

**The Union**

International Union Against  
Tuberculosis and Lung Disease  
*Health solutions for the poor*

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**International Trade Agreements and their  
Impact on Tobacco Control  
A Discussion Paper  
Department for Tobacco Control  
The International Union Against Tuberculosis and  
Lung Disease**

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## Abbreviations

BIT	bilateral investment treaties
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CESCR	Committee on Economic, Social and Cultural Rights
FDI	foreign direct investment
FET	fair and equitable treatment
FTA	free trade agreement
GATT	General Agreement on Tariff and Trade
ICC	International Chamber of Commerce
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICSID	International Centre for Settlement of Investment Disputes
IIA	International investment agreement
ISDS	investor state dispute settlement
MFN	most favoured nation
PMI	Philip Morris International
PTIA	Preferential Trade and Investment Agreement
TBT	technical barriers to trade
TPPA	Trans Pacific Partnership Agreement
TRIMS	Agreement on Trade Related Investment Measures
TRIPS	Trade-Related Aspects of Intellectual Property Rights
UNICTRAL	United Nations Commission on International Trade Law
WHO	World Health Organization
WHO FCTC	The WHO Framework Convention on Tobacco Control
WTO	World Trade Organization

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## 1.0 Position Statement on International Trade Agreements and their Impact on Tobacco Control

### 1.1 Summary of trade and investment law

Trade liberalisation is generally a domestic and foreign policy decision made by countries to reduce or remove trade barriers that impede the free flow of goods or services between countries. The decision to liberalise trade is justified on various grounds. Among other things, trade liberalisation is considered more economically efficient (in net terms) and is thought to promote predictability and stability for traders. Countries enter into international trade treaties, committing to liberalise their markets and place limits on their ability to constrain trade (**section 2.1**). The key international trade instruments relevant to tobacco control include: agreements under the World Trade Organization (WTO), free trade agreements (FTAs) and custom unions and international investment agreements (IIAs).

Accession to the WTO enables countries to enjoy the benefits that Members grant each other but also increases the number and breadth of a country's trade obligations under WTO Agreements (**section 2.2**). The key WTO Agreements relevant to tobacco control are: the General Agreement on Tariffs and Trade 1994 (GATT 1994) (**section 3.3.1**); the Agreement on Technical Barriers to Trade (TBT Agreement) (**section 3.3.2**); and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) (**section 3.3.3**). Core principles enshrined in these Agreements are: Members must not discriminate to favour domestic production (other than through tariffs) and regulations should not be more trade restrictive than necessary to achieve a legitimate objective, such as protection of human health. The WTO also provides a platform for multilateral negotiations for further liberalisation (**section 2.2**).

Countries can enter into trade agreements with commitments above and beyond those made at WTO through FTAs and customs unions (**section 2.3**). FTAs eliminate practically all restrictive regulations on trade between the signatory parties. Customs unions form a more profound trade integration between the signatory States. They seek to form a single territory for customs purposes between the signatory States that applies substantially the same regulations to the importation of goods from territories not forming a part of the union.

Other important international trade instruments with implications for tobacco control are international investment agreements (IIAs) (**section 2.4**). IIAs offer investors increased security for their investments under international law when they invest in foreign countries. Among other things, IIAs require parties to provide fair and equitable treatment, and full compensation in cases of nationalisation or expropriation of foreign investments.

By entering into these instruments, countries bind themselves to the agreed obligations and can be held liable under international law if they fail to comply with those obligations. The WTO provides a set of dispute settlement mechanisms, including mediation and appeals process, whereby Members can bring claims concerning implementation of a WTO covered agreement by another Member (**section 2.2**). In the case of FTAs and customs unions, international tribunals and arbitrators are often called upon to resolve substantial disputes (**section 2.3**). In most IIAs, investors can bring claims against host countries under investor-state dispute settlement (ISDS) provisions. These claims are brought under arbitral rules established by, inter alia, the International Centre for Settlement of Investment Disputes (ICSID), the United Nations Commission on International Trade Law (UNCITRAL) and the International Chamber of Commerce (ICC) (**sections 2.4 and 3.5**).

## 1.2 Implications of trade and investment law for tobacco control

### Trade Liberalisation and Tobacco Control

As discussed in **section 3.2**, an extensive body of research consistent with trade theory suggests that tobacco trade liberalisation can lead to: an increase in competition in domestic markets; a decrease in the price of tobacco products; and (in the case of countries permitting such activities) an increase in advertising and promotion expenditures by both international and domestic tobacco companies – outcomes that have all been shown to lead to increased tobacco use and harms.

It is now widely accepted that there is a risk that trade liberalisation and foreign direct investment may stimulate competition in the tobacco sector and increase consumer demand (depending on the circumstances of different countries). However, as illustrated in the case of *Thailand – Cigarettes (section 3.3.1)*, this stimulation can be combated through implementation of other measures such as tax increases, smoking bans in public buildings, disclosure of ingredients and requirements for prominent health warnings on cigarette packets.

*What this means for governments:*

- *Governments should assess the likely implications of trade liberalisation on tobacco use and harms when negotiating and signing trade and investment agreements.*
- *Governments should ensure that domestic tobacco control policy and law is strengthened in anticipation of any moves towards trade liberalisation. This may include implementing measures such as increasing domestic tobacco taxes, bans on tobacco advertising, promotion and sponsorship and substantive tobacco packaging and labelling requirements that effectively convey tobacco harms and means of quitting tobacco use.*
- *Some commentators advocate for the total exclusion of tobacco from future trade and investment agreements as a solution to mitigating trade liberalisation's effects on tobacco use and harms.*

### Tobacco Control under WHO FCTC and International Trade Law

Countries that are parties to different treaties may find themselves having divergent obligations under different treaties. As discussed in **section 3.1**, the WHO Framework Convention on Tobacco Control (WHO FCTC) has been widely adopted and has the objective to protect present and future generations from the devastating consequences of tobacco consumption and exposure. It obliges Parties to implement a range of tobacco control measures including price and tax measures, regulation of the contents of tobacco products and product disclosures, packaging and labelling measures, and tobacco advertising, promotion and sponsorship restrictions.

The question has been posed whether countries implementing tobacco control measures under the WHO FCTC may find themselves breaching their obligations under international trade law. Generally speaking, WTO panels and arbitral tribunals are unlikely to find a conflict to exist. Rather, the prevailing approach has been to use treaties such as the WHO FCTC in interpretation of trade and investment commitments to help determine whether trade or investment commitments have been violated.

*What this means for governments:*

- *Tobacco control measures specified under the WHO FCTC and its Guidelines are likely to be used in interpreting other trade and investment instruments to determine whether a particular instrument has been violated when tobacco control measures have been adopted; and*
- *Governments should be confident that provided they act in good faith and in line with basic principles of good policy-making (see policy considerations discussed below), they can freely implement tobacco control measures specified under the WHO FCTC without violating their trade and investment commitments.*

#### WTO Agreements and tobacco control

WTO Agreements provide Members with the freedom to accommodate health objectives underlying tobacco regulation (**section 3.3**). However, disputes such as the *US – Clove Cigarettes* (where restrictions on flavoured tobacco products that prohibit clove cigarettes but not menthol cigarettes in the United States were found to be discriminatory), and the *Thailand – Cigarettes* (where the panel found taxation measures and non-discriminatory bans on tobacco advertising to be reasonably available alternatives to the licensing system implemented by Thailand), highlight the need for governments to take many policy considerations into account when implementing a tobacco control measure.

*In order to use the flexibility provided by WTO Agreements when adopting tobacco control measures, whether explicitly proposed under the WHO FCTC or not, governments need to ensure that:*

- *the WTO principles of non-discrimination (both most favoured nation and national treatment) are not frustrated;*
- *there is a legitimate objective and clear purpose in introducing the measure;*
- *the proposed measure is a reasonable and proportional response to a defined problem or policy objective;*
- *the proposed measure is the least trade-restrictive means of achieving the policy objective; and*
- *there is a strong evidential basis and justification for the proposed measure.*

#### FTAs and customs union and tobacco control

FTAs and customs unions, which are negotiated and entered into outside the WTO platform, impose various additional obligations on parties that go above and beyond the WTO law, such as chapters governing investment protection and ‘TRIPS-plus’ obligations, which require higher levels of intellectual property protection than TRIPS (**section 3.4**).

Depending on the terms agreed, the FTAs and customs union could reduce the regulatory freedom available to Parties, including through terms governing intellectual property rights protection, investor protection and regulatory coherence. This paper uses the leaked draft chapters of the Trans-Pacific-Partnership Agreement as a case study to highlight how some of its terms have the potential to reduce the regulatory freedom available to its Parties.

Furthermore, unlike WTO law, which only permits WTO Members to bring claims in relation to a dispute, FTAs and customs unions may permit claims to be brought by tobacco companies in certain situations, such as for violation of an investment chapter. This is highlighted by Philip Morris’s claim, challenging Norway’s tobacco display ban under European Economic Area Agreement.

In theory, these risks might be reduced through tobacco-specific terms being built into the treaties during negotiation. In reality, however, this approach carries risks of its own that could make things worse rather than better.

Anti-tobacco groups and some academics strongly oppose the development of future FTAs and customs unions on the basis that they are open to abusive litigation, there are several difficulties with the dispute mechanisms that are in place, and that litigation can create regulatory chill and can impose significant costs on governments exercising their rights. They also criticise the fact that the negotiations of such agreements often take place in secrecy.

*In order to limit the risk of being challenged under future investment agreements, governments need to ensure that:*

- *they negotiate for provisions in these agreements that reinforce their ability to implement tobacco control measures that they think are necessary to protect public health; and*
- *they empower their public health communities to become more involved in trade and health issues at all levels of governance, such as by engaging with health authorities and groups during negotiations.*

### International Investment Agreements and tobacco control

IAs tend to contain various provisions that protect investors from expropriation and unfair treatment, and provide for compensation from the government where such treatment occurs (**section 3.5**). Recent challenges under investment treaties such as Philip Morris's challenge regarding Australia's plain packaging legislation and Uruguayan packaging and labelling measures highlight the legal constraints IAs impose on governments. However, under IAs, governments generally retain their sovereign powers to protect health, without incurring an obligation to compensate an investor for expropriation. To ensure that such powers can be exercised, there are a number of steps governments can take to minimise uncertainty and protect themselves from claims from the tobacco industry.

*What this means for governments:*

- *Given that IAs create an incentive for investment by providing additional legal protection, and may give tobacco companies new legal rights, governments should consider excluding investment in the tobacco industry from IAs altogether.*
- *Governments should ensure that future IAs:*
  - *reinforce the government's regulatory autonomy to protect public health in key provisions, particularly those dealing with expropriation and fair and equitable treatment;*
  - *prevent spurious or vexatious claims, for example by providing a procedural means to challenge such claims early in the arbitral process and providing for the award of costs against Claimants with failed claims; and*
  - *provide for transparency in the arbitral process.*
- *Governments need to manage their risk under existing IAs, such as by:*
  - *ensuring that tobacco control measures are not discriminatory, are not designed to cause a foreign investor to abandon its property, and are proportional to their goals;*
  - *ensuring that new commitments or representations are not made to investors, such as commitments or representations that suggest the investor may avoid future regulations;*

- *managing the establishment of foreign investment in the tobacco sector in line with existing commitments, for example by refusing to permit new foreign investment or attaching conditions to it (in line with existing commitments)*
- *Governments should also seek to clarify the scope of existing IIAs, particularly the scope of provisions that deal with expropriation and fair and equitable treatment (section 3.5), as a means of minimising the possibility of a dispute arising out of uncertainty in future. This may be done through:*
  - *re-negotiation of existing agreements;*
  - *the parties issuing joint declarations concerning interpretation or exchange of side-letters to the same effect; or*
  - *failing these, taking unilateral action, such as issuing unilateral statements of interpretation, or withdrawing from existing agreements.*

### The tobacco industry and its use of trade and investment agreements

As discussed in **section 4.1**, the tobacco industry uses various other methods to exploit trade and investment agreements in order to resist tobacco control. Export-oriented tobacco companies often lobby trade officials during trade and investment agreement negotiations to push for lower tariffs on tobacco products. Furthermore, the mere threat of a legal action under the tobacco industry's putative rights within international trade and investment agreements can bring about a regulatory chill for governments considering making a regulatory decision to pass a particular tobacco control measure.

This chilling effect is increased in developing countries where there may be limited capacity to assess the area of international trade and investment law and tobacco control. Additionally, commentators have pointed out that even where governments do have a valid and active defence against a tobacco industry claim, litigation costs can be very high.

*What this means for governments:*

- *The tobacco industry will continue to go to great lengths to impede tobacco control using international trade law.*
- *Governments should recognise that tobacco industry challenges are deliberately designed to deter other countries from introducing new tobacco control measures.*
- *Governments should proceed with being party to international trade agreements if they are prepared to strengthen and protect their domestic regulations from the inevitable challenges from the tobacco industry.*

### **1.3 Conclusion**

This paper provides background information on international trade and investment law (**section 2**) and identifies the issues and challenges that international trade and investment agreements pose for tobacco control (**section 3**). It also sets out current debates between international trade law and tobacco control (**section 4**).

The discussion in **section 3** highlights that without careful legal and policy assessment, international trade and investment agreements have the potential to hinder the implementation of tobacco control measures. Although WTO law provides flexibilities for its Members to implement tobacco



control measures, there are various policy considerations that Members must take into account to ensure that they do not violate their obligations under WTO Agreements. International trade instruments such as FTAs, customs unions and IIAs that are negotiated outside the WTO platform have the potential to go above and beyond the WTO obligations. Governments therefore need to be able to negotiate for provisions in these agreements that reinforce their ability to implement tobacco control measures that they think are necessary to protect public health.

The entrance of the WHO FCTC, recent WTO decisions and other trends in international trade and investment law have helped to clarify the extent of autonomy which governments retain to implement tobacco control measures without breaching their obligations under international trade and investment agreements. **Section 4** sets out that despite these clarifications, the tobacco industry continues to use international trade and investment law to impede tobacco control. Export oriented tobacco firms continue to lobby trade officials during trade and investment agreement negotiations to push for lower tariffs on tobacco products. This is accompanied by the tobacco industry bringing about legal challenges even when governments have a valid defence for implementing particular tobacco control measures. Such legal challenges are skilfully designed to deter other countries from making a regulatory decision to pass a particular tobacco control measure. Defending such litigation is very costly and this can heighten the 'regulatory chill' posed on the governments.

Governments should be aware of the implications international trade and investment agreements have on their ability to implement tobacco control measures. They should assess their willingness to be bound by the processes and limitations that are inherent to international trade and investment agreements. They should also judge their willingness to develop domestic tobacco control regulations despite knowing the implication is that it will be costly, time consuming and risky under the international trade and investment treaties they are part of. The tobacco industry will go to great lengths to resist tobacco control measures using international trade law and the governments should only proceed with being party to such agreements if they are prepared to strengthen and protect their domestic regulations from the inevitable challenges from the tobacco industry.

## 2.0 Context

This part of the paper outlines international trade and investment law. In particular it outlines and briefly describes the main treaties and agreements that are directly relevant to tobacco control.

