American Journal of Law & Medicine, 39 (2013): 382-441

Safeguards for Tobacco Control: Options for the TPPA

Robert Stumberg[†]

I. LEGACY OF 20TH CENTURY TRADE POLICY

With tobacco trade, the past is prologue. In the 1980s, the U.S. government used domestic trade remedies ("Super 301") to pry open markets for U.S. tobacco companies.[1] The targets included Japan, South Korea, Taiwan, and Thailand.[2] A grateful tobacco industry donated a renovation of the Treaty Room in the U.S. Department of State, declaring at the dedication: "Tobacco is intimately and historically associated with American diplomacy."[3]

Thailand responded by banning imported cigarettes on grounds that the imports were more addictive and marketing of imports was driving up consumption. The United States then challenged Thailand for violating the General Agreement on Tariffs and Trade (GATT). The GATT panel ruled against Thailand, finding that the import ban failed to satisfy the health exception of GATT Article XX.[4]

Studies showed that liberalizing tobacco trade in the 1990s resulted in lower tariffs, lower prices, aggressive marketing, and greater tobacco use—in the range of ten percent for all four countries.[5] The same results held true for China, India,

---

[†] Professor of Law, Georgetown University Law Center. The author appreciates the thoughtful suggestions and critiques on earlier drafts from Chris Bostic, Jane Kelsey, Jonathan Liberman, Matthew Porterfield, Keigan Mull, Aaron Schwid, Deborah Sy, and Yilan Yang. Any remaining errors or omissions are the author's alone. This article benefits from the research contributions of James Bangasser, Lloyd Grove, Keigan Mull, Sara Piazza, Rachel Rosenfeld, and Yilan Yang.

[1] *See* COUNCIL ON SCIENTIFIC AFFAIRS, AM. MED. ASS'N, IMPACT OF U.S. TOBACCO EXPORTS ON THE WORLDWIDE SMOKING EPIDEMIC 1-3 (1989), *available at* http://legacy.library.ucsf.edu/tid/zyn52f00/pdf;jsessionid=8E44A3B350560BC29FC6DCBD7ACE6B0C.tobacco03; *see also* Greg N. Connolly, *Tobacco and United States Trade Sanctions*, *in* SMOKING AND HEALTH 1987, at 351, 351-54 (Masakazu Aoki et al. eds., 1988); E. R. Shaffer et al., *International Trade Agreements: A Threat to Tobacco Control Policy*, 14 TOBACCO CONTROL (Supp. II) ii19, ii21-ii22 (2005).

[2] Allyn Taylor et al., *The Impact of Trade Liberalization on Tobacco Consumption*, *in* TOBACCO CONTROL IN DEVELOPING COUNTRIES 343, 355 (Prabhat Jha & Frank Chaloupka eds., 2000).

[3] Zoë Davidson & Maud S. Beelman, *U.S. Support for Tobacco Overseas: Going Out of Business?*, CTR. FOR PUB. INTEGRITY (Nov. 2, 1999), http://www.publicintegrity.org/1999/11/02/3328/us-support-tobacco-overseas-going-out-business.

[4] Panel Report, *Thailand–Restrictions on Importation of and Internal Taxes on Cigarettes*, ¶¶ 78-81, DS10/R–37S/200 (Oct. 5, 1990).

[5] PRABHAT JHA ET AL., THE WORLD BANK, CURBING THE EPIDEMIC: GOVERNMENTS AND THE ECONOMICS OF TOBACCO CONTROL 14-15 (1999); *see* Frank J. Chaloupka & Adit Laixuthai, *U.S. Trade Policy and Cigarette Smoking in Asia* 12-15 (Nat'l Bureau of Econ. Research, Working Paper No. 5543, 1996); DOUGLAS BETTCHER ET AL., COMM'N FOR MACROECONOMICS & HEALTH, CONFRONTING THE TOBACCO EPIDEMIC IN AN ERA OF TRADE LIBERALIZATION 51-53 (2001);

Indonesia, Malaysia, Pakistan, and the Philippines.[6] By 1997, the mounting evidence of a "tobacco epidemic"—and the overt connection with trade agreements—prompted an apparent shift in U.S. policy. The U.S. Congress adopted the Durbin and Doggett Amendments, which prohibit federal agencies from promoting "the sale or export of tobacco or tobacco products" or seeking "the reduction or removal by any foreign country of restrictions on the marketing of tobacco or tobacco products, except for restrictions which are not applied equally to all tobacco or tobacco products of the same type."[7] In 2001, President Clinton issued Executive Order 19393 to make clear that this policy applies to all executive agencies and "the implementation of international trade policy."[8] Limiting trade negotiators aimed to promote coherence between health and trade policy.[9]

In 2003, congressional leaders documented how the Office of U.S. Trade Representative (USTR) negotiated Korean tariff reductions on behalf of Philip Morris International (PMI), agreed to zero tobacco tariffs on the last day of negotiations on the U.S.-Chile Free Trade Agreement (FTA), and proposed ten of eleven amendments sought by PMI to weaken the draft Framework Convention on Tobacco Control (FCTC).[10] Since the Doggett Amendment has been in effect, the USTR has negotiated with eighteen countries to eliminate tariffs on processed tobacco leaf and cigarettes.[11] The United States continued to expand market access for tobacco-related services and extended investor rights to tobacco companies. Writing for the Council on Foreign Relations, Thomas Bollyky summarizes the legacy of twentieth century trade policy for tobacco:

CAMPAIGN FOR TOBACCO-FREE KIDS, PUBLIC HEALTH AND INTERNATIONAL TRADE VOLUME II: TARIFFS AND PRIVATIZATION 7-8 (2002); BENN MCGRADY, WORLD HEALTH ORGANIZATION, CONFRONTING THE TOBACCO EPIDEMIC IN A NEW ERA OF TRADE AND INVESTMENT LIBERALIZATION 26 (2012) ("[T]he literature has reached a point where it is safe to assume that there is a risk that trade liberalization and foreign direct investment may stimulate competition and consumption in the tobacco sector and consumer demand.").

[6] *See* Taylor et al., *supra* note 2, at 356-57.

[7] Consolidated Appropriations Act of 2010, Pub. L. No. 111-117, § 510, 123 Stat. 3034, 3151.

[8] Exec. Order No. 13193, 66 Fed. Reg. 7387 (Jan. 18, 2001).

[9] For a definition of coherence, see MCGRADY, *supra* note 5, at 79.

[10] Letter from Rep. Henry A. Waxman, Rep. Lloyd Doggett, and Sen. Richard Durban to President George W. Bush 2 (Nov. 18, 2003).

[11] *See, e.g.*, United States-Peru Trade Promotion Agreement, U.S.-Peru, ch. 2, Annex 2.3, Apr. 12, 2006, OFFICE OF THE U.S. TRADE REPRESENTATIVE [USTR], http://www.ustr.gov/trade-agreements/free-trade-agreements/peru-tpa/final-text [hereinafter U.S.-Peru FTA] (see item number 24012083; description: Cigarettes containing tobacco but not containing clove, paper-wrapped; base rate: $1.05/kg + 2.3%; category for reduction: A; negotiations to eliminate tariffs on processed tobacco leaf and cigarettes would eliminate the tariff under Annex 2.3.1(f)); U.S. INT'L TRADE COMM'N, HARMONIZED TARIFF SCHEDULE OF THE UNITED STATES (REV. 1) ch. 24 (2010) (see Heading number 2402.20.80; Article description: cigarettes containing tobacco, other: paper wrapped; Rate of duty: *general – $1.05/kg + 2.3%*; Rate of duty: *special – free*), *available at* http://www.usitc.gov/ publications/docs/tata/hts/bychapter/1001C24.pdf. For HTS8 classifications 24011021 to 24039990, see U.S.-Peru FTA, *supra*.

> Tobacco companies are aggressively exploiting trade and investment agreements to expand their market in low- and middle-income countries. Lower tariffs reduce the price of imported cigarettes in countries without good taxation systems to compensate. Multinational tobacco companies use dispute resolution . . . to block tobacco marketing and labeling regulations far more modest than those in the United States. Young women, who have historically smoked less than men in most parts of the developing world, are a major target of industry marketing campaigns.[12]

Now the U.S. government is leading negotiations among eleven countries on a Trans-Pacific Partnership Agreement (TPPA), "a true 21st century trade agreement" that "will reflect U.S. priorities and values."[13] The open question is whether a priority is to *support* tobacco trade as it contributes to 6 million deaths per year—one billion deaths in a twenty-first century epidemic.[14] The TPPA has six chapters that might provide material support to the tobacco industry.[15]

As trade agreements evolve through regional negotiations, the first global health treaty is emerging as a force to exercise, rather than restrict, regulatory authority. The FCTC does not directly regulate; it obligates countries to achieve a common foundation of taxes and tobacco-control measures.[16] A stream of recent work makes a strong case that trade agreements provide the "flexibilities" that governments need to implement the FCTC. This Article accepts that premise.

---

[12] Bollyky's summary recaptures the American Medical Association's findings from twenty-three years earlier, *before* the Doggett Amendment and E.O. 13193. *Compare* Memorandum from Thomas J. Bollyky on Forging a New Trade Policy on Tobacco, Council on Foreign Relations, Policy Innovation Memorandum No. 7, at 3 (Aug. 18, 2011) [hereinafter Bollyky Memo], *available at* http://www.cfr.org/trade/forging-new-trade-policy-tobacco/p25658, *with* COUNCIL ON SCIENTIFIC AFFAIRS, *supra* note 1, at 1-3.

[13] Press Release, USTR, Remarks by Ambassador Ron Kirk at the Washington International Trade Association (Dec. 15, 2009), http://www.ustr.gov/about-us/press-office/speeches/transcripts/2009/december/remarks-ambassador-ron-kirk-washington-inte.

[14] *Tobacco Fact Sheet N°339*, WORLD HEALTH ORG. (May 2012), http://www.who.int/mediacentre/factsheets/fs339/en/index.html#.

[15] While endorsing zero tariffs for all products, the Office of the U.S. Trade Representative told Representative Doggett that it plans to comply with the Doggett Amendment. *Ways and Means Members Press Marantis on Tobacco Treatment in TPP*, INSIDE U.S. TRADE, Dec. 15, 2011.

[16] WHO Framework Convention on Tobacco Control, *opened for signature*, June 16, 2003, 2302 U.N.T.S. 166 [hereinafter WHO FCTC]; *see also* World Health Organization Framework Convention on Tobacco Control, *Guidelines for Implementation of Article 5.3 of the WHO Framework Convention on Tobacco Control*, FCTC/COP3(7) (2008) [hereinafter WHO FCTC *Article 5.3 Guidelines*], *available at* http://www.who.int/fctc/protocol/guidelines/adopted/article_5_3/en/index.html (providing guidance on "the protection of public health policies with respect to tobacco control from commercial and other vested interests of the tobacco industry"); World Health Organization Framework Convention on Tobacco Control, *Guidelines for Implementation of Article 8 of the WHO Framework Convention on Tobacco Control*, FCTC/COP2(7) (2007), *available at* http://www.who.int/fctc/protocol/guidelines/adopted/article_8/en/index.html (providing guidance on "the protection from exposure to tobacco smoke"); World Health Organization Framework Convention on Tobacco Control, *Guidelines for Implementation of Article 11 of the WHO Framework Convention on Tobacco Control*, FCTC/COP3(10) (2008) [hereinafter WHO FCTC *Article 11 Guidelines*], *available at* http://www.who.int/fctc/protocol/guidelines/adopted/article_11/en/index.html (providing guidance on "packaging and labeling of tobacco products"); World Health Organization Framework Convention on Tobacco Control, *Guidelines for Implementation of Article 13 of the WHO Framework Convention on Tobacco Control*, FCTC/COP3(12) (2008) [hereinafter WHO FCTC *Article 11 Guidelines*], *available at* http://www.who.int/fctc/protocol/guidelines/adopted/article_13/en/index.html (providing guidance on "tobacco advertising, promotion and sponsorship"); Ruth Roemer, Allyn Taylor & Jean Lariviere, *Origins of the WHO Framework Convention on Tobacco Control*, 95 AM. J. PUB. HEALTH 936, 936-38 (2005).

Yet the frameworks for trade promotion and tobacco control intersect with many points of overlapping coverage. At most of these intersections, the tobacco industry lobbies or litigates to shrink the policy space to regulate. This Article explores options for protecting that space:

- Part II outlines how the TPPA might strengthen the trade framework to the benefit of the tobacco industry. It also highlights the role of international litigation in the industry's campaign to chill implementation of tobacco-control measures.
- Part III explains the options for Trans-Pacific Partnership (TPP) countries to safeguard tobacco-control measures—exclusions and exceptions—and how to evaluate them.
- Parts IV and V walk through the syntax of those safeguards. For each element of a safeguard, it parses the purpose, shortcomings, and alternatives to current practice. The focus is on the WTO's baseline health exception and alternatives for a tobacco exception, including one vetted by U.S. negotiators.
- The conclusion highlights the simplicity and effectiveness of exclusions compared to exceptions.

II. TPPA THREATS TO TOBACCO CONTROL

TPP leaders aim to do more than merely expand trade. The TPPA is portrayed as a blueprint for governance and economic integration,[17] "a model for . . . free-trade agreements in the future,"[18] and a "laboratory . . . [and] a stepping stone toward a broader, regionwide Free Trade Area of the Asia Pacific"[19] that surpasses the European Union (EU) in volume. The world's largest tobacco company supports the TPPA as a WTO-plus agreement; compared to the baseline agreements of the World Trade Organization (WTO), the TPPA increases market access for goods and services, strengthens trade and investment rules, and expands investor-state dispute settlement.[20]

A. WTO-PLUS CHAPTERS IN THE TPPA

1. Investment

The draft TPPA investment chapter provides for "Investor-State Dispute Settlement" (ISDS); it empowers foreign investors to directly challenge measures

---

[17] *See generally* Patrick B. Fazzone, *The Trans-Pacific Partnership – Towards a Free Trade Agreement of Asia-Pacific?*, 43 GEO. J. INT'L. L. 695, 734-43 (2012) (describing the TPP negotiations and stating that TPP will encourage free and open trade and investiment in the Asia-Pacific region).

[18] Press Release, Office of the U.S. Trade Representative, Joint Statement from Trans-Pacific Partnership Ministers Meeting on Margins of APEC in Big Sky, Montana (May 2011), http://www.ustr.gov/about-us/press-office/press-releases/2011/may/joint-statement-trans-pacific-partnership-ministers-me.

[19] JEFFREY J. SCHOTT, BARBARA KOTSCHWAR & JULIA MUIR, UNDERSTANDING THE TRANS-PACIFIC PARTNERSHIP 3 (2013).

[20] Philip Morris Int'l, Submission of Philip Morris International in Response to the Request for Comments Concerning the Proposed Trans-Pacific Partnership Trade Agreement 1-2 (2010) [hereinafter PMI Submission], *available at* http://www.smoke-free.ca/trade-and-tobacco/Resources/TPPA/PMI%20comments%20on%20TPP_USTR-2009-0041-0016.1%5B1%5D.pdf.

that adversely affect their investments.[21] Foreign investors use this process to seek monetary damages. PMI is using ISDS under similar agreements to seek "billions" of dollars from Australia and Uruguay for their tobacco-packaging laws.[22] PMI is also asking investment arbitrators to order governments to stop enforcing regulations.[23] The elements of these tobacco claims include:

- *Indirect expropriation*—PMI argues that packaging and branding restrictions significantly reduce the value of its trademarks.[24] Some TPP countries have limited the scope of expropriation, but their limiting language like "except in rare circumstances" is open to interpretation.[25] Annex 12-C of the draft investment chapter states that arbitrators determining whether an action constitutes indirect expropriation can consider "the extent to which the government action interferes with distinct, reasonable investment-backed expectations."[26] PMI argues that reliance on ability to use its trademarks was reasonable in light of national and international trademark protections.[27]
- *Fair and Equitable treatment (FET)*—Arbitrators have interpreted FET to entitle foreign investors to a "stable and predictable regulatory environment" that protects their "legitimate expectations" of profit. PMI argues that it expected to continue using established brands and trademarks in packaging to differentiate its products from tobacco as a mere commodity.[28] Some TPP countries have limited the scope of FET to state practice (of compensating investors),[29] but arbitrators have recently

---

[21] Draft Trans-Pacific Partnership Agreement, Investment Chapter (June 2012) [hereinafter Draft TPPA Investment Chapter], *available at* http://www.citizenstrade.org/ctc/wp-content/uploads/2012/06/tppinvestment.pdf; *Outlines of the Trans-Pacific Partnership Agreement*, OFFICE OF THE U.S. TRADE REPRESENTATIVE, http://www.ustr.gov/about-us/press-office/fact-sheets/2011/november/outlines-trans-pacific-partnership-agreement (last visited Mar. 2, 2013).

[22] Notice of Arbitration, Philip Morris Asia Ltd. v. Commonwealth, ¶ 8.3 (Nov. 21, 2011) [hereinafter Notice of Arbitration, PMA], *available at* http://www.ag.gov.au/Internationalrelations/InternationalLaw/Documents/Philip%20Morris%20Asia%20Limited%20Notice%20of%20Arbitration%2021%20November%202011.pdf; Request for Arbitration, FTR Holdings S.A. v. Uruguay, ICSID Case No. ARB/10/7 (Mar. 26, 2010) [hereinafter Request for Arbitration, FTR], *available at* http://www.smoke-free.ca/eng_home/2010/PMIvsUruguay/PMI-Uruguay%20complaint0001.pdf.

[23] *See* Notice of Arbitration, PMA, *supra* note 22, ¶ 8.2 ("PM Asia seeks an order for the suspension of enforcement of plain packaging legislation . . . ."); Request for Arbitration, FTR, *supra* note 22, ¶ 88 ("[T]he Claimants respectfully request that the Arbitral Tribunal order the suspension of the application [of the packaging laws].").

[24] Notice of Arbitration, PMA, *supra* note 22, ¶ 7.3; Request for Abitration, FTR, *supra* note 22, ¶ 82.

[25] Draft TPPA Investment Chapter, *supra* note 21, at art. 12.12, Annex 12-C, Annex 12-D.

[26] *Id.* Annex 12-C. This text applies to expropriation claims, not claims asserting a violation of fair and equitable treatment.

[27] Notice of Arbitration, PMA, *supra* note 22, ¶¶ 7.3-7.11; Request for Arbitration, FTR, *supra* note 22, ¶ 85.

[28] Notice of Arbitration, PMA, *supra* note 22, ¶¶ 7.6-7.8; Request for Arbitration, FTR, *supra* note 22, ¶¶ 84-85.

[29] 2004 Model Bilateral Investment Treaty art. 5.2, Office of the U.S Trade Representative, http://www.ustr.gov/sites/default/files/U.S.%20model%20BIT.pdf ("The concept . . . of 'fair and equitable treatment' . . . do[es] not require treatment in addition to or beyond that which is required by [customary international law], and do[es] not create additional substantive rights."); Draft TPPA Investment Chapter, *supra* note 21, at art. 12.6, Annex 12-B (discussing minimum standard of treatment and customary international law); *see also, e.g.*, Agreement Establishing the ASEAN-Australia-New Zealand Free Trade Area, ASEAN-Austl.-N.Z., ch. 11, art. 6(2)(c), Feb. 27, 2009, Austl. Dep't of Foreign Affairs & Trade, http://www.dfat.gov.au/fta/aanzfta/chapters/chapter11.html#fr6 [hereinafter ASEAN-Austl.-N.Z. FTA] ("[T]he concepts of 'fair and equitable

ignored the limiting language when interpreting U.S. trade agreements.[30] A number of panels cite other tribunals or the text of other investment treaties to support broad interpretations of FET.[31] In addition to its pending FET claims, PMI has targeted Singapore's delegation of authority to its Health Minister to ban marketing terms as a violation of investor expectations on grounds that it is overly broad.[32] Singapore's delegation is similar to that which the U.S. Congress granted to the U.S. Food and Drug Administration (FDA) in 2009.[33]

- *WTO obligations and Most-Favored Nation treatment* (*MFN*)—PMI argues that its expectations are shaped by countries' treaty obligations to protect trademark rights under the WTO's Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and the Paris Convention.[34] PMI continues to litigate this argument in spite of its

---

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.").

[30] R.R. Dev. Corp. v. Guatemala, ICSID Case No. ARB/07/23 80-91 (June 19, 2012).

