Tobacco Control Research Tūranga

INTERNATIONAL TRADE LAW AND TOBACCO CONTROL

Trade and investment law issues relating to proposed tobacco control policies to achieve an effectively smokefree New Zealand by 2025

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Trade and investment law issues relating to proposed tobacco control policies to achieve an essentially smokefree Aotearoa New Zealand by 2025

A report to the New Zealand Tobacco Control Research Tūranga:
A programme of innovative research to halve smoking prevalence in Aotearoa/New Zealand within a decade

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Conflict of Interest

None

Contents

About the author ... 2
Acknowledgements ... 2
Funding ... 2
Conflict of Interest ... 2

Contents ... 3

Abbreviations ... 5

Introduction ... 7

Part 1: Proposed Tobacco Control Policies and general considerations ... 9
General considerations ... 9

Part 2: Relationship between the Framework Convention on Tobacco Control and New Zealand's free trade and investment agreements ... 11
2.1 New Zealand's trade and investment law obligations ... 11
2.1.1 The GATT and the World Trade Organization ... 12
2.1.2 The CER Agreement with Australia ... 12
2.1.3 Bilateral investment agreements ... 13
2.1.4 Bilateral and regional free trade and investment agreements ... 14
2.2 The Framework Convention on Tobacco Control ... 15
2.2.1 Obligations under the Convention ... 15
2.2.2 Guidelines on Article 5.3 (Protection of tobacco control policies from commercial and other vested interests of the tobacco industry) ... 16
2.2.3 Guidelines on Article 11 (Packaging and labelling of tobacco products) ... 16
2.2.4 Guidelines on Article 13 (Tobacco advertising, promotion and sponsorship) ... 16
2.3 Relationship of the FCTC to free trade and investment treaties ... 17

Part 3: Legal issues ... 21
3.1 Trade in goods ... 21
3.1.1 Quantitative restrictions on imports ... 21
3.1.2 Tariffs ... 22
3.1.3 Non-discrimination ... 22
3.1.4 Exceptions ... 23
3.2 Technical barriers to trade ... 25
3.2.1 Non-discrimination ... 25
3.2.2 Necessary and least trade-restrictive measures ... 26
3.2.3 Notification ... 27
3.2.4 Implementation periods ... 28
3.3 Intellectual property rights ... 28
3.3.1 Alleged breaches of Intellectual property rights ... 28
3.3.2 Counter-arguments ... 29
3.3.3 Permitted constraints ... 30
3.4 Investor promotion, protection and enforcement ... 31
3.4.1 Non-discrimination ... 32
3.4.2 Expropriation ... 32
3.4.3 Fair and equitable treatment ... 33
3.4.4 Umbrella clauses ... 33
3.4.5 Exclusions and exceptions ... 34
3.4.6 Investor-state dispute powers ... 34
3.5 Trade in services ... 35
3.5.1 Scope of services agreements ... 36
3.5.2 Non-discrimination ... 37
3.5.3 Market access restrictions ... 37
3.5.4 Domestic regulation ... 37
3.5.5 Exceptions ... 39
3.5.6 Notification ... 40
3.6 Mutual recognition ... 40
3.7 Transparency and regulatory coherence ... 41
3.7.1 Transparency ... 41
3.7.2 Regulatory Coherence ... 42
3.7.3 The right to regulate ... 44

Part 4: Potential for Legal Intervention ... 45
4.1 State interventions ... 45
4.1.1 Notification of measures to the WTO ... 45
4.1.2 Discussion at the TBT Committee ... 46
4.1.3 Discussion at TRIPS Council ... 47
4.1.4 WTO Trade Policy Reviews ... 48
4.1.5 WTO disputes ... 48
4.1.6 FTIA disputes ... 49
4.1.7 USTR report on TBT ... 49
4.1.8 Mutual Recognition Arrangements ... 49
4.2 Investor interventions ... 49
4.2.1 Potential New Zealand industry interveners ... 50
4.2.2 Investor-state enforcement ... 51
4.2.3 Past tobacco-related investment disputes ... 51
4.2.4 Current tobacco-related investment disputes ... 52
4.2.5 The chilling effect ... 54
4.3 Policy self-censorship ... 57

Part 5: Issues for New Zealand's proposed tobacco control policies ... 61
5.1 General considerations ... 61
5.2 Legal issues relating to proposed policies ... 62
5.2.1 Mandatory plain packaging by 2013 ... 62
5.2.2 Annual reductions by a set percentage in the amount of imported tobacco ... 64
5.2.3 Annual reductions by a set percentage in the number of retail outlets ... 64
5.2.4 The power for local authorities to control the number and location of tobacco retailers ... 64
5.2.5 Annual reductions by a set percentage in the number and quantity of tobacco products for sale at each outlet ... 65

5.2.6 Ban on the use of terms like 'mild', 'smooth', 'fine' and colour descriptors 65
5.2.7 Enhanced high-impact graphic health warnings 65
5.2.8 Control of constituents such as flavours that have greatest impact on palatability, addictiveness and health impact of tobacco 65
5.2.9 Regulation of nicotine content 66
5.2.10 Ban on duty free sales of tobacco or reduced duty free allowances 66
5.2.11 Large annual increases in tobacco tax 67
5.2.12 Funding tobacco control policies through tobacco excise revenue or a tobacco levy 67
5.2.13 Registration as a pre-condition to import, distribute or sell tobacco 67
5.2.14 Disclosure of the volumes of tobacco imported, distributed or sold 67
5.2.15 Stronger disclosure of additives in tobacco products 67
5.2.16 Public reporting of elements of tobacco and smoke by class of product, brand and brand variant 67
5.2.17 Guidelines to prevent tobacco company interference in policy making 67
5.2.18 Local government initiated smoke free zones 67
5.2.19 Smoke free cars 68

Appendix 1: Potential legal challenges to New Zealand's tobacco control policies 69

Appendix 2: New Zealand's trade and investment agreements 71

Appendix 3: Tobacco control policies with trade and investment treaty implications 72

Appendix 4: Trade rules relevant to tobacco control policies 76

International instruments 76

1. Agreement on Trade-Related aspects of Intellectual Property Rights (TRIPS) 76
2. Paris Convention for the Protection of Industrial Property 77
3. Agreement on Technical Barriers to Trade (TBT) 77
4. General Agreement on Tariffs and Trade (GATT) 78
5. General Agreement on Trade in Services (GATS) 79
6. Framework Convention on Tobacco Control (FCTC) 81
7. Disciplines on Domestic Regulation 82
8. Regulatory Coherence (TPPA) 82
9. Agreement between the Government of Hong Kong and the Government of New Zealand for the Promotion and Protection of Investments 84
10. New Zealand - Malaysia Free Trade Agreement 84
11. Trans-Tasman Mutual Recognition Arrangement 87
12. Trans-Tasman Mutual Recognition Act 1997 (NZ) 90
13. Tobacco Plain Packaging Regulations 2011 (Aus) 92
14. Trans-Tasman Mutual Recognition Act 1997 (Aus) 92

Bibliography 95

Abbreviations

BIT	Bilateral Investment Treaty
CER	Australia New Zealand Closer Economic Relations Trade Agreement
EEAA	European Economic Area Agreement
EFTA	European Free Trade Area
EU	European Union
FCTC	World Health Organisation Framework Convention on Tobacco Control
FTA	Free Trade Agreement
FTIA	Free Trade and Investment Agreement
GATS	General Agreement on Trade in Services (WTO)
GATT	General Agreement on Tariffs and Trade (WTO)
MAC	Maori Affairs Committee
MoH	Ministry of Health
MRA	Mutual Recognition Arrangement
NAFTA	North American Free Trade Agreement
P-4	Trans-Pacific Strategic Economic Partnership Agreement
RIA	Regulatory Impact Assessment
RIA	Regulatory Impact Statement
TBT	Technical Barriers to Trade (WTO)
TRIPS	Agreement on Trade-related Aspects of Intellectual Property Rights (WTO)
TTMRA	Trans-Tasman Mutual Recognition Arrangement
TTMRAct	Trans-Tasman Mutual Recognition Act
TTPA	Trans-Pacific Partnership Agreement
UNCTAD	United Nations Conference on Trade and Development
US	United States of America
USTR	United States Trade Representative
WHO	World Health Organization
WTO	World Trade Organization

Introduction

This report addresses the implications of free trade and investment agreements for policies that aim to achieve an essentially smoke free Aotearoa New Zealand by 2025 and to advance that goal by 2015. It is a technical report that identifies the legal issues that might be raised as the policies are developed. It is not an opinion on the legality of these measures; that can only be prepared once proposed prescriptions and supporting documentation are available.

It is essential to stress at the outset that trade and investment law is neither clear-cut nor predictable, and is constantly shifting. As the number of agreements expands, they introduce subtle and substantive variations on wording, novel rules, and complex inter-relationships between treaties, including those related to tobacco control. The legal uncertainty is compounded by a multiplicity of possible dispute processes, which are often ad hoc; the mere threat of a dispute, combined with rights for tobacco industry interests to participate in domestic decision-making processes, can have a chilling effect on governments' regulatory decisions. These factors make it difficult to say with certainty what the outcome of any legal challenge to a tobacco control policy might be.

The approach taken in this report is conservative and aims to identify arguments that could be raised by or on behalf of the tobacco industry against proposed policies. The structure and detail also aims to help educate the public health community on the basics of the relevant international treaties.

Part 1 sets out the tobacco control policies that are evaluated in this report:

Part 2 discusses the relationship between the New Zealand government's international obligations under the Framework Convention on Tobacco Control and its trade and investment treaties;

Part 3 examines legal issues that might arise from New Zealand's trade and investment agreements under seven subject headings: trade in goods; technical barriers to trade; intellectual property rights; investment promotion and protection; trade in services; mutual recognition; and transparency and regulatory coherence;

Part 4 considers the contexts and forums within which these legal issues might be raised, grouped according to state-state interventions, industry interventions and domestic decision-making processes; and

Part 5 consolidates this analysis with reference to each policy.

In support, Appendix 1 sets out in tabulated form the potential legal trade and investment issues that might be raised (but does not assess the likelihood that these will succeed). Appendix 2 lists New Zealand's trade and investment agreements. Appendix 3 identifies those tobacco control policies recommended by the Maori Affairs Select Committee Inquiry into the Tobacco Industry in Aotearoa and the Consequences of Tobacco Use for Maori (the MAC report) that have been fully or partly endorsed by the government and that potentially raise trade and investment treaty issues. Appendix 4 sets out, for ease of reference, the key provisions of relevant chapters of those agreements and the Convention. The bibliography includes websites that could assist future researchers.

The report draws on five main sources, in addition to legal texts:

a. Official documents, including regulatory impact statements, prepared for the MAC, Smokefree Environments (Controls and Enforcement) Amendment Bill 2011 (display ban law) and Tobacco Plain Packaging Act 2011 of Australia.

b. Legal documents and scholarly analyses relating to Philip Morris Asia's challenge to the Australian plain packaging legislation pursuant to the Australia-Hong Kong Bilateral Investment Treaty 1993.

c. Minutes of sectoral committees and reports of dispute tribunals in the World Trade Organization and other trade and investment forums as they relate to tobacco control measures;

d. The views expressed by critics of tobacco control policies in submissions to the MAC inquiry, the Health Select Committee on the display ban law, the Australian Government's Consultation Paper on the Tobacco Plain Packaging Bill Exposure Draft 2011, and the consultation by trade ministries in New Zealand, Australia and the United States on the proposed Trans-Pacific Partnership agreement; and

e. Trade and investment law literature on smoking and alcohol control policies.[1]

[1] This literature review has been selective and centres on the principal issues raised by the proposed policies.

Part 1: Proposed Tobacco Control Policies and general considerations

The policies considered in this report are drawn from the New Zealand government's responses to the MAC report[2] and subsequent policy decisions,[3] and *Next Steps 2011-2015 towards Smokefree Aotearoa New Zealand by 2025* developed by the National Tobacco Control Working Group.[4] The scope of the policies has been interpreted broadly on the assumption that policy perspectives and governments may change over this period. The recommendations on which the policies are based are set out fully in Appendix 2. The following shorthand list of the proposals is referred to throughout the report.

- Mandatory plain packaging of tobacco products by 2013;
- Ban on the use of terms like 'mild', 'smooth', 'fine' and colour descriptors;
- Enhanced high impact graphic health warnings on packaging;
- Stronger disclosure of additives in tobacco products;
- Regulation of nicotine content;
- Control of constituents, such as flavours, that have the greatest impact on palatability, addictiveness and health impact of tobacco;
- Public reporting of elements of tobacco and smoke by class of product, brand and brand variant;
- Guidelines to prevent tobacco company interference in policy making;
- Annual reductions by a set percentage in the amount of imported tobacco;
- Annual reductions by a set percentage in the number and quantity of tobacco products for sale at each outlet;
- Annual reductions by a set percentage in the number of retail outlets selling tobacco;
- Power for local authorities to control the number and location of tobacco retailers;
- Registration and/or licensing as a pre-condition to import, distribute or sell tobacco;
- Disclosure of the volumes of tobacco imported, distributed or sold;
- Ban on duty free sales of tobacco or reduced duty free allowances;
- Large annual increases in tobacco tax;
- Funding tobacco control policies through tobacco excise revenue or a tobacco levy;
- Smokefree cars; and
- Local government-initiated smokefree zones.

Almost all these policies raise one or more trade and investment law issues. In some cases, the legal risks are remote. In others, the threat of a legal dispute is high, although that threat may not result in actual litigation and a challenge may or may not be successful. Appendix 1 sets out in tabulated form the potential legal trade and investment issues that might be raised.

General considerations

A number of general observations should be borne in mind when considering how international trade and investment agreements might affect New Zealand's policies:

[2] Government Response to the Report of the Maori Affairs Committee on its *Inquiry into the tobacco industry in Aotearoa and the consequences of tobacco use for Maori* (Final response), Presented to the House of Representatives in accordance with Standing Order 248, 14 March 2011 (Government Response to MAC)

[3] Cabinet, Plain Packaging of Tobacco Products, Minute of Decision, CAB Min(11) 34/6A, 19 September 2011; Cabinet Social Policy Committee, Plain packaging of tobacco products, 31 August 2011 (CSPC Paper)

[4] National Tobacco Control Working Group, *Smokefree Aotearoa/New Zealand by 2025: Next Steps 2011-2015*, January 2012, http://www.sfc.org.nz/announcements.php#smokefree2025 (accessed 19 April 2012)

- Achieving the government's goal for Aotearoa New Zealand to be essentially smoke free by 2025 will require more assertive tobacco control policies than governments have adopted to date, which will carry greater risks of threatened or actual legal challenges under free trade and investment agreements.
- The policies that pose the most potent threat to the tobacco supply chain by creating or reinforcing international precedents will be challenged most vigorously, while others that might technically breach agreements may receive relatively little attention.
- Incremental tobacco control policies spread over a period of time would make it harder for foreign investors to allege their investor rights have been violated, but long phase-in periods would undermine the smokefree target of 2025.
- The requirement for scientific evidence and a nexus between a particular tobacco control policy and its public health objective may require specific targets that are based on the Framework Convention on Tobacco Control (FCTC), citing the Convention as evidence of international consensus;
- Legal arguments are rarely decisive in policy decisions, and are often used strategically by tobacco industry interests and supportive states to weaken the government's resolve to adopt strong and innovative policies;
- Some states are actively challenging strong tobacco control policies at the World Trade Organization (WTO), although there are very few state-initiated disputes so far under other free trade and investment agreements (FTIAs).
- Recent approaches in WTO disputes have assessed individual policies as part of a coherent package designed to achieve a legitimate public health objective.
- Tobacco companies, especially Philip Morris, are aggressively using investor-state enforcement powers under bilateral investment treaties and FTIAs and lobbying for new agreements that confer even stronger investor rights and powers.
- 'Chilling' government decisions at the earliest stages of policy formation can be the most effective industry intervention, although actual litigation is used to deter countries from considering similar initiatives.
- The industry generates hundreds of billions of dollars a year in revenue, so legal and related costs to itself or proxies are trifling.
- The three major foreign-owned tobacco companies operating in New Zealand might claim 'legitimate expectations' to a regulatory environment that pre-dates New Zealand's signing the FCTC, but New Zealand's tobacco control programme to promote non-smoking began in 1984.[5]
- New Zealand is relatively well placed compared to other countries because it does not currently have many investment agreements that allow investor enforcement, but that would change dramatically if New Zealand agreed to investor-state enforcement powers under the proposed Trans-Pacific Partnership Agreement (TPPA).
- The government is bound as a party to the FCTC to ensure that any new international agreements it signs are consistent with its obligations under that Convention, including to restrict the influence of the tobacco industry over New Zealand's domestic policy decisions.
- The more new trade and investment agreements the government negotiates that deepen and extend existing obligations, the more constraints the government is likely to face on its tobacco control policy options between now and 2025; and
- The proposed TPPA poses the most serious imminent risk to New Zealand's ability to design, introduce and implement the innovative tobacco control policies needed to achieve the 2025 goal, as it would legally guarantee the tobacco industry and supply chain stronger, enforceable legal rights and the opportunity to influence domestic policy.

[5] MoH, *Interim advice to the Maori Affairs Select Committee: History of tobacco control in New Zealand*, Ministry of Health, Wellington, 13 May 2010.

Part 2: Relationship between the Framework Convention on Tobacco Control and New Zealand's free trade and investment agreements

International treaties have distinct origins and objectives, public policy considerations, and public, commercial and citizen constituencies. This results in diverse and sometimes divergent obligations on signatory governments. The potential for conflict between international agreements on public health and those on trade and investment poses difficult legal questions.[6] Stronger tobacco control policies have become a particular site for these tensions, as reflected in the numerous trade and investment disputes referred to in Parts 3 and 4.

The New Zealand government has many binding international obligations on public health under United Nations, regional and subject-specific instruments. Paramount among these in relation to tobacco control policies is the World Health Organization (WHO) Framework Convention on Tobacco Control (FCTC or the Convention).[7] New Zealand is also party to an expanding array of international trade and investment agreements. Advocates of tobacco control policies might expect the government, having ratified the FCTC, to pursue the goal of making New Zealand smokefree without compromise and give public health measures priority where there is a clash with trade and investment obligations.[8] Legal life is not that simple. Before examining the potential issues associated with specific policies, it is appropriate to review the legal relationship between the two sets of obligations.

2.1 New Zealand's trade and investment law obligations

The number and scope of New Zealand's trade and investment obligations has increased significantly since the World Trade Organization was established in 1995. They potentially impose significant constraints on the government's freedom to choose the public health measures it believe will best achieve its smokefree goals. Seven categories of international trade and investment obligations are relevant to this report:

a. New Zealand's **trade in goods** obligations under the WTO General Agreement on Tariffs and Trade 1994, as well as bilateral and regional free trade and investment agreements.
b. The rules on **technical barriers to trade**, such as product labelling and standards, in the WTO Agreement on Technical Barriers to Trade and in bilateral and regional free trade and investment agreements;
c. New Zealand's obligations in relation to **intellectual property** under the WTO Agreement on Trade-related Aspects of Intellectual Property Rights, the intellectual property and investment chapters of bilateral and regional free trade and investment agreements, and the Paris Convention for the Protection of Industrial Property 1967.
d. New Zealand's obligations to promote and protect **foreign investments** under bilateral investment treaties and investment chapters of bilateral and regional free trade and investment agreements;[9]
e. New Zealand's obligations on the **supply of services** across borders and through foreign-owned enterprises under the WTO's General Agreement on Trade in Services and in bilateral and regional free trade and investment agreements.
f. Obligations on New Zealand and Australia for **mutual recognition** of standards relating to the sale of products under the Trans-Tasman Mutual Recognition side-arrangement to their Closer Economic Relations Trade Agreement.

[6] One of the seminal treatises on this question is Joost Pauwelyn (2003) *Conflict of Norms in Public International Law: How WTO Law Rules to other Rules of International Law*, Cambridge University Press: Cambridge, UK

[7] *World Health Organization Framework Convention on Tobacco Control*, entered into force on 27 February 2005, www.who.int/fctc (FCTC) (accessed 19 April 2012)

[8] This tension is articulated in ER Shaffer, JE Brenner and TP Houston (2005) International trade agreements: a threat to tobacco control policy, *Tobacco Control*, 14, 19-25, esp 21 and 24

[9] New Zealand is also a signatory to several OECD instruments relating to investment. They are not considered in this report, as they are unlikely to form part of the challenges to proposed tobacco control policies.

g. Potential obligations of New Zealand, Australia and at least seven other countries on **transparency and regulatory coherence** in the Trans-Pacific Partnership Agreement currently under negotiation.

Similar legal concepts and issues often arise under more than one agreement.

The following explanation of the broad framework of these agreements aims to assist readers who are unfamiliar with the international trade and investment law regime. More details are provided in the substantive discussion in Part 3 of the report.

2.1.1 The GATT and the World Trade Organization

For many years New Zealand's principal trade obligations related to trade in goods under the General Agreement on Tariffs and Trade (GATT) 1947, which restricts tariffs and prohibits import quotas and preferences in favour of domestic goods or goods from some countries over others.[10] The advent of the WTO in 1995 expanded the scope of New Zealand's trade in goods obligations through more specific and detailed agreements on 'non-tariff barriers'. In particular, new agreements strengthened rules on technical barriers to trade (TBT),[11] such as labelling or product content requirements, and sanitary and phytosanitary measures, principally on quarantine. Two other relevant agreements also came into being: the General Agreement on Trade in Services (GATS) and the Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS).

The creation of an umbrella World Trade Organization introduced new institutional arrangements. Several are significant for tobacco control policies. First, the dispute mechanism is governed by its own agreement, which sets out procedures for a WTO member to follow when bringing a dispute against another member and the time frames that must be met for each stage. Findings of the lower level dispute panels can be appealed to a standing Appellate Body. The WTO member complained against has an obligation to implement the decision unless there is either a consensus of all WTO members (convened as the Dispute Settlement Body) not to adopt the report or the matter is settled. While a state cannot be forced to change its domestic measures, failure to comply with a decision may attract trade sanctions. Although an emerging body of jurisprudence from Appellate Body decisions is considered persuasive, the WTO does not operate a system of binding precedents.

Second, members are required to notify the other WTO members about the proposed adoption of certain measures that have implications for their legal obligations, notably under the TBT, TRIPS and GATS agreements. If WTO members have concerns about notified measures they can discuss them bilaterally or, along with other new policies and regulations of concern that have not been notified, at the relevant WTO committees. Minutes of those discussions provide an indication of potential challenges.

Third, periodic reviews are undertaken of each member's compliance with its WTO obligations. Adverse reports do not have direct repercussions, but provide further opportunities for peer pressure and censure from other members over existing and proposed policies and regulations.

Fourth, the existing WTO agreements can be extended or amended, consistent with the presumption of ongoing liberalisation and subject to demanding procedural requirements.[12] WTO members also have powers collectively to issue Declarations and Interpretations of existing agreements.[13] The Declaration on TRIPS and Public Health is often cited as an important precedent, [14] although it also illustrates how a highly contested process can result in a limited compromise that is very difficult to implement in practice.[15]

2.1.2 The CER Agreement with Australia

Australia and New Zealand had already signed the Australia New Zealand Closer Economic Relations Trade Agreement 1983 (CER) covering trade in goods before the negotiations that led to the WTO. A protocol on trade in services came into effect in 1989. These already far-reaching agreements have been extended through a variety of protocols and arrangements. Unlike the WTO and most bilateral and regional agreements, there is no supranational enforcement mechanism in CER. It relies on a presumption of good faith compliance,

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[10] Special rules permit preferences under regional trade arrangements, provided certain liberalisation requirements are satisfied.

[11] The *WTO* Agreement *on Technical Barriers to Trade* 1994 (*TBT Agreement*).

[12] *The Agreement Establishing the World Trade Organization 1994*, Article X.

[13] *The Agreement Establishing the World Trade Organization 1994*, Article IX.2

[14] WTO, *Declaration on the TRIPS Agreement and Public Health*, Adopted 14 November 2001, WT/MIN(01)/DEC/2. This proposition is discussed further in section 3.3.3.

[15] Haochen Sun (2004) The Road to Doha and Beyond: Some Reflections on the TRIPS Agreement and Public Health, 15(1) *European Journal of International Law* 123. The provision was most recently reviewed at the WTO in October 2011: Council for TRIPS, Minutes of the meeting on 24-25 October and 17 November 2011, IP/C/M/67, paras 166-249.

consultations through joint bodies, and the incorporation of obligations in each state's domestic law, some of which may be enforced in their domestic courts. The Trans-Tasman Mutual Recognition Arrangement, which affords mutual recognition to labelling and product standards, including those for tobacco products, was implemented in New Zealand through the Trans-Tasman Mutual Recognition Act 1997. A bilateral investment agreement with Australia was signed in February 2010, but is not yet in force. Unusually for investment treaties, but consistent with CER, this does not have any supranational enforcement mechanism.

2.1.3 Bilateral investment agreements

These are also known as Investment Promotion and Protection Agreements. Historically, these are stand-alone treaties designed to provide guaranteed treatment to foreign investors, including protections against moves to expropriate their investment through full nationalisation or interventions that have an equivalent effect, and to treat them fairly and equitably. Since the late 1980s it has become the norm for the obligations and enforcement procedures of these investment treaties to be incorporated within bilateral or regional free trade and investment agreements. A state may be party to many BITs and FTIAs, which can cross-fertilise in complicated ways. Investors often shop around to find the agreement that best suits their claims and may create legal entities to bring them within that jurisdiction. For example, subsidiaries of Philip Morris International are using an investment agreement between Uruguay and Switzerland to challenge Uruguay's tobacco control policies, and suing Australia over its plain packaging laws under Australia's bilateral investment treaty with Hong Kong.

New Zealand has fewer BITs than many other countries. Australia, for example, has 21 BITs in force,[16] as well as investment obligations under a number of FTIAs. New Zealand has only negotiated five bilateral investment agreements. Two, with Argentina and Chile, have never come into force. The investment protocol with Australia is also not yet in force.[17] New Zealand's two other BITs are with China,[18] and Hong Kong, China.[19] The former has effectively been superseded by the investment chapter in the New Zealand-China Free Trade Agreement.[20] The latter is currently in force, but is expected to be replaced by an Investment Protocol to the Hong Kong, China New Zealand Closer Economic Partnership Agreement.[21] New Zealand also has investment chapters in its FTIAs with ASEAN, China, Malaysia, Singapore and Thailand.[22]

Unlike WTO agreements, where obligations are only enforceable by WTO members,[23] investor protections can almost always be enforced directly by the investors of another party to the treaty.[24] A successful arbitration will result in a compensation award and (often large) legal costs. Almost all disputes are conducted through one of two mechanisms.[25] Because these disputes are private to the parties, the legal documents and final reports may not be released, although some free trade or investment treaties now specify a higher level of public disclosure and openness of hearings, including the right to present amicus curiae briefs.

Because these investment arbitration tribunals are ad hoc, previous decisions on similar legal issues or similar facts may be raised in argument but do not bind them. Those arbitral reports that have been released publicly reveal wide variations and inconsistencies between tribunals hearing similar cases.[26]

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[16] The United Nations Conference on Trade and Development (UNCTAD) maintains a list of BITs that have been signed and which of those are in force, www.unctadxi.org/iia (accessed 19 April 2012).

[17] *New Zealand-Australia Closer Economic Relations Investment Protocol*, Signed in February 2011. http://www.mfat.govt.nz/Trade-and-Economic-Relations/2-Trade-Relationships-and-Agreements/Australia/index.php#cerip (accessed 19 April 2012).

[18] *Agreement between the Government of China and the Government of New Zealand for the Promotion and Protection of Investments 1988*, www.unctadxi.org/iia (accessed 19 April 2012).

[19] *Agreement between the Government of Hong Kong and the Government of New Zealand for the Promotion and Protection of Investments 1995,* www.unctadxi.org/iia (accessed 19 April 2012).

[20] Pursuant to Article 30 of the *Vienna Convention on the Law of Treaties* 1969 (Vienna Convention).

[21] This protocol has been subject of consultations by the New Zealand Ministry of Foreign Affairs and Trade (MFAT) since June 2011.

[22] The exception is the *Trans-Pacific Strategic Economic Partnership Agreement 2005* between New Zealand, Singapore, Chile and Brunei, known as the P-4.

[23] Comprising states and state-like entities like the European Union and Hong Kong, China.

[24] What qualifies as ownership or control varies and is usually written into the treaty.

[25] They are: 1) International Centre for the Settlement of Investment Disputes; and 2) tribunals that operate under the rules of the United Nations Commission on International Trade Law. See Section 3.4.6.

[26] M. Sornarajah (2009) The Retreat of Neo-Liberalism in Investment Treaty Arbitration, in Catherine A Rogers and Roger P Alford, *The Future of Investment Arbitration*, Oxford University Press: Oxford, 273-296.

2.1.4 Bilateral and regional free trade and investment agreements

The rapid growth in free trade and investment agreements since the late 1990s reflects an international trend away from the multilateralism of the WTO, where negotiations to extend existing rules and obligations have stalled. New Zealand has actively pursued new agreements with one or more other states. It is the only developed country to have such an agreement with China, but does not have an FTIA with either the United States (US) or the European Union (EU).

Most of these new generation treaties expand on the scope and depth of the WTO agreements, incorporate key elements of BITs, and impose new 'disciplines' on domestic policy and regulation. Cumulatively, they intensify the constraints on the policy and regulatory space available to governments, including in the pursuit of public health goals.

By far the most significant agreement New Zealand is presently negotiating is the Trans-Pacific Partnership Agreement (TPPA).[27] This is currently a nine-country negotiation between Australia, Brunei, Chile, Singapore, Malaysia, New Zealand, Peru, the US and Vietnam. Japan, Canada and Mexico have indicated they wish to join the talks. The parties aim to create a new standard for free trade and investment treaties for the 21st century, with disciplines on governments that will extend further behind the border than any previous agreement. The participating governments have indicated their desire to conclude these negotiations in 2012.

At the start of the negotiations, Philip Morris International urged the US government to ensure the TPPA has comprehensive coverage, including the complete elimination of all tariffs on all goods, a TRIPS-plus intellectual property chapter with 'high quality' protection for trademarks and patents, and investor-state enforcement powers.[28] It singled out proposals for Australia's plain packaging law and discretionary powers for Singapore's Health minister to ban tobacco products as problematic policies the TPPA should address. Legislators from tobacco-producing states like Kentucky have been lobbying to ensure that tobacco products are covered in the agreement.[29] On the other side, the American Medical Association has called for the exclusion of both tobacco products and alcoholic beverages from the TPPA,[30] a position mirrored by the World Conference on Tobacco or Health in Singapore in March 2012.[31] The US Trade Representative (USTR) said in March 2012 the administration was still deciding its position.[32]

It is difficult to assess the legal implications of the working texts for tobacco control policies because the details remain secret; the parties have agreed not to release any draft texts and will keep all background documents secret for a further four years after any deal is concluded or the negotiations are terminated.[33]

Leaks of several chapters and other information gleaned from public records and private discussions suggest the agreement could seriously impact on New Zealand's tobacco control options. Presentations from tobacco control advocates to the stakeholders programme at the formal negotiating rounds of the TPPA have highlighted various areas of concern.[34] These include:

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[27] For an overview of the proposed agreement and its implications for New Zealand and Australia, including for public health policy, see Jane Kelsey (ed) (2010) *No Ordinary Deal. Unmasking the Trans-Pacific Partnership Free Trade Agreement,* Bridget Williams Books: Wellington.

[28] *Submission of Philip Morris International in Response to the Request for Comments Concerning the Proposed Trans-Pacific Partnership Trade Agreement*, undated.

[29] Paul Hornback and Wilson Stone, *Plan to exclude tobacco from trade pact unfair to state*, 2 April 2012, http://www.kentucky.com/2012/04/02/2135891/plan-to-exclude-tobacco-from-trade.html#storylink=cpy (accessed 19 April 2012).

[30] James L. Madara, CEO American Medical Association to Hon Ron Kirk, 8 September 2011.

[31] *Declaration of the 15th World Conference on Tobacco or Health*, Singapore, 20-24 March 2012, Recommendation 4, wctoh2012.org/nav-declaration.html (accessed 19 April 2012).

[32] Kirk seeks Proper Balance on Tobacco treatment in TPP Proposal, 5 March 2012, *Inside US Trade,* 5 March 2012, http://insidetrade.com/2012030523921 04/Inside-Trade-General/Short-Takes/kirk-seeks-proper-balance-on-tobacco-treatment-in-tpp-proposal/menu-id-176.html (subscriber only access, accessed 19 April 2012).

[33] Content of confidentiality letters, http://www.mfat.govt.nz/Trade-and-Economic-Relations/2-Trade-Relationships-and-Agreements/Trans-Pacific/1-TPP-Talk/0-TPP-talk-29-Nov-2011.php (accessed 19 April 2012).

[34] eg. Presentations to the official stakeholder programme at Chicago in October 2011 included: Heidi Heitkamp, Tobacco and Trade: Who will the TPPA Serve and Protect?, Forum on Democracy and Trade, Georgetown University Law Center, Washington DC, US; Patricia Ranald, *Investor-state dispute settlement (ISDS): the threat to health, environment and other social regulation*, AFTINET, Sydney, Australia; Tobacco Free Kids, *TPPA and Tobacco Products: The Threat to Public Health and The Case for Excluding Tobacco Products*, Tobacco Free Kids, Washington DC, US; Robert Stumberg, *Marlboro Man as Investor: Will the TPPA enable private investors to enforce trade rules?*, Georgetown University Law Centre, Washington DC, US.

- Conflict with the FCTC provisions and guidelines on demand-reduction strategies involving price and non-price measures;
- Zero tariffs on tobacco and tobacco products, restricting the fiscal policies available to governments to tax and increase the price of tobacco;
- Obliging a government to enforce ever-stricter intellectual property laws and anti-counterfeiting measures that benefit tobacco companies and require increased government-company engagement;
- Investor protections and enforcement powers that open tobacco control measures to threats of expensive and protracted investor-state disputes; and
- Expanded coverage of cross-border services that advertise and distribute tobacco products.

This report identifies additional issues arising from the proposed TPPA chapters on transparency and regulatory coherence.