### 2.1 Trade Liberalisation and International Trade Law

Simply speaking, trade liberalisation refers to the reduction or complete removal of trade barriers that impede the free flow of goods or services between countries. It may include lowering or removing tariffs (import duties) as well as lowering or removing non-tariff barriers to trade, which can include quotas, import licensing requirements and regulations. Trade liberalisation is closely related to globalisation, which refers to the free flow of information, ideas, technology and goods and services across international borders.<sup>1</sup>

Trade liberalisation is often a domestic and foreign policy decision made by a sovereign State. International trade treaties specify the ways in which State Parties may restrict trade. An international treaty is “an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.”<sup>2</sup> In other words, international treaties are a means by which countries as parties assume obligations among themselves, and can be held liable under international law if they fail to comply with the agreed obligations. The WTO provides a set of dispute settlement mechanisms, including a mediation and appeals processes. In the case of trade and investment treaties outside of the WTO, international tribunals and arbitrators are often called upon to resolve substantial disputes over treaty interpretations.

Depending on the country in question, international treaties may either be incorporated directly into national law (the monist system), or may require an act of incorporation, such as through legislation (the dualist system). Most countries with a civil law system are monist, whereas most countries with a common law system are dualist. In some countries, such as the United States, the Philippines, Brazil, Mexico and Argentina a dualist approach prevails, but some international treaties may be self-executing, where merely becoming a party results in direct incorporation into domestic law.

International treaties can be bilateral, between two States or entities, or multilateral, between multiple States or entities. They can originate from distinct objectives, public policy considerations and public, commercial and citizen constituencies. International treaties concerning trade have a variety of objectives. Open trade is considered more economically efficient (in net terms), meaning that trade agreements are sometimes justified on these grounds.<sup>3</sup> However, generally speaking, the political economy of trade is such that governments seek to assist export-oriented firms in attempts to access foreign markets and simultaneously protect import-sensitive firms against foreign competition. In this context, trade agreements are sometimes justified on grounds that they constrain protectionist behaviour and promote predictability and stability for traders.<sup>4</sup> In reality, the

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<sup>1</sup> Investor Glossary. “Globalization.” Accessed June 15, 2014. <http://www.investorglossary.com/globalization.htm>.

<sup>2</sup> Article 2(1)(a), *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331, available at: <http://www.refworld.org/docid/3ae6b3a10.html> [accessed June 15, 2014].

<sup>3</sup> For a critical overview of the literature see Bhala, Raj. *International trade law: Interdisciplinary theory and practice*. LexisNexis, 2008, p. 201 – 256.

<sup>4</sup> For this and other claims see for example, World Trade Organization. “10 Benefits of the WTO Trading System”. Accessed July 11, 2014. [http://www.wto.org/english/thewto\\_e/whatis\\_e/10ben\\_e/10b00\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/10ben_e/10b00_e.htm).

net economic gains from trade are often questionable and the terms of trade agreements are shaped by the bargaining power of the State parties and domestic constituents.

- Trade liberalisation is generally a domestic and foreign policy decision made by countries to reduce or remove trade barriers that impede free flow of goods or services between countries.
- The decision to liberalise trade is justified on various grounds. Among other things, trade liberalisation is considered more economically efficient (in net terms) and is thought to promote predictability and stability for traders.
- Countries enter into international trade treaties to commit to liberalise their markets and place limits on their ability to constrain trade.
- Countries can be held liable under international law if they fail to comply with the agreed obligations under international trade treaties.

## 2.2 World Trade Organization

The World Trade Organization (WTO) is a result of the 1986-94 Uruguay Round of trade negotiations and is now the primary inter-governmental organisation governing international trade.<sup>5</sup> The WTO facilitates the implementation, administration and operation of the WTO Agreement, which is an umbrella agreement that includes various trade agreements, including the General Agreement on Tariffs and Trade 1994. Although lately many bilateral and multilateral treaties have been going beyond the minimal WTO requirements, the WTO continues to provide a platform for Members to conduct negotiations for further liberalisation of trade.

The WTO also establishes a system of mandatory dispute settlement whereby one Member can bring a claim concerning implementation of a WTO covered agreement by another Member.<sup>6</sup> Disputes that are not resolved through consultations may be adjudicated by an independent panel. A decision of a panel may also be appealed to the Appellate Body.<sup>7</sup> If a panel finds that a Member has breached an agreement, the Member will be ordered to bring its policy into conformity with the rules. If it is not practically possible for the Member to conform, it must offer compensation to other countries by lowering trade barriers on other goods. If this is not done, then the State bringing in the claim, can receive authorisation from the WTO to impose higher duties on goods coming from the offending State for its failure to comply.<sup>8</sup>

By becoming a member of the WTO, a country enjoys the benefits that Members grant each other.<sup>9</sup> However, membership into the WTO simultaneously increases the number and scope of a country's trade obligations.<sup>10</sup> In particular, WTO membership can impose certain obligations and procedural

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<sup>5</sup> Marrakesh Agreement Establishing the World Trade Organization, April 15, 1994, The Legal Texts: The Result of the Uruguay Round of Multilateral Trade Negotiations 4 (1999), 33 I.L.M. 1144(1994) [hereinafter WTO Agreement] Accessed July 14, 2014 [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/fact1\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact1_e.htm).

<sup>6</sup> World Trade Organization. "Understanding the WTO: Settling Disputes". Accessed June 9, 2014. [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/disp1\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm).

<sup>7</sup> Ibid.

<sup>8</sup> Ibid.

<sup>9</sup> World Trade Organization. "The 10 Misunderstandings: 9. weak forced to join?" Accessed June 9, 2014. [http://www.wto.org/english/thewto\\_e/whatis\\_e/10mis\\_e/10m09\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/10mis_e/10m09_e.htm)

<sup>10</sup> World Trade Organization. "Understanding the WTO: BASICS". Accessed June 9, 2014. [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/fact1\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact1_e.htm).

requirements on governments when they consider the adoption of regulatory and fiscal measures, including in the area of tobacco control. It is therefore important to consider the WTO's governing principles and agreements.

- Membership into the WTO enables countries to enjoy the benefits that Members grant each other but also increases the number and breadth of a country's trade obligations under WTO Agreements.
- The WTO provides dispute settlement mechanisms whereby Members can bring claims concerning implementation of a WTO covered agreement by another Member.
- The WTO also provides a platform for its Members to negotiate trade liberalisation.

### 2.2.1 WTO Agreements

There are a large number of trade agreements overseen by the WTO. The main WTO Agreements cited in relation to their potential impact on the ability of WTO Members' ability to readily adopt and implement domestic tobacco control measures are set out below.

#### General Agreement on Tariffs and Trade 1994 (GATT)

Prior to the creation of WTO, the GATT 1947, a multilateral trade agreement, provided the rules for the international trade system. When the WTO was formed at the conclusion of the Uruguay Round, the GATT 1947 was incorporated with minor amendments as the GATT 1994. The GATT 1994 continues to be an important international instrument and is relevant to many tobacco control measures. Its central obligations are set out below.

##### ○ Bound tariffs

As part of the Uruguay Round, WTO Members agreed upper limits on tariffs applied to the importation of goods, including tobacco products. Under Article II of the GATT 1994, each WTO Member is prohibited from charging tariffs in excess of the bound rates set out in its Schedule of Concessions. These Schedules are unique to each Member, meaning that the bound limits on tariffs differ from Member to Member.<sup>11</sup>

##### ○ Most-favoured-nation treatment (MFN treatment)

Article I of the GATT 1994 requires Members to extend the treatment equivalent to 'most favoured nation' to all its trading partners. If a benefit, privilege or advantage (such as charging a lower tariff on a good) is granted to one country, then it must be granted to all WTO Members. In general, this principle means that every time a Member lowers (or introduces) a trade barrier or opens up a market, it has to do so with respect to the goods of all its fellow WTO Members.<sup>12</sup> However, exemptions to this obligation exist in the context of free trade agreements and customs unions

<sup>11</sup> General Agreement on Tariffs and Trade 1994, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, The Legal Texts: The Result of the Uruguay Round of Multilateral Trade Negotiations 17 (1999), 1867 U.N.T.S. 197, 33 I.L.M. 1153 (1994) [hereinafter GATT 1994]. Accessed July 15, 2014. [http://www.wto.org/english/docs\\_e/legal\\_e/gatt47\\_e.pdf](http://www.wto.org/english/docs_e/legal_e/gatt47_e.pdf).

<sup>12</sup> WTO Agreements and Public Health: A joint Study by the WHO and the WTO Secretariat, World Health Organization and World Trade Organization, (2002), p. 29, available at [www.wto.org/english/res\\_e/booksp\\_e/who\\_wto\\_e.pdf](http://www.wto.org/english/res_e/booksp_e/who_wto_e.pdf) [accessed June 9, 2014].

(section 2.3). Under such arrangements, it is permissible to provide preferential treatment to imports from the territory of other Parties.<sup>13</sup>

- **National treatment**

This principle, embodied in Article III, sets out that a Member must treat imported goods no less favourably than domestic goods, in terms of competitive opportunities in the Member's market. This applies with respect to both taxation and regulation, and prohibits discrimination either through the form or effect of a measure.<sup>14</sup>

- **General exceptions**

The central obligations referred to above are subject to the general exceptions set out in Article XX. These exceptions, which are discussed further in **section 3**, include an exception for measures that, among other things, are 'necessary' to protect human life or health. Whether a measure is necessary or not is determined by various "necessity tests" that aim to balance the two goals of: preserving the freedom of Members to set and achieve regulatory objectives through measures of their own choosing, and discouraging Members from adopting or maintaining measures that unduly restrict trade.<sup>15</sup>

### **Agreement on Trade-Related Investment Measures (TRIMS Agreement)**

This agreement clarifies that some of the core GATT principles apply to investment measures that affect trade in goods and prohibits measures that discriminate between imported and exported goods and/or create import or export restrictions.<sup>16</sup> It recognises that certain investment measures such as requirements for local content and trade balancing rules that have traditionally been used to both promote the interests of domestic industries and combat restrictive business practices, can have trade-restrictive effects. It also specifies that no Member shall apply a measure that is prohibited by the provisions of GATT Article III (national treatment) or Article XI (quantitative restrictions). For example, a local content requirement on tobacco products, imposed in a non-discriminatory manner on domestic and foreign enterprises is inconsistent with the TRIMS Agreement because it involves discriminatory treatment of imported products in favour of domestic products.<sup>17</sup> <sup>18</sup> By restricting preference of domestic industries, this agreement enables an easier operation for foreign industries in foreign markets. The implementation and operation of these rules is monitored by the TRIMS Committee. The TRIMS Committee also allows Member the opportunity to consult on any relevant matters.<sup>19</sup>

After many countries rejected the idea of negotiating a multilateral agreement on investment, the TRIMS Agreement was negotiated partly to clarify that this did not mean all investment measures were beyond the scope of WTO law.

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<sup>13</sup> GATT 1994. Accessed July 15, 2014. [http://www.wto.org/english/docs\\_e/legal\\_e/gatt47\\_e.pdf](http://www.wto.org/english/docs_e/legal_e/gatt47_e.pdf).

<sup>14</sup> WTO Agreements and Public Health, p. 29.

<sup>15</sup> International Centre for Trade and Sustainable Development. "World Trade Organization: Working Party on Domestic Regulation". Accessed June 9, 2014. <http://www.ictsd.org/downloads/2008/04/nctest.pdf>.

<sup>16</sup> Agreement on Trade-Related Investment Measures, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations 143 (1999), 1868 U.N.T.S. 186 [hereinafter TRIMS Agreement].

<sup>17</sup> "Chapter 12: Trade-Related Investment Measures and Investment." In *Making global trade work for people*. London: Earthscan, 2003, pp 235-254. Accessed July 22, 2014. [http://www.networkideas.org/doc/mar2003/UNDP\\_Trade.pdf](http://www.networkideas.org/doc/mar2003/UNDP_Trade.pdf)

<sup>18</sup> World Trade Organization. "Agreement on Trade-Related Investment Measures (TRIMS)". Accessed June 21, 2014. [http://www.wto.org/english/tratop\\_e/trims\\_e.htm](http://www.wto.org/english/tratop_e/trims_e.htm).

<sup>19</sup> *Ibid.*

## Agreement on Technical Barriers to Trade (TBT Agreement)

The TBT Agreement aims to ensure that technical regulations and standards do not create unnecessary obstacles to trade. The TBT Agreement establishes two basic principles: non-discrimination, and necessity.<sup>20</sup>

### ○ Non-discrimination

Article 2.1 prohibits discriminatory technical regulations (national treatment and Most-favoured-nation treatment). However, where treatment affecting the conditions of competition between one product category and another is based solely on a legitimate regulatory objective, a technical regulation will not violate Article 2.1.<sup>21</sup>

### ○ Necessity

Article 2.2 establishes a necessity test, but in this case it is an obligation to ensure that technical regulations are not more trade restrictive than necessary to achieve a legitimate objective.<sup>22</sup> This obligation is supplemented by rules governing international standards, which are discussed below.

## Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement)

The TRIPS Agreement aims to protect and enforce intellectual property rights to contribute to the promotion of technological innovation and to the transfer and dissemination of technology, for the mutual advantage of producers and users.<sup>23</sup> The agreement obliges WTO Members to ensure minimum standards of protection for intellectual property rights in their territories.<sup>24</sup>

In November 2001 the Doha Declaration on the TRIPS Agreement was adopted by the international community, representing the expression of governments' commitment to ensuring that the rule-based trading system is compatible with public health interests.<sup>25</sup>

### 2.2.2 WTO and health

As will be discussed in **section 3**, WTO Agreements relevant to tobacco control recognise that there are circumstances where Members may wish to subordinate trade-related considerations to other legitimate policy objectives and constraints, like health. Furthermore, WTO jurisprudence, on several occasions, has confirmed that WTO Members have the right to decide the level of health protection they consider to be appropriate.<sup>26</sup>

Each of the WTO covered agreements mentioned above has a different approach with respect to health. The GATT 1994 includes a general exception for measures necessary to protect human life or health that Members can invoke in the face of a claim that another GATT 1994 provision has been violated. The TBT Agreement includes an obligation to ensure that technical regulations are not

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<sup>20</sup> Agreement on Technical Barriers to Trade, 1868 U.N.T.S. 120. [hereinafter TBT Agreement]. Available at [http://www.wto.org/english/docs\\_e/legal\\_e/17-tbt.pdf](http://www.wto.org/english/docs_e/legal_e/17-tbt.pdf) (accessed July 15, 2014).

<sup>21</sup> Ibid.

<sup>22</sup> Ibid.

<sup>23</sup> Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), 1869 U.N.T.S. 299. [hereinafter TRIPS Agreement]. Available at [http://www.wto.org/english/docs\\_e/legal\\_e/27-trips.pdf](http://www.wto.org/english/docs_e/legal_e/27-trips.pdf) (accessed July 15, 2014)

<sup>24</sup> Ibid.

<sup>25</sup> World Trade Organization. "Declaration on the TRIPS agreement and public health. Accessed July 15, 2014. [http://www.wto.org/english/thewto\\_e/minist\\_e/min01\\_e/mindecl\\_trips\\_e.htm](http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_trips_e.htm).

<sup>26</sup> WTO Agreements and Public Health, p. 31.

more trade restrictive than necessary. The TRIPS Agreement includes ‘flexibilities’ that are intended to permit WTO Members to implement TRIPS in line with health objectives.

## 2.3 Free Trade Agreements and Customs Unions

Under WTO law, it is permissible for WTO Members to enter into trade agreements outside of the WTO system. This is permissible in the case of free trade agreements (FTAs) and customs unions. In each case, countries make commitments above and beyond those they have made at the WTO.

