere *(18)*. Rather, the intent is to give a brief explanation of relevant aspects of the law, directed at a non-specialized audience.

1. INTERNATIONAL TRADE LAW

In the 2001 paper by Bettcher et al., the WTO Secretariat outlined the key features of the WTO covered agreements and how they apply to tobacco control measures. The WTO Secretariat identified the GATT 1947 Panel report in *Thailand – Cigarettes* and the WTO Appellate Body report in *European Communities – Asbestos* as cases illustrating the way WTO law applies to health measures.

With this prior work in mind, this section gives a very brief explanation of the features of international trade law most relevant to tobacco control. The central requirements of the GATT, the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement), the TBT Agreement, the TRIPS Agreement and the General Agreement on Trade in Services (GATS) are examined.[2] Disputes directly relevant to tobacco control are then examined before a brief discussion of free trade agreements and customs unions.

(i) GATT

GATT governs trade in goods and is relevant to virtually every tobacco control measure. In order to determine whether a measure complies with the GATT, it is necessary to carry out a two-stage analysis. The first stage is whether any GATT prohibitions have been contravened. Where a contravention is established, it will be necessary to examine

2 Although the WTO Agriculture Agreement would govern certain measures relating to tobacco leaf, such as subsidies, these measures are not central to tobacco control and are therefore not addressed in this paper.

whether a WTO Member can invoke an exception so as to excuse the contravention. The case-law since 2001 suggests that it is more difficult to violate a GATT prohibition than once thought, and also that it is easier to justify health measures under exceptions than once thought.

The most relevant GATT prohibitions

A central requirement of the GATT is found in Article II, which prohibits each WTO Member from levying Customs duties (tariffs) above the levels specified in a Member's Schedule of Concessions. This requirement is relevant to all goods, including tobacco leaf and various types of tobacco products. Nonetheless, the requirement is of limited relevance to tobacco control because it only limits the use of tariffs, which are discriminatory taxes applied to imported goods.

The focus of disputes under the GATT is usually on compliance with other provisions governing non-tariff barriers to trade. In this respect, the most relevant prohibition concerns what is referred to as the principle of non-discrimination between imported and domestically produced goods. Article III:4 of the GATT prohibits a WTO Member from treating imported tobacco products less favourably than like products of national origin in respect of laws and regulations affecting the internal sale, purchase, transportation, distribution or use of those goods. Laws may not discriminate through their form (such as open discrimination based on the origin of a product) or their effect (such as where imported products are treated less favourably even though this is not immediately apparent). Article III:2 sets out similar requirements in respect of taxation measures. The principle of non-discrimination is elaborated below in the discussion of recent disputes relevant to tobacco control.

Another relevant provision is Article I of the GATT, which governs most-favoured-nation treatment. This provision sets out a principle of non-discrimination between imported goods emanating from one WTO Member or any other country as compared with those of another WTO Member. The provision applies in much the same manner as Article III, except for the focus on discrimination between goods imported from different WTO Members or from any other country.

Another GATT prohibition of significance for tobacco control is the prohibition on quantitative restrictions in Article XI:1 of the GATT. This provision prohibits WTO Members from imposing prohibitions or restrictions on the importation or exportation of products, other than duties, taxes or charges. The dominant view is that Article III limits the application of Article XI. More specifically, behind the border domestic regulations that happen to be enforced for imported goods at the border are subject to Article III, whereas pure border measures (applied only to imported goods) are subject to Article XI *(19,20)*. This distinction limits the application of Article XI:1 in respect of tobacco control measures because they will most often constitute internal regulations that happen to be enforced at the border.

GATT exceptions: Article XX(b)

In the event that a tobacco control measure contravenes one of these prohibitions, the Member implementing the measure may seek to invoke one of the exceptions in Article XX of the GATT. The most relevant exception is found in Article XX(b). Article XX(b) provides broad protection for health measures and also sets out principles relevant to the other WTO covered agreements. Article XX(b) states:

> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures: [...]
>
> (b) necessary to protect human, animal or plant life or health;

Analysis under Article XX(b) proceeds in four stages. In the first stage, a panel determines whether the measure violating a GATT prohibition could be described as a measure for the protection of human life or health *(21)*. The panel determines whether a risk to health exists and, if so, the objective of the measure will be assessed to determine whether the policy underlying the measure is to reduce that risk *(22)*. The risks posed by tobacco products are well established, suggesting

that tobacco control measures will ordinarily pass the first stage of analysis without much difficulty.

In the second stage, a panel weighs and balances a range of factors in order to make a preliminary determination of whether the measure could be considered necessary to achieve the Member's regulatory purpose. The factors to be weighed include, but are not limited to, the contribution of the measure to the regulatory goal and the restrictive impact of the measure on international trade. This process of weighing and balancing is carried out in light of the relative importance of the interests or values furthered by the challenged measure *(23,24,25)*. The more important the values or interests at stake, the easier it is to accept that a specific measure furthering those interests is necessary *(26)*. The case-law has treated the protection of human health as vital and important to the highest degree *(27, 28)*.

If the measure survives this preliminary determination of necessity, the panel will engage in the third stage of analysis. This requires it to examine whether reasonably available alternatives consistent, or less inconsistent, with the GATT could also achieve the Member's regulatory goal. In order for a measure to constitute a less trade-restrictive measure that is reasonably available, it must achieve the policy goal pursued, be less restrictive of trade, be reasonably available to the Member and be an actual alternative measure and not a cumulative or complementary measure.

Where a measure survives the first three stages of the analysis, it will be considered necessary to protect human health or life. In the fourth stage of the analysis, a panel examines compliance with the introductory clause (chapeau) of Article XX. The chapeau of Article XX prevents a Member from invoking Article XX(b) if the measure in question is "applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade". The requirements of the chapeau are designed to prevent abuse of the Article XX exceptions and relate to the manner in which a measure is applied rather than to the form of the measure itself *(29)*. The chapeau is an expression of the principle of good faith *(30)* and is animated by the idea that "a balance must be struck between the right of a member to invoke an exception under Article XX and the duty of that same member to respect the treaty rights of other members" *(31)*.

A good example of the application of Article XX(b) can be found in *Brazil – Retreaded Tyres (32)*.Brazil invoked Article XX(b) to justify a ban on the importation of retreaded tyres. Brazil argued that retreaded tyres have a shorter lifespan than new tyres and that the importation of retreaded tyres increases the accumulation of waste tyres to a greater degree than importation of new tyres. Brazil further argued that waste tyres pose threats to human health, such as providing a breeding ground for disease-carrying mosquitoes and releasing harmful chemicals when burnt *(33)*. The Panel found that the import ban contributed to Brazil's goal of preventing the generation of tyre waste and that the ban was necessary to protect human health. In reaching this conclusion, the Panel rejected arguments from the European Communities to the effect that taking steps to clean up waste tyres and encourage domestic retreading constitute a reasonably available alternative to a ban designed to prevent their accumulation *(34,35)*. The Panel and Appellate Body both recognized a distinction between alternative measures and measures that are cumulative or complementary. This is important in the context of tobacco control because it suggests that different types of tobacco control measures, such as taxes and restrictions on advertising, are not likely to be considered alternatives to one another.

Notwithstanding the necessity of the measures, Brazil ultimately lost the dispute. Exemptions in place for tyres from MERCOSUR countries and those resulting from domestic court injunctions were found to undermine the effectiveness of the measure and go against its purpose. As such, it was concluded that the partial approach adopted by Brazil did not comply with the chapeau of Article XX. Nonetheless, the fact that a measure banning importation of waste tyres was found to be necessary to protect human health demonstrates that WTO Members have a good deal of regulatory autonomy under the GATT. The concept of necessity elaborated in the case-law defers in a significant way to the policy goal of protecting human health.