[31] *See* Charles H. Brower, II, *Why the FTC Notes of Interpretation Constitute a Partial Amendment of NAFTA Article 1105*, 46 VA. J. INT'L L. 347, 358 n.66 (2006) ("[T]o the extent that treaties codify existing custom, their content should influence the application of [FET provisions] . . . . Alternatively, the widespread adoption of multilateral or bilateral treaties may reflect state practice sufficient to influence the development of custom . . . ."); Moshe Hirsch, *Sources of International Investment Law* 26-27 (International Law Association Study Group on the Role of Soft Law Instruments in International Investment Law, Research Paper No. 05-11, 2011), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1892564 ("An examination of decisions rendered by investment tribunals indicates that investment tribunals that pronounce various customary rules are inclined *not* to discuss the existence (or lack of) of the separate components of 'practice' and '*opinion juris'*, and that they frequently rely on decisions of international courts and tribunals . . . ."); Stephan W. Schill, The Sixteenth Treaty Forum Public Conference: Is There an Evolving Customary International Law on Investment?, *From Sources to Discourse: Investment Treaty Jurisprudence as the New Custom?*, 2 (May 6, 2011) ("Investment treaty tribunals . . . generate and implement a multilateral structure for international investment relations . . . not by reference to customary international law, but by referencing their own jurisprudence.").

[32] PMI Submission, *supra* note 20, at 3 (the Singapore delegation of authority includes "[b]road language that provides the Minister with extensive discretionary power to ban a certain term, without stipulating the basis upon which this may be done").

[33] *See* Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31 § 101(b)(3), 123 Stat. 1776, 1796 (2009) (codified as amended at 21 U.S.C. § 387f). Section 906(d)(1) of the Federal Food, Drug, and Cosmetic Act, as amended by the Family Smoking Prevention and Tobacco Control Act, provides:

> The Secretary may by regulation require restrictions on the sale and distribution of a tobacco product, including restrictions on the access to, and the advertising and promotion of, the tobacco product, if the Secretary determines that such regulation would be *appropriate for the protection of the public health*. The Secretary may by regulation impose restrictions on the advertising and promotion of a tobacco product consistent with and to the full extent permitted by the first amendment to the Constitution. The finding as to whether such regulation would be appropriate for the protection of the public health shall be determined with respect to the risks and benefits to the population as a whole, including users and nonusers of the tobacco product, and taking into account—
>
> (A) the increased or decreased likelihood that existing users of tobacco products will stop using such products; and
>
> (B) the increased or decreased likelihood that those who do not use tobacco products will start using such products."

Id. (emphasis added).

[34] Notice of Arbitration, PMA, *supra* note 22, ¶ 7.3; Request for Arbitration, FTR, *supra* note 22, ¶¶ 82-83; s*ee also* Memorandum from Lalive on Why Plain Packaging is in Violation of WTO Members' International Obligations under TRIPS and the Paris Convention to Philip Morris Int'l Mgmt. S. Afr. ¶ 16 (July 23, 2009). *See generally* Legal Opinion prepared by Carla A. Hills, Mudge

> rejection by the World Intellectual Property Organization.[35] PMI also invokes MFN clauses to gain treatment provided in other investment agreements. The draft TPP chapter excludes procedural treatment from MFN, but it still applies to the *substantive* provisions of other treaties—present or future—that protect investments. For example, these might include investment treaties, evolving FTA chapters, and disciplines on domestic regulation that apply to investments (commercial presence) in delivery of services.[36]

Investor rights are distinctly WTO-plus, and the TPPA chapter expands preexisting investment agreements among TPP countries in at least two respects. First, it could provide ISDS where it does not yet exist. For example, Australia is defending against PMI's investment claim under the Australia-Hong Kong treaty on jurisdictional grounds (in addition to substantive grounds). The TPPA chapter could give PMI, a U.S. investor, standing to challenge the law of a TPP country; Australia has anticipated that threat by excluding itself from ISDS provisions of the investment chapter.[37]

2. Intellectual Property

In response to PMI's investment claims, health advocates hold fast to their analysis that trademark treaties provide no right to use a trademark, particularly when marketing can be shown to endanger health. Even if investment agreements were to incorporate obligations in other treaties, no such obligation exists with respect to tobacco trademarks.[38] This debate is attracting political interest, as

---

Rose Guthrie Alexander & Ferdon, for R.J. Reynolds Tobacco Co. and Philip Morris Int'l, Inc. with Regard to Plain Packaging of Tobacco Products Requirement Under International Agreements (May 3, 1994).

[35] *See* Eric Crosbie & Stanton A. Glantz, *Tobacco Industry Argues Trademark Laws and International Treaties Preclude Cigarette Health Warning Labels, Despite Consistent Legal Advice that the Domestic Argument is Invalid*, TOBACCO CONTROL (Nov. 24, 2012), http://tobaccocontrol.bmj.com/content/early/2012/11/23/tobaccocontrol-2012-050569.full.html.

[36] *See* Room Document from New Zealand to Working Party on Domestic Regulation, *The Necessity Test in the Disciplines on Domestic Regulation*, RD/SERV/39 (Feb. 9, 2011) [hereinafter N.Z., *Necessity Test*]; GARY CLYDE HUFBAUER ET AL., PETERSON INST. FOR ECON., POLICY BRIEF NO. 12-10, FRAMEWORK FOR THE INTERNATIONAL SERVICE AGREEMENT 43 (Apr. 2012); Doug Palmer, *U.S. Says to Negotiate Services Trade Pact with EU, Japan, Others*, REUTERS, Jan. 15, 2013, *available at* http://www.reuters.com/article/2013/01/15/us-usa-trade-services-idUSBRE90E0TI20130115.

[37] *See* Draft TPPA Investment Chapter, *supra* note 21, sec. B n.20 (referring to Section B of the Draft Chapter on Investor-State Dispute Settlement); AUSTL. GOV'T DEP'T OF FOREIGN AFFAIRS & TRADE, GILLARD GOVERNMENT TRADE POLICY STATEMENT: TRADING OUR WAY TO MORE JOBS AND PROSPERITY 14 (Apr. 2011) ("The Government has not and will not accept provisions that limit its capacity to put health warnings or plain packaging requirements on tobacco products . . . .").

[38] *See, e.g.*, JANE KELSEY, 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, 29-31 (2012); Beatrice Lindstrom, *Scaling Back TRIPS-Plus: An Analysis of Intellectual Property Provisions in Trade Agreements and Implications for Asia and the Pacific*, 42 J. INT'L L. POL. 917 (2010); MCGRADY, *supra* note 5, at 37-38, 94; Benn McGrady, *TRIPS and Trademarks: The Case of Tobacco*, 3 WORLD TRADE REV. 53, 68-69 (2004); Andrew D. Mitchell, *Australia's Move to the Plain Packaging of Cigarettes and Its WTO Compatibility*, 5 ASIAN J. WTO INT'L HEALTH L. & POL'Y 405, 409-12; Andrew D. Mitchell & Tania Voon, *Patents and Public Health in the WTO, FTAs and Beyond: Tension and Conflict in International Law*, 43 J. WORLD TRADE 571, 580-81 (2009); Tania Voon, *Flexibilities in WTO Law to Support Tobacco Control Regulation*, 39 AM. J.L. & MED. 199, 213-17 (2013).

business associations have rallied to tobacco's cause, declaiming plain packaging as "mandated trademark destruction."[39]

This debate becomes relevant to the TPPA because the dairy industry persuaded the USTR to propose what the tobacco industry seeks to attain—a right in the TPPA to use certain trademarks.[40] Article 2.22 of the draft intellectual property (IP) chapter provides that parties "*shall permit the registration, of* signs or indications . . . that reference a geographical area that is not the true place of origin of the product."[41] This language is designed to enable Kraft to sell Parmigiano, Romano, and Provolone cheeses.[42] It also appears to cover Marlboro, Winston, and Salem. The draft chapter also expands protection of geographical indications to include use of distinctive scripts, letters, figurative elements (drawings, maps, etc.), and colors.[43]

---

[39] Press Release, Nat'l Foreign Trade Council, US Business Groups Issue Statement Expressing Deep Concern Following Announcement by the New Zealand Government of a Public Consultation to Review the Mandated Destruction of Trademarks and Branding in the Tobacco Sector (Apr. 20, 2012), http://www.nftc.org/newsflash/newsflash.asp?Mode=View&id=236&articleid=3466&category=All.

[40] New Initiative Aims to Expand Reach of Fight to Counteract EU on GIs, INSIDE U.S. TRADE, Mar. 30, 2012, at 10-11; *U.S., N.Z., Australia, Chile Work to Counter EU Initiative on GIs In TPP*, INSIDE U.S. TRADE, Mar. 16, 2012, at 19. The Dominican Republic recently raised a similar argument during the TRIPS geographical indications (GI) negotiations that EU-type IP protections are necessary to allow it and other developing tobacco-producing nations the ability to exploit GIs like "Dominican Cigars," and that plain packaging laws stand in the way of this. *See* Int'l Ctr. for Trade & Sustainable Dev., *Australian Cigarette Packaging Law Hits a Nerve with Developing Countries*, 15 BRIDGES WEEKLY TRADE NEWS DIGEST, June 15, 2011, *available at* http://ictsd.org/i/news/bridgesweekly/108710/.

[41] Draft Trans-Pacific Partnership Agreement, Intellectual Property Chapter, art. 2(22) (Feb. 10, 2011) [hereinafter Draft TPPA IP Chapter], *available at* http://keionline.org/sites/default/files/tpp-10feb2011-us-text-ipr-chapter.pdf. All tobacco companies have to do to use this type of protection is to make sure that not all of the tobacco actually originates from the place referenced in the product name. The full text reads:

> Art. 2:22 – Each Party shall permit the use, and as appropriate, shall provide for the registration, of signs or indications that identify services or products other than wines or spirits, and that reference a geographical area that is not the true place of origin of the services or of the product, provided that:
> (a) the sign or indication is used in a manner that does not mislead the public as to the geographical origin of the goods or services;
> (b) use of the sign or indication does not constitute an act of unfair competition within the meaning of Article 10*bis* of the Paris Convention (1967);
> (c) use of the sign or indication would not cause a likelihood of confusion with respect to an earlier-in-time similar or identical trademark or geographical indication that is used for identical or similar goods or services; and
> (d) where a request for registration is concerned, the sign or indication is not a generic term for the associated goods or services.

Id.

[42] The dairy industry sees Article 2(22) protections as an opportunity to block the EU's attempt to expand the WTO's TRIPS to protect products with place names as GIs. *See* BERNARD O'CONNOR, THE LAW OF GEOGRAPHIC INDICATIONS 50-51 (2006); DANIELE GIOVANNUCCI ET AL., INT'L TRADE CTR., GUIDE TO GEOGRAPHICAL INDICATIONS: LINKING PRODUCTS AND THEIR ORIGINS 16 (2009), *available at* http://www.intracen.org/policy/geographical-indications/. Compare the proposed U.S. language with proposed language for the EU-ASEAN FTA, which provides for "legal provisions laying down that registered names . . . (b) is protected against: . . . any misuse, imitation or evocation, even if the true origin of the product is indicated or if the protected name is translated or accompanied by an expression such as 'style,' 'type,' 'method,' 'as produced in', 'imitation' or 'similar.'" Draft European Union-ASEAN Free Trade Agreement, Intellectual Property Chapter, art. 7(6)(b) (2008) *available at* http://www.bilaterals.org/spip.php?article14281.

[43] The draft IP chapter of the TPPA expands upon TRIPS in protecting elements of GIs:

> For purposes of this Chapter, geographical indications means indications that identify a good as originating in the territory of a Party, or a region or locality in that territory, where a given quality, reputation, or other characteristic of the good is essentially attributable to its geographical origin. Any sign or combination of signs (such as words,

As noted below in Part V, any direct threat that Article 2.22 poses to tobacco controls can be cured by adding tobacco products to the article's terms of exclusion.[44]

3. Cross-border services and subsidiaries

Every sale of a tobacco product results from related services such as packaging, wholesale and retail distribution, advertising, transport, bulk storage, etc.[45] TPP countries have already made varying commitments to comply with rules of the WTO's General Agreement on Trade in Services (GATS).[46] Against this baseline, the TPPA's chapter on cross-border services will (1) replicate the GATS rules on market access and national treatment; (2) potentially add to GATS rules on domestic regulation; and then (3) expand the coverage to sectors that are not covered under GATS commitments. Notwithstanding its cross-border name, this chapter may also apply to measures that regulate purely domestic advertising, distribution, and other services by subsidiaries of foreign holding companies.[47]

- *Market access prohibitions*—The FCTC requires countries to adopt bans on tobacco advertising to the extent that their constitutions allow.[48] The

---

including geographical and personal names, as well as letters, numerals, figurative elements, and colors, including single colors), in any form whatsoever, shall be eligible to be a geographical indication. The term 'originating' in this chapter does not have the meaning ascribed to that term in Article__._ (Definitions).

Draft TPPA IP Chapter, *supra* note 41, at art. 2 n.4. This language in the TPPA provides evidence on the meaning of "signs" or "indications." Notably, it expands on the TRIPS trademark possibilities to include single colors. *See* Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, art. 15(1); *see also* THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 320 (1999), 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994) (referring to "figurative elements and combinations of colours as well as any combination of such signs").

[44] Draft TPPA IP Chapter, *supra* note 41, at art. 2.22 (explaining that the remedy would be to insert tobacco in the phrase, "products other than wines or spirits").

[45] *See* KELSEY, *supra* note 38, at 36.

[46] General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 284 (1999), 1869 U.N.T.S. 183, 33 I.L.M. 1167 (1994) [hereinafter GATS]; *see* MCGRADY, *supra* note 5, at 39.

[47] Cross-border services is mode 1 in the GATS lexicon; the other three modes of supply covered under GATS are: (2) Consumption abroad; (3) Commercial presence; and (4) Presence of natural persons. GATS, *supra* note 46, at art. 1.2. Article 12.1.3(a) of the United States-Korea FTA provides, "Articles 12.4 [Market Access], 12.7 [Domestic Regulation], and 12.8 [Transparency] shall also apply to measures adopted or maintained by a Party affecting the *supply of a service in its territory by a covered investment*." United States-Korea Free Trade Agreement, U.S.-Kor., ch. 12, art. 12.1.3(a), *effective* Mar. 15, 2012, Office of the U.S. Trade Representative, http://www.ustr.gov/trade-agreements/free-trade-agreements/korus-fta/final-text [hereinafter U.S.-Kor. FTA] (emphasis added). The U.S.–Korea approach expands upon the U.S.-Peru FTA, in which Article 11.14 (Definitions) defines "cross-border trade in services" as "the supply of a service: (a) from the territory of one Party into the territory of another Party; (b) in the territory of one Party by a person of that Party to a person of another Party; or (c) by a national of a Party in the territory of another Party; but *does not include the supply of a service in the territory of a Party by a covered investment*." United States-Peru Free Trade Agreement, U.S.-Peru, ch.11, art. 11.14, Apr. 12, 2006, Office of the U.S. Trade Representative, http://www.ustr.gov/trade-agreements/free-trade-agreements/peru-tpa/final-text [hereinafter U.S.-Peru FTA] (emphasis added).

[48] WHO FCTC, *supra* note 16, at art. 13.2 (addressing tobacco advertising, promotion and sponsorship); *see also, e.g.*, Tobacco (Control of Advertisements and Sale) Act, 2010, c. 309, §§ 3-4 (Sing.) [hereinafter Tobacco Act, Singapore] (banning advertising and foreign newspaper advertising); *Tobacco Advertising Prohibition Act 1992* (Cth) ss 13-14, 16-17, 23 (Austl.) (prohibiting broadcast advertising, published advertising, and import of periodicals with tobacco advertising, and permits

GATS Market Access rules prohibit quotas.[49] The WTO's Appellate Body has interpreted the rules to prohibit a full or partial ban; its reasoning is that if a type of service is banned, the ban is equivalent to a quota of zero ("zero quota").[50] Most TPP countries, however, do not have commitments to follow the GATS Market Access rules for cross-border (Mode 1) distribution of tobacco products.[51] Consequently, the TPPA would expand their coverage under Market Access.

- *Limits on domestic regulation*—Most countries require licensing of tobacco service providers (e.g., retail distributors), which can play a role in prohibiting sales (e.g., Internet sales).[52] The TPPA services chapter *might* follow the model of FTAs that require a measure to be "not more burdensome than necessary to ensure the quality of the service."[53] This is a WTO-plus element, which New Zealand and Australia have advocated without success in WTO negotiations to set limits on domestic regulation.[54] This obligation not only requires *necessity* (see Part IV

---

point of sale advertising to be governed by state law, including point of sale advertising on the Internet).

[49] GATS, *supra* note 46, at art. XVI:2 (addressing market access).

[50] The United States argued that the restrictions were "on the character of the activity supplied, not as quantitative limits," but the panel rejected this argument. Panel Report, *United States–Measures Affecting the Cross-border Supply of Gambling and Betting Services*, ¶ 6.328, WT/DS285/R (Apr. 30, 2004). The Appellate Body upheld the panel's reasoning: "[a prohibition on one, several or all means of delivery crossborder] is a 'limitation on the number of service suppliers in the form of numerical quotas' within the meaning of Article VI:2(a) because it totally prevents the use by service suppliers of one, several or all means of delivery that are included in mode 1." Appellate Body Report, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶ 223, WT/DS285/AB/R (Apr. 20, 2005). A debate continues among analysts about whether prohibitions are qualitative rather than quantative limits on services. *See, e.g.*, Eric H. Leroux, *Eleven Years of GATS Case Law: What Have We Learned?*, 10 J. INT'L ECON. L. 749, 775 (2007); Lode Van Den Hende & Herbert Smith, *GATS Article XCI and National Regulatory Sovereignty: What Lessons to Draw From US-Gambling*, *in* THE WORLD TRADE ORGANIZATION AND TRADE IN SERVICES 461, 466 (Kern Alexander & Mads Andenas eds., 2008).

[51] *Services Database*, WORLD TRADE ORG., http://tsdb.wto.org/default.aspx (last visited Mar. 3, 2013) (select "member" or "sector" from drop down menus to retrieve reports of which members have made commitments in a specific sector; results are presented as a summary table, with links to the text of the commitments; select 04. Distribution Services).

[52] *See, e.g.*, Tobacco Act, Singapore §§ 3-4 (prohibiting retail sales except in licensed retail outlets); *Id.* § 18.

[53] *See, e.g.*, Trans-Pacific Strategic Economic Partnership, Brunei-Chile-N.Z.-Sing.-Chile, art. 12.10.2(b), July 18, 2005, N.Z. Ministry of Foreign Affairs & Trade, http://www.mfat.govt.nz/Trade-and-Economic-Relations/2-Trade-Relationships-and-Agreements/Trans-Pacific/index.php ("[E]ach party *shall ensure* that [an authorizing, licensing or qualification measure] . . . is not more burdensome than necessary to ensure the quality of the service") (emphasis added); New Zealand-Malaysia Free Trade Agreement, N.Z.-Malay., § 8.18.2(b), Oct. 26, 2009, N.Z. Ministry of Foreign Affairs & Trade, http://www.mfat.govt.nz/Trade-and-Economic-Relations/2-Trade-Relationships-and-Agreements/Malaysia/index.php - text [hereinafter N.Z.-Malay. FTA]; U.S.-Peru FTA, *supra* note 47, art. 11.7(2) ("[E]ach Party shall *endeavor to ensure* . . . that [qualificatiions, technical standards, and licensing] measures are: . . . (b) not more burdensome than necessary to ensure the quality of the service") (emphasis added). *Compare* U.S.-Kor. FTA, *supra* note 47, art. 12.7, (relating to domestic regulation but containing no necessity language), *with* Agreement Establishing the ASEAN-Australia-New Zealand Free Trade Area, ASEAN-Austl.-N.Z., art. 10.2.2, Jan. 1, 2010, N.Z. Ministry of Foreign Affairs & Trade, http://www.asean.fta.govt.nz/preamble/ [hereinafter ASEAN-Austl.-N.Z. FTA] (pertaining to domestic regulation and including necessity language that depends on the outcome of WTO negotiations).