2.2 The Framework Convention on Tobacco Control

A number of international treaties impose obligations on states in relation to public health.[35] The potential for tension with their trade and investment obligations has been addressed in many international and national forums, often reaching different conclusions.[36]

2.2.1 Obligations under the Convention

While states have obligations to address the tobacco epidemic as part of generic public health treaties, the FCTC represents 'a paradigm shift in developing a regulatory strategy to address addictive substances; in contrast to previous drug control treaties, the WHO FCTC asserts the importance of demand reduction strategies as well as supply issues'.[37] Because it provides the most specific obligations and justification for tobacco control measures, the Convention will be the principal reference point in legal arguments.[38]

New Zealand ratified the Convention in January 2004 and assumed the obligations of a state party from 27 February 2005. All the states with which New Zealand has concluded or is negotiating, FTIAs or BITs are also FCTC parties, except for the US.

The Foreword to the Convention identifies core tobacco demand-reduction provisions as price and tax measures, and as non-price measures that involve ñ

- Protection from exposure to tobacco smoke.
- Regulation of the contents of tobacco products.
- Regulation of tobacco product disclosures.
- Packaging and labelling of tobacco products.
- Education, communication, training and public awareness.
- Tobacco advertising, promotion and sponsorship; and
- Tobacco dependence and cessation.[39]

Article 7 requires the parties, including the New Zealand government, to adopt and implement effective legislative, administrative and other measures necessary to implement their obligations in relation to non-price measures.

In addition to substantive policies, the general obligations provision of the Convention (Article 5) requires the government to limit the influence of tobacco companies on tobacco policy making: 'In setting and implementing their public health policies with respect to tobacco control, Parties shall act to protect these

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[35] See http://www.who.int/hhr/readings/en/ (accessed 19 April 2012).

[36] Eg. WHO, *WTO Agreements and Public Health*, WHO: Geneva, 2002; The Sub-Commission on the Promotion and Protection Human Rights, Liberalisation of Trade in Services and Human Rights. Report of the High Commissioner, E/CN.4/Sub.2/2002/9, 25 June 2002; Ad Hoc Coordinating Sub-committee to Review and Examine the Establishment of Thailand-United States Free Trade Area, *Report on Result of Examination of Human Rights Violations, the Thai National Human Rights Commission,* 2006, electronic copy on file with author.

[37] *FCTC*, Foreword, v.

[38] The doctrine of *lex specialis* says the law governing the more specific subject matter prevails over the more general law.

[39] These obligations are detailed in *FCTC*, Articles 6-14.

policies from commercial and other vested interests of the tobacco industry in accordance with national law'.[40] Conversely, the general principles in Article 4.7 recognise that 'The participation of civil society is essential in achieving the objective of the Convention and its protocols'.

Guidelines have been developed to elucidate these provisions. Several are especially significant for this report:

2.2.2 Guidelines on Article 5.3 (Protection of tobacco control policies from commercial and other vested interests of the tobacco industry)

The guidelines 'recognize that tobacco industry interference ... cuts across a number of tobacco control policy areas, as stated in the Preamble to the Convention, articles referring to specific tobacco control policies and the Rules of Procedure of the Conference of the Parties to the WHO Framework Convention on Tobacco Control'.[41] Hence, the parties 'should protect the formulation and implementation of public health policies for tobacco control from the tobacco industry to the greatest extent possible'.[42] Specifically, the Guidelines recommend that no preferential treatment be given to the tobacco industry,[43] and that interaction with the tobacco industry takes place 'only when and to the extent strictly necessary to enable them to effectively regulate the tobacco industry and tobacco products'.[44]

2.2.3 Guidelines on Article 11 (Packaging and labelling of tobacco products)

The Convention itself that specifies that packaging should not include misleading terms, such as 'low tar', 'light' and 'mild',[45] and health warnings should be 50 percent or more of principal display areas on product packaging and labelling, and not less than 30 percent.[46] The guidelines encourage parties to consider larger proportions and styles that would enhance overall visibility and legibility.[47] In addition to the warnings, information on relevant constituents and emissions of tobacco products should describe their effects.[48] Furthermore, the 'parties should consider adopting measures to restrict or prohibit the use of logos, colours, brand images or promotional information on packaging other than brand names and product names displayed in a standard colour and font style (plain packaging)'.[49]

2.2.4 Guidelines on Article 13 (Tobacco advertising, promotion and sponsorship)

These set out ways to achieve the Convention's requirement that all Parties undertake a comprehensive ban on such activities, unless they are not in a position to do so due to their constitution or constitutional principles. The guidelines recommend extending these bans to cross-border advertising, promotion and sponsorship.[50] This recognises that contemporary media platforms, such as the Internet, allow many forms of advertising permitted by domestic rules of one state to be disseminated widely to other countries, which can undermine domestic bans where the state in which the communication originates has weaker rules. Bans and obligations should hold entities across the entire marketing chain responsible, with prime responsibility resting on the initiator of advertising, promotion of sponsorship - usually the tobacco companies, wholesale distributors, importers, retailers and their agents and associations.[51] These guidelines also identify licensing of tobacco manufacturers, wholesale distributors, importers and retails as an effective method for controlling advertising, promotion and sponsorship.[52] Paragraph 16 again specifically endorses plain packaging, followed by a

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[40] *FCTC*, Article, 5.3.

[41] WHO, *Guidelines for implementation of Article 5.3 of the WHO framework Convention on Tobacco Control on the protection of public health policies with respect to tobacco control from commercial and other vested interests of the tobacco industry*, 2008, para 6 (*Guidelines on Article 5.3*).

[42] WHO, *Guidelines on Article 5.3*, para 13.

[43] WHO, *Guidelines on Article 5.3*, para 17.7.

[44] WHO, *Guidelines on Article 5.3*, para 20:2.1.

[45] See also WHO, *Guidelines for Implementation of Article 13 of the WHO Framework Convention on Tobacco Control (Tobacco Advertising, promotion and sponsorship),* 2008, para 39 (*Guidelines on Article 13*).

[46] *FCTC,* Article 11.1(iv).

[47] WHO, *Guidelines for Implementation of Article 11 of the WHO Framework Convention on Tobacco Control (Packaging and labelling of tobacco products),* 2008, para 12 (*Guidelines on Article 11*).

[48] WHO, *Guidelines on Article 11*, para 32-33.

[49] WHO, *Guidelines on Article 11*, para 46.

[50] WHO, *Guidelines on Article 13*, para 52.

[51] WHO, *Guidelines on Art 13*, para 53.

[52] WHO, *Guidelines on Art 13*, para 63.

recommendation that 'Parties should consider adopting plain packaging requirements to eliminate the effects of advertising or promotion on packaging'.

2.3 Relationship of the FCTC to free trade and investment treaties

There is no *a priori* hierarchy between a trade treaty and other treaties. The Vienna Convention on the Law of Treaties 1969 affirms that every treaty is binding on its parties and must be performed by them in good faith.[53] Each treaty should be interpreted using its ordinary words and in light of its object and purpose,[54] with a presumption that this should avoid conflict with the state's other obligations under international law.

Difficulties arise when the treaties themselves, or actions required to implement them, impose inconsistent obligations on state parties. That is potentially the case with New Zealand's obligations under the FCTC. According to the Convention's Foreword:[55]

> The WHO FCTC was developed in response to the globalization of the tobacco epidemic. The spread of the tobacco epidemic is facilitated through a variety of complex factors with cross-border effects, *including trade liberalization and direct foreign investment*. Other factors such as global marketing, transnational tobacco advertising, promotion and sponsorship, and the international movement of contraband and counterfeit cigarettes have also contributed to the explosive increase in tobacco use. (*emphasis added*)

Article 2.2 specifically addresses the relationship between the Convention and other international agreements and legal instruments. It states:

> 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*... (*emphasis added*)

The provision imposes obligations on parties when they enter into agreements, putting New Zealand under a positive duty when negotiating new trade and investment agreements to ensure compliance with its FCTC obligations. However, it does not directly address existing free trade and investment agreements and is silent on which treaty should take precedence when a conflict arises.[56] That wording was reportedly a compromise between tabled texts that would have explicitly subordinated the FCTC to trade agreements, and vice versa.[57]

Some investment experts point out that the self-executing obligation in Article 7 imposes binding obligations on parties to adopt, implement and defend a raft of tobacco demand-reduction measures.[58] How trade or investment tribunals will treat that argument remains untested. In a recent case challenging Norway's tobacco display ban Philip Morris argued that the FCTC and the Guidelines could not relieve a state of its obligations under the European Economic Area Agreement (EEAA), especially when the Guidelines were non-binding rules. Norway countered that it had a duty to implement a comprehensive ban on advertising and that

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[53] *Vienna Convention*, Article 26. The Convention is considered to embody customary international law and, as such, iterates obligations that are also binding on states that are not parties to the Convention.

[54] Article 31(1) of the *Vienna Convention* reads: 'A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'.

[55] *FCTC*, Foreword, v.

[56] Article 2.2 of the FCTC is less equivocal on this question than the equivalent Article 20 in the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions 2005, which was negotiated by UN members concerned that trade liberalisation and investment promotion and protection agreements were undermining cultural diversity. There the 'Parties recognize that they shall perform in good faith their obligations under this Convention and all other treaties to which they are parties. Accordingly, without subordinating this Convention to any other treaty, the promise to further mutual supportiveness of such treaties and take into account the provisions of the Convention when interpreting and applying other treaties.' Crucially, it then reasserts the rights and obligations in existing treaties: 'Nothing in this Convention shall be interpreted as modifying rights and obligations of the Parties under any other treaties to which they are parties.' For a discussion of negotiations on this provision see Jane Kelsey (2008) *Serving Whose Interests? The Political Economy of Trade in Services Agreements,* Routledge UK: Abingdon, 248-254.

[57] Robert Weissman (2003) 'International Trade Agreements and Tobacco Control: Threats to Public Health and the Case for Excluding Tobacco from Trade Agreements', *Essential Action*, Washington DC, November 2003, 25-26; Shaffer, at al (2005) 19-25, 21 and 24.

[58] Todd Weiler (2010) 'Philip Morris vs Uruguay: An Analysis of Tobacco Control Measures in the Context of International Investment Law', commissioned by Physicians for a Smoke Free Canada, 29-32.

the Guidelines were binding on parties to the Convention.[59] The European Free Trade Area (EFTA) court found that the health and life of humans ranks foremost among the assets or interests protected under the EEAA, but left it to the domestic courts to determine whether the particular measure was a proportionate response to that obligation.[60] The court's reasoning was based on case law relating to the EEAA and did not address the issue of the FCTC Guidelines.

Other commentators argue that the FCTC takes precedence because it is more recent than the WTO agreements, and under the rules of the Vienna Convention[61] supersedes inconsistent earlier obligations.[62] That proposition can certainly be argued, but it will face several problems. Two legal norms intersect here: *lex posterior* says the more recent law prevails where two agreements apply to the same subject matter; *lex specialis* says the more specific law prevails over the general law. While the FCTC and WTO treaties may both affect tobacco control policies, the Convention is likely to be seen as more specific when viewed through a public health lens, but not from the perspective of trade and investment law. As a further complication, most parties to the FCTC have adopted new and more extensive trade and investment agreements since ratifying the Convention. Moreover some states, notably the US, are not parties to the Convention and would argue that their trade and investment treaties are not affected.

The decisive factor in this conflict is the fact that trade and investment agreements have enforcement powers that the FCTC lacks. A legal argument that relies on the Convention to defend allegations that tobacco control policies breach those agreements needs to convince a tribunal of trade and investment experts. Even if sympathetic, they would be constrained by the extent to which the trade or investment text creates the legal space for them to consider the FCTC.[63] The Convention could be cited as factual evidence of the legitimate objectives of tobacco control policies and the validity of certain policies in pursuing those health objectives.[64] Hence, recent commentators on Australia's plain packaging laws argue that the instruction to parties in the Guidelines to consider plain packaging is a fact that should inform the interpretation of the ordinary meaning of WTO provisions.[65]

In the 2011 *US-Clove Cigarettes* case, the WTO panel noted, when recognising the importance of public health measures, that 'we are aware of the important international efforts to curb smoking within the context of the WHO FCTC and WHO *Partial Guidelines*.'[66] The panel relied on the FCTC as evidence that there is a growing consensus on the need to regulate additives that increase palatability based on 'the best available scientific evidence and the experience of the Parties'.[67] However, the panel also used the Convention to support Indonesia's argument that both menthol and clove cigarettes fall within that category of additives, and to find against the US ban that did not include menthol. The Panel made it clear that the measures that governments use to achieve their public health objectives and meet their obligations under the FCTC must be consistent with their WTO obligations:[68]

> At the outset, this Panel would like to emphasize that measures to protect public health are of the utmost importance, and that the WTO Agreements fully recognize and respect the sovereign right of Members to regulate in response to legitimate public health concerns.
>
> We note that the WTO seeks to promote general well-being through trade liberalization and recognizes the right of WTO Members to adopt measures to protect public health. In fact, WTO Members have a large measure of autonomy to determine their own policies to protect human health. This autonomy is only circumscribed by the need to ensure that the *means* chosen for realizing those policies is consistent with WTO rules.

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[59] *Philip Morris Norway AS v The Norwegian State,* case E16/10, Judgment of the EFTA Court, 12 September 2011, paras 20 and 23 (*Philip Morris v Norway*).
[60] *Philip Morris v Norway*, paras 77-78.
[61] *Vienna Convention*, Article 30.
[62] Shaffer et al (2005) 24.
[63] Articles 3.2 and 19.2 of the WTO *Dispute Settlement Understanding* states that decisions of dispute bodies cannot add to or diminish rights and obligations under the WTO agreements.
[64] Joost Pauwelyn (2001) 'The Role of Public International Law in the WTO: How far can we go?' 95 *American Journal of International Law*, 535 at 572.
[65] Tania Voon and Andrew Mitchell (2012) *Implications of WTO Law for Plain Packaging of Tobacco Products*, Melbourne Legal Studies Research Paper no.554, 17-18.
[66] *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/R, Report of the Panel, 2 September 2011, para 7.5 (*US-Clove Cigarettes-Panel).*
[67] *US-Clove Cigarettes - Panel,* para 7.230.
[68] *US-Clove Cigarettes - Panel,* paras 7.2 and 7.3.

The report of the Appellate Body in that dispute makes no reference to the Convention when addressing the need for balance between preventing unnecessary obstacles to trade and the right of governments to regulate.[69]

Experience to date shows that radical policies will be necessary to achieve the government's goal of a smokefree New Zealand by 2025 and its obligations under the FCTC. Those policies will face vigorous challenges from commercial interests in the tobacco supply chain. Reconciling the state's international public health obligations with those on trade and investment will be as much a political matter as a legal one. The way the legal arguments might influence their decision-making process is discussed further in Part 4.

[69] WTO, *United States – Measures Affecting the Production and Sale of Clove Cigarettes,* WT/DS406/AB/R, 4 April 2012, (*US-Clove Cigarettes-Appellate Body).*

Part 3: Legal issues

This part of the report identifies international trade and investment law issues that might be raised by any of the economic interests in the tobacco supply chain. It is organised by reference to the common subject categories used within the agreements.

3.1 Trade in goods

Summary

Annual reductions by a set percentage on imported tobacco:
Quantitative restrictions, such as quotas on imports, are prohibited. Mandated reductions to tobacco imports would also breach the rules against discrimination unless equivalent measures restricted tobacco production in New Zealand.

Annual increase in tobacco tax and tobacco excise revenues or levy tied to funding tobacco control policies:
Must apply equally to 'like' products that are imported and produced domestically.

Control of constituents that have greatest impact:
The same controls would need to apply to 'like' imported and locally produced tobacco products, but what products will be considered 'like' is unpredictable.

Exceptions:
In the case of a breach, the government would need to prove a nexus between the measure and its public health objective, justify the measure as the least trade-restrictive alternative to achieve that objective, and show the measure was not unjustified or arbitrary discrimination.

There are three basic rules on trade in goods under the GATT 1994 and FTIAs. The first prohibits quantitative restrictions on imports. The second rule caps, progressively reduces and sometimes seeks to eliminate tariffs (border taxes on imports). The third says goods imported from one party must not be treated less favourably than 'like' domestic goods or goods from a third country.

3.1.1 Quantitative restrictions on imports

The GATT prevents WTO members from applying 'prohibitions or restrictions other than duties, taxes or other charges on the importation of any product of the territory of any other Member'.[70] That includes quantitative limits on imports of tobacco products, as has been proposed in New Zealand.

The rule also applies to quantitative restrictions that are less explicit. British American Tobacco Australia argued that Australia's plain packaging law equated to a prohibition on imports of certain products from WTO members. The Bill was amended so it no longer restricted the importation of tobacco products that did not comply with the plain packaging law, and instead required compliance by the time of the first wholesale or retail sale within Australia.[71]

There is no WTO case law addressing quantitative restrictions on the import of tobacco products. However, Philip Morris[72] claimed that a ban on tobacco displays at point of sale that Norway introduced in January 2010 breached the government's obligations under the European Economic Area Agreement.[73] The company said the effect of the ban was equivalent to a quantitative restriction on free trade in goods, because it hindered access to Norway's market by removing the last remaining means for Philip Morris to communicate its products to consumers.[74] The EFTA court agreed that the ban was capable of having a restrictive effect on

[70] *GATT*, Article XI.1.
[71] Submission of Andrew Mitchell and Tania Voon, *Submission on the Inquiry into Plain Packaging*, 21 July 2011, paras 4-5,
[72] Private interests can enforce the trade rules under the EEAA.
[73] A display ban was held to be a 'selling arrangement' under the EEAA.
[74] *Philip Morris v Norway,* and Alberto Alemanno, '*Philip Morris vs Norway*: EFTA Court upheld visual display bans with a precautionary twist', 16 September 2011 http://albertoalemanno.eu/articles/philip-morrisefta (accessed 19 April 2012)

the marketing of tobacco products, especially for market penetration of new products. That interpretation has limited application beyond the EEAA, because the relevant article applies to measures that have 'an equivalent effect' to a quantitative restriction, whereas the GATT does not.[75]

3.1.2 Tariffs

The GATT aims to reduce tariffs. WTO members bind themselves to maximum tariff levels for different products. These levels are much lower in FTIAs and some agreements eliminate tariffs altogether. The 'bound' tariff rate in an FTIA can effectively become a uniform rate, both as a matter of practicality and because transnational manufacturers can relocate production to countries that benefit from the FTIA.[76] Cuts to tariffs affect countries that use them to increase the price, and hence restrict the volume, of imported tobacco products as part of their tobacco control strategies. That can have a perverse effect by lowering domestic prices or providing windfall profits to tobacco companies and distributors, unless there is a corresponding rise in domestic excise tax.[77]

New Zealand has so far retained the right to impose five percent tariffs on cigarettes and some other tobacco products,[78] but it cannot increase them beyond those bound rates. That may change under the TPPA, where parties are expected to eliminate all tariffs, including tobacco products.[79] That would have no immediate effect on New Zealand, which relies on internal excise taxes on tobacco that are not subject to the same caps as tariffs.[80] However, binding to zero tariffs in a TPPA would remove the policy option of using tariffs as a pricing mechanism in the future.

3.1.3 Non-discrimination

New Zealand cannot treat imported tobacco products from a party to one of its trade agreements less well than it treats 'like' goods or products made in New Zealand or imported from a third country. Many trade disputes over tobacco products involve allegations that imported goods were directly or indirectly discriminated against through differential internal or border taxes, or by explicit or covert discrimination that favours domestic products.[81]

A key question in disputes about discrimination is whether the products are 'like' each other. Although there is no closed list of relevant factors, four matters are traditionally considered:

a. The properties, nature and quality of the products.
b. The end-uses of the products.

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[75] As discussed in section 3.5.3, a ban on imports and sales of tobacco products might also be challenged under the market access rules on trade in services.

[76] Thailand was required under the ASEAN Free Trade Area to apply minimal tariffs to tobacco imports from within the ASEAN region. The transnational tobacco companies invested in production facilities within the region to bypass the tariffs that applied beyond ASEAN as part of a strategy to increase their market share significantly and break the dominance of Thailand's government-owned tobacco monopoly that maintained a low-advertising regime. See Weissman (2003) and Hatai Chitanondh (1999), *Denationalisation of Thailand's Tobacco Monopoly. Chronology of Events*, Thailand Health Promotion Institute, March 1999.

[77] A study in the early 1990s showed that cigarette consumption per person in Japan, South Korea, Taiwan and Thailand was nearly 10 percent higher after elimination of tariffs and non-tariff barriers than they would have been if those measures had been left in place. Cited in World Bank (1999) *Curbing the Epidemic. Governments and the Economics of Tobacco Control,* World Bank: Washington DC, 14 www.usaid.gov/policy/ads/200/tobacco.pdf (accessed 19 April 2012).

[78] The tariff schedule of the *Trans-Pacific Strategic Economic Partnership Agreement 2005 (P-4*) (Chapter 24 of Annex 1) binds New Zealand to a base rate of five percent for cigarettes containing tobacco and certain other manufactured tobacco and tobacco substitutes, and to zero tariffs on cigars and cigarillos. http://www.mfat.govt.nz/Trade-and-Economic-Relations/2-Trade-Relationships-and-Agreements/Trans-Pacific/0-P4-Text-of-Agreement.php (accessed 19 April 2012).

[79] There is internal disagreement within the US on this. Philip Morris International argued for zero tariffs with phase-in periods in its submission to the USTR on the TPPA in December 2009. The Council on Foreign Relations recently called for retention of tariffs on tobacco products, especially for Vietnam where tobacco companies are seeking to increase market share and the domestic taxation system is weak: Council on Foreign Relations, *Policy Innovation Memorandum no. 7,* 18 August 2011.

[80] For the rates of New Zealand excise duty on tobacco as at 4 January 2012, see www.customs.govt.nz/features/charges/feetypes/Pages/default.aspx (accessed 19 April 2012).

[81] Eg. WTO, *Dominican Republic - Measures Affecting the Importation and Internal Sale of Cigarettes*, Report of the Appellate Body, WT/DS302/AB/R, 25 April 2005; WTO, *Thailand - Customs and Fiscal Measures on Cigarettes from the Philippines,* WT/DS371/AB/R, 17 June 2011.

c. Consumers' tastes and habits - more comprehensively termed consumers' perceptions and behaviour - in respect of the products; and
d. The tariff classification of the products.

The public health policy objective behind the measure has not been considered directly relevant to deciding if products are 'like', although tribunals may consider that health-related factors are relevant to one or more limbs of this test (such as the nature of the products or consumer preferences). That was the approach taken, for example, in the case of the French ban on imported asbestos.[82]

Recent rulings on 'like' tobacco products have been controversial. In a recent WTO dispute, Indonesia successfully challenged a US ban on clove-flavoured cigarettes. As discussed below, the panel did consider the public health objective when determining 'likeness' of tobacco products (under the TBT agreement), but nevertheless held that clove-flavoured cigarettes (that were mainly imported from Indonesia) were 'like' menthol cigarettes (that were still legal and mainly produced in the US).[83] The US appealed. The Appellate Body drew analogies to the GATT the test for 'likeness', which it said was premised on a competitive relationship between and among the relevant products in the marketplace.[84] It rejected any general recognition of the public health objective, except as a factor in one of the four limbs of the test. Non-discrimination therefore meant not 'modifying the conditions of competition in the marketplace to the detriment of imported products vis-a-vis the group of domestic like products.[85] There are suggestions that Indonesia might challenge Brazil's law on additives, which applies to all flavours including menthol;[86] it is not clear what argument of 'likeness' they might use, assuming they continue to argue this is a matter of discrimination.

Another recent case, in which Philip Morris challenged Norway's display ban laws under the EEAA, considered the question of discrimination. Philip Morris said the measure favoured certain imported tobacco products that were well established in the local market because they had been produced in Norway until recently and discriminated against other foreign tobacco companies that needed to establish themselves in the Norwegian market. The EFTA court agreed that the display ban would be discriminatory if it were shown in fact to have that effect.[87]

New Zealand's proposed increases in tobacco taxes or levies would avoid such problems, so long as they were non-discriminatory. Moves to control certain constituents of tobacco products could raise objections if they have an adverse effect on products that are imported from a party to one of New Zealand's trade agreements, but not on 'like' products made in New Zealand or a third country. Similarly, annual reductions in imported tobacco could prompt concerns about discrimination in favour of an actual or potential local substitute.

3.1.4 Exceptions

There is a defence to breaches of these GATT provisions under the general exceptions in Article XX(b) and equivalent exceptions in FTIAs. However, its wording can mislead lay people into believing that it provides complete protection for public health measures, such as tobacco controls.[88] There are three key elements to the defence:

i. The measure must be 'necessary' to protect human, animal or plant life or health.

It is not enough for the government to say that the objective of its tobacco control policy is to protect human life or health. The crucial word is 'necessary'. The government is not the final judge of whether the measure is

[82] WTO European Communities - *Measures Affecting* Asbestos and Asbestos-*Containing Products*, *Appellate Body* Report, WT/DS135/AB/R, adopted 5 April 2001, para 101.
[83] See discussion in section 3.2.2.
[84] *US-Clove Cigarettes - Appellate Body,* paras 108-116.
[85] *US-Clove Cigarettes - Appellate Body,* para 179.
[86] 'Brazil's flavoured cigarette ban now targeted', *Eyes on Trade,* 16 April 2012, http://citizen.typepad.com/eyesontrade/2012/04/brazils-flavored-cigarette-ban-now-targeted.html (accessed 19 April 2012).
[87] *Philip Morris v Norway,* 2011, and Alemanno (2011).
[88] A number of New Zealand public health groups argued for an equivalent exception to be included in the proposed Regulatory Responsibility Bill, whose effect would have been similar in many respects to the free trade and investment agreements.

'necessary'; it is ultimately determined by trade experts in a dispute tribunal. The case law has been shifting around what 'necessary' means,[89] but the core requirements include that:

- The stated public health objective must be legitimate. That is rarely contested in relation to tobacco policy, although eliminating smoking altogether might provoke such a challenge;
- There must be a provable nexus between the measure adopted and the public health objective. That is often highly contested, especially where measures are unprecedented, precautionary or part of a policy package whose effect is cumulative; and
- There should be no alternative measure that is reasonably available to achieve that legitimate public health objective that would have a less restrictive effect on trade. Tobacco interests usually argue that education, and sometimes non-discriminatory taxes, are the most effective and proportionate policies.

The burden of proving these elements is on the government that relies on the exception. If it discharges that burden, the state bringing the dispute can still object. It needs to establish, that

ii. **The measure is being applied in a way that would constitute 'arbitrary' or 'unjustifiable' discrimination.** The test is not the intention, but the effect of the measure;

or that...

iii. **The measure constitutes a disguised restriction on international trade,** by using a public health measure to protect domestic producers.

This exception was first argued in defence of a tobacco control policy in 1990 in a case challenging Thailand's ban on importing US cigarettes.[90] That dispute was under the old GATT 1947 agreement. Thailand argued that many countries, including itself and the US, tried to discourage or control tobacco consumption. US cigarette exports to Asia had been increasing dramatically as a result of targeted marketing by tobacco companies and some American cigarettes were specifically targeted at women, whose smoking rate in Thailand was very low. Lifting the ban would have the effect of increased competition and advertising, wider availability of cigarettes and possibly lower prices, resulting in increased consumption. Thailand predicted that, if it was required to open its market, 'the United States cigarette industry would exert great efforts to force governments to accept terms and conditions which undermined public health and governments were left with no effective tool to carry out public health policies.'[91] An import ban was therefore the only measure that could protect public health. The GATT panel rejected Thailand's argument, saying the government had alternatives, including labelling rules, bans on tobacco advertising, and maintaining its domestic monopoly producer, so long as the chosen measure did not discriminate against imports.[92]

The WTO Appellate Body took a more progressive approach to the exception in 2007 when assessing the contribution of Brazil's measures to achieving its public health objective in *Brazil - Retreaded Tyres*.[93] It said an assessment of 'necessity' should consider:[94]

> ...the relevant factors, particularly the importance of the interests or values at stake, the extent of the contribution to the achievement of the measure's objective, and its trade restrictiveness. If this analysis yields a preliminary conclusion that the measure is necessary, this result must be confirmed by comparing the measure with possible alternatives.

The Appellate Body's approach to least trade-restrictive alternatives was also more sensitive to public policy objectives. Following the reasoning in an earlier GATS case, it said the obligation rested with the complainant to identify possible less trade-restrictive alternatives that would also 'preserve for the responding Member its right to achieve its desired level of protection with respect to the objective pursued'.[95] What the complainant

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[89] Ben McGrady (2009) 'Necessity Exceptions in WTO Law: Retreaded Tyres, Regulatory Purpose and Cumulative Regulatory Measures', 12(1) *Journal of International Economic Law,* 153.

[90] WTO, *Thailand - Restrictions on the Importation of and Internal Taxes on Cigarettes*, Report of the Panel adopted on 7 November 1990, DS10/R-37S/200. (*Thailand - Cigarettes).*

[91] *Thailand - Cigarettes,* para 27.

[92] *Thailand - Cigarettes,* paras 75-81. This case preceded the establishment of the TBT, GATS and TRIPS agreements under the WTO.

[93] WTO, Brazil - *Measures Affecting Imports of Retreaded Tyres*, Report of the Appellate Body, adopted 17 December 2007, WT/DS332/AB/R (*Brazil - Retreaded Tyres*).

[94] *Brazil - Retreaded Tyres*, para 178.

[95] *Brazil - Retreaded Tyres,* para 156.

proposed must be a genuine alternative, rather than an existing measure that it claimed to be adequate to achieve the objective, and be reasonably available.

Significantly, the Appellate Body also said the measure in dispute can form one part of a package of measures that cumulatively advance a public health objective, noting that 'certain complex public health or environmental problems may be tackled only with a comprehensive policy comprising a multiplicity of interacting measures'.[96] If this approach is followed in future cases it will provide much greater flexibility for tobacco control measures that are untested or form part of a portfolio of measures whose individual effects would be hard to correlate to explicit public health targets - including many of New Zealand's proposed policies. However, both the measures and the policy objective would still need to be sufficiently specific for the test to be applied, and there is no certainty that future tribunals will continue taking this line.[97]

3.2 Technical barriers to trade

Summary

Mandatory plain packaging by 2013
The ban on use of terms like 'mild', 'smooth', 'fine' and colour descriptors; enhanced high impact graphic health warnings; control of constituents, such as flavours; stronger disclosure of additives; public reporting of elements of tobacco and smoke by class of product, brand and brand variant; regulation of nicotine content would all come under the TBT Agreement. The same rules would need to apply to locally produced and foreign products that were or could be market competitors. The government would need to show both a scientific nexus between the measures and attaining the public health objective and that other less trade-restrictive alternatives were not available to meet that objective. Recent WTO case law has been more sensitive to public health objectives in assessing those factors.

Registration of importers and disclosure of the volumes of imports
These could be considered technical measures and require equivalent measures for local manufacture of tobacco products.

The purpose of the WTO Agreement on Technical Barriers to Trade, and equivalent provisions in New Zealand's FTIAs, is to prevent governments from finding other ways to restrict imports once they have removed import quotas and lowered their tariffs. The agreement targets technical regulation, which includes mandatory product characteristics, labelling and packaging requirements.[98] There are two main rules: non-discrimination between 'like' products, and using the least trade-restrictive measures that are necessary to achieve the public health objective. There is no separate exception provision as in the GATT.

3.2.1 Non-discrimination

Article 2.1 requires tobacco products imported from any WTO member to be treated no less favourably than 'like products' of New Zealand origin or that originate from another country. Because Imperial Tobacco manufactures tobacco products locally for sale within New Zealand and other local producers might emerge, there is a risk that the proposed technical standards might be considered discriminatory unless they apply uniformly to ingredients and end products.

Indonesia's challenge to the US Family Smoking Prevention and Tobacco Control Act 2009 illustrates the uncertainty of the current trade law climate on this issue. The US law said 'a cigarette or any of its constituent parts (including the tobacco, filter, or paper) shall not contain, as a constituent (including a smoke constituent)

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[96] *Brazil - Retreaded Tyres*, para 151.

[97] The WTO Appellate Body has said that adopted Panel and Appellate Body reports form part of the *acquis* of the WTO dispute settlement system that ensures 'security and predictability' in the dispute settlement system, and creates legitimate expectations among WTO Members. Prior reports should therefore be taken into account where they are relevant to any dispute, unless there are cogent reasons to the contrary; see WTO, *United States - Continued Existence and Application of Zeroing Methodology,* WT/DS350/AB/R, Report of the Appellate Body, 4 February 2009, para 362.

[98] 'Technical standard' is defined in Annex 1 to the *TBT Agreement* as a 'Document which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method'.

or additive, an artificial or natural flavour (other than tobacco or menthol) or an herb or spice.'[99] The Panel's report, released in September 2011, found the US had breached Article 2.1 because it accorded less favourable treatment to clove cigarettes, predominantly imported from Indonesia and subject to the ban, than to 'like' menthol cigarettes, which were mainly produced in the US and excluded from the law.[100] As noted above, in reaching that decision the panel gave weight to public health objectives in assessing whether the tobacco products were 'like'.[101]

In April 2012 the Appellate Body rejected the panel's approach in favour of a test that focused on whether the products were or could be market competitors. It said that regulatory concerns and evidence of health risk might be relevant to the four elements of 'likeness' to the extent they impacted on the competitive relationship between the products.[102] When deciding whether a foreign country's products were treated less favourably than domestic ones, it would look for even-handedness towards groups of like products.[103]

3.2.2 Necessary and least trade-restrictive measures

Article 2.2 is also potentially significant for a number of New Zealand's proposed policies. It reads:

> Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create. Such legitimate objectives are, *inter alia*: ...protection of human health or safety... In assessing such risks, relevant elements of consideration are, *inter alia*: available scientific and technical information, related processing technology or intended end-uses of products.

The rule applies when a tobacco control measure has the effect of obstructing international trade, even if that is not its purpose. Whether the measure creates an 'unnecessary' obstacle to trade requires a step-by-step assessment. The provision identifies three elements:

1. **The technical regulations must not restrict trade more than necessary.** This has been interpreted as a requirement that the measures are proportionate to the objective;

2. **They must fulfil a legitimate objective**. The indicative list of legitimate objectives includes 'the protection of human health';

3. **In weighing up necessity of the measure to achieve the objective, account must be taken of the risks non-fulfilment would create**. This opens the door to arguments over scientific evidence, and the nexus between the measure and the objective. WTO panels have applied a similar test for 'necessity' as for the general exception in the GATT, discussed above.[104]

Provided the measure aims to achieve a legitimate objective, such as protection of human health through tobacco controls, and accords with relevant international standards, it is presumed not to create an unnecessary obstacle to trade. However, that is a rebuttable presumption and can still be attacked, with the burden of proof on the country objecting.

