Regional Training Workshop on Tobacco Control and Trade

Background Paper

Introduction

It is now well established that trade liberalization and foreign direct investment (FDI) in the tobacco sector may stimulate demand for tobacco products. Available evidence suggests that the opening of traditionally closed tobacco markets in low- and middle-income countries has increased the prevalence of tobacco use in those countries.

Recent legal disputes at the World Trade Organization (WTO) have also highlighted the legal constraints international trade agreements impose on the ability of WHO Member States to implement tobacco control measures. These disputes include successful challenges to restrictions on flavoured tobacco products that prohibit clove cigarettes but not menthol cigarettes in the United States, and to the manner in which Thailand implemented tobacco tax measures. Ukraine, Honduras and the Dominican Republic have also recently brought complaints against Australia concerning legislation requiring plain packaging of tobacco products.[1] Outside of the WTO context, Philip Morris is challenging Australia's plain packaging legislation and Uruguayan packaging and labelling measures under bilateral investment treaties (BITs). Philip Morris also recently challenged Norwegian laws prohibiting tobacco advertising at the point of sale under the European Economic Area Agreement (EEA Agreement), which is a free trade agreement (FTA).

This paper provides background information in support of the regional training workshop on tobacco control and trade. This paper identifies issues and challenges international trade and investment agreements pose for tobacco control, current controversies, and their relevance to future trade and investment agreements. Part I provides a brief overview of the WHO Framework Convention on Tobacco Control (WHO FCTC). Part II provides an overview of WTO law. Part III provides an overview of international investment agreements (IIAs). Part IV provides an overview of the FTAs and FTA negotiations most relevant to WHO Member States in the Eastern Mediterranean region.

More detailed information relevant to the subject of this paper can be found in Confronting the Tobacco Epidemic in a New Era of Trade and Investment Liberalization, World Health Organization, 2012.

I. THE WHO FRAMEWORK CONVENTION ON TOBACCO CONTROL

The WHO FCTC was adopted by the World Health Assembly in 2003 and entered into force in 2005. With 176 Parties, the Convention is one of the most widely adopted treaties in the United Nations system.

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

> to protect present and future generations from the devastating health, social, environmental and economic consequences of tobacco consumption and exposure to tobacco smoke by providing a framework for tobacco control measures to be implemented by the Parties at the national, regional and

international levels in order to reduce continually and substantially the prevalence of tobacco use and exposure to tobacco smoke.

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

As a framework convention, the text of the WHO FCTC lays out a broad framework of obligations and rights that is supplemented by other instruments. The Parties have negotiated an optional protocol to the Convention concerning illicit trade in tobacco products. Parties have also adopted guidelines for the implementation of Articles 5.3, 8, 11, 12, 13 and 14 of the Convention, as well as partial guidelines for Articles 9 and 10.

The foreword to the Convention describes it as a response to the globalization of the tobacco epidemic, which was facilitated through processes such as trade liberalization. This is reflected in the preamble to the Convention, in which the Parties express their determination "to give priority to their right to protect public health." With this in mind, the WHO FCTC has three primary impacts on trade and investment issues. First, Article 5.3 obliges Parties to protect their public health policies with respect to tobacco control from commercial and other vested interests of the tobacco industry in accordance with national law. Guidelines for implementation of Article 5.3 stress that Parties should limit their dealings with the tobacco industry and avoid providing the industry with incentives for investment. Second, the WHO FCTC may be used in interpreting international trade and investment agreements. Third, the WHO FCTC establishes rules governing conflicts between it and other treaties.

II. THE LAW OF THE WORLD TRADE ORGANIZATION

WTO law limits the ways in which WTO Members may restrict or regulate trade in goods and services, including through the use of tariffs (customs duties) and non-tariff barriers to trade, such as regulatory measures. WTO law also imposes obligations with respect to the protection of intellectual property rights. This section describes the rules and recent disputes most relevant to tobacco control, as well as how WTO law is enforced.

A. The General Agreement on Tariffs and Trade 1994

The GATT 1994 applies to trade in goods and establishes a number of rules and principles that are also incorporated in various forms in other WTO covered agreements.

