(iv) Protecting policy space: steps policy-makers can take to protect public health measures

There are a number of different ways in which policy-makers can protect their ability to implement tobacco control measures under international investment agreements. These include ensuring that specific commitments to refrain from regulation are not made to the tobacco industry, monitoring the acceptance of foreign direct investment by the tobacco industry, ensuring that new international investment agreements clarify key concepts like expropriation and fair and equitable treatment and, where possible, clarifying the application of existing international investment agreements.

Ensuring that commitments are not made to the tobacco industry

If an investor has a legitimate expectation that a host State will refrain from regulation or conduct of a particular type, this can be relevant to whether expropriation has occurred and to whether a foreign investor has been treated fairly and equitably. Commitments made by government to the tobacco industry can, therefore, make legitimate tobacco control measures susceptible to challenge under international investment agreements.

For example, when partially privatizing its national tobacco monopoly, one country entered into an agreement with the purchaser (a foreign investor) to the effect that tobacco taxes would not be increased for a period of 30 years. In the event of an increase, the Government is liable under the agreement to pay compensation to the investor. This agreement has undermined the ability of the Government to implement tobacco tax reform by altering the political and budgetary implications of reform.

Monitoring the acceptance of foreign direct investment by the tobacco industry

Some international investment agreements draw a distinction between the way a host State can treat an investment upon entry to the State and the way it treats an investment once it is established in the territory of the host State. For example, it is arguable that some agreements do not govern the establishment of investments at all, meaning that they only apply to State conduct after an investment has been admitted.

Other international investment agreements govern the way a State can treat an investment both pre- and post-establishment. Some of these agreements include clauses that permit a host State to refuse to accept a foreign investment on public health grounds or on the basis that an investment is contrary to domestic law. For example, Article 2(1) of the Switzerland – Uruguay bilateral investment treaty governs promotion and admittance of investments. The provision states:[15]

> (1) To the extent that it is possible, each Contracting Party shall encourage investments by investors of the other Contracting Party within its territory, and shall admit such investments in accordance with its legislation. The Contracting Parties mutually recognize each other's right to not authorize economic activities for reasons of safety, order, health or public morality, as well as activities reserved by law for its own investors.

In accordance with this provision, Uruguay has a broad authority to refuse to admit investments from Swiss nationals for reasons relating to the protection of health. On the other hand, Uruguay's authority to regulate once an investment is established is not stated explicitly in the bilateral investment treaty. It is possible that this clause will be interpreted to apply also to regulation of the type in question, but this is not entirely clear.

Accordingly, governments can minimize the risks posed by international investment agreements by monitoring foreign direct investment in the tobacco industry and refusing to accept inappropriate investment where they have the power to do so. For example, governments could refuse to register trademarks that make a misleading suggestion that a particular tobacco product is less harmful than another. When a foreign investor registers a trademark in a host State, the host

15 Unofficial translation into English.

State could be taken to have accepted that trademark as an investment. Under a clause such as Article 2(1) of the Uruguay – Switzerland bilateral investment treaty, a host State would be within its rights to refuse registration of a tobacco trademark that is misleading. By doing so, the host State would minimize the risk that a tobacco company could bring a claim of the type brought against Uruguay.

Ensuring that new international investment agreements clarify key concepts

There is an emerging trend in international investment agreements to clarify key concepts such as expropriation and fair and equitable treatment. Almost invariably, these clarifications reinforce domestic regulatory autonomy and the ability of governments to protect health. Accordingly, health authorities should monitor the negotiation of international investment agreements and seek to ensure that these agreements do not reduce the scope for tobacco control.

Good examples of language clarifying an agreement can be found in Chapter 11 of the Free Trade Agreement between the Association of South East Asian Nations (ASEAN), Australia and New Zealand of 2009 *(100)*. Article 9 of the Agreement governs expropriation and compensation. The most relevant part of the provision states:

> 1. A Party shall not expropriate or nationalise a covered investment either directly or through measures equivalent to expropriation or nationalisation (expropriation), except:
>
> (a) for a public purpose;
>
> (b) in a nondiscriminatory manner;
>
> (c) on payment of prompt, adequate, and effective compensation; and
>
> (d) in accordance with due process of law.

An annex to this provision clarifies the effect of Article 9. The annex states:

> 1. An action or a series of related actions by a Party cannot constitute an expropriation unless it interferes with a tangible or intangible property right or property interest in a covered investment.
>
> 2. Article 9.1 (Expropriation and Compensation) of Chapter 11 (Investment) addresses two situations:
>
> (a) the first situation is direct expropriation, where a covered investment is nationalised or otherwise directly expropriated through formal transfer of title or outright seizure; and
>
> (b) the second situation is where an action or series of related actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure.
>
> 3. The determination of whether an action or series of related actions by a Party, in a specific fact situation, constitutes an expropriation of the type referred to in Paragraph 2(b) requires a case-by-case, fact-based inquiry that considers, among other factors:
>
> (a) the economic impact of the government action, although the fact that an action or series of related actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that such an expropriation has occurred;
>
> (b) whether the government action breaches the government's prior binding written commitment to the investor whether by contract, licence or other legal document; and
>
> (c) the character of the government action, including, its objective and whether the action is disproportionate to the public purpose
>
> 4. Non-discriminatory regulatory actions by a Party that are designed and applied to achieve legitimate public welfare objectives, such as the protection of public health, safety, and the environment do not constitute expropriation of the type referred to in Paragraph 2(b).

This annex, and particularly paragraph 4, clarify that health measures would constitute expropriation in a very limited range of circumstances for purposes of the Agreement. The wording could be considered to represent model language on the issue.

The ASEAN – Australia – New Zealand Free Trade Agreement also clarifies the concepts of fair and equitable treatment for purposes of that Agreement. Article 6 of Chapter 11 governs the treatment of investment. The provision states:

1. Each Party shall accord to covered investments fair and equitable treatment and full protection and security.
2. For greater certainty: [16]
   (a) fair and equitable treatment requires each Party not to deny justice in any legal or administrative proceedings;
   (b) full protection and security requires each Party to take such measures as may be reasonably necessary to ensure the protection and security of the covered investment; and
   (c) the concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required under customary international law, and do not create additional substantive rights.
3. A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article.

The clarifications found in Article 6 confirm that the vague notion of fair and equitable treatment does not require a higher standard than the international minimum standard found in customary international law. This standard was discussed earlier, and it will be recalled that it is only in rare circumstances that a government will be considered to have violated the standard. Thus, the clarification found in Article 6 could also be considered to be model language designed to preserve policy space for host States.

A further option would be to exclude investment in the tobacco sector entirely from the scope of an international investment agreement. This would not be unusual, because many agreements include carve-outs for specific industries. For example, Article 1108 of the NAFTA governs reservations and exceptions and, at the time NAFTA was concluded, permitted Parties to carve out specific sectors, subsectors or activities.

16 [Footnote numbered 6 in the original] In the case of Indonesia, only Paragraph 2(a) and (b) shall apply where Indonesia is the Party according treatment under this Article.