FTAs require elimination of practically all restrictive regulations of commerce between the territories involved. For example, an FTA might require complete elimination of tariffs on all goods. FTAs often establish rules that go further than WTO law. This includes rules governing investment protection and intellectual property rights.

An example of a large regional multilateral FTA currently under negotiation is the Trans Pacific Partnership Agreement (TPPA). This agreement is likely to involve eleven Asian and Pacific-rim countries. There has been considerable analysis of the possible impact of this agreement on the ability of signatory States to implement public health and in particular tobacco free policies and laws. This is considered in **section 3** of this report.

Customs unions involve the formation of a single customs territory for customs purposes between the signatory parties. Territories of a customs union apply substantially the same regulations to the importation of goods from territories not forming part of the union. For example, customs unions usually have a common external tariff applied to goods imported to any territory in the union. Substantially all restrictive regulations of commerce are eliminated for trade between the territories involved (within the union). The European Union is a prominent example of a customs union.

International tribunals and arbitrators are often called upon to resolve disputes. Unlike WTO law, which only permits WTO Members to bring challenges, FTAs and customs unions tend to have more flexible requirements that sometimes permit foreign investors, including those in the tobacco industry, to bring claims. The implications of this are discussed in **sections 3.4** and **4**.

Increasingly, countries participating in large FTAs are seeking to expand those agreements into customs unions. The Association of Southeast Asian Nations (ASEAN) provides a prominent example, with plans for a common market to come into effect from 2015.

- Countries can enter into trade agreements with commitments above and beyond those made at WTO. This can be done through FTAs and customs unions.
- FTAs eliminate practically all restrictive regulations on trade between the signatory parties.
- Customs unions seek to form a single customs territory between the signatory States that applies substantially the same regulations to the importation of goods from territories not forming a part of the union.

## 2.4 International Investment Agreements

International Investment Agreements (IIAs) are a type of international agreement that are often found in the form of investment chapters in FTAs and as separate Bilateral Investment Treaties (BITs) and Preferential Trade and Investment Agreements (PTIAs).<sup>27</sup> They offer foreign investors increased security and certainty for their capital and intellectual property investments under international law when they invest or set up a business in other countries.<sup>28</sup> This is usually achieved through a core set of features included in virtually all IIAs. By entering such agreements, countries commit themselves to adhere to specific standards on the treatment of foreign investments and investors within their territories. These include: fair and equitable treatment or a minimum standard of treatment; national treatment; most favoured nation treatment; and just, adequate, and full compensation in cases of nationalisation or expropriation.<sup>29</sup> It is argued by some that such investments benefit the host country by developing its economy.<sup>30</sup>

BITs usually cover investments by companies or individuals of one country in the territory of its treaty partner. PTIAs are treaties among countries on cooperation in economic and trade areas. They usually cover a broader set of issues and are concluded at bilateral or regional levels.

These agreements specify procedures for the resolution of disputes and tend to allow foreign investors to bring claims against the host countries through international arbitration, taking disputes out of the host country's domestic courts. This is achieved through provisions on investor-state dispute settlement (ISDS), which give investors the right to submit a case to an international arbitral tribunal if a dispute with the host country arises. Common venues through which arbitration is sought are the International Centre for Settlement of Investment Disputes (ICSID)<sup>31</sup> the United Nations Commission on International Trade Law (UNCITRAL)<sup>32</sup> and the International Chamber of Commerce (ICC)<sup>33</sup>.

- IIAs offer traders increased security for their investments under international law when they invest in foreign countries.
- Among other things, IIAs require signatory countries to provide fair and equitable treatment and full compensation in cases of nationalisation or expropriation to foreign investments.
- Investors can bring claims against host countries through international arbitration.

<sup>27</sup> See generally Dolzer, Rudolf, and Christoph Schreuer. *Principles of international investment law*. Oxford University Press, 2012.

<sup>28</sup> Organisation for Economic Co-operation and Development. *Reviewing the benefits of foreign direct investment in economic development*. Foreign Direct Investment for Development . OECD Publishing, 2002.

<sup>29</sup> Sy, Deborah. "Warning: Investment Agreements Are Dangerous to Your Health." *Geo. Wash. Int'l L. Rev.* 43 (2011): 625.

<sup>30</sup> Organisation for Economic Co-operation and Development. *Reviewing the benefits of foreign direct investment in economic development*.

<sup>31</sup> ICSID is an autonomous, intergovernmental organisation under the ICSID Convention. It provides facilities for arbitration of international disputes between the contracting States and private persons, natural or juridical. See *About ICSID*, International Centre for Settlement of Investment Disputes, [https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC694\\_En&caseId=C8](https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC694_En&caseId=C8).

<sup>32</sup> UNCITRAL is a legal body with universal membership established under the United Nations General Assembly. Its purpose is to "promote the progressive harmonisation and unification of international trade law. See *About UNCITRAL*, [http://www.uncitral.org/uncitral/en/about\\_us.html](http://www.uncitral.org/uncitral/en/about_us.html).

<sup>33</sup> ICC is a business organisation founded in 1919. It provides dispute resolution services for individuals, businesses, States and international organisations. See *ICC Dispute Resolution Services* <http://www.iccwbo.org/about-icc/organisation/dispute-resolution-services/>.



## 2.5 Agriculture related treaties

Agriculture treaties also have a direct impact on public health as they address trade issues involving primary and processed agricultural products, including tobacco and tobacco products. Examples of agriculture treaties include the Agreement on Agriculture<sup>34</sup> and the Application of Sanitary and Phytosanitary Measures Agreement (SPS Agreement)<sup>35</sup>.

The Agreement on Agriculture addresses (1) the reduction of tariff and non-tariff barriers to agricultural trade, and (2) the reduction or prohibition of export and domestic subsidies on agriculture products. However, it also contains specific rules for countries that want to restrict trade to ensure food safety and the protection of human life from plant- or animal-carried diseases or the spread of pests.

The SPS Agreement is related to the Agreement on Agriculture and aims to (1) recognise the sovereign right of Members to determine the level of health protection they deem appropriate; and (2) ensure that a sanitary or phytosanitary requirement does not represent an unnecessary, arbitrary, scientifically unjustifiable, or disguised restriction on international trade. In order to achieve its objective, the SPS Agreement encourages Members to use international standards, guidelines and recommendations where they exist. Members may adopt SPS measures which result in higher levels of health protection – or measures aimed at health concerns for which international standards do not exist – provided that they are scientifically justified. It should be noted, however, that the SPS agreement has a limited application, such that it is unlikely to apply to the vast majority of tobacco control measures. The exception to this conclusion is for tobacco control measures that address foods or beverages, such as nicotine infused water or confectionary.<sup>36</sup>

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<sup>34</sup> Agreement on Agriculture, 1867 U.N.T.S. 410.

<sup>35</sup> Agreement on the Application of Sanitary and Phytosanitary Measures, 1867 U.N.T.S. 493. Available at [http://www.wto.org/english/tratop\\_e/sps\\_e/spsagr\\_e.htm](http://www.wto.org/english/tratop_e/sps_e/spsagr_e.htm). (Accessed July 15, 2014).

<sup>36</sup> McGrady, Benn. *Trade and public health: The WTO, tobacco, alcohol, and diet*, p.175 - 178

### 3.0 The implications of international treaties on tobacco control

This part of the paper explores various issues and challenges that international trade and investment pose for tobacco control

#### 3.1 The WHO FCTC and its position alongside other international law

As mentioned in **section 2.1**, different treaties have different purposes and objectives. For this reason, State parties to different treaties may find themselves having divergent obligations under different treaties.<sup>37</sup> This raises the question of whether trade and investment agreements impose obligations that conflict with the WHO Framework Convention on Tobacco Control (WHO FCTC) obligations, and if so, how such conflicts are resolved. So far the prevailing approach has generally been to use treaties such as the WHO FCTC in interpretation of trade and investment commitments to assist in determining whether trade or investment commitments have been violated.<sup>38</sup>

The WHO FCTC was adopted by the World Health Assembly in 2003 and entered into force in 2005 to address the challenges relating to comprehensive tobacco control policies lying outside national borders. The WHO FCTC currently has 178 Parties, making it one of the most extensively adopted treaties in the United Nations system. In its foreword, the WHO FCTC is described as a response to globalisation of the tobacco epidemic, which has been facilitated through “a variety of complex factors with cross-border effects, including trade liberalisation and direct foreign investment”.<sup>39</sup> This is reflected in the preamble to the Convention, in which the Parties express their determination “to give priority to their rights to protect public health.”<sup>40</sup>

With this in mind, the WHO FCTC has three primary impacts on trade and investment issues.

First, Article 5.3 obliges Parties to protect their public health policies with respect to tobacco control from commercial and other vested interests of the tobacco industry in accordance with national law.<sup>41</sup> Guidelines for implementation of Article 5.3 stress that Parties should limit their dealings with the tobacco industry and avoid providing the industry with incentives for investment.<sup>42</sup> Second, the WHO FCTC may be used in interpreting international trade and investment agreements.<sup>43</sup> Third, the WHO FCTC establishes rules governing conflicts between it and other treaties.<sup>44</sup> Its purpose includes facilitating multilateral cooperation and action at the global level to address transnational tobacco control strategies based on empirical evidence to reduce demand for tobacco. These policies include increase in tobacco taxes and prices, restrictions on advertising and promotion, use of mass media and counter-advertising, design of warning labels and packaging, clean indoor air policies, and

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<sup>37</sup> Kelsey, Jane. "International Trade Law and Tobacco Control." *Trade and Investment Law Issues Relating to Proposed Tobacco Control Policies to Achieve an Essentially Smokefree Aotearoa New Zealand By 2025* (2012), p. 11.

<sup>38</sup> See for discussion, McGrady, Benn. *Trade and public health: The WTO, tobacco, alcohol, and diet*. Cambridge University Press, 2011, p. 38-42.

<sup>39</sup> FCTC, WHO. "Parties to the WHO framework convention on tobacco control." *World Health Organization website* (2012). Accessed July 15, 2014. <http://whqlibdoc.who.int/publications/2003/9241591013.pdf?ua=1>.

<sup>40</sup> Ibid.

<sup>41</sup> Ibid.

<sup>42</sup> Article 5.3, FCTC, WHO. "Parties to the WHO framework convention on tobacco control." *World Health Organization website* (2012). Accessed July 15, 2014. [http://www.who.int/fctc/guidelines/article\\_5\\_3.pdf?ua=1](http://www.who.int/fctc/guidelines/article_5_3.pdf?ua=1).

<sup>43</sup> See for discussion McGrady, Benn. *Trade and public health: The WTO, tobacco, alcohol, and diet*, p. 38-42.

<sup>44</sup> Article 2 FCTC, WHO. "Parties to the WHO framework convention on tobacco control." *World Health Organization website* (2012). Accessed July 15, 2014. <http://whqlibdoc.who.int/publications/2003/9241591013.pdf?ua=1>.

treatment of tobacco dependence.<sup>45</sup> Therefore, for the purposes of this paper, it is important to examine the potential conflicts between the WHO FCTC and WTO Agreements.

International jurisprudence around precedence of international law is generally covered under the Vienna Convention on the Law of Treaties. Article 30 of the Vienna Convention states that where there is an express statement in a particular treaty regarding its relationship with another treaty, that statement will be given effect.<sup>46</sup> It also states that in the event of inconsistency between treaties, the treaty later in time prevails.<sup>47</sup>

Article 2 of the WHO FCTC governs its relations with other agreements and legal instruments and states:<sup>48</sup>

‘2.1 In order to better protect human health, Parties are encouraged to implement measures beyond those required by this convention and its protocols, and nothing in these instruments shall prevent a party from imposing stricter requirements that are consistent with their provisions and are in accordance with international law.

2.2 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 shall communicate such agreements to the Conference of the Parties through the Secretariat.’

Article 2 remains silent on the issue of the relationship between the WHO FCTC and other instruments or agreements concluded prior to it. Therefore it leaves any conflict to be determined by rules of customary international law (as reflected in the Vienna Convention). Article 2.2 provides that the WHO FCTC does not affect the rights of Parties to enter into agreements afterwards, as long as they are compatible with the WHO FCTC. This acts to resolve a possible conflict between the WHO FCTC and a later treaty in favour of the WHO FCTC.<sup>49</sup>

WTO Agreements on the other hand tend to contain provisions governing conflicts between WTO-covered agreements, rather than express language governing relations between the WTO Agreements and other treaties like the WHO FCTC.<sup>50</sup> Considering these provisions, any conflict between a WTO Agreement and the WHO FCTC is governed by the terms of the WHO FCTC and customary rules, such as those in Article 30 of the Vienna Convention.<sup>51</sup>

A 2002 report jointly developed by the WTO and the WHO explored proposed provisions of the then draft WHO FCTC in relation to WTO agreements and concluded that none of the proposed provisions of the WHO FCTC were inherently WTO-inconsistent.<sup>52</sup> The report concluded that many of the restrictions called for by some of the WHO FCTC provisions might well be determined to be “necessary” for health protection under WTO rules.<sup>53</sup> Furthermore, in 2010, 171 Parties to the WHO

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<sup>45</sup> World Health Organization. “Tobacco Free Initiative”. Accessed July 15, 2014. <http://www.who.int/tobacco/framework/background/en/>.

<sup>46</sup> Article 30(2). *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331, available at: <http://www.refworld.org/docid/3ae6b3a10.html> [accessed June 15, 2014].

<sup>47</sup> *Ibid.*

<sup>48</sup> Article 2 FCTC, WHO. “Parties to the WHO framework convention on tobacco control.” *World Health Organization website* (2012). Accessed July 15, 2014. <http://whqlibdoc.who.int/publications/2003/9241591013.pdf?ua=1>.

<sup>49</sup> McGrady, Benn. *Trade and public health: The WTO, tobacco, alcohol, and diet*.

<sup>50</sup> *Ibid.*

<sup>51</sup> *Ibid.*

<sup>52</sup> *WTO Agreements and Public Health*, p. 76-77.

<sup>53</sup> *WTO Agreements and Public Health*, p. 77.

FCTC adopted the the Punta del Este Declaration on the implementation of the WHO FCTC,<sup>54</sup> to address the relationship between the WHO FCTC and international trade and investment law. Arising from the context of Uruguay and Philip Morris dispute (discussed in **section 3.4**), the declaration reinforces the flexibility available to countries when regulating tobacco products for public health interests.

Although whether the WHO FCTC prevails over other treaties in the event of conflict is an obvious question to ask, the reality in practice is that WTO panels and arbitral tribunals are unlikely to find a conflict to exist. Rather, the prevailing approach is to use treaties such as the WHO FCTC in interpretation of trade and investment commitments to assist in determining whether trade or investment commitments have been violated.<sup>55</sup> The WTO dispute of *US – Clove Cigarettes* (discussed in **section 3.2.2**) provides an example of this. In this dispute, the WTO panel and Appellate Body relied on the WHO FCTC to draw the conclusion that the US ban on clove flavoured cigarettes was not more trade restrictive than necessary to protect human health under Article 2.2 of the TBT Agreement.

This document discusses the tobacco control measures that the WHO FCTC obliges Parties to implement and what governments can do to achieve these measures alongside their obligations under international trade law.