Box 1. Invoking the GATT Article XX(b) exception

Step 1. Does the measure fall within the range of policies considered to protect human health?

1. Does a risk to human health exist?
2. If so, is the policy goal underlying the measure to reduce that risk?

Step 2. The panel will weigh and balance relevant factors in light of the importance of the regulatory goal in order to reach a preliminary determination on necessity.

1. How important is the regulatory goal?
   The case-law suggests that protection of human health is important to the highest degree. (*European Communities – Asbestos*; *Brazil – Retreaded tyres*)
2. To what extent does the measure contribute to achievement of the regulatory goal?
   It is not necessary to prove that the measure achieves the regulatory goal. Rather, a respondent must prove a genuine relationship of ends and means in that the measure brings about a material contribution to achievement of the goal. This contribution can be assessed in quantitative or qualitative terms.
3. How trade-restrictive is the measure?
   The panel will consider how the measure violates the GATT and whether this results in a complete ban on importation or some less trade-restrictive outcome.

Step 3. Are less trade-restrictive measures reasonably available?

1. Are the purported alternatives less trade-restrictive?
2. Do the purported alternatives achieve the respondent's risk tolerance or chosen level of protection?
3. Are the purported alternatives true alternatives, or are they actually complementary measures?
4. Are the purported alternatives reasonably available to the Member in question?

Step 4. Is the measure applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction upon trade?

1. Do reasons given for discrimination in application of the measure bear a rational connection to the policy goal or go against that goal?
2. Does a lack of connection between application of the measure and its objective suggest that the measure is applied as a disguised restriction on trade?

(ii) SPS Agreement

To date, no WTO disputes have arisen under the SPS Agreement concerning tobacco control measures. The SPS Agreement applies to all sanitary and phytosanitary measures which may, directly or indirectly, affect international trade. The definition of sanitary and phytosanitary measures is limited in such a way that the SPS Agreement will apply only to a very narrow range of tobacco control measures. More specifically, the SPS Agreement is likely only to apply to measures concerning foods and beverages, such as nicotine-infused foods and nicotine-infused beverages, but not to other tobacco products.

Because the SPS Agreement applies to such a limited range of tobacco control measures, it will not be discussed in detail here. Nonetheless, there are some important points to note about the Agreement. Article 2.2 establishes a requirement that all SPS measures be applied only to the extent necessary, in this instance, to protect human life or health. Unlike Article XX(b) of the GATT, however, this is an obligation applied to all SPS measures, and not an exception to be invoked when a violation has occurred. Article 2.2 also obliges WTO Members to ensure that SPS measures are based on scientific principles and not maintained without sufficient scientific evidence, except as provided for in Article 5.7 (discussed below).

The necessity requirement in Article 2.2 is also complemented by Article 3, which governs harmonization. Article 3.1 obliges WTO Members to base SPS measures on international standards, guide-

lines or recommendations where they exist, except as otherwise provided in the Agreement.[3] Measures conforming to such instruments are deemed necessary to protect human health and presumed to be consistent with the SPS Agreement (Article 3.2) and the GATT. The applicable international standards, guidelines and recommendations are those of specific bodies listed in Annex A, the most relevant of which is the Codex Alimentarius Commission.[4] At the time of writing, however, there are no relevant instruments for purposes of regulating nicotine-infused foods or beverages.

Article 5.1 of the SPS Agreement obliges WTO Members to base SPS measures on a risk assessment. Under Article 5.7, this is not required where relevant scientific evidence is insufficient. In such a situation, a WTO Member may provisionally adopt SPS measures on the basis of available pertinent information, including information provided by WHO. However, Members doing so must seek to obtain additional information necessary for a more objective assessment of risk and review the measure accordingly within a reasonable period of time.

Article 7 of the SPS Agreement also sets out a number of transparency requirements that oblige WTO Members to notify one another of the implementation of SPS measures. In conjunction with the SPS Committee, these notification requirements provide a forum for the discussion of SPS measures prior to domestic implementation.

(iii) TBT Agreement

The TBT Agreement applies to technical regulations that do not fall within the scope of the SPS Agreement. The phrase "technical regulation" is defined in Annex 1.1 of the TBT Agreement. The essence of a technical regulation is that it is a mandatory requirement that lays down product characteristics. Technical regulations can prescribe that a product should take a particular form, or prohibit a product from taking a particular form. In the tobacco control context, technical regulations

3 In this respect, Article 3.3 qualifies the obligation in Article 3.1.

4 SPS Agreement, Annex A(3). In addition to the specific agencies, the SPS Committee may identify other individual standards for the purposes of the Agreement, although no such relevant standards have been identified for the purposes of nicotine-infused water or nicotine-infused foods.

include measures such as packaging and labelling measures and product regulations, such as restrictions on flavoured tobacco products.[5]

There have been relatively few cases decided under the TBT Agreement. The one case concerning tobacco control is *United States – Clove Cigarettes*, a dispute discussed below.

Article 2.1 obliges WTO Members to ensure that technical regulations do not result in less favourable treatment for imported products than for like domestic products and that technical regulations do not result in less favourable treatment for products from the territory of one WTO Member than for like products from the territory of another WTO Member or any other country. Although this provision resembles Articles I and III of the GATT, Article 2.1 differs in that there is no health exception to fall back on in the event of violation. Nonetheless, as the below discussion of *United States – Clove Cigarettes* highlights, Article 2.1 is interpreted in a manner sensitive to the right to regulate.

Article 2.2 of the TBT Agreement establishes a requirement that WTO Members ensure all technical regulations are not more trade-restrictive than necessary to achieve a legitimate objective, such as the protection of human health. This is an obligation applicable to all technical regulations and not an exception to be invoked if another provision is violated. As in the SPS Agreement, necessity is determined partly by reference to relevant international standards. In this respect, Article 2.4 obliges WTO Members to use relevant international standards as the basis for technical regulations except where use of these standards would be an ineffective or inappropriate means for fulfilment of the legitimate objectives pursued. Additionally, Article 2.5 creates a rebuttable presumption that health measures in accordance with international standards are necessary for the purposes of Article 2.2.

Unlike the SPS Agreement, the TBT Agreement does not limit standard-setting to specific international standards or bodies such as the Codex Alimentarius Commission. The TBT Agreement (Annex 1) defines the term "standard" as a:

5 For the definition of technical regulations, see TBT Agreement, Annex 1.1. See also Appellate Body Report, *European Commission – Asbestos*, para. 67.

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.

It remains to be seen whether guidelines, such as the guidelines on implementation of Articles 9, 10 and 11 of the WHO FCTC would be international standards. Although the Panel in *United States – Clove Cigarettes* drew upon the WHO FCTC extensively, neither disputant asked the Panel to consider whether partial guidelines for Articles 9 and 10 constitute international standards for purposes of the TBT Agreement.

Finally, Article 2.9 of the TBT Agreement creates notification obligations where a WTO Member implements a technical regulation and that regulation is not in accordance with a relevant international standard, or where no relevant international standard exists. These notification obligations only apply if a technical regulation may have a significant effect on trade of other Members. The terms of Article 2.9.1 – 2.9.4 require a member, *inter alia,* to publish a notice, notify other WTO Members, provide particulars of the proposed regulation upon request, allow a reasonable time for comments and take those comments into account. These processes are intended to give other WTO Members the opportunity to comment while changes may still be made to the technical regulation. This dialogue is conducted partly through meetings of the TBT Committee.