Clarifying existing agreements

In addition to clarifying agreements while they are being negotiated, some States have clarified agreements after their entry into force. For example, Canada, Mexico and the United States clarified the concept of fair and equitable treatment under NAFTA after the Agreement was already in force *(101)*. Similarly, Singapore and the United States exchanged side letters clarifying aspects of the investment chapter of the Singapore – United States free trade agreement.[17] With all parties consenting, States concerned about the extent of their autonomy under existing international investment agreements could do the same. By taking this approach, States would minimize the uncertainty that stems from the vague standards often found in agreements and from the fact that different tribunals have taken inconsistent approaches to application of those standards.

3. THE ENTRY INTO FORCE OF THE WHO FCTC

Without question, the entry into force of the WHO FCTC *(102)* is the most important normative development since 2001 concerning the relationship between trade, investment and tobacco control. This international treaty creates international legal obligations to regulate tobacco. In some instances, the Convention also recognizes the rights of Parties under international law to implement tobacco control measures.

This section describes the basic structure and features of the WHO FCTC and its relevance to the relationship between trade, investment and tobacco control. In a legal sense, the WHO FCTC has at least three implications specific to the trade and investment context. Firstly, Article 5.3 of the Convention has implications for the way in which Parties interact with the tobacco industry. These implications are relevant not only to health officials, but also to other government officials working on trade, finance and investment policies. Secondly, the WHO FCTC and its guidelines may be used in the interpretation of international trade and investment agreements in the context of tobacco control measures. Thirdly, the WHO FCTC also provides some

17 See side letters to that Agreement, available at http://www.fta.gov.sg/fta_ussfta.asp?hl=13 (accessed 28 February 2012).

protection for tobacco control measures in the event of a conflict with a trade or investment agreement.

(i) WHO FCTC

The WHO FCTC is the first treaty concluded under Article 19 of the Constitution of WHO. The Convention was adopted by the World Health Assembly in 2003 and entered into force in 2005. With over 170 Parties, the Convention is one of the most widely adopted treaties in the United Nations system, and has more Parties than the WTO has Members.

Article 3 describes the objective of the WHO FCTC and its protocols as being:

> to protect present and future generations from the devastating health, social, environmental and economic consequences of tobacco consumption and exposure to tobacco smoke by providing a framework for tobacco control measures to be implemented by the Parties at the national, regional and international levels in order to reduce continually and substantially the prevalence of tobacco use and exposure to tobacco smoke.

The WHO FCTC obliges Parties to implement a range of tobacco control measures. Prominent among these are measures to reduce demand such as price and tax measures (Article 6), measures protecting individuals from exposure to tobacco smoke (Article 8), measures to regulate the contents of tobacco products and product disclosures (Articles 9 and 10), packaging and labelling measures (Article 11), measures relating to education, communication, training and public awareness (Article 12), restrictions on tobacco advertising, promotion and sponsorship (Article 13) and measures concerning tobacco dependence and cessation (Article 14). Measures relating to reduction of the supply of tobacco products are also prominent and include measures to reduce illicit trade in tobacco products (Article 15), measures relating to sales to and by minors (Article 16) and the provision of support for alternative livelihoods for tobacco growers (Article 17).

As a framework convention, the text of the WHO FCTC lays out a broad framework of obligations and rights that is supplemented by other instruments. At the time of writing, the Parties are negotiating an optional protocol to the Convention concerning illicit trade in tobacco products. Parties have also adopted guidelines for the implementation of Articles 5.3, 8, 11, 12, 13 and 14 of the Convention, as well as partial guidelines for Articles 9 and 10. Under the law of treaties, the legal status of the guidelines is governed by their terms. It is clear from these terms that the guidelines are not binding standalone legal obligations. However, under the law of treaties some parts of the guidelines may be considered subsequent agreements of the Parties, to be used in interpretation of the Convention's core obligations. In other instances, the guidelines may be recommendations and reflect best practices in tobacco control. It is not the purpose of this paper to comment on the legal status of the guidelines under the law of treaties and therefore, the issue is not discussed further here.

The foreword to the Convention describes it as a response to the globalization of the tobacco epidemic, which was facilitated through processes such as trade liberalization. This is true in both an indirect and a direct sense. In an indirect sense, the WHO FCTC functions as something of a counterweight to other factors that facilitate the spread of tobacco consumption from developed to developing countries. By obliging the Parties to implement tobacco control measures, the Convention counteracts other forces that have stimulated tobacco consumption. In a more direct sense, the Convention should play a role in the way trade and investment policy is set in the tobacco context. As described below, the Convention is also a significant development affecting trade and investment law in the context of tobacco control.

(ii) Implications of Article 5.3 of the WHO FCTC

Article 5.3 of the FCTC provides that "[i]n setting and implementing their public health policies in respect of tobacco control, Parties shall act to protect these policies from commercial and other vested interests of the tobacco industry in accordance with national law." Guidelines for the implementation of this provision were adopted by

the third session of the Conference of the Parties in 2008. The aim of the guidelines is to assist Parties in meeting their legal obligations under Article 5.3 *(103)*.

One of the central principles of the guidelines is that "[b]ecause their products are lethal, the tobacco industry should not be granted incentives to establish or run their businesses." The guidelines also recommend that Parties should not give preferential treatment to the tobacco industry. In this respect, the guidelines state:

> 28. Some governments encourage investments by the tobacco industry, even to the extent of subsidizing them with financial incentives, such as providing partial or complete exemption from taxes otherwise mandated by law.
>
> 29. Without prejudice to their sovereign right to determine and establish their economic, financial and taxation policies, Parties should respect their commitments for tobacco control.
>
> Recommendations
>
> 7.1 Parties should not grant incentives, privileges or benefits to the tobacco industry to establish or run their businesses.
>
> 7.2 Parties that do not have a State-owned tobacco industry should not invest in the tobacco industry and related ventures. Parties with a State-owned tobacco industry should ensure that any investment in the tobacco industry does not prevent them from fully implementing the WHO Framework Convention on Tobacco Control.
>
> 7.3 Parties should not provide any preferential tax exemption to the tobacco industry.

These guidelines are particularly relevant in the context of international investment law. It will be recalled that it was recommended earlier in this paper that States should avoid making specific commitments to the tobacco industry in order to minimize the legal risk that the industry will have a legitimate expectation that it is entitled to special treatment. These guidelines reinforce this conclusion in light of the history of tobacco industry conduct.

The principles underlying these guidelines are also relevant to trade ministries. Trade ministries should take account of the guidelines when dealing with industry lobbying concerning market access abroad. This means that trade ministries should consider the guidelines before negotiating agreements with the tobacco industry's interests in mind and should consider the guidelines before initiating disputes at the international level. Put another way, the guidelines suggest that trade ministries should consider the implications for public health of representing tobacco industry interests abroad.

(iii) Uses of the WHO FCTC in interpretation of trade and investment agreements

It is an established principle of international law that treaties should not be interpreted in isolation from one another *(104)*.[18] Accordingly, in the context of disputes involving tobacco control measures, the WHO FCTC and its guidelines may be used in interpreting international trade and investment agreements *(105)*.