- The WHO FCTC has been widely adopted and its objective is to protect present and future generations from the devastating consequences of tobacco consumption and exposure.
- The WHO FCTC and its guidelines oblige Parties to implement a range of tobacco control measures including price and tax measures, regulation of the contents of tobacco products and product disclosures, packaging and labelling measures, and tobacco advertising, promotion and sponsorship restrictions.
- Although whether the WHO FCTC prevails over other treaties in the event of conflict is an obvious question to ask, the reality in practice is that WTO panels and arbitral tribunals are unlikely to find a conflict to exist.
- Rather, the prevailing approach is to use treaties such as the WHO FCTC in interpretation of trade and investment commitments to assist in determining whether trade or investment commitments have been violated.

### **3.2 Trade liberalisation and globalisation and its impact on tobacco control**

As mentioned in **Section 2**, trade liberalisation involves the reduction or complete removal of barriers to trade between countries. It is closely linked with globalisation which is the free flow of information, ideas, technology and goods and services across international borders. One of the prominent tobacco control measures under the WHO FCTC is to reduce demand through price and tax measures (Article 6).

The impact of trade liberalisation and globalisation on tobacco control has been examined extensively and there is a common consensus among experts that trade liberalisation in countries

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<sup>54</sup> Punta del Este Declaration on the Implementation of the WHO Framework Convention on Tobacco Control, Conference of the Parties to the WHO Framework Convention on Tobacco Control, fourth session, Punta del Este, Uruguay, 6 December 2010, FCTC/COP/4/DIV/6.

<sup>55</sup> McGrady, Benn. *Trade and public health: The WTO, tobacco, alcohol, and diet*, p. 38-42.

with traditionally closed markets may increase consumption of tobacco.<sup>56 57 58 59 60</sup> It has been noted that tobacco trade liberalisation has the following effects:

- Increase in competition in domestic markets;
- Possible price reductions of tobacco products as savings from reduced tariffs are passed on to consumers, or due to increased competition; and
- In the case of countries permitting such activities, increases in advertising and promotion expenditures by international companies (to gain a foothold) and by domestic producers (to protect their market shares).<sup>61 62</sup>

The impact of lower prices and higher advertising expenditures is an increased demand and consumption of tobacco.<sup>63</sup> The entry of new firms into markets partly due to trade liberalisation may also see targeting of previously untapped markets such as women and children.<sup>64</sup>

It is important to note that a recent piece of research suggests that there is no clear-cut link between trade liberalisation and an increase in tobacco consumption.<sup>65</sup> It suggests that trade liberalisation has mixed effects on tobacco product affordability, consumption and regulation. The authors argue that tobacco industry investments are likely to play a much larger role than trade and trade policy in shaping tobacco control outcomes, including affordability, consumption and regulation. This school of thought suggests that taking political challenges into consideration, instead of attacking trade liberalisation broadly, tobacco control proponents should consider focusing more attention on discrete trade policy issues that appear to have potentially the largest effects on public health, including investor-state dispute settlement and increased intellectual property protections.<sup>66</sup>

The tobacco industry has a long history of using trade agreements to expand into new markets. This is illustrated by the case study below.

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<sup>56</sup> WTO Agreements and Public Health, p. 71-73.

<sup>57</sup> Chaloupka, Frank J., and Adit Laixuthai. *US trade policy and cigarette smoking in Asia*. No. w5543. National bureau of economic research, 1996.

<sup>58</sup> Hsieh, Chee-Ruey, Teh Wei Hu, and Chien-Fu Jeff Lin. "The demand for cigarettes in Taiwan: domestic versus imported cigarettes." *Contemporary Economic Policy* 17, no. 2 (1999): 223-234.

<sup>59</sup> Depken, Craig A. "The effects of advertising restrictions on cigarette prices: evidence from OECD countries." *Applied Economics Letters* 6, no. 5 (1999): 307-309.

<sup>60</sup> Taylor, Allyn, Frank J. Chaloupka, Emmanuel Guindon, and Michaelyn Corbett. "The impact of trade liberalisation on tobacco consumption." *Tobacco control in developing countries* (2000): 343-64.

<sup>61</sup> Ibid.

<sup>62</sup> WTO Agreements and Public Health, p. 71.

<sup>63</sup> Taylor, Allyn, Frank J. Chaloupka, Emmanuel Guindon, and Michaelyn Corbett. "The impact of trade liberalisation on tobacco consumption."

<sup>64</sup> World Health Organization. "Confronting the tobacco epidemic in a new era of trade and investment liberalisation." *Geneva, Switzerland: World Health Organization* (2012).

<sup>65</sup> Drope, Jeffrey, and Jenina Joy Chavez. "Complexities at the intersection of tobacco control and trade liberalisation: evidence from Southeast Asia." *Tobacco control* (2014): tobaccocontrol-2013.

<sup>66</sup> Ibid.

### Case Study

In the 1980s and 1990s, there was a decrease in tobacco consumption in many high-income countries. This decrease was accompanied by an increase in tobacco consumption in developing countries. The increase in tobacco consumption in developing countries was largely a consequence of transnational tobacco companies (TTCs) making their way into the open markets (reduced tariffs) of developing countries over the 1980s and 1990s.<sup>67</sup>

An example of this was seen following international trade agreements between the USA and several Asian countries in the 1980s. During this time, a demand for tobacco was stimulated in these countries for an initial period following aggressive marketing efforts by the TTCs.<sup>68</sup> Similar trends have been observed in high growth markets of Latin America and Eastern Europe, where TTCs have been able to take advantage of trade liberalisation to compete with domestically manufactured tobacco products. Moreover, there is evidence indicating that the effect of such marketing on increased tobacco consumption is greater in the low-and middle-income countries.<sup>69</sup>

- An extensive body of research links trade liberalisation and globalisation with increased consumption of tobacco in markets that had traditionally been effectively closed to competition from imported products.
- Other researchers argue that the increase in consumption is not a consequence of trade liberalisation in general, but a consequence of tobacco industry investments.
- There is a general consensus that there is a risk that trade liberalisation and foreign direct investment may stimulate competition in the tobacco sector and increase consumer demand (depending on the circumstances).
- Governments may rely on this general consensus as they go about making policy specific to their own circumstances.
- Some commentators advocate for the total exclusion of tobacco from future trade and investment agreements as a solution to mitigating trade liberalisation's effects on tobacco use and harms. This proposed solution is discussed in **section 4** along with other approaches mooted by those concerned about the impact of trade liberalisation on tobacco control.

## 3.3 Challenges under WTO Agreements

### 3.3.1 Tariff reduction & GATT 1994

It is well documented that higher taxes on tobacco products are often passed on to consumers, contributing to an increase in consumer price. Increases in tobacco prices tend to result in lower consumption and prevalence of smoking, including among youth.<sup>70 71</sup> Article 6 of the WHO FCTC

<sup>67</sup> WTO Agreements and Public Health, p. 72-73.

<sup>68</sup> Ibid.

<sup>69</sup> Ibid., p. 72.

<sup>70</sup> The World Bank. *Curbing the Epidemic: Governments and the Economics of Tobacco Control*. Series: Development in Practice. Washington DC: The World Bank, 1999.

obliges Parties to recognise that price and tax measures are an 'effective and important means of reducing tobacco consumption [particularly for] young persons'. However, raising tariffs runs counter to the general goal of trade liberalisation and to one of the key objectives of WTO agreements, which is to reduce tariffs and eliminate non-tariff barriers to trade.<sup>72</sup> A number of multilateral, regional and bilateral agreements include commitments to reduce tariffs including those on tobacco products. This does not prevent governments from applying non-discriminatory internal taxes, such as excise taxes, and certain other measures which they may consider appropriate to safeguard public health.<sup>73</sup> More specifically, the primary purpose of a tariff is to protect domestic industry from foreign competition and not to increase the retail price of all goods in a given product category.

As mentioned in **section 2.2.1** GATT 1994 relates to trade in goods and is relevant to many tobacco control measures governments may consider. A two-stage analysis is necessary to determine whether a measure complies with the GATT 1994. These stages are:

- 1) Whether any GATT 1994 prohibitions have been breached.
- 2) If a breach is established, can a WTO Member invoke an exception so as to justify the breach?

Therefore, in the event that a tobacco control measure introduced by a State breaches a GATT prohibition, the State introducing the measure may seek to invoke an exception. For example, if the effect of a measure is to discriminate in favour of domestic producers contrary to Article III:4 of the GATT (see the example from *US – Clove Cigarettes* in section 3.2.2), a Member might seek to rely on the Article XX(b) exception.

Analysis under Article XX(b) proceeds usually in front of a panel. This is outlined in the diagram below adopted from four steps identified by McGrady & Minhas in *Confronting the Tobacco Epidemic in a New Era of Trade and Investment Liberalisation*<sup>74</sup>:

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<sup>71</sup> Slater, Sandy J., Frank J. Chaloupka, Melanie Wakefield, Lloyd D. Johnston, and Patrick M. O'Malley. "The impact of retail cigarette marketing practices on youth smoking uptake." *Archives of pediatrics & adolescent medicine* 161, no. 5 (2007): 440-445.

<sup>72</sup> WTO Agreements and Public Health, p. 72.

<sup>73</sup> In this respect, Article III:2 of the GATT imposes a national treatment obligation with respect to taxes.

<sup>74</sup> World Health Organization, and WHO Tobacco Free Initiative. *Confronting the tobacco epidemic in a new era of trade and investment liberalisation*. Geneva, Switzerland: World Health Organization, 2012, p. 29-37.

Does the measure fall within a range of policies considered to *protect human health*?

- Does a risk to human health exist?
- If yes, is the policy goal underlying the measure to reduce that risk?

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*.

- How important is the regulatory goal?
- To what extent does the measure contribute to achievement of the regulatory goal? For this, the Member introducing the measure must prove a genuine relationship of ends and means in that the measure brings about a material contribution to the achievement of the goal.
- How trade-restrictive is this measure? For this, the panel will consider how the measure violates the GAIT and whether this results in a complete ban on importation or some less trade-restrictive outcome.

Are less trade-restrictive measures reasonably available?

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

Is the measure applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries, or a disguised restriction upon trade?

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



Since the formation of the WTO and the clarification of Article XX(b) through dispute settlement, there has not been a good example of a dispute in which a tobacco control measure has been scrutinised under Article XX(b). Nonetheless, disputes such as *EC – Asbestos*<sup>75</sup>, *Brazil – Retreaded Tyres*<sup>76</sup> and *US – Clove Cigarettes*<sup>77</sup> suggest that WTO Members retain a significant degree of regulatory autonomy to implement tobacco control measures.

Prior to the formation of the WTO, the application of Article XX(b) to tobacco control measures was tested in *Thailand – Cigarettes*.

#### **Case study: Thailand cigarette case**

The GATT 1947 dispute with respect to the *Thailand - Cigarette Case* provides a useful example of the implications of international trade treaties on tobacco control for individual countries.

In 1966, Thailand implemented a licensing system that effectively prohibited the importation of cigarettes and other tobacco products but authorised the sale of domestic cigarettes produced by the Thai tobacco monopoly. Thailand argued that its import restrictions were part of a comprehensive policy to control tobacco use to protect human health. In 1989, the United States complained that the import restrictions were inconsistent with the General Agreement on Tariffs and Trade (GATT).

The GATT panel found that the import restrictions were inconsistent with Article XI:1, which prohibits quantitative restrictions on importation of goods. Thailand sought to defend the import restrictions under Article XX(b), but the panel found they were not justified.<sup>78</sup> The panel reasoned that taxation measures and non-discriminatory bans on tobacco advertising were reasonably available alternatives to the maintenance of the licensing system.

As a result Thailand had to lift its import ban because this could not be justified on health grounds so long as the sale of domestic cigarettes was allowed.

Initially, this opening of the domestic market resulted in an increase in cigarette consumption, however, later this also served to prompt Thailand in developing and strengthening its national tobacco control measures.<sup>79</sup> After this ruling, Thailand passed significant tobacco control laws to increase taxes, banning smoking in public buildings, requirements for disclosure of ingredients, and requirements for prominent health warnings on cigarette packages. As a result, smoking prevalence declined in the mid and late 1990s.<sup>80</sup>

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<sup>75</sup> In the *EC – Asbestos* dispute, Canada alleged that measures imposed by France, in relation to the ban on imports of goods containing asbestos, violate various WTO Agreements, including TBT, SPS Agreement and the GATT 1994. The Panel and the Appellate Body concluded that asbestos presents a serious risk to human health and the objective pursued by France to ban asbestos was both vital and important. For further discussion see: [http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds135\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds135_e.htm).

<sup>76</sup> In the *Retreaded Tyres* dispute, Brazil successfully proved that the ban on imported tyres, although in violation of GATT, was nevertheless necessary to protect human, animal or plant life or health, against the risks arising from the accumulation of waste tyres. For further discussion see: [http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds332\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds332_e.htm).

<sup>77</sup> Discussed further in **section 3.3.2**.

<sup>78</sup> GATT Panel Report, *Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes*, DS10/R, adopted 7 November 1990, BISD 37S/200.

<sup>79</sup> WTO Agreements and Public Health, p. 73.

<sup>80</sup> Ibid.

- GATT 1994, like many other bilateral and multilateral agreements contains an exception for measures, inter alia, necessary to protect human life or health.
- However, the exception can only be invoked for a measure if the measure is least trade-restrictive (and in the absence of other least trade-restrictive measure that can achieve the same regulatory goal), and the same burden is put on domestic producers.
- Therefore, justified and evidence-based tobacco control measures, if uniformly applied to domestic and international producers, are likely to be consistent with the GATT (and the TBT Agreement) as long as they are least trade-restrictive measures or other least trade restrictive measure cannot achieve the same regulatory goal.

### 3.3.2 Technical barriers to trade

Other prominent measures under the WHO FCTC include regulation of the contents of tobacco products and packaging and labelling measures (Articles 10 and 11). The WTO Agreement on Technical Barriers to Trade (TBT Agreement) prevents governments from finding other ways to restrict trade once they have removed import quotas and lowered their tariffs. 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 include packaging and labelling measures and product regulations, such as restrictions on flavoured tobacco products. For example, Australia's plain tobacco packaging law is currently being challenged by five WTO Members, including under Articles 2.1 and 2.2 of the TBT Agreement.

The four main principles for TBT Agreement most relevant to tobacco control are outlined in the table below.<sup>81 82</sup>

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<sup>81</sup> Confronting the tobacco epidemic in a new era of trade and investment liberalisation, p. 34-35.

<sup>82</sup> World Trade Organization. "SPS Agreement Training Module: Chapter 9 Health and Other WTO Agreements". Accessed July 15, 2014. [http://www.wto.org/english/tratop\\_e/sps\\_e/sps\\_agreement\\_cbt\\_e/c9s3p1\\_e.htm](http://www.wto.org/english/tratop_e/sps_e/sps_agreement_cbt_e/c9s3p1_e.htm).