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(iv) TRIPS Agreement

Tobacco companies often rely on the TRIPS Agreement in lobbying governments. TRIPS establishes minimum standards for the protection of intellectual property rights, including trademarks. The Agreement applies to all trademarks and is relevant to tobacco packaging and labelling laws.

Before describing the basic obligations in respect of trademark protection, it is worth noting that Articles 7 and 8 of TRIPS establish the objectives and principles of the Agreement. Article 8 recognizes that WTO Members may adopt measures necessary to protect public health, provided that those measures comply with the terms of TRIPS. This provision does not establish an exception to the Agreement. Rather, Article 8 establishes a principle to be used in interpreting the substantive provisions of TRIPS. In short, the substantive obligations of TRIPS include "flexibilities". In accordance with these flexibilities, WTO Members have significant discretion in the way they implement TRIPS in domestic law. This concept is examined below in the discussion of the Doha Declaration on the TRIPS Agreement and Public Health.

Article 15 of TRIPS obliges WTO Members to protect trademarks through their registration. However, Members may deny registration on a number of grounds, including the grounds that a trademark is of such a nature as to mislead the public.[6] For example, in the tobacco context, it is permissible for a WTO Member to deny registration of a misleading trademark containing terms such as "light" or "mild" that suggest a product may be less harmful than other products *(36)*.

Under TRIPS, the right conferred by ownership of a trademark is a right to prevent third parties from using in the course of trade identical signs for goods or services which are identical or similar to those in respect of which the trademark is registered where such use would result in a likelihood of confusion (Article 16(1)). More specifically, TRIPS does not confer on a trademark owner the right to use a trademark in the course of trade *(37)*. The right is a negative right which excludes others from use. This is important because a variety of tobacco control measures limit the use of trademarks. For example, use of trademarks is limited where States prohibit:

- the use of tobacco logos or brands on products other than tobacco products (brand-stretching);
- the use of misleading descriptors such as "light" and "mild"; or
- tobacco advertising, sponsorship or promotion.

6 Article 15(2) of TRIPS enshrines the right to deny registration on the grounds permitted under the Paris Convention for the Protection of Industrial Property. Article 6*quinquies* B(iii) of that Convention provides that Parties may refuse registration on the basis that a mark is misleading.

Against this general backdrop, Article 20 of TRIPS is the most relevant provision. Article 20 provides that "[t]he use of a trademark in the course of trade shall not be unjustifiably encumbered by special requirements, such as use with another trademark, use in a special form or use in a manner detrimental to its capability to distinguish the goods or services of one undertaking from those of other undertakings." Tobacco companies often argue that Article 20 prevents measures such as plain packaging and bans on misleading descriptors that are also trademarks. However, it is not clear that the provision applies to measures purely limiting use of a trademark and, in any case, the provision only prohibits unjustifiable encumbrances. This latter point is important because the flexibilities inherent in TRIPS suggest that measures necessary to protect human health are justifiable and therefore lawful.

In their Requests for Consultations with Australia concerning plain packaging of tobacco products, both Ukraine and Honduras have invoked a number of provisions of TRIPS, including Article 20.[38] These are the first WTO disputes under TRIPS concerning a tobacco control measure.

(v) GATS

Some tobacco control measures affect trade in services. For example, restrictions on advertising, sponsorship and promotion could affect advertising services. Similarly, restrictions on the sale of tobacco products through remote means such as the Internet, and licensing measures that limit participation in the tobacco industry, could affect trade in retail or distribution services.

The GATS applies to measures by WTO Members affecting trade in services. For purposes of the GATS, trade in services may be supplied through one of the four following modes:

- cross-border supply (where a service is supplied from the territory of one Member to the territory of another);
- consumption abroad (where a consumer from one Member consumes a service in the territory of another Member);
- commercial presence (where a supplier provides a service through a commercial presence in the territory of another WTO Member); and

- presence of natural persons (where a service is supplied by a service supplier of one Member through presence of natural persons of a Member in the territory of another Member).

Unlike the other WTO covered agreements described above, GATS obligations are partly dependent on each WTO Member's willingness to make specific commitments. Some obligations bind all WTO Members. For example, Article II of GATS establishes a most-favoured-nation obligation binding all WTO Members.

Other obligations bind WTO Members only to the extent that a Member has made specific commitments in respect of a particular service sector and mode of supply. The specific commitments made under the GATS differ from one Member to another. In many instances, a Member's schedule of specific commitments will also be qualified by carve-outs that exclude certain regulatory measures. The obligations of greatest relevance include national treatment (non-discrimination) under Article XVII and market access under Article XVI. Article VI also establishes obligations concerning domestic regulation of the supply of services, e.g. through licensing requirements and other approval procedures where Members have made specific commitments.

The concept of non-discrimination, explained above in the context of the GATT, is similar in principle under the GATS (although it applies to services and service suppliers). On the other hand, the market access obligations in Article XVI of the GATS go much further than Article XI:1 of the GATT, which was also explained earlier. Article XVI of the GATS prohibits a range of restrictions on market access, such as limitations on the number of service suppliers, limitations on the total value of services supplied and limitations on the total number of service operations. This provision is also interpreted in a broad manner. Quantitative-type measures, including complete prohibition of the supply of a service, fall within the scope of the provision, whereas regulation of a qualitative character does not *(39)*. However, the difference between quantitative measures and qualitative regulation is often difficult to identify.

Article XIV of the GATS sets out general exceptions to the obligations described above. This provision is similar to Article XX of the GATT and

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there is an exception equivalent to that in GATT Article XX(b), found in GATS Article XIV(b). This provision is interpreted in much the same manner as Article XX(b) of the GATT. Thus, even where a measure is inconsistent with a GATS prohibition, exceptions similar to those in Article XX of the GATT provide wide-ranging protection for WTO Members implementing measures for the protection of human health.

In the event that a tobacco control measure results in violation of a Member's specific commitments (a scenario that is yet to occur), the Member implementing the measure may renegotiate its specific commitments, provided that it compensates other WTO Members where a commitment is withdrawn (GATS, Article XXI:2). In ongoing or future GATS negotiations, WTO Members could also consider whether to include specific carve-outs in their schedules in respect of tobacco control measures that might affect trade in services.

Ongoing negotiations for further liberalization under the GATS could also result in changes to the substantive obligations set out in the text of the Agreement. For example, a number of Members have proposed that provisions governing domestic regulation in Article VI should incorporate a requirement that regulations be necessary to achieve a legitimate objective, such as the protection of health.[7] This could affect measures such as the licensing of entities involved in the tobacco industry by imposing new rules that govern these types of measures. Accordingly, health authorities should consider the implications of ongoing GATS negotiations.

(vi) Remedies and standing to bring a claim under WTO law

Where a WTO Member is found to be in violation of a WTO covered agreement, a panel will recommend that the Member in question should bring the measure into conformity with the Agreement.[8] If it is impracticable to comply with the recommendation of the Dispute Settlement Body immediately, a reasonable period of time to comply

7 For further information, see http://www.wto.org/english/tratop_e/serv_e/s_negs_e.htm (accessed 27 February 2012).
8 See Article 19(1) of the Dispute Settlement Understanding.

will be given.[9] If, after the expiry of that reasonable period of time, a Member has still not implemented the rulings, the complainant may obtain authorization to suspend concessions (WTO obligations owed by the complainant to the respondent) from that point forward.[10] The Dispute Settlement Body will authorize the suspension of concessions only at a level equivalent to the extent to which the complainant's benefits under the Agreement are nullified or impaired as a consequence of the initial violation.