One way in which the WHO FCTC might be used in a trade or investment dispute is as evidence of a fact in dispute. For example, in the context of necessity analysis under WTO law, the Convention or its guidelines might constitute evidence of the:

- existence of certain risks to health (or of a consensus that such risks exist)
- regulatory goal underlying a measure
- contribution a measure makes to achievement of a State's regulatory goal and
- importance of the regulatory goal pursued.

The WHO FCTC and its guidelines could also be used in the application of trade and investment rules to specific tobacco control measures. For example, the fact that a measure is compelled or encouraged by the Convention or its guidelines favours the conclusion that the measure is necessary and proportional to the health risks that a State may be seeking to address. This might also affect other legal questions, such as whether a foreign investor had legitimate expectations that it could avoid regulation of the type in dispute.

18 See also Vienna Convention, Article 31(3)(c).

It is also possible that WHO FCTC guidelines could constitute international standards for purposes of the TBT Agreement.[19] This would depend on whether the WHO FCTC Conference of the Parties, or the WHO itself, is recognized as an international standards organization and whether the guidelines themselves constitute international standards. The case-law does not yet clarify this matter. In *United States – Tuna*, a recent dispute under the TBT Agreement, the panel gave a wide definition to these terms, finding that a resolution of the Member States of the Agreement on the International Dolphin Conservation Program constitutes an international standard *(106)*. Following this authority, WHO FCTC guidelines may constitute international standards for the purposes of the TBT Agreement. However, at the time of writing, this aspect of the Panel's report is under appeal. If WHO FCTC guidelines were recognized as international standards, measures in accordance with the guidelines would be presumed not to create an unnecessary obstacle to international trade.

The fact that the WHO FCTC and its guidelines may be used in the ways described above is important because it is likely to heighten the sensitivity of WTO panels and investment arbitrators to the concerns underlying tobacco control measures. This was certainly the case in *United States – Clove Cigarettes* (discussed above), in that the Panel drew upon the WHO FCTC and its guidelines to confirm its interpretation of the law in a number of respects.

(iv) Conflicts between the WHO FCTC and trade and investment agreements

Where the WHO FCTC and a trade or investment agreement govern the same subject matter, there is also a risk that the agreements will conflict. Where a conflict arises, one treaty may prevail over the other to the extent of that conflict. The question of which treaty prevails is

19 The term "standard" is defined in Annex 1 of the TBT Agreement as a "[d]ocument 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."

governed first by the terms of the treaties in question and secondly by customary international law.

Article 2.2 of the WHO FCTC governs the relationship between the Convention and other treaties concluded later in time, stating:

> The provisions of the Convention and its protocols shall in no way affect the right of Parties to enter into bilateral or multilateral agreements, including regional or subregional agreements, on issues relevant or additional to the Convention and its protocols, provided that such agreements are compatible with their obligations under the Convention and its protocols. The Parties concerned shall communicate such agreements to the Conference of the Parties through the Secretariat.

By providing that subsequent agreements must be compatible with the Convention, Article 2.2 gives priority to the WHO FCTC in the event of conflict with treaties concluded later in time *(107)*. However, this clause does not govern treaties concluded earlier than the WHO FCTC, such as the WTO Agreement and many international investment agreements. Assuming the absence of wording governing conflicts in these treaties, which is ordinarily the case, conflicts are governed by customary international law. This custom is reflected in Article 30 of the Vienna Convention. In effect, customary international law gives priority to the treaty concluded later in time. Accordingly, customary international law gives the WHO FCTC priority in the event of conflicts with treaties concluded earlier and Article 2.2 of the Convention gives it priority in the event of conflict with treaties concluded later in time.

The apparent protection afforded to the WHO FCTC by these rules is qualified by the fact that conflicts can only arise where three prerequisites are met. There must be an overlap of parties and subject matter, and these overlaps must occur at the relevant point in time.

The requirement that there be an overlap of parties means that a conflict between treaties can only arise between States parties to both treaties. The rationale for this is that a treaty cannot govern relations between two States where one State has not consented to application

of both treaties by becoming a party to both. For example, in the trade law context, a conflict could not arise between the WHO FCTC and the WTO Agreement in respect of a claim brought by a WTO Member that is not a Party to the WHO FCTC. Similarly, in the international investment law context, it is only where both States parties to an international investment agreement are Parties to the WHO FCTC that a conflict could arise.

The question whether two treaties govern the same subject matter concerns whether those treaties actually conflict with one another. One view is that "a conflict in the strict sense of incompatibility arises only where a party to the two treaties cannot simultaneously comply with its obligations under both treaties" *(108)*. Under this view, an obligation under the WHO FCTC could conflict with a prohibition under another treaty. However, a right in a treaty such as the WHO FCTC would give way to an obligation in a treaty such as the WTO Agreement because both treaties could be complied with if a State elects not to exercise its right (in this example, a right to control tobacco). Another view is that the concept of conflict is much broader and that the common intentions of the States in question, as reflected in the treaties, is the controlling issue *(109)*. Although the case-law tends to favour the narrow view, the broader view is gaining acceptance *(110,111)*. This view would recognize a conflict between a right set out in the WHO FCTC and a prohibition in another treaty.

The question of which treaty was concluded prior to the other can also be complex. For example, if the States in question were not both parties to a treaty from the date of its entry into force, the date of ratification is a more appropriate date to use. This causes problems where States have ratified treaties in a different order to one another because the treaties cannot be considered earlier or later for purposes of relations between the States in question *(112)*. For example, one State may ratify the WHO FCTC before acceding to the WTO Agreement, whereas another State may undertake obligations in the opposite order.

In summary, rules governing conflicts between treaties may provide some protection for measures implementing the WHO FCTC, in the rare event that those measures violate WTO law. However, the protection afforded under the rules governing conflicts is qualified because conflicts are not likely to arise often *(113)*.

4. OTHER NORMATIVE DEVELOPMENTS CONCERNING TRADE AND HEALTH

In addition to the WHO FCTC, there have been a number of other normative developments specific to the relationship between trade and health. In late 2001, the Ministerial Council of the WTO issued the Doha Declaration on the TRIPS Agreement and Public Health. In 2006, the World Health Assembly passed a resolution on trade and health, which stressed the need for greater coordination in the development of trade and health policies. In 2010, the fourth session of the Conference of the Parties to the WHO FCTC unanimously adopted the Punta del Este Declaration on implementation of the Convention. This section gives a brief explanation of these instruments and their implications. The instruments are given in full in an annex to this paper.

(i) The Doha Declaration on the TRIPS Agreement and Public Health

The Ministerial Conference of the WTO adopted the Doha Declaration in 2001 (reproduced in Annex 1 of this paper) in response to concerns about the implications of the TRIPS Agreement for access to essential medicines.