Article II:1(a) of the GATT 1994 governs tariff bindings. This provision establishes maximum tariffs (customs duties) that each Member may impose on the importation of goods, including tobacco products. The tariff bindings are established in each Member's unique Schedule of Concessions.

Other rules governing non-tariff barriers to trade seek to ensure that non-tariff measures (such as regulatory measures) do not erode the value of the commitments made under Article II. These rules prohibit discrimination (Articles III and I) and the use of quantitative restrictions, subject to general exceptions (Article XX).

Non-Discrimination – National Treatment

Article III:1 establishes a principle of non-discrimination against imported goods. This principle prohibits measures that discriminate either in their form or effect. Because the public health justifications for discriminating against tobacco products based on their origin are limited, it is discrimination through the effect of a measure that merits discussion.

Article III:4 governs internal regulation, which refers to laws, regulations or requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of imported products. This includes a variety of tobacco control measures such as product regulations, labelling measures and some restrictions on tobacco advertising, promotion and sponsorship.

Under Article III:4, imported tobacco products must not be treated less favourably than like products of national origin. Whether product categories are like depends on the nature and extent of a competitive relationship between those categories. For less favourable treatment to have occurred a measure must modify the conditions of competition to the detriment of imported products.

US – Clove Cigarettes[1] shows the relevance of Article III:4 to measures drawing distinctions between product classes for regulatory reasons. In that dispute, Indonesia brought a claim relating to a US law prohibiting the sale of cigarettes containing a constituent that is a characterizing flavour of tobacco or tobacco smoke, other than menthol or tobacco.[2] Indonesia argued that the regulation discriminated against Indonesian products because it prohibited clove cigarettes (primarily imported from Indonesia) but not menthol cigarettes (primarily manufactured in the US). Although this dispute was resolved in favour of Indonesia under the TBT Agreement (discussed below) rather than the GATT 1994, Indonesia argued the issue under both agreements. Indonesia's claim also exemplifies the types of claims that are made under Article III:4.

Article III:4 was also applied in *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines.*[3] The claim did not bring into question Thailand's right to implement tobacco taxes, but concerned administration of the Thai tobacco

[1] Panel Report, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/R, 2 Sept 2011; Appellate Body Report, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/AB/R, adopted 24 April 2012

[2] *Family Smoking Prevention and Tobacco Control Act*, HR 1256, section 907(a)(1)(A).

[3] Panel Report, *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines*, WT/DS371/R, 15 November 2010.

tax system. The Philippines claimed that ad valorem tariffs and taxes were being charged at higher rates than otherwise due because Thailand was overvaluing imported cigarettes at customs. The Philippines also claimed that the tax system was administered in a discriminatory manner, partly because the methodologies used for calculating taxes favoured domestic producers. The WTO panel found that the tax system was administered in a discriminatory manner.[1] The WTO Appellate Body rejected an appeal by Thailand, upholding the panel's report.[2]

Article III:2 of the GATT 1994 establishes a prohibition on discriminatory taxes. Although there are differences in the application of Article III:2 from Article III:4, similar principles are at work.

Non-Discrimination – Most-Favoured Nation Treatment

Article I:1 of the GATT establishes a principle of most-favoured nation (MFN) treatment). This provision prohibits discrimination against the imports of any Member in favour of those from any other country.

Quantitative Restrictions

Article XI:1 forbids prohibitions or restrictions on the importation or exportation of products, other than duties, taxes or charges. In practice, Article XI:1 tends not to be applied to all measures restricting importation, but only to measures applicable solely to imported goods. This is consistent with the view that internal regulations that happen to be enforced at the border are addressed under Article III, and are outside the scope of Article XI:1. [3]

Article XI:1 was invoked in *Thailand – Cigarettes*,[4] which was a dispute under the GATT 1947.[5] That dispute concerned a Thai licensing measure the effect of which prevented importation of tobacco products and protected the Thai tobacco monopoly. The licensing system was found to be contrary to Article XI:1. This left Thailand to argue that the measure was necessary to protect human health under Article XX(b), as discussed further below.

General Exceptions

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

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

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[1] Panel Report, *Thailand – Customs and Fiscal Measures*, para. 7.637.

[2] Appellate Body Report, *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines*, WT/DS371/AB/R, 17 June 2011.