Where states regulate and international standards do exist, they must base their measures on those standards, unless they would be ineffective or inappropriate to fulfil the objectives.[105] Whether there are relevant international standards may be contested. In the area of tobacco regulation, there is no formal agreement on international standards. The FCTC is a 'framework' and the Council of Parties has adopted Guidelines, not mandatory standards as defined by the TBT agreement (although the panel in *US-Clove*

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[99] *US Family Smoking Prevention and Tobacco Control Act 2009,* Section 907(a)(1)(A).

[100] For legal arguments against this finding see Todd Tucker (2012) 'Considerations for U.S. in Appellate Body Review of Lower Panel *Clove Cigarettes* Ruling', *Public Citizen*, Washington, 13 January 2012.

[101] *US-Clove Cigarettes - Appellate Body,* paras 107-109 and 112.

[102] *US-Clove Cigarettes - Appellate Body,* paras 118-119.

[103] *US-Clove Cigarettes - Appellate Body,* paras 181 and 193.

[104] The overall reasoning of the Appellate Body in *US - Clove Cigarettes,* which applied the GATT test to the *TBT Agreement*, appears to apply to Article 2.2 even though the US did not appeal the panel's ruling on that provision. The Appellate Body said at para 96 that although the structure of the GATT and TBT agreements was different, both balanced the obligation to avoid unnecessary obstacles to trade with the right to regulate. The relationship between the tests in Article XX GATT, Article 2.2 of TBT and Article 5.6 of the *Agreement on Sanitary and Phytosanitary Measures* will be clarified further in the pending Appellate Body report on WTO, *United States - Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products,* WT/DS381.

[105] *TBT Agreement*, Article 2.4.

Cigarettes did 'note' the guidelines in considering Article 2.2).[106] The TBT agreement does give special recognition to ISO standards, but policy analysts have criticised them in relation to tobacco, for example over measurement of the components of tobacco smoke. Tobacco companies have tried to promote their own voluntary international standards, which could then be presented as an international norm to challenge policies that exceed them.[107]

There has been very little case law on Article 2.2. The WTO Panel in *US-Clove Cigarettes* rejected Indonesia's complaint based on Article 2.2,[108] and followed the same reasoning as *Brazil-Retreaded Tyres*, discussed in section 3.1.3. It found the US objective was to reduce youth smoking and that objective was legitimate. It then examined whether there was a 'genuine relationship of ends and means between the objective pursued and the measure at issue' that showed it would make a material contribution, and found there was. The decision then turned on whether there were less trade-restrictive alternatives that could make an equivalent contribution to achieving the level of protection the US sought through the measure. Indonesia had suggested 25 alternative policies; the panel said each of them seemed to carry a greater risk of not fulfilling the US objective and many of the alternative measures were already in place. The panel decision on Article 2.2 was not appealed.

The EFTA court in the Philip Morris case against Norway's display ban also took a broad approach to the nexus between the measure and the objective. The court found that where the state: [109]

> ...legitimately aims for a very high level of protection, it must be sufficient for the authorities to demonstrate that, even though there may be some scientific uncertainty as regards the suitability and necessity of the disputed measure, it was reasonable to assume that the measure would be able to contribute to the protection of human health... [A] measure banning the visual display of tobacco products, such as the one at issue, by its nature seems likely to limit, at least in the long run, the consumption of tobacco in [Norway]. Accordingly, in the absence of convincing proof to the contrary, a measure of this kind may be considered suitable for the protection of public health.

A commentator on that case remarked that 'the Court grants a rather wide margin of manoeuvre to States in selecting tobacco control measures whose effects cannot be proven either because they have never been applied (e.g. plain packaging) or because of the epistemic difficulty, given the highly-polarised debate surrounding their introduction (e.g., visual display ban), in determining their effectiveness in reducing tobacco consumption.' [110] Somewhat inconsistently, however, the court noted that exceptions must be 'strictly interpreted' and left it to national courts to decide on proportionality of the measure to the objective and whether in fact there were less trade-restrictive alternatives.

This approach seems helpful to New Zealand's goal of becoming essentially smoke free by 2025. However, the EFTA decision was informed by legal precedents from the European Union and has limited application to New Zealand's FTIAs.[111] Its greater significance may be in establishing the legality of similar bans in the United Kingdom, Finland and Ireland in accordance with Article 13 of the FCTC, and influencing the direction of the EU Tobacco Products Directive, with flow-on effects of normalising such measures internationally.

3.2.3 Notification

Where there is no relevant international standard for a product, or the technical regulation is not consistent with that standard, and the measure could significantly impact on international trade the government introducing it must notify other WTO members at an early stage in the legislative process. The notification covers the products that would be affected, the objective and the rationale.[112] The regulating member must, without discrimination, allow enough time for other governments to make written comments, discuss them if it

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[106] *US-Clove Cigarettes,* para 7.427.

[107] In 2001, during FCTC negotiations, British American Tobacco, Philip Morris International and Japan Tobacco International jointly introduced industry self-regulation guidelines, called the International Tobacco Products Marketing Standards; see British American Tobacco, International Tobacco Products Marketing Standards, www.bat.com/group/sites/uk__3mnfen.nsf/vwPagesWebLive/DO52ADRK/$FILE/medMD74MLPM.pdf?openelement. Weismann also gives the example of ventilation for smoking areas. Weismann (2003) 14.

[108] The arguments are summarised in Tucker (2012).

[109] *Philip Morris v Norway*, para 83.

[110] Alemanno (2011).

[111] The wording of the exception provision is also different, as it omits the word 'necessary' for the protection of public health; nevertheless, the court applied a necessity requirement.

[112] *TBT Agreement*, Article 2.9.

is asked to, and take the comments and discussions into account before finalising the technical regulation. Recent notifications include Brazil's restrictions on additives and Australia's plain packaging law, discussed in section 4.1.2.[113]

3.2.4 Implementation periods

Article 2.12 requires a 'reasonable interval between the publication of technical regulations and their entry into force'. The Panel in *US-Clove Cigarettes* found that the three months time lag provided by the US was insufficient and the industry should have been given six months to comply. The Appellate Body upheld that decision, albeit on different reasoning.[114] This ruling could be important when New Zealand looks at time lines for harmonisation to the Australian plain packaging law and the time scales provided in the Trans-Tasman Mutual Recognition Arrangement (see section 3.6).

3.3 Intellectual property rights

Summary

Mandatory plain packaging by 2013
The ban on the use of terms like 'mild', 'smooth', 'fine' and colour descriptors; enhanced high impact graphic health warnings have all been challenged as breaches of the rights of trademarks owners. There are strong counter-arguments to such claims.

Stronger disclosure of elements of tobacco and smoke by class of product
This might be challenged as a breach of protections of trade secrets, but that fundamentally misconstrues the provision.

Exceptions
In the absence of a general public health exception in intellectual property chapters the government could rely on the positive statement of principle that it may adopt measures necessary to protect public health. That has a less onerous burden of proof than the GATT exception provision, but the right to act is subject to an untested and circular requirement that measures are consistent with the TRIPS.

Note
There is no similar statement of principle in USFTIAs, which heightens the risks for New Zealand if that approach were carried into the TPPA alongside stricter protections for intellectual property the US proposes.

At US insistence, a strict regime to protect intellectual property rights has been included in free trade and investment agreements since 1995, when the Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS) came into force as part of the WTO regime. While TRIPS incorporates some elements of UN treaties, such as the Paris Convention on Protection of Industrial Property 1967, it goes much further in ways that effectively globalise US intellectual property law. Those obligations have been significantly extended, and some of the exceptions diluted or omitted, in subsequent FTIAs, especially involving the US. New Zealand has taken a generally minimalist position in its FTIAs that reiterates its TRIPS obligations. It is consequently under intense pressure from the US to accept much stricter rules in the TPPA that would impact significantly on the smokefree policies.

3.3.1 Alleged breaches of Intellectual property rights

The most comprehensive legal arguments in support of tobacco industry claims that tobacco control policies violate their intellectual property rights have been set out in response to Australia's tobacco control policies.[115]

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[113] For an overview of Notifications and subsequent discussion of TBT issues see WTO, *Specific Trade Concerns Raised in the TBT Committee*, Note by the Secretariat, G/TBT/GEN/74/Rev.8, 1 June 2011.
[114] *US - Clove Cigarettes - Appellate Body,* 296-297.
[115] See Erik Bloomquist (2011) *Global Tobacco. The Plain Risk to Global Tobacco*, Berenberg Bank, Switzerland, 21 March 2011; Patrick Basham and John Luik, *Public Consultation on Plain Packaging of Tobacco Products*. Submission to the Department of Health and Ageing, Government of Australia', Democracy Institute, Washington DC, June 2011; Memorandum from Lalive to Philip Morris International Management SA, *Why Plain Packaging is in Violation of WTO Members' International Obligations under TRIPS and the Paris Convention*, 23 July 2009. Industry groups, especially in the US,

Most of the following arguments can be expected to inform the challenge that Ukraine and Honduras have lodged at the WTO.[116]

1. Balanced rights and obligations: The protection and enforcement of intellectual property rights should contribute to a balance of rights and obligations.[117] The industry's rights have not been paid due regard, as reflected in poor quality regulatory impact statements, inadequate research, and failure to consult adequately.

2. **Right to register trademarks**: Any sign or combination of signs capable of distinguishing goods of one undertaking from those of others is eligible for registration as a trademark in accordance with the Paris Convention 1967.[118] The Paris Convention defines 'industrial property' to include all manufactured or natural products, including 'tobacco leaf'.[119] A 'sign' includes personal names, letters, numerals, figurative elements and combinations of colours. Registration of a trademark is rendered nugatory if there is no right to use it.[120]

3. **All goods are treated equally:** The nature of the goods to which a trademark applies shall in no case form an obstacle to registration of the trademark.[121] This means governments cannot treat registration of trademarks differently based on the kind of goods. Tobacco must therefore be treated no differently from any other legal commodity.

4. **Ability to distinguish between products**: Use of the trademark 'shall not be *unjustifiably encumbered* by special requirements, such as ...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' (*emphasis added*).[122] States have a duty to protect nationals of parties to the Paris Convention from 'unfair competition', which explicitly prohibits acts whose nature would create confusion with the goods of a competitor.[123] Specified forms of labelling or plain packaging are an 'unjustifiable encumbrance' on the use of a trademark. Plain packaging, in particular, seriously impedes or removes the capability of consumers to distinguish between different companies' tobacco products.

5. **Protecting trade secrets:** Tobacco companies have a right to protect commercially valuable information from disclosure and cannot be required to disclose commercially sensitive information and trade secrets.[124]

3.3.2 Counter-arguments

There are counter-arguments to all these propositions.[125] The first involves a factual dispute in which FCTC Article 5.3 could be raised. Arguments 2 and 3 apply only to registration of trademarks, not their use, and none of New Zealand's proposed policies seek to deny registration. The fact that 4 refers explicitly to 'use' of trademarks reinforces the argument that the other provisions were intended only to cover their registration. Significantly, the US has proposed stronger but coded wording for the TPPA in its draft chapter on intellectual property, which would create an affirmative right to use certain types of trademark.[126]

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raised the same arguments more briefly in standardised submissions on the Australian government's consultation paper on plain packaging; eg. US Chamber of Commerce to the Australian Department of Health and Ageing, 26 May 2011.

[116] The request for consultations by Ukraine alleges that Australia has violated its obligations under *TRIPS* Article 1, 1.1, 2.1, 3.1, 15, 16, 20 and 27 (as well as TBT and GATT), but this initial documentation does not disclose details of the legal arguments. *Australia - Certain Measures Concerning Trademarks and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging,* WT/DS434/1, 13 March 2012, Request for Consultations by Ukraine (*Australia - Plain Packaging*).

[117] *TRIPS*, Article 7.

[118] *TRIPS*, Article 15.1 .

[119] *The Paris Convention for the Protection of Industrial Property 1967*, Article 1. Article 2 of *TRIPS* incorporates all substantive provisions of the Paris Convention.

[120] There is a potential issue relating to 'use' of trademarks under the *New Zealand-China Free Trade Agreement*, because trademarks are investments and the FTA protects the right to use those investments. See section 3.4.4.

[121] *TRIPS*, Article 15.4.

[122] *TRIPS*, Article 20. Discussed in *EC - Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs* WT/DS174/R 7.650, and Voon and Mitchell (2012) 9-11.

[123] *Paris Convention*, Article 10*bis.*

[124] *TRIPS*, Article 39.2.

[125] Voon and Mitchell (2011).

[126] Article 2.3 of the US-proposed draft Intellectual Property Chapter of the TPPA, dated February 2011, infojustice.org/resource-library/tpp (accessed 19 April 2012), prevents certain requirements concerning the relative size, placement or style of use of a trademark that would impair its use. Lloyd Grove and Robert Stumberg have argued that Article 2.2 and 2.22 could also be used *Proposed TPP intellectual property language on geographical indications*, Memorandum

Whether packaging and labelling measures 'unjustifiably' encumber the use of trademarks is a question of degree and justification, raising similar arguments to the 'necessity' test. However, under 4 the burden of proof is on the industry to show lack of justification.

The trade secrets argument in 5 misrepresents a protection that is designed to prevent unauthorised use of such information by commercial competitors.

3.3.3 Permitted constraints

There is no general exceptions provision in the TRIPS. However, the New Zealand government might have recourse to three provisions to defend its policies:

a. **The 'principles' provision in Article 8 of TRIPS says a government may adopt measures necessary to protect public health.**[127] This looks very like the 'public health' exception in the GATT and is subject to similar arguments on 'necessity', including the scientific nexus and less trade-restrictive alternatives. In an adaptation of those arguments, critics of strong tobacco control policies, especially plain packaging, say there is no robust scientific evidence of a nexus between tobacco control policies that negate their trademarks and a limited legitimate public health objective of reducing tobacco consumption among youth.[128]

While Article 8 states this principle in the positive, meaning the burden of proof falls on the objectors, there is a problematic proviso that any such public health measures must be consistent with the provisions of TRIPS. The industry side argues that measures that violate the provisions of TRIPS are disqualified from relying on the public health exception. In other words, the principle merely affirms the right to make public policy provided the agreement is complied with.[129] This provision has not yet been the subject of a WTO dispute decision, although Ukraine has cited it in its request for consultations over Australia's plain packaging law.[130] It is impossible to predict how it would be interpreted.

b. **Registration of a trademark can be withheld where granting it would be contrary to public morals, and in particular deceive the public,**[131] which various descriptors are considered to do.[132] A public morals defence has been upheld in a WTO case involving Internet Gambling,[133] although that was under a GATS exception that has different wording and context. However, this power relates only to withholding registration.

c. **Members may impose constraints on the rights conferred by a trademark, such as requiring fair use of descriptive terms, provided such exceptions are limited and take account of the legitimate interests of the owner of the trademark and of third parties.**[134] Critics of industry says tobacco control measures that effectively prohibit tobacco companies from using their trademarks, especially plain packaging and extensive graphic health warnings, are not limited in their nature and fail to take account of the interests of the tobacco producers, or importers, retailers or other commercial actors in the supply chain.[135] Other scholars point out that the rights conferred in TRIPS are predominantly negative rights that entitle the trademark owner to exclude others, not positive rights for them to use the trademark.[136]

The interpretation of these provisions will depend on how the tribunal applies the rules of treaty interpretation. The tobacco industry will argue that TRIPS was intended to introduce a rigorous intellectual property rights regime and the need to balance rights and obligations should give effect to that intention. Others argue that the TRIPS provisions should be read through the interpretive lens of the WTO Declaration on TRIPS and Public

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to ASH, 9 April 2012, on file with author.

[127] *TRIPS*, Article 8.

[128] See eg. Basham and Luik (2011) 20-23; *Written Notification of Claim by Philip Morris Asia Ltd to the Commonwealth of Australia pursuant to Agreement between the Government of Hong Kong and the Government of Australia for the Promotion and Protection of Investments*, 22 June 2011, para 40 (PMAsia Statement of Claim).

[129] There is a similar, equally contentious, phrase in the prudential exception to the WTO financial services agreement, but that has not been subject of adjudication either.

[130] *Australia - Plain Packaging,* Request for Consultations.

[131] Based on Article 6 quinquinies B of the *Paris Convention*, where a trademark may be denied registration if it would be contrary to morality or public order, and in particular, be of such a nature as to deceive the public.

[132] *FCTC*, Article 11(a).

[133] *United States - Measures affecting the cross-border supply of gambling and betting services,* Report of the Appellate Body, 21 December 2007, WT/DS285/ABR, 7 April 2005 (*US-Gambling).*

[134] *TRIPS*, Article 17.

[135] Bloomquist (2011) 21.

[136] Glen Gordon (2010) Trademark attorney: Tobacco companies have no case on plain packaging, *Crikey*, 7 May 2010.

Health.[137] That approach would strengthen the public health element of the equation, but would require a sympathetic tribunal. While the preamble to the Declaration reasserts that TRIPS 'does not and should not prevent Members from taking measures to protect public health' and should be interpreted in a manner that supports that right, the substantive scope is restricted to access to medicines for pandemics. Further, the substance is circumscribed by very restrictive conditions that were considered by WTO members to achieve a 'balance' of public health and intellectual property rights interests.[138]

Possible interpretations of the TRIPS provisions and exceptions provide some comfort for New Zealand's proposed policies, but they are yet to be tested. The rulings in the *Australia - Plain Packaging* dispute will be crucial, assuming it proceeds to a hearing. However, it is essential to remember that these exceptions are not always replicated in FTIAs, in particular with the US. For example, the intellectual property chapter in the recent FTIA negotiated by the US with Korea does not have an equivalent public health exception, and the General Exceptions provision of the FTIA does not apply to the intellectual property chapter.[139] If that were replicated in a TPPA, many of the proposed tobacco control policies would be vulnerable to threats of a dispute that claims violation of intellectual property rights. Such claims could have a chilling effect on government decisions, even if the industry's argument was considered tenuous.

3.4 Investor promotion, protection and enforcement

Summary

Mandatory plain packaging by 2013; ban on the use of terms like 'mild', 'smooth', 'fine' and colour descriptors; enhanced high impact graphic health warnings; regulation of nicotine content and flavours; annual reductions by a set percentage in imported tobacco; annual reductions by a set percentage in the number and quantity of products at each outlet; annual reductions by a set percentage in the number of retail outlets; local authority power to control the number and location of retailers; ban on duty free sales of tobacco or reduced duty free allowances, large increases in tobacco tax.

All these measures potentially affect investments, whether in the form of intellectual property rights, share value or the commercial viability of tobacco companies or other foreign-owned participants in the tobacco supply chain. Most of New Zealand's investment chapters include wording to restrict the scope of indirect expropriation and fair and equitable treatment provisions, which are the main grounds for investor-initiated disputes. However, the ad hoc disputes process and untested nature of these provisions means the outcome is unpredictable. Threatened or actual strategic litigation would divert resources from promoting new policy initiatives to defending them against challenges. The risks would intensify under a TPPA because US tobacco companies are high-users of these powers, and are seeking more stringent investor rights and protections that they could enforce through investor-state dispute processes.

There is no investment chapter per se in the WTO, although commercial establishment (foreign direct investment) is one of the ways that services can be 'traded' internationally under the GATS and FTIAs. Those rules are discussed in section 3.5.

New Zealand's only operative bilateral investment treaty is with Hong Kong, China, and that is expected to be replaced by an investment protocol to the New Zealand Hong Kong, China CEP. New Zealand also has investment chapters in its FTIAs with Singapore, China, Malaysia and Australia-ASEAN. These chapters follow broadly similar templates, but there are differences between them that could prove significant. It is common for transnational corporations to shop around to find investment treaties with provisions that suit their argument.

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[137] Voon and Mitchell (2012) 13. This draws on Article 31.3(c) of the *Vienna Convention* 1969 that treaty interpretation should take into account 'any relevant rules of international law applicable in the relations between the parties'.

[138] Council for TRIPS, 'Notification under Paragraph 2(A) of the Decision of 30 August 2003 on the Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health: Rwanda', IP/N/9/RWA/1, 19 July 2007; 'Members discuss implementation of TRIPS "Para 6" solution', Published in SUNS #6864, 16 February 2010, www.twnside.org.sg/title2/wto.info/2010/twninfo100212.htm (accessed 19 April 2012).

[139] Article 18.11 of *Korea-US Free Trade Agreement* sets out Understandings Regarding Certain Public Health Measures, which relate to the WTO *Declaration on the TRIPS Agreement and Public Health* (WT/MIN(01)/DEC/2), but that is limited to access to medicines.

'Investments' are defined broadly to cover every kind of asset and specifically include those that might be affected by tobacco control policies, such as intellectual property rights and goodwill, licenses, shares in a company, and other rights conferred by law, including rights to manufacture or sell products. In several cases under the North American Free Trade Agreement (NAFTA), arbitration panels have said that a foreign firm's 'market access' or 'market share' could also be considered a protected investment.[140] Conversely, some tribunals have reined in the scope of investment agreements, with one stream of arbitral decisions considering that only investments that contribute to the state's economic development should be entitled to protection.[141] That approach would open the door to health economy arguments.

The following are standard provisions in most investment chapters or agreements.

3.4.1 Non-discrimination

Similar to the trade agreements, governments are bound not to discriminate in favour of local investors and investments, or investors or investments of a third country under the 'most-favoured-nation' (MFN) rule. Those obligations may apply to some or all the spectrum of investment activities: establishment,[142] acquisition, expansion, management, conduct, operation, liquidation, sale, transfer, or other disposition. New Zealand's tobacco control policies would therefore need to apply across the board.

The MFN provision has a second important application: investors covered by an investment agreement can claim the right to more favourable legal protections or entitlements that are given 'in like circumstances' to investors or investments from other countries. Philip Morris is using that strategy against Ukraine to avoid a requirement to pursue the case initially in the domestic courts.[143]

3.4.2 Expropriation

Governments agree not to expropriate an investment covered by an agreement unless the measure is adopted for a public purpose, is non-discriminatory, with payment of full compensation and according to due process. None of New Zealand's proposed tobacco control measures would formally sequester the investment. However, the rule applies to measures that have an equivalent effect to expropriation, referred to as indirect expropriation. Tribunals have made widely varying interpretations of the kind and degree of loss that constitutes indirect expropriation, ranging from a significant or substantial impact on the asset to the virtual destruction of its value.[144]

This standard provision[145] became very controversial after investment dispute tribunals awarded investors large compensation payments for public health, environment and other public policy measures. It is now common for FTIAs to have an interpretive Annex[146] on expropriation. New Zealand's agreements have variations on the requirement that indirect expropriation:

a. Must be either severe or for an indefinite period; and

b. Disproportionate to the public purpose.

A measure is particularly likely to be an indirect expropriation if:

c. It discriminates against an individual or class of investor; or

d. Breaches the state's prior binding written commitment.

Most significantly for tobacco control policies, some annexes say a measure is not an indirect expropriation if it may be 'reasonably justified' in the protection of the public welfare, including public health. Reasonable justification is not self-judging; it must be established as a defence once a prima facie case of indirect expropriation has been shown. There is additional uncertainty in the New Zealand-China FTA and proposed

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[140] *Pope & Talbot Inc v Government of Canada*, Interim Award, 26 June 2000, paras. 96-98; *S.D. Myers, Inc. v. Canada*, Partial Award, 13 November 2000, 232.

[141] Andrew Mitchell and Sebastian Wurzberger (2011) *Boxed in? Australia's Plain Tobacco Packaging Initiative*, Melbourne Legal Studies Research Paper no.559, 9.

[142] Not all New Zealand's agreements (notably not the *New Zealand-China FTA*) commit to non-discrimination on the establishment of an investment.

[143] See section 4.2.1

[144] The cases are reviewed in Matthew C. Porterfield (2011) State Practice and the (purported) Obligation under Customary International Law to Provide Compensation for Regulatory Expropriations, 37, North Carolina Journal *of International Law and Commercial Regulation* 159 at 164 and 177.

[145] However, there is no expropriation provision in the *New Zealand-Singapore Closer Economic Partnership 2011*.

[146] This is a footnote rather than an Annex in the pending *Australia-New Zealand Investment Protocol*.

Australia-New Zealand investment protocol, where the public welfare protection is qualified by the words 'except in rare circumstances'. If the TPPA follows the US approach it would be more limited again, as those texts introduce a proportionality test.[147] To date there are no known investment disputes that apply this Annex,[148] and with no system of precedents applying to investment disputes tribunals could reach divergent interpretations.

3.4.3 Fair and equitable treatment

The controversy over expropriation has seen it decline as the basis for investment disputes and a corresponding rise in disputes that invoke the guarantee of 'fair and equitable treatment', which has become 'the most relied upon and successful basis' for investment treaty claims.[149] The key economic interest to be protected is the investor's 'legitimate expectations' of a stable and predictable business environment that are not impaired by new regulatory or taxation measures.[150] Tribunal interpretations have ranged from the restrictive to the expansive.[151] Factors that might or might not be considered relevant include the contribution of the investment to the country, whether the measure is considered arbitrary or unreasonable, especially given its nexus to the objective, and the state of government policy at the time of the investment.[152]

Governments have responded by seeking to rein in the scope for claims based on fair and equitable treatment. New Zealand's FTIAs attempt to clarify and limit the risk of creative interpretation by linking fair and equitable treatment to 'customary international law', variously saying that it:

a. Includes not being denied justice or fair treatment in domestic legal proceedings.

b. Does not require treatment in addition to or beyond customary international law.

c. Does not create additional substantive rights; and/or

d. Is not established merely by a breach of another provision in the FTIA or another international agreement.[153]

Again, these terms remain untested and how an arbitral panel will interpret them is something of a lottery. Most arbitrators already purport to base their reasoning on customary international law that is rooted in state practice, but generate widely divergent results.[154]

There is no such limitation on fair and equitable treatment in the New Zealand-Hong Kong BIT. So long as that BIT exists, an investor covered by another FTIA with New Zealand, or the proposed TPPA, could invoke the MFN clause to claim it is entitled to the benefit of that more open-ended provision.

3.4.4 Umbrella clauses

Old-style BITs often impose very far-reaching blanket obligations on governments. The Australia-Hong Kong BIT that Philip Morris Asia is using to challenge Australia's plain packaging law has an 'umbrella clause' that says: 'Each Contracting Party shall observe any obligations it may have entered into with regard to investments of investors of the other Contracting Party.' Tobacco companies claim this includes any WTO or other agreements, including intellectual property rights under TRIPS.[155]

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[147] Eg. The *Korea-US FTA* Annex 11-B reads: 'Except in rare circumstances, *such as, for example, when an action or a series of actions is extremely severe or disproportionate in light of its purpose or effect,* non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health ... do not constitute indirect expropriations. (*emphasis added*). The other parts of the Annex are also different from New Zealand's FTIAs.

[148] The dispute that seemed most likely to address this 'comfort wording' was between Peru and US mining company RENCO under the *Peru-US Free Trade Agreement 2006*; however, there are suggestions the dispute may be settled, despite initial determination by the Peruvian government to defend its position.

[149] UNCTAD, Latest Developments in Investor-State Dispute Settlement, *IIA Monitor* 2009 no.1, UNCTAD/WEB/DIAE/IA/2009/6, 8 http://www.unctad.org/templates/Page.asp?intItemID=3766&lang=1

[150] Porterfield (2011) 167-168.

[151] ADR Williams and A Kawharu (2011) *Williams and Kawharu on Arbitration*, Lexis Nexis: Wellington, 813.

[152] Mitchell and Wurzberger (2011) 641-647.

[153] *Australia-New Zealand Investment Protocol (pending)*, Art 12; *Australia-NZ-ASEAN Free Trade Agreement 2008*, Art 11.6; *Malaysia-NZ Free Trade Agreement 2009*, Art 10.10; only (a) is found in the *NZ China FTA* Art 143; there is no clarificatory provision in the *Thailand-NZ Closer economic Partnership 2005*.

[154] For a critique of how customary international law and state practice is being interpreted, see Porterfield (2011).

[155] *Philip Morris Asia v Australia*, Notice of Claim, paras 41-42.

New Zealand's BIT with Hong Kong, which is still in effect, has a virtually identical umbrella clause. However, there is a crucial difference: an exclusion provision says the agreement does not 'in any way limit' the right of the government to 'take measures directed to the protection of ... public health... provided that such measures would not constitute a means of arbitrary or unjustified discrimination.'[156] Tobacco companies often complain that plain packaging measures are arbitrary and unjustified, but they would have to be shown to constitute arbitrary discrimination before this exception would be disallowed.

There is no similar umbrella clause in New Zealand's FTIAs. However, the New Zealand-China FTA has a different provision (which is unique among New Zealand's investment agreements) that prohibits 'unreasonable or discriminatory measures against management, maintenance, use, enjoyment, and disposal of investments'.[157] A Chinese-based investor could invoke that provision to challenge tobacco control policies as 'unreasonable' restrictions on the use of trademarks (which is a covered investment). An investor that is covered by another of New Zealand's FTIAs, or the proposed TPPA, could also use the MFN provision to demand treatment no less favourable than China's investors enjoy.

3.4.5 Exclusions and exceptions

Old-style BITs do not usually have exception clauses or provision for exclusions. The public health provision in the New Zealand-Hong Kong BIT is unusual in that regard.

New Zealand's FTIAs do contain Annexes that list non-conforming measures or activities that are not subject to the rules on discrimination or access to the market; those exclusions do not to apply to expropriation or fair and equitable treatment.

The investment chapters in New Zealand's more recent FTIAs and investment protocols also cross-reference to the general exceptions provisions in the GATT and GATS, which raises the interpretive issues discussed above. The CER Investment Protocol spells out the terms of this exception:

- The government is not precluded from adopting or enforcing measures necessary to protect human health
- ... provided the measures are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between investors or investments of one party and [any] other investors or investments 'where like conditions prevail'
- ... or a disguised restriction on investment.[158]

Significantly, the exception in the Australia-New Zealand Investment protocol does not apply to expropriation or fair and equitable treatment.

3.4.6 Investor-state dispute powers

Unlike the WTO agreements and all other chapters in New Zealand's FTIAs, investment rules can be enforced directly by the investors of states that are party to the treaty. The dispute process is private to the government and investor. A successful arbitration will usually result in a compensatory award of damages and legal costs. Even when governments win a dispute, these costs can run into several millions of dollars, eclipsing the tobacco control budgets of most countries. The industry has been remarkably candid about its litigation strategy to 'spare no cost in exhausting their adversaries' resources'.[159]

Two principal mechanisms are used for investor-state disputes; the treaty text usually specifies which of them apply.

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[156] *New Zealand-Hong Kong BIT*, Article 8.3.

[157] This obligation does not apply to the establishment of an investment.

[158] *Australia-New Zealand Investment Protocol*, Article 19.

[159] JK Ibrahim and Stanton Glantz (2006) Tobacco industry litigation strategies to oppose tobacco control media campaigns, 15 *Tobacco Control* 50 at 54 www.ncbi.nlm.nih.gov/pmc/articles/PMC2563618/ (accessed 19 April 2012); Robert L Rabin (1992) A Sociological History of the Tobacco Tort Litigation, 44 *Stanford Law Review* 853 at 857, and Brief of Amici Curiae Tobacco Control Legal Consortium and Tobacco Control Resource Center, *Howard A Engle, MD, et al, Petitioners vs Liggett Group Inc et al, Respondents* in the Supreme Court of Florida, Case no. SCO3-1856, 2004 at www.law.fsu.edu/library/flsupct/sc03-1856/03-1856amicus.pdf (accessed 19 April 2012).

i. The International Centre for Investment Dispute (ICSID)

This operates under the World Bank umbrella. It exercises jurisdiction where states are parties to the ICSID (or Washington) Convention.[160] New Zealand ratified the Convention in 1980 but has only been party to one dispute,[161] about which very little is known. The ICSID Convention requires governments to make their arbitral awards enforceable as if they are final judgements of the domestic courts. There is no system of appeal, although parties have increasingly invoked ICSID's procedural provisions to secure reviews.

ICSID has come under strong pressure to be less secretive. Its website now lists information on the registration of all requests for conciliation or arbitration and the date and method of the termination of each proceeding.[162] However, the arbitral decisions and level of awards are only published if both disputing parties agree; otherwise ICSID publishes excerpts of the legal reasoning. The documents and hearings generally remain confidential to the parties. Since 2006 the rules have allowed requests for filing of a written submission from amicus curiae in circumstances that maintain 'the integrity of the process' in terms of parties' rights, but with no right of access to documents. Non-parties can also ask to attend the hearings; ICSID webcast hearings in real time for the first time in June 2010.

ii. The United Nations Commission on International Trade Law 2010 (UNCITRAL) rules

The other main mechanism operated under the UNCITRAL rules. This involves an ad hoc process where arbitral panels are constituted for the particular case. Each side nominates one arbitrator and they agree on a third Chair. The Philip Morris challenge to the Australian plain packaging laws is being brought under Article 4 of these rules.

The UNCITRAL process can be even more secretive than ICSID. In 2011 a working group of the Commission did not resolve whether the existence of investor-state disputes, at least, should be publicly notified, to allow *amicus curiae* to submit briefs in certain circumstances,[163] or to make awards public, and whether any changes it did approve should apply retroactively to existing BITs. Meanwhile, the parties resolved to maintain the non-disclosure of confidential, privileged and other information.[164] Unlike ICSID, there is no obligation on the government to ensure that UNCITRAL awards are enforceable through the domestic courts.

3.5 Trade in services

Summary

Annual reductions by a set percentage in the number and quantity of products at each outlet; annual reductions by a set percentage in the number of retail outlets; local authority power to control the number and location of retailers; ban on duty free sales of tobacco or reduced duty free allowances could all be subject to New Zealand's market access obligations.

Registration of importers, distributors and retailers, where the number is not capped, would be a licensing requirement that is subject to a least burdensome test directed to the quality of the service.