One purpose of the Declaration was to clarify application of the TRIPS Agreement, particularly in respect of the compulsory licensing of patents and parallel importing of pharmaceuticals. Because these issues are not central to tobacco control, they will not be explained further here, except to say that the Doha Declaration clarified the flexibilities available to WTO Members under TRIPS in respect of these issues. In doing so, the declaration also clarified the relationship between TRIPS and public health more generally. The Ministerial Conference stated:

> 4. We agree that the TRIPS Agreement does not and should not prevent members from taking measures to protect public health. Accordingly, while reiterating our commitment to the TRIPS Agreement, we affirm that the Agreement

can and should be interpreted and implemented in a manner supportive of WTO members' right to protect public health and, in particular, to promote access to medicines for all.

In this connection, we reaffirm the right of WTO members to use, to the full, the provisions in the TRIPS Agreement, which provide flexibility for this purpose.

5. Accordingly and in the light of paragraph 4 above, while maintaining our commitments in the TRIPS Agreement, we recognize that these flexibilities include:

a. In applying the customary rules of interpretation of public international law, each provision of the TRIPS Agreement shall be read in the light of the object and purpose of the Agreement as expressed, in particular, in its objectives and principles.

The objectives and principles of TRIPS are set out in Articles 7 and 8 of the Agreement, the relevant parts of which state:

Article 7

Objectives

The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.

Article 8

Principles

1. Members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement.

Thus, the Doha Declaration confirms the use of provisions such as Articles 7 and 8 in interpreting the substantive obligations found in

TRIPS. In the tobacco control context, the general interpretive guidance to TRIPS offered by the Doha Declaration is significant because it reinforces the right of WTO Members to regulate tobacco products in a manner that affects use of trademarks. This interpretive guidance is reiterated in the Punta del Este declaration.

(ii) Resolution WHA59.26 on international trade and health

Resolution WHA59.26 of 2006 (reproduced in Annex 1 of this paper) recognized the demand for information on the possible implications of international trade and trade agreements for health and health policy. The resolution urged WHO Member States to promote a multi- stakeholder dialogue at the national level, take action to address the outcomes of that dialogue, use coordination mechanisms across relevant ministries, create constructive relationships across the public and private sector and continue to develop capacity to address the challenges that trade and trade agreements pose for health. The resolution also requested the Director-General to provide support to Member States in their efforts to frame coherent policies to address the relationship between trade and health, respond to requests for support in terms of capacity building and coordinate activities with other competent international organizations.

In contrast to the Doha Declaration, the focus of this resolution was not on the legal question of the regulatory autonomy States have under trade agreements. Rather, the resolution addressed problems of policy incoherence. In the tobacco control context, these problems are reflected in the risk that trade liberalization and foreign direct investment in the tobacco sector may indirectly stimulate demand for tobacco products. The challenges of coordinating policies so as to maximize the potential economic benefits of trade while also protecting against negative health impacts are discussed in Part IV of this paper.

(iii) The Punta del Este Declaration on Implementation of the WHO FCTC

Following the Request for Arbitration filed against Uruguay, which was described earlier, the fourth session of the Conference of the Par-

ties to the WHO FCTC issued the Punta del Este Declaration in 2010 (decision FCTC/COP4(5), reproduced in Annex 1 of this paper). In its preamble, the Declaration recalls the right to the highest attainable standard of health and the determination of the Parties to the WHO FCTC to give priority to their right to protect health. The preamble also recognizes that "measures to protect public health, including measures implementing the WHO FCTC and its guidelines fall within the power of sovereign States to regulate in the public interest" and recalls a number of provisions in WTO law that affirm the regulatory autonomy of WTO Members.

The instrument declares both the commitment of Parties to implement the WHO FCTC and their legal authority to do so within the boundaries set by agreements such as the WTO covered agreements. In the latter respect, the Declaration emphasizes the principles and objectives underlying the TRIPS Agreement, as set out in Articles 7 and 8 of that Agreement. The instrument declares that "Parties may adopt measures to protect public health, including regulating the exercise of intellectual property rights in accordance with national public health policies, provided that such measures are consistent with the TRIPS Agreement". This Declaration, like Article 8, recognizes the flexibilities inherent in TRIPS that permit measures to protect health. That is, the provisions governing protection of intellectual property rights such as trademarks leave significant scope for health measures.

The legal status of the Declaration is not entirely clear. In the context of WTO law, the instrument does not have any formal legal effect. Under the WTO Agreement (Article IX:2), only the Ministerial Conference of the WTO and the General Council have the power to issue authoritative interpretations of the WTO covered agreements.

Under international law more generally, there are two roles the Declaration could play. One interpretation is that the instrument declares or clarifies customary international law, particularly in respect of the sovereign powers of States to regulate in the public interest. This could be relevant to claims for expropriation or claims relating to fair and equitable treatment that are linked to the standards of treatment required in customary international law. Another interpretation is that

the Declaration constitutes a subsequent agreement of the parties to an international investment agreement (where both are Parties to the WHO FCTC), and on this basis be used in interpretation of the agreement. A further alternative is that the Declaration will be viewed as a political instrument that has no formal legal status. It is not possible to predict which of these approaches an arbitral tribunal might take.

III. TOBACCO INDUSTRY EXPLOITATION OF TRADE AND INVESTMENT AGREEMENTS

In their 2001 paper, Bettcher et al. identified how the tobacco industry viewed trade agreements as a means of improving access to foreign markets for imported tobacco products *(114)*. Today, there are at least four primary ways in which trade and investment agreements open up foreign markets to the tobacco industry. Trade and investment agreements can facilitate market access:

- by lowering tariffs;
- through the removal of non-tariff barriers to trade, such as monopolies and regulatory measures;
- by providing a set of legal rules for the tobacco industry to refer to in attempts to resist regulation; and
- through foreign direct investment, which may increase access to the market in which an investment is made as well as access to other markets having preferential trading arrangements with the host State.

This section provides some contemporary case-studies to illustrate how the industry seeks to exploit trade and investment agreements. The case-studies draw upon documents prepared by tobacco companies and other groups that represent their interests. The section is

divided into two parts. Part 1 sets out some examples of the way the industry uses agreements to gain access. Part 2 provides some contemporary examples of the way the industry draws on trade and investment agreements in attempts to resist regulation.

A. Tobacco industry use of trade and investment agreements to access foreign markets

Trade agreements open up and liberalize markets when they require a foreign State to reduce tariffs on the importation of tobacco products. Lower tariffs reduce the costs associated with importing products, thereby increasing the competitiveness of imported products in terms of price. Thus, the tobacco industry has often lobbied trade officials in the hope that these officials would push for lower tariffs on tobacco products in the territory of trading partners. For example, during China's accession to WTO, British American Tobacco lobbied European Union and United States authorities to urge China to lower tariffs on tobacco products as a part of its accession agreement *(115)*.