[54] *See* N.Z., *Necessity Test*, *supra* note 36; Communication from Australia, Chile, Hong Kong, China, New Zealand and the Separate Customs Territory of Taiwan, Kinmen and Matsu, *Article VI:4 Disciplines – Proposal for Draft Text*, JOB(06)/193 (June 19, 2006) (produced by the Working Party on Domestic Regulation, World Trade Organization). *See generally* Robert Stumberg, Plain Language

below), it also limits the objective of regulations to ensuring the quality of services, as compared with a broader objective like protecting public health. In opposition at the WTO, countries that usually support trade liberalization (Brazil, Canada, and the United States) asserted that a necessity test "threatens the crucial discretion that regulators must maintain to . . . take into account legitimate policy objectives."[55]

- *Expanded coverage of sectors*—The most likely WTO-plus element of the services chapter is its expansion of coverage. GATS rules like the Market Access prohibition on quotas apply to a "positive list" of sectors listed in a country's schedule of commitments.[56] Unlike GATS, the TPPA is a "negative list" commitment; it covers a sector unless a country *excludes* that sector in its schedule.[57] The option to exclude applies to several rules linked to discrimination in services and investment; it does not apply to disciplines on domestic regulation, investment rules on expropriation, or fair and equitable treatment.[58]

4. Regulatory Coherence

The draft Regulatory Coherence Chapter would create a TPP Committee on Regulatory Coherence to promote a "wide range of stakeholder input in . . . regulatory measures."[59] It would be required to ensure that interested persons have the opportunity "to provide views on approaches to enhance regulatory coherence."[60] The chapter also mandates a national coordinating body for "systemic regulatory reform" that among other objectives promotes collaboration with industry stakeholders.[61]

Some health advocates feel that systemic collaboration with the tobacco industry undermines the spirit of FCTC Article 5.3, which provides that "Parties shall act to protect [tobacco-control] policies from commercial and other vested interests of the tobacco industry."[62] The World Health Assembly formally urged nations "to be alert to any efforts by the tobacco industry to continue its subversive practice and to assure the integrity of health policy development in any WHO [World Health Organization] meeting and in national governments."[63]

Guide: GATS Negotiations on Domestic Regulation (May 19, 2010) (unpublished paper), *available at* http://www.boell.org/downloads/Stumberg_-_Guide_to_GATS_Dom_Reg_5-19-10.pdf.

[55] Communication from Brazil, Canada and the United States, Views on the Issue of the Necessity Test in the Disciplines on Domestic Regulation, ¶ 2, S/WPDR/W/44 (Mar. 22, 2011).

[56] The schedule of GATS commitments for each TPP country is available through *Services Database*, WORLD TRADE ORG., http://tsdb.wto.org/ (last visited Mar. 18, 2013).

[57] *See, e.g.*, United States-Australia Free Trade Agreement, U.S.-Austl., art. 12.6, Annex II, Jan. 1, 2005, Office of the U.S. Trade Representative, http://www.ustr.gov/trade-agreements/free-trade-agreements/australian-fta/final-text [hereinafter U.S.-Austl. FTA] (discussing non-conforming measures in Article 12.6 and discussing the exclusion of tobacco distribution from Market Access prohibitions but not from tobacco advertising in Annex II, which is a schedule of Australia, Market Access). *See infra* Part 5 for discussion on exclusions.

[58] *See* U.S.-Peru FTA, *supra* note 47, at art. 11.6.2, Annex II § 1 (addressing non-conforming measures in Article 11.6.2 and including Explanatory Notes in Annex II § 1).

[59] Draft Trans-Pacific Partnership Agreement, Regulatory Coherence Chapter, art. X.1.2.d (Mar. 4, 2010) [hereinafter Draft TPPA Regulatory Coherence Chapter].

[60] *Id.* at art. X.6.

[61] *Id.* at art. X.2.

[62] KELSEY, *supra* note 38, at 15-16.

[63] Draft World Health Assembly Res. 54.18, World Health Organization, A54/52, Agenda item 13.5 ¶ 1 (May 21, 2001); *see also* WORLD HEALTH ORG., TOBACCO INDUSTRY INTERFERENCE WITH

The Regulatory Coherence Chapter would work cumulatively with the transparency, Technical Barriers to Trade (TBT), services, and other TPPA chapters to monitor domestic policies that are not "coherent" with trade liberalization. This chapter would also promote international scrutiny of agency rulemaking and Regulatory Impact Assessments that support industry engagement in rulemaking.[64] These elements are modeled after administrative procedures that tobacco companies are using to challenge tobacco-control measures in the domestic courts of New Zealand.[65]

5. Technical Barriers to Trade

On the surface, the TPPA Chapter on TBT seems an unlikely chapter to add WTO-plus content to the TBT Agreement. Two developments, however, may prove to be controversial: an industry request to limit the influence of the WHO and a proposal by Malaysia to block mandates to disclose formulas and contents.

Influence of the WHO—In late 2012, a coalition of business associations stridently urged the U.S. government to oppose efforts of the WHO to coordinate with the WTO, to discourage "policymakers [from taking] health policy considerations into account when formulating trade policy," and to block interpreting WTO obligations in light of FCTC obligations.[66] One place where the USTR could heed the business associations' request is the TBT chapter, which regulates how TPP governments cooperate when setting regulations, standards, or guidelines, such as those adopted under the FCTC.[67]

Disclosure of contents—FCTC Article 10 obligates parties to adopt "measures requiring manufacturers and importers of tobacco products to disclose to governmental authorities information about the contents and emissions of tobacco products."[68] It calls for public disclosure of toxic contents and emissions.[69] Eight TPP countries have adopted measures that require tobacco manufacturers to disclose the contents of their products.[70] For example, legislation adopted by the U.S. Congress in 2009 requires the FDA to first approve any change in formulas before

---

TOBACCO CONTROL 2-3 (2008), *available at* http://whqlibdoc.who.int/publications/2008/9789241597340_eng.pdf.

[64] *See* Jane Kelsey, *The Trans-Pacific Partnership Agreement: A Gold-Plated Gift to the Global Tobacco Industry?*, 39 AM. J.L. & MED. 237, 246-52 (2013).

[65] *See, e.g.*, Imperial Tobacco N.Z. Ltd., Submission to the Commerce Select Committee on the Regulatory Standards Bill, ¶ 2.6 (2011); KELSEY, *supra* note 38, at 43.

[66] Letter from the Emergency Comm. for Am. Trade, the Nat'l Ass'n of Mfrs., the Nat'l Foreign Trade Council, the U.S. Chamber of Commerce, the U.S. Council for Int'l Bus., to Hon. Hillary Rodham Clinton, Sec'y of State 2-3 (Nov. 8, 2012) [hereinafter WHO letter to Clinton].

[67] *See, e.g.*, U.S.-Kor. FTA, *supra* note 47, arts. 9.3, 9.8, 9.10 (discussing "International Standards" in Article 9.3, "Committee on Technical Barriers to Trade" in Article 9.8, and "Definitions – Good regulatory practice" in Article 9.10).

[68] WHO FCTC, *supra* note 16, at 9.

[69] *Id.* Article 9 authorizes the FCTC Conference of Parties to adopt guidelines for testing and measuring the contents and emissions of tobacco products. *Id.*

[70] TPP countries that report having adopted disclosure measures include: Australia, Brunei, Canada, Chile, Mexico, New Zealand, and the United States, and Vietnam. Not on this list are Malaysia and Peru. For each of these countries, see WORLD HEALTH ORG. FRAMEWORK CONVENTION ON TOBACCO CONTROL, PARTIES' REPORTS, *available at* http://www.who.int/fctc/reporting/party_reports/en/index.html (last visited Mar. 4, 2013).

tobacco companies may market their products.[71] The FDA has yet to approve the 3500 filings in the first several years under this law.[72]

Reports surfaced in early 2013 that Malaysia proposed (with the United States in support) that the TBT chapter prevent TPP governments from requiring companies to disclose proprietary formulas before they could market their products in that country.[73] Depending on how it is drafted, this proposal could be at odds with FCTC Article 10 and the U.S. Tobacco Control Act.

6. Tariffs

As noted above, there is consistent empirical evidence that lowering high tobacco tariffs results in lower prices, more aggressive marketing, and greater tobacco use in the range of 10% within a decade of liberalizing trade. Nonetheless, TPPA negotiators aim to reduce tobacco tariffs to zero. Some TPP countries have high WTO tariff bindings for cigarettes: Singapore's tariff is $115 per kilogram, and Vietnam's is 135%.[74] Applied rates are much lower, in the range of zero (Australia, Brunei, Singapore), to 5% to 6% (Chile, New Zealand) to 9% (Peru).[75]

Vietnam is the outlier with applied cigarette tariffs of 100%.[76] The rate of smoking in Vietnam is high for men (47.4%) but very low for women (1.4%).[77] This disparity is ripe for exploitation by foreign tobacco companies. Reducing tariffs is likely to result in aggressive gender-based marketing, as was the case in Japan, South Korea, and Taiwan after tariff reduction in those countries.[78] One commentator recommends excluding Vietnam from the goal of zero tariffs because "[e]ntry of multinational tobacco companies and marketing tactics into Vietnam would be disastrous."[79]

B. OVERLAP EFFECTS

The potential threats outlined above focus on individual TPPA chapters. In addition, measures are often covered by *multiple* chapters, which could result in one or more overlap effects.

---

[71] Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, sec. 101(b)(3), § 910, 123 Stat. 1776, 1807, 1810 (2009) (codified as amended at 21 U.S.C. § 387j) (discussing "Application for review of certain tobacco products" and the "Basis for finding").

[72] Debbie Elliott, *Cigarette Makers Frustrated as Product Approvals Stall*, NAT'L PUB. RADIO (Jan. 11, 2013), http://www.npr.org/2013/01/11/169158843/cigarette-makers-frustrated-as-product-approvals-stall.

[73] *U.S. Backs Malaysian TPP Proposal Aiming to Protect Product Formulas*, INSIDE U.S. TRADE, Jan. 9, 2013, at 31.

[74] *WTO Tariff Analysis Online*, WORLD TRADE ORG., http://tariffdata.wto.org/ (last visited Mar. 9, 2013) (click "Next," select country of interest in the search box for "Reporters" and select "bound tariffs" when the menu expands, type in "tobacco" and click "find" in the "Products" search box, choose "240220 Cigarettes containing tobacco" product, click "Next," then download the document).

[75] *Id.*

[76] *Id.*

[77] WORLD HEALTH ORG., WHO REPORT ON THE GLOBAL TOBACCO EPIDEMIC, 2011: VIET NAM 1, *available at* http://www.who.int/tobacco/surveillance/policy/country_profile/vnm.pdf.

[78] U.S. GEN. ACCOUNTING OFFICE, GAO/NSIAD-90-190, TRADE AND HEALTH ISSUES: DICHOTOMY BETWEEN U.S. TOBACCO EXPORT POLICY AND ANTISMOKING INITIATIVES 12 (1990). Targeting women has been particularly notable in Japan, where an industry-backed pledge against tobacco advertising to women replaced a government prohibition when the market was liberalized. Since then, the tobacco industry has introduced new brands and major advertising targeting women. Kaori Hanjo & Ichiro Kawachi, *Effects of Market Liberalization on Smoking in Japan*, 9 TOBACCO CONTROL 193, 193 (2000).

[79] Bollyky Memo, *supra* note 12, at 3.

Multiple grounds to challenge—First, a measure can be challenged under multiple rules and legal arguments, and while some chapters have a health exception (e.g., services), some do not (e.g., investment). MFN clauses may even extend the overlap to more favorable treatment in other agreements, particularly if those agreements are more specific.[80] The overlap increases the threat of international litigation and possibly the chilling effect on adopting a measure.

Difficulty reserving a measure—Second, the overlap makes it harder for negotiators to reserve the right to regulate ("take a reservation") with a particular measure. For example, negotiators of the chapter on services can take a reservation under the market access rule, but they cannot do so under disciplines on domestic regulation or the investment rules on indirect expropriation or fair and equitable treatment.

Forum shopping—Third, the overlap promotes forum shopping. Tobacco companies have urged and financed governments to use trade rules to challenge tobacco-control measures of another country.[81] Yet even if governments choose not to help the industry, tobacco companies can challenge the measure under the investment chapter.[82] Not only do investment chapters give investors a forum, they give investors a say in the choice of arbitrators. An investor recently tried to nominate an arbitrator who had investor-friendly views of MFN treatment.[83]

Lobbying to chill stronger tobacco control—In his case studies of Australia, Canada, and the TPPA, Benn McGrady documents the tobacco industry's strategy to resist stronger regulation: overlapping coverage magnifies the threat of litigation and builds solidarity with business allies.[84] The industry then spends this legal and political capital on a global lobbying strategy to chill the progress of trendsetting measures.[85]

C. STRATEGIC LITIGATION

In 2010, PMI's chairman reiterated, "We will continue to use all necessary resources . . . and where necessary litigation, to actively challenge unreasonable regulatory proposals."[86] Selecting targets like Uruguay is "a means of dissuading other counties from implementing similarly strong measures or delaying such action."[87]

The industry has been candid in saying that its tactic is to "spare no cost in exhausting their adversaries' resources."[88] It can exhaust resources so long as it has a

---

[80] *See* MTD Equity Sdn. Bhd. v. Chile, ICSID Case No. ARB/01/7, Award, ¶ 104 (May 25, 2004). MFN is discussed further below. *See infra* text accompanying notes 152-54 (Threat of MFN claims).

[81] WORLD HEALTH ORG., *supra* note 63, at 13.

[82] Australia argues that PMI acquired its interest in Philip Morris Asia (PMA) to come within the jurisdiction of the Australia-Hong Kong bilateral investment treaty. Australia's Respose to the Notice of Arbitration, *Philip Morris Asia Ltd. v Commonwealth*, ¶ 30 (Dec. 21, 2011).

[83] Luke Eric Peterson, *UNCITRAL Tribunal Chaired by Christopher Greenwood Declines to Let Claimant Use MFN Clause to Detour Around Highly-Restrictive Arbitration Clause*, INVESTMENT ARB. REP., Jan. 22, 2013, at 20.

[84] MCGRADY, *supra* note 5, at 84-97.

[85] *Id*.

[86] World Lung Found., *Legal Challenges and Litigation*, TOBACCO ATLAS, http://www.tobaccoatlas.org/solutions/legal_litigation/text/ (last visited Apr. 11, 2013) (quoting Louis Camilleri, Chairperson and CEO, Philip Morris International).

[87] MCGRADY, *supra* note 5, at 91.

[88] Robert L. Rabin, *A Sociological History of the Tobacco Tort Litigation*, 44 STAN. L. REV. 853, 857 (1992); *see also* Brief for Tobacco Control Legal Consortium and Tobacco Control Resource

case based on uncertainty of the outcome;[89] it need not be a winning case. Internal documents show that before starting litigation, industry strategists do not expect to win.[90] For example, the industry has lobbied and threatened litigation based on trademark arguments long after those arguments were rejected by the World Intellectual Property Organization.[91]

PMI is paying its own litigation expenses against Uruguay and Australia. It is also paying for Sidley Austin to represent the Dominican Republic in its WTO claim against Australia, while British American Tobacco (BAT) is paying the legal expenses for Ukraine and Honduras in their WTO claims against Australia.[92]

The government of New Zealand estimates that the cost of investment arbitration is in the range of $2.4 to $4.8 billion U.S. dollars (USD) (which is $3 to $6 billion New Zealand dollars (NZD)), and the cost of defending a WTO dispute is in the range of $1.26 to $1.68 million USD ($1.5 to $2 million NZD).[93] A recent survey by the Organization for Economic Co-operation and Development (OECD) found that legal and arbitration costs averaged over $8 million USD, exceeding $30 million in some cases; tribunals usually required parties to share tribunal and administrative costs equally and absorb their own legal costs. [94] Based on these reports, the cost of international dispute settlement is upwards of $1 million USD per year over a multi-year process.

Daunted by paying "contract lawyers at $1,500 an hour for several years," Uruguay's President Jose Mujica almost settled PMI's claim. He decided to defend Uruguay's laws only after former President Vazquez voiced a protest,[95] and the Bloomberg Philanthropies helped finance Uruguay's defense team.[96]

Center as Amici Curiae Supporting Petitioners, Engle v. Liggett Group, Inc., 945 So.2d 1246 (Fla. 2004) (No. SC03-1856), 2004 WL 1868929.

[89] F. Rojid et al., *No Coverage for Tobacco Industries with Regard to Tobacco-Control Measures—The Future of International Investment Agreements?*, TRANSNAT'L DISPUTE MGMT., Nov. 2012, at 10 ("The cost of commencing a dispute goes even beyond that for host countries: whenever the outcome of arbitration is uncertain, States are much more likely to settle the claim, which would be at the expense of public policy because it would lead to 'regulatory chills' and the use of public funds to pay compensation.").

[90] *See* PHYSICIANS FOR A SMOKE-FREE CANADA, PACKAGING PHONEY INTELLECTUAL PROPERTY CLAIMS 14 (2009), *available at* http://www.smoke-free.ca/plain-packaging/documents/2009/packagingphoneyipclaims-june2009-a4.pdf; Internal Document, Souza Cruz, Tobacco Strategy Group, International Conference on Sales and Distribution (May 11, 1994), *available at* http://legacy.library.ucsf.edu/documentStore/s/k/o/sko08a99/Ssko08a99.pdf (discussing "little joy" from GATT/TRIPS and stating that "current conventions & treaties offer little protection" for the industry).

[91] Crosbie & Glantz, *supra* note 35.

[92] Myron Levin, *As Nations Try to Snuff Out Smoking, Cigarette Makers Use Trade Treaties to Fire Up Legal Challenges*, FAIRWARNING (Nov. 29, 2012), http://www.fairwarning.org/2012/11/as-nations-try-to-snuff-out-smoking-cigarette-makers-use-trade-treaties-to-fire-up-legal-challenges/. In other sectors venture capital firms and investment banks that specialize in high-stakes international litigation are stepping up to finance investment disputes. *See* ORG. FOR ECON. CO-OPEREATION & DEV, INVESTOR-STATE DISPUTE SETTLEMENT, PUBLIC CONSULTATION: 16 MAY – 9 JULY 2012 37 (2012) [hereinafter OECD, INVESTOR-STATE], *available at* http://www.oecd.org/daf/inv/internationalinvestmentagreements/50291642.pdf; David Gaukrodger & Kathryn Gordon, *Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community*, 36-43 (Org. for Econ. Co-opereation & Dev., Working Paper on International Investment, No. 2012/3, 2012), *available at* http://www.oecd.org/daf/inv/investment-policy/WP-2012_3.pdf.

[93] N.Z. MINISTRY OF HEALTH, REGULATORY IMPACT STATEMENT: PLAIN PACKAGING OF TOBACCO PRODUCTS 11 (Mar. 28, 2012), *available at* http://www.health.govt.nz/system/files/documents/pages/regulatory-impact-statement-plain-packaging-tobacco-products.pdf.

[94] OECD, INVESTOR-STATE, *supra* note 92, at 17.

[95] Claudio Paolillo, *Part III: Uruguay vs. Philip Morris: Tobacco Giant Wages Legal Fight Over South America's Toughest Smoking Controls*, CTR. FOR PUB. INTEGRITY (Apr. 11, 2011, 10:39 AM),

Advocates assert that the industry pushes litigation to divert scarce government resources away from anti-tobacco campaigns.[97] For low- and middle-income countries, litigation costs above $1 million per year would exceed the annual budget for tobacco control and education to reduce smoking. Based on average spending per capita, the estimated tobacco reduction budget for Peru is about $382,000, so every year of litigation would cost more than three years of the tobacco reduction program.[98] Vietnam reported spending about $40,000 on tobacco control in 2008, but even if its tobacco control budget rises to average annual spending (amounting to about $1.1 million), it could be eclipsed by a year of litigation.[99]

While the cost of litigation is certain, the risk of losing a trade or investment is difficult to predict. The sanction for violating investment rules is monetary compensation, and for trade rules, it is "suspension of concessions," which usually means punitive tariffs.[100] Trade sanctions are prospective only,[101] but they tend to hurt innocent companies or sectors that are drawn into the political response to losing a dispute.[102]

D. INTERSECTING FRAMEWORKS—TRADE AND TOBACCO

Dr. Margaret Chan, Director General of the WHO, describes tobacco litigation with a biblical metaphor: "The wolf is no longer in sheep's clothing, and its teeth are bared . . . [meaning] the pressure of costly, drawn-out litigation and threats of billion-dollar settlements . . . ."[103]

---

http://www.publicintegrity.org/2010/11/15/4036/part-iii-uruguay-vs-philip-morris; Press Release, Foley Hoag, Government of Uruguay Taps Foley Hoag for Representation in International Arbitration Brought by Philip Morris to Overturn Country's Tobacco Regulations (Oct. 8, 2010), http://www.foleyhoag.com/news-and-events/news/2010/october/uruguay-taps-foley-hoag-for-representation.

[96] "The "cost of defending this case, and the risk of being held liable, would intimidate all but the most wealthy, sophisticated countries into inaction." Levin, *supra* note 92 (quoting Matthew L. Myers, president of the Campaign for Tobacco-Free Kids) (internal quotations omitted).

[97] J. K. Ibrahim & Stanton A. Glantz, *Tobacco Industry Litigation Strategies to Oppose Tobacco Control Media Campaigns*, 15 TOBACCO CONTROL 50, 54 (2006), *available at* http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2563618/.