Disclosure of the volumes of imports, distribution and retail sales would be technical standards, but subject to domestic regulation disciplines only for retail sales.

Guidelines to prevent tobacco company interference with policy could contravene transparency obligations.

[160] The Convention on the Settlement of Investment Disputes between States and Nationals of other States, done at Washington, 18 March 1965; entered into force, 14 October 1966.

[161] *Mobil Oil Corporation v New Zealand,* ICSID Case no ARB/87/2 related to the Synthetic Fuels Project that had formed part of the Think Big investments. The dispute was registered in April 1987 and discontinued at the parties' request in November 1990 after they agreed a settlement. An associated decision of the High Court of New Zealand granted a stay of proceedings in the domestic courts pending the establishment of the arbitral tribunal and the tribunal's decision on its jurisdiction. See *Attorney-General v. Mobil Oil* 1987 in Rosemary Rayfuse, ed (1995) *ICSID Reports: Reports of cases decided under the Convention on the Settlement of Investment Disputes*, Cambridge, University of Cambridge Press, 119

[162] http://icsid.worldbank.org (accessed 19 April 2012).

[163] Some tribunals have read the 'privilege' of amicus briefs into the UNCITRAL rules. See Eugenia Levine (2011) Amicus Curiae in International Investment Arbitration, 29(1) *Berkeley Journal of International Law,* 200 at 209 www.boalt.org/bjil/documents/LevineArticle_000.pdf (accessed 19 April 2012).

[164] www.iisd.org/itn/2011/04/07/news-in-brief-3/(accessed 19 April 2012).

Limitations and exceptions:
Coverage of service sectors in relation to market access, national treatment and (often) disciplines on domestic regulation are limited by the government's schedules. General exceptions clauses apply across the services chapter and are subject to a 'necessity' test. However, commercial presence of a subsidiary of a foreign company in New Zealand may be governed by the investment chapter, which provides additional investor guarantees and investor-state enforcement that are not subject to the limitations and exceptions.

The free trade/tobacco control debate has largely focused on goods, intellectual property and investment rules. The trade in services agreements are potentially as significant. The General Agreement on Trade in Services is part of the raft of agreements that came into being under the WTO umbrella. It is carried over in different forms into the FTIAs. Services that are affected by the smokefree strategy include wholesale and retail distribution, franchises, advertising, computer and telecommunications, printing and packaging and events management.

3.5.1 Scope of services agreements

The idea of trading services is often difficult to grasp. A services transaction becomes 'international trade' in four different ways.[165] The most significant 'modes' for this report are the supply of services across the border and through foreign investment. Examples of cross-border transactions are buying duty free cigarettes at Singapore airport on the way back to New Zealand, buying Cuban cigars from another country through the Internet, or advertising by New Zealand tobacco companies on websites hosted offshore that New Zealanders are likely to visit. Services are also 'traded' when foreign companies set up in New Zealand and supply the service here, such as foreign-owned importers of tobacco products, supermarkets or duty free chains, or foreign-owned franchises of convenient stores.

Trade in services agreements impose restrictions on the kind of measures (laws, regulations, bylaws, administrative decisions and procedures etc) that a government can adopt if those measures 'affect' the supply of the service, even if that effect is incidental or unintended. The restrictions apply at central and local government level and to bodies and non-government agencies that exercise delegated responsibility, such as licensing authorities.[166]

Two of the main rules - on access to the New Zealand services market (known as market access) and non-discrimination between foreign and local services and suppliers (known as national treatment) do not automatically apply to all services. Under the GATS and most of New Zealand's FTIAs these two rules apply only to services that New Zealand has listed in its schedule. The government could make different commitments for different ways of supplying the same service (eg. retail sales of tobacco across the border and by foreign-owned retailers), and could specify limitations on the services it did commit to preserve its right to continue certain kinds of measures that would otherwise not be allowed. A third rule, the right to MFN treatment, entitles foreign suppliers of services and the services themselves from a treaty partner to any better treatment New Zealand gives to a third country.

New Zealand's GATS schedules were agreed in 1994. Negotiations to expand the sectoral commitments of WTO members have so far stalled, although they could revive before 2015 and certainly before 2025. New Zealand agreed in 1994 that advertising and retail distribution services would be subject to the market access and national treatment rules in all the ways of supplying them. It also said commission agents and wholesale services would be subject to those rules - but excluded those that supplied tobacco and alcohol. It is not clear why tobacco and alcohol were excluded for wholesale distribution, but not for retail or advertising. The same commitments have been carried through to all New Zealand's FTIAs.

The Trans-Pacific Strategic Economic Partnership Agreement between Brunei, Chile, New Zealand and Singapore (known as the P-4) uses a different approach to scheduling of commitments. The rules apply to all cross-border services and foreign direct investments in services suppliers unless the government specifically excludes a sector or a measure. This is known as a negative list approach. New Zealand reserved the right to

[165] These 'modes' have been reorganised under most FTIAs into separate chapters on cross-border services, investment, and temporary movement of natural persons.
[166] Central government is required to take 'reasonable measures' to ensure compliance, but what that would require is unclear.

use any market access measure that it had reserved in the GATS, which means advertising and retail services are also committed under the P-4.

New Zealand has also made extensive commitments on telecommunication and computer services. The FCTC promotes regulation or restriction of the activities of what it calls 'responsible entities', including content producers (advertising agencies), content publishers (internet publishers), content hosts (server operators), content navigators (entities that run search engines), and end-user access providers (internet suppliers or libraries) - which all fall under those sectors. For simplicity, the following discussion focuses on the market access, national treatment and domestic regulation rules as they affect advertising and retail services.

3.5.2 Non-discrimination

As with trade in goods, foreign advertisers and retailers and their actual services cannot receive less favourable treatment than their local counterparts or those of any other country. This rule applies to 'like' services and service suppliers. How 'like' will be interpreted is crucial, as the policies apply specifically to retail or advertising of tobacco products, but there is no helpful case law on the 'likeness' question,[167] and the test for goods does not transpose easily to services.

3.5.3 Market access restrictions

These also pose problems for tobacco control policies. Central and local governments are prohibited from adopting measures that would cap the size or growth of the market for advertising or retailing, whether the restriction applies across the whole country or in just one city or region. Only certain kinds of measures are prohibited. The most relevant for this report are:

i. Limits on the number of suppliers of retail or advertising services operating in New Zealand or in specific areas.

Examples would be a licensing regime that limited the total number of tobacco retailers in New Zealand, or local by-laws restricting the number of tobacco outlets in Te Kuiti or Porirua. Another example would be the introduction of a monopoly or exclusive supply arrangement to distribute tobacco (similar to methadone treatment). The rule would also prevent a by-law that says new tobacco retailers can only be established if the area needs more outlets.

ii. Limits on the total quantity of output from retailers or advertisers.

An example is Internet sales of tobacco, which the FCTC Guidelines recommend should be banned.[168] The measure raises two issues. First, the WTO Appellate Body has said a ban is a zero quota that constitutes a quantitative restriction on total output.[169] Second, the GATS has been interpreted to mean that a commitment on a particular service must be applied in a 'technologically neutral' way,[170] meaning a ban that only applied to Internet sales of tobacco within New Zealand while tobacco could still be sold legally over-the-counter, would breach this rule. As a separate example, it might be argued that restricting the amount of space a convenience store can allocate to tobacco products or the hours they can be sold is a quantitative restriction on output.[171]

iii. Requiring a foreign investment to adopt a certain legal form.

For example, the government could not create a unique legal entity through which tobacco must be sold. A requirement for registration as a condition of selling tobacco would not count as a legal form; the registration regime would be governed instead by the 'disciplines on domestic regulation'.

3.5.4 Domestic regulation

A further set of GATS restrictions apply to licensing requirements and procedures, and to technical standards and procedures relating to their enforcement. Technical standards are defined as government measures that lay down the characteristics of a service or the manner in which it is supplied. These disciplines have also been

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[167] Pietro Poretti (2009) *The Regulation of Subsidies within the General Agreement on Trade in Services of the WTO: problems and prospects,* Kluwer Law International: Netherlands, 129-136.

[168] *FCTC Guidelines on Article 13*, Para 21 Recommendation.

[169] For an account of this dispute see Kelsey (2008) 174-181.

[170] WTO, *China - Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/R, Report of the Panel, 12 August 2009, para 7.1256-7.

[171] The US took a case against Japan's restrictions on store size in 1996, but it never went to a hearing because Japan amended its law. WTO, *Japan - Measures Affecting Distribution Services,* DS45, www.wto.org/english/tratop_e/dispu_e/cases_e/ds45_e.htm

imported into New Zealand's FTIAs. At present they only apply in the WTO to the services that are committed in New Zealand's schedule; they therefore affect licensing or registration of tobacco retailers and technical standards on sales and advertising of tobacco products. Under some FTIAs, they apply to all services, irrespective of whether New Zealand has made national treatment or market access commitments.[172] The rules apply to

i. Transparency

Regulations relating to licenses and technical standards must be administered in a 'reasonable, objective and impartial manner', which provides an avenue for complaints about unreasonable processes, subjective assessment of evidence, lack of consultation and pre-judgement by regulators.

ii. Unnecessary barriers to trade

To ensure that licensing requirements and technical standards do not pose 'unnecessary barriers to trade' they must be based on[173]

a. **Objective and transparent criteria,** such as competence and the ability to supply the tobacco retail or advertising service;

b. **Not be more burdensome than necessary to ensure the quality of the service**; this explicitly applies a necessity test and the requirement for the least restrictive alternative to achieve the objective of a 'quality' service - a highly subjective criteria when dealing with retailing or advertising tobacco. It could be argued that knowledge of tobacco laws are expected of a 'quality' tobacco retailer or advertiser; requiring knowledge of health impacts of tobacco sales and ability to give advice about the hazardous nature of the product might be more difficult to sustain; and

c. **Where licenses are required they must not in themselves restrict the supply of the service**, so the licensing regime cannot limit the supply of tobacco retail or advertising services. Any such restrictions would have had to be listed as limitations to New Zealand's market access commitments, and they were not.

In 2002 the WTO Secretariat prepared a memorandum that listed examples of measures that some WTO members thought would not comply with the disciplines on domestic regulation of services.[174] Relevant examples include:

Transparency:

- Lack of opportunity for interested non-governmental market participants to meet with government officials to discuss the impact of new or proposed regulations.
- Inadequate information available, or information not readily available, to non-governmental market participants about new or proposed regulations affecting their interests.
- Regulatory changes without adequate prior notice.
- Procedures at the local level are not transparent.
- Domestic laws and regulations are unclear and administered in an unfair manner; and
- Lack of transparency in domestic town planning regulations that might prejudice decisions on the location of installations to provide services.

Licensing:

- Overly burdensome licensing requirements.
- Unreasonable restrictions on licensing.
- Restrictions on the use of firm names; and
- Needing to obtain/renew the same license in every region/local government.

Technical standards

- Unreasonable safety standards; and

[172] Eg. *Malaysia-New Zealand FTA* 2009, Article 8.18.

[173] There is a proviso that the disciplines do not apply if other governments could reasonably have expected those regulations in 1995, but that would not apply here.

[174] WTO, Working Party on Domestic Regulation, *Examples of Measures to be Addressed by Disciplines under GATS Article CVI4*, Informal Note by the Secretariat, Second Revision, JOB(01)/62/Rev.2, 12 July 2002.

- Restrictions/prohibitions on marketing and advertising (noted to be 'subject to Members' interpretation').

This list is the result of a survey and does not mean all such measures would be challenged; however, it indicates potential areas of objection.

When assessing whether a government is meeting these obligations, the international standards of relevant organisations must be 'taken into account'.[175] As with the TBT agreement, the government could refer to the FCTC and Guidelines, but even if their status as international standards were conceded, they would be one of several factors to be considered.

The existing disciplines are interim. Ongoing negotiations for more definitive rules in the WTO have stalled. However, the proposals for new disciplines are very relevant because they would be imported into New Zealand's FTIAs as well as the GATS. Under the latest text produced by the chair of the negotiations:

- The 'transparency' rule would explicitly require governments to 'endeavour to ensure' that any measures falling within the scope of the disciplines are published in advance and 'endeavour to provide reasonable opportunities for service suppliers to comment on such proposed measures';
- A government should 'endeavour' to address collectively in writing the substantive issues raised by the services industries;
- Relevant international standards should be taken into account in formulating technical standards, but could be set aside if they were an 'ineffective or inappropriate' means to fulfil national policy objectives.[176]

New Zealand tabled a proposal in February 2011 that would more seriously constrain a government's ability to choose regulations that it believed best met its national policy objectives.[177] New Zealand wants to 'enshrin[e] the requirement that regulation should avoid impacting on trade if this is not necessary in order to achieve Members' legitimate national policy objectives', although it stopped short of specifying what are considered legitimate objectives. Governments would need to ensure that technical standards and licensing requirements did not have the effect of creating 'unnecessary barriers to trade in services' and were 'not more trade-restrictive than necessary to fulfil specific policy objectives, including to ensure the quality of a service'. A number of members, including the US, have objected that the multiple layers of necessity and least restrictive requirements intrude too deeply on their regulatory autonomy, but Australia supported the proposal. It is possible that New Zealand and Australia might be advancing similar rules in the TPPA, although the proposed transparency and regulatory chapters of that agreement could have an equivalent effect.[178]

3.5.5 Exceptions

The general exception in the GATS for public health parallels the exception in the GATT, so the discussion in section 3.1.3 applies. There are two additional cases that are relevant to trade in services.

Although the challenge to Thailand's restriction on importing tobacco in 1990 was a GATT dispute that preceded the WTO and the GATS,[179] the legal argument is useful. At the time Thailand had a non-discriminatory ban on tobacco advertising and marketing, which it saw as an important means of restricting expansion of tobacco sales if the import ban was lifted.[180] The US objected to Thailand's request for the panel to review whether the advertising ban was legal under the GATT.[181] But the panel did indicate that continuance of the advertising ban and marketing restrictions would meet the standards of the GATT health exception.[182]

Second, in a challenge from Antigua and Barbuda to a US ban on Internet gambling the US invoked the general exception that the measure was 'necessary to protect public morals'. The panel ruled that the US had an obligation to consult with Antigua to identify alternatives, which it had failed to do. The Appellate Body

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[175] This only applies to international organisations to which all WTO members can belong.
[176] WTO, Working Party on Domestic Regulation, *Disciplines on Domestic Regulation Pursuant to GATS Article VI:4*, Informal Note by the Chairman, Room Document, 20 March 2009.
[177] WTO, Working Party on Domestic Regulation, *The Necessity Test in the Disciplines on Domestic Regulation*, RD/SERV/39, 9 February 2011.
[178] Discussed in Section 3.7.
[179] Discussed in Section 3.1.3.
[180] Weismann (2003) 23.
[181] *Thailand - Cigarettes,* para 34.
[182] *Thailand - Cigarettes*, para 78.

disagreed,[183] finding that the interests the US was seeking to protect were vital, the measures contributed to the objective of prohibiting remote gambling, and there were no other less trade-restrictive alternatives that would secure the level of protection being sought. The remaining question was whether the measures were a disguised trade restriction or arbitrary or unjustified discrimination; one measure was found to be discriminatory. It could be argued that smoking involves a matter of public morals under the GATS exception although that might be discounted given there is a separate public health exception.

3.5.6 Notification

A WTO member is required to notify the WTO's Council for Trade in Services if it introduces a new measure that significantly affects its trade in services commitments in the GATS. The minutes of the Council do not reveal any discussion of notifications relating to tobacco measures in recent years.

3.6 Mutual recognition

Summary

Plain packaging; ban on the use of terms like 'mild', 'smooth', 'fine' and colour descriptors; enhanced high impact graphic health warnings; stronger disclosure and public reporting of elements of tobacco and smoke by class of product; regulation of nicotine content; control of constituents, such as flavours are all production or presentation standards or other requirements that could restrict sales of tobacco products from Australia if Trans-Tasman regulations are not harmonised. If different rules are maintained, the power to add exclusions or exceptions would have to be used. That could generate complaints that failure to comply with the TTMRA violates investment protections.

Mutual recognition arrangements (MRAs) are designed to facilitate the efficient movement of goods with minimal compliance costs between countries that view each other's product standards and processes as of comparable quality. The Trans-Tasman Mutual Recognition Arrangement entered into with Australia in 1997 is New Zealand's most significant MRA. Both countries agreed to implement a mutual recognition principle that goods produced in or imported into one country that can lawfully be sold in that country can also be sold lawfully in the other country, without the need to comply with any of its legal 'requirements relating to sale'. This obligation is implemented through each country's domestic laws.

New Zealand's Trans-Tasman Mutual Recognition Act describes several categories of 'requirements relating to sale' that are governed by the mutual recognition principle. The categories relevant to tobacco control policies are:[184]

a. Product standards relating to the composition, performance, production, quality or any other aspect of the goods themselves.
b. Presentation standards relating to labelling, packaging or any other aspect of presentation (labelling is defined as any means by which, at the point of sale, information is attached to goods or displayed in relation to them without being attached); and
c. Any other requirement that would prevent or restrict the sale of the goods in New Zealand, or would have that effect.

There is an exception for laws that regulate the manner of selling goods by dealing with:

a. The contractual aspects of the sale of the goods (eg., no incentives or bonuses for quantity of tobacco product sold);
b. Who can and cannot be sold the goods (eg., age limits on tobacco purchasers);
c. The circumstances in which they can and cannot be sold (eg., ban on sales of tobacco at sporting events);
d. Franchise agreements or arrangements relating to the sale of goods (eg., banning tobacco sales by certain categories of retailers); and
e. Registration of sellers (eg., as a condition of selling tobacco).

[183] *US-Internet Gambling*, para 292.
[184] *Trans-Tasman Mutual Recognition Act 1997*, Section 10 (TTMRAct).

The exception is only applicable where the laws apply equally to locally produced and imported goods.[185]

The TTMRA and associated legislation contain annexes specifying laws that are excluded or exempt, but no entries in New Zealand's annexes relate to tobacco regulation. The agreement allows the government to seek a temporary exemption from compliance, mainly for the purpose of protecting human health and safety, and for permanently amending the annexes of exclusions and exemptions.

Such exceptions or exemptions could trigger complaints from tobacco manufacturers, importers, retailers and marketers under the Australia-New Zealand Investment Protocol or other investment agreements. Covered investors might claim an indirect expropriation of their investment if differential rules seriously eroded their ability to operate on a Trans-Tasman basis, or a breach of fair and equitable treatment based on a legitimate expectation that the same rules on tobacco products would continue to apply in both countries.[186]

New Zealand's other FTIAs have much looser mutual recognition obligations, although they lay the groundwork for TTMRA-like arrangements. New Zealand views the Trans-Tasman Mutual Recognition Arrangement between Australia and New Zealand as a best practice mechanism and both countries are expected to promote a CER-style approach in the TPPA. The commercially driven nature of the negotiations means they are unlikely to give priority to innovative public health policies. A similar arrangement across TPPA parties could effectively reduce tobacco policies to the lowest common denominator, unless extensive exclusions or exemptions were made. It is likely some kind of threshold requirement could seek to limit that risk, but it is not possible to predict what the criteria would be.

3.7 Transparency and regulatory coherence

Summary

Guidelines to prevent tobacco company interference in policy making would conflict directly with the transparency and regulatory coherence provisions proposed for the Trans-Pacific Partnership Agreement.

According to the New Zealand government's response to the MAC report, it considers New Zealand is in compliance with Article 5.3 and would ensure that legislation and policy-making processes continue to comply.[187] That would be inconsistent with adopting the drafts chapters on 'transparency' and 'regulatory coherence' in the proposed Trans-Pacific Partnership agreement.

Despite the secrecy of the negotiations, it is understood that these chapters on transparency and regulatory coherence would encourage the parties to coordinate regulatory activities with other parties, share best practices and harmonize regulatory approaches, standards and procedures. There are mixed messages on how far this might move towards actual regulatory convergence,[188] which would dramatically circumscribe the ability of individual states to pursue their own tobacco control policies.

In theory, the mechanisms being proposed could create opportunities for best practice tobacco control policies and input into regulatory decision-making by the public health community. However, several texts that have been leaked show how the agreement could institutionalise the role of tobacco companies in the policy-making process under the rubric of regulatory coherence and transparency, contrary to the obligations on parties under Article 5.3 of the FCTC.

3.7.1 Transparency

Free trade agreements have been gradually increasing the obligations on governments to disclose information and engage with commercial interests. The TPPA is officially building on the Trans-Pacific Strategic Economic Partnership Agreement or P-4 between New Zealand, Chile, Singapore and Brunei. Chapter 14 on transparency in that agreement requires each Party 'where possible' to publish in advance any law, regulation, procedures, or general administrative ruling it proposes to adopt and 'provide, where appropriate, interested persons and Parties with a reasonable opportunity to comment'.

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[185] *TTMRAct*, Article 11.

[186] In its investment dispute against Uruguay's tobacco labelling laws, Philip Morris International is arguing that Uruguay's government failed to comply with its own regulations.

[187] Government Response to MAC, 6.

[188] *Remarks by President Obama at the APEC CEO Business Summit, Honolulu, 12 November 2011* referred to 'convergence', whereas other documents say 'coherence'. www.apec2011.gov/media/remarks/index.htm (accessed 19 April 2012).

In reality, the TPPA is more strongly influenced by US FTIAs, which go further than the P-4. The transparency chapter in the recent Korea-US FTA requires a party to give 'interested persons' opportunities to comment 'to the extent possible'. One government must promptly provide information and respond to questions on any actual or proposed measure that the other government considers might affect the operation of the agreement, even if it has not been formally notified of that measure.[189] Where the government adopts new regulations that affect matters covered in the agreement it must publicly explain their purpose and rationale and 'address significant, substantive comments received during the comment period and explain substantive revisions it made to the proposed regulations'.

This wording or something stronger can be expected in the TPPA. It would give further leverage to tobacco producers, retailers, advertisers and lobby groups to demand a right to influence tobacco control policies, complain if they are marginalised or excluded from the policy-making process, and force the government to engage and explicitly respond to their arguments. In the background would be the prospect of an investor-state dispute using all this information.

3.7.2 Regulatory Coherence

The transparency provisions are complemented by a novel chapter on Regulatory Coherence that the US, New Zealand and Australia have apparently sponsored. A draft text, leaked in August 2011, promotes 'best practice regulation' based on APEC and OECD principles and guidelines.[190] If adopted, the Regulatory Coherence chapter would have four main effects on domestic policy-making:

i. Formalise the right of companies in the tobacco supply chain to participate in setting policy and regulation at national and TPPA-wide levels

The text imposes an enforceable obligation on governments to 'endeavour' to establish a centralised mechanism to coordinate and review domestic regulation, and provide various kinds of opportunities for 'stakeholders'. One of the 'overarching characteristics' of this process should be its 'important role' in advancing the disciplines in the transparency chapter. The Parties' also affirm the importance of a 'wide range of stakeholder input into the development and implementation of regulatory measures', and encourage governments to consider ways to build successful collaboration between the parties to the TPPA and their respective stakeholders.[191] A TPPA-wide Committee on Regulatory Coherence must promptly establish mechanisms to ensure 'meaningful opportunities for interested persons' to provide views on approaches to regulatory coherence through the Agreement. Again, in theory these obligations could provide opportunities for public health advocates, but they are clearly intended for the major corporate, sector and industry interests.

ii. Require regulatory impact statements

States are expected to encourage the use of regulatory impact assessments (RIA) as 'good regulatory practice', although they are not mandatory. The RIA is expected to identify:

- A clearly defined problem and policy objectives, with an assessment of the significance of the problem and the need for regulatory action.
- Potentially effective and reasonably feasible alternatives to achieve the policy objective; and
- Grounds for concluding the selected alternative achieves the objective in a way that maximises net benefits, based on a cost-benefit analysis, while considering how the impact is distributed.

More specific elements include:

- Whether there is a need to regulate or whether a non-regulatory and/or voluntary approach could achieve the objective;
- Assess the costs and benefits of each available alternative, including not to regulate, recognising some costs and benefits are hard to monetise.
- Explain why the alternative is superior to other available alternatives, including the relative size of net benefits for each; and
- The best reasonably obtainable scientific, technical, economic, and other information.

[189] Korea-US FTA 2007, Article 21.2.
[190] Draft TPPA Chapter, *Regulatory Coherence*, 2011, http://web.me.com/jane_kelsey/Jane/TPPA.html (accessed 19 April 2012).
[191] Draft TPPA Chapter, *Regulatory Coherence*, Article X.7.

These criteria are less detailed than the domestic RIA regimes that operate in Australia 192 and New Zealand,[193] which are likely to be promoted as 'best practice' in the TPPA. In addition the chapter is cross-referenced to the OECD and APEC guidelines on 'best practice regulation' that promote pro-competitive, light-handed regulation.[194]

The practical effect of the RIA is to impose a more prescriptive domestic version of the TBT agreement. These processes and criteria are ill suited to public health policy decisions that require highly qualitative assessments, multilayered and integrated strategies and a precautionary approach, and where timelines and processes are often politically sensitive. The cost-benefit analysis, and criteria that must be considered, are intrinsically biased against innovative policies that have a quantifiable impact on commercial interests, but where equivalent quantifiable health benefits cannot be proven.[195]

Experience to date shows that opponents of stronger tobacco control policies will vigorously contest the validity and objectivity of research and advice, the calculations used to assess cost and benefits, the failure to adopt the less burdensome alternatives, and the rejection of their arguments. The current practice where the industry sponsors research and reports that advance their arguments is likely to intensify,[196] tying up officials in reading and responding to documents in defence of new tobacco control initiatives, rather than developing, promoting and implementing them. The health ministries in Australia[197] and New Zealand[198] have already been criticised for failing to comply with RIA requirements and the tobacco industry has cited these criticisms in support of their attacks on tobacco control policies.[199]

iii. Require disclosure of information that has informed the decision-making.

Governments are expected to ensure that their regulatory bodies provide 'appropriate' public access to the regulatory measures themselves, and to their supporting documentation, regulatory analyses and data, and where practicable put this online for viewing and reproduction, in accordance with the transparency chapter. Detailed disclosure will provide more material for the tobacco industry and its allies to dispute the quality of decision-making and sources relied on in the domestic processes that are required by the chapter. The tobacco industry will also use the evidence generated through the RIA process to challenge tobacco control policies through investor-state disputes. The Australian tobacco industry has already used documents and email communications secured under the freedom of information law in its submission opposing the legislation and to support its legal challenges to the plain packaging legislation.[200]

The regulatory coherence chapter is not confined to new regulation. Each country's regulatory oversight agency is expected to have a process to review the existing stock of regulation, including whether it has become unnecessary or out-dated through changed circumstances or if its effectiveness could be enhanced. Such reviews provide ongoing opportunities for the tobacco supply chain to seek reviews of existing policies.

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[192] Council of Australian Governments, *Best Practice Regulation. A Guide for Ministerial Councils and National Standard Setting Bodies*, October 2007, www.finance.gov.au/obpr/about/ (accessed 19 April 2012).

[193] Government Statement on Regulation, 'Better Regulation, Less Regulation', 17 August 2009, www.treasury.govt.nz/economy/regulation/statement/release (accessed 19 April 2012) (Better Regulation, Less Regulation).

[194] APEC, *Information Notes on Good Practices for Technical Regulation 2000*, APEC, Singapore, September 2000, www.jisc.go.jp/eng/apec-asem/pdf/grp_info.pdf (accessed 19 April 2012); OECD, *APEC/OECD Integrated Checklist on Regulatory Reform. A policy instrument for regulatory quality, competition policy and market openness,* OECD, Paris www.oecd.org/dataoecd/41/9/34989455.pdf (accessed 19 April 2012).

[195] Discussed further in section 4.2.5.

[196] A review of studies on the economic impact of smoke-free policies revealed that 'the best designed studies report no impact or a positive impact of smoke-free restaurant and bar laws on sales or employment' and that all studies 'concluding a negative impact were supported by the tobacco industry'. M Scollo et al (2003) Review of the quality of studies on the economic effects of smoke-free policies on the hospitality industry, 12 *Tobacco Control,* 13-20, cited in World Health Organization (2008) *Tobacco Industry Interference with Tobacco Control*, WHO, Geneva, 18.

[197] Director, Office of Best Practice Regulation to the Director, Tobacco Control Section, Department of Health and Ageing (Aus), 4 May 2010.

[198] New Zealand Chambers of Commerce Submission to the *Regulatory Standards Bill*, August 2011; MartinJenkins (2010) *Assessment of the Ministry of Health's Policy Function. Final Report*, 15 October 2010, MartinJenkins Consultancy: Wellington.

[199] Eg. Japan Tobacco International, JTI's response to the Australian Government's Consultation Paper on *the Tobacco Plain Packaging Bill 2011* Exposure Draft', 2 June 2011, 11-16.

[200] Commoditising tobacco products through plain packing will harm public health, violate treaties, and does not meet the test of evidence-based policy: Submission by Philip Morris Ltd on the *Tobacco Plain Packaging Bill Exposure Draft*, June 2011; JTI's Response to the Australian Government's Consultation Paper' (2011).

The expectation that governments will publish annually an agenda of new regulations they plan to issue over at least the next year will provide clear lobbying targets and further inhibit expeditious decisions.

3.7.3 The right to regulate

There are comfort words in the regulatory coherence chapter about the government's right to regulate, which might be applied to protect public health objectives. First, the text recognises the importance of each government's sovereign right to identify its own regulatory priorities and establish and implement regulatory measures to address them. However, that right is subject to the constraints on various policy options contained within this and other chapters, and on the processes for government decision-making.

Second, it 'recognises' the role that regulation plays in achieving public policy objectives, such as protecting public and worker health and safety. 'Recognise' is a soft legal term. In addition, a footnote indicates that text may need to be reconsidered when the parties decide whether it should contain 'additional guidance on a Party's right to regulate in pursuit of *legitimate objectives*' (*emphasis added*). This suggests some parties want to restrict, or at least indicate, what objectives are considered legitimate (as with TBT).

Third, the principles of regulatory coherence recognise the importance of 'taking into account' Parties' international obligations. Again, 'taking into account' is a weak legal obligation. While it provides grounds for advocacy based on international health and human rights instruments, including the FCTC, governments must also take into account their international commercial obligations, which are more aligned to the objectives and techniques for 'regulatory best practice'.

The chapter makes frequent references to 'stakeholders' without defining them. The secrecy of the negotiating process makes it impossible to know what is understood by stakeholder input at the national and TPP-wide level, or if the means for balancing international obligations has been discussed. Based on current practices and OECD guidelines, the chapter aims to enhance the role of market participants through information exchanges, dialogue and meetings. It is only states and investors who are empowered to use disputes processes in the agreement to enforce rights that might be adversely affected by new regulations.

New Zealand already adopts many of these procedures under a Cabinet minute on Better Regulation, Less Regulation in August 2009.[201] That is a domestic regime that can be changed or revoked. The proposed transparency and regulatory coherence provisions of the TPPA would elevate that executive instruction to an internationally enforceable status that enhances the role of commercial stakeholders through information exchanges, dialogue and meetings. Ultimately investors can threaten legal action if their views on new regulations are rejected and they are adversely affected. These provisions would directly conflict with New Zealand's obligations under Article 5.3 of FCTC and the associated Guidelines.

[201] *Better Regulation, Less Regulation* (2009).

Part 4: Potential for Legal Intervention

This part of the report considers the diverse ways in which international trade and investment law considerations might be raised in opposition to tobacco control policies. Pressure to drop or change proposed policies on legal grounds can take various forms, usually stopping short of an actual dispute. Influencing government decisions is an incremental and multi-faceted process that involves a number of players who may press similar arguments simultaneously in different forums. There are three principal avenues where that takes place: state interventions, industry interventions, and internal government processes.

4.1 State interventions

The WTO and existing FTIAs provide numerous opportunities for other states to intervene over New Zealand's tobacco control policies:

1. Notification of measures to the WTO.
2. Discussion at the WTO TBT Committee.
3. Discussion at the WTO TRIPS Council.
4. The WTO Trade Policy Review Mechanism.
5. The WTO dispute mechanism for consultations, panels, Appellate Body and compliance.
6. Formal FTA state-state dispute processes; and
7. USTR Report on TBT.

4.1.1 Notification of measures to the WTO

The notification requirements of the TBT agreement provide an early opportunity for states supportive of tobacco interests to pressure the government to back down on proposed measures that arguably fall within that agreement. The effect such discussions have on government decisions is not usually evident, except by inference from discussions in the TBT Committee.

Notification is required when there is no relevant international product standard, or a new technical regulation is not consistent with that standard, and the measure could have a significant impact on international trade. Whether a measure would have that impact is a subjective decision for the government. The notification to other WTO members must be at an early stage in the legislative process and record the products that would be affected, the objective and the rationale.[202] The government must then allow enough time for other WTO members to make written comments, discuss them if it is asked to, and take those comments and discussions into account before finalising the regulation.

Recent TBT notifications include Australia's draft plain packaging bill and accompanying public consultation document in April 2011,[203] and Brazil's proposals to define permitted levels of tar, nicotine and carbon monoxide in cigarette smoke and prohibit a long list of additives.[204] Controversially, Canada did not notify the Cracking Down on Tobacco Marketing Aimed at Youth Act to the Committee, presumably because it did not consider the measure fell within the notification criteria.[205]

There are less onerous notification obligations under the GATS[206] and TRIPS[207] for measures that significantly affect the subject matter of those agreements. There appear to have been no tobacco-related notifications.

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[202] *TBT Agreement*, Article 2.9.
[203] WTO, Committee on TBT, *Notification*, G/TBT/N/AUS/67, 8 April 2011.
[204] WTO, Committee on TBT, *Notification* G/TBT/N/BRA/407, 15 December 2010.
[205] Discussed at WTO, Committee on TBT, Minutes of meetings on 5-6 November 2009, paras 8-18; 24-25 March 2010, 23-24 June 2010, paras 181-226; November 2010, paras 203-228; March 2011, paras 215-227.
[206] *GATS*, Article III.3 and III.4.
[207] *TRIPS*, Article 63.

4.1.2 Discussion at the TBT Committee

The minutes of the TBT Committee show that tobacco control measures have been a major focus of discussions in recent years, with a significant number of countries alleging breaches of the agreement and only a handful (usually Australia, New Zealand, Norway, and Uruguay) defending them.