Although WTO Members are under a general obligation to comply with their treaty obligations in good faith,[11] the consequences of violation are an important consideration in the policy-making process. There is no independent enforcement mechanism, meaning that enforcement turns on diplomatic considerations as much as on legal analysis. In addition, the fact that remedies such as the suspension of concessions apply only in a prospective fashion (from the point of authorization forward), limits the risks to which a Member is exposed in implementing a measure.

(vii) Recent WTO disputes relevant to tobacco control

Since 2001, there have been a number of WTO disputes involving tobacco products. *Dominican Republic – Importation and Sale of Cigarettes* concerned measures implemented to address illicit trade. *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines*, concerned Customs valuation of cigarettes and affects the Thai tobacco tax regime but is not a direct challenge to the autonomy of Members to implement tobacco taxes. *United States – Clove Cigarettes* concerns measures restricting flavoured tobacco products and is a direct challenge to the legitimacy of a tobacco control measure. Additionally, if the Ukrainian and Honduran requests for consultations with Australia concerning plain packaging lead to establishment of a panel, those requests could be seen as a direct challenge to the legitimacy of another, distinct tobacco control measure.

9 See Article 21(3) of the Dispute Settlement Understanding.
10 See Articles 22(1) and 22(2) of the Dispute Settlement Understanding.
11 In this respect, see Article 26 of the Vienna Convention on the Law of Treaties, where the principle of *pacta sunt servanda* is codified.

Dominican Republic – Importation and Internal Sale of Cigarettes

In this dispute, Honduras brought a claim against the Dominican Republic concerning a requirement that tax stamps be affixed to cigarettes at the point of importation in the Dominican Republic. This requirement meant that imported products had to be unpacked and stamped on importation, which increased the cost of production and undermined the capacity of foreign manufacturers to control how their products were presented. In contrast, domestic manufacturers could comply with the stamping requirement at the point of manufacture. It was held that this measure resulted in less favourable treatment for imported cigarettes under Article III:4 of the GATT *(40)*.

However, another Honduran claim was rejected under Article III:4. Honduras argued that an import-bonding requirement (designed to secure payment of taxes) was less favourable to imported products because the greater market share of imported goods meant that higher bonds had to be paid by importers than by domestic producers who had a smaller market share (and lower tax liability). In this context, the Panel found that the fact that an importer held the majority market share of an adversely affected good did not mean that a measure was necessarily less favourable to imported goods. As such, this second claim under Article III:4 failed *(41)*.

In its defence, the Dominican Republic invoked Article XX(d) of the GATT, which permits measures necessary to secure compliance with laws or regulations (such as tax laws) where those laws are themselves not inconsistent with the GATT. Honduras argued that less restrictive means existed, such as providing secure stamps for exporters so that the stamps could be affixed under supervision of an agent of the Dominican Republic at the point of production. The Dominican Republic failed to satisfy its burden of showing that this would not be a reasonably available alternative measure *(42)*.

The implications of this dispute for tobacco control measures with the primary purpose of protecting human health are minimal. The outcome of the dispute is more relevant to measures to address illicit trade in tobacco products. The dispute suggests that WTO Members should be careful to ensure that measures targeting specific points in the supply chain are necessary to secure compliance with tax or other laws.

Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines

In this dispute, the Philippines brought a claim against Thailand concerning Thailand's treatment of Philip Morris cigarettes imported from the Philippines *(43)*. The claim did not bring into question the legitimacy of Thailand's tobacco control measures, but concerned measures administering the Thai tobacco tax system.

Some of the claims related to the process of Customs valuation, which occurs when a good is imported. If tariffs and other taxes are based on the value of a good (i.e. *ad valorem* taxes), the Customs valuation forms the basis for determining the taxes due. The Philippines alleged that Thailand was overvaluing cigarettes imported from its territory, resulting in the payment of tariffs and taxes at a higher rate than was due. Thai Customs had rejected the transaction value of the cigarettes (the price at which the imported cigarettes were purchased) as the basis for valuation. Thailand argued that the exporter and importer, both of which are Philip Morris companies, are related parties and that the transaction value was lower than the true value of the imported cigarettes. The Panel agreed with the Philippines, finding that Thailand's Customs authorities had violated a number of procedural obligations governing how imported goods should be valued.

Other claims related to the administration of the Thai tobacco tax system. One claim related to the calculation of the tax base for purposes of Thailand's value-added tax. It was found that Thailand had departed from its general methodology for the calculation of the tax base in respect of imported cigarettes on a number of occasions. The Panel found that the effect of these departures was to increase the amount of tax due on imported cigarettes, but not on domestic cigarettes, resulting in a violation of Article III:2 of the GATT *(44)*.

The Philippines also took issue with Thai laws imposing value-added tax on resellers for the sale of imported cigarettes, but not for domestic cigarettes. Whereas domestic cigarettes qualified for an automatic

exemption, a reseller was forced to apply for a rebate of the tax in respect of sales of imported cigarettes. The Philippines argued that this violated Article III:2 of the GATT because imported cigarettes were taxed more heavily than domestic cigarettes. The Panel agreed, finding that the procedural obligation to apply for a rebate created a risk of discrimination that was sufficient to violate Article III:2 of the GATT *(45)*. In this respect, there was a risk that a reseller might not be granted the rebate if adequate documentation could not be provided. The Panel also found that the additional procedural burden of having to apply for a rebate resulted in violation of Article III:4 of the GATT. In this respect, the Panel found that the less favourable treatment of imported products was based on their foreign origin *(46)*.

Thailand sought to argue that these measures were necessary to secure compliance with tax laws under Article XX(d) of the GATT. However, the Panel ruled that the administrative requirements in question were not compliant with Article III:2 of the GATT and, therefore, Article XX(d) could not be invoked. This aspect of the Panel's decision was reversed by the Appellate Body, although the Appellate Body ultimately held that Thailand had not substantiated its defence under Article XX(d) *(47)*.

In the context of tobacco control, this outcome is likely to affect the price of imported cigarettes in Thailand by pushing that price down. The dispute also raises questions about the ability of WTO Members to conduct customs valuations when transactions between related parties are concerned. However, the broader implications of the dispute for tobacco control appear to be minimal. The outcome of the dispute appears to be quite specific to the way in which the Thai laws in question were implemented. Additionally, questions of customs valuation are less likely to be significant if a domestic tobacco tax regime utilizes specific taxes primarily, as compared with *ad valorem* taxes.

United States – Clove Cigarettes[12]

In *United States – Clove Cigarettes*, Indonesia brought a claim against the United States concerning a law that prohibits cigarettes containing a constituent that is a characterizing flavour of tobacco or tobacco smoke, other than menthol or tobacco *(48)*. Among other things, Indonesia argued that the law treats Indonesian clove cigarettes less favourably than like menthol cigarettes of United States origin, in violation of Article 2.1 of the TBT Agreement and Article III:4 of the GATT. Indonesia also argued that the measure is not necessary to achieve a legitimate objective, such as protection of human life or health, and that accordingly, the measure results in violation of Article 2.2 of the TBT Agreement, and is not defensible under Article XX(b) of the GATT 1994.

The United States argued that the measure is non-discriminatory and that the law draws a distinction between clove cigarettes and menthol cigarettes on health grounds (rather than based on the origin of the products). More specifically, the US argued that clove cigarettes are a niche product that is used disproportionately by youth, whereas menthol cigarettes are attractive to youth and adult smokers in similar proportions, and are smoked by tens of millions of adults in the United States on a regular basis. After the United States had made its first and second written submissions to the panel, the Tobacco Products Scientific Advisory Committee (TPSAC) issued a report concluding that the availability of menthol cigarettes increases initiation among youth *(49)*.