Trade agreements also require the removal of some non-tariff barriers to trade. For example, in China's WTO accession negotiations, British American Tobacco lobbied European Union and United States authorities to call for the removal of a distribution monopoly and special licensing requirements for the sale of imported tobacco products *(116)*. The fact that trade agreements address non-tariff barriers to trade also creates a window for the industry to lobby trade officials on common tobacco control measures that would not violate the agreements in question. For example, when the office of the United States Trade Representative (USTR) urged Japan to open up its market to United States cigarettes in the 1980s, it also urged the country not to restrict tobacco advertising *(117)*. British American Tobacco also lobbied European Union and United States trade authorities on this point in the context of China's WTO accession *(118)*.

International trade and investment agreements may also facilitate foreign direct investment, which provides another means for tobacco companies to access a foreign market. Where tariffs on importation

of tobacco products remain high, companies may choose to invest directly in a market by locating a manufacturing facility in that market. This circumvents the barriers put in place by tariffs, and makes an investor's products more competitive (in terms of price) in the country hosting the investment. Foreign direct investment can also make an investor's products more competitive in foreign markets with which the host State has preferential trading arrangements, e.g. by virtue of a regional trade agreement or free trade agreement.

1. CASE-STUDY: THE TRANS-PACIFIC PARTNERSHIP NEGOTIATIONS

At the time of writing, a number of Asia-Pacific Economic Cooperation (APEC) Member States are negotiating a new trade and investment agreement, known as the Trans-Pacific Partnership (TPP).[20] In 2009, the United States Trade Representative published a request for comments concerning the proposed agreement. A response by PMI provides some insight into the way the company still lobbies governments with a view to improving market access and limiting regulation abroad. In its general comments, PMI shows its support for trade and investment liberalization by stating:

> As a company heavily engaged in international trade on a constant basis, PMI supports bilateral, plurilateral, and multilateral negotiations that promote freer trade in goods, services and investment; encourage uniform rules of origin; foster harmonization of legitimate, science-based regulations; increase the efficiency of moving goods, services and investment across national borders; and protect investor and intellectual property rights *(119)*.

In its submission, PMI also makes a number of specific comments concerning the coverage of the Trans-Pacific Partnership, restrictions on the use of trademarks and investor protection.

With respect to the coverage of the Partnership, Philip Morris argues that the agreement should be comprehensive and lead to the com-

20 Brunei, Chile, New Zealand and Singapore are already parties to an agreement. Australia, Malaysia, Peru, the United States and Viet Nam are negotiating to join the group on new terms.

plete elimination of tariffs on all goods. The subtext to this submission is that, if they chose to do so, Partnership countries could negotiate an agreement that does not require any additional reductions in tariffs on tobacco products. In order to avoid this possibility, PMI argues that longer phase-out periods and temporary special safeguards can be used as means of mitigating the impact of obligations to remove tariffs on sensitive products (such as tobacco products).

With respect to the protection of trademark rights, PMI states that it:

> is becoming increasingly concerned about government-sponsored initiatives that would effectively cancel or expropriate valuable trademark rights. PMI supports the inclusion of a comprehensive "TRIPs-plus" intellectual property chapter that includes a high standard of protection for trademarks and patents.

The submission details an example of this concern by identifying legislative initiatives in Australia to implement plain packaging of tobacco products, a measure recommended in the guidelines for the implementation of Articles 11 and 13 of the WHO FCTC. PMI argues that:

> by imposing severe restrictions – restrictions tantamount to expropriation – on the use of long-held and extremely valuable intellectual property rights, plain packaging would unduly limit the freedom of commercial speech, significantly restrict competition and breach Australia's obligations under the WTO TRIPs Agreement.[footnote omitted] Given, on the one hand, the lack of evidence that plain packaging will achieve its intended public health objectives [footnote omitted] and, on the other hand, the wide range of effective measures to reduce smoking incidence, plain packaging is neither an appropriate nor proportionate step to address smoking related issues. [footnote omitted]

In essence, PMI submits that the United States Trade Representative should seek strong provisions governing intellectual property in the Trans-Pacific Partnership in order to prevent initiatives such as plain packaging.

With respect to investor protection, PMI argues that the Partnership should include a strong investment chapter, including investor-State dispute settlement permitting foreign investors to bring claims before international arbitral tribunals. In essence, PMI is seeking the inclusion of provisions similar to those that it is invoking in its complaint against Uruguay before the International Centre for Settlement of Investment Disputes. This would expand the ability of the company to bring complaints of this type in countries such as Australia.[21]

Subsequent to the PMI submissions, in April 2011, the Australian Government issued a trade policy statement. It took a step back from investor-State dispute settlement and expressed the Government's intention to avoid agreements that would limit Australia's regulatory autonomy, stating:

> The Gillard Government supports the principle of national treatment – that foreign and domestic businesses are treated equally under the law. However, the Government does not support provisions that would confer greater legal rights on foreign businesses than those available to domestic businesses. Nor will the Government support provisions that would constrain the ability of Australian governments to make laws on social, environmental and economic matters in circumstances where those laws do not discriminate between domestic and foreign businesses. The Government has not and will not accept provisions that limit its capacity to put health warnings or plain packaging requirements on tobacco products or its ability to continue the Pharmaceutical Benefits Scheme.
>
> In the past, Australian Governments have sought the inclusion of investor-State dispute resolution procedures in trade agreements with developing countries at the behest of Australian businesses. The Gillard Government will discontinue this practice. If Australian businesses are concerned about sovereign risk in Australian trading partner countries, they will need to make their own assessments about whether they want to commit to investing in those countries *(120)*.

21 Australia has free trade agreements with investment chapters and bilateral investment treaties with a number of Trans-Pacific Partnership countries. However, Australia's free trade agreement with the United States includes an investment chapter that does not permit investor-State dispute settlement.

Although the Australian Government's position suggests that PMI's lobbying of the United States Trade Representative is unlikely to be successful in respect of plain packaging, the submission concerning the Trans-Pacific Partnership provides a contemporary example of the types of outcome that the tobacco industry pursues through trade and investment agreements. These outcomes include tariff reductions abroad, increased protection of tobacco industry trademarks and the right to bring claims before international arbitral tribunals with a view to resisting regulation. Alongside this strategy, Philip Morris has since brought a claim against Australia under the bilateral investment treaty between Australia and the Hong Kong.

2. USE OF FOREIGN DIRECT INVESTMENT AND STRATEGIC LOCATIONS TO IMPROVE MARKET ACCESS IN ASIA

International investment agreements and free trade agreements can create incentives for foreign investment. In the tobacco context, these agreements can be used to gain improved access to markets in a way not possible from a company's home country. These agreements can also be used for purposes of creating staging points for international litigation.

Preferential trade agreements, such as free trade agreements, offer favourable market access to participating countries. Under the GATT, WTO Members have bound tariff rates that cannot be exceeded. However, WTO Members are also permitted to enter into regional or bilateral agreements. These agreements liberalize substantially all trade between participants, meaning that substantially all tariffs are eliminated between those countries participating in a regional or bilateral agreement. The participating countries receive improved access to one another's markets, primarily in the form of lower tariffs. Goods from the participating countries are likely to receive preferential access in the sense that tariffs for goods from the territory of a participating country will be lower than from the territory of other WTO Members that do not have a similar agreement with the importing country (assuming that the importing country does not apply a tariff rate lower than the tariff ceiling in its bound commitment).