US restrictions on flavoured cigarettes: Indonesia asked a series of questions of the US regarding the Family Smoking Prevention and Tobacco Control Act that became law in June 2009.[208] The matter was discussed at the TBT committee, with the US responding to Indonesia's questions.[209] Indonesia subsequently requested formal consultations in April 2010 as a prelude to a hearing under the WTO's dispute settlement rules.

Australia's plain packaging law: The Dominican Republic formally requested a discussion of this proposed law at the TBT Committee in June 2011.[210] Both the Dominican Republic and Mexico viewed the measure as more trade restrictive than necessary and lacking scientific support. They were supported by China, Chile, Colombia, Cuba, Nicaragua, Honduras, and the Philippines. The EU said that it was currently revising its Tobacco Products Directive and considering the option of plain packaging as part of an ongoing impact assessment. It asked Australia to provide the Committee with the scientific data or other relevant information it was relying on, any impact assessment it had conducted, why alternative solutions were considered less effective to achieve the legitimate health objective, and how it had taken into account its obligations under TRIPS and other agreements aside from the FCTC. The EU routinely seems to make such requests. While its explanation for doing so may be genuine, those questions also provide valuable information for a state or investor to initiate a dispute. WHO observers at the meeting strongly defended the Australian legalisation, including its evidential justification.

Brazil's proposals to define permitted levels of tar, nicotine and carbon monoxide in cigarette smoke and prohibit a long list of additives were challenged during 2010 and 2011.[211] Turkey, Malawi, Zambia, Indonesia, Mexico, Dominican Republic, Mozambique, Chile, Honduras and Cuba considered the measure was too trade restrictive and lacked supportive science; it was suggested that Brazil should ban flavoured additives instead.[212] Colombia said the question of additives should be dealt with at the WHO.[213] The EU made the same request for information as it did to Australia.

Canada's Cracking Down on Tobacco Marketing Aimed at Youth Act (Bill-C32) was another long-standing item on the TBT Committee agenda.[214] The law prohibited production, sale and distribution of tobacco products containing taste enhancers and additives but, as with the US ban on imports of clove cigarettes that Indonesia successfully challenged, exempted menthol and several other additives. It also imposed further restrictions on advertising of tobacco products. The debate involved similar players and arguments. Tanzania ventured that the law was also inconsistent with Article 904(4) of NAFTA. As noted, Canada had decided not to notify the Bill to the Committee.

Alcohol control policies: Discussions on alcohol control laws in the TBT Committee canvass similar issues.[215] Tobacco companies claim that Australia's (and New Zealand's) defence of tobacco control policies is compromised by their contradictory position on equivalent public health measures for alcohol.[216] Both countries have objected at TBT committee meetings to Thailand's proposal to introduce graphic health

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[208] WTO, Committee on TBT, *Certain New Measures by the United States Addressing the Ban on Clove Cigarettes*, G/TBT/W/323, 20 August 2009.
[209] WTO, Committee on TBT, Minutes of the Meeting of 5-6 November 2011, paras 6-7.
[210] WTO, Committee on TBT, Minutes of the Meeting of 15-16 June 2011, paras 3-46.
[211] WTO, Committee on TBT, Minutes of the Meeting of 3-4 November 2010, paras 256-264; 24-25 March 2011, paras 3-59; 15-16 June 2011, paras 253-261.
[212] Yet that approach can also be challenged, as in *US - Clove Cigarettes*.
[213] WTO, Committee on TBT, Minutes of the Meeting of 24-25 March 2011, para 49.
[214] WTO, Committee on TBT, Minutes of the Meeting of 5-6 November 2009, paras 8-18; 23-24 June 2010, paras 181-226; 3-4 November 2010, paras 203-228; 24-25 March 2011, paras 215-227.
[215] The Thai measures was notified on 21 January 2010, G/TBT/N/THA/332. It could be argued, however, that the nature of the market for tobacco and alcohol are very different.
[216] Eg. Imperial Tobacco Australia Ltd, Submission regarding the *Tobacco Plain Packaging Bill 2011 (Exposure Draft) and Consultation Paper*, 6 June 2011, 23-24.

warnings for alcoholic beverages,[217] similar to those used for tobacco. Thailand's draft law, issued in January 2010, specified the proportion of packaging surfaces to be allocated to warning statements and required images to be rotated every 1000 packages.[218] Australia and New Zealand, along with the US, Brazil, Chile, the EU, Mexico and Switzerland, said they supported Thailand's right to regulate to prevent alcohol-related harm, but there were less trade restrictive means to pursue the objective.[219] As an indicator of how this pressure can be used to wear down a government, during the course of the TBT deliberations Thailand has produced a report to support its position, [220] hosted a plurilateral meeting of WTO members, and announced a new subcommittee to study the impact of the regulation on alcoholic beverages, including the health warnings it had notified.[221]

Kenya's Alcohol Controls Act 2010, which required warning texts including pictures to take up a minimum of 30 percent of the total surface of the product and be rotated every 50 packets, attracted a similar response.[222] Mexico said the law posed unnecessary barriers to trade and that information campaigns were more effective mechanisms to fight excessive consumption of alcohol. The law had also come into effect before WTO members had an opportunity to comment. The US and EU made similar arguments. This matter was discussed at the same TBT session as the Australian plain packaging law, and the minutes suggest that neither Australia nor New Zealand spoke.

The TBT Committee discussions can be a precursor to a formal dispute, as in the *US-Clove Cigarettes* and *Australia-Plain Packaging Tobacco* [223] cases. It provides both a pressure point and a means for collecting information for a subsequent legal challenge.

4.1.3 Discussion at TRIPS Council

Australia's plain packaging legislation was also discussed at the June and October 2011 meetings of the WTO Council for TRIPS.[224] Similar arguments were raised at both meetings. The main objectors were developing countries[225] and Ukraine, expressing concern that preventing cigarette and cigar companies from using their trademarks would ultimately hurt tobacco farmers in small and vulnerable economies. Their arguments echoed some of the non-investment claims by the tobacco companies: that a generic packaging regime would provoke price competition and easier counterfeiting, which perversely makes tobacco products cheaper when the most effective tobacco control measure is price. Chile, China, Switzerland, India, Brazil and the EU sat on the fence, affirming states' right to use flexibilities in the TRIPS for public health reasons, including tobacco control, but urging Australia to ensure its measures did not conflict with the agreement. The WHO, an observer at the TRIPS Council, again endorsed plain packaging as part of the FCTC.

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[217] WTO, Committee on TBT, Minutes of the Meeting of 3-4 November 2010, para 235 records that 'New Zealand supported the right of Thailand to regulate to prevent alcohol-related harm, but there were less trade restricted means of pursuing the objective. New Zealand was concerned about significant additional costs the measure would impose on exporters and how much of that cost would arise from differences in Thailand's requirements vis-a-vis requirements in the rest of the world. The representative noted that the World Health Assembly's *Strategy on the Harmful Use of Alcohol* provided guidance, indicating that there should be a proper balance between policy goals in relation to the harmful use of alcohol and other policy goals'.

[218] Ronald Kirk, *2011 Report on Technical Barriers to Trade*, Office of the USTR: Washington DC, 90 (USTR TBT Report).

[219] WTO, Committee on TBT, Minutes of the Meeting of 23-24 June 2010, paras 237-251; 3-4 November 2010, paras 234-248; 24-25 March 2011, paras 228-231; 115-16 June 2011, paras 196-197.

[220] Thaksaphon Thamarangsi and Areekul Puangsuwan (2010) *Why Thailand Should have the Pictorial Warning Label on Alcoholic Beverage Packages: A Technical report*, Center for Alcohol Studies, International Health Policy Program, Thailand, June 2010.

[221] WTO, Committee on Technical Barriers to Trade, Minutes of the Meeting of 24-25 March 2011 228-231.

[222]WTO, *The Alcoholic Drinks Control (Licensing) Regulations, 2010: Legal Notice No. 206: 2010*, G/TBT/N/KEN/282; WTO, Committee on TBT, Minutes of the Meeting of 15-16 June 2011, paras 89-94.

[223] *Australia - Plain Packaging Tobacco,* Request for Consultations .

[224] WTO, Council for TRIPS, Minutes of the Meeting of 7 June 2011, para 166-228; see discussion in Members debate cigarette plain packaging's impact on trademark rights, 7 June 2011, *WTO: 2011 News items,* www.wto.org/english/news_e/news11_e/trip_07jun11_e.htm (accessed 19 April 2012); *Intellectual property council talks health, tobacco packaging and enforcement*, 24 and 25 October 2011, *WTO: 2011 News Items*, www.wto.org/english/news_e/news11_e/trip_24oct11_e.htm (accessed 19 April 2012).

[225] The Dominican Republic, Mexico, Nigeria, Cuba, Nicaragua, Honduras, El Salvador, Zambia, Philippines, Ecuador and Zimbabwe.

Australia replied that it had carefully studied the policy to ensure it did not violate TRIPS and would be effective in reducing smoking. It also said it would counter undesired adverse effects by higher excise taxes and possible counterfeiting labelling. Australia was supported by Uruguay, New Zealand and Norway.

4.1.4 WTO Trade Policy Reviews

Periodic reviews are undertaken of each member's compliance with its WTO obligations. Adverse reports do not have direct repercussions, but provide further opportunities for peer pressure and censure from other states over existing and proposed policies and regulations. Perhaps surprisingly, tobacco control measures do not feature in reviews of countries that have adopted innovative tobacco control laws.

4.1.5 WTO disputes

WTO disputes are governed by their own agreement, which sets out specific procedures for member states to bring a dispute against another member and time frames that must be met. Findings of the lower level panels can be appealed to a standing Appellate Body. The WTO membership (sitting as the Dispute Settlement Body) must adopt their reports unless there is a consensus not to do so. A state found to have breached an agreement is expected to comply by withdrawing or adjusting the offending measure. Ongoing non-compliance can result in the withdrawal of trade benefits to a value equivalent to the harm caused to the complaining member's exports. These sanctions may become targeted at one or more strategic industries that had nothing to do with the dispute and who have an interest in convincing their government to comply.[226]

The economic significance of an adverse ruling largely depends on the economic impact of the measure on the complaining state(s) and the relative size of the economies in the dispute. For example, the failure of the US to comply with the adverse ruling on Internet gambling illustrates the ability of a major power to privilege its domestic policies over its WTO obligations.[227] Whether it will do the same for *US - Clove Cigarettes* remains to be seen. It would be possible for New Zealand to take the same position, although there are different implications where the trade balance depends on a dominant export sector.

However, size may not be definitive in bringing a dispute. Ukraine, a party to the FCTC since 2006, has initiated a dispute against Australia over the plain packaging laws,[228] even though it does not have an export trade on tobacco with Australia, [229] apparently on the grounds that plain packaging would inhibit its ability to build a presence in the Australian market.

A breach can also have reputational consequences for a country's diplomatic standing among the free trade community and its ability to promote its other commercial interests by requiring other countries to comply with rules that are central to a dispute. For example, New Zealand and Australia have a long-standing position to require strict compliance with the TBT agreement, which is reflected in their position on Thailand's alcohol laws. Legal issues are therefore not the only matters that states consider when launching or defending a dispute.

Although WTO disputes are very expensive, it should not be assumed that poor countries that have been outspoken in the WTO committees cannot bring them, as the affected industries may supply the finance. The challenge by Antigua and Barbuda to a US ban on Internet gambling was bankrolled by the global gaming industry.[230] The tobacco industry is rumoured to have funded a private law firm based in Washington DC to assist the successful challenge by the Philippines to Thailand's cigarette excise taxes.[231] That may explain the

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[226] In a prolonged dispute with the EU over bananas, the US adopted in 2000 what was termed a rotational or 'carousel' approach that spread the sanctions across a range of sectors to increase the pressure on the EU to comply. See Eliza Patterson, The EU Banana Dispute, *American Society of International Law Insights*, February 2001, www.asil.org/insigh63.cfm (accessed 19 April 2012).

[227] Phillip Morton, Antigua to Push WTO Enforcement of 2005 US Gambling Ruling, 21 February 2012, *Tax-News*, www.tax-news.com/news/Antigua_To_Push_WTO_Enforcement_Of_2005_US_Gambling_Ruling____54069.html (accessed 19 April 2012).

[228] *Australia - Plain Packaging*, Request for Consultations.

[229] Ukraine Files WTO Complaint over Australian Tobacco Law, *Rianovosti,* 15 March 2012, http://en.ria.ru/business/20120315/172180945.html.

[230] For an account of this dispute see Kelsey (2008) 174-180.

[231] Foong Kin and Mary Assunta, *Tobacco Industry Interference*, Southeast Asia Tobacco Control Alliance, Bangkok, February 2009, 10, resources.seatca.org/Tobacco%20Industry%20Interference.pdf (accessed 19 April 2012).

note in panel's report that a private entity asked to submit information and it was told to convey it directly to the parties for them to use in their submissions and arguments as they saw fit.[232]

The same is happening with the WTO challenge to Australia's plan packaging law. Philip Morris has had a presence in Ukraine since 1995.[233] Philip Morris International and British American Tobacco have admitted they are providing legal support to Ukraine and Honduras, saying it 'is commonplace for affected industries to support countries in WTO disputes and we are open to supporting governments that challenge Australia on plain packaging'.[234]

4.1.6 FTIA disputes

Most FTIAs are relatively new so there are few full disputes, especially over tobacco policies. There have been cases in the EU and under NAFTA, but they have been brought by investors, rather than states, and are discussed in the next section.

4.1.7 USTR report on TBT

The annual report of the USTR on Technical Barriers to Trade reflects the concerns of US industries about certain issues and countries. It provides prior warning of TBT arguments that the US might raise in the WTO, or that US industry might raise through investment disputes (or a TPPA process). The 2011 report makes no reference to tobacco, presumably because the Congress has prohibited the USTR from seeking changes to other countries' non-discriminatory tobacco laws since 1967 under an amendment to the annual appropriations bill and an Executive Order issued by President Clinton in 2001.[235]

The TBT report does express US concerns that labelling requirements for alcoholic beverages in various countries, similar to those used for tobacco, appeared to 'lack a scientific basis',[236] and interfered with legitimate trade-marks - as did mandatory retail labelling of 'biotech' (GE) foods, minimum and maximum alcohol content limits on distilled spirits, [237] chemical content, food additive and labelling requirements. [238] Rotational requirements were considered an onerous and potentially trade-restrictive burden.

4.1.8 Mutual Recognition Arrangements

The text of the reciprocity provisions in the Trans-Tasman Mutual Recognition Arrangement (TTMRA) conflicts with Australia's plain packaging law, and would allow tobacco products to be imported from New Zealand and sold legally in Australia, thereby circumventing the new legislation.[239] Australian regulation has introduced an exemption from 1 October 2012.[240] It is not clear from the wording whether this is a temporary exemption, which would be renewable for another twelve months, or if New Zealand has agreed to a permanent exemption that would relieve the pressure on the government to harmonise the tobacco packaging laws.

4.2 Investor interventions

As countries decide how to implement their obligations under the FCTC the tobacco supply chain is likely to use all means available to defeat policies that would set strong global precedents. One commentator describes

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[232] *WTO rules against Thailand in cigarette dispute*, SUNS #7043, 19 November 2010, www.twnside.org.sg/title2/wto.info/2010/twninfo101202.htm (accessed 19 April 2012).

[233] Philip Morris Ukraine was established in 1995 when Philip Morris International bought a majority share of the JSC Kharkiv tobacco factory, www.pmi.com/marketpages/pages/market_en_ua_aspx (accessed 19 April 2012).

[234] 'Cigarette groups aid plan packs opposition', *Financial Times*, 30 April 2012

[235] Matthew C. Porterfield and Christopher R. Byrnes, Philip Morris v Uruguay: Will investor-State arbitration send restrictions on tobacco marketing up in smoke?, *Investment Treaty News,* 12 July 2011, www.iisd.org/itn/2011/07/12/philip-morris-v-uruguay-will-investor-state-arbitration-send-restrictions-on-tobacco-marketing-up-in-smoke/ (accessed 19 April 2012).

[236] *USTR TBT Report* (2011) 51.

[237] *USTR TBT Report* (2011) 69.

[238] *USTR TBT Report* (2011) 95.

[239] The Distilled Spirits Association of NZ asserted a similar entitlement in August 2011 when the New Zealand government announced an alcohol reform package that would restrict the alcohol level and volume of read-to-drink products, and which could be lawfully sold under Australian law. www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10747476 (accessed 19 April 2012).

[240] *Tobacco Plain Packaging Regulations 2011* (Aus), clause 1.1.5, provides an exemption from 1 October 2012.

their strategy as making the FCTC a ceiling, rather than a floor.[241] The tobacco industry in particular can be expected to invest heavily in legal advice, advocacy and research from prestigious and sympathetic sources.[242] This pressure will aim primarily to stave off the more far-reaching of the new tobacco control policies at the earliest possible stage, backed by the ultimate threat of an investment dispute.

4.2.1 Potential New Zealand industry interveners

Tobacco companies are the most prominent voices of opposition to New Zealand's tobacco control measures, asserting their interests as manufacturers, importers and distributors.

British American Tobacco (BAT) NZ Ltd is potentially the most seriously affected by a significant reduction in tobacco use, as it claims approximately three-quarters of the tobacco products market in New Zealand.[243] BAT has a long-standing investment in New Zealand, created in 1999 through the merger of Rothmans and Wills. BAT NZ Ltd is a wholly owned subsidiary of Sydney-based BAT Australasia. Although the parent company is based in London, it has a complex web of subsidiaries that include countries with which New Zealand has or is negotiating investment agreements,[244] including the US under the TPPA. Its principal shareholder is US private equity firm Blackrock, with a 6.65 percent holding,[245] although Blackrock's dispersed investments mean that tobacco control policies would not impact sufficiently on its value to justify an investor claim.

Imperial Tobacco NZ Ltd is a more recent investor in New Zealand and has 19 percent of market share. It has asserted that a smokefree New Zealand by 2020 'would destroy Imperial Tobacco's fundamental right to trade as a legal entity in New Zealand'.[246]

Imperial is the only tobacco company to have a New Zealand manufacturing plant (in Petone) and announced plans in March 2012 to expand its production. This presence may be relevant to cost-benefit analyses and to national treatment of 'like' imported tobacco. Australia is its largest market for manufactured products through Imperial Tobacco Australia, taking around 68 percent of its output, making the New Zealand operation an obvious source for tobacco products to circumvent Australia's plain packaging laws had there not be a temporary exemption from the TTMRA. Imperial Tobacco's exports to Australia could be affected by the introduction of divergent product standards, for example on nicotine levels or flavouring.

Imperial Tobacco claims it was invited by the Commerce Commission to invest in New Zealand in 1999 to add competition to the tobacco market following the merger of Rothmans and Wills, and would presumably argue this created a legitimate expectation that the investment would enjoy a stable legal regime. In its submission to the MAC Imperial Tobacco complained about the unpredictable political environment under Labour and National over the display ban legislation. Imperial's submissions in both New Zealand and Australia take a more ideological position than other tobacco companies on freedom of choice of adult smokers and the protection of private property from state interference.

Philip Morris has a very small presence in New Zealand, with only around five percent of the market, and mainly operates through wholesalers. It might claim that policies that reduce brand profile are anti-competitive as they prevent it from developing a stronger market presence in New Zealand - a similar argument to that expected from Ukraine in the WTO challenge to Australia's plain packaging laws. Philip Morris is the most litigious of the tobacco companies in using investor-state dispute powers. The submission by Philip Morris International to the US Trade Representative on the TPPA pressed for investor-state arbitration, protection of trademarks and brands, and stronger disciplines on regulation of cross-border services.[247] It singled out the proposed Australian plain packaging law and Singapore's proposed restrictions on terms as 'excessive' and violations of existing bilateral and multilateral agreements with the US, as examples of potential obstacles to negotiating 'a high-standard, 21st century' TPPA.

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[241] Robert Stumberg, *Tobacco in the Trans-Pacific Partnership. A web of investment and trade rules*, Discussion draft, 1 December 2010, 7 (on file with author).

[242] A notable example was the commissioning by RJ Reynolds and Philip Morris of a legal opinion from former US Trade Representative Carla Hills that claimed Canada's proposed plain packaging laws in the 1990s was a breach of trademark rights under the Paris Convention, NAFTA and TRIPS. Discussed in Weismann (2003) 9.

[243] British American Tobacco NZ Ltd, *Submission to the MAC*, January 2010, para 1.1.

[244] Australia, China, Hong Kong China, Singapore, Peru and Vietnam.

[245] *British American Tobacco Plc*, www.bized.co.uk/compfact/gw/FTSE100/38897 (accessed 19 April 2012).

[246] Imperial Tobacco NZ Ltd, *Submission to the MAC*, January 2010, 21.

[247] Submission of Philip Morris International to the USTR on the TPP (2009).

While the tobacco companies are the most obvious interveners, other important players in the tobacco supply chain, especially distributors, wholesalers and retailers, have also sought to influence the New Zealand policy debate, and those that are foreign-owned could invoke the trade and investment agreements as part of their arguments. The economic impact of a smokefree New Zealand on the retail sector could be economically significant, especially for the petrol station convenience stores, duty free shops and supermarkets, and they would be expected to use the trade and investment law arguments to achieve maximum leverage over policy decisions.[248] The New Zealand Association of Convenience Stores, which has been accused of being a front for the tobacco industry,[249] includes the tobacco companies themselves, the two dominant supermarket chains of Foodstuffs and Australian-owned Progressive Enterprises, franchisees and the major oil companies.[250] The duty free stores' submission on the display ban bill noted the UK, Australia and Canada had modified their regime for duty free stores, and that their 'unique position' could be accommodated without undermining the policy.[251] That argument is likely to be raised in relation to all policies that directly affect them.

4.2.2 Investor-state enforcement

Most investment chapters in FTIAs and BITs empower investors of the parties to enforce the rules directly against another state party in private international arbitral proceedings. As noted earlier, successful arbitration will usually result in a damages award and legal costs, with the objective of also forcing the government to withdraw the measure. Sometimes this requires the consent of the host state,[252] but usually the treaty acts as a pre-commitment to submit a dispute to an investment tribunal. The dispute processes are private to the parties. Investor-state enforcement is attractive to industry for several reasons:

- The companies have more control over proceedings because their home state will weigh up competing diplomatic, economic and political interests before taking a dispute against another state.
- Some states may also be reluctant to litigate if they are themselves promoting tobacco restrictions. As noted, the US government is formally prohibited from promoting tobacco exports or seeking removal by other countries of their non-discriminatory tobacco regulations, although US trade officials are said to violate this constraint routinely.[253]
- Investor disputes involve ad hoc tribunals that have fluid rules and are notoriously idiosyncratic, which fosters uncertainty even where states believe they have a strong defence. By comparison the WTO's dispute mechanism has a modicum of consistency, although that should not be overstated.
- Investors can 'treaty shop' by (re)locating their legal presence to take advantage of an investment agreement with a host state. Philip Morris, a US corporation with 60 international affiliates, has done this in its disputes against Uruguay and Australia.
- If the dispute succeeds it will usually result in a damages award and legal costs; the investors will receive the sum awarded, which is not guaranteed in a state-initiated investment dispute; and
- Even if the dispute does not succeed legally, the industry will have diverted energy and resources of policy-makers and regulators that would have been used to advance the tobacco control strategy into defending the measure.

4.2.3 Past tobacco-related investment disputes

A number of known investor-initiated disputes have challenged tobacco control policies,[254] although the secrecy surrounding such disputes means there may have been more.

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[248] The two main duty-free chains operating concessions in New Zealand are DFS, which has a global structure that includes Australia, Singapore, Vietnam and the US, and JR Duty Free, which originated in Australia and currently appears to be a subsidiary of Swissair.

[249] http://ash.org.nz/?t=193 (accessed 19 April 2012).

[250] New Zealand Association of Convenience Stores, *Submission to the MAC*, January 2010, para 5.

[251] New Zealand Duty Free Retailers, Supplementary submission on the *Smokefree Environments (Controls and Enforcement) Amendment Bill*, 7 March 2011.

[252] That requirement applies in the *New Zealand-Singapore CEP* and the *New Zealand-Thailand FTA.*

[253] Matthew C. Porterfield and Christopher R. Byrnes, Philip Morris v Uruguay: Will investor-State arbitration send restrictions on tobacco marketing up in smoke?, *Investment Treaty News,* 12 July 2011, www.iisd.org/itn/2011/07/12/philip-morris-v-uruguay-will-investor-state-arbitration-send-restrictions-on-tobacco-marketing-up-in-smoke/ (accessed 19 April 2012).

[254] Porterfield and Byrnes (2011).

RJ Reynolds v Canada is an example of an investor-state dispute that never went to hearing because the Canadian government withdrew its proposal to introduce plain packaging. In the mid-1990s US tobacco giant RJ Reynolds threatened to bring a NAFTA investment dispute seeking hundreds of millions of dollars in compensation for expropriation of its trademark. The company's interpretation was supported before a parliamentary select committee by its legal counsel, former US Trade Representative Carla Hills and her former deputy, who had been chief negotiator of NAFTA. The proposed policy was formally dropped after the Canadian Supreme Court ruled in 1995 that the Tobacco Products Control Act was invalid because it breached guaranteed freedom of expression in the Canadian Charter of Rights, but the NAFTA threat is considered to have weakened the government's resolve and had a longer term chilling effect.[255]

Philip Morris threatened Canada over moves in 2001 to prohibit the use of 'light' and 'mild' on tobacco packaging, using its powers under Bill C-71, the Tobacco Act 1997. The government said the terms were fundamentally misleading; the company said they were used to communicate differences of taste to consumers. Philip Morris claimed a ban would breach Canada's obligations under TRIPS and NAFTA and violate an integral part of its registered trademarks that included the term 'light'.[256] This threat came at a time when the tobacco companies were subject to numerous class action suits in Canada for damages relating to deceptive labelling. Other countries were not deterred from introducing similar bans: Brazil did so in January 2002, as did the EU in September 2003. Despite those precedents, Canadaís Federal Competition Bureau opted for voluntary agreements with the tobacco companies in 2006 to stop using such terms; tobacco products continued to suggest brand distinctions. The proposal to regulate was revived in 2011.[257]

British American Tobacco, Imperial Tobacco and Japan Tobacco v. the EU in 2002 involved a dispute over trademarks after the European Union proposed warning label requirements. The European Court of Justice rejected their intellectual property claims based on EU legal provisions, but declined jurisdiction over legality under the TRIPS.[258]

Philip Morris challenged Norway's display bans in the EFTA court in 2011.[259] As explained in section 3.2.2, the court upheld the company's principal argument and the matter reverted to the domestic court.

Feldman Karpa (a US cigarette exporter) challenges the Mexican government under NAFTA for denying it an export tax rebate for tobacco products. [260] The ICSID tribunal found the denial of the rebate was not an expropriation, but that Mexico had failed to show the firm was being treated similarly to local firms in 'like circumstances'. The company was awarded only $1.5 million of the $50 million claimed, but the case took four years.

4.2.4 Current tobacco-related investment disputes

There are two known current disputes that are potentially very significant for the New Zealand policies.

Philip Morris v Uruguay was filed with ICSID in January 2010 under a Switzerland- Uruguay BIT.[261] The claimants are Philip Morris's Uruguay operation and two Swiss-based holding companies that are subsidiaries of Philip Morris International.[262] The dispute challenges three requirements that were introduced in 2009 as part of Uruguay's smokefree vision:

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[255] Physicians for Smoke-free Canada, *The Plot Against Plain Packaging*, 3 and 8 (2nd ed. 2008) www.smoke-free.ca/pdf_1/plotagainstplainpackaging-apr1.pdf (accessed 19 April 2012) cited in Porterfield and Byrnes (2011).

[256] Weismann (2003) 12.

[257] ēPromotion of Tobacco Products and Accessories Regulations (Prohibited Terms)ī, 145(8) *Canada Gazette* 19 February 2011, http://www.gazette.gc.ca/rp-pr/p1/2011/2011-02-19/html/reg5-eng.html (accessed 19 April 2012)

[258] *R v British American Tobacco Ltd and others*, Judgement of the European Court of Justice in Case C-491/01, 10 December 2002, paras 122-141.

[259] *Philip Morris v Norway* and Alamanno (2011). Philip Morris and a local retailer also challenged Ireland's display ban in Ireland's domestic courts, see www.smokernewsworld.com/philip-morris-to-fight-against-irish-cigarette-display-ban/(accessed 19 April 2012).

[260] Scott Sinclair (2009) *NAFTA Chapter 11 Investor-State Disputes*, Canadian Centre for Policy Alternatives, Ottawa.

[261] *FTR Holdings S.A. (Switzerland) v Oriental Republic of Uruguay*, Request for Arbitration, ICSID Case No. ARB/10/7, February 2010. For a detailed analysis of the legal issues in this case and a defense of the Uruguay law see Weiler (2010).

[262] Switzerland has a very large number of BITs, which makes it attractive for transnational companies to establish holding companies there. Weiler (2010) 2-3.

1. The prohibition on use of misleading product names such as 'light' was extended to allow only one tobacco product to be marketed under each brand;
2. 'Pictogrammes' with graphic images must appear on tobacco packaging; and
3. Health warnings were increased from 50 to 80 percent of the bottom portion of cigarette packs.

Philip Morris claims its investments were subjected to 'unreasonable' measures because Uruguay's measures were too broad and there was no rational nexus between them and the government's public health objectives; the limit of one product to one brand expropriated its trademarks on multiple brands; and Uruguay had frustrated the company's legitimate expectations by failing to provide 'fair and equitable treatment' through a 'stable and predictable regulatory environment' and by violating Philip Morris's intellectual property rights under TRIPS.

The company is seeking both monetary compensation and the unusual remedy of the suspension of the regulations. It is also trying to circumvent the requirement in the BIT that it must provide six months notice to the government and attempt to litigate through the domestic courts for at least eighteen months before pursuing the investor-state claim. Using the MFN provision in the Switzerland- Uruguay BIT, Philip Morris claims it is entitled to the less onerous standard that Uruguay has promised to Australia in their BIT.[263] A similar argument has also succeeded in an earlier high-profile arbitration.[264]

Subsequent to the lodging of the dispute, the Uruguay government reportedly proposed some changes to the law, such as reducing the size of health warnings to 65 percent and giving permission to sell 'light' cigarettes. That provoked outrage from public health campaigners who accused the government of caving in to pressure from the companies.[265] The Uruguay-based Centre for Investigation of the Tobacco Epidemic also expressed fears that conceding to pressure on these policies could prompt new challenges to the ban on smoking in enclosed spaces or on advertising.[266] The government has since held firm to the original policies.

Uruguay's memorandum in response from September 2011 has been leaked.[267] It rejects ICSID's jurisdiction under the BIT on the grounds that the domestic litigation requirement has not been satisfied, saying the MFN provision the company relies on only applies to substantive undertakings and not to procedural pre-conditions for bringing a dispute. Second, it says the Switzerland-Uruguay BIT explicitly recognises the right of each party not to allow economic activities for reasons of public health - a provision not dissimilar to the New Zealand-Hong Kong BIT.

Philip Morris v Australia is a dispute initiated by Philip Morris Asia (PMAsia) against Australia under the Australia-Hong Kong Bilateral Investment Treaty 1996. The Australian Liberal (Howard) government refused to agree to the inclusion of investor-state dispute processes in the Australia-US FTA that came into force in 2005. It appears that the tobacco companies then began surveying Australia's other BITs for treaty shopping opportunities. PMAsia is claiming the plain packaging law impacts on investments it owns or controls in Australia, including its shares in Philip Morris Australia (PMA), the shares PMA holds in Australian subsidiary Philip Morris Ltd (PML), and the intellectual property and goodwill of PML.[268] The dispute is being brought under the UNCITRAL rules before an ad hoc tribunal, which PMAsia proposed should meet in Singapore.

PMAsia wants the plain packaging law repealed and damages for losses incurred until that is done. If it succeeds, compensation could run into billions of dollars. There are three main elements to its claim (although these are not their only arguments):

1. PMAsia's rights in the trademark on the cigarette packets are its most valuable assets. Violation of those rights will destroy the value of its investments and of the company and constitute an expropriation.
2. The right to fair and equitable treatment has been breached by a lack of credible evidence to support the causal link between the plain packaging law and the objective to reduce smoking. The investor's intellectual property rights under the TRIPS and the TBT agreement have been violated. Less burdensome alternatives were available to achieve the stated goals.

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[263] Article 13 of the *Australia-Uruguay BIT* does not require Australian investors to pursue litigation in the domestic courts before lodging an arbitration claim against Uruguay at ICSID.

[264] *Emilio Agustin* Maffezini *v Kingdom of* Spain, ICSID Case No. ARB/97/7, 2000.

[265] Ministry of Health, *Maori Affairs Select Committee Inquiry into the Tobacco Industry in Aotearoa and the Consequences of Tobacco Use for Maori, Post Advisor Report Advice to the Maori Affairs Select Committee*, 15 August 2010, 7.

[266] Uruguay v Philip Morris, *Health24*, 28 July 2010, www.health24.com (accessed 19 April 2012).

[267] *Philip Morris Brands Sarl, Philip Morris Products SA and Abal Hermanos SA v Oriental Republic of Uruguay, Uruguay's Memorial on Jurisdiction,* 24 September 2011, ICSID Case no. ARB/10/7, on file with author.

[268] PMAsia Statement of Claim, para 25.

3. The Australian government has failed to afford **full protection and security** to PMAsia's investments.

The Australian government has posted PMAsia's statement of claim and its response on its website. Australia has indicated a two-pronged defence.[269] The first challenges the tribunal's jurisdiction to hear a dispute under the Australia-Hong Kong BIT. PMAsia did not acquire its shares in PMA until 23 February 2011. By that time the investor was fully aware of both the Australian government's long-standing regulation of tobacco manufacture and sale and its ratification of the FCTC. The Australian company PML had participated in the consultative process since the creation of the National Preventative Health Taskforce, which recommended in June 2009 that the Australian government introduce plain packaging laws and increase the size of its graphic health warning. During this period PMAsia had no interest in the Australian companies; the shareholder in PMA and PML was a Swiss company, Philip Morris Brands Sarl. Having acquired its shares in full knowledge of the proposed plain packaging legislation, PMAsia cannot repackage pre-existing tobacco industry complaints into a BIT claim that objects to the government proceeding to do what it said it would do. To claim coverage of the BIT is an abuse of right under Article 10 of the treaty.