The United States had also argued that a regulatory distinction was drawn between clove and menthol cigarettes because the extent of menthol consumption in the United States means that prohibiting menthol could create significant risks of illicit trade as well as problems for the United States health system (given the addictive character of nicotine).

As noted above, Article III:4 of the GATT 1994 also establishes a principle of non-discrimination with respect to internal regulation.

12 The summary of this dispute is adapted from *Tobacco product regulation and the WTO*: US – Clove Cigarettes [briefing paper 12 September 2011]. Washington, DC, O'Neill Institute for National and Global Health Law, 2011 and *Tobacco product regulation and the WTO*: Appellate Body Report, US – Clove Cigarettes (available athttp://www.law.georgetown.edu/oneillinstitute/documents/O%27Neill%20Briefing_TobaccoProductRegulation.pdf, accessed 11 April 2012).

Three requirements must be met for a violation of Article III:4 to be established. A measure must be a law, regulation or requirement affecting the internal sale, offering for sale, purchase, transportation, distribution or use of a good. Secondly, the imported and domestic goods in question must be considered like. Finally, the imported products in question must be accorded treatment less favourable than that accorded to the like domestic products. The limited case-law applying the TBT Agreement meant that the Panel had to draw some initial conclusions of law relating to the way Article 2.1 applies. In doing so, the Panel compared the TBT Agreement with the GATT 1994 and drew upon the case-law of the latter agreement.

Although the elements of Articles 2.1 and III:4 are similar, the Panel concluded that a different approach to Article 2.1 should be taken. Under Article III:4, whether products are like turns on the extent to which they are in a competitive relationship. In contrast, the Panel concluded that likeness analysis under Article 2.1 should be permeated by the regulatory objective pursued *(50)*. Put another way, the Panel sought to determine whether the products were like in terms of their effect on youth smoking (the risk the United States was seeking to address).

On the facts, the Panel concluded that clove and menthol cigarettes are like in terms of the regulatory objective pursued. The panel found that each type of cigarette imparts a characterizing flavour that reduces the harshness of tobacco, and that each is attractive to youth *(51)*. In drawing this conclusion, the panel determined that evidence presented by both parties concerning the tastes and habits of youth smokers in the United States could not be relied upon for purposes of determining market share *(52)*. Rather than engaging with the evidence presented on questions of market share, to determine whether the products are like the panel drew on the TPSAC report, on the work of a WHO scientific advisory committee and on the WHO FCTC partial guidelines for Articles 9 and 10.

The Panel also drew some conclusions about how the less favourable treatment standard applies under Article 2.1. The Panel stated that it was not sufficient for Indonesia to demonstrate that the measure affected competition between imported clove and domestic menthol cigarettes to the detriment of imported clove cigarettes. Indonesia also had to demonstrate that the adverse effects on clove cigarettes were related to the foreign origin of the product *(53)*. The Panel emphasized that less favourable treatment is not established by merely showing that some imported products are treated less favourably than some domestic like product *(54)*. Nonetheless, on the facts, the Panel concluded that the less favourable treatment requirement was met. The Panel noted that the vast majority of Indonesian exports of cigarettes to the United States were prohibited *(55)*. Because the Panel had already concluded that the exemption of menthol was not based on menthol posing different risks to human health from clove, the United States was forced to rely on the argument that the differential treatment of clove and menthol was based on the risk of illicit trade and risks to the United States health system, rather than on the foreign origin of clove. The Panel rejected this argument and concluded that the purpose of Article 2.1 would be defeated "if Members were allowed to remove their domestic products from the application of those same regulations to avoid potential costs that it might otherwise incur" *(56)*.

The Panel also addressed Indonesian arguments under Article 2.2 of the TBT Agreement. As with Article 2.1, the limited case-law on Article 2.2 meant that the Panel had to draw some preliminary conclusions of law. The Panel noted that the approach to analysing Article XX(b) of the GATT is relevant to Article 2.2 *(57)*.

Firstly, the Panel examined whether Indonesia had demonstrated that the ban on clove cigarettes exceeds the level of protection sought by the United States. The Panel concluded that Indonesia had not brought sufficient evidence to establish the level of protection actually pursued by the United States *(58)*. On this basis, there was not sufficient evidence for the Panel to conclude that the measure exceeded the level of protection pursued.

Secondly, the Panel examined whether Indonesia had demonstrated that the ban on clove cigarettes makes no material contribution to the objective of reducing youth smoking. In rejecting Indonesia's argument, one issue the Panel considered is whether young people smoke

clove cigarettes in insignificant numbers. The evidence brought by the United States and Indonesia on this issue conflicted. The United States evidence suggested that young people smoke clove cigarettes at higher rates than was suggested in evidence presented by Indonesia. In evaluating the evidence, the Panel stated that "the survey evidence before the Panel is susceptible to different interpretations. However, even if we accept Indonesia's numbers, these numbers do not show that an insignificant number of youth smoke clove cigarettes" *(59)*.

The Panel also considered whether the scientific evidence supports Indonesia's argument that banning clove cigarettes will do little to deter young people from smoking. In rejecting Indonesia's argument, the Panel concluded that "this is a case in which the measure actually represents at least the majority view, and potentially the unanimous view" *(60)*. After citing the relevant scientific evidence, the Panel also stated that the WHO FCTC partial guidelines on implementation of Articles 9 and 10 reinforced its understanding. The Panel quoted from the partial guidelines to the effect that they draw on the best available scientific evidence and the experience of Parties, before noting that they "show a growing consensus within the international community to strengthen tobacco-control policies through regulation of the content of tobacco products, including additives that increase the attractiveness and palatability of cigarettes" *(61)*.

Thirdly, the Panel considered whether Indonesia had demonstrated that there are less trade-restrictive alternative measures that would make an equivalent contribution to achievement of the objective at the level of protection sought by the United States. In this respect, the Panel concluded that Indonesia had merely listed a number of tobacco control measures as alternatives, but had not demonstrated that these measures would make an equivalent contribution to achieving the level of protection pursued by the United States *(62)*. The Panel also noted that many tobacco control measures are already in place in the United States, suggesting that these measures may be complementary rather than alternative measures *(63)*. Finally, the Panel noted that "prohibiting the sale of flavoured cigarettes is actually one of the measures that has been recommended in the WHO [FCTC] partial guidelines" *(64)*.

In summary, the Panel concluded that Indonesia had not established that the United States measure was more trade-restrictive than necessary to protect human health under Article 2.2.

The United States appealed the findings of the panel on discrimination under Article 2.1 of the TBT Agreement and on other procedural issues that are not addressed in this paper. Indonesia did not appeal the panel's findings with respect to Article 2.2. The Appellate Body rejected the US appeal concerning Article 2.1, thereby upholding the panel's finding that the law in question is discriminatory.

With respect to likeness, the Appellate Body followed the approach adopted under the GATT and stressed that a determination of likeness under Article 2.1 is "a determination about the nature and extent of a competitive relationship between and among the products at issue."[65] Hence, the Appellate Body rejected the panel's earlier approach of determining whether the products were like in terms of the regulatory objective pursued. In doing so, the Appellate Body reinforced the approach developed in *EC – Asbestos* whereby divergent risks posed by products are relevant only to determining competitiveness of those products. That is, the fact that products pose divergent risks to health will not in and of itself mean that they are not like products.

In its discussion of like products, the Appellate Body made some observations relevant to whether tobacco products in different product categories will ordinarily be considered like products. First, the Appellate Body recognized that satisfying an addiction to nicotine is one end use shared by clove and menthol cigarettes. Second, in discussing the relevance of consumers' tastes and habits the Appellate Body noted that it is not necessary to demonstrate that products are substitutable for all consumers. Rather, if products are highly substitutable for some consumers but not for others, this may be sufficient to show likeness.[66] For example, the fact that one product category is particularly attractive to children may not be significant to likeness if children use that product category interchangeably with another category of tobacco products.

