Introduction

1. This paper was prepared in accordance with the decision of the Conference of the Parties (COP) to the World Health Organization Framework Convention on Tobacco Control (WHO FCTC) at its fourth session concerning cooperation between the Convention Secretariat and the World Trade Organization (WTO) (FCTC/COP4(18)). The purpose of this document is to facilitate information sharing on trade-related tobacco control issues and to facilitate the monitoring of trade disputes regarding WHO FCTC-related tobacco control measures and other trade-related issues of relevance to the implementation of the Convention. In addition, the COP adopted the Punta del Este Declaration on the implementation of the WHO FCTC (FCTC/COP4(5)), which emphasizes the flexibility that Parties have to implement tobacco control measures in general, including those (such as packaging and labelling) which may touch upon intellectual property matters.

2. Recent events have also highlighted the relationship between WHO FCTC implementation and international trade and investment agreements. These events include formal WTO disputes concerning tobacco control measures, debates in WTO committees, a claim lodged under a free trade agreement (FTA), and two claims lodged under international investment agreements (IIAs). This paper therefore addresses implications for WHO FCTC implementation of these three international fora in turn, before identifying steps that WHO FCTC Parties can take to minimize challenges in these contexts arising from their implementation of the Convention.

I. THE WHO FCTC

3. The WHO FCTC is the first international treaty negotiated under the auspices of WHO; it is an evidence-based treaty developed in response to the globalization of the tobacco epidemic. The Convention entered into force in 2005 and currently has 174 Parties, over 140 of which are also Members of the WTO. The WHO FCTC contains international legal obligations on Parties to implement a number of tobacco control measures for both reduction of supply of, and demand for, tobacco products. Other instruments supplementing the Convention include guidelines for implementation of the WHO FCTC adopted by the Parties by consensus as well as a draft protocol to eliminate illicit trade in tobacco products, currently under negotiation.

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2 Guidelines for implementation have been adopted in respect of Articles 5.3, 8, 11, 12, 13 and 14, and partial guidelines have been adopted for Articles 9 and 10 of the Convention.
4. In the context of trade-related issues, the main impact of the WHO FCTC is threefold. First, Article 5.3 of the Convention (and the relevant guidelines for implementation) state that Parties should protect their policies from commercial and other vested interests of the tobacco industry, and in particular, Parties should avoid providing the tobacco industry with incentives for investment, and should limit their dealings with the industry, including in terms of establishing trade policy. In addition, the WHO FCTC can be used in the interpretation of international trade and investment agreements, making those agreements more sensitive to the concerns underlying tobacco control measures. Finally, the Convention contains rules governing conflicts between itself and other treaties, including trade and investment agreements, as well as being subject to the rules governing the law of treaties.

II. THE LAW OF THE WORLD TRADE ORGANIZATION

5. The WTO Agreements limit the way in which WTO Members restrict or regulate trade in goods and services, including through Members’ imposition of tariff barriers (also known as import or customs duties) and non-tariff barriers to trade (such as regulatory measures). The WTO Agreements most relevant to tobacco control are the General Agreement on Tariffs and Trade 1994 (GATT 1994), the Agreement on Technical Barriers to Trade (TBT Agreement), and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). Below, the paper explains relevant aspects of the GATT 1994, the TBT Agreement, and TRIPS, before detailing how challenges may be brought against WTO Members for failure to comply with these agreements. Disputes between Members concerning compliance with these agreements that are not resolved through consultation are referred to an ad hoc WTO panel, at first instance, and, if appealed, to the standing WTO Appellate Body. Alternatively, formal queries or complaints may be raised outside the dispute settlement system but within relevant WTO committees.