<p>Non-discrimination between 'like' products</p>	<ul style="list-style-type: none"> <li>• Article 2.1 requires Members to ensure that technical regulations do not treat imported products less favourably than domestic products, or the products of one WTO Member less favourably than those of another Member or country.</li> </ul>
<p>Avoidance of unnecessary obstacles to trade</p>	<ul style="list-style-type: none"> <li>• Article 2.2 requires WTO Members to ensure that technical requirements are not more trade-restrictive than necessary to achieve a legitimate objective.</li> <li>• Protection of human health is considered a legitimate objective (Article 2.2).</li> </ul>
<p>Harmonisation principle</p>	<ul style="list-style-type: none"> <li>• Article 2.4 requires WTO Members to use relevant international standards as the basis for technical regulations, unless the use of international standards would be ineffective or inappropriate.</li> <li>• Article 2.5 creates a rebuttable presumption that technical regulations in accordance with international standards are not more trade restrictive than necessary to achieve a legitimate objective.</li> </ul>
<p>Transparency principle</p>	<ul style="list-style-type: none"> <li>• Article 2.9 requires WTO Members to notify the WTO of technical regulations that are not based on international standards and whose adoption they are considering if they are likely to have a significant effect on trade.</li> <li>• This requires a member 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.</li> </ul>

These principles of the TBT Agreement have direct implications for WTO Members who may be contemplating certain tobacco control measures. It is contested whether the WHO FCTC amounts to relevant international standards under Article 2.4 of TBT. However, the Partial Guidelines<sup>83</sup> of the WHO FCTC were referred to extensively by the Panel in *United States – Clove Cigarettes* (outlined below).

**Case study: US Clove Cigarettes case\***

In 2009, the United States effectively banned clove cigarettes under a provision in the Family Smoking Prevention Tobacco Control Act that prohibited cigarettes containing a constituent that is a characterising flavour of tobacco or tobacco smoke, other than menthol or tobacco.<sup>84</sup>

Indonesia brought a WTO complaint, arguing that this law is inconsistent with Article 2.1 of the TBT as it treats Indonesian clove flavoured cigarettes less favourably than U.S. produced menthol flavoured cigarettes.<sup>85</sup> Indonesia alleged that although at face value the technical regulation did not discriminate against imported products, the effect of this ban was nevertheless discriminatory.

<sup>83</sup> World Trade Organization. "Partial guidelines for implementation of Article 9 and 10 of the WHO Framework Convention on Tobacco Control". Accessed July 15, 2014. [http://www.who.int/fctc/guidelines/Guidelines\\_Articles\\_9\\_10\\_rev\\_240613.pdf?ua=1](http://www.who.int/fctc/guidelines/Guidelines_Articles_9_10_rev_240613.pdf?ua=1).

<sup>84</sup> Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, § 907(a)(1)(A), 123 Stat. 1776, 1799 (2009).

<sup>85</sup> Panel Report, *United States—Measures Affecting the Production and Sale of Clove Cigarettes*, ¶ 3.1, WT/DS406/R (Sept. 2, 2011).

Indonesia's argument was based on the fact that clove cigarettes consumed in the United States prior to the implementation of the law were predominantly Indonesian in origin, whereas menthol cigarettes were predominantly of US origin.

The United States argued that the regulatory distinction drawn between clove and menthol cigarettes was based not on the foreign origin of clove cigarettes, but on the fact that clove cigarettes are a "starter product" used disproportionately by youth. Whereas menthol cigarettes are consumed in similar proportions by youth and adults.

A Panel was established by the Dispute Settlement Body of the WTO which found in favour of Indonesia and reasoned that there was no legitimate regulatory distinction between clove and menthol flavoured cigarettes because both reduce the harshness of tobacco and are attractive to youth. The Appellate Body upheld the Panel's conclusion (although for different reasons). In doing so, the Appellate Body clarified that where a technical regulation affects the conditions of competition to the detriment of imported products, less favourable treatment will be established unless the effect of the regulation stems solely from a legitimate regulatory distinction. Like the panel, the Appellate Body concluded that there was no legitimate regulatory distinction between clove and menthol in this case.

Indonesia also argued that the prohibition on clove flavoured cigarettes was more trade-restrictive than necessary to protect human health, contrary to Article 2.2. The panel rejected this argument and Indonesia did not appeal this aspect of the Panel report.

- The TBT Agreement provides that technical regulations may not be more trade restrictive than necessary to achieve a legitimate objective, such as protection of human health.
- When proposing a tobacco control measure, Members must ensure that like products of different origins are all subjected to the regulation in a similar manner.
- If the measure invariably treats the products differently, Members must ensure that there are legitimate regulatory reasons for drawing the regulatory distinction.
- If this is not the case, and the effect of the tobacco control measure falls hardest on imported products, the measure might be considered discriminatory.

### 3.3.3 Intellectual property & TRIPS

Under Article 11 of the WHO FCTC, signatory governments are obliged to implement measures that prohibit misleading descriptors such as 'light' or 'mild' and require health warnings to cover at least 30 percent of the principal display areas of a tobacco package. The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) is an important WTO Agreement that deals with protection and enforcement of intellectual property rights, including trademarks. However, like other WTO Agreements, the TRIPS Agreement also provides flexibilities to allow States to implement tobacco control measures.

Article 20 of TRIPS provides that the use of a trademark '...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...of one undertaking from those of other...'

The relevant principles of TRIPS are:<sup>86</sup>

- 1) Under Article 8, WTO Members may adopt measures necessary to protect public health, provided that those measures are consistent with the terms of TRIPS. This principle gives Members ‘flexibility’ in the way they implement TRIPS in their domestic law.
- 2) Under Article 15, WTO Members are obliged to protect trademarks through their registration. However, Members may refuse registration on the basis that a mark is misleading.
- 3) There is no general right permitting a trademark rights holder to use a trademark. Rather, the right is a “negative right” whereby trademark owners can merely exclude others from using their trademark.

In light of these principles, it is permissible for a WTO Member to deny registration of a misleading trademark containing terms such as ‘light’ or ‘mild’ that suggest that a certain product may be less harmful than another. It is also permissible for a WTO Member to restrict use of a trademark so long as the restriction is justifiable under Article 20.<sup>87</sup>

Furthermore, the Doha Declaration on the TRIPS Agreement and Public Health<sup>88</sup> has helped clarify the flexibilities that permit WTO Members to protect health under TRIPS Agreement. There has been a widespread international implementation of large graphic health warnings and bans on misleading descriptors without any WTO-related dispute arising.

In terms of plain packaging, however, Ukraine, Honduras, the Dominican Republic, Cuba and Indonesia have invoked a number of provisions of TRIPS including Article 20 in challenging Australia’s measure.<sup>89</sup> Some commentators argue that plain packaging is likely to withstand any WTO challenge due to the limited character of its trademark rights under TRIPS.<sup>90</sup>

A large substance of the plain packaging challenge is under investor protection provisions. **Section 3.3** discusses the implication of Investment Agreements on plain packaging as well as other tobacco control policies.

- Certain tobacco control measures have been scrutinised under TRIPS by the tobacco industry.
- However, various flexibilities are built into the TRIPS Agreement that allow WTO Members to implement tobacco control measures without violating the terms of the Agreement.
- Furthermore, the Doha Declaration on TRIPS and Public Health reaffirms these flexibilities, including for governments to implement tobacco control measures.

<sup>86</sup> World Trade Organization. “SPS Agreement Training Module: Chapter 9 Health and other WTO Agreements”.

<sup>87</sup> McGrady, Benn. “The Real Deal on International Trade; Investment Agreements; and Packaging and Labeling Regulations”. Campaign for Tobacco-Free Kids. June 23, 2011. Accessed July 15, 2014. <http://www.tobaccocontrol.org/learn-more/resources/>.

<sup>88</sup> Declaration on the TRIPS agreement and public health. Adopted 14 November 2001. WT/MIN(01)/DEC/2. Accessed July 15, 2014. [http://www.wto.org/english/thewto\\_e/minist\\_e/min01\\_e/mindecl\\_trips\\_e.pdf](http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_trips_e.pdf).

<sup>89</sup> Request for Consultation by Ukraine, *Australia – Certain Measures Concerning Trademarks and other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*. World Trade Organization, WT/DS434/1, IP/D/30, G/TBT/D/39, G/L/985.

<sup>90</sup> McGrady, Benn. “The Real Deal on International Trade; Investment Agreements; and Packaging and Labeling Regulations”.

### 3.4 Negotiating multilateral trade treaties

As mentioned in **section 2**, countries can enter into FTAs and customs unions outside the WTO. Multilateral and bilateral trade treaties and agreements are often entered into by countries when they are unable to gain the terms they want through the trading system generally overseen by the WTO.<sup>91</sup> This has resulted in many complex trade commitments that often overlap.<sup>92</sup>

Recent evidence and commentary indicates that the tobacco industry is increasingly turning to multilateral trade and investment agreements to strengthen its ability to launch legal challenges against measures aimed at reducing tobacco use.<sup>93 94 95</sup> One of the biggest concerns regarding multilateral trade treaties is the inherent power imbalances, where high income countries often use their greater bargaining power to negotiate advantageous trade rules and gain concessions that they are unable to obtain through the WTO.<sup>96</sup> Large corporations such as transnational tobacco companies also hold disproportionate power in such agreements, when compared to civil society groups.<sup>97</sup> These asymmetries are compounded by the lack of transparency in treaty negotiations.<sup>98</sup> The negotiating parties often enter into a confidentiality agreement which is justified on the grounds that such trade and investment agreements deal with a range of commercially-sensitive sectors and confidentiality during the negotiations encourage negotiators to communicate with each other with a greater degree of candour.<sup>99</sup>

A pertinent example of the tobacco industry using these avenues to resist tobacco control measures can be seen through the current negotiations for the TPPA. The TPPA is an excellent example of a new style of regional trade agreement that has the potential to hinder countries from implementing novel tobacco control measures.

#### Case study: Trans Pacific Partnership Agreement

An example of a large regional multilateral trade agreement currently under negotiation is the Trans Pacific Partnership Agreement (TPPA). This agreement is likely to involve more than eleven Asian and Pacific-rim countries. Negotiating countries currently include Australia, Brunei, Canada, Chile, Japan, Malaysia Mexico, New Zealand, Peru, Singapore, Thailand, the USA and Vietnam. The Philippines might also enter the agreement in the future. The TPPA aims to promote free trade, investment and economic integration among the signatory parties. The TPPA is likely to deepen global economic integration by reaching much further into

<sup>91</sup> Gleeson, Deborah, and Sharon Friel. "Emerging threats to public health from regional trade agreements." *The Lancet* 381, no. 9876 (2013): 1507-1509

<sup>92</sup> Ibid.

<sup>93</sup> Collin, Jeff. "Tobacco control, global health policy and development: towards policy coherence in global governance." *Tobacco control* 21, no. 2 (2012): 274-280.; Action on smoking and health. Hidden hand of big tobacco leads to WTO challenge. 20 August 2012. <http://ash.org/hidden-hand-of-big-tobacco-leadsto-wto-challenge/>.

<sup>94</sup> Campaign for Tobacco-Free Kids. "Tobacco and trade". Accessed July 15, 2014, [http://www.tobaccofreekids.org/what\\_we\\_do/federal\\_issues/trade/](http://www.tobaccofreekids.org/what_we_do/federal_issues/trade/).

<sup>95</sup> Action on smoking and health. "Hidden hand of big tobacco leads to WTO challenge". Accessed July 15, 2014. <http://ash.org/hidden-hand-of-big-tobacco-leads-to-wto-challenge/>.

<sup>96</sup> Fooks, Gary, and Anna B. Gilmore. "International trade law, plain packaging and tobacco industry political activity: the Trans-Pacific Partnership." *Tobacco control* (2013)

<sup>97</sup> Kelsey, Jane. "International Trade Law and Tobacco Control.", p. 51.

<sup>98</sup> Ibid.

<sup>99</sup> Office of the United States Trade Representative. "Fact Sheet: Transparency and the Trans-Pacific Partnership". Accessed July 16, 2014. <http://www.ustr.gov/about-us/press-office/fact-sheets/2012/june/transparency-and-the-tpa>.

the regulation of domestic policy than other multilateral trade agreements.

There has been considerable analysis of the possible impact of this agreement on the ability of signatory States to implement tobacco control measures. Negotiations are held under conditions of confidentiality and draft texts are not publicly available. Consequently most of the commentaries are based on the leaked texts of the draft agreement.

From this, four major ways have been identified in which the TPPA might affect tobacco control. These include stronger intellectual property rights and investor protections, and provisions governing regulatory coherence. These four ways, outlined below, are in addition to those protections provided by previous trade agreements.

*1) Stronger intellectual property rights*<sup>100</sup>

There is a possibility that the TPPA could require Parties to protect trademarks and geographical indications in ways that are not required by TRIPS. This could include granting a positive right to use trademarks or geographical indications in certain circumstances, which may be problematic for tobacco packaging and labelling measures such as plain packaging.<sup>101</sup>

*2) Regulatory coherence*<sup>102</sup>

The TPPA may include provisions governing regulatory coherence. Such provisions might see Parties harmonise their regulatory approach to an issue in order to reduce barriers to trade, or at least recognise different approaches to achieving the same level of protection as equivalent to one another. Either approach would permit a product sold in the territory of one Party also to be sold in the territory of the others. Harmonisation along these lines poses at least two risks for tobacco control. First, it takes regulatory decision-making out of the WHO FCTC context and places it in an international context where the industry is more likely to be influential. Second is the risk that this will lead to 'harmonisation down', or less ambitious regulatory approaches.

In addition to these concerns, it is possible that the TPPA will create new transnational bodies in which regulatory issues may be discussed among the Parties, possibly with industry participation. This could provide a new platform for industry to influence regulatory decision-making.

*3) Investor protection*

Like most contemporary FTAs, the TPPA is likely to include a chapter governing investor protection. Such a chapter could extend the rights of foreign investors, including tobacco companies, to bring claims against governments with respect to tobacco control measures. These issues are discussed in further detail in **section 3.5** below.

*4) Tobacco specific language*

In the context of the TPPA negotiations, the United States (US) has proposed the inclusion of new language specific to tobacco control. Malaysia has also proposed that tobacco be carved out completely from the agreement. It is possible that these approaches could negate the risks identified above. However, it is also possible that these approaches might increase the risks trade and investment agreements pose to tobacco control. For example, the initial language proposed by the US may have increased the evidentiary burden on Parties implementing tobacco control measures. There is also a separate risk that tobacco-specific language or exclusion of tobacco products specifically will imply that existing trade and investment agreements containing similar rules do not give governments sufficient space to engage in tobacco control. This could have the perverse effect of discouraging tobacco control.

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<sup>100</sup> Fooks, Gary, and Anna B. Gilmore. "International trade law, plain packaging and tobacco industry political activity: the Trans-Pacific Partnership."

<sup>101</sup> Ibid.

<sup>102</sup> Kelsey, Jane. "International Trade Law and Tobacco Control.", p. 82-84.

- The last decade has seen a rise in countries entering multilateral and bilateral trade treaties and agreements outside of the WTO context.
- Depending on the terms agreed, these treaties could reduce regulatory freedom available to Parties, including through terms governing intellectual property rights protection, investor protection and regulatory coherence.

### 3.5 Challenges under investment agreements

As mentioned in **section 2**, IIAs usually take the form of bilateral investment treaties and investment chapters in free trade agreements. Disputes under such investment agreements between foreign investors and States have become more common in the past decade. There are several potential grounds for concern in relation to implementation of tobacco control measures under investment agreements. Foreign direct investments can act as another avenue to access a foreign market with high barriers to trade.<sup>103</sup>

Unlike WTO agreements, where obligations are only enforceable by WTO Members, investor protections can almost always be enforced directly by the investors of another party to the investment agreement. This is because almost all investment agreements contain a provision for investor-State dispute settlement (ISDS), giving foreign investors standing to bring a claim against a State for violation of a particular international investment agreement. Almost all disputes are conducted through one of two mechanisms, the International Centre for the Settlement of Investment Disputes (ICSID), and tribunals that operate under the rules of the United Nations Commission on International Trade Law. Although of late, some free trade or investment agreements have specified a higher level of public disclosure and openness of hearings, most legal documents and reports of past disputes have not been necessarily released to the public.<sup>104</sup> Compensation is the remedy ordinarily awarded for violation of an investment treaty.