On the facts, the Appellate Body upheld the panel's finding that clove and menthol cigarettes are like for purposes of this dispute.[67]

With respect to the less favorable treatment element, the Appellate Body elaborated a test that seeks to balance the right to regulate with the obligation not to discriminate.[68] The Appellate Body emphasized that the less favorable treatment element of Article 2.1 is not established by mere detriment to some imported products.[69] In this respect, the Appellate Body stated that "Article 2.1 should not be interpreted as prohibiting any detrimental impact on competitive opportunities for imports in cases where such detrimental impact on imports stems exclusively from legitimate regulatory distinctions."[70] To determine whether this is the case panels will need to scrutinize "the design, architecture, revealing structure, operation and application of the technical regulation at issue, and, in particular, whether that technical regulation is even-handed".[71]

In light of this test, the Appellate Body upheld the panel's finding that the law results in less favorable treatment contrary to Article 2.1. The Appellate Body noted that the prohibited products consist primarily of clove cigarettes from Indonesia whereas the permitted products consist primarily of domestically produced menthol cigarettes.[72] In addition, the Appellate Body stated that it was not persuaded that the detrimental impact on competitive opportunities for imported cigarettes stems from a legitimate regulatory distinction.[73] The Appellate Body relied on the panel's findings that both menthol and clove mask the harshness of tobacco and that "menthol cigarettes have the same product characteristic that, from the perspective of the stated objective of Section 907(a)(1)(A), justified the prohibition of clove cigarettes."[74] The Appellate Body also rejected the argument that risks posed to the United States health system and in terms of illicit trade (if menthol were to be banned) constitute grounds for a legitimate regulatory distinction between clove and menthol cigarettes. Specifically, the Appellate Body stated "it is not clear that the risks that the United States claims to minimize by allowing menthol cigarettes to remain in the market would materialize if menthol cigarettes were to be banned, insofar as regular cigarettes would remain in the market."[75]

The implications of this dispute for tobacco control are mixed. On the one hand:

- The outcome of the dispute binds only the United States and Indonesia.
- The outcome was fact specific in that the dispute was decided on grounds specific to the partial form of regulation implemented by the United States and not on the grounds that prohibiting a specific category of tobacco product is more trade restrictive than necessary to protect human health. Accordingly, the outcome does not prevent other WTO Members from implementing non-discriminatory tobacco product regulations.
- The panel's analysis under Article 2.2 suggests that it will often be difficult for a complainant to meet its burden of proving that another Member's measure is more trade restrictive than necessary to protect human health.
- The panel report made extensive use of the WHO Framework Convention on Tobacco Control and its Partial Guidelines for Implementation of Articles 9 and 10 in the analysis.
- The Appellate Body sought to elaborate a test under Article 2.1 balancing the right to regulate with the obligations of non-discrimination.

On the other hand, the approach to likeness adopted by the Appellate Body suggests that tobacco products will ordinarily be considered like. Hence, for product regulations that fall hardest on imported products the question will be whether the effect on the competitive opportunities of those imported products stems exclusively from legitimate regulatory distinctions.

(viii) Free trade agreements and customs unions

Although the WTO Agreement is the central multilateral instrument governing international trade, free trade agreements are becoming increasingly common. Free trade agreements are usually bilateral or regional in character, and require the elimination of practically all restrictive regulations of commerce (such as tariffs) between the territories involved.[13] In this way, free trade agreements can grant prefer-

13 See GATT Article XXIV:8(b) for a more detailed definition.

ential treatment to goods that originate in the territory of the parties because those goods may enter tariff-free or subject to lower tariffs than goods from the territory of other WTO Members.

Free trade agreements usually set out rules governing non-tariff barriers to trade that are similar to those in the WTO covered agreements. However, in some instances, free trade agreements impose tighter restrictions on domestic regulation. This is seen most often in respect of intellectual property rights. Some free trade agreements incorporate so-called TRIPS-plus provisions, which impose additional requirements for the protection of intellectual property rights that limit the flexibility of Contracting Parties to address issues such as access to essential medicines. Often, free trade agreements also incorporate rules governing the protection of foreign investments, an issue discussed in the next section of this paper.

Customs unions are a deeper form of economic integration between States. Customs unions involve the formation of a single customs territory between two or more States. As with free trade agreements, substantially all restrictive regulations of commerce are eliminated for trade between the territories involved. In addition, the territories of a customs union apply substantially the same regulations (such as tariffs) to the importation of goods from territories not forming a part of the union.[14] The European Union is one prominent example of a customs union.

The risk that liberalization will stimulate demand for tobacco products also applies in the context of concluding a free trade agreement or forming a customs union. Similarly, the risk that an agreement will limit a State's regulatory autonomy also applies. This risk is apparent in a claim filed by Philip Morris against Norway.

Norway is a party to the EEA Agreement, a free trade agreement which extends parts of European Union law governing the free movement of goods to Norway. Philip Morris Norway has lodged a claim with the Oslo District Court, arguing that Norwegian bans on point-of-sale display violate Norway's obligations. The Oslo District Court

14 See GATT Article XXIV:8(a) for a more detailed definition.

requested an advisory opinion from the European Free Trade Association (EFTA) Court, which has competence to advise on implementation of the EEA Agreement. In essence, the two questions before the EFTA Court were (1) whether a point-of-sale display ban constitutes a measure having equivalent effect to a quantitative restriction on the free movement of goods and (2) if so, whether a ban would be suitable and necessary for purposes of protecting public health.

On the first question, the EFTA Court concluded that "a visual display ban ... constitutes a measure having equivalent effect to a quantitative restriction on imports within the meaning of Article 11 EEA if, in fact, the ban affects the marketing of products imported from other EEA States to a greater degree than that of imported products which were, until recently, produced in Norway". On the second question, the EFTA Court concluded that it is for the national court to "identify the aims which the legislation at issue is actually intended to pursue and to decide whether the public health objective of reducing tobacco use by the public in general can be achieved by measures less restrictive than a visual display ban on tobacco products".

Although the outcome of this claim remains to be seen, it provides an example of ways in which agreements outside the realm of the WTO are also relevant to tobacco control.

(ix) Steps policy-makers can take to protect tobacco control measures

In light of the discussion above, there are some steps policy-makers can take in order to minimize the risk of non-compliance with WTO law. The most obvious step is to seek assistance from a lawyer with expertise in WTO law during the development of new tobacco control measures. This assistance might come from within the government or from external sources. Beyond this, there are specific steps that may minimize the risk of discrimination and maximize the possibility that the necessity of a measure will be established.

With respect to provisions governing discrimination, it is prudent to gather up-to-date information on the composition of the domestic tobacco market. Such information could be used to identify how a proposed measure is likely to affect imported as compared to domestic to-

bacco products. Most importantly, where a proposed tobacco control measure may treat products differently from one another it is prudent to ensure that there are legitimate regulatory reasons for drawing the distinctions in question. If this is not the case, and the effect of the measure falls hardest on imported products, the measure might be considered discriminatory.