[98] This estimate is based on the MPOWER average for spending on tobacco control by middle-income countries: $.013 USD per capita. The World Bank classifies Peru as an upper-middle-income nation with a population of 29,399,817. *Country and Lending Groups*, THE WORLD BANK, http://data.worldbank.org/about/country-classifications/country-and-lending-groups#Upper_middle_income (last visited Mar. 4, 2013); *Peru: Country at a Glance*, THE WORLD BANK, http://www.worldbank.org/en/country/peru (last visited Mar. 4, 20130). Estimated annual spending is *29,399,817 x .013 = $382,197.621*.

[99] This estimate is based on the MPOWER average for spending on tobacco control by middle-income countries: $.013 USD per capita. The World Bank classifies Vietnam as a lower-middle-income nation with a population of 87,840,000. *Country and Lending Groups*, *supra* note 98; *Vietnam:Country at a Glance*, THE WORLD BANK, http://www.worldbank.org/en/country/vietnam (last visited Mar. 4, 2013). Estimated annual spending is *87,840,000 x .013 = $1,141,920*. In 2011, Vietnam reported spending considerably less, only $40,000 USD using 2008 data. WORLD HEALTH ORG., WHO REPORT ON THE GLOBAL TOBACCO EPIDEMIC, 2011: VIET NAM (2011), *available at* http://www.who.int/tobacco/surveillance/policy/country_profile/vnm.pdf.

[100] MCGRADY, *supra* note 5, at 41.

[101] *See id.*

[102] Understanding on Rules and Procedures Governing the Settlement of Disputes, art. 22.3, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401.

[103] Dr. Margaret Chan, Dir. Gen. of the World Health Org., Keynote Address at the 15th World Conference on Tobacco or Health (Mar. 20, 2012), http://www.catcprc.org.cn/index.aspx?menuid=25&type=articleinfo&lanmuid=156&infoid=2837&language=en.

Speaking to the World Conference on Tobacco or Health in March 2012, Dr. Chan described international litigation as a long-term strategy, not just a few big cases that would settle the debate if only the governments can win: "It is hard for any country to bear the financial burden of this kind of litigation, but most especially so for small countries like Uruguay. This is not a sane, or reasonable, or rational situation in any sense. This is not a level playing field."[104]

Within a few months, a broad business coalition—the U.S. Chamber of Commerce, the National Association of Manufacturers, the National Foreign Trade Council, the U.S. Council for International Business, and the Emergency Committee for American Trade—responded by challenging the WHO, arguing that it seeks to undermine "the balance of [trade] rights and obligations . . . [and] exceed its area of competence and promote an agenda that would trump international trade and investment rules . . . ."[105]

What has the WHO done to attract this broadside? The WHO comments at WTO committee meetings about the evidence in support of tobacco-control measures, and it provides educational materials to health ministries on how the tobacco and trade frameworks relate to each other.[106] The FCTC requires 176 parties to fill the regulatory framework by exercising their regulatory powers.[107] The WTO agreements require 159 members to refrain from exercising regulatory powers that restrict trade.[108]

The trade and tobacco frameworks have overlapping coverage. Chart 1 maps where six chapters of the TPPA intersect with types of tobacco-control measures. At most of these intersections, the tobacco industry litigates or lobbies in its campaign to shrink the policy space available for regulation. In the TPPA negotiations, the industry expects to benefit from WTO-plus elements such as expanded coverage (e.g., regulation of services), stronger trade rules (e.g., use of trademarks), and investor protection (e.g., expanded opportunities to litigate).

---

[104] *Id.*

[105] WHO letter to Clinton, supra note 66, at 1.

[106] *See, e.g.*, Committee on Technical Barriers to Trade, *Minutes of the Meeting of 15-16 June, 2011*, ¶¶ 33-46, G/TBT/M/54 (Sept. 20, 2011) (statement of the WTO representative); MCGRADY, *supra* note , at 27-53.

[107] *Parties to the WHO Framework Convention on Tobacco Control*, WHO FRAMEWORK CONVENTION ON TOBACCO CONTROL, http://www.who.int/fctc/signatories_parties/en/index.html (last visited Feb. 11, 2013).

[108] *Members and Observers*, World Trade Org., http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (last visited Apr. 17, 2013).

Chart 1: Intersecting Frameworks

Tobacco Control: Selected FCTC measures	Trade Promotion: Selected TPPA Chapters					
	Goods, Tariff Reduction	**Goods, Technical Barriers**	**Intellectual property**	**Cross-Border Services**	**Regulatory Coherence**	**Investment**
6. Price & Tax Measures 2b. Restrict Duty-Free Sales	✓	✓			✓	✓
Product contents 9. Regulate (or ban) 10. Disclose	✓	✓			✓	✓
11. Packaging & labeling 1a. Misleading 1b. Warnings 2. Constituents & Emissions		✓	✓	✓	✓	✓
13. Advertising 1. Comprehensive ban 2. Restrictions 3. Minimum 4. Eliminate cross-border 5. Eliminate sponsorship		✓	✓	✓	✓	✓
5. General 3. Protect from commercial interests					✓	✓

III. OPTIONS FOR SAFEGUARDS—EXCEPTIONS AND EXCLUSIONS

As tobacco traders campaign to shrink policy space, health advocates are beginning to focus on protecting it. Following Dr. Chan's keynote, the World Conference responded by resolving that "[p]ublic health protection clauses be included in all new or re-negotiated trade and investment agreements and treaties. Tobacco to be explicitly excluded from such agreements and treaties."[109]

This call to protect health measures and exclude tobacco recognizes that the health exception in GATT and GATS does not apply to the rules being used in current tobacco litigation. Even if it did, the exception has complex conditions that require extensive litigation.

Some advocates sought to exclude tobacco from the beginning of TPPA negotiations.[110] During the spring of 2012, the ranks of those calling to exclude

[109] 15TH WORLD CONFERENCE ON TOBACCO OR HEALTH DECLARATION, WORLD CONFERENCE ON TOBACCO OR HEALTH 2012 (Mar. 20-24 2012) [hereinafter WCTOH Declaration], *available at* http://www.wctoh2012.org/nav-declaration.html (recommendation #3).

[110] *See, e.g.*, CTR. FOR POLICY ANALYSIS ON TRADE & HEALTH, CALL TO ACTION: FIX THE FATAL FLAWS IN U.S. TRADE POLICY ON TOBACCO (2012), *available at* http://www.cpath.org/sitebuildercontent/sitebuilderfiles/cpathfinalontpppproposal5-6-12.pdf; *Campaign for Tobacco-Free Kids Urges Trans Pacific Partnership Agreement (TPPA) Negotiators to Exempt Tobacco from the Proposed Free Trade Agreement*, CAMPAIGN FOR TOBACCO-FREE KIDS, http://www.tobaccofreekids.org/content/what_we_do/federal_issues/trade/ TPP.pdf (last visited Apr. 12, 2013); Letter from Bungon Ritthiphakdee, Dir., Se. Asia Tobacco Control Alliance, to President

tobacco from the TPPA swelled to include many of the leading medical and public health associations in the United States.[111] In May 2012, USTR vetted the abstract of a tobacco exception to "create a safe harbor" for regulation of tobacco products by the FDA.[112] Several public health organizations supported the Administration's effort, while holding out hope that "the tobacco industry will not be able to use *anything* in the TPP as a weapon to prevent the countries involved from adopting or maintaining measures to reduce tobacco use . . . ."[113]

The remainder of this section outlines an approach for evaluating the U.S. proposal, the baseline health exception of GATT and GATS, and alternative safeguards. There are two basic options for choosing a safeguard, and the resolution of the World Conference calls for both: exceptions, which the resolution refers to as "protection clauses," and exclusions, which some advocates refer to as "carve-outs."[114] Most trade agreements use a combination of partial exceptions and partial exclusions. Existing treaties offer models for drafting both. Choosing between them can be confusing, so the purpose of this paper is to provide a logical approach. This section explains the steps for selecting each element of a safeguard.

- *Basic differences*—First, what are the differences between exceptions and exclusions? For example, an exception involves litigation; an exclusion limits it.
- *Syntax of safeguards*—Second, how do you write an exception or exclusion? There is a syntax of elements for writing a safeguard. For an exception, it is scope, protection, deference, nexus, objective, and sometimes, additional restrictions. Drawing from existing trade or

---

Barack Obama (Feb. 16, 2012), *available at* http://www.interaksyon.com/business/25134/advocates-urge-obama-take-tobacco-out-of-free-trade-talks.

[111] *See* Letter from Nancy Brown, Chief Exec. Officer, Am. Heart Ass'n, Christopher W. Hansen, President, Am. Cancer Soc'y Cancer Action Network, Matthew L. Myers, President, Campaign for Tobacco-Free Kids, and Charles D. Connor, President & Chief Exec. Officer, Am. Lung Ass'n, to Ron Kirk, Ambassador, Office of the U.S. Trade Representative (May 7, 2012), *available at* http://www.tobaccofreekids.org/content/what_we_do/federal_issues/trade/20120507_ngo_letter.pdf; *see also* Letter from the Am. Acad. of Pediatrics, the Am. Acad. of Family Physicians, the Am. Coll. of Obstetricians & Gynecologists, the Am. Coll. of Physicians, the Am. Coll. of Preventive Med., the Am. Med. Ass'n, the Ctr. for Policy Analysis on Trade & Health, to Ron Kirk, Ambassador, Office of the U.S. Trade Representative (May 15, 2012), *available at* http://www.cpath.org/sitebuildercontent/sitebuilderfiles/med_pub_health_tpp_tobacco_16_may_2012.pdf; Letter from Peter Goldstraw, President, Int'l Ass'n for the Study of Lung Cancer, to Ron Kirk, Ambassador, Office of the U.S. Trade Representative (May 16, 2012), *available at* http://www.cpath.org/sitebuildercontent/sitebuilderfiles/iaslctpp-letter.pdf; Letter from Carolyn M. Dresler, Human Rights & Tobacco Control Network, to Ron Kirk, Ambassador, Office of the U.S. Trade Representative (May 8, 2012), *available at* http://www.cpath.org/sitebuildercontent/sitebuilderfiles/hrtcn-tpplettertoustrmay2012.pdf; Letter from Jeffrey B. Rich, The Soc'y of Thoracic Surgeons, to Ron Kirk, Ambassador, Office of the U.S. Trade Representative (May 15, 2012), *available at* http://www.cpath.org/sitebuildercontent/sitebuilderfiles/sts_letter_to_us_trade_representative_kirk.pdf.

[112] *Fact Sheet: TPP Tobacco Proposal*, OFFICE OF THE U.S. TRADE REPRESENTATIVE, http://www.ustr.gov/about-us/press-office/fact-sheets/2012/may/tpp-TOBACCO-proposal (last visited Mar. 5, 2013) [hereinafter *TPP Tobacco Proposal*].

[113] Letter from the Am. Acad. of Family Physicians, Am. Acad. of Pediatrics, Am. Ass'n for Cancer Research, Am. Ass'n for Respiratory Care, Am. Cancer Soc'y–Cancer Action Network, Am. Heart Ass'n, Am. Lung Ass'n, Am. Thoracic Soc'y, Campaign for Tobacco Free Kids, Nat'l Latino Tobacco Control Network, Oncology Nursing Soc'y, and P'ship for Prevention, to Ron Kirk, Ambassador, Office of the U.S. Trade Representative (May 22, 2012); *see also* J. Strawbridge, *Cigarettes, TPP, and the Wisdom of Product-Specific Rules in Trade Deals*, TRANSNAT'L DISPUTE MGMT., Nov. 2012, at 9.

[114] WCTOH Declaration, *supra* note 109; Strawbridge, *supra* note 113, at 3.

investment agreements, there are multiple word choices for each of these elements.

- *Evaluation criteria*— Third, what are the health-oriented evaluation criteria for choosing alternative language? For example, is the objective to provide a defense within trade litigation? Or is it to limit litigation as much as possible?

A. DIFFERENCES BETWEEN EXCEPTIONS AND EXCLUSIONS

1. Exclusions

An exclusion should be simple; it describes what a trade agreement does not cover. An exclusion can be full (excluded from a treaty altogether) or partial (excluded from particular chapters or particular articles). Partial exclusions are common, often taking the form of a reservation. While reservations are unilateral, they are negotiated like any other kind of exclusion.

- *Reservations*—The Vienna Convention on the Law of the Treatiesdefines a reservation as "a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State."[115] The practice of modern trade agreements is to place reservations in an annex that excludes a measure or category of measure from chapters of the agreement, usually the chapters on investment and services.[116]
- *Negotiated partial exclusions*—A partial exclusion means a particular chapter or article does not apply to a particular product, a subject (e.g., tobacco control), a sector, or more broadly, to a particular country. It can be negotiated as part of treaty text to exclude certain measures for all parties.[117] They can be negotiated in the sense that all parties accept that another party excludes itself from the scope of a particular chapter or rule. In the TPPA negotiations, Australia has excluded itself from investor-state dispute settlement, although it is not clear whether other parties have accepted its exclusion.[118] Australia has multiple qualms

[115] Vienna Convention on the Law of the Treaties, art. 2(d), May 23, 1969, 1155 U.N.T.S. 331. Article 19 of the Vienna Convention on the Law of the Treaties governs formulation of reservations; Article 20 governs acceptance of and objection to reservations; Article 21 governs legal elects of reservations and of objections to reservations; Article 22 governs withdrawal of reservations and of objections to reservations; and Article 23 governs procedure regarding reservations. *Id.* arts. 19-23.

[116] *See, e.g.*, U.S.-Austl. FTA, *supra* note 57, Annex II; ASEAN-Austl.-N.Z. FTA, *supra* note 53.

[117] Footnote 9 of Article XVI in GATS states, "Subparagraph 2(c) does not cover measures of a Member which limit inputs for the supply of services." *See, e.g.*, GATS, *supra* note 46, at art. XVI(2)(c) n.9. This means that the GATS prohibition on the total quantity of service output does not apply to measures that limit the quantity of inputs for supplying a service. This is generally understood as excluding measures that conserve environmental inputs such as trees, land, fish or othe wild animals.

[118] Draft TPPA Investment Chapter, *supra* note 21, sec. B n.20. In brackets to signify non-consensus, the exclusion footnote states, "Section B does not apply to Australia or an investor of Australia. Notwithstanding any provisions of this Agreement Australia does not consent to the submission of a claim to arbitration under this section." *Id.*

about ISDS; this exclusion has particular salience to treatment of tobacco companies.[119]

- *Full exclusions.* A full exclusion, or "carve-out," means that the entire agreement does not apply to a subject of regulation such as tobacco control. Full carve-outs are not common.[120]

The effect of excluding tobacco measures from coverage is to deny jurisdiction for dispute settlement and hence to preclude liability for trade sanctions or compensation to investors. It is fair to say that a purpose of these exclusions is not merely to defend measures in litigation; it is to limit litigation. In the WTO's multi-step method for judging violation of a trade agreement, the first step is to determine whether a measure is covered by a trade agreement. It is possible that a vaguely worded exclusion could lead to litigation over whether it applies to a measure. If an exclusion clearly applies to a measure, however, there is no prima facie case of violation, and the inquiry is ended.[121]

2. Exceptions

To start, an exception is not an exclusion. That is, an exception comes into play when a measure *is covered* by a treaty. In practice, a country invokes an exception when (a) a measure is covered, and (b) there is a prima facie case that it violates a trade or investment rule. For reasons of judicial economy, a tribunal does not decide first that an exception applies. That question only arises if the tribunal decides that a measure violates a rule.[122]

In the dispute settlement process, the purpose of an exception is to enable a country to present an affirmative defense of a measure that would otherwise violate a trade or investment rule. From a health perspective, the opportunity to defend protects the public interest.[123] From a trade perspective, the opportunity to "weigh and balance" a health measure protects trade-promotion objectives from all but the

---

[119] In 2011, the Australian Government stated its policy to discontinue ISDS in its trade and investment agreements with this connection to tobacco litigation with this comment: "The Government has not and will not accept provisions that limit its capacity to put health warnings or plain packaging requirements on tobacco products." AUSTL. GOV'T DEP'T OF FOREIGN AFFAIRS & TRADE, *supra* note 37, at 14. A year prior to PMA's investment claim against Australia's plain packaging law, the Australian Government Productivity Commission recommended against including ISDS in Australian FTAs. Referencing Canada's experience with invstment threats to plain packaging, the commission commented, "[T]he prospect of such a claim in the future increases the possibility that regulatory chill will influence government decisions and regulatory outcomes." AUSTL. GOV'T PRODUCTIVITY COMM'N, BILATERAL AND REGIONAL TRADE AGREEMENTS 271 (Nov. 2010); *see also Investor Rights to Sue Governments Hotly Debated at Trans-Pacific Trade Talks in Auckland*, Austl. Fair Trade & Inv. Network Ltd., http://aftinet.org.au/cms/node/543 (last visited Mar. 5, 2013) ("[The PMI claim] has contributed to the Australian Government decision to refuse to have investor rights to sue applied to Australia in the TPPA.").

[120] *See* U.S.-Kor. FTA, *supra* note 47, art. 23.3 ("Except as set out in this Article, nothing in this Agreement shall apply to taxation measures."). The article goes on to narrow the full carve-out to measures adopted under a tax convention and provide a number of partial carve-outs for tax measures.

[121] *See infra* Part IV(a) (discussing the WTO baseline).

[122] *See* PETER VAN DEN BOSSCHE, THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION 617 (2d ed. 2008) ("Article XX is relevant and will be invoked by a Member only when a measure of that Member has been found to be inconsistent with another GATT provision."); *see also* ANDREW T. GUZMAN & JOOST H.B. PAUWELYN, INTERNATIONAL TRADE LAW 339 (2009).

[123] *See* PETER SUTHERLAND ET AL., CONSULTATIVE BD. TO THE DIR.-GEN. SUPACHAI PANITCHPAKDI, WORLD HEALTH ORG., THE FUTURE OF THE WTO: ADDRESSING INSTITUTIONAL CHALLENGES IN THE NEW MILLENNIUM ¶ 44 (2004).

most efficiently designed health measures.[124] It is this balancing process that involves litigation and makes outcomes hard to predict. Trade negotiators may view the uncertainty of exceptions and any chilling effect on regulators as desirable.[125]

From a strategy point of view, tobacco companies may view exceptions as creating opportunitites for litigation. The vagueness of their terms (like "measures necessary" to protect health) requires interpretation, and the factual context will change with every measure that a country or investor decides to challenge.

3. Other Terms and Defenses in Investment Agreements

Not all analysts of investment agreements use the "exception/exclusion" rubric. Instead, Burke-White, von Staden, and others refer to provisions for "non-precluded measures" (NPMs), a term that draws from the text of the U.S.-Panama and other bilateral investement treaties (BITs): "[t]his treaty *shall not preclude* the application by either Party of any and all measures necessary for the maintenance of public order . . . ."[126] What some call an NPM, however, Canada, Singapore, Mexico, India, Korea and other countries call *exceptions* in both investment and trade agreements.[127] Some investment arbitrators and commentators view *NPM* and *exception* as interchangeable concepts,[128] depending on the plain language of the text.[129]

---

[124] *See id.* ¶ 39 ("It is not that the WTO disallows market protection, only that it sets some strict disciplines under which governments may choose to respond to special interest."); MCGRADY, *supra* note 5, at 101; BENN MCGRADY, TRADE AND PUBLIC HEALTH 218-28 (2011); Benn McGrady, *Trade Liberalisation and Tobacco Control: Moving from a Policy of Exclusion Towards a More Comprehensive Policy*, 16 TOBACCO CONTROL 280, 281 (2007).

[125] General Agreement on Tariffs and Trade, art. XX(b), Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT]; GATS, *supra* note 46, art. XIV(b); *see* VAN DEN BOSSCHE, *supra* note 122, at 615-17 ("The exceptions are 'conditional' in that Article XX only provides for justification of an otherwise illegal measure when the conditions set out in Article XX . . . are fulfilled."); WTO ANALYTICAL INDEX 318–19 (3d ed. 2012).

[126] William W. Burke-White & Andreas Von Staden, *Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties*, 48 VA. J. INT'L L. 307, 327 (2008).

[127] *See* Burke-White & Von Staden, *supra* note 126, at 328; Josef Ostransky, *How Can States Use Exceptions in Treaties to Defend Tobacco Control Legislation?*, TRANSNAT'L DISPUTE MGMT., Nov. 2012, at 11 n.6; Prabash Ranjan, *Non-Precluded Measures in Indian International Investment Agreements and India's Regulatory Power as a Host Nation*, 2 ASIAN J. INT'L. L. 21, 34-35 n.93 (2011); *see also, e.g.*, Canada-Uruguay Agreement for the Promotion and Protection of Investments, Can.-Uru., Annex I, Oct. 29, 1997, 1999 Can. T.S. No. 31; Comprehensive Economic Cooperation Agreement Between the Republic of India and the Republic of Singapore, India-Sing., art. 6(11), June 29, 2005, Dep't of Commerce, Ministry of Commerce & Indus., http://www.commerce.nic.in/ceca/toc.htm [hereinafter India-Sing. BIT].