The Australian government points to a second, more substantive-based problem of jurisdiction. What is referred to as the 'umbrella' clause requires the government to 'observe any obligation it may have entered into with regard to investments of investors of the other Contracting Party'.[270] PMAsia cites Australia's intellectual property rights obligations under TRIPS, TBT and the Paris Convention as relevant obligations. The government responds that those treaties have their own enforcement mechanisms and the BIT tribunal does not have a roving jurisdiction to determine matters that could potentially conflict with the bodies that were established to examine breaches of those treaties.

If the jurisdictional arguments fail, the government's responses to the substantive claims are:

1. **Expropriation**: the Australian government has designed and adopted non-discriminatory plain packaging measures of general application to achieve the most fundamental public welfare objective, being the protection of public health. These do not amount to expropriation, nor are they equivalent to expropriation, and they do not give rise to a duty of compensation.
2. **Fair and equitable treatment**: PMAsia could have had no legitimate expectation that the Australian government would act any differently from what it had announced.
3. **Impairment by unreasonable or discriminatory measures** of the management, maintenance, use, enjoyment or disposal of PMAsia's investments under the BIT is explicitly 'without prejudice to the government's laws', such as the plain packaging legislation. That measure is neither unreasonable nor discriminatory, as it is of general application, based on a considerable body of sound evidence, and adopted in good faith following extensive consultations to pursue the fundamental public welfare objective of protection of public health.
4. **Full protection and security**: provision is mischaracterised and applies to police power protection and security.
5. **The umbrella clause** applies to commitments to investors that the Australian government has entered into with respect to specific investments, and does not encompass general obligations in multilateral treaties.

The message from this list of past and current disputes is that investment litigation can take a long time and be very costly, and it takes considerable political fortitude to see the legal process through to a conclusion.

4.2.5 The chilling effect

Litigation is often not necessary to stop an innovative tobacco control measure. The 'chilling effect' of industry opposition through invisible or opaque channels can be more effective than a high-profile legal dispute.[271] Aside from direct lobbying, the principal opportunities arise during regulatory impact statements and submissions on policy and legislation, against the backdrop of an implicit or explicit threat of an investor-state dispute if industry views are ignored. By its very nature it is impossible to know the extent of the chilling effect.

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[269] *Philip Morris Asia Ltd v Australia*, Australia's Response to the Notice of Arbitration, 21 December 2011.
[270] *Australia-Hong Kong BIT*, Article 2.2.
[271] Weissman (2003), 20.

Submissions from the industry in New Zealand and Australia indicate five main arguments will be raised in opposition to New Zealand smoke free policies,[272] many of which echo arguments on GATT, TBT, TRIPS and GATS.

1. **Evidence-based policy and regulation:** A long-standing industry complaint is the lack of sound, reasonable evidence-based regulation to support tobacco control policies. Several submissions on the display ban legislation cited the discussion paper released by the Prime Minister's chief science adviser Sir Peter Gluckman *Towards better use of evidence in policy formation* in support of their concerns.[273] Principal objections are:

a. The public health objectives are often vague and poorly defined, with broader sweep than is justified by the evidence. This argument is usually directed towards narrowing the policy objective to smoking cessation among youth and hence policies that target all smokers are not the least-restrictive approach to achieve the legitimate public health objective.

b. There is no robust evidence of a causal connection between specific measures and stated health objectives, especially where the marginal efficacy of new measures in addition to existing measures cannot be identified, and where recently adopted measures have not had sufficient time to operate and be evaluated.

c. Research relied upon is flawed due to weak methodology and otherwise low quality of evidence; selective evidence; failure to give weight to contrary (often industry-funded) research and diverse disciplinary insights; inadequate consideration of overseas experience with similar policies and their decisions not to proceed with proposed policies; and lack of robust peer review.

d. The policy process is actively biased, given the Ministry of Health's relationship to New Zealand Tobacco Action Network.[274] Politicised or overcautious judgements on tobacco policies result from pressure, public perceptions and media, influenced by single interest lobby groups - meaning tobacco control advocates.[275]

e. There is no real world data to show that novel policies, especially plain packaging, will be effective.[276] A precautionary approach is not valid, as it undermines legal certainty and is an excuse to change the rules of the game in an essentially arbitrary manner; and

f. The Ministry of Health itself admits there is inadequate evidence to support the proposed policies.[277]

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[272] The following information draws principally on submissions made by New Zealand Association of Convenience Stores, New Zealand Retailers Association, and New Zealand Duty Free Retailers on the *Smoke-free Environments (Controls and Enforcement) Amendment Bill* 2011; British American Tobacco NZ and Imperial Tobacco NZ Submissions to the MAC Inquiry; Alliance of Australian Retailers, Australasian Convenience and Petroleum Marketers Association, British American Tobacco Australia, Imperial Tobacco Australia, Philip Morris Ltd, Japan Tobacco Group, Service Station Association Submissions on the Australia *Tobacco Plain Packaging Bill 2011 Exposure Draft and Consultation Paper.*

[273] Sir Peter Gluckman (2011) *Towards better use of evidence in policy formation: a discussion paper,* Office of the Prime Minister's Science Advisory Committee: Wellington, April 2011.

[274] The submission from the New Zealand Association of Convenience Stores on the *Smoke-free Environments (Controls and Enforcement) Amendment Bill*, 8 March 2011 complained that the Ministry refused to release information about their role with the New Zealand Tobacco Action Network 'which includes publicly funded groups ASH and the Smoke-free Coalition'. The 'perception that these contracted providers [ASH] receive preferential treatment to that of other stakeholders ... risks questions about the integrity and political independence of the Ministry in providing independent advice to the Crown'. See also an undated submission to the MAC inquiry by Cameron Slater, who questioned the accountability and effectiveness of taxpayer funding to 'groups whose sole purpose is to reduce tobacco use'.

[275] Imperial Tobacco NZ *Submission to the MAC*, January 2010, 16.

[276] Philip Morris called plain packaging 'an unprecedented experiment without empirical support'. Submission of Philip Morris Ltd on the *Tobacco Plain Packaging Bill Exposure Draft*, June 2011, 1.

[277] eg. Imperial Tobacco NZ Ltd, Submission to the Commerce Select Committee on *the Regulatory Standards Bill*, August 2011 quotes the Ministry of Health's Regulatory Impact Statement that 'the research evidence concerning banning retail tobacco displays can be criticised as it is largely based on surveys of people's responses to tobacco displays. The Ministry also notes that it is difficult to prove cause and effect between prohibition of retail tobacco displays and reduction in smoking rates. However, small retailers will bear the costs of implementing this new regulation that is not proven to have the desired, or any, benefits' (footnotes omitted).

2. **Cost-benefit Analysis:** New Zealand's best practice policy guidelines and the Cabinet's Better Regulation, Less Regulation statement require policy decisions to be based on a cost-benefit analysis. Critics of the cost-benefit approach point to conceptual and methodological deficiencies, with particular concerns about the focus on metrics in assessing intangible public policy goals, such as public health, arbitrary valuation of different elements, the range of factors considered, and the weight assigned to them.[278]

The industry argues 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.[279] Submissions from across the tobacco supply chain identify a wide range of factors they believe should be considered in a cost-benefit analysis of tobacco control policies, including:

- Fiscal impacts of loss of excise revenue from tobacco sales and from retailers who close; loss of revenue to illicit dealing; implementation budget; possible compensation costs; and legal costs of defending disputes.
- Investment loss through takings of tangible and intangible property rights and corporate assets in which substantial investment has been made; direct impacts on brand equity of premium brands and assets.
- Industry costs through loss of revenue to retailers; closures of stores rendered unprofitable; compliance costs for manufacturers; waste of stock not sold before law changes; additional costs and higher risk of error throughout the supply chain; costs of legal, accounting and other auxiliary services to ensure compliance.
- Economic costs of loss of jobs and exports; undermining of investment and innovation in packaging and marketing.
- Reputational damage to government among investors and in trade forums.
- Health impacts of increased availability of contraband and greater health risk from illicit tobacco; and
- Consumer rights by denying adults freedom of choice; less information for informed choice; less access to quality services.

The current RIA process provides some flexibility for policymakers to deal with arguments that are spurious[280] or contradictory,[281] and to give greater weight to qualitative considerations than the methodology of cost-benefit analyses might allow. The current transparency obligations in FTIAs reduce this flexibility and open it to challenge. The proposed TPPA would impose much more serious constraints.

3. **Proportionality** is given various meanings: the impact of the proposed measure versus the impact of the policy; the contribution the measure would make to achieving the stated objective; the comparable treatment of other harmful substances; the constituency that is targeted versus the constituency affected; the severity of a penalty given the seriousness of an offence; and the cost of compliance. Industry arguments sometimes disaggregate these considerations and sometimes challenge the high-level impact of measures. The question of proportionality often overlaps with the advocacy of 'least burdensome' measures.

4. **Least trade restrictive/least burdensome alternatives** Tobacco interests have a standard list of approaches they claim are a less burdensome to achieve the public health objective. They argue that:

- Price-based measures are the most effective and should be predominantly relied on; achieving this through minimum retail prices, rather than excise taxes, also reduces the risk of budget brands that generate cut-price competition and increase affordability and consumption.

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[278] See eg. Claudio M. Radaelli (2008) *Evidence Based policy and Political Control: What Does Regulatory Impact Assessment Tell Us?*, Paper to the European Consortium for Political Research, University of Rennes, France; Claudio M. Radaelli (2007) *Towards Better Research on Better Regulation*, Centre for Regulatory Governance, University of Exeter; Fiona Haines and David Gurney (2003) The Shadows of the Law: Contemporary Approaches to Regulation and the Problem of Regulatory Conflict, 25(4) *Law and Policy* 353.

[279] JTI's *Response to the Australian Government's Consultation Paper on the Tobacco Plain Packaging Bill 2011 Exposure Draft*, 2 June 2011, 13.

[280] Eg., that there is a greater health risk from illicit tobacco.

[281] Eg., support for price-based policies when non-price measures are being promoted and opposition from the industry when government proposes to increase tobacco excise, advocating instead minimum retail prices from which they would profit.

- Education and enabling measures can achieve the same objective as coercive and/or discriminatory measures.
- Voluntary arrangements achieve a respectful balance between rights and responsibilities of both industry and government.
- Youth-targeted strategies should focus on education about smoking, and education of families about the illegalities of supplying tobacco to youth.
- Licensing schemes for retailers should be based on notification of intention to sell tobacco products,[282] alongside stronger monitoring and enforcement for infringement, provided the cost is minimal and fees are not used to limit the number of outlets.
- Stakeholder cooperation through closer engagement between the industry and government and a partnership approach can better achieve the public health goals; and
- Increased enforcement should identify and punish retailers who breach sales laws and have a greater focus, resources and effective enforcement on illicit trade.

5. **Inadequate Regulatory Impact Statements**: Both the Australian and New Zealand tobacco interests have attacked the quality of the regulatory impact statements prepared in support of tobacco control policies. In Australia, a regulatory impact statement (RIS) is a pre-requisite before a proposal with 'medium compliance costs or significant impacts on business and individuals or the economy' can proceed to Cabinet. The Department of Health prepared a draft RIS for the Australian plain packaging law that, according to the Australian Office of Best Practice Regulation, did not satisfy the best practice guidelines. The government then made a decision on the proposal, so there was no opportunity to undertake further work on an RIS. The Office of Best Practice Regulation reported the policy was 'non-compliant' and a post-implementation review would be required within one to two years of the implementation. The next paragraph in the document released to the public was redacted, so it is not clear what further comment was made.[283]

Commercial interests have a long-standing dissatisfaction with the New Zealand regulatory process. The New Zealand Chamber of Commerce submission on the Regulatory Standards Bill claimed that only half the Cabinet's significant regulatory proposals in the past three years have met the expected standards of an RIS.[284] Tobacco retailers' submissions on the display ban law cited a report that was highly critical of the Ministry of Health's performance of its policy functions and its failure to address the criteria required in the RIS.[285] They also criticised the 'lack of due process' when Supplementary Order Papers are introduced during the legislative process without an additional RIS,[286] which is common in controversial legislation where changes result from select committee hearings or political compromises. Failure to engage with these arguments sets the ground for later objections that the RIS and cost-benefit analysis was inadequate, lacked evidence for policy choices, and failed to adopt the least trade-restrictive options.

4.3 Policy self-censorship

The tobacco lobby, and some of their parent states, can be expected to prosecute their case vigorously. The chilling effect of this pressure can also operate within the policy-making process without direct intervention from other states or industry through:[287]

- The criteria and procedures for regulatory impact statements[288] and the Better Regulation, Less Regulation statement of August 2009;[289]

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[282] Supported by British American Tobacco NZ, but not by Imperial Tobacco NZ.
[283] Director, Office of Best Practice Regulation to Director, Tobacco Control Section, Department of Health and Ageing (Aus), 4 May 2010.
[284] New Zealand Chambers of Commerce, Submission to the *Regulatory Standards Bill*, August 2011.
[285] *Assessment of the Ministry of Health's Policy Function. Final Report*, 15 October 2010, MartinJenkins Consultancy, Wellington. The supplementary submission from New Zealand Association of Convenience Stores on the *Smoke-free Environments (Controls and Enforcement) Amendment Bill*, 8 March 2011 did not make it clear that this report was a general critique and not specific to the Ministry's RIS performance on tobacco laws.
[286] New Zealand Retailers Association, Supplementary Submission on the *Smoke-free Environments (Controls and Enforcement) Amendment Bill*, 4 April 2011.
[287] Weismann (2003).

- Pressure on the Ministry of Health and other ministries from the influential Ministry of Foreign Affairs and Trade, who will highlight the risks of violating trade and investment agreements, possible negative impacts on other trade objectives, and impacts on New Zealand's reputation in the international trade community;
- Pressure from the New Zealand Treasury about the implications for foreign investment, including damage to investor confidence and risks of investment flight or strike; and
- Self-censorship by health ministries and other agencies responsible for tobacco control policies.

These factors are very difficult to monitor, especially as the Official Information Act has special provisions to allow information relating to New Zealand's economic interests, international treaty obligations and negotiations, and legal advice to be withheld.[290]

The government has apparently received some detailed analysis of the trade and investment law implications of proposed tobacco control policies. However, that advice remains confidential. Given the significance of international trade and investment law for New Zealand's tobacco control policies, the paucity of publicly available policy documents that address the question is a matter for concern.

The officials' advice to the MAC devoted less than one page to the issue. It remarked that the obligations relating to goods, services, investments and intellectual property would need to be considered carefully during any analysis of further tobacco control measures.[291] Officials also noted that it might be possible to justify policies that are inconsistent with WTO and FTIA obligations through an exception for measures 'necessary to protect public health'. The success of that justification would depend on demonstrating that less trade restrictive measures were not available, ineffective or insufficient to protect public health; evidence of a strong link between the proposed measure and protecting public health; and ensuring policy design and the method of implementation were non-discriminatory and not a disguised restriction on international trade. Consultation might also be required with the OECD regarding duty free arrangements and with Australia over the TTMRA. There are several other incidental references to international litigation over other countries policies and the need to take account of trade implications of certain proposals.[292]

In similarly light vein, the MAC itself recommended the government should investigate further options for measures to reduce the supply of tobacco with a view to reducing its availability in New Zealand over time 'taking into account trade and other implications'.[293] The government's response reiterated the need to weigh up trade policy and other implications, including New Zealand's international trade obligations and legal protections for sunk investment, as well as relevant exceptions for measures necessary to protect public health.[294]

The minutes of the Cabinet decision on the plain packaging policy in September 2011 note that:[295]

> ... further work to assess regulatory impacts and implications under trade and investment agreements is required before decisions can be taken on changing New Zealand's tobacco product labelling regime, including continued monitoring and assessment of the Australian experience in introducing its scheme and any developments in the legal challenges by the tobacco industry, and resolving any Trans-Tasman Mutual Recognition Arrangement issues.

The public version of the background document for the Cabinet meeting contained a two-page, heavily censored section on International Trade and Investment Issues. It concluded, in relation to further work on the policy decisions, that 'The analysis will need to be developed carefully with the trade agreement implications *front of mind*' (*emphasis added*). The remaining three lines of that paragraph are redacted.[296]

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[288] The Treasury, *Regulatory Impact Analysis Handbook*, 2 November 2009, http://treasury.govt.nz/publications/guidance/regulatory/impactanalysis (accessed 19 April 2012).

[289] *Better Regulation, Less Regulation.*

[290] Official Information Act 1982, Section 6 gives as conclusive reasons for withholding official information the likelihood that disclosure would (b) 'prejudice the entrusting of information to the Government of New Zealand on a basis of confidence by the Government of any other country' and (e) 'damage seriously the economy of New Zealand by disclosing prematurely decisions to change or continue government economic or financial policies relating to the entering into of overseas trade agreements'.

[291] MoH, *Advisor Report to the Maori Affairs Select Committee Part III*, 28 July 2010, 230-231.

[292] *Ministry of Health's Supplementary Advice to the Maori Affairs Select Committee's Inquiry into the Tobacco Industry in Aotearoa and the Consequences of Tobacco Use for Maori, Comments on proposed revisions*, 22 October 2010.

[293] MAC Recommendation no. 5.

[294] Government Response to MAC, 7.

[295] Cabinet Minute of Decision, *Plain Packaging of Tobacco Products*, CAB Min(11) 34/6A, 19 September 2011.

[296] CSPC Paper.

Unless there is greater disclosure, it will be impossible to tell whether the government is being overly cautious and how much influence industry is having behind the scenes, which in turn makes it very difficult to rebut arguments against adopting progressive tobacco control initiatives.

Implementing the obligation under Article 5.3 of the FCTC, reiterated in the MAC's recommendations, would have a broad and powerful effect on the prospect of achieving New Zealand's smokefree goal. To be effective, these restrictions would need to apply to all players in the tobacco supply chain, who have been very active in submissions and consultations on tobacco control policies in both New Zealand and Australia.

Despite the government's assurances, there are already obstacles to implementing that obligation. The Cabinet instruction on Better Regulation, Less Regulation directs policy-makers to consult with commercial interests over regulatory decisions that might affect them. Industry consultation is also read into the 'transparency' provision on domestic regulations of trade in services, and has been reinforced and broadened in recently negotiated FTIAs. If the proposed transparency and regulatory coherence chapters of the TPPA were adopted industry consultation could become a legally enforceable corporate entitlement.

Part 5: Issues for New Zealand's proposed tobacco control policies

The final part of this report consolidates the analysis of legal issues relating to each of the proposed policies in order of their likely significance.

5.1 General considerations

A number of general observations should be borne in mind when considering how international trade and investment agreements might affect New Zealand's policies:

- Achieving the government's goal for Aotearoa New Zealand to be essentially smoke free by 2025 will require more assertive tobacco control policies than governments have adopted to date, which will carry greater risks of threatened or actual legal challenges under free trade and investment agreements.
- The policies that pose the most potent threat to the tobacco supply chain by creating or reinforcing international precedents will be challenged most vigorously, while others that might technically breach agreements may receive relatively little attention.
- Incremental tobacco control policies spread over a period of time would make it harder for foreign investors to allege their investor rights have been violated, but long phase-in periods would undermine the smokefree target of 2025.
- The requirement for scientific evidence and a nexus between a particular tobacco control policy and its public health objective may require specific targets that are based on the FCTC, citing the Convention as evidence of international consensus.
- Legal arguments are rarely decisive in policy decisions, and are often used strategically by tobacco industry interests and supportive states to weaken the government's resolve to adopt strong and innovative policies;
- Some states are actively challenging strong tobacco control policies at the WTO, although there are very few state-initiated disputes so far under FTIAs.
- Recent approaches in WTO disputes have assessed individual policies as part of a coherent package designed to achieve a legitimate public health objective.
- Tobacco companies, especially Philip Morris, are aggressively using investor-state enforcement powers under BITs and FTIAs and lobbying for new agreements that confer even stronger investor rights and powers.
- 'Chilling' government decisions at the earliest stages of policy formation can be the most effective industry intervention, although actual litigation is used to deter countries from considering similar initiatives.
- The industry generates hundreds of billions of dollars a year in revenue, so legal and related costs to itself or proxies are trifling.
- The three major foreign-owned tobacco companies operating in New Zealand might claim 'legitimate expectations' to a regulatory environment that pre-dates New Zealand's signing the FCTC, but New Zealand's tobacco control programme to promote non-smoking began in 1984.[297]
- New Zealand is relatively well placed compared to other countries because it does not currently have many investment agreements that allow investor enforcement, but that would change dramatically if New Zealand agreed to investor-state enforcement powers under a TPPA.
- The government is bound as a party to the FCTC to ensure that any new international agreements it signs are consistent with its obligations under that Convention, including to restrict the influence of the tobacco industry over New Zealand's domestic policy decisions.

[297] MoH, *Interim advice to the Maori Affairs Select Committee: History of tobacco control in New Zealand*, Ministry of Health, Wellington, 13 May 2010.

- The more new trade and investment agreements the government negotiates that deepen and extend existing obligations, the more constraints the government is likely to face on its tobacco control policy options between now and 2025; and
- The proposed TPPA poses the most serious imminent risk to New Zealand's ability to design, introduce and implement the innovative tobacco control policies needed to achieve the 2025 goal, as it would legally guarantee the tobacco industry and supply chain stronger, enforceable legal rights and the opportunity to influence domestic policy.

5.2 Legal issues relating to proposed policies

The legal arguments that might be raised in relation to each policy are consolidated below. Their order broadly reflects the projected likelihood of a legal dispute. The technical bases for possible challenges are tabulated in Appendix 1.

5.2.1 Mandatory plain packaging by 2013

This is clearly the landmark policy that will attract most attention from other states and the tobacco industry. In late 2011 the New Zealand Cabinet recognised the need not to create any impediment to Australia's plain packaging law as a result of the TTMRA and the desirability of alignment, but did not commit to a position.[298] The government said it would consider options that ranged from full alignment with Australia to a separate regulatory regime, something both the trade rules and regulatory impact statements would require. In April 2012 the government announced agreement in principle to introduce a plain packaging regime aligned to Australia's, but that was subject to the outcome of a public consultation process to be undertaken later in 2012.[299] That raises important questions about how the government will fulfill its obligation under Article 5.3 of the FCTC to limit tobacco companies' influence over the policy making process. The process suggests the passage of legislation is unlikely before late 2013, assuming the government remains committed to a plain packaging law.

The Australian experience indicates the likely legal responses to such a law, but it is still evolving. To date the plain packaging law has been challenged as unconstitutional in the High Court of Australia.[300] Australia has notified the legislation to the WTO as a TBT measure and it has been discussed in the TBT and TRIPS committees. Since March 2012 Ukraine[301] and Honduras[302] have requested consultations under the WTO's Dispute Settlement Understanding. As of 26 March 2012, Australia had accepted requests by Brazil, Canada, the European Union, Guatemala, New Zealand, Nicaragua, Norway and Uruguay to join the consultations. If the matter is not resolved after 60 days, it is likely to proceed to a formal WTO dispute. Legal analyses suggest Australia has a strongly arguable defence, but the outcome is far from certain. The official timetable for a dispute is a maximum of one year from the request for consultations to the adoption of the panel report, and another three months for an appeal. It can take longer. The WTO dispute raises important timing questions for New Zealand's decision on plain packaging: the government might be tempted to await the outcome rather than proceeding now and potentially face similar legal action.

Conversely, the government faces time-constraints because of the TTMRA. The Australian regulations that provide for implementation of the plain packaging law have adopted an exemption from the TTMRA from 1 October 2012.[303] Although it does not specify any term or end date, this is a temporary exemption for twelve

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[298] Cabinet Social Policy Committee, 2011, para 44.

[299] Tariana Turia, *Moving towards plain packaging of tobacco products*, Press release, New Zealand Government, 19 April 2012, www.scoop.co.nz/stories/PA1204/S00253/moving-towards-plain-packaging-of-tobacco-products.htm, (accessed 19 April 2012).

[300] The litigation has been brought by four tobacco interests: British American Tobacco, Imperial Tobacco, Philip Morris and Japan Tobacco International alleging a taking of property, being the intellectual property and goodwill associated with tobacco labels, in breach of Section 51(xxxi) of the Australian Constitution. The documents are available on the Australian High Court website: www.hcourt.gov.au/

[301] Ukraine lodged its request on 13 March 2012; see *Australia - Plain Packing* - Request for Consultations.

[302] *Australia - Certain Measures Concerning Trademarks and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging,* WT/DS435/1, 4 April 2012, Request for Consultations by Honduras.

[303] *Tobacco Plain Packaging Regulations 2011*, reg 1.1.5.

months, as permitted under the TTMRA, to allow New Zealand to address the anomaly.[304] That exemption can be extended for another year, subject to agreement by two-thirds of the federal and state governments participating in the TTMRA, meaning it could be done without New Zealand's consent. If New Zealand does not pass similar legislation, Australia is expected to seek agreement to a permanent exemption; that would require the consent of New Zealand and all the participating Australian state and federal governments, and involve extensive industry consultation.[305] That exemption could be revoked if New Zealand subsequently adopts a plain packaging law.

Australia also faces an investment dispute brought by Philip Morris Asia under the Australia-Hong Kong BIT, as discussed in detail in section 4.2.4. If New Zealand adopts plain packaging laws, it should expect that tobacco companies will threaten, and if necessary bring, an investment dispute. Ironically, the Australian industry is most directly affected, but would have the least legal opportunity to challenge the law as the Australia-New Zealand Investment Protocol has no enforcement mechanism aside from consultations and both governments have excluded investor-state disputes between them from the ASEAN-Australia-New Zealand FTA. However, all three of the major tobacco producers could reorganise their corporate affiliations through subsidiaries that can utilise the Singapore-New Zealand CEP,[306] the China-New Zealand FTA or the ASEAN-Australia-New Zealand FTA. All those agreements retain some regulatory space for public health measures, but they are far from watertight and the arbitrariness of investment tribunals makes the outcome unpredictable. While New Zealand does not face the same level of risk as Australia under its BIT with Hong Kong, because it contains a strong exception for public health, Hong Kong investors such as PMAsia might try to use the MFN provision in that agreement to import a weaker public health exception from an investment chapter in one of New Zealand's FTIAs. All these arguments are legally contentious, but that would not prevent the companies from pursuing them.

The risks of investor-state litigation would vastly increase under a TPPA if the US succeeds in securing more stringent intellectual property rights, investor protections and investor-state dispute processes than in New Zealand's current BIT and FTIAs.[307] The litigious US tobacco firms would no longer need to treaty shop. Even if Australia and New Zealand entered a side-letter to exclude application of the investor-state powers in relation to each other, as they did in the Australia-New Zealand-ASEAN FTA, that would not limit the rights of investors from other TPPA parties, including offshore subsidiaries of the Australian tobacco companies. These firms could also use the MFN provision to construct the best possible medley of rights and protections in New Zealand's existing agreements under which to threaten or actually litigate. In addition, they might claim a violation of their investment rights, and pursue and investor-state dispute against the New Zealand government, if new exemptions were added to the TTMRA[308] - meaning it could face threats of legal action whether it harmonises with Australia or delays the introduction of equivalent plain packaging laws.

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[304] A joint statement on 29 January 2012 said: 'The Prime Ministers underlined their commitment to strong tobacco control measures and undertook to cooperate closely in their efforts to reduce tobacco use domestically. New Zealand will closely follow progress in implementation of Australia's plain packaging legislation and the countries will look to ensure that no branded tobacco is able to be re-exported from New Zealand to Australia'. www.pm.gov.au/press-office/joint-statement-prime-minister-new-zealand (accessed 19 April 2012).

[305] The converse situation arose in March 2011. A submission on the New Zealand Alcohol Reform Bill on behalf of Independent Distillers (Aust) Pty Ltd argued that restrictions on RTDs under an Alcohol Reform Bill would violate the TTMRA and the principles and intention of the Closer Economic Relations agreement between the two countries and the Australia New Zealand Food Standards Code. They also claimed it would breach New Zealand's TBT obligations at the WTO. Changes to the Food Standards Code would require 'a lengthy consultation process' (in which the industry would doubtless make vigorous interventions). Ultimately, they could bypass New Zealand's new regulations under the TTMRA by importing higher alcohol products that could be sold legally in Australia. See *Trans-Tasman legal expert raises red flag on Alcohol Reform*, Press release: Independent Distillers Aust Pty Ltd, 13 March 2011, business.scoop.co.nz/page/20/?tag=liquor (accessed 19 April 2012).

[306] New Zealand would have to consent to investor-state arbitration under this agreement.

[307] The USTR is expected to table an exception that specifically addresses tobacco control measures, but it will not be a self-judging carveout for tobacco policies, which will still be subject to disputes. The USTR has said the proposed text will not be made public until the TPP negotiations are concluded.

[308] See discussion in section 3.6.

Finally, submissions on the proposed Regulatory Responsibility (later Regulatory Standards) Bill[309] illustrate the importance to tobacco interests of active participation in the policy process, especially consultation, cost-benefit analysis, disclosure and review mechanisms. Industry interests should be expected to use every domestic policy avenue available to resist plain packaging, and to cite transparency provisions in the GATS and FTIAs to bolster their claims. The proposed TPPA would strengthen those opportunities for leverage if, as anticipated, mutual recognition obligations cross-fertilise with chapters on investment, transparency and regulatory coherence, incorporating the RIS process.

5.2.2 Annual reductions by a set percentage in the amount of imported tobacco

This policy might be challenged on two fronts. In relation to trade in goods, quantitative restrictions on tobacco imports are prohibited and cuts to imports would be discriminatory unless there were equivalent measures to reduce tobacco production in New Zealand. The measure would have to rely on the general exception for public health measures.

A percentage reduction in imports might deprive the retailer of tobacco products, and thereby affect the supply of services,[310] but it would not breach market access obligations in retail distribution services because of a special exemption for limit on 'inputs' for the supply of services.[311]

Again, there are investment issues. Annual reductions in imports would affect the interests of all tobacco companies that rely on imported tobacco, whether as raw material or final products, and could prompt threats of legal action. Elimination of imports would effectively end the tobacco industry's operation in New Zealand, unless there was a very large increase in domestically grown tobacco, which would then raise issues of discrimination.

The more incremental the rate and volume of changes and deferred the losses, the less likely the measure is to meet the threshold of 'substantial' impacts on the investment. Cuts of 20 percent a year over five years would obviously have a much more dramatic impact on the share value and profitable operations of tobacco companies and other foreign-owned commercial participants in the supply chain than five percent cuts over 15 years or three percent cuts over 30 years. The contribution of these reductions to achieving the public health goals would be correspondingly diluted.

5.2.3 Annual reductions by a set percentage in the number of retail outlets

This policy would be seen as setting a precedent and threats of litigation could be expected. A cap on the number of outlets selling tobacco or reductions to the current stock of outlets would be a quantitative restriction on retail services under the market access rules in the GATS and FTIAs. Relying on the general exception would require convincing evidence of the measure's effectiveness and why available options that are less trade-restrictive could not achieve the public health objective. Under the current trend in WTO dispute reasoning, it would benefit from being combined in a policy package.

If the affected retail outlets were, for example, convenience stores at petrol stations that were owned or franchised by foreign chains and the loss of income from tobacco sales made them unprofitable and terminated the investment, they might claim actual or indirect expropriation or a breach of fair and equitable treatment.

In both cases, the quantum and speed of the reductions would be highly relevant to the legal risks and conversely, to the effectiveness of the tobacco control policies.

5.2.4 The power for local authorities to control the number and location of tobacco retailers

This raises similar services and investment issues to reduction of retail outlets. Local authorities are subject to trade in services obligations, although any legal dispute would be taken against the state. The government would need to show it had taken reasonable steps to ensure local government compliance - which it clearly could not do if the government had conferred the power on local authorities. The substantive arguments on services and investment would be the same as for restricting the number of retailers, although the likelihood that local authorities would make variable use of this power would further dilute the credibility of claims about its impact on investments.

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[309] The National government agreed in its confidence and supply arrangement with the ACT Party to introduce a diluted version of this legislation, which could still provide some leverage to the tobacco companies and other parts of the supply chain.

[310] Under trade in services agreements the rules apply to measures 'affecting' trade in services; see *GATS*, Article 1.1.

[311] *GATS* Article XVI, fn 9.

5.2.5 Annual reductions by a set percentage in the number and quantity of tobacco products for sale at each outlet

Again, this raises similar arguments to reductions in the number of outlets, although under a different category of market access for services and its effect would be dispersed across all retailers. Industry submissions claimed the display ban law would have a significant impact on the commercial viability of retailers, amounting to around one-third of sales in convenience stores at (foreign-owned or franchised) petrol stations.[312] They might argue that cuts in permitted tobacco sales that jeopardise their viability are an indirect expropriation or a breach of fair and equitable treatment. Again, the quantum and speed of reductions would be highly relevant. The precedent value of the measure might see threats to litigate.

5.2.6 Ban on the use of terms like 'mild', 'smooth', 'fine' and colour descriptors

Similar bans form part of a package of measures adopted by Uruguay that are being challenged by Philip Morris under a BIT between Switzerland and Uruguay. Philip Morris alleges the measures lacked a scientific rationale, expropriated its intellectual property, and frustrated its legitimate expectations.[313] The outcome of that dispute will give an important signal to other countries and the industry, even though there is no system of precedent in investment arbitrations.

As TBT measures, there will be questions about the scientific evidence, nexus between the measure and the public health objective, and the less trade restrictive alternatives.

There is potentially a TRIPS argument that the policy impinges on trademarks. Because the New Zealand Commerce Commission has already moved to restrict use of some descriptors,[314] and the ban would still allow the use of some key brand identifiers, the risk of a dispute seems limited, unless it is part of a package that has a cumulatively strong impact on state and industry interests. At the same time, a package of measures would enhance the justification that the policy would contribute to achieving the public health objective. The lack of action against Uruguay to date by a WTO member it suggests it is unlikely, but still possible, that a state would pursue a dispute at the WTO.

While the industry might object to differential requirements between Australia and New Zealand under the TTMRA, they are hardly likely to want to import plain packaged tobacco into New Zealand from Australia. The risk to New Zealand would heighten given the range of countries involved in a TPPA.