A. The GATT 1994

6. The GATT 1994 applies to trade in goods and is the most general of the WTO agreements. It establishes a number of rules relevant to tobacco control; the most relevant are listed below:

- Article I:1 governs most-favoured nation (MFN) treatment, and requires WTO Members not to discriminate against the imports of any Member in favour of those from any other country;
- Article II:1(a) governs tariff bindings, and establishes maximum tariffs that each Member may impose on the importation of goods, depending on the classification of the particular goods;
- Articles III:2 and III:4 govern national treatment, and preclude Members from discriminating against goods imported from WTO Members in favour of domestically produced goods with respect to internal taxes and internal regulation;
- Article XI:1 establishes a prohibition on quantitative restrictions, which prevents Members from prohibiting or restricting imports from other Members other than through duties, taxes or other charges; and
- Article XX(b) establishes general exceptions for measures that are necessary to protect human, animal or plant life or health, provided that those measures are not applied in a manner constituting a means of arbitrary or unjustifiable discrimination, or a disguised restriction on international trade.

Articles III, XI and XX have been invoked in disputes relating to tobacco products, as explained in the following sections.
Article III

7. Article III:1 establishes a principle of non-discrimination against imports through internal taxation (under Article III:2) or internal regulation (under Article III:4). This principle applies to measures that discriminate in their form or effect. As the WHO FCTC does not require Parties to discriminate with respect to the origin of a product, discrimination through the effect of a measure is of central concern.

8. Internal taxation includes taxes and charges other than tariffs (import duties), including excise taxes, sales taxes and value added taxes. Article III:2 establishes two rules governing such measures. The first sentence of Article III:2 prohibits internal taxes or charges in excess of those applied to ‘like’ (or similar) domestic products. The second sentence of Article III:2 prohibits internal taxes or charges where ‘directly competitive or substitutable’ products are not similarly taxed, so as to afford protection to domestic production. Some WTO disputes and consultations have concerned the application of Article III:2 to tobacco tax measures. However, those disputes have concerned administrative aspects of the laws in question rather than health justifications for tobacco taxes.

9. Internal regulation refers to laws, regulations or requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of imported products. This includes a variety of tobacco control measures including product regulations, labelling measures and some restrictions on tobacco advertising, promotion and sponsorship. Article III:4 prohibits WTO Members from treating imported tobacco products less favourably than like products of national origin.

10. Article III:4 is particularly relevant to tobacco control measures that draw regulatory distinctions between different product classes. For example, in US – Clove Cigarettes\(^3\) (which is currently under appeal), Indonesia claimed that US laws prohibiting certain flavoured cigarettes were discriminatory. The US law in question prohibits the sale of cigarettes containing a constituent that is a characterizing flavour of tobacco or tobacco smoke, other than menthol or tobacco.\(^4\) Indonesia argued that the law discriminated against Indonesian products by prohibiting clove cigarettes (primarily imported from Indonesia) but not menthol cigarettes (primarily domestically manufactured). Although this dispute centred on the TBT Agreement (as discussed below) rather than the GATT 1994, Indonesia’s argument provides an example of the type of claim that might be made under Article III:4. In fact, Indonesia brought the non-discrimination claim under both the TBT Agreement and the GATT 1994.

11. Article III:4 was also one of the provisions at issue in Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines.\(^5\) The claim concerned administration of the Thai tobacco tax system (but did not bring into question Thailand’s right to implement tobacco taxes). The Philippines claimed that Thailand was overvaluing imported cigarettes at customs, resulting in tariffs and taxes being charged at higher rates than were due. The Philippines also claimed that the tax system was administered in a discriminatory manner, partly because the methodologies used for calculating taxes favoured domestic producers. The

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WTO panel agreed that the tax system was administered in a discriminatory manner.\(^6\) Thailand appealed that decision, but the WTO’s Appellate Body upheld the panel’s report.\(^7\)

**Article XI**

12. Article XI:1 prohibits WTO Members from using prohibitions or restrictions on the importation or exportation of products, other than duties, taxes or charges. The dominant view is that Article XI:1 does not apply to all measures restricting importation, but merely to border measures that apply only to imported goods.\(^8\) Under this view, internal (behind the border) regulations that happen to be enforced at the border do not fall within the scope of the provision; rather, they are addressed under Article III.