The production of Philip Morris cigarettes in the Philippines by Philip Morris Philippines Manufacturing Inc. (PMPMI) is an example of the way preferential trade agreements can be used to access foreign markets. The Philippines and Thailand are both members of ASEAN and participants in the ASEAN Free Trade Area. Under the WTO Agreement, Thailand is permitted to maintain tariffs on the importation of tobacco products, including cigarettes. At present, Thailand applies an *ad valorem* tariff of 60% for cigarettes from the territory of WTO Members. However, pursuant to agreements governing AFTA, Thailand charges no tariff on the importation of cigarettes from original AFTA Members and charges a 5% *ad valorem* tariff on the importation of cigarettes from new Members *(121)*. Accordingly, cigarettes from the Philippines are treated preferentially when compared with cigarettes from the territory of other States that lack a similar arrangement with Thailand. As discussed above, trade theory would suggest that this preferential access is likely to lower prices, increase competition and stimulate consumption in countries such as Thailand.

Another possible implication of foreign direct investment of the type undertaken in the Philippines is that it will undermine domestic tobacco control efforts by changing the political economy of tobacco control. For example, in 2003 President Arroyo claimed that the inauguration of a PMPMI production facility in the Philippines was proof of investor confidence in her Government *(122)*. Through this claim, the Government of the Philippines linked its success in terms of attracting foreign direct investment directly to the success of PMPMI. Subsequently, the Government of the Philippines supported Philip Morris by bringing the abovementioned WTO claim against Thailand in *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines*.

This dispute also reflects the way foreign direct investment and preferential trade arrangements through free trade agreements may create a staging point for international litigation. More specifically, foreign direct investment of this type can create an incentive for a Government to bring an international claim on behalf of a tobacco company where such an incentive may not previously have existed. Similarly, in the context of investor-State dispute settlement, Philip

Morris has located its assets strategically so as to take advantage of the investment treaties to which states are parties. For example, the Australian Government has argued that Philip Morris (Asia) Ltd only acquired a stake in its Australian subsidiary after it was announced that the Government intended to implement plain packaging. The argument advanced by Australia is that Philip Morris did so for the purpose of bringing the claim in question *(123)*.

B. Tobacco industry invocation of trade and investment agreements in attempts to resist regulation

Tobacco companies often rely on international trade and investment agreements in attempts to resist domestic regulation. For example, the industry argues that many tobacco control measures violate WTO Members' legal obligations and that some measures require the payment of compensation under international investment law.

As the analysis in Part II demonstrated, actual trade or investment law disputes have been quite rare in the context of tobacco control measures that are designed to protect public health. One reason for this is that tobacco companies themselves have no standing to bring WTO claims and will only be able to bring investment claims in limited circumstances where there is jurisdiction under a relevant treaty. Another possible reason is that testing industry arguments in international dispute resolution carries a risk for the industry that those arguments will be dismissed, undermining their use in lobbying.

That said, there has been some litigation. The Philip Morris (Switzerland) claim against Uruguay is one example. However, even this dispute could be viewed as an attempt to convince a government to roll back tobacco control measures. Two aspects of the Request for Arbitration filed by Philip Morris (Switzerland) et al. suggest that the central goal is the softening of tobacco control measures rather than the pursuit of compensation. Firstly, the Request for Arbitration was filed only a few days before President Tabaré Vázquez, a vocal supporter of tobacco control, left office. The timing suggested that the claimants were testing the political commitment to tobacco control of the new Uruguayan Government. Secondly, the primary remedy sought in the Request for Arbitration is an order for the removal of the tobacco control measures rather than compensation.

The incentive for the industry to use international trade or investment agreements in lobbying or litigation is also high where potentially trend-setting measures are at issue. For example, by requiring pack warnings to cover 80% of the surface of a pack and implementing the single presentation requirement, Uruguay went further than any other country had gone before. Thus, the arbitration involving Uruguay could be seen as a means of dissuading other countries from implementing similarly strong measures or delaying such action. The same could be said in the context of plain packaging given that Australia is the first state to implement the measure.

In the case of established measures, there is likely to be less doubt about whether they are lawful. For example, the industry often argues that prohibiting descriptors such as "light" and "mild", which are misleading when used in conjunction with tobacco products, violates the TRIPS Agreement because the descriptors are also registered trademarks. For example, Japan Tobacco International has often argued that prohibiting use of the brand "Mild 7" would violate TRIPS. However, many countries have implemented such measures, giving regulators comfort as they prohibit misleading use of these terms. In a sense, there is strength in numbers, because the fact that many countries have implemented a measure may reinforce the necessity or proportionality of the measure.

The way in which the industry has targeted new potentially trend-setting measures can also be illustrated by case-studies of Australia's move to plain packaging and Canada's experience with restrictions on flavoured tobacco products.

1. CASE-STUDY: AUSTRALIA'S MOVE TO PLAIN PACKAGING

The Australian Government has passed legislation that will require tobacco products to be packaged in plain packaging from December

2012. Under the Tobacco Plain Packaging Act 2011 (Cth), all tobacco products manufactured or packaged in Australia for domestic consumption from 1 October 2012 will be required to be in plain packaging. All tobacco products sold in Australia will be required to be sold in plain packaging by 1 December 2012. The legislation will prohibit tobacco industry logos, brand imagery, colours and promotional text other than brand and variant names in a standard colour, position, font style and size; it will also restrict the use of branding and logos on tobacco products. This initiative provides a useful case-study of the way the tobacco industry invokes trade and investment agreements in its attempts to resist regulation.

The first stage of tobacco industry lobbying occurred in the context of an Australian Preventative Health Taskforce report, which examined, among other things, Australia's regulation of tobacco products. The taskforce, which was composed of expert public health practitioners, was lobbied by the tobacco industry, including on the lawfulness of plain packaging.

The second phase of lobbying came before the Australian Government announced that it would implement plain packaging, when an independent senator introduced the Plain Tobacco Packaging (Removing Branding from Cigarette Packs) Bill 2009 to the Australian Parliament. This bill was referred for a parliamentary inquiry and members of the public were permitted to make submissions. These submissions show the way the tobacco industry rallies chambers of commerce and similar industry groups, libertarian-leaning think tanks, law firms, academics and associations of intellectual property lawyers in its defence. The submissions also illustrate how the industry and its defenders use legal arguments that are selective at best, and at times misleading. These arguments appear to be designed to overwhelm public health policy-makers, who may have limited capacity to engage in legal analysis of international trade and investment law.

Tobacco industry lobbying moved into a new phase after the Australian Government committed publicly to the introduction of plain packaging. The Government released an exposure draft of the legislation and solicited public comments relating to that draft. Australia also

notified other WTO Members of its intention to implement the legislation, triggering discussions in the TBT Committee and TRIPS Council.