Because there is no doctrine of precedent in investment treaty arbitration, previous decisions on similar legal issues or similar facts may be raised in argument but do not bind a tribunal.<sup>105</sup> Arbitral reports that have been released publicly reveal wide variations and inconsistencies between tribunals hearing similar cases.<sup>106</sup> Additionally, each Agreement is also likely to have its own distinct provisions.

As mentioned in **section 2**, some features of international investment agreements are similar to trade agreements and include for example, provisions governing national treatment and most-favoured-nation treatment that seek to prevent discrimination between investors and investments, (although these clauses are interpreted slightly differently in the investment context). However, other features of international investment agreements offer protections for investors much greater than those offered by trade agreements.<sup>107</sup> These include provisions requiring States to pay compensation for expropriation of investments and requiring States to provide investors and investments with fair and equitable treatment.<sup>108</sup>

<sup>103</sup> Confronting the tobacco epidemic in a new era of trade and investment liberalisation, p. 19.

<sup>104</sup> Kelsey, Jane. "International Trade Law and Tobacco Control.", p. 13.

<sup>105</sup> Ibid.

<sup>106</sup> Ibid.

<sup>107</sup> Ibid.

<sup>108</sup> See generally Dolzer, Rudolf, and Christoph Schreuer. *Principles of international investment law*. Oxford University Press, 2012.



## Expropriation

Most international investment agreements provide that investments of either contracting party shall not be expropriated, nationalised or subjected to measures having the effect of the same in the territory of the other contracting party, except where certain conditions are met, including the prompt payment of full compensation.<sup>109</sup>

Most tobacco control measures do not involve direct expropriation or nationalisation of the property of a tobacco company as there is no direct transfer of property from tobacco companies to the State or seizure of property.<sup>110</sup> However, an indirect expropriation arises if a measure is equivalent to expropriation. In determining whether an indirect expropriation has occurred, a tribunal is likely to take the following factors into consideration:<sup>111</sup>

### The degree of interference with property rights

- Significant interference with an investment is necessary (but not in itself sufficient) for an indirect expropriation to occur.
- In the 2006 case of *Fireman's Fund Insurance Company v Mexico*, the tribunal held that to amount to an indirect expropriation, a measure must result in "a substantially complete deprivation of the economic use and enjoyment of rights to the property" (ICSID Case No. ARB(AF)/02/01, IIC 291, 2006)

### Whether the measure is within the recognised police powers of the host State

- Sovereign police power of States includes the power to protect health, without incurring an obligation to compensate an investor for expropriation.
- A State may exercise these powers as 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 an unreasonable price.
- These 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.

### Investor's legitimate expectations for its investment

- This factor requires an assessment of an investor's legitimate expectations and, in particular, whether an investment was induced by a commitment of the host State that was subsequently not honoured.

<sup>109</sup> Confronting the tobacco epidemic in a new era of trade and investment liberalisation, p. 54-59.

<sup>110</sup> Ibid.

<sup>111</sup> Ibid.

### *Fair and equitable treatment (FET clause)*

Another distinct feature of international investment agreements is that they tend to include obligations on countries to ensure that investments are afforded fair and equitable treatment. A number of circumstances in which a violation of this standard have been recognised in the case law include:<sup>112</sup>

- 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.

Over the years, the tobacco industry has argued that various tobacco control measures violate international investment agreements and would require governments implementing such measures to compensate the industry.<sup>113</sup> The following case studies illustrate how these grounds for concerns under investment agreements have manifested.

#### **Case studies**

##### **Large health warnings on tobacco products in Uruguay**

During 2009-10, Uruguay issued an Ordinance that required all tobacco products to bear health warnings covering 80% of the surface of the pack. Uruguay has also issued a ban on misleading branding so as to prohibit the sale of brand variants (known as a single presentation requirement). Philip Morris filed a Request for Arbitration with ICSID against Uruguay alleging that the measure violates the following three obligations under the Switzerland – Uruguay bilateral investment treaty<sup>114</sup>:

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

Uruguay challenged the jurisdiction of the Tribunal on a number of grounds. The Tribunal found that it does have jurisdiction to hear the claim. Consequently, the parties are in the process of filing written submissions and oral hearings are expected to take place in early 2015.

##### **Plain packaging of tobacco products in Australia**

In 2011, the Australian government passed the Tobacco Plain Packaging Act 2011 that prohibits the use of trademarks, symbols, graphics and other images on all tobacco products, other than brand and variant names in a standardised font, style and size. These words must be printed against a plain brown background. The remainder of the pack's surface is to be taken up by health warnings and other features required by law.

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<sup>112</sup> Confronting the tobacco epidemic in a new era of trade and investment liberalisation, p. 54-59

<sup>113</sup> Ibid., p. 59-63.

<sup>114</sup> *Agreement between the Swiss Confederation and the Oriental Republic of Uruguay concerning the reciprocal promotion and protection of investments*, signed 7 October 1988.

Philip Morris Asia has served the Commonwealth of Australia with a Notice of Arbitration alleging that the Act violates the Australia-Hong Kong Bilateral Investment Treaty 1993 by:<sup>115</sup>

- expropriating PMA's investment and its trademarks and goodwill;
- failing to provide its investments fair and equitable treatment; and
- failing to accord PMA's investments full protection and security.

An investor-state dispute tribunal under the United Nations Commission on International Law (UNCITRAL) rules was established in May 2012.

Australia requested that the case to be split into two parts to (1) challenge Philip Morris Asia's right to contest Australian Plain Packaging laws, by arguing that Philip Morris Asia only acquired an indirect interest in the Australian subsidiary after Australia had announced its decision to implement plain packaging; and (2) challenging the merits of Philip Morris Asia's claims.

### **Possible outcomes and implications**

In July 2014, the Permanent Court of Arbitration bifurcated the proceedings allowing Australia to challenge jurisdictions of the tribunal (Philip Morris Asia's right to contest Australian Plain Packaging laws) before any argument on the merits is heard.<sup>116 117</sup> If Australia is successful in this case, it could send a robust message to the tobacco industry against acquiring shares in countries for the purposes of bringing claims under international treaties.<sup>118</sup>

Although decisions are yet to be made on the above disputes, many commentators have discussed their possible outcomes and implications. Generally speaking, it has been argued that States retain a significant degree of regulatory autonomy even after entering into International investment agreements. When taking factors such as degree of interference and State's police powers, the arguments of Phillip Morris are likely to fail. Furthermore, 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.

However, any specific representation that may have been made to the investor, may weigh in favour of Philip Morris depending on the substance of the representation. It is also important to note that there may also be some uncertainty produced by inconsistencies in the case-law.

A major concern cited by commentators about Bilateral Investment Treaties is that they transfer State decision-making from the national to international level and provide the tobacco industry with an international court of appeal through which to challenge the capacity of governments to introduce new public health measures. The dispute brought by Philip Morris Asia under UNCITRAL, makes this clear in light of its defeat in the Australian High Court over the 2011 Act.<sup>119 120</sup>

Nonetheless, the weight of the case law and State practices in implementing tobacco control measures, suggest that States such as Uruguay and Australia may implement bona fide public health measures, including

<sup>115</sup> Full text of this challenge can be found at Investment Treaty Arbitration. "Philip Morris Asia Limited v. The Commonwealth of Australia". Accessed July 16, 2014, <http://italaw.com/cases/851>.

<sup>116</sup> *Philip Morris Asia Limited v. The Commonwealth of Australia*, UNCITRAL, PCA Case No. 2012-12. Procedural Order No. 9. Accessed July 16, 2014. <http://italaw.com/sites/default/files/case-documents/italaw3239.pdf>.

<sup>117</sup> Corderoy, Amy. "Australia wins first battle in plain packaging trade dispute." *The Sydney Morning Herald*, July 2, 2014. Accessed 3 July, 2014. <http://www.smh.com.au/national/australia-wins-first-battle-in-plain-packaging-trade-dispute-20140702-zst8d.html#ixzz36LxhZ3wy>.

<sup>118</sup> *Ibid.*

<sup>119</sup> Investment Treaty Arbitration. "Notice of claim under the Australia/Hong Kong agreement for the promotion and protection of investments." Accessed July 16, 2014. <http://drupaldev.italaw.com/sites/default/files/case-documents/ita0665.pdf>.

<sup>120</sup> *JT International SA v Commonwealth of Australia/British American Tobacco Australasia Limited v The Commonwealth*. High Court of Australia 2012, 5 October 2012; 43(S409/2011. S389/2011). <http://www.austlii.edu.au/au/cases/cth/HCA/2012/43.html#fnB420>. (accessed July 16, 2014).

- International investment agreements tend to contain various provisions that protect investors from expropriation and unfair treatment, and provide for compensation from the government where such treatment occurs.
- Most tobacco control measures do not involve direct expropriation or nationalisation of the property of a tobacco company. However, in determining whether an indirect expropriation has occurred, a tribunal is likely to take the following factors into consideration:
  - The degree of interference with property rights.
  - Whether the measure is within the recognised police powers of the host State
  - An Investor's legitimate expectations for its investment
- A tribunal is likely to take the following factors into consideration to determine whether a State has breached its obligation to provide fair and equitable treatment:
  - 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.
- Unlike WTO agreements, where obligations are only enforceable by WTO Members, investor protections can almost always be enforced directly by the investors of another party to the investment agreement.
- The tobacco industry challenges to Uruguay's large health warnings and single presentation requirement and Australia's plain packaging of tobacco products demonstrate how grounds for concerns under IIAs have manifested.

tobacco control measures, without having to pay compensation under an international investment agreement.

Many observers have suggested that such dispute claims by the tobacco industry are part of a larger strategy to bring 'regulatory chill' to governments from bringing in certain tobacco control measures. Others fear that a win in favour of the tobacco industry in this case could lead to a slippery slope that would question the credibility and legitimacy of the investor-state dispute system. This is discussed further in **section 4**.

## 4.0 Discussion

This part of the document sets out further ways the tobacco industry exploits international trade agreements to resist tobacco control. It also sets out current debates around international trade law and tobacco control.

### 4.1 The tobacco industry and its use of trade and investment agreements

In light of the above discussion of trade and investment agreements and their implications for tobacco control, it can be concluded that without careful legal and policy assessment, trade liberalisation and foreign direct investment have the potential to hinder the implementation of various tobacco control measures. This is compounded by limited legal awareness and capacities of low- and middle-income countries. However, recent WTO decisions, the entrance of the WHO FCTC, and other trends in investment law have helped clarify the extent of autonomy which countries have to implement tobacco control measures without breaching their obligations under international trade and investment agreements.

Despite this clarification, the tobacco industry continues to use various ways to exploit trade and investment agreements as a means of resisting tobacco control interventions. Export-oriented tobacco companies use international trade negotiations to seek access to foreign markets in order to increase import of their products. The two common methods by which trade and investment law are used by the tobacco industry to resist tobacco control interventions and to aid market access for the tobacco industry are: tobacco industry lobbying and the 'chilling' effect.

#### 4.1.1 Lobbying

The tobacco industry often lobbies trade officials during trade and investment agreement negotiations to push for lower tariffs on tobacco products in the particular countries under negotiations.<sup>121</sup> An example of this is lobbying by British American Tobacco to European Union and United States authorities during China's accession to WTO, to remove distribution monopoly and special licensing requirements for the sale of imported tobacco products in China.<sup>122</sup>

The tobacco industry has also lobbied trade officials on common tobacco control measures that are non-tariff barriers. For example, during the negotiations between United States Trade Representatives and Japan, there was lobbying by the industry to not only open its markets to United States cigarettes but also to not restrict tobacco advertising.<sup>123</sup>

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<sup>121</sup> Confronting the tobacco epidemic in a new era of trade and investment liberalisation, p. 84-85.

<sup>122</sup> Zhong, Fei, and Eiji Yano. "British American Tobacco's tactics during China's accession to the World Trade Organization." *Tobacco control* 16, no. 2 (2007): 133-137.

<sup>123</sup> Lambert, A., J. D. Sargent, S. A. Glantz, and P. M. Ling. "How Philip Morris unlocked the Japanese cigarette market: lessons for global tobacco control." *Tobacco control* 13, no. 4 (2004): 379-387.

### 4.1.2 The ‘chilling effect’

It has been argued that trade and investment agreements can potentially impose significant internal constraints on a government’s freedom to choose the public health measures it believes will best control tobacco use in its country. This is known as the chilling effect where the mere threat of a dispute, combined with alleged rights of the tobacco industry built into international agreements can deter a government from making a regulatory decision to pass a particular tobacco control measure.

International trade and investment agreements are often relied upon to resist domestic regulation. As discussed in **sections 3.2** and **3.3**, the tobacco industry has argued that many tobacco control measures violate the WTO Members’ legal obligations and that some measures require the payment of compensation under international investment law.

The chilling effect is of particular concern when it comes to implementing a potentially “trend-setting measure” such as large pack warnings and plain packaging. This is set out in the case studies below.<sup>124</sup>

#### Case studies

##### Uruguay: large warnings on cigarette packs

In March 2010, Uruguay required pack warnings to cover 80% of the surface of the pack and issued a ban on misleading branding to as to prohibit the sale of brand variants (the single presentation requirement). This measure would have been a trend setter for other countries to follow.

The tobacco industry has used the arbitration as a means to dissuade or delay other countries from implementing similar measure.<sup>125</sup>

##### Australia: plain packaging

As profiled in **section 3.4** above, in December 2012, the Australian government passed legislation requiring tobacco products to be packaged in plain packages.<sup>126</sup>

The tobacco industry has opposed this measure from the outset and has challenged the lawfulness of plain packaging. To do so, the industry has used selective and sometimes misleading legal arguments. These arguments have the potential to overwhelm public health policy-makers, who may lack the legal expertise to analyse international trade and investment law.<sup>127</sup>

##### Canada: restrictions on flavoured tobacco products

In 2009, Canadian government passed legislation prohibiting the use of flavourings that enhance the taste of American-style blended cigarettes.<sup>128</sup>

Tobacco industry, foreign governments and elected officials in other countries have argued that this violates

<sup>124</sup> Confronting the tobacco epidemic in a new era of trade and investment liberalisation, p. 90-91.

<sup>125</sup> Ibid.

<sup>126</sup> Tobacco Plain Packaging Act 2011 (Cth)

<sup>127</sup> Confronting the tobacco epidemic in a new era of trade and investment liberalisation, 2012, p. 91-92

<sup>128</sup> Act to Amend the Tobacco Act 2010

Canada's international trade and investment commitments. Specifically, under the TBT Agreement, WTO Members have questioned the scientific basis for the Canadian measure and have argued that it is more trade-restrictive than necessary to achieve Canada's regulatory goal.<sup>129</sup>

Canada continues to maintain the legislation and asserts that it complies with the WTO law. The Canadian Government has been prepared to answer tobacco industry arguments as it had taken legal advice, prior to passing the legislation. It had also compiled basic information about the make-up of the Canadian market that helped it to identify how the measures would affect imported and domestic products.