13. Article XI:1 was at issue in *Thailand – Cigarettes*,\(^9\) a dispute under the GATT 1947.\(^10\) That dispute concerned a Thai licensing system that had the effect of closing the Thai tobacco market to imported products and protecting the market share of the Thai tobacco monopoly. The licensing system was found to constitute a quantitative restriction of the type prohibited by Article XI:1. Thailand took the position that the measure was necessary to protect human health under Article XX(b), as discussed further below.

**Article XX**

14. Article XX of the GATT 1994 sets out general exceptions to the provisions discussed above. Article XX(b) states:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures:

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\ldots \\
(b) \text{ necessary to protect human, animal or plant life or health;}
\]

15. In applying this provision, a panel will determine whether a measure is a measure for the protection of human life or health.\(^11\) In order to make a preliminary determination of necessity, a panel will then weigh and balance the trade restrictiveness of a measure against its contribution to the objective pursued, in light of the importance of that objective. Assuming that a measure withstands this preliminary analysis, a panel will then determine whether there are alternative measures that are less trade restrictive and that are reasonably available to achieve the objective pursued. If there are no such measures, a panel will examine whether the measure complies with the introductory paragraph (chapeau) of Article XX.

16. In the tobacco control context, Article XX(b) was applied in the GATT 1947 dispute of *Thailand – Cigarettes*. Thailand argued that its licensing system was necessary to protect human health. The GATT panel disagreed, ruling that the licensing system was not necessary.

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\(^8\) This interpretation is based on the additional note to Article III. For discussion, see generally Petros Mavroidis, *The General Agreement on Tariffs and Trade: A Commentary*, Oxford, Oxford University Press (2005), pp 46–48.


\(^10\) The GATT 1947 was the precursor to the GATT 1994, which was incorporated into the WTO Agreement.

because taxation measures and non-discriminatory bans on tobacco advertising were reasonably available alternatives to the maintenance of the licensing system. \(^{12}\)

**B. The TBT Agreement**

17. The TBT Agreement applies to technical regulations, which are mandatory requirements that set out product characteristics. \(^{13}\) Technical regulations can prohibit a product from taking a particular form or require that a product take a particular form. Technical regulations include measures such as packaging and labelling measures and product regulations.

18. The most relevant rules in the context of WHO FCTC implementation are:
   - Article 2.1, which imposes non-discrimination obligations on Members (both national treatment and MFN treatment);
   - Article 2.2, which imposes a positive obligation on Members to ensure that technical regulations are not more trade restrictive than necessary to achieve a legitimate objective, such as protection of human health;
   - Article 2.4, which requires Members to use relevant international standards as the basis for technical regulations, except when such international standards or relevant parts would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued;
   - Article 2.5, which creates a presumption that health measures in accordance with international standards do not create unnecessary obstacles to international trade under Article 2.2;
   - Article 2.8, which requires that Members frame technical regulations in terms of performance rather than design or descriptive characteristics, wherever appropriate; and
   - Article 2.9, which obliges WTO Members to notify other Members of their technical regulations.

19. Relatively few disputes have arisen under the TBT Agreement. However, three panel reports, including *US – Clove Cigarettes*, were issued in disputes under the TBT Agreement in 2011. As noted above, *US – Clove Cigarettes* is the subject of an appeal. The reports of the Appellate Body on this and other disputes may provide greater clarity on the TBT Agreement.

20. In *US – Clove Cigarettes*, the panel found that the effect of the US measure was to discriminate against imported clove flavoured cigarettes in favour of menthol cigarettes produced in the US, contrary to Article 2.1 of the TBT Agreement.

21. The panel also considered whether the US measure was more trade restrictive than necessary to protect human health under Article 2.2. On this issue, the panel rejected Indonesia’s claim of violation.