(i) Rallying sympathetic actors to the cause

The Australian Parliament held two separate inquiries into the plain packaging legislation in 2011. Both inquiries received submissions from a wide variety of sources *(124)*. In the specific context of international trade and investment law, Philip Morris Limited presented documents prepared by law firms and academics. British American Tobacco Australia and Imperial Tobacco Australia Limited chose to address the trade and investment law issues in their own respective submissions.

In the first inquiry, at least four submissions on international trade and investment law were received from bodies devoted to libertarian causes or the protection of free enterprise, many of which are based in Washington, DC. Industry groups based in the United States and other countries, associations of intellectual property lawyers and a foreign government made other submissions.

In the first inquiry, 17 submissions argued that Australia would violate either international trade or international investment laws if it were to implement plain packaging. Although the focus of this discussion is on tobacco industry tactics, it is also worth noting that a number of submissions argued the contrary view that plain packaging is lawful under Australia's international commitments.

(ii) Selective use of legal authorities

It is not the purpose of this paper to address in detail the legal merits of the submissions made *(125,126)*. Nonetheless, the submissions do not reflect impartial attempts to weigh the legal issues and advise on the merits. Rather, legal authorities are used in a selective manner, with authorities favourable to the industry's interests being cited and unfavourable authorities being ignored. This use of law in industry lobbying is well documented. For example, Physicians for a Smoke-Free Canada have documented the way tobacco industry documents reveal the industry's own impression that agreements such as TRIPS

do not offer protection from measures such as plain packaging and how, despite this, the industry has made assertions to the contrary in its lobbying *(127)*.

With few exceptions, the submissions made to the Australian Government which opposed the plain packaging measure neglect to mention key principles that confirm the extent of Australia's regulatory autonomy. These principles include the following:

- trademark rights (as provided for under international law) are negative rights that permit a right-holder to exclude third parties from use of a trademark in certain circumstances, but are not a positive right to use of a registered trademark;
- the TRIPS Agreement contains flexibilities that permit WTO Members to regulate in the public interest, as recognized in the Doha Declaration;
- Article 8 of the TRIPS Agreement sets out the principles to be used in interpretation of the Agreement, including the principle that WTO Members may adopt measures necessary to protect public health; and
- that there is a distinction under international investment agreements between indirect expropriation and non-compensable government regulation, such as exercise of police powers.

(iii) Lobbying in the TBT Committee and TRIPS Council

At the time of writing, a number of WTO Members have taken up arguments made by the tobacco industry and presented them either in the WTO TRIPS Council or the TBT Committee. At the meeting of the TRIPS Council on 7 June 2011, the Dominican Republic expressed concern that plain packaging would violate Article 20 of the TRIPS Agreement. The Dominican Republic was supported by a number of WTO Members, including some that are Parties to the WHO FCTC *(128)*. These sentiments were again expressed at the meetings of the TRIPS Council on 24-25 October 2011 and 28-29 February 2012 *(129)*.

Similar arguments were made in the TBT Committee meetings of 15–16 June 2011 and 10-11 November 2011, where a number of WTO Members suggested that plain packaging is more trade-restrictive than necessary to achieve Australia's objective. It is quite clear from the minutes of the June meeting that Members were taking issue with plain packaging per se, and not with anything specific to Australia's implementation of plain packaging *(130)*.

The objections to plain packaging made in the TRIPS Council and TBT Committee are largely similar in substance to those raised by tobacco companies in their submissions to the Australian Government. Of importance from the perspective of WTO law is the Dominican Republic's argument that there is not sufficient scientific evidence to suggest that plain packaging will be an effective means of tobacco control *(131)*.

Australia responded to this concern by highlighting the fact that the measure had been recommended by a committee of Australia's leading public health experts and by pointing to peer-reviewed experimental research suggesting that the measure would be an effective means of achieving the objectives pursued *(132)*. The Australian plain packaging measure has received support from a number of WTO Members including Norway, Canada, Uruguay and New Zealand.

WHO was also represented at the TBT Committee meeting, as was the Convention Secretariat of the WHO FCTC. WHO explained the impact of tobacco on public health and highlighted WHO FCTC provisions and guidelines addressing plain packaging. WHO also stressed that peer-reviewed research suggests that plain packaging "would increase the impact of health warnings, reduce false and misleading messages that deceive customers into believing that some tobacco products were safer than others, and reduce the attractiveness of products to segments of the population specifically targeted by tobacco companies" *(133)*.

As was noted above, Ukraine and Honduras have each made a formal Request for Consultations with Australia, which is the first step in WTO dispute settlement.

2. CASE-STUDY: CANADA'S EXPERIENCE WITH RESTRICTIONS ON FLAVOURED TOBACCO PRODUCTS

Canada's experience with the imposition of restrictions on flavoured tobacco products provides another example of attempts by the tobac-

co industry to resist regulation through the invocation of international trade and investment agreements. This case-study also highlights how the industry rallies sympathetic actors to its cause. In addition, the case-study illustrates how international trade and investment law arguments can spill over into WHO FCTC activities.

In 2009, the Canadian Parliament passed an Act to Amend the Tobacco Act, which is also known as the Cracking Down on Tobacco Marketing Aimed at Youth Act. The Act came into force in July 2010. Among other things, the Act prohibits use of specific additives, including some flavours in cigarettes, little cigars and blunt wraps. This prohibition includes flavourings that are used to enhance the taste of American-style blended cigarettes that incorporate burley, which form less than 1% of the Canadian tobacco market. As is the case with measures implemented in the United States, there is an exemption for menthol-flavoured products. Health Canada has argued that menthol-flavoured cigarettes are already established in the market, and that the new measure is targeted at new products designed to entice children to initiate tobacco use *(134)*.

International trade and investment laws have been referred to in political debates at three levels. Firstly, various entities lobbied the Canadian Government before enactment of the Act, arguing that it would result in violation of Canada's international trade and investment commitments. These entities included tobacco companies, foreign governments and elected officials in other countries *(135)*.

Secondly, the legislation was discussed in the TBT Committee. It will be recalled from the earlier discussion of the TBT Agreement that the TBT Committee provides a forum for discussion of technical regulations. In this context, WTO Members have questioned the scientific basis for the Canadian measures and have asserted that the measures are more trade-restrictive than necessary to achieve Canada's regulatory goal *(136)*. Objections have been raised primarily by countries where burley is grown. At the time of writing, the discussions in the TBT Committee appear to be continuing, although no WTO Member has filed a formal request for consultations with Canada, which is the first step in dispute settlement.

Thirdly, controversy over the Canadian measures was reflected in negotiations during the fourth session of the Conference of the Parties to the WHO FCTC. At this session, the Parties adopted partial guidelines for the implementation of Articles 9 and 10 of the Convention. One issue considered in these negotiations was the guidance which should be given in respect of the regulation of flavourings in tobacco products. The draft guidelines presented to the Conference of the Parties suggested that Parties should either prohibit or restrict ingredients that may be used to increase palatability, including flavouring substances. During discussion of the passage, at least one Party drew upon international trade law in arguing against inclusion of the provision.