[128] *See, e.g.*, Luke Engan, *In Search of Necessity: Congruence, Proportionality and the Least-Restrictive Means in Investor-State Dispute Settlement*, 43 GEO. J. INT'L L. 495 (2012); Andrew Newcombe, *General Exceptions in International Investment Agreements*, *in* 30 GLOBAL TRADE LAW SERIES: SUSTAINABLE DEVELOPMENT IN WORLD INVESTMENT LAW 351, 363 (Marie-Claire Cordonier Segger et al. eds, 2011) (exceptions in IIA); Ranjan, *supra* note 127, at 50; F. Rojid, et al., *supra* note 89, at 5-8, 11; *see also* Continental Casual Co. v. Argentina, ICSID Case No. ARB/03/9 (Sept. 5, 2008).

[129] *See* ORG. FOR ECON. CO-OPERATION & DEV., INTERNATIONAL INVESTMENT PERSPECTIVES 165-66 (OECD Publishing, 2006); José Alvarez & Tegan Brink, *Revisiting the Necessity Defence: Continental Casualty v. Argentina* 23 (Int'l Law & Justice, Working paper 2010/3, 2010).

B. SYNTAX OF SAFEGUARDS

Exceptions and exclusions usually consist of a single sentence that defines how the safeguard works.[130] Chart 2 shows a hypothetical exception,[131] labels each element, and explains each element.

Chart 2: Hypothetical Exception
The Language, the Elements, and What They Do

Nothing in this chapter	prevents a party from adopting or enforcing measures	that it considers	necessary	to protect human health,	provided that a measure is not arbitrary.
1. Scope States the rule, article, chapter or agreement from which a measure is protected	**2. Protection** Expresses the nature of protection – whether it excludes a measure from litigation or provides a defense within litigation	**3. Deference** Sets the degree of deference a dispute panel must give a government's use of an exception	**4. Nexus** Expands or shrinks the class of measures (means) in relation to their policy objective (end)	**5. Objective** Defines the scope of policy that is protected	**6. Additional Restriction** Further restricts use of an exception, even if the nexus and objective are satisfied

A growing body of literature tracks the alternative terms for each of these elements.[132] Exceptions have at least four elements and as many as six; exclusions usually have three. Alternative safeguards can be evaluated by comparing like elements—apples to apples.

C. EVALUATION CRITERIA FOR SAFEGUARDS

This Article uses this syntax of safeguards to evaluate potential TPPA exceptions and exclusions. One criterion for evaluating a safeguard is whether the safeguard enables a country to defend tobacco measures. Another is whether the safeguard enables a country to minimize litigation.

---

[130] *See* Burke-White & Von Staden, *supra* note 126, at 329-36 (describing a taxonomy of elements in an investment treaty in order to make sense of the chaotic interpretations by four arbitration panels interpreting the same "necessity" exception in the U.S.-Argentina BIT in 2004). *See generally* Jean Galbraith, *Treaty Options: Towards a Behavioral Understanding of Treaty Design*, VA. J. INT'L. L. (forthcoming 2013).

[131] *See* Agreement between the Swiss Federal Council and the Government of the United Arab Emirates on the Promotion and Reciprocal Protection of Investments, Switz.-U.A.E., art. 11(4), Mar. 11, 1998, SR-Nr. 0.975.232.5, *available at* http://www.admin.ch/ch/f/rs/c0_975_232_5.html ("Nothing in this agreement shall be construed to prevent a Contracting Party from taking any action necessary for reasons of public security and order, public health or morality.").

[132] *See* Ranjan, *supra* note 7 and the literature cited therein.

Defend measures—The existing health exception of GATT/GATS provides a baseline of protection for tobacco-control measures.[133] An alternative exception would be stronger, for example, if it expands the scope of protection to investment as well as trade rules. It would also be stronger if it reduces the burden of proof under the nexus, adds a term of deference to the defending government, or removes additional restrictions.

Minimize litigation—From a health perspective, it is good to have a defense but better to limit litigation to the minimum. The tobacco industry admits that it litigates in order to inflict costs, win or lose, on defending governments. The effort and cost of litigation are compounded by (a) the number of chapters and rules that apply to a measure, and (b) the ability of the complaining investor or country to use MFN clauses, umbrella clauses, or other terms that invoke more favorable protections in other trade or investment agreements.

IV. TOBACCO EXCEPTIONS IN THE TPPA

A. WTO BASELINE

As noted above, an exception strikes a balance. It enables a country to present an affirmative defense of a measure that would otherwise violate a trade or investment rule. From a health perspective, an exception creates policy space to protect the public interest. From a trade perspective, an exception "weighs and balances" trade-promotion objectives so as to screen out all but the most efficiently designed health measures.

This Article explains two reasons why the WTO health exception does little to limit litigation. The first is complexity: it requires four stages of analysis, some of which have several sub-stages.[134] The second is the vagueness of text, which gives dispute panels broad discretion to interpret terms like "necessity."[135] The combination of vagueness and complexity invites the tobacco industry to generate its own science and finance its government allies to repeatedly test the exception's meaning in an evolving field of law.[136]

The practice in U.S. FTAs is to incorporate the general exception of GATT Article XX and GATS Article XIV.[137] This approach links the TPPA into both the GATT/GATS text and WTO interpretations of the text. The exception reads a follows:

---

[133] *See* GATT, *supra* note 125, at art. XX(b); GATS, *supra* note 46, at art. XIV(b).

[134] *See* MCGRADY, *supra* note 124, at 154.

[135] *Id.* at 141.

[136] *See* Levin, *supra* note 92.

[137] There are other health safeguards that are specific to FTA chapters and WTO agreements, but these are beyond the scope of this paper, which focuses only on the GATT/GATS health exception and the U.S. proposal for a tobacco exception.

GATT/GATS exception on health measures

> 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 . . . (b) necessary to protect human, animal or plant life or health; . . . .[138]

TPPA negotiations will seek to retain the language for general exceptions in recent FTAs. The question is, which recent FTAs? On the crucial element of scope, eight TPP countries are parties to FTAs that expand the health exception to cover the investment chapter.

After scope, there is little variation among the elements, which are incorporated by reference from the GATT/GATS exception. This article assumes that the GATT/GATS template will not be altered. The purpose of reviewing it is to explain why TPPA drafters should consider adding a tobacco-specific exception or exclusion in addition to the baseline exception. For each element of the GATT/GATS syntax, the following sections explain the shortcomings (usually complexity and vagueness) and then identify alternatives that could be applied to a tobacco exception.

1. Scope

In the U.S. model for exceptions in FTAs, the general exception is not truly general. The scope element incorporates the GATT/GATS exception by reference and applies it to selected chapters including market access for goods, technical barriers to trade, and cross-border services, among others. It does not apply the exception to chapters on investment or intellectual property.[139]

The scope alternatives are to (a) add the investment chapter to the scope of the exception as eight TPP countries have already done, and (b) add as well the intellectual property chapter and others that tobacco companies could use to challenge tobacco measures.

Chart 3 shows precedents among TPP countries for applying the exception to the investment chapter; few have FTA chapters on IP.

---

[138] GATT, *supra* note 125, art. XX; GATS, *supra* note 46, at art. XIV.

[139] *See, e.g.*, U.S.-Peru FTA, *supra* note 47, at art. 22(1). Specfically,

> 1. For purposes of Chapters Two through Seven (National Treatment and Market Access for Goods, Textiles and Apparel, Rules of Origin and Origin Procedures, Customs Administration and Trade Facilitation, Sanitary and Phytosanitary Measures, and Technical Barriers to Trade), Article XX of the GATT 1994 and its interpretive notes are incorporated into and made part of this Agreement, mutatis mutandis. The Parties understand that the measures referred to in Article XX(b) of the GATT 1994 include environmental measures necessary to protect human, animal, or plant life or health, and that Article XX(g) of the GATT 1994 applies to measures relating to the conservation of living and non-living exhaustible natural resources.
>
> 2. For purposes of Chapters Eleven, Fourteen, and Fifteen (Cross-Border Trade in Services, Telecommunications, and Electronic Commerce), Article XIV of the GATS (including its footnotes) is incorporated into and made part of this Agreement, mutatis mutandis. The Parties understand that the measures referred to in Article XIV(b) of the GATS include environmental measures necessary to protect human, animal, or plant life or health.

Id.

Chart 3: Precedents for an Exception to the Investment Chapter

TPP Country	Health Exception for Investment Rules
Australia	***3 FTAs:*** ASEAN–Australia–New Zealand FTA art. 15.1.2; India-Australia BIT art. 15; Australia-Chile FTA Chapter 22, Article 22.1
Brunei	***1 FTA:*** ASEAN–Australia–New Zealand FTA art. 15.1.2 ***2 BITs:*** China BIT, Protocol 1.a; Germany BIT, Protocol 1.a
Canada	***3 FTArs:*** Canada-Panama FTA art. 23.2.2; Canada-Peru FTA, art. 2201.3; Canada-Peru FIPA, art. 10 ***19 BITs and the model:*** Canada-Model BIT 2004, art. 10; Jordan BIT, Art. 10; Romania BIT, Art. XVII.3.b; Lebanon BIT, Annex I, III.2.b; Costa Rica BIT, Annex I, III.2.b; Uruguay BIT, Annex I, III.2.b; Venezuela BIT, Art. 10.b.2; Latvia BIT, Art. XVII.3.b; Czech Republic BIT Art. IX, 1.a; Slovak Republic BIT Art. IX, 1.a; Thailand BIT, Art. XVII.3.b; Barbados BIT, Art. XVII.3.b; Ecuador BIT, Art. XVII.3.b; Egypt BIT, Art. XVII.3.b; El Salvador BIT, Annex I, III.2.b; Croatia BIT, Annex I, III.2.b; South Africa BIT, Art. XVII.3.b; Trinidad and Tobago BIT, Art. XVII.3.b; Ukraine BIT, Art. XVII.3.b; Armenia BIT, Art. XVII.3.b
Malaysia	***2 FTAs:*** ASEAN–Australia–New Zealand FTA art. 15.1.2; Malaysia-New Zealand FTA, art. 17.1 ***1 BIT:*** Germany BIT, Protocol 4
New Zealand	***4 FTAs:*** ASEAN–Australia–New Zealand FTA art. 15.1.2; New Zealand-Malaysia FTA, art. 17.1; New Zealand-Hong Kong FTA, Ch12, Art. 4.2b; New Zealand-China FTA, Chapter 17 Exceptions, Article 200(2) ***1 BIT:*** Argentina BIT, Art. 5
Peru	***4 FTAs:*** Peru-Canada FTA, art. 2201.3; Peru-Canada FIPA, art. 10; Peru-China FTA, Ch. 16, Art. 193; Peru-Korea FTA Ch. 24, Art. 24.1
Singapore	***4 FTAs:*** ASEAN–Australia–New Zealand FTA art. 15.1.2; Singapore-India CECA art. 6(11); Singapore-Japan FTA, art. 69; Singapore-Korea FTA art. 21.2 ; Singapore-China FTA Exceptions under Chapter 7, Art. 69 ***4 BITs:*** Pakistan BIT, Art. 11; Poland BIT, Art. 11; Germany BIT, Exchange of Letters No. 1, 9/26/1973; Czech Republic BIT, Art. 11; China BIT, Art. 11
Vietnam	***1 FTA:*** ASEAN–Australia–New Zealand FTA art. 15.1.2 ***1 BIT:*** Japan BIT, Art. 15.1.c

The missing actors on this list are the United States and Chile.[140] The USTR takes the position that even if an exception applies to the investment chapter, the language of an exception ("nothing in this chapter prevents . . .") does not apply to the obligation to compensate investors for indirect expropriation.[141] This issue is discussed below in Part IV(B) (scope and protection of a tobacco-specific exception).

2. Protection

The GATT/GATS exception provides that "nothing shall be construed to prevent the adoption or enforcement by any contracting party of measures . . . ."[142]

[140] *See, e.g.*, U.S.-Kor. FTA, *supra* note 47, at art. 23.1; U.S.-Peru FTA, *supra* note 47, at art. 22.1; Chile-Malaysia Free Trade Agreement, Chile-Malay., art. 13.1 (entered into force 18 April 2012); Chile-Australia FTA, Chile-Austl., art. 22.1, Nov. 13, 2010, Ministry of Int'l Trade & Indus., http://www.miti.gov.my/cms/documentstorage/com.tms.cms.document.Document_62ac20fc-c0a8157 3-44934493-bf60f59a/MCFTA-consolidated%20text-full.pdf; Canada-Chile Free Trade Agreement, Can.-Chile, art. O-01, Dec. 5, 1996, Foreign Affairs & Int'l Trade Can., http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/chile-chili/menu.aspx?lang=en&view=d.

[141] *See infra* Part IV.B.

[142] GATT, *supra* note 125, at art. XX(b); GATS, *supra* note 46, at art. XIV(b).

The first phrase implies that this exception is an exception and not an exclusion.[143] That is, it applies to "construing" obligations of a chapter, an analysis that only arises if a chapter covers a measure and if there is a prima facie claim that the measure violates a rule of that chapter. These are the first steps of analysis that the WTO's Appellate Body applies when a country defends a measure under GATT or GATS.[144]

The protection afforded by the GATT/GATS exception is broad in two respects. First, its coverage of measures is all-inclusive: "any measure by a Member, whether in the form of a law, regulation, rule, procedure, decision, administrative action, or any other form."[145] Second, the exception covers both present and future measures—those adopted and enforced—at any stage of the lawmaking process.

a. Shortcomings

Burden of litigation—Even considering its inclusive terms of protection, the shortcoming of this element is its nature as an exception. It functions as an affirmative defense; it requires the effort and expense of litigation.

Threat of MFN claims—In its investment claim against Uruguay, PMI used the MFN clause in an effort to invoke more favorable procedural treatment in investment agreements outside of the primary treaty.[146] PMA used an umbrella clause to expand its argument that Australia has a duty to comply with obligations outside of the primary treaty—in this case, trademark treaties.[147] The question here is whether a safeguard can limit the extent to which MFN supports treaty shopping.[148]

In the draft TPPA investment chapter, the MFN clause excludes procedural rights; MFN remains available for expanding substantive investor rights.[149] In fact, investors have most frequently and successfully sought to expand their substantive rights using MFN clauses.[150] For example, in *MDT Equity Sdn. Bhd. v Republic of Chile*, arbitrators ruled that MFN applied to the FET clause of other Chilean agreements because those clauses were more favorable and more specific (they

---

[143] Some analysts view such phrases as part of the scope, not a distinct element, but it helps to focus on the verb phrase because it signifies whether the safeguard is an exclusion (e.g., "does not apply") or an exception. *See* Burke-White & Von Staden, *supra* note 126, at 331.

[144] For GATT art. XX(b), see, for example, Appellate Body Report, *Brazil—Measures Affecting Imports of Retreaded Tyres*, WT/DS332/AB/R (Dec. 3, 2007) [hereinafter ABR, *Brazil—Tyres*]. For GATS art. XIV, see, for example, Appellate Body Report, *China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/AB/R (Dec. 21, 2009) [hereinafter ABR, *China—AV Products*].

[145] GATS, *supra* note 46, at art. XXVIII(a). The GATS definition of *measure* encompasses *regulations* and other forms that are covered by GATT. *See id.*; GATT, *supra* note 125, at arts. III, XI.

[146] Request for Arbitration, FTR, *supra* note 22, ¶ 52 (seeking to avoid a waiting period and a requirement to exhaust domestic court remedies).

[147] Notice of Arbitration, PMA, *supra* note 22, ¶ 46; Agreement Between the Government of Hong-Kong and the Government of Australia for the Promotion and Protection of Investments, H.K.-Austl., art. 2.2, Sept. 15, 1993, Dep't of Justice, http://www.legislation.gov.hk/eng/index.htm ("Each Contracting Party shall *observe any obligation* it may have entered into with regard to investments of investors of the other Contracting Party.") (emphasis added).

[148] *See* United Nations Conference in Trade and Development, UNCTAD Series on International Investment Agreement II, *Most-Favored Nation Treatment*, 114 UNCTAD/DIAE/IA/2010/1 (2010) ("MFN clauses permitting treaty shopping can raise numerous fundamental policy and legal issues.").

[149] Draft TPPA Investment Chapter, *supra* note 21, at art. 12.5 (discussing the Most-Favoured Nation Treatment).

[150] Yas Banifatemi, *The Emerging Jurisprudence on the Most-Favored-Nation Treatment in Investment Arbitration*, *in* INVESTMENT TREATY LAW: CURRENT ISSUES III 241, 242 (Andrea K. Bjorklund et al. eds., 2009).

required issuance of development permits).[151] In several cases, arbitrators accepted jurisdiction based on MFN comparison to prior agreements, but then they ruled that the investor did not prove that the prior agreement actually provides more favorable treatment.[152]

Arbitrators have rejected MFN claims when the primary treaty would not grant jurisdiction to a claim.[153] Likewise, they have rejected MFN arguments that a prior agreement is more favorable because it does not have a limiting provision contained in the more recent primary agreement (e.g., a narrower definition of investment).[154]

This logic supports the value of exclusions because they make clear that a type of measure (e.g., tobacco control) is outside the jurisdiction of ISDS. The intent to limit jurisdiction (and the reach of MFN clauses) is not explicit with respect to an exception.[155] Investors have also sought to invoke MFN in order to gain access to umbrella clauses or obligations to comply with international law, which occur in the BITs of TPP countries.[156]

---

[151] MTD Equity Sdn. Bhd. v. Republic of Chile, ICSID Case No. ARB/01/7, Award, ¶ 104 (May 25, 2004).

[152] *See, e.g.*, Asian Agric. Products Ltd. v. Sri Lanka, ICSID Case No. ARB/87/3, Final Award (June 27, 1990); ADF Grp. Inc v. United States, ICSID Case No ARB(AF)/00/1, Award, ¶¶ 194-95 (Jan. 9, 2003).

[153] Banifatemi, *supra* note 150, at 250; Société Générale v. Dominican Republic, LCIA Case No. UN 7927, Award on Preliminary Objections to Jurisdiction, ¶ 41 (Sept. 19, 2008); Tecnicas Medioambientales Tecmed S.A. v. United Mexican States, ICSID Case No. ARB(AF)/00/2, Award, ¶ 69 (May 29, 2003); M.C.I. Power Grp. L.C. v. Republic of Ecuador, ICSID Case No ARB/03/6, Decision on Annulment, ¶ 128 (Oct. 19, 2009); Anglo-Iranian Oil Company Case (U.K. v. Iran), 1952 I.C.J. 93, 109 (July 22) (stating that jurisdiction is based on consent to arbitration). *But see* ANDREW NEWCOMBE & LLUIS PARADELL, LAW AND PRACTICE OF INVESTMENT TREATIES 222 (2009) ("[I]t is arguable that an MFN clause that applies to all matters in the treaty could be applied to establish the intention of the parties to confer better temporal protection.").

[154] *See* CMS Gas Transmission Co. v. Argentine Republic, ICSID Case No. ARB/01/8, Award, ¶ 337 (May 12, 2005) (stating that an absence of clause in prior agreements is not a basis for MFN treatment).

[155] *See generally* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 801 (1987); *Draft Articles on Most-Favoured-Nation Clauses*, 2 Y.B. INT'L L. COMM'N (U.N.) 16, 53 (1978) ("A most-favoured-nation clause, unless otherwise agreed, obviously attracts benefits extended to a third State both before and after the entry into force of the treaty containing the clause").