With respect to the necessity test, there are a number of steps policy-makers can take to maximize the chances of tobacco control measures being considered necessary. Firstly, policy-makers should take particular care in how they articulate the regulatory goals underlying a tobacco control measure. Framing regulatory goals in qualitative terms and articulating the particular role of a particular measure within the broader quantitative goal of reducing the prevalence of tobacco use may enhance the prospect of a tobacco control measure being considered necessary. Secondly, identifying how a particular measure complements other tobacco control measures in place or under implementation may maximize the possibility of those other measures being considered complementary rather than alternatives. Thirdly, identifying how tobacco control measures implement the WHO FCTC may maximise the role of the WHO FCTC in the event of a WTO dispute. Finally, identifying WHO FCTC guidelines as relevant international standards when notifying other WTO Members of the implementation of a technical regulation under the TBT Agreement may enhance the role played by those guidelines in discussion of TBT issues and in TBT disputes.

2. INTERNATIONAL INVESTMENT LAW

Since 2001, the field of international investment law has grown significantly, as the proliferation of international investment agreements has gathered pace. These agreements have taken the form of bilateral investment treaties and investment chapters in free trade agreements. More importantly, however, the number of disputes arising under international investment agreements has increased since 2001, as foreign investors have turned to international arbitration, rather than foreign courts, as a means of dispute settlement.

The tobacco industry has long asserted that various tobacco control measures would violate international investment agreements, requiring governments to compensate the industry. The classic example can be found in Carla Hills' submission to the Canadian Standing Committee on Health in respect of plain packaging. In addition to arguing that the measure would violate WTO covered agreements, such as TRIPS, Hills argued that plain packaging would constitute expropriation of industry property under the investment chapter of the North American Free Trade Agreement (NAFTA) *(76)*. More recently, Philip Morris Products (Switzerland) and other companies filed a Request for Arbitration *(77)* with the International Centre for Settlement of Investment Disputes (ICSID) against Uruguay, pursuant to a bilateral investment treaty between Switzerland and Uruguay *(78)*.The request concerns Uruguayan tobacco packaging measures and seeks arbitration before the ICSID, which is based at the World Bank in Washington, DC. Philip Morris has also brought a claim under the bilateral investment treaty between Australia and Hong Kong concerning plain packaging measures that the Australian Government intends to implement. Before outlining these disputes in further detail, it is worth identifying some of the standard features of international investment agreements.

Although it is not always the case, most international investment agreements make provision for investor-State dispute settlement. This gives a foreign investor standing to bring a claim against a State for violation of the international investment agreement and to seek compensation. For example, the bilateral investment treaty between Switzerland and Uruguay permits Swiss nationals with an investment in Uruguay to enforce the bilateral investment treaty through arbitration with Uruguay. This can be contrasted with the WTO system, where only WTO Members have standing to bring a claim.

Some features of international investment agreements are similar to trade agreements. For example, international investment agreements usually include provisions governing national treatment and most-favoured-nation treatment that seek to prevent discrimination between investors and investments *(79)*. In other respects, international investment agreements offer protection for investors well be-

yond that offered in trade agreements. Pertinent examples are found in the obligation of States to pay compensation for expropriation of investments and in the obligation to provide investors and investments with fair and equitable treatment.

(i) Expropriation and measures equivalent thereto

Although specific agreements differ in their terms, it is common for international investment agreements to provide that investments of nationals or companies of either contracting party shall not be expropriated, nationalized or subjected to measures having equivalent effect in the territory of the other contracting party, except for a public purpose, on a non-discriminatory basis and against compensation.

Under these types of clauses, expropriation of the property of a national of a contracting party, whether direct or indirect, is prohibited entirely unless it is for a public purpose and on a non-discriminatory basis. Where expropriation occurs and it is non-discriminatory and for a public purpose, compensation must nonetheless be paid.

Typically, tobacco control measures do not involve the direct expropriation or nationalization of the property of a tobacco company, because there is no direct transfer of property from tobacco companies to the State *(80,81)*. As such, the most pertinent issue concerns what is meant by indirect expropriation or measures equivalent to expropriation.

In order for an indirect expropriation to occur, there must be some degree of interference with property rights. Although the exact degree of interference required has not been established by the case-law, in recent years tribunals have viewed indirect expropriation as requiring a taking that is "a substantially complete deprivation of the economic use and enjoyment of rights to the property, or of identifiable distinct parts thereof (i.e. it approaches total impairment)" *(82)*. Interference with an investment is necessary for an indirect expropriation to occur but, as a general rule, interference alone is not recognized as sufficient to constitute expropriation. As one tribunal put it:

> To distinguish between a compensable expropriation and a non-compensable regulation by a host State the following factors (usually in combination) may be taken into account: whether the measure is within the recognized police powers of the host State; the (public) purpose and effect of the measure; whether the measure is discriminatory; the proportionality between the means employed and the aim sought to be realized; and the bona fide nature of the measure *(83,84)*.

Although it is beyond the scope of this section to explain how all of these factors are applied, it is worth explaining what is meant by the police powers of a State, and also to touch on the concept of an investor's legitimate expectations.

With respect to the recognized police powers of the host State, it is well recognized that there is a range of regulatory activity that falls outside the bounds of indirect expropriation. As one NAFTA tribunal put it:

> not all government regulatory activity that makes it difficult or impossible for an investor to carry out a particular business, change in the law or change in the application of existing laws that makes it uneconomical to continue a particular business, is an expropriation under Article 1110. Governments, in their exercise of regulatory power, frequently change their laws and regulations in response to changing economic circumstances or changing political, economic or social considerations. Those changes may well make certain activities less profitable or even uneconomic to continue *(85)*.

This passage is consistent with the long established principle that the State may act within its sovereign police powers, which include the power to protect health, without incurring an obligation to compensate an investor for expropriation, so long as the State's conduct is not discriminatory and is not designed to cause a foreign investor to abandon property to the State or sell it at a distress price *(86,87)*. This view holds either that police powers constitute an exception to the obligation to pay compensation, or that a legitimate exercise of police powers means that a measure is not expropriatory in character. Under this view, whether a measure is implemented for a public purpose is distinct from whether that measure has an expropriatory character.

Another factor for consideration is the extent to which a foreign investor had a legitimate expectation that the value of its property would not be lost in whole or in part by the regulatory activity of the State *(88)*. As one tribunal has put it:

> as a matter of general international law, a non–discriminatory regulation for a public purpose, which is enacted in accordance with due process and, which affects, inter alios, a foreign investor or investment is not deemed expropriatory and compensable unless specific commitments had been given by the regulating government to the then putative foreign investor contemplating investment that the government would refrain from such regulation *(89)*.

The harmful character of tobacco products and the near-universal ratification of the WHO FCTC suggest that it is reasonable for tobacco companies to expect the implementation of tobacco control measures, a factor weighing against the idea that such measures are compensable expropriation.

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(ii) Fair and equitable treatment

An obligation to ensure that investments are afforded fair and equitable treatment is common to most international investment agreements. A variety of different formulations of this concept exist, making it difficult to generalize about the specific requirements of this standard of treatment *(90)*. Some formulations of the concept appear to set out a standalone treaty obligation that could apply to a wide range of conduct, whereas other formulations of the concept are limited to the international minimum standard of treatment required by customary international law.

Notwithstanding the difficulty in generalizing about the content of the fair and equitable treatment standard, it is possible to identify a variety of circumstances in which a violation of this standard may be found. These include:

- failure to provide a transparent and stable environment and to observe an investor's legitimate expectations;
- arbitrary, discriminatory or unreasonable treatment;

- denial of due process or procedural fairness;
- bad faith; or
- government coercion and harassment.

Where clauses governing fair and equitable treatment are formulated in a manner that links them to the international minimum standard and to customary international law, it is generally difficult for an investor to establish a violation of that standard. For example, after reviewing the authorities, the tribunal in *Glamis Gold v United States* stated that, "an act must be sufficiently egregious and shocking—a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons—so as to fall below accepted international standards" *(91)*. Equally, some tribunals have taken a more liberal approach, concluding that customary international law may be violated by acts that are merely unfair, inequitable or unreasonable *(92)*. Although recent case-law tends to suggest a trend towards a strict standard, such as that identified in *Glamis*, inconsistencies in the case-law mean that it is often difficult to identify the applicable standard with much certainty.