22. Some aspects of the panel’s interpretation of Articles 2.1 and 2.2 are noteworthy. First, the panel treated Article 2.1 as a stand-alone non-discrimination clause for which there is no exception. This can be contrasted with the rule-exemption relationship of Articles III and XX of the GATT 1994. Second, although the panel referred to the *Partial guidelines for*...
implementation of Articles 9 and 10 of the WHO FCTC,\textsuperscript{14} as adopted by the Conference of the Parties, it did not consider whether those guidelines constitute international standards for the purposes of Article 2.

23. The panel also considered an argument to the effect that the US measures violate Article 2.8 of the TBT Agreement, which requires that where appropriate WTO Members specify product regulations in terms of performance standards rather than design or descriptive characteristics. The panel ruled in favour of the US, finding that Indonesia had not established that it would be appropriate to set out the technical regulation in terms of the performance of the products in question.\textsuperscript{15}

24. Article 2.9 of the TBT Agreement creates notification obligations if a WTO Member implements a technical regulation not in accordance with a relevant international standard, or where no relevant international standard exists. These obligations apply if a technical regulation may have a significant effect on trade of other Members. Paragraphs 1 – 4 of Article 2.9 require a Member to, among other things, 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.

25. In \textit{US – Clove Cigarettes}, the panel held that the US had “acted inconsistently” with its notification obligations under Article 2.9. Given that these obligations are procedural in character, they are not discussed further in this paper.

C. The Agreement on Trade-Related Aspects of Intellectual Property Rights

26. TRIPS establishes minimum standards for the protection of intellectual property rights including trademarks and is relevant to tobacco packaging measures.

27. TRIPS obliges WTO Members to permit the registration of trademarks. There are exceptions to this basic obligation, including for misleading trademarks.\textsuperscript{16} As Article 11.1(a) of the WHO FCTC stipulates, misleading or deceptive descriptors include trademarks using terms like ‘light’ or ‘mild’ to suggest that a tobacco product is less harmful than other tobacco products.

28. The ordinary wording of TRIPS and existing case law suggest that TRIPS does not require Members to grant trademark owners the right to \textit{use} a trademark in the course of trade.\textsuperscript{17} Rather, TRIPS guarantees trademark owners only a negative right to \textit{exclude others} from using a trademark. This distinction is important because a variety of tobacco control measures limit the use of trademarks, for example through prohibitions on brand-stretching, prohibitions on the use of misleading descriptors, and restrictions on tobacco advertising, sponsorship or promotion.

29. Nonetheless, tobacco companies often argue that large graphic health warnings and plain packaging violate Article 20 of TRIPS, which states that ‘[t]he use of a trademark in the

\textsuperscript{14} Available along with all of the guidelines adopted by the Conference of the Parties at http://www.who.int/fctc/protocol/guidelines/adopted/en/.
\textsuperscript{15} Panel Report, \textit{US – Clove Cigarettes}, para. 7.498.
\textsuperscript{16} TRIPS, Article 15(2) provides a right to deny registration on the grounds permitted under the Paris Convention for the Protection of Industrial Property. Article 6 quinquies B(iii) provides that Parties may refuse registration on the basis that a mark is misleading.
\textsuperscript{17} See Article 16.1, which suggests a negative right to exclude; Panel Report, \textit{European Communities – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs}, Complaint by Australia, WT/DS290/R, adopted 20 April 2005, paras 7.610 – 7.611.
course of trade shall not be unjustifiably encumbered by special requirements, such as use with another trademark, use in a special form or use in a manner detrimental to its capability to distinguish the goods or services of one undertaking from those of other undertakings.’

30. Article 20 has not been the subject of a relevant WTO dispute. Hence, it is not clear what constitutes a special requirement under the provision. In any case, Article 20 prohibits only unjustifiable encumbrances. In determining whether an encumbrance is justifiable, WTO panels may refer to Article 8 of TRIPS, which indicates that Members may adopt measures necessary to protect public health provided that those measures comply with the terms of TRIPS. Article 8 guides interpretation of other provisions, including Article 20. Accordingly, tobacco control measures that are necessary to protect public health are likely to be lawful under Article 20.