[156] *See, e.g.*, Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Chile for the Promotion and Protection of Investments with Protocol, Jan. 8, 1996, U.K-N. Ir.-Chile, art. 2, [1997] GR. BRIT. T.S NO. 37 (1997) (international law clause); Agreement Between the Belgo-Luxemburg Economic Union and the Government of Malaysia on Encouragement and Reciprocal Protection of Investments, Belg.-Lux-Malay., art. 3, Nov. 22, 1979, 1284 U.N.T.S. 121 (international law clause); Agreement Between the Government of the Kingdom of Denmark and the Government of Malaysia for the Mutual Promotion and Protection of Investments, Den.-Malay., art. 3, Jan. 6, 1992, IC-BT 886 (umbrella clause); Agreement Between the Government of Hong Kong and the Government of New Zealand for the Promotion and Protection of Investments, H.K.-N.Z., art. 3, July 6, 1995, U.N. Conference on Trade & Dev., http://www.unctadxi.org/templates/DocSearch.aspx?id=779 [hereinafter N.Z.-H.K. BIT] (umbrella clause); Agreement on the Promotion and Protection of Investments, N.Z.-China, art. 3, Nov. 22, 1988, 1787 U.N.T.S. 186 [hereinafter N.Z.-China BIT] (umbrella clause); Agreement on Economic Cooperation Between the Government of the Kingdom of the Netherlands and the Government of the Republic of Singapore, Neth.-Sing., art. VII, May 16, 1972, U.N. Conference on Trade & Dev., http://www.unctadxi.org/templates/DocSearch.aspx?id=779 (international law clause); Agreement Between the Government of the People's Republic of China and the Government of the Republic of Singapore on the Promotion and Protection of Investments, China-Sing., art. 3, Nov. 11, 1985, U.N. Conference on Trade & Dev., http://www.unctadxi.org/templates/DocSearch.aspx?id=779 (umbrella clause); Treaty Between United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment, U.S.-Arg., art. II, Nov. 14, 1991, T.I.A.S. (international law clause); Treaty Between the United States of America and the Republic of

The point of comparison here is that an exclusion clearly blocks MFN treatment; an exception may not.

b. Alternatives

The alternative to the U.S. approach to defining the scope of the GATT/GATS—listing selected chapters —would be to paraphrase the language of GATT and GATS: "*nothing in this Agreement* prevents . . . ."[157]

The MFN threat can be avoided by providing an explicit interpretation clause to limit its reach. For example, the clause could provide that if a measure is justified under the exception, it does not constitute less favorable treatment.

3. Deference

The GATT/GATS health exception provides no explicit terms of deference to a defending government. The agreement establishing the WTO speaks only to which agreement prevails if there is a conflict among WTO agreements.[158] A question of deference can arise when interpreting the health exception, or more broadly, when defending a measure on grounds that the measure implements treaty obligations under the FCTC. The literature on a treaty-based defense refers to the analysis in terms of conflicting norms or treaty conflict.

The complexity of analyzing conflicting treaty norms exceeds the scope of this article, so a few general observations must suffice. From a health perspective, the prospect of conflicting norms means that a country could defend a measure on grounds that it implements the FCTC. A treaty conflict arises only if both parties in a trade dispute are FCTC parties; all TPP countries are FCTC parties except for the United States, which signed but did not ratify the FCTC.[159]

Several commentators agree that a dispute panel should favor a defense based on treaty conflict by finding that the FCTC prevails over a trade agreement.[160] It is more likely that a dispute panel would follow the principle of effective interpretation and find that trade obligations should be read narrowly to avoid a conflict with the FCTC – or vice versa with the FCTC being read narrowly to avoid a conflict.[161] The literature describes these options in terms of broad versus narrow views of treaty conflict. When interpreting conflicts among WTO agreements, WTO panels have taken the narrow view in two disputes[162] and the broad view in one.[163]

Ecuador Concerning the Encouragement and Reciprocal Protection of Investment, U.S.-Ecuador, art. II, Aug. 27, 1993, SEN. TREATY DOC. NO. 103-15 (umbrella clause).

[157] *See* GATT, *supra* note 125, at art. XX; GATS, *supra* note 46, at art. XIV.

[158] "In the event of conflict between a provision of the General Agreement on Tariffs and Trade 1994 and a provision of another agreement in Annex 1A . . . the other agreement shall prevail to the extent of the conflict." General Interpretive Note to Annex 1A, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 154.

[159] *Parties to the WHO Framework Convention on Tobacco Control*, *supra* note 107.

[160] *See* Deborah Sy, *Warning: Investment Agreements Are Dangerous to Your Health*, 43 GEO. WASH. INT'L L. REV. 625, 652-55 (2011) (arguing that "the FCTC and other trade agreements are on equal footing and, in case of conflict, the tobacco control treaty must prevail"); *see also* Sam Foster Halabi, *The World Health Organization's Framework Convention on Tobacco Control: An Analysis of Guidelines Adopted by the Conference of the Parties*, 39 GA. J. INT'L & COMP. L. 121, 132 (2010).

[161] Vienna Convention on the Law of the Treaties, *supra* note 155, at arts. 30, 31.3(c); *see* Gabrielle Marceau, *Conflicts of Norms and Conflicts of Jurisdiction: The Relationship Between the WTO Agreement and MEAs and Other Treaties*, 35 J. WORLD TRADE 1081, 1084-85, 1129 (2001); *see also* Chuan-feng Wu, *State Responsibility for Tobacco Control: The Right to Health Perspective*, 3 ASIAN J. WTO & INT'L HEALTH L. & POL'Y 379, 385-86 (2008).

[162] *See* Marceau, *supra* note 161, at 1085 (citing Appellate Body Report, Guatemala—*Anti-Dumping*

The narrow view is that there is a treaty conflict only when it is impossible for a country to comply with explicit mandates or prohibitions in two treaties at the same time.[164] The tobacco industry—including Philip Morris International, British American Tobacco, and regional companies—is waging a lobbying and litigation campaign to argue for the narrowest possible interpretation of FCTC obligations, thus limiting the scope of possible "conflicts."[165] A number of WTO delegations have echoed this theme.[166] The industry's "narrow" argument is that a country can avoid conflict with a trade obligation by not exercising its authority to implement an FCTC recommendation.[167]

Yet even under the narrow view, a country can defend a tobacco-control measure, particularly when an FCTC article requires a type of measure and the guideline interprets the requirement and recommends best practices to accomplish it.[168] In this context, the guidelines are "a subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions."[169] For example, Article 13 requires a "comprehensive" ban on advertising, which the guidelines interpret with a review of forms of advertising (promotion, sponsorship, display, packaging, etc.) and recommendations for each form, including plain packaging, to implement this FCTC requirement.[170]

There is a strong argument that an FCTC recommendation is not soft. The plain language of the FCTC creates a framework of common measures, some of which are required and some of which are encouraged. The principle of effective interpretation requires deference to FCTC recommendations and guidelines; otherwise the purpose of the convention to serve as a framework would be thwarted. If that were not enough, the guidelines are a subsequent agreement as noted above.[171]

Investigation Regarding Portland Cement from Mexico, ¶ 65, WT/DS60/AB/R (Nov. 25, 1998); Panel Report, *Indonesia—Certain Measures Affecting the Automobile Industry*, ¶¶ 14.29-14.36, 14-97-14.99, WT/DS54, WT/DS5455, WT/DS5459, WT/DS5464/R, (July 23, 1998)).

[163] *See id.* at 1085 (citing Panel Report, *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, ¶ 7.159, WT/DS27/R(US) (May 22, 1997)).

[164] *See* JOOST PAUWELYN, CONFLICT OF NORMS IN PUBLIC INTERNATIONAL LAW: HOW WTO LAW RELATES TO OTHER RULES OF INTERNATIONAL LAW, 166-169, 179 (2003); MCGRADY, TRADE AND PUBLIC HEALTH, *supra* note 124, at 235-42, 246 ("The nature of the law of treaties means that there is no one universally applicable answer to the question of how conflicts will be resolved.").

[165] *See, e.g.*, Catherine Saez, *Plain Packaging For Tobacco Raises IPR Questions At WTO*, INTELLECTUAL PROPERTY WATCH (June 16, 2011), http://www.ip-watch.org/2011/06/16/plain-packaging-for-tobacco-puts-wto-members-in-a-quandary/ (quoting a King and Spaulding Report for British American Tobacco); Manifestation and Compliance of Respondent Mighty Corp. ¶¶ 42-51, Dep't of Health et al. v. Honorable Judge Alexander P. Tamayo et al., G.R. No. 193414 (S.C., May 16, 2011) (arguing that the FCTC is "hortatory" and "merely permissive").

[166] WTO Committee on Technical Barriers to Trade, *Minutes of the Meeting of 10-11 November 2011*, ¶¶ 204-205, G/TBT/M/55 (Feb. 9, 2012) (statements of Cuba); *id.* ¶ 215 (statements of Honduras); *id.* ¶ 216 (statements of Mexico); *id.* ¶ 217 (statements of Dominican Republic); *id.* ¶ 218 (statements of Zimbabwe).

[167] Saez, *supra* note 165.

[168] *See* Jonathan Liberman, *Four COPs and Counting: Achievements, Underachievements and Looming Challenges in the Early Life of the WHO FCTC Conference of the Parties*, TOBACCO CONTROL (Sept. 14, 2011), http://tobaccocontrol.bmj.com/content/21/2/215.full.pdf+html?sid=fff0952f-4f88-423c-8880-903fc7656d24.

[169] Vienna Convention on the Law of the Treaties, *supra* note 115, at art. 31.3(a).

[170] WHO FRAMEWORK CONVENTION ON TOBACCO CONTROL, GUIDELINES FOR IMPLEMENTATION 92-99 (2011) [hereinafter FCTC Guidelines], *available at* http://whqlibdoc.who.int/publications/2011/9789241501316_eng.pdf.

[171] *See* Halabi, *supra* note 160, at 132 (stating that FCTC obligations are "based on their perceived national interests"). While some FCTC guidelines are recommendations, some of them interpret explicit obligations to adopt certain measures. "A plain reading of the guidelines' language, as well as interpretive guidance from the Vienna Convention on the Law of Treaties and customary international norms, supports

The broad view is that there is a treaty conflict—and hence a defense is available—when objectives and recommendations of two treaties run counter to each other.[172] Several commentators take the broad view that a country can defend a measure that is within the scope of FCTC articles, protocols and guidelines as they evolve over time.[173]

If a dispute panel finds a treaty conflict, there are strong arguments that the FCTC (2004) would prevail over the WTO agreement (1995). The customary interpretation is that a later treaty in time prevails over an earlier one,[174] and a specific treaty (FCTC) prevails over a more general one (WTO).[175] With respect to subsequent agreements like the TPPA, Article 2 of the FCTC reverses the presumption that a later treaty prevails (among FCTC parties). FCTC parties may enter into agreements that are "relevant to or additional to the Convention and its protocols, provided that such agreements are compatible with their obligations with the Convention and its protocols . . ."[176]

Moving beyond treaty conflict, the recent panel report in *United States—Clove Cigarettes* sheds positive light on using FCTC guidelines to interpret the GATT/GATS health exception. The panel readily accepted the FCTC guidelines as evidence of "a growing international consensus" on the need to restrict additives that make cigarettes more palatable.[177] As this pertained to whether a measure is necessary under Article 2.2 of the TBT Agreement, it bodes well for deference to FCTC guidelines when determining whether a measure is necessary under the health exception.[178]

The panel in *Clove Cigarettes* did not defer to the United States in its attempt to justify less-favorable treatment of clove flavoring compared to menthol, which the panel viewed as like products.[179] The panel did not even consider survey evidence that the United States relied on to explain exclusion of menthol simply because the opposing surveys used different parameters.[180] The Appellate Body confirmed that a dispute panel does not need to give any particular weight to evidence of a defending

---

the conclusion that the binding nature of the guidelines is stronger than [the industry] argues them to be." *Id.* at 126. Halabi agrees with the conclusion of the WHO Legal Counsel that "decisions of the Conference of the Parties, as the supreme body comprising all Parties to the FCTC, undoubtedly represent a 'subsequent agreement between the Parties regarding the interpretation of the treaty,' as stated in Article 31 of the Vienna Convention.' . . . The guidance issued by the COP would appear to be instrumental in fulfilling the FCTC-imposed obligation to adopt 'effective . . . measures.'" *Id.*

[172] *See* MCGRADY, TRADE AND PUBLIC HEALTH, *supra* note 124, at 235-42; PAUWELYN, *supra* note 164, at 166-169; Marceau, *supra* note 161, at 1084.

[173] *See* Halabi, *supra* note 160, at 126; Sy, *supra* note 160, at 653; R. Hammond & M. Assunta, *The Framework Convention on Tobacco Control: Promising Start, Uncertain future*, 12 TOBACCO CONTROL 241 (2003).

[174] *See* Vienna Convention on the Law of the Treaties, *supra* note 115, at art. 30.3 (codifying the supremecy of a treaty adopted later in time and another treaty). The FCTC was adopted 10 years after the WTO agreements.

[175] *Id.* at art. 30.4. *See* MCGRADY, TRADE AND PUBLIC HEALTH, *supra* note 124, at 245-46; McGrady, *supra* note 124, at 75.

[176] WHO FCTC, *supra* note 16, at art. 2.2. This analysis presumes that for purposes of article 2.2, the effective date of the TPPA would be 2014 or later, even though it would incorporate the GATT/GATS exception by reference. The effective date of GATT and GATS is 1995.

[177] *See* Panel Report, *United States—Measures Affecting the Production and Sale of Clove Cigarettes*, ¶ 7.414, WT/DS406/R (Sept. 2, 2011) [hereinafter Panel Report, *U.S.–Clove Cigarettes*].

[178] *See* Benn McGrady & Alexandra Jones, *Tobacco Control and Beyond: The Broader Implications of* United States—Clove Cigarettes *for Non-Communicable Diseases*, 39 AM. J.L. & MED. 265 (2013).

[179] Agreement on Technical Barriers to Trade, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, art. 2.1, 1868 U.N.T.S. 120 [hereinafter TBT Agreement].

[180] Panel Report, *U.S.—Clove Cigarettes*, *supra* note 177, ¶¶ 7.209-.210. The panel gave greater weight to evidence that clove and menthol flavorings are substitutable in the U.S. market, where only menthol had established a significant market share. *Id.* ¶¶ 7.211-232.

party.[181]

Some analysts argue that dispute panels *should* defer to a defending government because panels lack scientific expertise,[182] or that panels *should* defer to the scientific evidence embodied in the FCTC and its guidelines.[183] Tthe panel's lack of deference to the United States in *Clove Cigarettes*, however, suggests that governments should expect no deference when justifying discrimination, and some science may not be enough.[184]

a. Alternatives

Self-judging exception – The security exceptions of GATT and GATS provide a model for how to draft a self-judging exception, for which a dispute panel must defer to the defending government. The exception covers measures that a party "*considers necessary*" for the stated purpose.[185] The Colombia-Belgium BIT provides a self-judging exception for measures a party "*considers appropriate*" for compliance with environmental law.[186]

Whether a dispute panel could review a country's use of a self-judging exception is uncertain. Article 26 of the Vienna Convention requires a country to carry out its obligations in good faith. Some analysts therefore believe that a self-judging exception is subject to a good-faith review.[187] Others interpret the explicit deference as requiring that a panel should not even be established.[188]

Yet another interpretation of self-judging exceptions is that a dispute panel must

---

[181] Appellate Body Report, *United States—Measures Affecting the Production and Sale of Clove Cigarettes*, ¶ 149, WT/DS406/AB/R (Apr. 4, 2012) [hereinafter ABR, *U.S.—Clove Cigarettes*].

[182] *See, e.g.*, Ostransky, *supra* note 127, at 8-9.

[183] The preamble of FCTC provides that the FCTC parties recognize that "scientific evidence has unequivocally established that tobacco consumption and exposure to tobacco smoke cause death, disease and disability." WHO FCTC, *supra* note 16, at preamble; *see, e.g.*, Rojid et al., *supra* note 89, at 6; Lukasz Gruszczynski, *The WHO Framework Convention on Tobacco Control as an International Standard under the TBT Agreement?*, TRANSNAT'L DISPUTE MGMT., Nov. 2012, at 5 (considering FCTC as an international standard under TBT).

[184] *See* Burke-White & Von Staden, *supra* note 126, at 361-63 (stating that investment arbitrators may defer less when they can draw their own conclusions from scientific evidence). On an issue such as justifiable discrimination, Article 2(1) of the FCTC could be cited by either side of an argument about conflict between a trade agreement and the FCTC. It provides that "nothing in these instruments shall prevent a Party from imposing stricter requirements that are consistent with their provisions *and are in accordance with international law*." WHO FCTC, *supra* note 16, at art. 2(1) (emphasis added). In BIT disputes, investors have argued that "international law" includes treaty obligations, but the United States has argued with success that reference to international law is limited to principles of customary international law. *See* ADF Group Inc. v. United States, ICSID Case No. ARB(AF)/00/1, Award, ¶ 194 (Jan. 9, 2003). Article 38 of the ICJ Statute defines sources of international law to include international conventions, but the traditional view is that a treaty can be cited as evidence of international law only when repeated use in a large number of treaties is "evidence of a uniform practice or usage." Ellery C. Stowell, INTERNATIONAL LAW: A RESTATEMENT OF PRINCIPLES IN CONFORMITY WITH ACTUAL PRACTICE xv, 31 (Treaties as a Source of International Law) (1931); *accord* A. D'Amato, TREATY-BASED RULES OF CUSTOM, IN INTERNATIONAL LAW ANTHOLOGY 94, 100 (A. D'Amato ed., 1994); Benjamin Mason Meier, *Breathing Life into the Framework Convention on Tobacco Control: Smoking Cessation and the Right to Health*, 5 YALE J. HEALTH POL'Y L. & ETHICS 137, 192 (2005).

[185] GATT, *supra* note 125, at art. XXI(b); GATS, *supra* note 46, at art. XIV bis. 1(b).

[186] "Nothing in this Agreement shall be construed as to prevent a Contracting Party from adopting, maintaining, or enforcing any measure that it considers appropriate to ensure that an investment activity in its territory is undertaken in accordance with the environmental law of the Party." Rojid et al., *supra* note 89, at 8 (quoting Colombia-Belgium BIT, art. VII(4)).

[187] Burke-White & Von Staden, *supra* note 126, at 377–78.

[188] *See* Dapo Akande & Sope Williams, *International Adjudication on National Security Issues: What Role for the WTO?*, 43 VA. J. INT'L L. 365, 374 (2003).

determine whether the exception applies.[189] This approach could be codified with explicit language: "The jurisdiction of a dispute panel is limited to determining whether this exception applies to the measure."

A self-judging health exception would provide more than strong deference; it would minimize litigation as well. Yet because of its clarity and power, a self-judging exception may not be politically feasible unless it applies to an objective that is narrower than protecting health. For a tobacco-specific exception, the self-judging objective could be "to reduce use of tobacco products or its harms."[190]

4. Nexus

The nexus of the GATT/GATS exception is *necessary*; it links a measure and its objective, as in "measures . . . necessary to protect . . . health."[191] This nexus enables countries to defend a health measure while ensuring that the necessity test screens all but the most efficiently designed health measures that might otherwise distort trade more than is necessary. In other words, it serves to shrink the broader class of health measures to those that satisfy the necessity test.[192]

The necessity test was drafted when most health measures were designed to have direct causal effect on communicable diseases. More recent measures often aim to suppress non-communicable diseases (NCDs) such as those caused by smoking. They govern an indirect chain of causal connections, from production of harmful products to marketing, packaging, distribution, and consumption.[193] Some analysts are optimistic that the WTO's interpretation of necessity will accept the indirect connection between tobacco measures (more so than other NCD measures) and their objective of influencing health outcomes.[194] Others anticipate ongoing legal conflict over tobacco trade, "where measures are unprecedented, precautionary or part of a policy package whose effect is cumulative."[195]

Before a WTO dispute panel, the analysis of whether a measure is necessary involves the first three stages in a four-stage process (the fourth being additional restrictions in the chapeau). The first asks whether a measure fits within the scope of protected health measures.[196] If so, the second "balances and weighs" three factors to determine *prima facie* whether a measure is necessary: the importance of values or interests at stake, the contribution of the measure to the objective, and the restrictive effects of the measure on international trade.[197]

In *Brazil—Tyres*, the Appellate Body accepted that in making its prima facie defense, a government could defend a measure as contributing to a cumulative package that protects public health.[198] Moreover, it can prove the contribution a

---

[189] U.S.—Korea FTA, *supra* note 47, at art. 23.2 n.2 (providing that if a party involves the exception, "the tribunal or panel hearing the matter shall find that the exception applies").

[190] *See* WHO FCTC, *supra* note 16, at art. 3.

[191] GATT, *supra* note 125, at art. XX; GATS, *supra* note 46, at art. XIV.

[192] *See* Ranjan, *supra* note 127, at 51; Burke-White & Von Staden, *supra* note 126, at 330-31.

[193] *See* MCGRADY, TRADE ABD PUBLIC HEALTH, *supra* note 124, at 2, 14-15; Benn McGrady, *Necessity Exceptions in WTO Law: Retreaded Tyres, Regulatory Purpose and Cumulative Regulatory Measures*, 12 J. INT'L. ECON. L. 153 (2009).

[194] *See* McGrady, *supra* note 124, at 165.

[195] KELSEY, *supra* note 38, at 23.

[196] *See* ABR, *China—AV Products*, *supra* note 144, ¶ 230.

[197] *Id.* ¶ 237-38; ABR, *Brazil—Tyres*, *supra* note 144, ¶ 178.