#### **Norway: tobacco product display ban**

In 2010, Norway introduced a ban on tobacco displays at point of sale.<sup>130</sup>

Philip Morris Norway brought a claim under the Oslo District Court alleging that the ban violates Norway's obligations under the Agreement on the European Economic Area (EEA Agreement). The Oslo District Court decided to refer this question to the European Free Trade Association (EFTA) Court. The two questions before the EFTA Court were:<sup>131</sup>

- whether a point-of-sale display ban constitutes a measure having equivalent effect to a quantitative restriction on the free movement of goods; and
- if so, whether a ban would be suitable and necessary for the purpose of protecting public health

In relation to the first question, the EFTA Court decided that the point-of-sale display does constitute a measure having equivalent effect to a quantitative restriction on the free movement of goods and further stated that "...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."<sup>132</sup>

In relation to the second question, the EFTA Court said that it was up to 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."<sup>133</sup>

The Oslo District Court ruled in favour of Norway and stated that the display ban was necessary, and that there are no other less restrictive measures available to achieve the goals in question.<sup>134</sup>

The three case studies above illustrate the extent to which the industry will resist trend-setting tobacco control measures and use trade and investment law to support its arguments.

The chilling effect is further enhanced in developing countries where there may be limited capacity to assess the areas of international trade and investment law and tobacco control. This consequently constrains a government from identifying its ability to implement certain tobacco control measures without breaching its obligations under international trade and investment agreements.<sup>135</sup>

<sup>129</sup> Confronting the tobacco epidemic in a new era of trade and investment liberalisation, p. 95-97.

<sup>130</sup> Section 5, Tobacco Control Act.

<sup>131</sup> Philip Morris Norway AS v The Norwegian Government represented by the Ministry of Health and Care Services, Oslo District Court, 14 September 2012, available in English at [http://www.regjeringen.no/upload/HOD/Vedlegg/judgment\\_norway\\_vs\\_philipmorris\\_140912.pdf](http://www.regjeringen.no/upload/HOD/Vedlegg/judgment_norway_vs_philipmorris_140912.pdf).

<sup>132</sup> Ibid.

<sup>133</sup> Ibid.

<sup>134</sup> Ibid.

<sup>135</sup> Confronting the tobacco epidemic in an era of trade, p. 102-103.

In such instances, industry arguments appear more credible to governments and consequently weaken the political will to implement tobacco control measures. This is further complicated by the threat of complicated and costly legal disputes.<sup>136</sup>

#### **4.1.3 Other ways international trade and investment law is used by the tobacco industry to impede tobacco control**

The presence of tariffs can create an incentive for foreign direct investments<sup>137</sup> (FDIs), whereby traders can invest abroad to manufacture behind tariff walls. In recent TPP negotiations, Philip Morris submitted its support for trade and investment liberalisation. The tobacco industry has continued to lobby for tariff reductions, increased protection of tobacco industry trademarks and the right to bring claims before international arbitral tribunals with a view to resisting regulation. As discussed in section 3.3 Philip Morris has accompanied this with a claim against Australia under the bilateral investment treaty between Australia and Hong Kong.

The tobacco industry also uses trade and investment law to resist tobacco control during the process of governments developing regulatory impact statements and by making submissions on policy and legislation. Through these processes the industry has the opportunity to scrutinise and strongly oppose any tobacco control policy detrimental to the industry.<sup>138</sup> The main arguments in submissions from the industry echo their arguments on GATT, TBT and TRIPS Agreements. These include challenging the soundness and reasonableness of evidence-based regulation to support tobacco control policies; arguing that while conducting cost-benefit analysis, there is a heavy burden of proof where the government wants to displace fundamental freedoms and property rights that are set out in international law and trade treaties; proportionality; least trade-restrictive/least burdensome alternatives; and inadequate Regulatory Impact Statements.<sup>139</sup> In addition to this, the industry often develops and circulates a set of legal rules within the industry to refer to in attempts to resist a particular regulation.<sup>140</sup> This tends to leave a positive impression among the general public with respect to the validity of such claims.

## **4.2 Countervailing positions on the implications of international trade on tobacco control**

As evident from sections 2 and 3 of this paper, international trade and investment law is complex and its impacts on governments' attempts to regulate tobacco have led to a number of legal disputes. Presently, these disputes include claims under WTO jurisdiction against Australia regarding its law on plain packaging of tobacco products; a claim under an investment treaty by Philip Morris against Australia regarding its plain packaging of tobacco products; and a claim under an investment treaty by Philip Morris against Uruguay regarding its packaging and labelling measures.

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<sup>136</sup> Ibid.

<sup>137</sup> Foreign direct investment can be defined as "a direct investment into production or business in a country by a company in another country". For more information see: European Commission. "Investment". Accessed July 16, 2014. <http://ec.europa.eu/trade/policy/accessing-markets/investment/>.

<sup>138</sup> Kelsey, Jane. "International Trade Law and Tobacco Control.", p. 54-57.

<sup>139</sup> Ibid.

<sup>140</sup> Ibid.



The existence of these disputes, combined with the ongoing negotiation of the TPP@, have led to two schools of thought about how to respond to such challenges to tobacco control. The arguments of the two groups and the literature supporting their views are discussed below.

#### 4.2.1 Trade and investment law has flexibilities to support tobacco control regulations

This school of thought maintains the position that countries have the ability to retain regulatory autonomy to support tobacco control while entering into trade and investment agreements. The literature that supports this aims to explain to governments the scope they retain under trade agreements to regulate in the interests of health. It also aims to explain why tobacco industry arguments under such agreements are ordinarily wrong on the law and facts. The aim of this group is to empower governments and public health proponents with knowledge and tools to develop tobacco control measures that are consistent with the core principles of international trade. This also helps to ensure that governments are not dissuaded from implementing legitimate regulations because of concerns over existing international commitments.

In terms of WTO law, Tania Voon<sup>141</sup> acknowledges the fact that the WTO Agreements impose strict rules on Members. However, she contends that this should not discourage Members from implementing strong tobacco control measures.<sup>142</sup> She bases this argument on an exploration of the various exceptions available in the WTO Agreements, the Appellate Body's refusal to equate differential treatment with discriminatory treatment, and recognition throughout the agreements of the need to balance trade liberalisation with other objectives, including health. She identifies that the GATT 1994 contains explicit exceptions acknowledging the importance of the protection of human life or health. The TRIPS Agreement also contains principles and flexibilities to support health measures that may restrict the use of trademarks, strengthening the defences available to countries like Australia that wish to pursue plain packaging. In regards to the TBT Agreement, she examines recent Appellate Body Reports and concludes that it also has ample flexibility to accommodate health objectives underlying tobacco regulation. She concludes that tobacco control measures are likely to face difficulties defending their legitimacy if they discriminate, either overtly or in effect against imports; or if they are not based on sound evidence demonstrating their contribution to their objectives. She also acknowledges that the WHO FCTC has increasingly become an important potential source of health evidence in defending the legitimacy of particular tobacco control measures.<sup>143</sup>

In their article, Eric Crosbie<sup>144</sup> and Stanton Glantz<sup>145</sup> provide similar recommendations. By conducting a review of tobacco industry documents, they find that the tobacco industry's own lawyers have told the industry that their arguments in opposing strong health warning labels under international trade law, are unsubstantiated.<sup>146</sup> They go on to recommend that governments not be intimidated by tobacco industry threats and unsubstantiated claims, and carefully craft their regulatory laws in order to withstand any lawsuits from the tobacco industry.<sup>147</sup>

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<sup>141</sup> BSc (Melb), LLB(Hons) (Melb), Grad Dip Intl L(Melb), AMusA, LLM (Harv), PhD (Cantab); Professor and Associate Dean (Research), Melbourne Law School, The University of Melbourne; Former Legal Officer, Appellate Body Secretariat, World Trade Organization.

<sup>142</sup> Voon, Tania. "Flexibilities in WTO Law to Support Tobacco Control Regulation." *Am. J.L. & Med.* 39 (2013): 199.

<sup>143</sup> Ibid.

<sup>144</sup> Centre for Tobacco Control Research and Education, Cardiovascular Research Institute, San Francisco, California, USA

<sup>145</sup> Department of Medicine (Cardiology), Philip R. Lee Institute for Health Policy Studies, University of California San Francisco, San Francisco, California, USA.

<sup>146</sup> Crosbie, Eric, and Stanton A. Glantz. "Tobacco industry argues domestic trademark laws and international treaties preclude cigarette health warning labels, despite consistent legal advice that the argument is invalid." *Tobacco control* (2012): tobaccocontrol-2012.

<sup>147</sup> Ibid.

In terms of concerns that are often expressed over governments losing their regulatory autonomy due to trade liberalisation, Simon Lester<sup>148</sup> argues that these are generally unfounded.<sup>149</sup> He contends that one of the goals of trade liberalisation is to fight protectionism, which essentially prevents governments from protecting domestic tobacco producers from foreign competition. He argues that governments will only have difficulty in defending a dispute when a certain tobacco control measure is in fact protectionism in disguise. He asserts that the decision of the Appellate Body in the *U.S. – Clove Cigarettes* case was based on the notion that the law that excluded menthol cigarettes (that were predominantly produced in the U.S.A.), while prohibited the competing clove cigarettes (that were predominantly produced in Indonesia) and this constituted protectionism. If the U.S. law had banned menthol cigarettes as well, the decision would have very likely to have been found to be consistent with the trade rules. He also asserts that the issue with trade liberalisation leading to lower tobacco prices due to removal of tariff and non-tariff barriers, can be resolved by governments through implementing non-discriminatory taxes that are applied to both foreign and local products. Therefore, he concludes that trade liberalisation constrains domestic regulation only to the extent that such regulations discriminate against imports do not preclude legitimate domestic policymaking.<sup>150</sup>

Lastly, in her article, Holly Jarman<sup>151</sup> recognises that tobacco industry is equipped with sufficient resources and will continue to use all the legal avenues available to them to resist tobacco control.<sup>152</sup> In light of that, she provides possible actions countries could take to support their public health policies. These include: raising the profile of the evidence base for such public health policies; ensuring that national tobacco legislation is non-discriminatory; working to strengthen global legal frameworks that support public health norms, such as WHO FCTC, and invoking them in disputes and domestic legislation; and including public health exemptions in new trade and investment agreements. She recognises that countries that are highly dependent upon tobacco for economic growth, are more vulnerable to lobbying by the tobacco industry. For this reason she also recognises the need for economic diversification in such countries.<sup>153</sup>

Jeffrey Drope<sup>154</sup> and Raphael Lencucha<sup>155</sup> provide similar recommendations to enable public health advocates to defend tobacco control measures in international trade disputes. In addition to recommending that governments should seek to implement measures that are non-discriminatory; have an evidence-based case for necessity; and complement existing law and regulation, they also emphasise the need for tobacco control proponents to assert the parties' obligations under the WHO FCTC to implement the regulation.<sup>156</sup>

<sup>148</sup> Policy Analyst at Herbert A. Stiefel Center for Trade Policy Studies, Cato Institute.

<sup>149</sup> Lester, Simon. "Free Trade and Tobacco: Thank You for Not Smoking (Foreign) Cigarettes." (2012).

<sup>150</sup> Ibid.

<sup>151</sup> Department of Health Management & Policy, University of Michigan, School of Public Health, Washington Heights, Ann Arbor, USA.

<sup>152</sup> Jarman, Holly. "Attack on Australia: tobacco industry challenges to plain packaging." *Journal of public health policy* 34, no. 3 (2013): 375-387.

<sup>153</sup> Ibid.

<sup>154</sup> International Tobacco Control Research, American Cancer Society, Atlanta, Georgia 30303, USA.

<sup>155</sup> Faculty of Health Sciences, University of Lethbridge, Lethbridge, Canada.

<sup>156</sup> Drope, Jeffrey, and Raphael Lencucha. "Tobacco control and trade policy: Proactive strategies for integrating policy norms." *Journal of public health policy* 34, no. 1 (2013): 153-164.

- This body of literature contends that international trade law has the flexibility to accommodate health objectives underlying tobacco regulation
- However, to use this flexibility there are many considerations that governments need to take into account when implementing a tobacco control measure. These, include ensuring that:
  - the WTO principles of non-discrimination (both most favoured nation and national treatment) are not frustrated;
  - there is a legitimate objective and clear purpose in introducing the measure;
  - the proposed measure is a reasonable and proportional response to the objective;
  - the proposed measure is the least trade restrictive means of achieving the objective; and
  - there is a strong evidential basis and justification for the measure.
- Tobacco industry challenges are deliberately designed to deter other countries from introducing new tobacco control measures.
- In order to limit the risk of being challenged under future investment agreements, governments need to ensure that:
  - They negotiate for provisions in these agreements that reinforce their ability to put forward tobacco control measures that they think are necessary to protect public health; and
  - They empower their public health communities to become more involved in trade and health issues at all levels of governance, such as by engaging with health authorities and groups during negotiations.

#### 4.2.2 Trade and investment law poses an inherent threat to tobacco control regulations

This school of thought proposes that international trade and investment law inherently impedes tobacco control. Proponents of this school of thought have focused on resisting trade and investment negotiations to ensure that new rules under such agreements do not further constrain a country's domestic regulatory autonomy that might be essential in implementing tobacco control measures. This group and the literature that supports their view argue that international trade law tends to undermine domestic sovereignty, adds a great amount of unpredictability and provides the tobacco industry with new avenues to challenge a government's tobacco control measures. This is compounded by a multiplicity of possible dispute processes that can have a chilling effect on governments' regulatory decisions on tobacco control.

In terms of WTO law, Jane Kelsey<sup>157</sup> points out that the burden of proving the elements of 'necessity' for a tobacco control measure under the GATT 1994 is on the government that relies on such exception. What amounts to 'necessary' is ultimately determined by trade experts in a dispute tribunal. She refers to the case of *Thai Cigarettes* to illustrate this point, where Thailand argued that its ban on importing US cigarettes was necessary as lifting the ban would have the effect of increased competition and advertising specifically targeted at previously untapped market of women and children. As mentioned in **section 3**, the panel in that case rejected Thailand's argument, stating that the Thai government had alternatives such as labelling rules and bans on tobacco advertising – as long as the chosen measure did not discriminate against imports. Similarly, the tobacco industry has used this to argue that there is no strong scientific evidence of a nexus between tobacco control

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<sup>157</sup> University of Auckland, Bachelor of Laws (Hons) Victoria University of Wellington, Bachelor of Civil Law Oxford University, Master of Philosophy (Crim) University of Cambridge, PhD Law University of Auckland.

policies such as plain packaging, that negate their trademarks and a limited legitimate public health objective of reducing tobacco consumption among youth.<sup>158</sup>

This school of thought notes that although the health exceptions in the WTO Agreements provide some flexibility for tobacco control regulations, such exceptions are not always replicated in international investment agreements. One of the biggest issues outlined by proponents of this school of thought is the multifaceted ways BITs and FTAs can be used by the tobacco industry against host States that are attempting to implement tobacco control measures. As mentioned previously, export-oriented tobacco companies often lobby trade officials during FTA negotiations to push for lower tariffs on tobacco products. Jane Kelsey argues that this can be accompanied by an implicit or explicit threat of an investor-state dispute if industry views are ignored.<sup>159</sup> In their article, Deborah Gleeson<sup>160</sup> and Sharon Friel<sup>161</sup> state that regional trade and investment agreements tend to emerge in the context of countries being unable to gain the terms they want through the multilateral trading systems generally overseen by the WTO. This exacerbates health inequities, because of the inherent power imbalances, where wealthy countries have more power to negotiate advantageous trade rules and obtain concessions they were unable to gain through the WTO.<sup>162</sup> At other times, developing countries request FTAs with developed nations and developed nations negotiate for investor protection or TRIPS-plus provisions in exchange for further opening their markets.