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

[4] GATT Panel Report, *Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes*, DS10/R, adopted 7 November 1990, BISD 37S/200.

[5] The GATT 1947 was the precursor to the GATT 1994, which was incorporated into the WTO Agreement.

. . .

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

A panel will first determine whether the measure in question is a measure for the protection of human life or health.[1] A panel will then weigh and balance the trade restrictiveness of a measure against its contribution to the objective pursued, in light of the importance of that objective. This weighing and balancing exercise is used to make a preliminary determination of necessity. If a measure passes this preliminary analysis, the question becomes whether there are reasonably available alternative measures that are less trade restrictive and capable of achieving the objective pursued. In the absence of such measures, the analysis turns to whether the impugned measure complies with the introductory paragraph (chapeau) of Article XX.

Article XX(b) was at issue in the GATT 1947 dispute of *Thailand – Cigarettes*. Thailand argued that the abovementioned licensing system was necessary to protect human health. However, the GATT panel found that taxation measures and non-discriminatory bans on tobacco advertising were reasonably available alternatives to the maintenance of the licensing system.[2] Hence, the licensing system was found not to be necessary to protect human health.

B. The Agreement on Technical Barriers to Trade

The TBT Agreement applies to technical regulations. Technical regulations are mandatory requirements that set out product characteristics.[3] Technical regulations can require that a product take a particular form or prohibit a product from taking a particular form. In the tobacco control context, technical regulations include measures such as packaging and labelling measures and product regulations. Among other things, the TBT Agreement establishes obligations with respect to non-discrimination, necessity and transparency.

Non-Discrimination

Article 2.1 establishes a prohibition on discriminatory technical regulations, (both national treatment and MFN treatment). Importantly, Article 2.1 is not subject to an exception.

In *US – Clove Cigarettes*, the panel found that the US regulation prohibiting clove cigarettes, but not menthol cigarettes, discriminated against cigarettes produced in Indonesia in favour of cigarettes produced in the US. The Appellate Body upheld this decision. In doing so, the Appellate Body found that clove and menthol cigarettes are sufficiently competitive in the US market to be considered like products.[4] The Appellate Body also found that the prohibition of clove but not menthol resulted in less favourable treatment of imported products because the regulation fell heaviest on imported products and was not based solely on a legitimate regulatory distinction

[1] See for example Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, adopted 5 April 2001, DSR 2001:VII, 3243, paras 156 – 163.

[2] GATT Panel Report, *Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes*, DS10/R, adopted 7 November 1990, BISD 37S/200, paras 78 – 81.

[3] For the definition of technical regulations see TBT Agreement, Annex 1.1; See also Appellate Body Report, *EC - Asbestos*, para. 67.

[4] Appellate Body Report, *US – Clove Cigarettes*, para. 160.

between the two product classes. In the latter respect, the Appellate Body emphasized that clove and menthol each mask the harshness of tobacco and that clove and menthol cigarettes are each attractive to youth.[1]

It should be noted that the outcome of *US – Clove Cigarettes* does not necessarily prevent WTO Members from engaging in product regulation of the type implemented by the US. Rather, the outcome was based on discrimination specific to the US measure and the US tobacco market.

Necessity

Article 2.2 of the TBT Agreement imposes a positive obligation on Members to ensure that technical regulations are not more trade restrictive than necessary to achieve a legitimate objective, such as protection of human health. This obligation is supplemented by Article 2.4, which obliges Members to use relevant international standards as the basis for technical regulations, except when such international standards or relevant parts would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued. Article 2.5 then creates a presumption that health measures in accordance with international standards do not create unnecessary obstacles to international trade under Article 2.2.

In *US – Clove Cigarettes* a WTO panel considered whether the US restriction on clove flavoured cigarettes is more trade restrictive than necessary to protect human health under Article 2.2. The panel rejected Indonesia's argument that Article 2.2 had been violated. This aspect of the panel's decision was not appealed. In reaching its decision, the panel referred to the *Partial guidelines for implementation of Articles 9 and 10 of the WHO FCTC*,[2] as adopted by the Conference of the Parties, without considering whether those guidelines constitute international standards for the purposes of Article 2.5.