[198] ABR, *Brazil—Tyres*, *supra* note 144, ¶ 151.

measure makes with a qualitative theory or logic model; scientific evidence of a measure's effectiveness is not required.[199]

A dispute panel's consideration of a measure's restrictive effect on trade is a particular concern for tobacco control because a number of countries ban particular tobacco products or services. After finding that a partial ban violates market access commitments under GATS, the Appellate Body accepted a U.S. ban on Internet gambling services as necessary to protect public morals.[200] Yet, the ban did not survive the exception's additional restrictions (in the "chapeau"); it was held to constitute unjustifiable discrimination.[201]

If a measure passes the second stage as prima facie necessary, the third evaluates whether less-restrictive measures are reasonably available.[202] The challenging country carries the initial burden of identifying alternative measures,[203] and if it does, the burden shifts to the defending country to show that the alternatives are not "reasonably" available.[204]

Even if the answer is yes at stage three, the fourth stage analyzes whether the measure satisfies the chapeau requirements that a measure cannot constitute "arbitrary or unjustifiable discrimination" or a "disguised restriction" on trade.[205] This is covered below under *additional restrictions* to the nexus tests.

If the WTO Appellate Body sustains the approach and degree of deference that it upheld in *Brazil–Tyres*, it will enable governments to defend their policy space to adopt tobacco measures "whose individual effects would be hard to correlate to explicit public health targets."[206] That assumption, however, depends on the kind of measure, the specific product or service it regulates, the objective, the surrounding policy framework, the available science, and whether the Appellate Body chooses to extend the logic of *Brazil–Tyres* to that entire context.

a. Shortcomings

Scope—Before focusing on the nexus element, it bears repeating that the flexibility of the necessity test, as summarized above, only comes into play if the health exception applies to a dispute. The GATT/GATS health exception does not

---

[199] In ABR, *Brazil—Tyres*, the Appellate Body reasoned that "A contribution exists when there is a genuine relationship of ends and means between the objective pursued and the measure at issue." *Id.* ¶ 210.

[200] Appellate Body Report, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶ 292, WT/DS285/AB/R (Apr. 7, 2005) [hereinafter ABR, *U.S.—Gambling*].

[201] *Id.* In the pre-WTO era, a GATT dispute panel opined that Thailand's ban on cigarette advertising and marketing could be defended under the health exception. Panel Report, *Thailand—Restrictions on the Importation of and Internal Taxes on Cigarettes*, ¶ 78, DS10/R-37S/200 (Nov. 7, 1990) [hereinafter Panel Report, *Thailand—Cigarettes*].

[202] ABR, *China—AV Products*, *supra* note 144; ABR, *Brazil—Tyres*, *supra* note 144; ABR, *U.S.—Gambling*, *supra* note 200; Appellate Body Report, *European Communities—Measures Affecting Asbestos and Asbetos-Containing Products*, ¶ 171, WT/DS135/AB/R (Mar. 12, 2001).

[203] *See* Panel Report, *United States—Clove Cigarettes*, *supra* note 177, ¶ 7.422 (Indonesia must do more than merely list alternatives, it must establish that alternatives make a contribution to the health objective).

[204] ABR, *Brazil—Tyres*, *supra* note 144, ¶ 156; Panel Report, *Dominican Republic—Measures Affecting the Importation and Internal Sale of Cigarettes*, ¶ 7.22, WT/DS302/R (May 19, 2005) (stating that the Dominican Republic failed to meet in burden of showing that its tax scheme was less restrictive than alternatives identified by Honduras).

[205] ABR, *Brazil—Tyres*, *supra* note 144, ¶ 214.

[206] KELSEY, *supra* note 38, at 25.

apply in the investment claims against Uruguay or Australia or in the WTO claims against Australia that are based on the TBT Agreement.[207]

Necessity in investment disputes—There is no report of any proposal in the TPP negotiations to extend the GATT/GATS health exception to the investment chapter. Assuming that such a proposal is made and adopted, however, how would investment arbitrators apply the necessity test? Some analysts predict that when interpreting investment treaties with a health exception, arbitrators may show little deference to a defending country, which will be expected to defend its measure with scientific evidence.[208] A TPPA arbitration panel would be *ad hoc* and not necessarily schooled in WTO jurisprudence. Even if arbitrators follow the steps of the necessity test, they would balance the interests in a different legal context for investment than for trade, particularly with respect to the impact of a measure on investor expectations.[209]

Uncertainty of interpretation—In *Brazil–Tyres*, the Appellate Body used the vagueness of the necessity test to steer its interpretation in a progressive direction: *necessity* does not require scientific evidence; it does accept the indirect contribution of cumulative measures, and it places the burden of identifying alternative measures on the complaining country.[210] But the future meaning of *necessity* remains unpredictable for several reasons. Most generally, the power to interpret necessity as falling within a broad range—somewhere between *indispensible* and *making a contribution*—is in the hands dispute panels of the WTO or a regional agreement like the TPPA.[211] Uncertain meaning of the health exception can "foment regulatory-chill."[212]

In *Brazil–Tyres*, the Appellate Body accepted Brazil's cumulative measures as complementary parts of a whole policy. In prior and subsequent decisions, this has not always been the case.[213] In *United States–Gasoline*, the Appellate Body evaluated the necessity of individual sections of the gasoline regulation; the effect of the entire clean air policy could not justify individual provisions.[214] In *Australia–Salmon*, the Appellate Body evaluated the necessity of individual measures because they applied to different preparations of the same type of fish.[215] Most recently, the

---

[207] To defend an investment claim, a government can invoke backgrounds principles of international law, including scope of the police power and necessity of measures to cope with exigent circumstances. *See generally* Newcombe, *supra* note 128; Burke-White & Von Staden, *supra* note 126.

[208] *See* Burke-White & Von Staden, *supra* note 126, at 361-63. Whether arbitrators show deference may depend on whether the investor's home nation is a party to the FCTC. *See* Sy, *supra* note 160, at 653-55.

[209] *See* Newcombe, *supra* note 128, at 356; Ranjan, *supra* note 127, at 53-58. *But see* Rojid et al., *supra* note 89, at 7 (arguing that tobacco-control measures restrict services or product characteristics, not investments per se).

[210] ABR, *Brazil—Tyres*, *supra* note 144, ¶ 133-212.

[211] Appellate Body Report, *Korea—Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, ¶ 161, WT/DS161/AB/R, WT/DS169/AB/R (Jan. 10, 2001).

[212] MCGRADY, *supra* note 124, at 141, 143, 168; MCGRADY, *supra* note 5, at 102.

[213] To be clear, a series of measures is different from their effect. In *U.S—Gambling*, the Appellate Body upheld a panel finding that a series of three U.S. measures had the cumulative effect of a total prohibition on Internet gambling services. The total prohibition was not a measure; it was the result, an effective impairment of GATS obligations. ABR, *U.S.—Gambling*, *supra* note 200, ¶ 124; *see also* Appellate Body Report, *United States–Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, ¶ 2, WT/DS381/AB/R (May 16, 2012).

[214] Appellate Body Report, *United States—Standards for Reformulated and Conventional Gasoline*, 13-14, WT/DS2/AB/R (Apr. 29, 1996) [hereinafter ABR, *U.S.—Gasoline*].

[215] Appellate Body Report, *Australia–Measures Affecting Importation of Salmon*, ¶¶ 93, 101-05, WT/DS18/AB/R (Oct. 20, 1998).

panel in *China–Audiovisual Products* required China to establish the contribution of each type of measure in its content review policy for achieving its objective, its restrictive impacts on trade, and the weighing and balancing of factors.[216]

When defending a tobacco measure, it is difficult for a country to produce scientific evidence that a discrete measure contributes to a health outcome. Except in rare circumstances, public health scientists cannot isolate population health data to study the effect of a discrete measure.[217] Moreover, they cannot prove the effect of a particular law before it is adopted.[218] They must study the effect of "a series of comprehensive anti-smoking measures" over an extended period of time.[219]

In addition to these trade law variables, the unique language and legislative history of a tobacco measure can drive the interpretation of necessity. A broadly stated objective, like protecting people from the "devastating health, social, environmental and economic consequences of tobacco consumption,"[220] might leave a measure vulnerable on grounds that less-restrictive alternatives are available to achieve the desired result.[221] The industry argues that the availability of alternatives increases to the extent that a measure is part of a cumulative scheme; one alternative might substitute for another.[222] For example, PMI argues "[g]iven . . . the wide range of effective measures to reduce smoking incidence, plain packaging is neither an appropriate nor proportionate step to address smoking related issues."[223]

Burden of litigation—Given the uncertain meaning of *measures necessary*, a country must divert its own legal resources to defend a tobacco measure, hire legal advisors and expert witnesses, and pay costs of litigation that will exceed several million dollars over the course of several years. As noted above, it is the tobacco industry's strategy to generate opposing scientific evidence, assert that a measure does not contribute to positive health outcomes, and drain maximum resources from a defending country through litigation.[224]

b. Alternatives

More inclusive nexus—A health measure will survive a challenge in U.S. courts so long as it has a rational connection to protecting health,[225] apart that is, from

---

[216] Panel Report, China—Measure Affecting Trading Rights and Distribution Services for Certain publications and Audiovisual Entertainment Products, ¶¶ 7.814-7.868, WT/DS363/R (Aug. 12, 2009); ABR, *China—AV Products*, *supra* note 144, ¶¶ 244, 248-249.

[217] *See, e.g.*, Kenneth E. Warner, *The Effects of the Anti-Smoking Campaign on Cigarette Consumption*, 67 AM. J. PUB. HEALTH 645, 649 (1977).

[218] Winston Abascal et al., *Tobacco Control Campaign in Uruguay*, 380 LANCET 1575, 1575 (2012); *see* Lois Biener, Jeffrey E. Harris & William Hamilton, *Impact of the Massachusetts Tobacco Control Programme*, 321 BRIT. MED. J. 351, 351 (2000); *see also* ABR, *Brazil—Tyres*, *supra* note 144, ¶ 154.

[219] Abascal et al., *supra* note 218, at 1575; *see also* Biener, Harris & Hamilton, *supra* note 218, at 351; *see* ABR, *Brazil—Tyres*, *supra* note 144, ¶ 154.

[220] WHO FCTC, *supra* note 16, at art. 3.

[221] MCGRADY, *supra* note 124, at 139-43 (characterizing a regulatory goal and the level of protection sought).

[222] *Id.* at 155.

[223] PMI Submisison, *supra* note 20, at 3.

[224] *See supra* Part II(c).

[225] *See* RONALD D. ROTUNDA & JOHN E. NOWAK, 2 NOWAK AND ROTUNDA'S TREATISE ON CONSTITUTIONAL LAW —SUBSTANCE AND PROCEDURE § 15.4(a), § 18.2(a) (5th ed. 2012); *see also* EUGENE MCQUILLIN, 6A THE LAW OF MUNICIPAL CORPORATIONS § 24:29 (3d ed. 2012).

regulation of tobacco advertising and display.[226] There are several nexus terms that approximate the rational-connection standard of review.

- *Measures "for" protecting health*[227]—The plain meaning of *for* is "with the purpose of . . . conducive to."[228] Similar nexus terms in investment exceptions include "taken for reasons of,"[229] "to," "directed to," and "designed and applied to."[230] Commentators have interpreted the variations of *for* to require only a rational connection between a measure and its objective.[231]
- *Measures that "relate to" protecting health*[232]—The plain meaning of *relate* is "connected."[233] The Appellate Body interpreted *relating to*, the nexus in GATT Article XX(e) and (g), to require a rational connection such as whether a measure is "primarily aimed at" achieving its objective.[234] Based on their plain-language definitions, *for, to*, and *relate to* are more inclusive than *necessary*.[235]

Among these alternatives, *for* and *to* are probably more inclusive because they have not been interpreted to mean *primarily aimed at* achieving an objective. This is important because some tobacco-control measures pursue multiple objectives. For example, a licensing requirement may promote tobacco control, but also customs, consumer protection, and other regulatory objectives.

---

[226] *See* Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 581 (2001); RONALD D. ROTUNDA & JOHN E. NOWAK, 5 NOWAK AND ROTUNDA'S TREATISE ON CONSTITUTIONAL LAW-SUBSTANCE AND PROCEDURE § 20.31(b)(iii)(4)(VIII) (4th ed. 2012).

[227] For example, Prabhash Ranjan reports that India uses "for" or another nexus that is more inclusive than *necessary* in more than 35 of its international investment agreements. Ranjan, *supra* note 127, at 51; *see also* Burke-White & Von Staden, *supra* note 126, at 330; Ostransky, *supra* note 127, at 6.

[228] "For – IV. Of purpose or destination 8.a. With a view to; with the object or n purpose of: as preparatory to.; c. Conducive to.; 9.a. In order to obtain. 14. Of result or effect; used after words like cause, ground, motive, reason, etc." *For Definition*, OXFORD ENGLISH DICTIONARY ONLINE, http://www.oed.com.

[229] *E.g.*, Agreement between the Swiss Confederation and the Oriental Republic of Uruguay on the Reciprocal Promotion and Protection of Investments, Switz.-Uru., art. 2(1), July 10, 1988, 575 U.N.T.S. 159. Article 2(1) of the Uruguay–Switzerland BIT will influence the outcome of PMI's investment claim against Uruguay; it provides that each party recognizes each other's "right not to allow economic activities *for reasons of* " public health. *Id.* (emphasis added).

[230] *E.g.*, N.Z.-H.K. BIT, *supra* note 156, at art. 8(3); U.S.-Austl. FTA, *supra* note 57, at Annex 11-B; N.Z.-China BIT, *supra* note 156, at art. 11; Accord Entre L'Union Economique Belgo-Luxembourgeoise et les Etats-Unis du Mexique Concernant L'Encouragement et la Protection Reciproques des Investissements, Belg.-Lux.-Mex., art. 3(2), Aug. 27, 1998, Council of State, http://reflex.raadvst-consetat.be/reflex/pdf/Mbbs/traiverd%5C4829.pdf ("destinées à").

[231] Ostransky, *supra* note 127, at 6.

[232] *See, e.g.*, Agreement Between Japan and the Republic of Singapore for a New-Age Economic Partnership, Japan-Sing., art. 19, Jan. 13, 2002, Ministry of Foreign Affairs of Japan, http:// www.mofa.go.jp/region/asia-paci/singapore/jsepa.html; India-Sing. BIT, *supra* note 127, at art. 6.

[233] "Relate, adj - Related, connected." *Relate Definition*, OXFORD ENGLISH DICTIONARY ONLINE, http://www.oed.com.

[234] Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, ¶¶ 135-142, WT/DS59/AB/R (Oct. 12, 1998) [hereinafter ABR, *U.S.—Shrimp*](whether the measure was primarily aimed at its objective); *see also* WORLD TRADE ORG., WTO E-LEARNING: THE WTO MULTILATERAL TRADE AGREEMENTS 346 (2010), *available at* https://etraining.wto.org/admin/files/Course_234/CourseContents/eWTO-E-R3-Print.pdf; MICHAEL J. TREBILCOCK & ROBERT HOWSE, THE REGULATION OF INTERNATIONAL TRADE 532 (3d ed. 2005).

[235] *But see* Ranjan, *supra* note 127, at 51 (arguing that *relating to* is a stronger nexus than *for*).

5. Objective

The GATT/GATS objective of protecting "human, animal or plant life or health"[236] is stated in very general terms, and it has been applied to investment chapters or treaties by the eight TPP countries cited in Chart 3 in the section on scope.

When they are adopted, some customs, licensing, and tax measures may not explicitly address a health objective.[237] For example, measures to license retailers may have been adopted for consumer protection or tax purposes, and their connection to health may have evolved as a secondary or incidental function over time. As noted above, a defending government must establish that these measures make a contribution to protecting health – operating independently or in conjunction with other measures.

6. Additional Restrictions

Even if a measure passes the necessity test, it still needs to satisfy the additional restrictions in the chapeau, which require that 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 trade . . . ."[238] The necessity test considers the substance of a measure, while the additional restrictions consider how the measure is applied. A measure may well be necessary on its face but then fail to satisfy the additional considerations as applied.[239]

The purpose of these restrictions is to prevent countries from "abusing" the exceptions to defend measures that are intentionally protectionist (unjustifiable) or that have a protectionist effect (arbitrary).[240] The burden of proving that a measure is not applied to abuse an exception rests on the party invoking the exception.[241] That burden is "a heavier task than that involved in showing that an exception . . . encompasses the measure at issue."[242]

In two recent decisions, *Brazil—Tyres* and *U.S.—Gambling*,[243] the Appellate Body found that bans (on importing retreaded tires and Internet gambling) were necessary to protect health, but the measures failed the test of arbitrary or unjustifiable discrimination.[244]

---

[236] GATT, *supra* note 125, at art. XX; GATS, *supra* note 46, at art. XIV.

[237] FCTC Guidelines interpreting Article 6 recognize that a tax measure can serve dual purposes. *See* Fourth Session of the Conference of the Parties to the WHO Framework Convention on Tobacco Control, Punta del Este, Uru., Nov. 15-20, 2010, Framework Convention Alliance, *Guidelines for FCTC Article 6 (Price and Tax Measures to Reduce the Demand for Tobacco) – What Finance Ministries Need to Know*, *available at* http://www.fctc.org/images/stories/Art%206%20briefing%20finance%20ministries.pdf.

[238] GATT, *supra* note 125, at art. XX; GATS, *supra* note 46, at art. XIV.

[239] ABR, *U.S.—Shrimp*, *supra* note 234, ¶¶ 118–19, 160; ABR, *U.S.—Gasoline*, *supra* note 214, at 22.

[240] ABR, *U.S.—Gasoline*, *supra* note 214 (reviewing the drafting history of Article XX); *see also* ABR, *U.S.—Clove Cigarettes*, *supra* note 181, ¶ 109 (discussing the balance stricken by the preamble of the TBT Agreement which includes similar recognition of rights to regulate); ABR, *U.S.—Shrimp*, *supra* note 234, ¶¶ 158-59; ABR, *Brazil—Tyres*, *supra* note 144, ¶ 215; ABR, *U.S.—Gambling*, *supra* note 200, ¶ 339.

[241] ABR, *U.S.—Gasoline*, *supra* note 214, at 22-23.

[242] *Id.*

[243] ABR, *U.S.—Gambling*, *supra* note 200, ¶ 367-69.

[244] ABR, *China—AV Products*, *supra* note 144, ¶ 237-38.

a. Shortcomings

Inability to freeze the market—When the U.S. Congress banned cigarette flavorings, except for menthol, the intent was to freeze the market—to stop its growth among young smokers who were the targets of flavors like chocolate and bubble gum.[245] The flavor freeze had the effect of preventing Indonesia's clove cigarettes from entering the market, and Indonesia prevailed in its WTO discrimination claim based on Article 2.1 of the TBT Agreement (national treatment).[246] To the law's detractors, excluding menthol was "disguised protectionism," pure and simple.[247]

In *United States—Gasoline*, the Appellate Body found that discrimination is not justifiable if it can be foreseen and is not "merely inadvertent or unavoidable."[248] Similar to the U.S. law, Canada's 2009 Tobacco Act could also be described as a measure to freeze the market. It bans a select list of youth-oriented flavorings that account for less than one percent of the market, and like the U.S. law, it does not ban menthol.[249]

Upon losing the *Clove Cigarettes* case, the U.S. government explained that the dispute panel's interpretation of national treatment is "insufficient to allow for the type of legitimate incremental regulation commonly applied to situations such as the one presented here."[250]

Apart from preventing intentional disguise of protectionism,[251] there is confusion over what "disguised barrier to trade" adds as a restriction. As discussed by the panel in *Brazil—Tyres*, it may entail stricter scrutiny of whether a defending country avails itself of alternative measures that are less trade-restrictive.[252] The Appellate Body, however, observed that the panel was conflating "disguised restriction" with "arbitrary or unjustifiable discrimination."[253] It then reversed the panel's decision on "arbitrary or unjustifiable discrimination," finding instead that the U.S. measure unjustifiably discriminated.[254]

In comparison with measures that arbitrarily discriminate, "disguised restriction" would apply to non-discriminatory measures. For example, a licensing

---

[245] Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, sec. 101(b)(3), § 907(a)(1)(A), 123 Stat. 1776, 1799 (2009) (to be codified as amended at 21 U.S.C. § 387g); H.R. REP. No. 111-58, pt. 1, at 2, 37, 77 (2009).

[246] *See* ABR, *U.S.—Clove Cigarettes*, *supra* note 181, ¶¶ 181-182.

[247] Simon Lester, *Free Trade and Tobacco: Thank You for Not Smoking (Foreign) Cigarettes*, CATO FREE TRADE BULLETIN, August 15, 2012, at 1, 6, *available at* http://www.cato.org/sites/cato.org/files/pubs/pdf/FTB-049.pdf.