Another reason for this shift towards these post-WTO agreements is that the WTO has had the effect of creating a level playing field for both wealthy and low- and middle-income countries whereby larger low and middle income countries have been able to bind wealthy countries to common trade rules. Regional trade and investment agreements on the other hand have the capability to reduce the number of countries that form part of the negotiation and allow wealthy countries to have a higher bargaining power. Furthermore, countries seek preferential access to foreign markets using FTAs as tariff rates under WTO law must be applied on a Most-Favoured-Nation basis (i.e. equally for all WTO Members). Therefore, FTAs offer the prospect of a country's exporters to have better access to foreign markets than exporters from foreign countries that do not have an FTA with their trading partner. This has resulted in a domino effect where for example, if Australia concludes an FTA with Japan and receives better access to the dairy market, New Zealand will be compelled to seek an FTA with Japan to compete on equal terms with Australia.

This school of thought uses the TPPA as an example to demonstrate how trade agreements of such large scale can provide new material to support tobacco industry arguments.<sup>163</sup> They argue that the TPPA intensifies the existing trade provisions that are found in WTO Agreements and in other multilateral trade agreements. They also argue that the TPPA introduces unprecedented provisions that increase the protections for investors and intellectual property rights-holders.<sup>164</sup> Deborah Gleeson and Sharon Friel use the leaked text of the draft TPPA to demonstrate how States can be exposed to investor-state disputes as a result of implementing tobacco control measures. They scrutinise the leaked chapters of the TPPA and find that the United States is pursuing several provisions for this agreement that would constrain domestic policy space for governments to protect

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<sup>158</sup> Kelsey, Jane. "International Trade Law and Tobacco Control.", p. 23-24.

<sup>159</sup> Kelsey, Jane. "International Trade Law and Tobacco Control.", p. 54-55.

<sup>160</sup> School of Public Health and Human Biosciences, La Trobe University, Melbourne, Victoria, Australia.

<sup>161</sup> National Centre for Epidemiology and Population Health, Australian National University, Acton, ACT, Australia.

<sup>162</sup> Gleeson, D., & Friel, S. (2013). Emerging threats to public health from regional trade agreements. *The Lancet*, 381(9876), 1507-1509.

<sup>163</sup> A detailed discussion of TPPA is set out in **section 3.4** of this paper.

<sup>164</sup> World Bank, *World Development Report 2010: Development and Climate Change*, (Washington, 2010). Accessed July 22, 2014. <http://siteresources.worldbank.org/INTWDR2010/Resources/5287678-1226014527953/WDR10-Full-Text.pdf>

the health of their populations. In his article, Robert Stumberg<sup>165</sup> highlights the fact that international law cannot be separated from political systems of a country and alleges that the current TPPA negotiations are largely being driven by the United States government which has worked to expand market access for advertising and distribution, trademark protections, investor rights and reduce tariffs, to the benefit of tobacco companies.<sup>166</sup>

Sharon Friel et al.<sup>167</sup> assess the implications of various leaked chapters in the TPPA as a means to discuss the potential food-related public health risks of TPPA. They assert that the draft *Investment* chapter may extend the provisions in TRIMs (which prohibits Members from applying a trade-related measure on goods by way of national treatment or quantitative restrictions that are specified in GATT 1994). This in turn may create more favourable conditions for long-term investment by the trans-national food industry.<sup>168</sup> Likewise, this extension of TRIMs Agreement could also create favourable conditions for trans-national tobacco industry by preventing governments from imposing measures that prevent discrimination against imports, thereby increasing competition between domestic and foreign tobacco companies.

Additionally, the proponents of this school of thought criticise the dispute mechanism for IIAs, particularly for its perceived lack of coherence and transparency. They assert that most IIAs tend to contain investor-state dispute settlement (ISDS) mechanisms, under which States allow investors access to a forum where disputes against host States may be removed from the political realm and domestic courts and resolved through arbitration. In their article, Deborah Gleeson<sup>169</sup> and Sharon Friel<sup>170</sup> refer to Philip Morris Asia's challenge to Australia's plain packaging laws under the ISDS to illustrate that trade and investment treaties provide investors with avenues for international corporations to challenge democratically-enacted public health policies in different countries.<sup>171</sup> They allege that even if the governments defending the claim have a valid defence, the cost of such litigation can amount to millions of dollars and the ISDS process is without many of the safeguards and the transparency of domestic legal systems. Deborah Sy<sup>172</sup> points out that this sort of dispute mechanism places host States and investors on equal footing and can hold States liable for pecuniary damages based on commercial laws. There are also limited options in terms of the appeals process which make it difficult to overturn decisions or evaluate the discretion exercised by the tribunals.<sup>173</sup> Each arbitral tribunal is independent and no central permanent appeal body exists that is accountable for the decision of the tribunals. She points out that some tribunals in the past have taken a narrow view that the IIAs' purpose is primarily to protect investors and resolve ambiguities

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<sup>165</sup> Professor of Law, Georgetown University Law Centre.

<sup>166</sup> Stumberg, Robert. "Safeguards for tobacco control: options for the TPPA." *Am. J.L. & Med.* 39 (2013): 382

<sup>167</sup> Sharon Friel, National Centre for Epidemiology and Population Health, The Australian National University, Acton 0200, ACT, Australia; Deborah Gleeson, School of Public Health and Human Biosciences, La Trobe University, Melbourne, VIC 3086, Australia; Anne-Marie Thow, Menzies Centre for Health Policy, School of Public Health, University of Sydney, Darlington, NSW 2006, Australia; Ronald Labonte, Institute of Population Health, University of Ottawa, Ottawa ON K1N 6N5, Canada; David Stuckler, Department of Sociology, University of Cambridge, UK; Adrian Kay, Crawford School of Public Policy, The Australian National University, Acton, ACT 0200, Australia; Wendy Snowdon, C\_POND, Fiji National University and Deakin University, Suva, Fiji

<sup>168</sup> Friel, Sharon, Deborah Gleeson, Anne-Marie Thow, Ronald Labonte, David Stuckler, Adrian Kay, and Wendy Snowdon. "A new generation of trade policy: potential risks to diet-related health from the trans pacific partnership agreement." *Global Health* 9 (2013): 46

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<sup>170</sup> National Centre for Epidemiology and Population Health, The Australian National University, Acton, ACT, Australia

<sup>171</sup> Gleeson, Deborah, and Friel Sharon. "Emerging threats to public health from regional trade agreements." *The Lancet* 381, no. 9876 (2013): 1507-1509.

<sup>172</sup> Adjunct Professor, Harrison Institute, Georgetown University Law Centre. L.L.M. 2011, Georgetown University Law Centre; L.L.B. 2004, University of the Philippines College of Law; B.S. Business Economics 1993, University of Philippines School of Economics; Member of the Philippine Bar.

<sup>173</sup> Sy, Deborah. "Warning: Investment Agreements Are Dangerous to Your Health." *Geo. Wash. Int'l L. Rev.* 43 (2011): 625.

in treaty interpretations in favour of investors; other tribunals have recognised the need to balance investor protection with the need to foster a host State's development.<sup>174</sup>

In her article, Deborah Sy also notes that despite the fact that most tobacco industry arguments relating to trade and investment agreements are weak, the threat of a tobacco industry-initiated claim remains high. She also points out that such proceedings are generally private and confidential despite the fact that they involve matters of public interest. She therefore concludes that taking tobacco out of the investment protection regime will help ensure that public health is protected and will potentially preserve the international investment system. She recommends that States should take action both individually and collectively, through negotiations or consultations as well as by developing norms, to achieve this goal.<sup>175</sup>

- The message being promoted by this school of thought is that although WTO law gives States the flexibility to implement tobacco control measures, the States usually have to bear the burden of establishing that they have taken all policy considerations into account prior to the implementation.
- These flexibilities are not necessarily replicated in international trade and investment agreements outside of the WTO platform, which tend to impose obligations on States that go above and beyond the WTO law.
- FTAs and IIAs provide the tobacco industry with avenues to challenge democratically-enacted public health policies in international courts that lack transparency, coherency and appeals processes.
- Such litigation by the tobacco industry under international law can create regulatory chill and can impose significant costs on governments exercising their rights.
- Some commentators from this school of thought advocate for the total exclusion of tobacco from future trade and investment agreements as a solution to mitigate trade liberalisation's effects on tobacco use and harm.
- Some commentators from this school of thought recommend that the public health community should become more involved in trade and health issues at all levels of governance, including during negotiation of trade and investment agreements.

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<sup>174</sup> Ibid.

<sup>175</sup> Ibid.

## 5.0 Human Rights

This section presents a brief introduction to international human rights law and its relation to the WHO FCTC.

### 5.1 Human rights-related treaties

International human rights law can generally be classified into two categories: declarations, which are adopted by bodies such as the United Nations General Assembly, which are not legally-binding although they may be politically so as soft law; and conventions, which are legally-binding instruments concluded under international treaties. Some examples of Human rights-related treaties include: the International Covenant on Civil and Political Rights (ICCPR)<sup>176</sup>; the International Covenant on Economic, Social and Cultural Rights (ICESCR)<sup>177</sup>; and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)<sup>178</sup>.

### 5.2 Human rights-related treaties and the WHO FCTC

On several occasions, the tobacco industry has also used human rights-based arguments to challenge tobacco regulation. However, such arguments have been proved to be weak. Indeed, recent literature suggests that tobacco control and human rights are not in conflict, but are mutually reinforcing.<sup>179</sup> Oscar Cabrera<sup>180</sup> and Lawrence Gostin<sup>181</sup> have offered counter-arguments in favour of tobacco regulation based on international human rights obligations. In their article, they assert that the international human rights law and human rights bodies can provide tobacco control advocates with avenues for international monitoring and enforceability which are lacking in the WHO FCTC.<sup>182</sup>

According to the Committee on Economic, Social and Cultural Rights (CESCR)<sup>183</sup>, States have obligations to respect, protect and fulfil all human rights. With regard to the obligation to respect in

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<sup>176</sup> The International Covenant on Civil and Political Rights, was adopted in 1966 by the United Nations General Assembly. It is a multilateral treaty whereby parties agree to respect the civil and political rights of individuals, including right to life, freedom of religion, freedom of speech, freedom of assembly, electoral rights and rights to due process and fair trial. *Full text can be found at* <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>

<sup>177</sup> The International Covenant on Economic, Social and Cultural Rights, was adopted in 1966 by the United Nations General Assembly. It is a multilateral treaty whereby parties agree to work towards granting economic, social, and cultural rights to Non-Self-Governing and Trust Territories and individuals, including labour rights and the right to health, the right to education, and the right to an adequate standard of living. Full text can be found at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx>.

<sup>178</sup> The Convention on Elimination of All Forms of Discrimination Against Women, was adopted in 1979 by the United Nations General Assembly. It is a multilateral treaty whereby parties agree to work towards elimination of discrimination against women. *Full text can be found at* <http://www.ohchr.org/en/ProfessionalInterest/pages/cedaw.aspx>

<sup>179</sup> Cabrera, Oscar A., and Lawrence O. Gostin. "Human rights and the framework convention on tobacco control: mutually reinforcing systems." *International Journal of Law in Context* 7, no. 03 (2011): 285-303.

<sup>180</sup> Georgetown University Law Centre.

<sup>181</sup> Georgetown University Law Centre.

<sup>182</sup> Cabrera, Oscar A., and Lawrence O. Gostin. "Human rights and the framework convention on tobacco control: mutually reinforcing systems."

<sup>183</sup> UN Committee on Economic, Social and Cultural Rights (CESCR) was established in 1985 to monitor the implementation of the International Covenant on Economic, Social and Cultural Rights by its States parties. *For further information see*

the context of tobacco control, States must refrain from actively promoting the use of tobacco products. With regard to the obligation to protect in the context of tobacco control, States must take measures to prevent third parties' interference with human rights. This obligation is essential for developing and expanding the human rights approach to tobacco control. They assert that governments have a legal obligation, enshrined in human rights law, to regulate the tobacco industry to prevent the industry from interfering with the right to health and other human rights. For example, governments must ban misleading advertisement of tobacco products in order to protect the right to health, right to information and right of consumers.<sup>184</sup> This analysis therefore suggests that human rights law supports and indeed reinforces tobacco control and governments should be confident that they can (and are in fact obliged to) implement certain tobacco control measures under human rights law.

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United Nations Human Rights. "Committee on Economic, Social and Cultural Rights". Accessed July 16, 2014. <http://www.ohchr.org/EN/HRBodies/CESCR/Pages/CESCRIntro.aspx>.

<sup>184</sup> Cabrera, Oscar A., and Lawrence O. Gostin. "Human rights and the framework convention on tobacco control: mutually reinforcing systems."



## Appendix A: Project Scope

### 1. Client needs

International Union Against Tuberculosis and Lung Disease (the Union) has invited *Allen + Clarke* to provide a comprehensive and up-to-date review on international trade and investment agreements and their impact on tobacco control. The purpose of this review is to produce a position statement for the Union on the actual and potential impact of international trade and investment agreements on domestic and international tobacco control.

The aim of the paper is to provide a background of relevant international trade law instruments and discuss the issues and challenges they pose for tobacco control. The paper then aims to provide an overall summary of the issues with recommendations for the Union and its partners.

### 2. Proposed approach

*Allen + Clarke* has undertaken this work in three phases:

- *Phase one* – planning and establishing project oversight
- *Phase two* – research and information collection
- *Phase three* – compilation and development of the paper

#### 2.1 Planning and establishing project oversight

This phase involved establishing a group known as International Treaties Impact Working Group (ITIWG) to provide guidance, advice and feedback as required in relation to the development of the Union's position statement. *Allen + Clarke* discussed the project with ITIWG and agreed on the proposed research methodology, structure of the final paper, communication around the project and timing for the work.

*Allen + Clarke* also secured engagement with an external expert on international law and public health to provide guidance and peer-review the paper.

#### 2.2 Research and information collation

*Allen + Clarke* developed a search criteria and undertook a literature search using the following search terms:

- Trade agreements/treaties/conventions/protocols + tobacco / tobacco control
- Trade agreements/treaties/conventions/protocols + WHO Framework Convention on Tobacco Control / FCTC
- Multilateral/bilateral investment agreements / treaties + tobacco / tobacco control
- Multilateral/bilateral investment agreements /foreign investment/ treaties + WHO Framework Convention on Tobacco Control / FCTC
- Trade liberalisation/free trade + tobacco / tobacco control
- Trade liberalisation + WHO Framework Convention on Tobacco Control / FCTC
- Trade + public health + tobacco / tobacco control
- Trade + chilling effect + tobacco

- Trade + protection public health
- Human rights treaties/agreements + tobacco / tobacco control
- Agriculture/Agricultural treaties/agreements + tobacco / tobacco control
- Human rights treaties/agreements + WHO Framework Convention on Tobacco Control / FCTC

### **2.3      Compilation and report development**

*Allen + Clarke* developed a proposed structure of the paper. This was shared and approved by the ITIWG.

*Allen + Clarke* then developed a draft paper which was peer-reviewed by external expert. This was shared with the ITIWG for review and approval.

The second draft of the paper incorporated the recommendations by the ITIWG members. This final draft has been peer-reviewed by external expert and is presented to the ITIWG.