D. Dispute settlement and remedies

31. Only WTO Members have standing within the WTO dispute settlement system to bring a complaint that another Member has violated WTO law. If a WTO panel finds a violation, it generally recommends to the Dispute Settlement Body (DSB) (comprising representatives of all WTO Members) that the Member in question be required to bring the measure into conformity with WTO law.\(^1\) The DSB’s adoption of a panel’s recommendations is quasi-automatic and converts those recommendations into DSB rulings. If a Member does not implement an adverse ruling of the DSB, the complainant may ultimately obtain DSB authorization to retaliate against the respondent from the expiry of the period of time granted for implementation.\(^2\) Retaliation takes the form of ‘suspension of concessions’ – that is, withholding compliance with certain WTO rules with respect to the respondent – subject to qualitative and quantitative limitations.\(^3\)

E. Debates in WTO committees

32. The WTO committee system provides a forum within which WTO Members can discuss measures before they are implemented, with a view to avoiding formal dispute settlement. A number of tobacco control measures have generated debate within WTO Committees, including Canadian and Brazilian measures to reduce the palatability and attractiveness of tobacco products, and Australian measures requiring the plain packaging of tobacco products. These measures have not been the subject of formal dispute settlement.

33. Canadian law prohibits the presence in tobacco products of specific additives, including some characterizing flavours used in cigarettes, little cigars and blunt wraps. The law also prohibits additives used to enhance the flavour of burley tobacco in American style blended cigarettes. These types of cigarettes make up less than 1% of the Canadian tobacco market. An exemption permits the sale of menthol-flavoured products. The rationale underlying this exemption is that the law is targeted at new products designed to entice children to use tobacco, whereas menthol-flavoured products are well established in the market.\(^4\)

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\(^1\) See Article 19(1) of the Dispute Settlement Understanding.
\(^2\) See Articles 22(1) and 22(2) of the Dispute Settlement Understanding.
\(^3\) See Articles 22(3) and 22(4) of the Dispute Settlement Understanding.
34. In the TBT Committee, some WTO Members questioned the evidence base underlying the Canadian law, querying whether it is more trade restrictive than necessary to protect human life or health. The primary objectors to the law have been Members with burley tobacco growing in their territory. No WTO Member has filed a formal request for consultations with Canada, which is the first step in dispute settlement.

35. Brazil, which has notified WTO Members that it intends to implement legislation similar to Canada’s, has faced similar issues in the TBT Committee. Brazil’s legislation will prohibit the presence of a wide variety of additives in tobacco products, with a view to preventing additives from enhancing the palatability and attractiveness of tobacco products. A number of WTO Members have objected to the law on the basis that it constitutes an unjustifiable restriction on trade. The law is yet to be implemented and it remains to be seen how the issue will develop.

36. In 2011, the Australian government passed a law requiring tobacco products to be sold in plain packaging. The law will prohibit the use of tobacco industry logos, brand imagery, colours and promotional text on product packaging, other than brand and product names in a standard colour, position, font style and size. The packaging must be a standard drab dark brown colour in matt finish, with health warnings required by law. The introduction of the plain packaging of tobacco products is relevant to the implementation of Australia’s obligations under the WHO FCTC. The guidelines for implementation of Articles 11 and 13 of the WHO FCTC, as adopted by the Conference of the Parties, recommend plain packaging. A number of WTO Members have expressed support for Australia’s measure, while others have objected to Australia’s law in meetings of the TBT Committee and TRIPS Council. One of the primary objections is that there is not sufficient evidence to suggest that plain packaging will be effective in achieving its goals. This objection has been raised by a number of WTO Members, including by some that are also WHO FCTC Parties, even though the guidelines for implementation of Articles 11 and 13 of the WHO FCTC recommend plain packaging.

37. Representatives of WHO and the WHO FCTC Secretariat have attended a number of meetings of the TBT Committee and TRIPS Council as observers. In this capacity, WHO has explained the impact of tobacco consumption on public health and the WHO FCTC Secretariat has outlined those provisions of the WHO FCTC and its guidelines that are relevant to the measures in question.