In a subsequent dispute, *US – Tuna II*, the Appellate Body was asked to consider the question of under what circumstances an instrument elaborated by a treaty body could be a relevant international standard under the TBT Agreement. The Appellate Body's decision leaves open the possibility that WHO FCTC guidelines may constitute international standards. The decision stresses that an international standardizing body must (i) have recognized activities in standardization and (ii) be open (in terms of membership) to the relevant bodies of at least all WTO Members.[3]

Transparency and the TBT Committee

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

[1] *Ibid*, para. 225.
[2] Available along with all of the guidelines adopted by the Conference of the Parties at http://www.who.int/fctc/protocol/guidelines/adopted/en/.
[3] Appellate Body Report, United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products, WT/DS381/AB/R, adopted 13 June 2012, paras 357 – 358.

proposed regulation upon request, allow a reasonable time for comments, and take those comments into account.

In *US – Clove Cigarettes*, the panel held that the US had failed to comply with its notification obligations under Article 2.9. These obligations are not discussed further in this paper because they are procedural in character.

The TBT Agreement also establishes the TBT Committee, which provides a forum within which WTO Members can discuss measures before they are implemented, with a view to avoiding formal dispute settlement. A number of tobacco control regulations have generated debate within the TBT Committee, including Canadian and Brazilian measures to reduce the palatability and attractiveness of tobacco products, and Australian regulations requiring the plain packaging of tobacco products.

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

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

Under TRIPS, WTO Members are obliged to permit the registration of trademarks. This obligation is subject to exceptions, including for misleading trademarks.[1] In this respect, Article 11.1(a) of the WHO FCTC provides that misleading or deceptive descriptors include trademarks with descriptors like 'light' or 'mild', which suggest that a tobacco product is less harmful than other tobacco products.

The ordinary wording of TRIPS does not require Members to grant trademark owners the right to use a trademark in the course of trade.[2] Case law also suggests that TRIPS guarantees trademark owners only a right to exclude others from using a trademark.[3] In this respect, many tobacco control measures limit the use of trademarks. These measures include restrictions on tobacco advertising, sponsorship or promotion such as prohibitions on brand-stretching and prohibitions on the use of misleading descriptors.

Despite this, tobacco companies have argued that measures such as large graphic health warnings and plain packaging violate Article 20 of TRIPS. Article 20 states that "[t]he use of a trademark in the course of trade shall not be unjustifiably encumbered by special requirements, such as use with another trademark, use in a special form or use in a manner detrimental to its capability to distinguish the goods or services of one undertaking from those of other undertakings."

To date, Article 20 has not been clarified through WTO dispute settlement. Hence, what constitutes a special requirement under the provision is not clear. Nonetheless,

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

[2] See Article 16.1, which suggests a negative right to exclude.

[3] Panel Report, *European Communities – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs*, Complaint by Australia, WT/DS290/R, adopted 20 April 2005, paras 7.610 – 7.611.

Article 20 only prohibits unjustifiable encumbrances. In evaluating the justifiability of an encumbrance, a WTO panel may consider Article 8 of TRIPS, which specifies that Members may adopt measures necessary to protect public health so long as those measures comply with the terms of TRIPS. Article 8 guides interpretation of Article 20 and other TRIPS obligations. Thus, measures that are necessary to protect public health are likely to be lawful under Article 20.

A WTO panel may also take account of the Doha Declaration on the TRIPS Agreement and Public Health. Paragraph 4 of the Doha Declaration states:

> We agree that the TRIPS Agreement does not and should not prevent members from taking measures to protect public health. Accordingly, while reiterating our commitment to the TRIPS Agreement, we affirm that the Agreement can and should be interpreted and implemented in a manner supportive of WTO members' right to protect public health and, in particular, to promote access to medicines for all.
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> In this connection, we reaffirm the right of WTO members to use, to the full, the provisions in the TRIPS Agreement, which provide flexibility for this purpose.