5.2.7 Enhanced high-impact graphic health warnings

These warnings are TBT measures that would require notification. Similar arguments apply in relation to investment, TBT, TRIPS and TTMRA as for bans on certain terms. Given New Zealand and Australia's challenge to Thailand's graphic health warnings on alcohol products, their differential positions on tobacco and alcohol policies would need a robust rationale - which, in turn, could have negative implications for progressive initiatives to address non-communicable diseases more generally.

5.2.8 Control of constituents such as flavours that have greatest impact on palatability, addictiveness and health impact of tobacco

Such controls involve trade in goods, TBT and investment issues. The *US - Clove Cigarettes* dispute shows action is possible by states at the WTO, and possibly by investors under an FTIA or the TPPA.

The measures would require notification under the TBT agreement and be discussed by the TBT committee.[315] The more comprehensive the proposal, such as banning all additives or anything that enhances palatability of raw tobacco, the more vigorous the challenge over its 'necessity' is likely to be. Each element that is subject to control would need to be justifiable separately. Current trends in interpreting the least trade-restrictive requirement show some sensitivity to public health objectives, but these objectives need to be clearly defined.

The same controls would have to apply across all imported and locally produced tobacco products that might be considered 'like' - recognising that definition is unpredictable. The categories of constituents would

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[312] New Zealand Association of Convenience Stores, *Submission to the MAC*, January 2010.

[313] See discussion in Section 4.2.4.

[314] The New Zealand Commerce Commission warned tobacco companies in 2008 that descriptors like 'light' and 'mild' risks misleading consumers and therefore risks breaching the Fair Trading Act; www.comcom.govt.nz/media-releases/detail/2008/consumerswarnedlightandmildtobacco (accessed 19 April 2012).

[315] Ironically, critics of Brazil's restrictions on tar content proposed a ban on flavoured additives as a less trade restrictive alternative, see Section 4.1.2.

need to be carefully selected to avoid claims from a country that specialises in exporting one such product that they are being treated less favourably than products from other countries or New Zealand. In particular, menthol would need to be treated as a flavour like all others. However, even that may not be enough. Brazil's package of tobacco control measures that targets additives includes menthol. After it came into force in March 2012 the Indonesian tobacco industry urged its government to hold immediate bilateral talks with Brazil, and the trade minister appeared to concur.[316] Another WTO dispute may therefore be imminent that muddies the water even further on what kind of restrictions might be compliant with WTO law.

Tobacco companies could be expected to object to such controls. Whether the loss might be substantial enough to constitute an expropriation would depend on facts, the interpretation of the public health provision in the Annex and what kind of precedent it sets. Whether a claim based on fair and equitable claim might assert a legitimate expectation of the right to sell such products would also depend on the history of the investor in relation to the particular products and how the measures fit with New Zealand's history of tobacco control policies.

A TTMRA issue could arise if there were significant differences between New Zealand and Australian standards, although most Australian states have the power to ban flavoured cigarettes.[317] If the policies were not harmonised, provisions for temporary or permanent exemptions might need to be used.

5.2.9 Regulation of nicotine content

Such regulations would raise TBT, investment and mutual recognition issues. They would require notification as a TBT measure. Brazil's regulations have been challenged in the TBT committee and this could turn into a formal dispute. The standard arguments on the public health exception would apply, although scientific proof of health damage caused by nicotine would strengthen the argument.

New Zealand and Australian tobacco companies could be expected to vigorously oppose this policy, as it would affect Trans-Tasman tobacco production and third country exports. They could argue that the measure is an indirect expropriation or a breach of fair and equitable treatment, but will struggle to satisfy the legal thresholds unless it could be shown to cause a severe fall-off in smoking. The Australian companies could raise the argument under the proposed Australia-New Zealand Investment Protocol, but would provide no enforcement mechanism. The legal risk would heighten under a TPPA, but how serious the threat depends on what public health exceptions apply.

As with flavoured tobacco products, some Australian states regulate nicotine content; whether there is a TTMRA issue will depend on temporary exemptions and moves towards Trans-Tasman harmonisation.

5.2.10 Ban on duty free sales of tobacco or reduced duty free allowances

This policy is potentially problematic, depending on how it is framed.[318] A total ban on tobacco sales in duty free stores would be a market access restriction under the GATS and FTIAs, where New Zealand has unlimited commitments for retail distribution services. Given the foreign ownership of the duty free chains directly or through franchises, a ban that did not apply equally to domestic tobacco retailers could also be discriminatory, assuming they are considered 'like' services competing in a market.

To justify a total ban under the general exception the government would need to show the ban was 'necessary' and the least trade-restrictive approach available to achieve the policy goal. The current trend in interpretation suggests a ban that was part of a multi-faceted tobacco control programme will still need strong evidence to show its effectiveness and the significance of its contribution to attaining the objective. Once that test is met, the measure also needs to be neither arbitrary not discriminatory; if a similar ban is not applied to other retail outlets it could be difficult to justify.

A lesser measure, such as lower duty free allowance or a requirement that tobacco is sold at non-duty free prices, would avoid these problems.

There remains the issue of investment rules. Foreign-owned duty free stores would be protected investments under investment chapters, either as foreign direct investments, shareholdings, franchises or

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[316] Brazil's flavoured cigarette ban now targeted, *Eyes on Trade,* 16 April 2012 http://citizen.typepad.com/eyesontrade/2012/04/brazils-flavored-cigarette-ban-now-targeted.html (accessed 19 April 2012).

[317] As of 2011, legislation allowed the banning of flavoured cigarettes in New South Wales, South Australia, Victoria, Tasmania, and the Australian Capital Territories. Andrew Mitchell and Tanya Voon (2011), Regulating Tobacco Flavors: Implications of WTO Law, 29 *Boston University International Law Journal* 383, Annex, 423-424.

[318] There are legal issues relating to duty-free stores beyond the trade and investment agreements, which have not been considered in this report.

concessions. Whether a ban on sales, or a reduction or removal of the duty free element, was considered an indirect expropriation would likely depend on whether the proportion of lost tobacco sales to total revenue met the threshold of 'substantial' and how the exclusion of public health measures in the annex on expropriation would be interpreted. A claim that the ban was a breach of fair and equitable treatment would require a duty free investor to convince an arbitral tribunal that it had legitimate expectations of a stable regulatory environment when it made or expanded the investment. That seems the more likely argument, although it could have difficulty discounting New Zealand's long-standing commitment to progressive tobacco controls. If government has a legal right to renegotiate duty free concessions it might also avoid triggering these obligations.

5.2.11 Large annual increases in tobacco tax

The tax must apply equally to imported and domestically produced 'like' products. It could also become an investment issue if the tax increase was significant enough to cause a major reduction in tobacco use and have a substantial effect on the value or viability of the investments in New Zealand of tobacco companies or retailers. Again, questions of legitimate expectations and the public health proviso in the Annex of expropriations would arise.

5.2.12 Funding tobacco control policies through tobacco excise revenue or a tobacco levy

The funding policy and levy must apply equally to imported and domestically produced products.

5.2.13 Registration as a pre-condition to import, distribute or sell tobacco

If that kind of registration is considered a form of licensing it would become subject to the disciplines on domestic regulation of services and require a least burdensome approach to achieve the quality of the service. It is arguable that quality in relation to tobacco distribution should take account of the nature of the product, but if that were accepted the measures would still need to be the least burdensome way to achieve that quality. Under the GATS, this would apply only to retail sales, but the disciplines in other FTAs apply to all services, which includes importing and distribution of tobacco products.

5.2.14 Disclosure of the volumes of tobacco imported, distributed or sold

These requirements are technical standards for the domestic regulation of services, and procedures would need to reflect a least burdensome approach to achieve the quality of the distribution service. Again, it can be argued that such standards must be product specific. Under the GATS, that would apply only to retail sales, but under other FTIAs would include importing and distribution of tobacco products.

5.2.15 Stronger disclosure of additives in tobacco products

This disclosure is a TBT issue of relatively low-level impact. Depending on where, how and to whom the disclosure is required it may not need to be notified to the WTO as a TBT measure and action by states seems unlikely.

5.2.16 Public reporting of elements of tobacco and smoke by class of product, brand and brand variant

Public reporting is a TBT issue that could require notification, but states and industry are likely to treat it as of nuisance value.

5.2.17 Guidelines to prevent tobacco company interference in policy making

If the guidelines impose meaningful restrictions they would conflict with the transparency obligations in the GATS and services chapters in FTIAs. A state would probably not pursue the issue unless it was part of a broader package of problematic measures. Investors can be expected to resist attempts to exclude them using all available legal channels.

There would be a serious and direct conflict between the government's obligation to ensure that future agreements are consistent with its obligations under the FCTC and the transparency and regulatory coherence provisions proposed for the TPPA as currently drafted.

5.2.18 Local government initiated smoke free zones

This does not raise obvious legal issues, provided it does not impose a total ban on large territorial areas that might impact significantly on retailers in those suburbs or regions. The indirect relationship between the restriction and the service or investment should make it difficult to sustain a legal objection.

5.2.19 Smoke free cars

This does not raise obvious legal issues.

Appendix 1: Potential legal challenges to New Zealand's tobacco control policies

The following table provides a shorthand record of the potential legal claims that might be raised for each policy. *It does not assess the validity of the legal argument or of any successful defence.*

Policy	Possible trade or investment claims	Trade or investment rule	Agreements
Mandatory plain packaging	Lacks scientific proof and/or not least trade restrictive measure to achieve the objective Interferes with usage of trademarks Interferes with usage of trademarks Inconsistent product specifications (exempt)	Technical barrier to trade Intellectual property Investment Mutual recognition	TBT/FTIAs/TPPA TRIPS/FTIAs/TPPA BITs/FTIAs/TPPA TTMRA/TPPA
Ban on use of misleading terms	Lacks scientific proof and/or not least trade restrictive measure to achieve the objective Interferes with usage of trademarks Interferes with usage of trademarks Inconsistent product specifications	Technical barrier to trade Intellectual property Investment Mutual recognition	TBT/FTIAs/TPPA TRIPS/FTIAs/TPPA BITs/FTIAs/TPPA TTMRA/TPPA
Enhanced high impact warnings on packaging	Lacks scientific proof and/or not least trade restrictive measure to achieve the objective Interferes with usage of trademarks Interferes with usage of trademarks Inconsistent product specifications	Technical barrier to trade Intellectual Property Investment Mutual recognition	TBT/FTIAs TRIPS/FTIAs BITS/FTIAs/TPPA TTMRA
Regulation of nicotine content	Lacks scientific proof and/or not least trade restrictive measure to achieve the objective Expropriation of an investment Breach of fair and equitable treatment Inconsistent product specifications	Goods Investment Investment Mutual recognition	TBT/FTIAs BITs/FTIAs/TPPA BITs/FTIAs TTMRA/TPPA
Control of constituents such as flavours	Discriminates against a country's exports Lack of scientific evidence and not least trade restrictive measure to achieve objective Expropriation of an investment Breach of fair and equitable treatment Inconsistent product specifications	Goods Technical barriers to trade/Goods Investment Investment Mutual recognition	GATT/FTIA TBT/FTIAs BITs/FTIAs/TPPA BITs/FTIAs/TPPA TTMRA/TPPA
Guidelines to stop industry interference in policy	Participation of stakeholders in decision making processes	Transparency Regulatory Coherence	GATS/FTIAs/TPPA TPPA
Annual reductions in imported tobacco	Quantitative restriction on imports Discrimination against foreign products Expropriation of an investment	Goods and Services Goods and Services Investment	GATT/GATS GATT/GATS/ BITs/ FTIAs BITs/FTIAs
Annual reductions in tobacco retail outlets	Market access restriction on retailers	Services & Investment Investment	GATS/FTIAs/TPPA BITs/FTIAs/TPPA

Policy	Possible trade or investment claims	Trade or investment rule	Agreements
	Expropriation of an investment Breach of fair and equitable treatment	Investment	BITs/FTIAs/TPPA
Power for local authorities to control number of outlets	Market access restriction on retailers Expropriation of an investment Breach of fair and equitable treatment	Services & Investment Investment Investment	GATS/FTIAs/TPPA BITs/FTIAs/TPPA BITs/FTIAs/TPPA
Annual reductions in number of products sold per outlet	Market access restriction on retailers Expropriation of an investment Breach of fair and equitable treatment	Services & Investment Investment Investment	GATS/FTIAs/TPPA BITs/FTIAs/TPPA BITs/FTIAs/TPPA
Registration as pre-condition to distribute	Domestic regulation of distribution services	Services	GATS/FTIAs/TPPA
Disclosure of import volumes	Technical standards for distribution services	Services	GATS/FTIAs/TPPA
Ban on duty free sales or reduced allowances	Ban on all sales is market access restriction Discrimination if ban not on all retailers Expropriation of an investment Breach of fair and equitable treatment	Services Services Investment Investment	GATS/FTIAs/TPPA GATS/FTIAs/TPPA BITs/FTIAs/TPPA BITs/FTIAs/TPPA
Large annual increases in tobacco tax	Indirect expropriation of investment Breach of fair and equitable treatment	Investment Investment	BITs/FTIAs/TPPA BITs/FTIAs/TPPA
Fund tobacco control policies by tax or levy	Discrimination if not applied across the board	Goods	GATT/FTIAs/TPPA
Public reporting of elements of tobacco	Notification as technical barrier to trade	Goods	TBT
Stronger disclosure of additives	Notification as technical barrier to trade	Goods	TBT/FTIAs
Smokefree zones	Expropriation of investment if total ban No significant issues if not comprehensive	Investment	BITs/FTIAs/TPPA
Smokefree cars	No significant issues		

Appendix 2: New Zealand's trade and investment agreements

World Trade Organization Agreements:

General Agreement on Tariffs and Trade 1947
Agreement on Trade-Related Aspects of Intellectual Property Rights 1994
General Agreement on Trade in Services 1994
Agreement on Technical Barriers to Trade 1994
Dispute Settlement Understanding 1994

Other International Agreements

Paris Convention for the Protection of Industrial Property
Australia New Zealand Closer Economic Relations Trade Agreement 1983
The Trans-Tasman Mutual Recognition Arrangement 1997
The Trans-Tasman Mutual Recognition Act 1997

New Zealand's FTAs

Australia-New Zealand Closer Economic Relationship - 1983
New Zealand-Singapore Closer Economic Partnership - 2001
Trans-Pacific Strategic Economic Partnership (P4) - 2005
New Zealand-Thailand Closer Economic Partnership - 2005
New Zealand-China Free Trade Agreement - 2008
ASEAN-Australia-New Zealand Free Trade Agreement - 2010
New Zealand-Malaysia Free Trade Agreement entered into force on 1 August 2010
New Zealand-Hong Kong, China Closer Economic Partnership entered into force on 1 January 2011
Anti-Counterfeiting Trade Agreement 2010

Investment treaties

New Zealand Hong Kong Investment Promotion and Protection Agreement 1995
New Zealand-Australia Closer Economic Relations Investment Protocol (not yet in force)

Appendix 3: Tobacco control policies with trade and investment treaty implications

Government Response to the report of the Maori Affairs Committee on its ***Inquiry into the tobacco industry in Aotearoa and the consequences of tobacco use for Maori*** (Final Response), Presented to the House of Representatives in accordance with Standing Order 248

The government stated that tobacco was 'unlike other similarly dangerous addictive substances' because 'it is a legal product and smoking is a socially entrenched behaviour. As recognised by the Committee, this is in large part due to decades of concerted and sophisticated commercial marketing by tobacco companies'.

The focus of government policies has been on informing people of health risks, preventing young people from starting to smoke, encouraging smokers to quit, and protecting people from the dangers of second hand smoke, especially in the workplace. Current policy at the time centred on:

- Excise tax increases in April 2010 and January 2011, with further increase in January 2012.
- Making help to smokers to quit one of six priority targets for the health sector.
- Support services like Quitline.
- Health education and promotion and media campaigns.
- Legal protections from second-hand smoke and controls on tobacco in the Smoke-free Environments Act 1990 et al.
- Introduction of the Smoke-free Environments (Controls and Enforcement) Amendment Bill in December 2010 to prohibit tobacco displays and tighten other controls on tobacco retail.

Recommendations of the Maori Affairs Committee Inquiry with implications for trade and investment agreements that received a positive response from government.

Recommendation 1

That the Government aim for tobacco consumption and smoking prevalence to be halved by 2015 across all demographics, followed by a longer-term goal of making New Zealand a smoke-free nation by 2025.

The Government agrees to set specific mid-term targets as a means to ensure meaningful progress towards the longer term goal of making New Zealand essentially a smoke-free nation by 2025, taking into consideration the Committee's recommendation to aim for tobacco consumption and smoking prevalence to be halved by 2015.

The Government's existing tobacco policy settings are based on a 'smoke-free' vision, but no specific date has been set. The Committee's report is clear that 'the term "smoke-free" is intended to communicate an aspirational goal and not a commitment to the banning of smoking altogether by 2025' (p.10). On that basis, the Government agrees with a longer term goal of reducing smoking prevalence and tobacco availability to minimal levers, thereby making New Zealand essentially a smoke-free nation by 2025.

Specific mid-term targets are important tools for ensuring progress towards the longer-term goal. Setting ambitious outcome targets for reducing smoking prevalence and tobacco consumption would signal strong intent. Setting a proportionate challenge for improvement across all demographics is an appropriate response to seriously address the higher smoking rates among Maori. The Committee has itself observed that halving the Maori smoking rate from the current 45 percent will be a far bigger challenge than halving the much lower non-Maori smoking rate.

Nevertheless, time-bound targets need to be set carefully to ensure they not only provide sufficient 'stretch', but are also realistic and cost-effectively achievable. Processes to monitor and evaluate progress and to recommend any corrective action required to keep on track would need to be established, and these too would need to be cost-effective. Other intermediate outcomes such as youth uptake or smoker quitting rates might make for more useful and tractable targets.

The Government therefore proposes to undertake further detailed work to determine the optimal set of specific mid-term targets to ensure progress is made towards the long term smoke-free goal. Once decided,

the Government's targets will be incorporated into the priorities set for the Government's established tobacco control programme through the Ministry of Health.

The combination of specific id-term targets and a long term aspirational goal sets a challenging path forward. In agreeing to take on specific mid-term targets for 2015 and the aspirational smoke-free 2025 goal, the Government is committing to an ongoing programme in future years of reviewing progress towards these targets and assessing what additional steps may be required over time to further address these issues.

Recommendation 5

That the Government investigate further options for measures to reduce the supply of tobacco into New Zealand, taking into account trade and other implications, with a view to reducing the availability of tobacco in New Zealand over time.

The government agrees to investigate further options for measures to reduce tobacco supply.

The wording of the Committee's recommendation explicitly acknowledges that introducing possible controls to restrict supply would need to weigh trade policy and other implications. These include New Zealand's international trade obligations and legal protections for sunk investment, as well as relevant exceptions for measures necessary to protect public health.

There could also be undesirable unintended consequences, such as creating windfall profits for suppliers in a situation of excess demand, and potentially creating the conditions for illegal black market supply. Any feasible options for reducing the supply of tobacco would therefore need to be careful consideration and assessment, and details of design and implementation would be critical.

The feasibility of, and need for possible options is also dependent on the success of other measures in lowering smoking rates and demand for tobacco products. The case for any interventions to reduce supply is therefore likely to be more appropriate for consideration at a later stage in New Zealand's transition to the smoke-free goal.

Recommendation 6

That the Government consider annually reducing (by a set percentage)

- *The amount of imported tobacco.*
- *The number and quantity of tobacco products for sale at each outlet, and*
- *The number of retail outlets.*

This proposal is one particular example of the range of supply reduction options covered by Recommendation 5.

Recommendation 7

That the tobacco industry be required to provide tobacco products exclusively in plain packaging, harmonising with the proposed requirement in Australia from 2012.

The Government is monitoring Australia's progress on its proposal to legislate for plain packaging of tobacco products in 2012, and will consider the possibility of New Zealand aligning with Australia. New Zealand Government officials have commenced discussions with respective Australian counterparts on the possible alignment. An initial report back to Cabinet is due by 30 June 2011.

Recommendation 8

That it be compulsory for tobacco companies to publicly report the elements of their tobacco and smoke by class of product, brand, and brand variant, so consumers and the Ministry of Health know exactly what substances, and in what proportions, cigarettes and loose tobacco contain. The measure should be standardised across the industry.

The Government will consider developing a more stringent, specific and effective information disclosure regime, consistent with the evolution of the guidelines for Articles 9 and 10 of the WHO Framework Convention on Tobacco Control...

Recommendation 9

That the provisions in the Smoke-free Environments Act for regulating additives and nicotine in tobacco be used to reduce the additives and nicotine in tobacco on an annual basis.

The Government will consider promulgating regulations to reduce the harmful constituents contained in tobacco products or generated in their smoke, including tar and nicotine. Developing and assessing the case for regulation will follow after, and be informed by the renewed information disclosure regime for tobacco products (Recommendation 8). The Smoke-free Environments Act 1990 already contains regulation-making powers to control harmful constituents. However, this is a difficult area for effective regulation, and to date no regulations have been promulgated.

Recommendation 10

That the Smoke-free Environments Act be amended to stop tobacco companies from engaging in covert sponsorship arrangements such as exclusive supplier deals.

The government agrees to consider introducing an amendment to the Smoke-free Environments (Controls and Enforcement) Amendment Bill (currently under consideration by the Health Committee) to prohibit covert sponsorship arrangements such as exclusive supplier deals. This proposal is consistent with other amendments the Government is progressing through that Bill to prohibit retail tobacco displays and other aspects of tobacco promotion and advertising.

Recommendation 11

That all retail displays of tobacco products be prohibited.

The government has introduced a prohibition on retail displays through the Smoke-free Environments (Controls and Enforcement) Amendment Bill

Recommendation 16

That the Government investigate giving local authorities the power to control the number and location of tobacco retailers, to reduce the exposure of children and young people to tobacco.

This proposal is one particular example of the range of supply reduction options covered by Recommendation 5. In considering local decision-making powers, the Government will need to assess the appropriateness of having potentially varied controls between districts.

Recommendation 17

That legislation be amended to ban the use of the word "tobacco" (and associated terms) in names of retail outlets.

The Government agrees and has addressed this in the Smoke-free Environments (Controls and Enforcement) Amendment Bill, currently before Parliament.

Recommendation 32

That the Government legislate for further incremental tax increases over and above the annual adjustment for inflation.

The current programme of three 10% increases in tobacco excise over and above the annual adjustment for inflation runs through to 2012. The Government will consider regularly increasing the price of tobacco products through raising the tobacco excise by further sizeable and regular increments from 2013 onwards. The Government considers raising the price of tobacco through tobacco excise increases is an effective measure to reduce tobacco consumption and smoking prevalence. In April 2010 the Government moved to raise the tobacco excise in three steps of 10% with the last increment to come into force on 1 January 2012. Subject to evaluation of these recent excise increases, the Government will consider further sizeable and regular increases the price from 2013 onwards.

Recommendation 33

That a tobacco control strategy and action plan be established, with a strong emphasis on Maori focused outcomes, to ensure that tobacco consumption and smoking prevalence is halved by 2015 in a cost-efficient way. In 2015, the strategy should be revised to work towards making New Zealand smoke-free by 2025.

The Government already has a comprehensive action plan through its current tobacco control and smoking reduction initiatives, supplemented by the additional steps proposed in this response.

The Government's emphasis is on practical actions with a demonstrable impact on smoking. Rather than devote resources to developing a tobacco control strategy document and publishing a separate action plan, the Government prefers to focus on implementing the actions it identifies as necessary and prioritises for implementation.

As set out in the response to Recommendation 1, the Government agrees that mid-term targets are necessary to work towards making New Zealand essentially smoke-free by 2025, and that progress needs to be routinely monitored and evaluated to enable the Government to identify any further action required to keep on track.

Recommendation 42

That the duty-free allowances in other jurisdictions be investigated with a view to changing that permitted at New Zealand ports of entry, recognising Article 6.2 of the Framework Convention on Tobacco Control.

The Government agrees to investigate possible mechanisms for reducing duty-free allowances in step with major tourism partners such as Australia, taking into account international agreements and the implications for New Zealand businesses in a competitive international marketplace.

... The policy rationale for allowing duty-free purchases in transit between countries, such as Australia and New Zealand which both heavily tax tobacco, is questionable except for the existence of international agreements that provide for personal duty-free allowances. The Government intends to raise this issue together with plain packaging and other tobacco control policy alignment issues through trans-Tasman dialogue in 2011.

Appendix 4: Trade rules relevant to tobacco control policies

This Appendix provides selected provisions from the relevant international and domestic legislation.

International instruments

1. Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS)
2. Paris Convention for the Protection of Industrial Property
3. Agreement on Technical Barriers to Trade (TBT)
4. General Agreement on Tariffs and Trade (GATT)
5. General Agreement on Trade in Services (GATS)
6. Framework Convention on Tobacco Control (FCTC)
7. Disciplines on Domestic Regulation
8. Regulatory Coherence (TPPA)
9. New Zealand-Malaysia Free Trade Agreement
10. Hong Kong-New Zealand Investment Promotion and Protection Agreement
11. Trans-Tasman Mutual Recognition Arrangement (TTMRA)
12. Trans-Tasman Mutual Recognition Act (NZ)
13. Tobacco Plain Packaging Regulations 2011 (AUS)
14. Trans-Tasman Mutual Recognition Act (Aus)

1. Agreement on Trade-Related aspects of Intellectual Property Rights (TRIPS)

Article 7: Objectives

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

Article 8: Principles

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

Article 15: Protectable Subject Matter

1. Any sign, or any combination of signs, capable of distinguishing the goods or services of one undertaking from those of other undertakings, shall be capable of constituting a trademark. Such signs, in particular words including personal names, letters, numerals, figurative elements and combinations of colours as well as any combination of such signs, shall be eligible for registration as trademarks. Where signs are not inherently capable of distinguishing the relevant goods or services, Members may make registrability depend on distinctiveness acquired through use. Members may require, as a condition of registration, that signs be visually perceptible.

2. Paragraph 1 shall not be understood to prevent a Member from denying registration of a trademark on other grounds, provided that they do not derogate from the provisions of the Paris Convention (1967).

4. The nature of the goods or services to which a trademark is to be applied shall in no case form an obstacle to registration of the trademark.

Article 17: Exceptions
Members may provide limited exceptions to the rights conferred by a trademark, such as fair use of descriptive terms, provided that such exceptions take account of the legitimate interests of the owner of the trademark and of third parties.

Article 20: Other Requirements
The use of a trademark in the course of trade shall not be unjustifiably encumbered by special requirements, such as use with another trademark, use in a special form or use in a manner detrimental to its capability to distinguish the goods or services of one undertaking from those of other undertakings. This will not preclude a requirement prescribing the use of the trademark identifying the undertaking producing the goods or services along with, but without linking it to, the trademark distinguishing the specific goods or services in question of that undertaking.

2. Paris Convention for the Protection of Industrial Property

Article 1: Establishment of the Union; Scope of Industrial Property
(3) Industrial property shall be understood in the broadest sense and shall apply not only to industry and commerce proper, but likewise to agricultural and extractive industries and to all manufactured or natural products, for example, wines, grain, tobacco leaf, fruit, cattle, minerals, mineral waters, beer, flowers, and flour.

Article 10bis: Unfair Competition
1. The countries of the Union are bound to assure to nationals of such countries effective protection against unfair competition.
2. Any act of competition contrary to honest practices in industrial or commercial matters constitutes an act of unfair competition.
3. The following in particular shall be prohibited:
   i. all acts of such a nature as to create confusion by any means whatever with the establishment, the goods, or the industrial or commercial activities, of a competitor;
   ii. false allegations in the course of trade of such a nature as to discredit the establishment, the goods, or the industrial or commercial activities, of a competitor;
   iii. indications or allegations the use of which in the course of trade is liable to mislead the public as to the nature, the manufacturing process, the characteristics, the suitability for their purpose, or the quantity, of the goods.

3. Agreement on Technical Barriers to Trade (TBT)

Article 2: Preparation, Adoption and Application of Technical Regulations by Central Government Bodies

2.2 Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create. Such legitimate objectives are, inter alia: national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment. In assessing such risks, relevant elements of consideration are, inter alia: available scientific and technical information, related processing technology or intended end-uses of products.

2.5 A Member preparing, adopting or applying a technical regulation which may have a significant effect on trade of other Members shall, upon the request of another Member, explain the justification for that technical regulation in terms of the provisions of paragraphs 2 to 4. Whenever a technical regulation is prepared, adopted or applied for one of the legitimate objectives explicitly mentioned in paragraph 2, and is in accordance with relevant international standards, it shall be rebuttably presumed not to create an unnecessary obstacle to international trade.

2.8 Wherever appropriate, Members shall specify technical regulations based on product requirements in terms of performance rather than design or descriptive characteristics.

2.9 Whenever a relevant international standard does not exist or the technical content of a proposed technical regulation is not in accordance with the technical content of relevant international standards, and if the technical regulation may have a significant effect on trade of other Members, Members shall: ...

2.9.2 Notify other Members through the Secretariat of the products to be covered by the proposed technical regulation, together with a brief indication of its objective and rationale. Such notifications shall take place at an early appropriate stage, when amendments can still be introduced and comments taken into account; ...

2.9.4 Without discrimination, allow reasonable time for other Members to make comments in writing, discuss these comments upon request, and take these written comments and the results of these discussions into account.

4. General Agreement on Tariffs and Trade (GATT)

Article III: National Treatment on Internal Taxation and Regulation

1. The contracting parties recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic production.

2. The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products. Moreover, no contracting party shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in paragraph 1.

3. With respect to any existing internal tax which is inconsistent with the provisions of paragraph 2, but which is specifically authorized under a trade agreement, in force on April 10, 1947, in which the import duty on the taxed product is bound against increase, the contracting party imposing the tax shall be free to postpone the application of the provisions of paragraph 2 to such tax until such time as it can obtain release from the obligations of such trade agreement in order to permit the increase of such duty to the extent necessary to compensate for the elimination of the protective element of the tax.

4. The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. The provisions of this paragraph shall not prevent the application of differential internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product.

5. No contracting party shall establish or maintain any internal quantitative regulation relating to the mixture, processing or use of products in specified amounts or proportions which requires, directly or indirectly, that any specified amount or proportion of any product which is the subject of the regulation must be supplied from domestic sources. Moreover, no contracting party shall otherwise apply internal quantitative regulations in a manner contrary to the principles set forth in paragraph 1.

6. The provisions of paragraph 5 shall not apply to any internal quantitative regulation in force in the territory of any contracting party on July 1, 1939, April 10, 1947, or March 24, 1948, at the option of that contracting party; Provided that any such regulation which is contrary to the provisions of paragraph 5 shall not be modified to the detriment of imports and shall be treated as a customs duty for the purpose of negotiation.

7. No internal quantitative regulation relating to the mixture, processing or use of products in specified amounts or proportions shall be applied in such a manner as to allocate any such amount or proportion among external sources of supply.

8. (a) The provisions of this Article shall not apply to laws, regulations or requirements governing the procurement by governmental agencies of products purchased for governmental purposes and not with a view to commercial resale or with a view to use in the production of goods for commercial sale.

(b) The provisions of this Article shall not prevent the payment of subsidies exclusively to domestic producers, including payments to domestic producers derived from the proceeds of internal taxes or charges applied consistently with the provisions of this Article and subsidies effected through governmental purchases of domestic products.

9. The contracting parties recognize that internal maximum price control measures, even though conforming to the other provisions of this Article, can have effects prejudicial to the interests of contracting parties supplying imported products. Accordingly, contracting parties applying such measures shall take account of the interests of exporting contracting parties with a view to avoiding to the fullest practicable extent such prejudicial effects.

10. The provisions of this Article shall not prevent any contracting party from establishing or maintaining internal quantitative regulations relating to exposed cinematograph films and meeting the requirements of Article IV.

Article XX: General Exceptions

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 contracting party of measures:

(a) Necessary to protect public morals.

(b) Necessary to protect human, animal or plant life or health; ...

5. General Agreement on Trade in Services (GATS)

Article I: Scope and Definition

1. This Agreement applies to measures by Members affecting trade in services.

2. For the purposes of this Agreement, trade in services is defined as the supply of a service:

(a) From the territory of one Member into the territory of any other Member.

(b) In the territory of one Member to the service consumer of any other Member.

(c) By a service supplier of one Member, through commercial presence in the territory of any other Member...

3. For the purposes of this Agreement:

(a) "Measures by Members" means measures taken by:

i. Central, regional or local governments and authorities; and

ii. Non-governmental bodies in the exercise of powers delegated by central, regional or local governments or authorities.

Article III: Transparency

Each Member shall promptly and at least annually inform the Council for Trade in Services of the introduction of any new, or any changes to existing, laws, regulations or administrative guidelines which significantly affect trade in services covered by its specific commitments under this Agreement.

Article VI: Domestic Regulation

1. In sectors where specific commitments are undertaken, each Member shall ensure that all measures of general application affecting trade in services are administered in a reasonable, objective and impartial manner.

4. With a view to ensuring that measures relating to qualification requirements and procedures, technical standards and licensing requirements do not constitute unnecessary barriers to trade in services, the Council for Trade in Services shall, through appropriate bodies it may establish, develop any necessary disciplines. Such disciplines shall aim to ensure that such requirements are, inter alia:

(a) Based on objective and transparent criteria, such as competence and the ability to supply the service.

(b) Not more burdensome than necessary to ensure the quality of the service.

(c) In the case of licensing procedures, not in themselves a restriction on the supply of the service.

5. (a) In sectors in which a Member has undertaken specific commitments, pending the entry into force of disciplines developed in these sectors pursuant to paragraph 4, the Member shall not apply licensing and qualification requirements and technical standards that nullify or impair such specific commitments in a manner which:

(i) Does not comply with the criteria outlined in subparagraphs 4(a), (b) or (c); and

(ii) Would not reasonably have been expected of that Member at the time the specific commitments in those sectors were made.

(b) In determining whether a Member is in conformity with the obligation under paragraph 5(a), account shall be taken of international standards of relevant international organizations applied by that Member.

Article XIV: General Exceptions

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 like conditions prevail, or a disguised restriction on trade in services, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures:

(a) Necessary to protect public morals or to maintain public order.

(b) Necessary to protect human, animal or plant life or health.

Article XVI: Market Access

1. With respect to market access through the modes of supply identified in Article I, each Member shall accord services and service suppliers of any other Member treatment no less favourable than that provided for under the terms, limitations and conditions agreed and specified in its Schedule.