III. FREE TRADE AGREEMENTS

38. FTAs are usually bilateral or regional and, when concluded between WTO Members, must eliminate most duties and other barriers to trade between the countries involved.

39. Although dispute settlement under most FTAs is not common, a tobacco company recently made a claim against Norway under the European Economic Area Agreement (EEA

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24 Tobacco Plain Packaging Act 2011 (Cth).
25 See GATT Article XXIV:8(b) for a more detailed definition.
26 The exception to this is investor – state dispute settlement, which is discussed below.
The EEA Agreement extends parts of EU law governing the free movement of goods to Norway. The claim was lodged with the Oslo District Court, where it was argued that Norway violated its obligations by banning tobacco product displays at the point of sale.

The European Free Trade Association (EFTA) court has competence to advise on implementation of the EEA Agreement. Hence, the Oslo District Court requested an advisory opinion from that body. The EFTA court had to consider 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 purposes of protecting public health.

The EFTA court concluded that a ban would constitute a measure having the equivalent effect of a quantitative restriction if 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. The EFTA court referred the second question back to the national court.

IV. INTERNATIONAL INVESTMENT AGREEMENTS

IIAs can be found in the form of investment chapters in FTAs or as separate bilateral investment treaties (BITs). These agreements limit the ability of states to interfere with investments made by foreign investors. IIAs seek to protect the property rights of foreign investors abroad by guaranteeing protection against discrimination, compensation for expropriation of property, and protection against treatment that is unfair or inequitable. It is important to note that under IIAs, foreign investors, i.e. corporate actors, usually have standing to bring claims directly against states. Damages (compensation for losses) are also available as a remedy under IIAs. The following sections identify some of the typical IIA provisions that are most relevant to WHO FCTC implementation: expropriation, fair and equitable treatment, and umbrella clauses.

A. Indirect expropriation

Typically IIAs provide protection against nationalization and expropriation or measures equivalent thereto, except where such measures are for a public purpose and non-discriminatory, and compensation is paid.

Because tobacco control measures do not normally involve the direct transfer of property from tobacco companies to the state, they do not normally raise questions of direct expropriation or nationalization. Rather, tobacco companies argue that certain tobacco control measures are equivalent to expropriation (also known as indirect expropriation). These arguments have been made in domestic regulatory debates and in claims made by tobacco companies against Uruguay and Australia.

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27 See the EFTA Court website page devoted to the case at http://www.eftacourt.int/index.php/cases/philip_morris_norway_as_v_staten_v_helse_og_omsorgsdepartementet

28 On direct expropriation see Pope & Talbot Inc v Canada, Interim Award, para. 100; see also Feldman Karpa v Mexico, Award, ICSID Case No ARB(AF)/99/1; IIC 157 (2002); (2003) 18 ICSID Rev—FILJ 488; (2003) 42 ILM 625, para. 151.
45. In the Uruguayan context, a tobacco company based in Switzerland has filed a claim under a BIT between Switzerland and Uruguay. The claim, which will be arbitrated under the Rules of the International Centre for Settlement of Investment Disputes (ICSID), takes issue with Uruguayan tobacco packaging measures. Uruguayan law requires that 80% of the surface of tobacco packaging be taken up with graphic health warnings and prohibits package design that is misleading as to the health effects of consumption. The latter law has been implemented so as to constitute a single presentation per brand requirement i.e. Uruguayan authorities have deemed variants of the tobacco company’s brands to be misleading and determined that only one presentation per brand may be used in the Uruguayan market.

46. The tobacco company argues that these two measures result in indirect expropriation of its property rights. It also argues that the size of the images used in graphic health warnings are expropriatory because they are designed to shock and repulse consumers rather than to warn of the actual risks of consumption.