At the time of writing, there are three WTO disputes underway concerning a tobacco control measure under TRIPS. Ukraine, Honduras and the Dominican Republic have each requested the establishment of a panel to adjudicate disputes with Australia concerning the Tobacco Plain Packaging Act 2011 (Cth), which implements guidelines to Articles 11 and 13 of the WHO FCTC. Under this law, all tobacco products sold in Australia are required to be sold in plain packaging. The legislation prohibits tobacco industry logos, brand imagery, colours and promotional text other than brand and variant names in a standard colour, position, font style and size. Ukraine, Honduras and the Dominican Republic have each asserted that plain packaging violates TRIPS.

D. Dispute Settlement and Remedies

In the event that a WTO covered agreement is violated, a panel will recommend to the Dispute Settlement Body (DSB) that the Member in question bring the measure into conformity with WTO law.[1] A reasonable period of time to comply will be given if it is impracticable to comply with the recommendation of the DSB immediately.[2] If a Member has still not implemented the rulings after the expiry of that reasonable period of time, the complainant may obtain authorization to suspend concessions (WTO obligations owed by the complainant to the respondent) from that point forward.[3] The DSB will authorize the suspension of concessions only at a level equivalent to the extent to which the complainant's benefits under the Agreement are nullified or impaired as a consequence of the initial violation.

III. INTERNATIONAL INVESTMENT AGREEMENTS

IIAs are often found in the form of investment chapters in FTAs and as separate BITs. IIAs protect the property rights of foreign investors abroad by guaranteeing various

[1] See Article 19(1) of the Dispute Settlement Understanding.
[2] See Article 21(3) of the Dispute Settlement Understanding.
[3] See Articles 22(1) and 22(2) of the Dispute Settlement Understanding.

standards of protection, which are discussed below. Foreign investors usually have standing to bring claims directly against states under IIAs. IIAs also make compensation available as a remedy for violation. The following discussion identifies some of the typical IIA standards of protection that are most relevant to tobacco control.

A. Indirect expropriation

It is common for IIAs to provide that investments of nationals or companies of either contracting party shall not be expropriated, nationalized or subjected to measures having equivalent effect in the territory of the other contracting party, except for a public purpose, on a non-discriminatory basis and against compensation.

Ordinarily, tobacco control measures do not require the direct transfer of property from tobacco companies to the state. Hence, tobacco control measures do not normally raise questions of direct expropriation or nationalization.[1] Consequently, tobacco companies assert that some tobacco control measures are equivalent to expropriation (indirect expropriation). Claims made by Philip Morris against Uruguay and Australia provide examples of these arguments.

Philip Morris (Switzerland) and other associated parties have filed a claim against Uruguay under the Switzerland – Uruguay BIT.[2] The claim concerns Uruguayan tobacco packaging measures. In this respect, under Uruguayan law graphic health warnings must cover 80% of the surface of tobacco packaging. Uruguayan law also prohibits package design that is misleading with respect to the health effects of consumption. Uruguayan authorities have deemed variants of Philip Morris's brands to be misleading and implemented the latter law so that only one variant per brand may be used in the Uruguayan market.

It is argued by Philip Morris that these two measures result in indirect expropriation of its property rights. The company also argues that the images used in graphic health warnings result in expropriation because they shock and repulse rather than warn of the risks of consumption.

Philip Morris (Asia) has also brought a claim against Australia under a BIT between Australia and China, (Hong Kong, Special Administrative Region).[3] Philip Morris argues that plain packaging results in indirect expropriation of its property rights. As in the claim against Uruguay, Philip Morris argues that its trademarks and goodwill have been expropriated through tobacco packaging measures.

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[1] On direct expropriation see *Pope & Talbot Inc v Canada*, Interim Award, para. 100; see also *Feldman Karpa v Mexico, Award*, ICSID Case No ARB(AF)/99/1; IIC 157 (2002); (2003) 18 ICSID Rev—FILJ 488; (2003) 42 ILM 625, para. 151.

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

[3] Notice of Arbitration, Australia / Hong Kong Agreement for the Promotion and Protection of Investments, Philip Morris (Asia) Limited, 21 November 2011; Agreement between the Government of Hong Kong and the Government of Australia for the Promotion and Protection of Investments, 1748 UNTS 385 (signed and entered into force 15 September 1993).

Case law applying investment treaties suggests that a number of factors will be considered in determining whether a measure results in indirect expropriation (although this case law is not binding precedent).