2. In sectors where market-access commitments are undertaken, the measures which a Member shall not maintain or adopt either on the basis of a regional subdivision or on the basis of its entire territory, unless otherwise specified in its Schedule, are defined as:

(a) Limitations on the number of service suppliers whether in the form of numerical quotas, monopolies, exclusive service suppliers or the requirements of an economic needs test.

(b) Limitations on the total value of service transactions or assets in the form of numerical quotas or the requirement of an economic needs test.

(c) Limitations on the total number of service operations or on the total quantity of service output expressed in terms of designated numerical units in the form of quotas or the requirement of an economic needs test.

(e) Measures which restrict or require specific types of legal entity or joint venture through which a service supplier may supply a service; and

(f) Limitations on the participation of foreign capital in terms of maximum percentage limit on foreign shareholding or the total value of individual or aggregate foreign investment.

Article XVII: National Treatment

1. In the sectors inscribed in its Schedule, and subject to any conditions and qualifications set out therein, each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting

the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers.

2. A Member may meet the requirement of paragraph 1 by according to services and service suppliers of any other Member, either formally identical treatment or formally different treatment to that it accords to its own like services and service suppliers.

3. Formally identical or formally different treatment shall be considered to be less favourable if it modifies the conditions of competition in favour of services or service suppliers of the Member compared to like services or service suppliers of any other Member.

Article XXVIII: Definitions

For the purpose of this Agreement:

(a) "Measure" means any measure by a Member, whether in the form of a law, regulation, rule, procedure, decision, administrative action, or any other form.

(b) "Supply of a service" includes the production, distribution, marketing, sale and delivery of a service.

6. Framework Convention on Tobacco Control (FCTC)

Foreword

The WHO FCTC was developed in response to the globalization of the tobacco epidemic. The spread of the tobacco epidemic is facilitated through a variety of complex factors with cross-border effects, including trade liberalization and direct foreign investment. Other factors such as global marketing, transnational tobacco advertising, promotion and sponsorship, and the international movement of contraband and counterfeit cigarettes have also contributed to the explosive increase in tobacco use.

Article 2: Relationship between this Convention and other agreements and legal arrangements

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.

Article 4: Guiding Principles

7. The participation of civil society is essential in achieving the objective of the Convention and its protocols.

Article 5: General Obligations

In setting and implementing their public health policies with respect to tobacco control, Parties shall act to protect these policies from commercial and other vested interests of the tobacco industry in accordance with national law'.

Article 13: Tobacco Advertising, promotion and sponsorship

7. Parties which have a ban on certain forms of tobacco advertising, promotion and sponsorship have the sovereign right to ban those forms of cross-border tobacco advertising, promotion and sponsorship entering their territory and to impose equal penalties as those applicable to domestic advertising, promotion and sponsorship originating from their territory in accordance with their national law. This paragraph does not endorse or approve of any particular penalty.

7. Disciplines on Domestic Regulation

Working Party on Domestic Regulation, 'The Necessity Test in the Disciplines on Domestic Regulation', RD/SERV/39, 9 February 2011 (NZ Proposal)

Members shall ensure that measures relating to licensing requirements and procedures, technical standards and qualification requirements and procedures are not prepared, adopted or applied with a view to or with the effect of creating unnecessary barriers to trade in services. For this purpose, Members shall ensure that such measures are not more trade-restrictive than necessary to fulfil specific national policy objectives, including to ensure the quality of a service.

8. Regulatory Coherence (TPPA)

Article X.1 General Provisions

2. The parties affirm the importance of: ...

b. Each Party's sovereign right to identify its regulatory priorities and establish and implement regulatory measures to address these priorities, at the levels that a Party considers appropriate;

c. The role that regulation plays in achieving public policy objectives, such as protecting the environment, worker rights, and public and worker health and safety;

d. A wide range of stakeholder input in the development and implementation of regulatory measures; and

e. Regional regulatory cooperation

taking into account the Parties' international obligations.

Article X.2 Establishment of Central Coordination and Review Processes or Mechanisms

2. The Parties recognize that, while the design, scope of authority, and institutional location of national coordinating bodies or other appropriate processes or mechanisms will vary depending on their respective national circumstances (including differences in levels of development and political and institutional structures), the body, process or mechanism referred to in Article X.2.1 should generally have certain overarching characteristics to enable maximum effectiveness in promoting regulatory coherence as follows:

a. Publicly - available legal or administrative documents that specify institutional elements, and that grant sufficient resources and stature to be credible within the government and with external stakeholders;

b. The authority to review covered regulatory measures to determine the extent to which the development of such measures adheres to good regulatory practices, which may include but are not limited to those set out in Article X.3 [below], and make recommendations based on that review;

c. An important role in advancing the transparency disciplines set out in Chapter X of this Agreement;

d. The ability to strengthen coordination and consultation among ministries within the government so as to minimize overlap and duplication, prevent the creation of inconsistent requirements across ministries, and ensure development of coherent regulatory approaches by, inter alia, allowing all ministries with an interest in a particular covered regulatory measure to participate in its development;

e. The ability to make recommendations for systemic regulatory reform for consideration by decision - makers; and

f. A periodic public report on its activities, including with respect to specific regulatory measures reviewed, any proposals for systemic regulatory reform, and an update on its own institutional development.

Article X.3 Implementation of Core Good Regulatory Practices

1. Through its national coordinating body, process or mechanism, each Party, in carrying out responsibilities for reviewing covered regulatory measures, should generally encourage relevant regulatory authorities, consistent with domestic law, to conduct regulatory impact assessments (RIAs) when developing covered regulatory measures that exceed a threshold of economic impact established by a Party, to assist in designing a measure to best achieve the Party's objective.

a. An RIA should identify, among other things:

(1) the problem and the policy objective that the regulatory authority intends to address, including an assessment of the significance of the problem and a description of the need for regulatory action;

(2) potentially effective and reasonably feasible alternatives to achieve the policy objective;

and

(3) where appropriate, the grounds for concluding that the selected alternative achieves the policy objectives in a way that maximizes net benefits, including qualitative benefits, while also considering distributional impact.

b. An RIA should include the following elements:

(1) a consideration of whether, for all aspects of the planned regulatory measure, there is a need to regulate to achieve the policy objective or whether an objective can be met by non - regulatory and/or voluntary means, consistent with domestic law;

(2) an assessment, to the extent feasible and consistent with domestic law, of the costs and benefits of each available alternative, including not to regulate, recognizing that some costs and benefits are difficult to quantify and monetize;

(3) an explanation why the alternative selected is superior to the other available alternatives identified, including, if appropriate, through reference to the relative size of net benefits of the available alternatives; and

(4) decisions based on the best reasonably obtainable scientific, technical, economic, and other information, within the boundaries of the authorities, mandates, and resources of the particular regulatory authority.

4. Each Party should ensure that relevant regulatory authorities provide appropriate public access to covered regulatory measures and their supporting documentation, regulatory analyses, data, and, where practicable, make this information available online for viewing and reproducibility, in accordance with the transparency disciplines set out in Chapter X of this Agreement.

5. Each Party should establish or maintain procedures for it to review, at intervals it deems appropriate, some or all of its existing stock of significant regulatory measures to determine whether specific regulatory measures should be modified, streamlined, expanded, or repealed so as to make the Party's regulatory program more effective in achieving the policy objective(s) pursued. For a Party reviewing its regulatory measures, relevant elements of consideration include whether such measures have become unnecessary or outdated by reason of changed circumstances, such as fundamental changes in technology, or their effectiveness could be enhanced through expansion or through regulatory cooperation activities.

6. Each Party should publish, on an annual basis, a regulatory agenda which includes any covered regulatory measure that it reasonably expects its regulatory authorities to issue within no less than the following twelve - month period.

7. Each Party should consider a variety of methods that can contribute to successful collaboration among Parties and their respective stakeholders with respect to covered regulatory measures, such as:

a. information exchanges, dialogues or meetings with other Parties;

b. information exchanges, dialogues, or meetings with interested stakeholders, including small and medium - sized enterprises, of other Parties;

c. coordination of regulatory activities with other Parties;

d. participation in efforts to share best practices and harmonize relevant regulatory approaches, standards and related procedures, as well as consideration of such efforts in the development of regulatory measures; and

e. consideration of regulatory schedules that allow for sufficient time to consider regulatory approaches in other Parties, as well as relevant developments in international, regional and other fora to the extent appropriate and consistent with domestic law.

Article X.6: Engagement with Interested Persons

At its first meeting, to ensure participation from a broad - based cross - section of interest in all Parties, the Committee on Regulatory Coherence shall establish mechanisms to ensure meaningful opportunities for interested persons to provide views on approaches to enhance regulatory coherence through the Agreement.

9. Agreement between the Government of Hong Kong and the Government of New Zealand for the Promotion and Protection of Investments

Article 1: Definitions

5. 'Investment' means every kind of asset which has been invested in accordance with the laws of the Contracting Party receiving it and in particular, though not exclusively, includes:

(i) Movable and immovable and any other property rights such as mortgages, usufructs, liens or pledges.

(ii) Shares in and stock and debentures of a company and any similar form of participation in a company.

(iii) Claims to money or to any performance under contract having financial value.

(iv) Copyright, intellectual property rights (such as patents for inventions, trade marks, industrial design), know-how, technical processes, trade names and goodwill.

(v) Business concessions conferred by law or under contract, including concessions to search for, cultivate, extract or exploit natural resources.

A change in the form in which assets are invested does not affect their character as investments, provided that the assets continue to be invested in accordance with the laws and regulations of the Contracting Party receiving them;

Article 6: Expropriation

1. Investors of either Contracting party shall not be deprived of their investments nor subjected to measures having effect equivalent to such deprivation in the area of the other Contracting Party except lawfully, for a public purpose related to the internal needs of that Party, on a non -discriminatory basis, and against compensation. Such compensation shall amount to the real value of the investment immediately before the deprivation or before the impending deprivation became public knowledge whichever is the earlier. Where that value cannot be readily ascertained, the compensation shall be determined in accordance with generally recognised principles of valuation and equitable principles taking into account the capital invested, depreciation, capital already repatriated, replacement value, currency exchange rate movements and other relevant factors. Compensation shall include interest at a normal commercial rate until the date of payment, shall be made without undue delay, be effectively realisable and be in a freely convertible currency. The investor affected shall have a right, under the law of the Contracting Party making the deprivation, to prompt review by a judicial or other independent authority of that Party, of the investor's case and of the valuation of the investment in accordance with the principles set out in this paragraph.

Article 8: Exceptions

3. The provisions of this Agreement shall not in any way limit the right of either Contracting Party to take measures directed to the protection of its essential interests, or to the protection of public health, or to the prevention of diseases and pests in animals and plants, provided that such measures are not applied in a manner which would constitute a means of arbitrary or unjustified discrimination.

10. New Zealand - Malaysia Free Trade Agreement

Chapter 10: Investment

Section A

10.1: Definitions

(h) Investment means every kind of asset owned or controlled, directly or indirectly, by an investor of a Party in the territory of the other Party, and in particular, though not exclusively, includes:

i. Shares, stocks or other forms of equity participation in an enterprise, and rights derived therefrom.

ii. Bonds, including Government issued bonds, debentures, loans and other forms of debt, and rights derived therefrom.

iii. Futures, options and other derivatives.

iv. Rights under contracts, including turnkey, construction, management, production or revenue-sharing contracts.

v. Claims to money or to any contractual performance related to a business and having a financial value.

vi. Intellectual property rights which are recognised pursuant to the laws and regulations of each Party and goodwill.

vii. Rights conferred pursuant to law or contract such as concessions, licences, authorisations, and permits; and

viii. Any other tangible and intangible, movable and immovable property, and any related property rights, such as leases, mortgages, liens and pledges.

For the purposes of this definition, investment also includes an amount yielded by or derived from an investment, including profits, dividends, interest, capital gains, royalty payments, payments in connection with intellectual property rights, and all other lawful income. Such returns that are invested shall be treated as investments and any alteration of the form in which assets are invested or reinvested shall not affect their character as investments;

(j) Measure adopted or maintained by a Party means any measure of a Party, whether in the form of a law, regulation, rule, procedure, decision, administrative action, practice, or other form, adopted or maintained by:

i. Central, regional or local Governments or authorities; or

ii. Non-governmental bodies in the exercise of powers delegated by central, regional or local Governments or authorities.

In fulfilling its obligations under this Chapter, each Party is obliged to take such reasonable measures as may be available to it to ensure their observance by regional and local Governments and authorities and non-governmental bodies within its territories;

Article 10.3: Scope

3. Notwithstanding paragraph 2, the following Articles and Sections of this Chapter shall apply mutatis mutandis, to measures affecting the supply of services by a service supplier of a Party through commercial presence in the territory of the other Party pursuant to Chapter 8 (Trade in Services), but only to the extent that they relate to a covered investment and an obligation under this Chapter, regardless of whether or not such a service sector is scheduled in a Party's Schedule in Annex 4 (Schedules of Specific Services Commitments):

(b) Article 10.8 (Expropriation)

(d) Article10.10 (Minimum Standard of Treatment)

(f) Section B (Investor-State Dispute Settlement).

Article 10.8 Expropriation

1. Neither Party shall nationalise, expropriate or subject to measures equivalent to nationalisation or expropriation a covered investment of an investor of the other Party ("expropriation") except:

(a) For a public purpose;

(b) In a non-discriminatory manner;

(c) On payment of prompt, adequate, and effective compensation in accordance with paragraphs 2 through 4; and

(d) In accordance with due process of law.

2. Compensation shall:

(a) Be paid without delay;

(b) Be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place ('the date of expropriation');

(c) Not reflect any change in value occurring because the intended expropriation had become known earlier; and

(d) Be fully realisable and freely transferable.

Article 10.10: Minimum Standard of Treatment

1. Each Party shall accord to covered investments fair and equitable treatment and full protection and security.
2. For greater certainty:

   (a) Fair and equitable treatment requires each Party not to deny justice in any legal or administrative proceedings.

   (b) Full protection and security requires each Party to take such measures as may be reasonably necessary to ensure the protection and security of the covered investment; and

   (c) The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required under customary international law, and do not create additional substantive rights.

3. A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article.

Article 10.11: Non-Conforming Measures

1. Articles 10.4 (National treatment) and 10.5 (Most Favoured Nation Treatment), shall not apply to:

   (a) Any existing non-conforming measure maintained by a Party at:

      (i) The central and regional level of Government, as set out by that Party in its Schedule to Annex I; or

      (ii) A local level of Government.

   (b) The continuation or prompt renewal of any non-conforming measure referred to in subparagraph (a); or

   (c) An amendment to any non-conforming measures referred to in subparagraph (a), provided that the amendment does not decrease the level of conformity of the measure as it existed at the date of entry into force of the Party's Schedule to Annex I with Articles 10.4 (National Treatment) and 10.5 (Most Favoured Nation Treatment).

2. Articles 10.4 (National Treatment) and 10.5 (Most Favoured Nation Treatment) do not apply to any measure that a Party adopts or maintains with respect to sectors, sub-sectors, or activities, as set out in its Schedule to Annex II.

3. The Parties will endeavour to progressively remove the non-conforming measures.

4. Neither Party may, under any measure adopted after the date of entry into force of the Schedules referred to in Article 10.17 (Work Programme) and covered by its Schedule to Annex II, require an investor of the other Party, by reason of its nationality, to sell or otherwise dispose of an investment existing at the time the measure becomes effective.

Section B: Investor State Dispute Settlement

Article 10.19: Scope

1. For the purposes of this Chapter, an investment dispute is a dispute between a Party and an investor of the other Party that has incurred loss or damage by reason of, or arising out of, an alleged breach of any right conferred by this Chapter directly concerning a covered investment of the investor of that other Party.

2. A natural person possessing the nationality or citizenship of a Party may not pursue a claim against that Party under this Section.

Annex 7: Expropriation

1. An action or a series of related actions by a Party shall not constitute an expropriation unless it interferes with a tangible or intangible property right or property interest in an investment.
2. Expropriation may be either direct or indirect:

   (b) Indirect expropriation occurs when a State takes an investor's property in a manner equivalent to direct expropriation, in that it deprives the investor in substance of the use of the investor's property, although the means used fall short of those specified in subparagraph (a).

3. In order to constitute indirect expropriation, the State's deprivation of the investor's property must be:
   (a) Either severe or for an indefinite period; and
   (b) Disproportionate to the public purpose.
4. A deprivation of property shall be particularly likely to constitute indirect expropriation where it is either:
   (a) Discriminatory in its effect, either as against the particular investor or against a class of which the investor forms part; or
   (b) In breach of the State's prior binding written commitment to the investor, whether by contract, licence, or other legal document.
5. Non-discriminatory regulatory actions by a Party that are designed and applied to achieve legitimate public welfare objectives, such as the protection of public health, safety, and the environment do not constitute indirect expropriation.

11. Trans-Tasman Mutual Recognition Arrangement

Purpose

A. The purpose of the Arrangement is to give effect to a scheme implementing mutual recognition principles between the Parties relating to the sale of Goods and the Registration of Occupations, consistent with the protection of public health and safety and the environment.

Objectives

B. The objective of the Arrangement is to remove regulatory barriers to the movement of Goods and service providers between Australia and New Zealand, and to thereby facilitate trade between the two countries. This is intended to enhance the international competitiveness of Australian and New Zealand enterprises, increase the level of transparency in trading arrangements, encourage innovation and reduce compliance costs for business.

Principles

G. Subject to the provisions of this Arrangement, two basic principles relating to Goods and Occupations respectively, underpin the Arrangement.

1. Goods
The basic principle in respect of Goods is that a Good that may legally be sold in the Jurisdiction of any Australian Party may be sold in New Zealand, and a Good that may legally be sold in New Zealand may be sold in the Jurisdiction of any Australian Party.

H. Consistent with the principles in paragraph G, it is the intention of the Parties to minimise exemptions and exclusions to the Arrangement.

I. The Parties acknowledge that:
1. subject to certain exemptions for the protection of public health and safety and the environment, the Arrangement is intended only to take precedence over such Laws of Participating Parties in respect of Goods as would effectively prevent or restrict the sale in the Jurisdiction of that Party of a Good that can legally be sold in the Jurisdiction of another Participating Party;

Part II: Interpretation

"Goods" means goods of any kind, and includes:
1. Animals or plants.
2. Material of microbial origin.
3. A package containing Goods; or
4. A label attached to Goods.

"Intellectual property" will have the meaning provided for in Article 2 of the Convention establishing the World Intellectual Property Organisation done at Stockholm on 14 July 1967 and in the World Trade Organisation Agreement on the Trade Related Aspects of Intellectual Property Rights done at Marrakesh on 15 April 1994, and will include all rights, such as those relating to copyright, patents, registered designs, registered and unregistered trade marks, plant varieties, confidential information, circuit layouts and semi-conductor chip products, geographical indications and service marks.

"Labelling" of Goods includes any means by which, at the point of sale, information is attached to Goods or is displayed in relation to Goods without being attached to them.

"Produce" includes to manufacture, and also includes to harvest or otherwise produce in the course of any form of primary production.

"Requirements", when used in relation to Goods, means requirements, prohibitions, restrictions or conditions.

"Sell" includes sell by wholesale or retail, and includes distribute for sale, expose or offer for sale or have in possession for sale or agree to sell, and includes barter, and includes supply by way of exchange, lease, hire or hire-purchase.

Part III: Establishment of Arrangement

3.1 The Parties will, in accordance with this Arrangement, and upon the coming into force of the legislation applicable to each Party, observe the mutual recognition principles set out in Recital G and in the Australian Draft Bill and New Zealand Draft Bill.

Part IV: Operation of the Scheme Goods

4.1.1 Under this Arrangement, a Good that may legally be sold in the Jurisdiction of an Australian Party may legally be sold in New Zealand and a Good that may legally be sold in New Zealand may legally be sold in the Jurisdiction of any Australian Party. Goods need only comply with the standards or Regulations applying in the jurisdiction in which they are produced or through which they are imported. The understandings entered into under this principle are confined to the laws of each Party.

4.1.2 Under the principle referred to in sub-paragraph 4.1.1, mutual recognition will affect certain laws relating to the sale of Goods of the jurisdiction where the Goods are intended for sale. Such laws include:

(a) Requirements relating to production, composition, quality or performance of a Good.

(b) Requirements that a Good satisfy certain standards relating to presentation, such as packaging, labelling, date, or age stamping.

(c) Requirements that Goods be inspected, passed or similarly dealt with; or

(d) Any other Requirement that would prevent or restrict, or would have the effect of preventing or restricting, the sale of the Good.

4.1.3 The Arrangement is not intended to affect the operation of any laws to the extent that they regulate:

(a) The manner of the sale of Goods or the manner in which sellers conduct or are required to conduct their business, so long as those laws apply equally to Goods produced or imported in the Jurisdiction of the Party. Examples include:

(i) The contractual aspects of the sale of Goods;

(ii) The registration of sellers or other persons carrying on occupations;

(iii) The requirements for business franchise licences;

(iv) The persons to whom Goods may or may not be sold; and

(v) The circumstances in which Goods may or may not be sold;

(b) The transportation, storage or handling of Goods, so long as those laws apply equally to Goods produced or imported under the laws of the Party and so long as they are directed at matters affecting

public health and safety or at preventing, minimising or regulating environmental pollution (including air, water, noise or soil pollution); or

(c) The inspection of Goods, provided inspection is not a prerequisite to the sale of Goods, the laws apply equally to Goods produced or imported under the laws of the Party, and the laws are directed to protecting the health and safety of persons or to preventing, minimising or regulating environmental pollution.

4.1.4 Consistent with the mutual recognition principle set out above, the Parties intend that the Arrangement will not affect the operation of any law or regulation prohibiting or restricting the export of Goods from a Participating Party.

Temporary exemptions

4.2.1 The Parties may temporarily exempt a Good or a law relating to a Good from the operation of the Arrangement where such exemptions are substantially for the purpose of protecting the health and safety of persons or preventing, minimising or regulating environmental pollution. Such Temporary Exemptions will apply only to the laws of the Party or Parties which invoke them. It is intended that a Party will not be able to have a Good banned or restricted from sale in the jurisdiction of another Party.

4.2.2 It is intended that a Temporary Exemption for such a Good or law, or a series of consecutive Temporary Exemptions for the same Good or law, not apply for a period exceeding an aggregate maximum of 12 months. Prior to the expiration of the exemption relating to the Good, the relevant Ministerial Council(s) will endeavour to determine whether a standard should apply to the Good, and, if so, that standard. Alternatively, the Ministerial Council may recommend to Heads of Government that the Good or law be Permanently Exempted from the Arrangement.

Referrals

4.3 A Participating Party may, at any time and substantially for the purpose of protecting the health and safety of persons or preventing, minimising or regulating environmental pollution, refer the matter of the standard applicable to any Goods under the Jurisdiction of another Participating Party to the Ministerial Council having responsibility for such Goods. The Ministerial Council will endeavour to determine, within 12 months of receiving such a referral, whether or not a standard should be set with respect to the Good, and if so, that standard.

Part VII: Exclusions

7.1 The Parties have identified a number of laws which include requirements relating to the sale of Goods as set out in paragraph 4.1.2 that might otherwise be unintentionally affected by mutual recognition.

7.2 It is intended that laws falling within the following categories should be excluded from the Arrangement:

(a) Customs controls and tariffs - to the extent that Commonwealth and New Zealand laws provide for the imposition of tariffs and related measures (for example, anti- dumping and countervailing duties) and the prohibition or restriction of imports.

(b) Intellectual property - to the extent that Commonwealth, State, Territory and New Zealand laws provide for the protection of intellectual property rights and relate to requirements for the sale of Goods.

(c) Commonwealth, State, Territory and New Zealand taxation - to the extent that the laws provide for the imposition of taxes on the sale of locally produced and imported goods in a non-discriminatory way including, for example, Wholesale Sales Tax (Commonwealth), business franchise fees and stamp duties (States and Territories) and Goods and Services Tax (New Zealand); and

(d) Other specified international obligations to the extent that Commonwealth and New Zealand laws implementing those obligations deal with the requirements relating to the sale of goods.

7.3 A list of these laws falling within the scope of paragraph 7.2 is contained in Schedule 1. Amendments to the laws specified in Schedule 1 and any further laws, which fall within the scope of the laws described in paragraph 7.2, may also be excluded from the Arrangement. Any such amendments and laws will be duly notified by the relevant Party to all other Participating Parties.

7.4 Additions to the categories of excluded laws described in paragraph 7.2 require the unanimous agreement of the Heads of Government of the Participating Parties.

Part VIII: Permanent Exemptions

8.1 The Parties have identified a number of areas of Goods regulation that are potentially covered by the mutual recognition principle, but for which the Parties have determined that mutual recognition should not apply. These have been termed 'permanent exemptions'. The areas of regulation to be permanently exempted from the operation of the Arrangement are set out in Schedule 2. The laws in Schedule 2 are exempt from the Arrangement to the extent that they deal with the requirements relating to the sale of goods set out in paragraph 4.1.2 of the Arrangement.

8.2 Additions to the list of laws in Schedule 2 require the unanimous consent of the Heads of Government of the Participating Parties. In their deliberations, Heads of Government may take into account such matters as they consider relevant, including any recommendation of a Ministerial Council.

8.3 Unless otherwise stated, a law described in Schedule 2 includes any amendment or replacement of that law, but only to the extent that the amendment or replacement does not expand the scope of the exemption as at the Date of Commencement of the Arrangement.

12. Trans-Tasman Mutual Recognition Act 1997 (NZ)

Section 2: Interpretation

Intellectual property

includes all intellectual property rights, including (without limitation) rights relating to circuit layouts and semiconductor chip products, confidential information, copyright, geographical indications, patents, plant varieties, registered designs, registered and unregistered trade marks, and service marks

Labelling, in relation to goods, includes any means by which, at the point of sale, information is attached to goods or is displayed in relation to goods without being attached to them.

Section 5: Application

(1) Every law of New Zealand must, unless it or this Act otherwise expressly provides, be subject to this Act.

(2) The Trans-Tasman mutual recognition principle in relation to goods, the Trans-Tasman mutual recognition principle in relation to occupations, and the provisions of this Act may be taken into consideration in proceedings of any kind and for any purpose.

Section 9: Place of Production

(1) For the purpose of determining where goods are produced for the purposes of this Act, goods are taken to be produced in the place where the most recent step in the process of producing the goods, whether by way of harvesting, packaging, or processing the goods or otherwise, has occurred.

Subsection (1) applies even though -

(c) Some steps in the process were carried out elsewhere; or
(d) The goods or a component of the goods were imported into Australia.

Section 10: Trans-Tasman mutual recognition principle in relation to goods

(1) The Trans-Tasman mutual recognition principle in relation to goods is that, subject to this Act, good produced in or imported into an Australian jurisdiction, that may be lawfully sold in the Australian jurisdiction

either generally or in particular circumstances may, but virtue of this Act, be sold in New Zealand either generally or in particular circumstances (as the case may be), without the necessity for compliance with any of the requirements relating to sale that are imposed by or under the law of New Zealand and are described in subsection (2).

(2) The requirements referred to in subsection (1) are the following:

(a) A requirement that the goods satisfy standards relating to their composition, performance, production, or quality, or relating to any other aspect of the goods themselves.

(b) A requirement that the goods satisfy standards relating to their age, date stamping, labelling, or packaging, or relating to any other aspect of the way the goods are presented; or

(c) A requirement that the goods be inspected, passed, or similarly dealt with in or for the purposes of New Zealand; or

(d) A requirement that any step in the production of the goods not occur outside of New Zealand; or

(e) Any other requirement relating to sale that would prevent or restrict, or would have the effect of preventing or restricting, the sale of goods in New Zealand.

Section 11: Section 10 not to affect operation of certain laws

Nothing in section 10 affects the operation of any laws of New Zealand that regulate the manner of the sale of goods in New Zealand or the manner in which sellers conduct or are required to conduct their business in New Zealand, by dealing with (without limitation) -

a. The contractual aspects of the sale of goods; or
b. The persons to whom goods may or many not be sold; or
c. The circumstances in which goods may or may not be sold; or
d. Franchise agreements or arrangements relating to the sale of goods; or
e. The registration of sellers of other persons carrying on occupations,--

So long as those laws apply equally to goods produced in or imported into New Zealand.

Section 12: Defences to offences regarding sale

(1) It is a defence to a prosecution for an offence against a law of New Zealand, being a prosecution in relation to the sale of any goods, if the defendant expressly claims that the Trans-Tasman mutual recognition principle in relation to goods applies and established that -

a. The goods were labelled at the point of sale with a statement to the effect that they were produced in or imported into Australia or a State; and
b. The defendant had no reasonable grounds for suspecting that they were not so produced or imported.

(2) The defence described in subsection (1) is not available if the prosecution proves that the Trans-Tasman mutual recognition principle in relation to goods did not apply in the circumstances of the alleged offence.

(3) Nothing in section 10 affects the operation of any laws of New Zealand regarding the inspection of goods within New Zealand, so long as those laws -

(a) Apply equally to goods produced in or imported into New Zealand; and

(b) Are directed at matters affecting the health and safety of persons in New Zealand or at avoiding, remedying, or mitigating any adverse effects of activities on the environment in New Zealand; and

(c) Do not require the inspection of goods as a prerequisite to the sale of the goods in New Zealand.

Section 13: Goods that comply with local law

Nothing in this Part prevents goods from being sold in New Zealand if (apart from this Act) they comply with the relevant requirements of the law in force in New Zealand.

13. Tobacco Plain Packaging Regulations 2011 (Aus)

Explanatory Note: This regulation provides that the Act is exempt from the operation of the Trans-Tasman Mutual Recognition Act 1997. The purpose of that Act is to recognise within Australia regulatory standards adopted in New Zealand regarding goods and occupations. The exemption prevents products that do not comply with the plain packaging requirements from being sold in Australia, whether or not those products are able to be sold in New Zealand.

The exemption is effective on and from 1 October 2012, being the date that the first offences under the Act commence. The exemption operates for a period of up to 12 months (see subsection 46(4) of the Trans-Tasman Mutual Recognition Act 1997).

1.1.5 Exemption from *Trans-Tasman Mutual Recognition Act 1997*

For section 109 of the Act, on and from 1 October 2012 the Act is exempt from the operation of the Trans-Tasman Mutual Recognition Act 1997.

14. Trans-Tasman Mutual Recognition Act 1997 (Aus)

Part 4: Exclusions and Exemptions

Section 44: Exclusions

(1) This Act does not affect laws of an Australian jurisdiction specified or described in Schedule 1, to the extent that Schedule 1 indicates that they are excluded from the operation of this Act.

(2) The Governor-General may make regulations amending Schedule 1.

(3) A regulation may not be made for the purposes of this section unless all of the then participating jurisdictions have endorsed the regulation.

(4) However:

(a) If such a regulation merely omits or reduces the extent of an exclusion of a law of a State from Schedule 1, the regulation may be made if the State has endorsed the regulation; or

(b) If such a regulation amends Part 2 of Schedule 1 by substituting or adding a law of a State that relates to a matter referred to in paragraph (a), (b), (c) or (d) of subclause 1(1) of Part 1 of that Schedule, the regulation may be made if the State has endorsed the regulation.

Section 45: Permanent exemptions

(1) This Act does not affect the operation of laws of an Australian jurisdiction specified or described in Schedule 2, to the extent that Schedule 2 indicates that they are exempt from the operation of this Act.

(2) Such an exemption may be limited or unlimited in its application. If a law is specified or described in Schedule 2 without any limitation, it is taken to be wholly exempt from the operation of this Act.

(3) The Governor-General may make regulations amending Schedule 2.

(4) A regulation may not be made for the purposes of this section unless all of the then participating jurisdictions have endorsed the regulation.

(5) However:

(a) If such a regulation relates solely to one or more laws specified or described in Schedule 3 and will not take effect within five years after the commencement of section 48, the regulation may be made if at least two-thirds of the then participating jurisdictions have endorsed the regulation; or

(b) If such a regulation merely omits or reduces the extent of an exemption of a law of a State from Schedule 2, the regulation may be made if the State has endorsed the regulation.

Section 46: Temporary exemptions

(2) For the purposes of this section, goods or laws are exempt if the goods are of a kind, or the laws are, for the time being declared by or under an Act or regulation of the jurisdiction to be exempt from the operation of this Act.

(3) Any such exemptions have effect only if they are substantially for the purpose of protecting the health and safety of persons in the jurisdiction or preventing, minimising or regulating environmental pollution (including air, water, noise or soil pollution) in the jurisdiction.

(4) No such exemption operates (together with the period of any previous exemption) for longer than a period of 12 months or an aggregate period of 12 months.

Section 47: Continuation of temporary exemptions to enable implementation of ministerial agreements

(1) The purpose of this section is to create a mechanism to provide an additional period not exceeding 12 months for legislative or other action to be taken to implement a ministerial agreement arising out of consideration of an exemption under section 46. However, this subsection does not provide grounds for invalidating any regulations made for the purposes of this section.

(3) For the purposes of this section, goods or laws are exempt if the goods are of a kind, or the laws are, for the time being declared by regulations under this Act to be exempt from the operation of this Act.

(4) The Governor-General may make regulations for the purposes of this section, but any such regulations may be made only if they have the effect of continuing or reviving, wholly or partly, and with or without modification, the effect of an exemption under section 46.

(5) Such a modification may only:

(a) In the case of an exemption relating to goods:

(i) Limit the circumstances in which the goods are exempt; or

(ii) Provide that the exemption does not apply if certain standards or conditions are complied with in relation to the goods; or

(b) In the case of an exemption relating to a law:

(i) Modify the operation of the law while the exemption operates; or

(ii) Provide that the exemption does not apply in relation to particular goods if certain standards or conditions are complied with in relation to the goods.

(6) The regulations may discontinue any exemption under this section.

(7) A regulation may not be made for the purposes of this section unless at least two-thirds of the then participating jurisdictions have endorsed the regulation.

(8) No exemption under this section operates (together with the period of any previous such exemption) for longer than a period of 12 months or an aggregate period of 12 months after the corresponding exemption under section 46 ceases to operate.

(9) In this section:

Ministerial agreement means an agreement of Ministers of participating jurisdictions made in relation to goods or laws that are the subject of an exemption under section 46.

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