47. In the Australian context, an Asia-based tobacco company has brought a claim under the 1993 Agreement between the Government of Australia and the Government of Hong Kong for the Promotion and Protection of Investments. The claim relates to the Tobacco Plain Packaging Act 2011 (Cth), which was described above in paragraph 36. The tobacco company argues that plain packaging results in indirect expropriation of its property rights. The arguments raised are similar to those made against Uruguay. In each instance, the tobacco company argues that tobacco packaging measures result in expropriation of their trademarks and the goodwill associated with their brands.

48. Although past cases do not constitute binding precedent for the arbitral tribunals hearing these disputes, those cases suggest that a number of factors will be considered in determining whether indirect expropriation has occurred.

49. The extent of interference with an investor’s property rights is one factor for consideration. There is no set threshold to be met, but recent case law suggests that for indirect expropriation to occur there must be ‘a substantially complete deprivation of the economic use and enjoyment of rights to the property, or of identifiable distinct parts thereof (i.e. it approaches total impairment)’. The dominant approach found in the case law is to treat this degree of interference as necessary, but not in itself sufficient for indirect expropriation to arise. That is, tribunals will also consider other factors in determining whether a measure constitutes compensable expropriation or non-compensable regulation by the host state. These factors may include: whether the measure is within the police powers of the state, the proportionality of the measure to its aims, and the legitimate expectations of the investor.

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29 FTR Holdings SA (Switzerland), Philip Morris Products SA (Switzerland) and Abal Hermanos SA (Uruguay) v Oriental Republic of Uruguay, Request for Arbitration, Under the Rules of the International Centre for Settlement of Investment Disputes, 19 February 2010.


31 Fireman’s Fund Insurance Company v Mexico, Award, ICSID Case No ARB(AF)/02/01, IIC 291 (2006), despatched 17 July 2006, para. 176(c); cited in Corn Products International Inc v Mexico, Decision on Responsibility, ICSID Case No ARB(AF)/04/1; IIC 373 (2008), signed 15 January 2008, para. 91.

32 Corn Products International Inc v Mexico, Decision on Responsibility, ICSID Case No ARB(AF)/04/1; IIC 373 (2008), signed 15 January 2008, para. 87(j); Although for a controversial view that emphasizes interference see Metalclad Corp v Mexico, Award, Ad hoc—ICSID Additional Facility Rules; ICSID Case No ARB(AF)/97/1; IIC 161 (2000), signed 25 August 2000, para. 103.
50. The concept of police powers recognizes that sovereign states may exercise certain powers, including the power to protect health, without attracting liability for indirect expropriation. When acting in accordance with this power, states do not have an obligation to compensate an investor for expropriation, so long as the state’s conduct is not discriminatory and is not designed to cause a foreign investor to abandon property to the state or sell it at a distress price. The concept of police powers is rarely articulated in the text of IIAs. One view is that measures within police powers are exempt from the obligation to pay compensation. Another view is that measures falling within police powers are not expropriatory in character.

51. The legitimate expectations held by an investor are another relevant factor. If specific commitments have been made to an investor and that investor has acted in reliance on those expectations in making its investment this may form the basis of a claim for indirect expropriation. It will not be sufficient for a tobacco company to argue that it had a general expectation that it would avoid regulation. The legitimacy of such expectations is also questionable in light of the harmful character of tobacco products and the existence of the WHO FCTC.

B. Fair and equitable treatment

52. The tobacco company complainants in the challenges against Uruguay and Australia have also argued that the Uruguayan and Australian measures result in violation of provisions ensuring fair and equitable treatment for investors. In each instance, the tobacco company also argues that the measures are unreasonable and arbitrary.

53. It is common for IIAs to contain clauses requiring that investors be afforded fair and equitable treatment. It is difficult to generalize about these types of clauses because a variety of formulations exist. Some clauses establish stand-alone treaty obligations that are quite broad in scope. Other clauses require only the standard of treatment found in the international minimum standard required by customary international law. The content of this latter standard is debated and different tribunals have taken different approaches.

54. Violation of the fair and equitable treatment standard has occurred in a number of different circumstances, including 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, and government coercion and harassment.