One factor for consideration is the extent of interference with an investor's property rights. Although there is no universally accepted standard, case law suggests that there must be 'a substantially complete deprivation of the economic use and enjoyment of rights to the property, or of identifiable distinct parts thereof (i.e. it approaches total impairment)' for indirect expropriation to occur.[1] The case law tends to treat this degree of interference as necessary, but not sufficient for indirect expropriation to occur. Tribunals usually consider other factors in determining whether a measure constitutes non-compensable regulation by the host state or compensable expropriation. It is common for tribunals to consider factors such as whether the measure is within the police powers of the state, the proportionality of the measure to its aims, and the legitimate expectations of the investor.[2]

That sovereign states may act to protect public health without being liable for indirect expropriation is recognized in the concept of police powers.[3] When acting in accordance with police powers, states do not have an obligation to compensate an investor for expropriation, provided that the state's conduct is not discriminatory and is not designed to cause a foreign investor to abandon property to the state or sell it at a distress price.[4] Although the concept of police powers is not usually reflected in the text of IIAs, one view is that measures within police powers are exempt from the obligation to pay compensation. An alternate view is that measures falling within police powers are not expropriatory in character.

Another relevant factor for consideration is whether a foreign investor had legitimate investment backed expectations.[5] If, in making an investment, an investor has acted in reliance on specific commitments made to it those expectations may form the basis of a claim for indirect expropriation.[6] In this respect, a general expectation that an investor will avoid regulation is not sufficient. Moreover, in the tobacco context, the legitimacy of such expectations is questionable given the harmful character of tobacco products and the existence of the WHO FCTC.

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

[2] *Corn Products International Inc v Mexico*, Decision on Responsibility, ICSID Case No ARB(AF)/04/1; IIC 373 (2008), signed 15 January 2008, para. 87(j); Although for a controversial view that emphasizes interference see *Metalclad Corp v Mexico*, Award, Ad hoc—ICSID Additional Facility Rules; ICSID Case No ARB(AF)/97/1; IIC 161 (2000), signed 25 August 2000, para. 103.

[3] See *Feldman Karpa v Mexico*, Award, ICSID Case No ARB(AF)/99/1; IIC 157 (2002); (2003) 18 ICSID Rev—FILJ 488; (2003) 42 ILM 625, despatched 16 December 2002, para. 112.

[4] *Emmanuel Too v Greater Modesto Insurance Associates and the United States of America* (1989) 23 Iran–USCTR 378; The Restatement (Third) of the Foreign Relations Law of the United States.

[5] Campbell McLachlan, Laurence Shore and Matthew Weiniger, *International Investment Arbitration: Substantive Principles*, New York : Oxford University Press, 2007, pp. 303 – 304.

[6] See *Methanex Corporation v United States of America*, Final Award on Jurisdiction and Merits, (2005) 44 ILM 1345, 9 August 2005, Part IV, Chapter D, para. 8.

B. Fair and equitable treatment

Philip Morris has also argued that the Uruguayan and Australian measures contravene provisions ensuring fair and equitable treatment for foreign investors. Philip Morris bases these claims on the argument that the measures in question are unreasonable and arbitrary.

IIAs often include clauses requiring that investors be afforded fair and equitable treatment. These clauses can be found in a variety of formulations, making it difficult to generalize.[1] Some clauses establish stand-alone treaty obligations that are of a broad character. Other clauses require the standard of treatment found in the international minimum standard required by customary international law.

There are a number of different circumstances in which violation of the fair and equitable treatment standard has occurred. These include failure to provide a transparent and stable environment and to observe an investor's legitimate expectations, arbitrary, discriminatory or unreasonable treatment, denial of due process or procedural fairness, bad faith, and government coercion and harassment.

It is generally difficult for an investor to establish a violation of a clause linked to customary international law. For example, the standard was articulated by the tribunal in *Glamis Gold v United States,* which stated that 'an act must be sufficiently egregious and shocking – a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons – so as to fall below accepted international standards.'[2] Equally, a higher standard of treatment has been required by some tribunals, which have concluded that customary international law may be violated by acts that are merely unfair, inequitable or unreasonable.[3]

C. Umbrella clauses

In claims against Uruguay and Australia Philip Morris has also based arguments on so-called 'umbrella clauses'. Typically, these clauses require a host state to respect commitments made with respect to investments. Philip Morris argues that commitments under WTO law, and particularly TRIPS, fall within the scope of the umbrella clauses in the relevant agreements. It remains to be seen whether WTO commitments could be invoked under an umbrella clause. Despite this, the argument highlights how legal commitments made to foreign tobacco companies might be litigated under investment treaties.