(iii) Recent cases relevant to tobacco control

Philip Morris Products (Switzerland) v Uruguay

As was noted earlier, the Request for Arbitration filed by Philip Morris Products (Switzerland) against Uruguay is a contemporary example of an international investment dispute relevant to tobacco control.

The Request for Arbitration takes issue with the following three aspects of Uruguay's tobacco packaging laws:

- the fact that Uruguayan law requires that tobacco products bear warnings covering 80% of the surface of a pack;
- the images used in mandatory health warnings, which the claimants allege are designed to shock and repulse rather than warn consumers of the actual effects of smoking; and
- a prohibition on the presentation of a single brand in multiple forms (the so-called single presentation requirement), where those forms are misleading about the health consequences of consumption, and in particular, the implementation of this prohibition in

such a way as to constitute a de facto single presentation per brand requirement.

The claimants allege that the measures violate the following three obligations under the Switzerland – Uruguay bilateral investment treaty:

- not to obstruct the management, use, enjoyment, growth or sale of investments through unreasonable or discriminatory measures (Article 3(1));
- to refrain from acts of expropriation except for a public purpose and upon payment of compensation (Article 5(1)); and
- to provide fair and equitable treatment for the claimants' investments (Article 3(2)).

In addition, the claimants argue that a so-called umbrella clause (a clause requiring Uruguay to respect commitments it has made with regard to the investments of Swiss nationals) has been violated. The claimants argue that the commitments referred to include the WTO covered agreements and that Uruguay's measures violate the TRIPS Agreement. Some would argue this is an attempt to circumvent the fact that the claimants do not have standing to bring a claim under WTO law.

It remains to be seen what the outcome of this claim will be. Although it is beyond the scope of this paper to examine the issues in detail, it is worth emphasizing that the discussion above about expropriation and fair and equitable treatment suggests that States generally have a significant degree of regulatory autonomy. There may be exceptions to this conclusion, e.g. where some specific representation has been made to a tobacco company in order to attract investment. There may also be some uncertainty produced by inconsistencies in the case-law. Nonetheless, the weight of the case-law, and State practice in implementing tobacco control measures, suggest that States may implement bona fide public health measures, including tobacco control measures, without having to pay compensation under an international investment agreement.

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Philip Morris Asia Limited v Australia

In November 2011, Philip Morris Asia Limited served a Notice of Arbitration on the Commonwealth of Australia *(93)*. The Notice of Arbitration challenges plain packaging requirements in the Tobacco Plain Packaging Act 2011 (Cth) under the bilateral investment treaty between Australia and Hong Kong *(94)*.

The Tobacco Plain Packaging Act requires that tobacco products sold in Australia should be sold in plain packaging. The law implements the guidelines for the implementation of Articles 11 and 13 of the WHO FCTC and, in essence, restricts branding on product packaging to the display of brand and variant names in standardized font styles and sizes. The remainder of a pack's surface is to be taken up by health warnings required by law and a plain background.

Philip Morris Asia Limited alleges that Australia's plain packaging law violates obligations concerning expropriation of investments, fair and equitable treatment, non-impairment of investments, the provision of full protection and security for investments and an obligation to observe commitments which Australia has entered into with regard to investments of Hong Kong SAR investors *(95)*. These arguments are substantially similar to those raised by Philip Morris in its claim against Uruguay.

The Australian Government has responded to the Notice of Arbitration, indicating that Australia intends to contest the jurisdiction of the tribunal, as well as the merits of the claim. Notably, Australia has pointed out that Philip Morris Asia Limited only acquired an indirect interest in the relevant Australian subsidiary after the Australian Government had announced its decision to implement plain packaging. In this respect, an ownership interest was transferred from a Swiss company to Philip Morris Asia Limited. Given that Australia does not have an international investment agreement with Switzerland, it is possible that the transfer was made for the very purpose of bringing a claim under the bilateral investment treaty between Australia and Hong Kong.

Australia has also pointed out that PM Asia can have no grounds for complaint when PM Asia made a decision to acquire an indirect inter-

est in the Australian subsidiary *after* the Government had announced its decision to implement plain packaging, and then did exactly what it said it was going to do.

Grand River Enterprises Six Nations v United States of America

In January 2011, a decision was handed down in an international investment dispute under NAFTA that is peripherally related to tobacco control *(96)*. The dispute concerned implementation of the Master Settlement Agreement, which is a 1998 agreement between tobacco manufacturers and a number of states of the United States. The Master Settlement Agreement settled litigation and required those tobacco manufacturers that are parties to pay compensation to States that are parties. In order to minimize the adverse impact of the Master Settlement Agreement on the competitiveness of participating companies, nonparticipating companies were subjected to separate legislative requirements. These requirements were the subject of the claims.

The claimants are of Canadian nationality and are participants in the tobacco industry in the United States. The claimants made a number of arguments concerning the legislative requirements to which they were subjected. The Tribunal dismissed the majority of the claims for jurisdictional reasons. The outcome of the claims falling within the Tribunal's jurisdiction is not directly relevant to tobacco control, because the model of tobacco control offered by the Master Settlement Agreement is not a common one. Nonetheless, the Tribunal did reach a number of conclusions that may have broader implications for tobacco control.

In discussing the legitimate expectations of one of the claimants, the Tribunal noted that "trade in tobacco products has historically been the subject of close and extensive regulation by US states, a circumstance that should have been known to the Claimant from his extensive past experience in the tobacco business. An investor entering an area traditionally subject to extensive regulation must do so with awareness of the regulatory situation" *(97)*. This passage suggests that, in the absence of some representation by government to the contrary which induces a particular investment, tobacco companies are unlikely to have a legitimate expectation that they can avoid new regulation.

With respect to expropriation, the Tribunal emphasized that Article 1110 of NAFTA concerns expropriation of an investment, not part of an investment. The Tribunal stated that "expropriation must involve the deprivation of all, or a very great measure, of a claimant's property interests" *(98)*. Because the claimant continued to run a successful enterprise, the Tribunal concluded that expropriation was not established. If this rationale were applied more broadly, limited restrictions, such as those relating to the use of trademarks on packaging, would also be unlikely to constitute expropriation solely on the basis that the interference with property interests would not be sufficient. That is, it would not even be necessary to consider the regulatory character of the measure or the police powers of the State.

Feldman Karpa v Mexico

The 2002 award in *Feldman Karpa v Mexico (99)* is another NAFTA dispute concerning the tobacco industry, but peripheral to tobacco control. The claimant was a United States national who conducted a grey-market export business in Mexico. The claimant purchased cigarettes from bulk retailers and sold them abroad. The claimant argued that he was entitled under Mexican law to rebates for taxes paid at the point of purchase in Mexico for cigarettes that were subsequently exported, but had been denied those rebates on some occasions. The claimant argued that this denial amounted to expropriation of his investment and that, when his treatment was compared with the treatment of a Mexican firm operating in like circumstances, Mexico had failed to comply with its national treatment obligations.

The Tribunal rejected the expropriation claim partly on the basis that the claimant continued to run a successful business. However, a majority of the Tribunal did find, on the specific facts of this case, that Mexico had breached its national treatment obligation by providing less favourable treatment to the claimant as compared with a Mexican firm operating in like circumstances. The systemic implications of this case for the relationship between tobacco control and international investment law would appear to be minimal, because the less favourable treatment was specific to the facts of the case.