For its part, Canada has maintained the measures and argued that they comply with WTO law. Canada's actions provide an example for other States in a number of respects. The Government was prepared to answer the arguments raised in industry lobbying because it had taken legal advice prior to enactment of the legislation. The Canadian Government was also well placed to identify how the measure would affect imported and domestic products because the Government compiles basic information about the make-up of the market. The Government was thus able to determine that American-style blended cigarettes made up less than 1% of the domestic market.

The Canadian experience of restricting flavoured tobacco products, like the Australian experience with plain packaging, is continuing. Both episodes illustrate the lengths to which the industry will go in resisting new tobacco control measures as well as the way it uses trade and investment law in doing so.

IV. CHALLENGES FOR TOBACCO CONTROL POSED BY TRADE AND INVESTMENT AGREEMENTS

As discussed earlier, trade and investment agreements pose two general risks for tobacco control. One risk is that trade and investment in the tobacco sector will lead to demand stimulation and associated increases in morbidity and mortality. At the domestic level, this risk creates a challenge of policy coordination and coherence. Another risk discussed earlier was the risk that trade and investment agreements will restrict domestic regulatory autonomy. At the domestic level, there are various challenges created by this risk, including ensuring that legal capacity is sufficient to analyse the legal issues and ensuring that political will is not eroded by spurious claims. These challenges, and some of the approaches adopted to address them, are examined below.

A. Challenges in policy coordination

Governments face challenges in coordinating their public health policies with their trade and investment policies. While one government department may be pursuing a strong tobacco control policy, another

may be preparing to liberalize trade in tobacco, accept foreign direct investment in the tobacco sector or even promote the export of tobacco products. The general difficulties of policy coordination and coherence are well established at the international level *(137)*. This is also true in the context of trade and health, as is reflected in resolution WHA59.26, described earlier, and in a body of academic literature *(138)*. Ultimately, failure to coordinate policies makes it difficult to maximize the potential economic benefits of trade and investment while protecting against negative health impacts.

The fact that trade negotiations are usually shielded from public view while they are under way is a central challenge for policy coordination. The primary justification given for this secrecy is that it insulates governments from the protectionist demands of their local industries *(139)*. One criticism of this approach is that it undermines the democratic legitimacy of the trade regime and makes it difficult for civil society to have an input into what may be important public policy choices. Another more critical perspective on the status quo is that it actually has the reverse effect of that intended because it privileges a group of "insiders", including powerful industry groups which have access to government and elected officials, to the exclusion of a broader cross-section of society.

Another challenge for policy coordination lies in the barriers that exist between the health community, on the one hand, and the trade and investment communities, on the other. As a general rule, health officials have limited capacity to engage with trade and investment officials on questions of trade policy. Similarly, it is not common for trade or investment officials to have training in public health, limiting their capacity to identify the potential implications of their actions for public health. These gaps among policy-makers are most evident in the way in which some WTO Members have objected to tobacco control measures at the WTO, despite their support for the same measures in the WHO FCTC context.

In the tobacco control context, examples of failure to coordinate trade and investment policy with health policies could include the following actions by governments:

- opposing adoption of tobacco control measures that have been endorsed in other international forums, such as the by WHO FCTC Conference of the Parties;
- lowering tariffs on tobacco products without using other measures, such as taxes, to negate the impact of lower tariffs on prices;
- making specific commitments to foreign investors that could undermine the ability of the government to implement its public health agenda; and
- entering international investment agreements that fail to clarify the meaning of key provisions, such as those invoked by Philip Morris against Uruguay.

There is no perfect approach to policy coordination that works in all circumstances. The most prominent approach is the Sustainability Impact Assessment model used by the European Commission *(140)*. This approach uses external experts to conduct *ex ante* impact assessments of the economic, social and environmental implications of a potential trade agreement. The assessments examine the potential impact on European Union countries as well as on trading partners. Equally, some commentators have been critical of this process, arguing that tobacco companies have sought to ensure it is business oriented.[141]

Other commentators have called for broader changes that would build health engagement and capacity and assert health goals in trade policy. These proposals would require efforts by a variety of actors (including governments) to strengthen the evidence base on the links between trade and health. These proposals also suggest that governments should ensure that health representatives are involved in trade policy-making, e.g. through inclusion in trade delegations and the development of interdepartmental committees *(142)*.

Others still have called not so much for policy coordination, but for the assertion of health interests over economic interests, through the exclusion of tobacco products from the scope of trade agreements. This approach has, however, been criticized on the basis that it would undermine economic efficiency, protect the tobacco industries of developed countries and permit discriminatory regulatory measures in the absence of a health rationale justifying discrimination *(143,144)*.

It is not the purpose of this paper to evaluate the merits of different approaches to enhancing policy coherence. Nonetheless, it is possible to observe that the tobacco control community must monitor and engage with trade and investment policy in order to meet the challenges posed for public health.

B. Legal capacity constraints and the erosion of political will

It is well established that many countries, particularly developing countries, have very limited internal capacity in the areas of international trade and investment law. These capacity constraints limit the ability of governments to identify their international trade and investment obligations as they apply to public health measures.

A number of negative consequences may flow from legal capacity constraints. These include industry arguments appearing more credible in the eyes of government than they may actually be, and increased costs associated with tobacco control because of legal fees. These consequences may affect the political will necessary for the implementation of public health measures. For example, the prospect of litigation alters the cost–benefit analysis of implementing a tobacco control measure by increasing the up-front costs in terms of legal fees and time spent by government officials. Financial and other risks associated with losing a claim also increase the potential cost of a government policy. It also stands to reason that, wherever the legal risks associated with a tobacco control measure are significant in the policy choices a government makes, the capacity to assess those risks will be important.

A number of different approaches are used to address the limited trade law capacity of governments. The WTO Secretariat has provided extensive trade-related technical assistance to developing and least-developed countries *(145)*. Similarly, the United Nations Conference on Trade and Development has provided significant support for developing countries on international investment issues. Some WTO Members have also established the Advisory Centre on WTO Law, which provides advice and representation for developing countries and least-developed-countries *(146)*. Retaining private counsel is another approach used by some States. For example, since becoming a WTO Member in 2001, China has often retained private counsel and required them to collaborate with domestic lawyers in an attempt both to remedy limited capacity and to ensure that domestic legal capacity is built up *(147)*.

However, there are limitations on the successes of capacity building. Capacity building can be more difficult in the context of international investment law because the field lacks a unifying multilateral regime like the WTO. Internal capacity building in respect of trade and health may also be of limited interest to governments managing small economies where trade policy is not a priority. Additionally, even where trade and investment law capacity is strong, the fact that domestic trade and investment lawyers are not ordinarily familiar with the rationales underlying tobacco control measures, or the policy choices involved, may undermine their ability to give sound advice.

These limitations suggest that the merits of new initiatives may be worth exploring. One approach is to follow a capacity-building model and attempt to ensure that States have some standing capacity to address the issues. In this context, initiatives worth exploring might include training public health lawyers on the interaction of trade law with health, and sensitizing trade and investment lawyers to tobacco control and public health issues. Another approach would be to create a mechanism that provides information and assistance to States on a case-by-case basis.