D. Contemporary Treaty Practice to Preserve Regulatory Autonomy

Although international investment agreements often afford States a wide degree of autonomy to regulate in the public interest, there are steps that States can take to minimize uncertainty and protect themselves from claims under IIAs. These steps include ensuring that specific commitments are not made to foreign investors in the tobacco industry, monitoring incoming investment and refusing establishment of

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[1] For an overview see Ioana Tudor, *The Fair and Equitable Treatment Standard in International Foreign Investment Law*, Oxford, Oxford University Press (2008).

[2] *Glamis Gold Ltd v United States*, Award, Ad hoc—UNCITRAL Arbitration Rules; IIC 380 (2009), signed 14 May 2009, para. 616.

[3] See *Merrill & Ring Forestry LP v Canada,* Award, Ad hoc—UNCITRAL Arbitration Rules; IIC 427 (2010), 31 March 2010, para. 210.

investment if it is appropriate and lawful to do so, clarifying the scope of key provisions when future IIAs are negotiated and clarifying the scope of existing IIAs.[1]

IV. FREE TRADE AGREEMENTS

FTAs are usually bilateral or regional in character, and require elimination of practically all restrictive regulations of commerce (such as tariffs) between the territories involved.[2] FTAs often include rules that go beyond those found in WTO law, such as chapters governing investment protection and 'TRIPS-plus' obligations, which require higher levels of intellectual property protection than TRIPS.

Within the Eastern Mediterranean region there are a number of FTAs already in effect, or under negotiation. Many of these FTAs are bilateral in character. Prominent regional agreements and negotiations are identified below.

Greater Arab Free Trade Area (GAFTA)

A declaration of the Social and Economic Council of the Arab League brought the GAFTA into force in order to implement the Trade Facilitation and Development Agreement. The GAFTA required parties to eliminate tariffs on the importation of goods from the territory of other parties as well as non-tariff barriers such as quotas. GAFTA parties include Algeria, Bahrain, Egypt, Iraq, Kuwait, Lebanon, Libya, Morocco, Oman, Palestine, Qatar, Saudi Arabia, Sudan, Syria, Tunisia, United Arab Emirates and Yemen

The GAFTA is one step towards the achievement of an Arab common market by 2020. Agreements concluded under the auspices of the Council of Arab Economic Unity are also part of this process. There are a number of parties to Agreements on Investment Protection and Promotion and Investment Dispute Settlement, including Jordan, Egypt, Syria, Iraq and Libya.

The Gulf Cooperation Council (GCC)

The GCC has a number of members, including Bahrain, Kuwait, Oman, Qatar, Saudi Arabia and the United Arab Emirates. Although some of these states have concluded FTAs at the bilateral level, the GCC also negotiates FTAs as a group. Existing FTAs include agreements with Syria (2005), Singapore (2008) and the European Free Trade Area states (2009). The GCC is also negotiating FTAs with a number of other states and organizations, including China, Japan, MERCOSUR, ASEAN and the EU.

FTAs with the US and EU

There are processes under-way to develop regional free trade areas involving the US and EU. The Euro-Mediterranean Free Trade Area is the product of the Barcelona Declaration of 1995, which foresees the development of a free trade area through conclusion of FTAs between the EU and states bordering the Mediterranean, as well as through the non-EU states themselves. The Agadir Agreement, between Egypt, Jordan, Morocco and Tunisia is an example of the latter. The process of negotiating the agreements to construct the free trade area is ongoing. In a similar process, the US has sought the negotiation of a free trade area with many states in the region.

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[1] These approaches are described in further detail in Confronting the Tobacco Epidemic in a New Era of Trade and Investment Liberalization, World Health Organization, 2012, pp. 64 - 69

[2] See GATT Article XXIV:8(b) for a more detailed definition.