55. Under clauses linked to customary international law, it is difficult for an investor to establish a violation. For example, the tribunal in Glamis Gold v United States stated that ‘an

act must be sufficiently egregious and shocking – a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons – so as to fall below accepted international standards. On the other hand, some tribunals have required a higher standard of treatment, concluding that customary international law may be violated by acts that are merely unfair, inequitable or unreasonable.

C. Umbrella clauses

56. The tobacco company complainants have also invoked so-called ‘umbrella clauses’ in claims against Uruguay and Australia. These clauses typically require a host state to respect commitments it has made to investors with regard to investments. In each claim, the tobacco company argues that commitments under WTO law, and particularly TRIPS, constitute commitments to investors that fall within the scope of the umbrella clauses in question. Whether WTO commitments could be invoked under an umbrella clause remains to be seen. Nonetheless, the argument highlights that some non-IIA commitments, particularly those made directly to investors, may possibly be litigated under investment treaties.

V. DOMESTIC IMPLEMENTATION OF THE WHO FCTC

57. WHO FCTC Parties can take a number of approaches to minimize the risk that international trade or investment agreements will impede implementation of the Convention.

A. Policy coordination

58. Problems of policy coordination and coherence are well established in the context of trade and health. These problems are particularly evident when WTO Members object to the implementation of measures they have supported in the WHO FCTC context.

59. In some cases, increased dialogue between trade and health ministries may lower barriers to implementation of the Convention. For example, the input of health authorities in negotiation of new trade and investment agreements may reduce the risk that those agreements will have negative effects on health. Similarly, the input of health authorities in WTO committee debates may make it easier for other WHO FCTC Parties to lead the way in implementing the Convention, as in the case of plain packaging.

B. Market data and non-discrimination

60. One means by which WHO FCTC Parties can prepare themselves for challenges under international trade agreements is to collect and maintain accurate data concerning the market for tobacco products in their territory. Accurate market data should permit authorities to identify any disparate impact of tobacco control measures on imported as compared to domestic products and thereby tailor measures to reduce the risks associated with claims of discrimination.

C. International investment agreements

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61. In the context of IIAs, Parties can take a number of steps to minimize the risk of liability. Some of these steps relate to prospective agreements, whereas others address the implications of existing agreements.

62. When negotiating new IIAs, Parties can take steps to clarify the application of these agreements to health measures. Some more recent agreements, such as the ASEAN – Australia – New Zealand FTA, include language clarifying the concepts of indirect expropriation and fair and equitable treatment.

63. Another approach is to ensure that health measures, or tobacco control measures, are completely excluded from new IIAs. The Australian government has announced that it will not seek investor state dispute settlement in its international agreements and that it has not, and will not agree to commitments that compromise its ability to implement plain packaging.\(^{41}\)

64. Another possible step is to avoid making commitments to tobacco companies that could lead to legitimate expectations that more or stricter regulation will not occur at some future point. Apart from specific representations, such commitments might include tax holidays, tax or duty exemptions in free trade zones, and concessions that permit sale of tobacco products duty free at airports or other locations. In this respect, the *Guidelines for implementation of Article 5.3 of the WHO FCTC*, as adopted by the Conference of the Parties to the WHO FCTC, are also relevant to the actions Parties take.

65. Similarly, Parties to the WHO FCTC can take steps to monitor foreign investment in the tobacco industry. Many IIAs do not limit the ability of contracting parties to refuse the establishment of an investment in their territories. These agreements permit some flexibility to refuse foreign investment in the tobacco sector. Alongside monitoring of tobacco industry investment, Parties to the WHO FCTC could also monitor their trademark registers to ensure that misleading tobacco trademarks (for example those containing the words ‘light’ or ‘mild’) are not granted registration and that existing misleading trademarks are stripped of registration.

66. With respect to existing agreements, Parties have also taken steps to limit their potential liability, such as exchanging side notes clarifying interpretation of their commitments\(^ {42}\) and issuing joint declarations to achieve the same purpose.\(^ {43}\)

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