[248] ABR, *U.S.—Gasoline*, *supra* note 214, at 28.

[249] An Act to Amend the Tobacco Act, S.C. 2009, c. 27 (Can.). Canada's flavoring ban has been discussed in the WTO's TBT committee, but no country as requested a dispute panel yet. World Trade Org. Comm. on Technical Barriers to Trade, *Minutes of the Meeting of 23-24 June 2010*, ¶¶ 181-26, G/TBT/M/51 (Oct. 1, 2010).

[250] *Statements by the United States at the April 24, 2012, DSB Meeting*, MISSION OF THE U.S.: GENEVA, SWITZ., http://geneva.usmission.gov/2012/04/25/statements-by-the-united-states-at-the-april-24-2012-dsb-meeting (last visited Mar. 18, 2013).

[251] Panel Report, *Brazil—Measures Affecting Imports of Retreaded Tyres*, ¶ 7.330, WT/DS332/R (June 12, 2007) [hereinafter Panel Report, *Brazil—Tyres*]. Intentional protectionism would be an act of bad faith, which underlies the requirement to avoid applying a disguised barrier to trade. *See* ABR, *U.S.—Shrimp*, *supra* note 234, ¶ 158; ABR, *Brazil—Tyres*, *supra* note 144, ¶ 215.

[252] The Panel considered the amounts of retreaded tyres that Brazil exempted from the import ban because significant amounts "would have the potential to undermine the achievement of the stated objective," therefore constituting a disguised restriction. Panel Report, *Brazil—Tyres*, *supra* note 251, ¶ 7.353.

[253] ABR, *Brazil—Tyres*, *supra* note 144, ¶ 239.

[254] *Id.*

requirement combined with other measures might be challenged as a disguised measure—not because it discriminates, but because it limits trade in a way that applies to domestic and foreign suppliers alike.

According to the U.S. flavoring ban's defenders, there are several shortcomings in not being able to freeze the status quo. First, there is a public health challenge in dealing with 12 million smokers who are addicted to menthol cigarettes.[255] Second, there is a political challenge in banning a flavoring that has such a large market share already in place. According to this view, Congress would not have adopted the ban if it applied to menthol, and given political trends since the WTO decision, the United States is boxed in; there is no majority in the Congress to either add menthol to the ban or to exclude cloves from the ban.[256] As a result, the element of additional restrictions is a barrier to achieving a domestic legislative majority—the art of the possible. When regulating an addictive product, banning the incremental product (e.g., one percent of users) is often more politically feasible than banning one that affects twenty percent of users (and eighty percent of African American users).[257]

b. Alternatives

As for alternatives, a tobacco-specific exception could be drafted with no additional restrictions. The focus on tobacco greatly reduces its impact on other sectors.

[255] H.R. REP. No. 111-58, pt. 1, at 39 (2009).

[256] *See* Todd Tucker, *'One of These Things Is Not Like the Other': Likeness and Detrimental Impacts in US—Clove Cigarettes*, TRANSNAT'L DISPUTE MGMT., Nov. 2012, at 3, 8.

[257] *Id.*

Chart 4: Alternatives to the GATT/GATS Health Exception

1. Scope	2. Protection	3. Deference	4. Nexus	5. Objective	6. Additional restrictions
GATT/GATS exception—with added scope and interpretive notes					
For purposes of [chapters on goods, tech. barriers, cross-border services],[258]	nothing shall be construed to prevent the adoption or enforcement by any contracting party of measures:		necessary	to protect human, animal or plant life or health	[no] arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade,
Alternatives					
Nothing in this Agreement	prevents a party from adopting or enforcing measures		that relate to for	Protecting human, animal or plant life or health (*no change*)	*No additional restrictions*
Nothing in this Agreement	prevents a party from adopting or enforcing measures	that it it considers	appropriate to	protect human, animal or plant life or health (*no change*)	
Add: chapters on investment, intellectual property, other relevant chapters (e.g., regulatory coherence)	*Add interp. clause:* If the exception applies, a measure is consistent with MFN treatment				

B. U.S. PROPOSAL

In May 2012, the USTR vetted a summary of a proposal to treat tobacco in the TPPA as follows:[259]

- Explicitly "recognize the unique status of tobacco products from a health and regulatory perspective."[260]
- Eliminate tariffs on tobacco products.
- Provide "language in the 'general exceptions' chapter that allows health authorities in TPP governments to adopt regulations that impose origin-neutral, science-based restrictions on specific tobacco products/classes in order to safeguard public health."[261]

As of this writing, the proposal has yet to be formally "tabled" in the negotiations, and no text of draft language has been released to the public. The analysis below is based on this summary, which may or may not comport with eventual text.

[258] These selected scope terms are extracted from the U.S.-Peru FTA, *supra* note 47, at art 22.1.
[259] *TPP Tobacco Proposal*, *supra* note 112.
[260] *Id.*
[261] *Id.*

Chart 5: U.S. Proposal for a Tobacco Exception

1. Scope	2. Protection	3. Additional restrictions	3. Deference	4. Nexus	6. Objective
Language in the general exceptions chapter that	allows health authorities to adopt regulations on specific tobacco products/classes	that impose origin-neutral, science-based restrictions	*none*	in order to	safeguard public health

1. Scope

The U.S. proposal is designed to provide the FDA with a safe harbor to exercise broad authority that Congress delegated in 2009 to regulate sale, distribution, advertising, and promotion of tobacco products if doing so would protect public health.[262]

The proposal would provide "language in the general exceptions chapter."[263] In June 2012 briefings, USTR staff said that the exception would apply to all chapters of the TPPA.[264] Hence, it would apply to state-to-state disputes based on trade rules. The proposal, however, says that it is "retaining important trade disciplines (national treatment, compensation for expropriation, and transparency) on tobacco measures."[265]

a. Shortcomings

Despite its narrow band of protection, the U.S. proposal was criticized by former U.S. Trade Representatives, who echo the business concerns: "Since measures 'necessary to protect . . . health' are already excluded from our FTAs by operation of the general exception grounded in GATT Article XX, we are concerned about the signal this sends to our trading partners that the United States is willing to support a plethora of new special interest exceptions to FTA obligations."[266] The oddity of this critique is that (1) existing U.S. FTAs do not apply the GATT/GATS exception to the trade and investment articles that are being used to challenge tobacco-control measures, and (2) the U.S. proposal stops short of covering them as well.

National treatment is the rule that Indonesia used to successfully challenge the U.S. ban on clove cigarettes in a WTO dispute.[267] Honduras and Ukraine are making *de facto* national treatment claims under GATT and the TBT Agreement against

[262] *Id.*; *see also* Author's notes, briefings by USTR staff (May 2012) [hereinafter Author's Notes, USTR Briefings]. This and other accounts of USTR's interpretation of the U.S. proposal is based on notes from direct communication with USTR staff at a briefing for public health organizations on May 18, 2012 (in person at the White House Conference Center and via conference call) and prior conference calls during the week of May 7, 2012.

[263] *TPP Tobacco Proposal*, *supra* note 112.

[264] Author's Notes, USTR Briefings, *supra* note 262.

[265] For a journalistic account of the U.S. interagency process and off-the-record commentary from the business community, trade lawyers, and health advocates, see Strawbridge, *supra* note 113, at 4-11.

[266] Letter from Bill Brock, Mickey Kantor, Susan Schwab, and Clayton Yeutter to Ron Kirk, Ambassador, Office of the U.S. Trade Representative (June 22, 2012); *Critics of Draft U.S. Tobacco Proposal in TPP Poised to Renew Efforts*, INSIDE U.S. TRADE, Feb. 1, 2013, at 1.

[267] ABR, *U.S.—Clove Cigarettes*, *supra* note 181, ¶¶ 86–87.

Australia's plain packaging legislation.[268] In *United States—Clove Cigarettes*, the Appellate Body explained that even if a measure does not *de jure* discriminate against imports, it could still be a de facto violation of national treatment.[269] If the U.S. proposal is "retaining" national treatment, it is apparently through the "origin-neutral" requirement.

Compensation for expropriation is one of the rules that PMI is using to challenge tobacco-control measures in Uruguay and Australia. The exception would not apply to expropriation because, according to USTR, the rule does not prevent a health authority from adopting regulations.[270] The reasoning is, as long as governments compensate investors, "nothing prevents" adoption of a measure that expropriates an investment.[271]

Some investment and trade rules are phrased as positive obligations, others are phrased as prohibitions,[272] which the USTR may view as "preventing" the FDA from adopting regulations that restrict tobacco investments.[273] For example, the chapter on cross-border services is likely to prohibit quantitative limits on services, including prohibitions (zero quotas).[274]

A number of investment rules are phrased as prohibitions, for example: "No Party may condition an advantage . . . ."[275] and "No party may require that an enterprise . . . appoint to senior management . . . persons of a particular nationality."[276] The article on expropriation is likewise phrased as a prohibition: "No party may expropriate . . . except (a) for a public purpose, . . . [etc.]" Its prohibition is followed by provisos that allow for compensated expropriation, but there is nothing inherent to this rule that suggests that an exception cannot apply to an obligation to compensate.

USTR's argument that an exception would apply to rules that prohibit measures and but would not apply to rules that create positive obligations (e.g., to compensate)

---

[268] Request for the Establishment of a Panel by Ukraine, *Australia—Certain Measures Concerning Trademarks and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WT/DS434/11 (Aug. 17, 2012) (citing the measures as violating art. I and art. III(4) of the GATT 1994, art. 3.1 of the TRIPS Agreement, and art. 2.1 of the TBT Agreement); Request for the Establishment of a Panel by Honduras, *Australia—Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WT/DS435/16 (Oct. 17, 2012) (citing the measures as violating Article III(4) of the GATT 1994, Article 3.1 of the TRIPS Agreement, and Article 2.1 of the TBT Agreement).

[269] ABR, *U.S.—Clove Cigarettes*, *supra* note 181, ¶¶ 181–82.

[270] Author's Notes, USTR Briefings, *supra* note 262*; see also* Benn McGrady, *Clarification of US Proposal on Tobacco in the TPP*, TRADE, INV. & HEALTH (May 22, 2012), http://www.oneillinstitutetradeblog.org/clarification-of-us-proposal-on-tobacco-in-the-tpp/; Benn McGrady, *Update on Tobacco in the Trans-Pacific Partnership*, TRADE, INV. & HEALTH (May 21, 2012), http://www.oneillinstitutetradeblog.org/update-on-tobacco-in-the-trans-pacific-partnership/; Benn McGrady, *US Proposal on Tobacco in Trans-Pacific Partnership*, TRADE, INV. & HEALTH (May 18, 2012), http://www.oneillinstitutetradeblog.org/us-proposal-on-tobacco-in-trans-pacific-partnership/ [hereinafter McGrady, *US Proposal*].

[271] *See* Strawbridge, *supra* note 113, at 10-11.

[272] Arguably the article on expropriation is framed as a prohibition: "No party may expropriate . . . except (a) for a public purpose, . . . [etc.]" U.S.-Peru FTA, *supra* note 47, at art. 10.7(1).

[273] The investment prohibitions are not relevant to the tobacco disputes. *E.g.*, U.S.-Kor. FTA, *supra* note 47, at arts. 11.8-.9.

[274] *See id.* at art. 12.4(a).

[275] *Id*. at art. 12.7.

[276] *Id*. at art. 12.8(1).

is a distinction without a difference. Failure to meet positive obligations produces the same sanction—compensating the investor—as violating a prohibition.[277]

In their article on exceptions in investment treaties, Burke-White and Von Staden anticipated USTR's argument. They focused on exceptions providing that a treaty "shall not preclude the applicability of measures." This language ("NPM clauses") is close to the conventional trade exception: "nothing in this agreement prevents." The definition of "to preclude" is "to prevent."[278] Their view is that, "The exceptions contained in NPM clauses preclude the very applicability of the specified substantive obligation(s) of the BIT to acts that fall within the scope of the clause. If a certain action is covered by the terms of the exception, the result is the preclusion of wrongfulness, not because a violation of a particular obligation is justified under the circumstances, but because the obligation does not apply to that action in the first place."[279] Burke-White and Von Staden considered the argument that an exception might apply to state actors, but not to a state's "residual" liability to compensate investors for expropriation. They reject this argument:

> Any residual duty a state may owe to investors for a breach of a BIT must stem from the BIT instrument itself. As the NPM clause specifies that the BIT "shall not preclude" state actions that fall under it and removes such actions from the scope of the BITs protections, no residual liability can be left under the BIT.[280]

In light of these considerations, USTR's argument may not prevail if it is tested in dispute settlement. However, USTR's argument can also be understood as the U.S. policy position on how an exception *should* operate on expropriation. If the problem is merely a semantic interpretation, the words of a tobacco exception can be changed so that it applies to the expropriation article. (See the alternatives below under the protection element.) If the USTR's argument is really a policy position, then USTR may not be open to alternative language. If that is the case, USTR's position could influence interpretation of a tobacco exception if one is adopted.

---

[277] Draft TPPA Investment Chapter, *supra* note 21, at art. 12.28; *see also* U.S.-Kor. FTA, *supra* note 47, at arts. 11.26, 22.13. Likewise, violation of a trade obligation results in only in economic sanctions – usually in the form of punitive tariffs. *See generally* JOHN H. JACKSON, SOVEREIGNTY, THE WTO AND CHANGING FUNDAMENTALS OF INTERNATIONAL LAW ch. 5 (2006).

[278] "Preclude – 2. Shut out, exclude; prevent, frustrate; make impossible. 3. Esp. of a situation or condition: prevent (a person) from an action or (from) doing something." *Preclude Definition*, OXFORD ENGLISH DICTIONARY ONLINE, http://www.oed.com.

[279] Burke-White & Von Staden, *supra* note 126, at 386.

[280] *Id.* at 387.

b. Alternatives

There are two models to state the scope of an exception:

- *List chapters*—In U.S. FTAs, the "general exceptions" do not apply generally; they apply to a list of selected chapters. If that is the way that the tobacco exception works, then one alternative would be to add those chapters that might threaten tobacco-control measures. The scope element would read, "For purposes of chapters [A, B, C, …] X (Investment), Y (Intellectual Property, and Z (Reglatory Coherence) . . . ." As noted above, eight TPP countries already apply exceptions to investment chapters or BITs (see chart 4).
- *True general exception*—A tobacco-specific exception would be stronger if it used the scope terms of the GATT/GATS exception: "Nothing in this Agreement . . . [prevents a party] or [applies]."[281]

2. Protection

While described as a general exception, the U.S. proposal is designed to protect rulemaking by a specific agency. It would "create a safe harbor for FDA tobacco regulation, providing greater certainty that the provisions in the TPP will not be used in a manner that would prevent FDA from taking the sorts of incremental regulatory actions that are necessary to effectively implement the Tobacco Control Act, while retaining important trade disciplines (national treatment, compensation for expropriations, and transparency) on tobacco measures."[282] The FDA enjoys a very broad delegation of authority from the U.S. Congress to regulate the sale, distribution, advertising, and promotion of a tobacco product if doing so would be "appropriate for the protection of the public health."[283]

a. Shortcomings and Alternatives

"Allow health authorities in TPP governments"—As noted above, USTR argues that the U.S. proposal would not protect measures against a challenge under the article on expropriation. USTR's argument implies that the actual language of the proposal differs from the summary ("allows") and uses the conventional approach to drafting an exception ("nothing prevents"). An exception that does not apply to expropriation would be significantly compromised.

Another shortcoming is that the proposal does not cover regulations set by non-health authorities, some of which implement sub-national regulations. These include tax, license, consumer protection, environment, intellectual property, and customs authorities.[284] USTR staff was asked whether the reference to "TPP governments"

---

[281] *See, e.g.*, ASEAN-Austl.-N.Z. FTA, *supra* note 29, at art. 15(1)(2).

[282] *TPP Tobacco Proposal*, *supra* note 112.

[283] *See* Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, sec. 101(b)(3), § 906(d)(1), 123 Stat. 1776, 1796 (2009) (to be codified as amended at 21 U.S.C. § 387f). Section 906(d)(1) of the Federal Food, Drug, and Cosmetic Act, as amended by the Tobacco Control Act, provides: "The Secretary may by regulation require restrictions on the sale and distribution of a tobacco product, including restrictions on the access to, and the advertising and promotion of, the tobacco product, if the Secretary determines that such regulation would be *appropriate for the protection of the public health*." *Id.* (emphasis added).

[284] For example, at the local level, licensing authorities often have jurisdiction over point-of-sale environments; at the national level, the U.S. Federal Trade Commission (FTC) has regulated cigarette advertising. *See* Strawbridge, *supra* note 113, at 5 n.12.

covers sub-national units of government.[285] The answer was that sub-national governments would be covered in a general sense, but that some sub-national tobacco measures (e.g., regulation of sale, retail display, distribution, possession, or fire safety of tobacco products) are not within the scope of "regulations adopted by a health authority" because they were adopted by a legislature, a licensing authority, or a tax authority.[286]

The following alternatives respond to these shortcomings.

- "[*Nothing in this Agreement*] *prevents a party"*— The first alternative is to apply the exception to policy set by parties, not just health authorities. This approach, however, does not directly address USTR's argument that a duty to compensate investors does not prevent parties from adopting a tobacco-control measure.
- "[*Nothing in this Agreement*] *applies to measures"*—A stronger approach would provide that: "Nothing in this Agreement *applies* [to measures that aim or contribute to reducing use of tobacco products or harms]." This approach overcomes the "nothing prevents" argument with respect to protecting measures from challenges under the expropriation article. As explained by Burke-White and Von Staden, stating that an agreement "does not apply" to a measure disengages state responsibility: "there is no state liability and no compensation can be due."[287]
- *Interpretive clause—"For greater certainty, this exception applies to all obligations including any duty to compensate for direct or indirect expropriation."* This approach would also directly address USTR's argument, at least to the extent that USTR is making a semantic interpretation.

"Adopt"—The proposal refers to *adopting* regulations, which creates ambiguity as to whether it applies to maintaining or implementing existing regulations. By comparison, the general exceptions of GATT and GATS apply to "adoption or enforcement" of measures.[288]

- *Alternative*—Apply the exception to "adoption and enforcement."

"Regulations"—The proposal covers "regulations," not policy set by legislation (i.e., measures adopted by national or subnational legislatures). For example, it would not apply to the Act of Congress that banned clove cigarette flavoring, a legislative measure that Indonesia successfully challenged at the WTO.[289] Nor would

---

[285] Author's Notes, USTR Briefings, *supra* note 262.

[286] *See, e.g.*, TOBACCO CONTROL LEGAL CONSORTIUM, FACT SHEET 2: EXPANSION OF STATE AND LOCAL AUTHORITY (2009), *available at* http://www.publichealthlawcenter.org/sites/default/files/fda-2.pdf; TOBACCO CONTROL LEGAL CONSORTIUM, FACT SHEET 4: UNCHANGED STATE AND LOCAL AUTHORITY (2009), *available at* http://www.publichealthlawcenter.org/sites/default/files/fda-4.pdf; TOBACCO CONTROL LEGAL CONSORTIUM, FACT SHEET 6: STATE AND LOCAL AUTHORITY TO ESTABLISH TOBACCO PRODUCT STANDARDS (2009), *available at* http://www.publichealthlawcenter.org/sites/default/files/fda-6.pdf; Michael Freiberg, *Options for State and Local Governments to Regulate Non-Cigarette Tobacco Products*, 21 ANNALS HEALTH L. 407 (2012), *available at* http://www.publichealthlawcenter.org/sites/default/files/resources/phlc-lreview-freiberg-regulating-otp-2012.pdf; *Firesafe Cigarettes*, PUB. HEALTH L. CENTER, http://www.publichealthlawcenter.org/topics/tobacco-control/product-regulation/firesafe-cigarettes (last visited Feb. 25, 2013).

[287] Burke-White & Von Staden, *supra* note 126, at 387.

[288] *See* U.S.-Kor. FTA, *supra* note 47, at art. 23.1 (incorporating by reference the general exceptions of GATT art. XX and GATS art. XIV).

[289] Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, sec. 101(b)(3), § 907, 123 Stat. 1776, 1799 (2009) (to be codified as amended at 21 U.S.C. § 387g); ABR, *U.S.—Clove Cigarettes*, *supra* note 181, ¶¶ 1-4, 298.

it apply to legislation that restricts tobacco products in other countries. Legislation in other countries or the sub-national level is often specific and operationally effective.[290]

- *Alternatives*—Apply the exception to any "measure" so as to include legislation and other government policies. GATS defines *measure* broadly to include "any measure by a Member, whether in the form of a law, regulation, rule, procedure, decision, administrative action, or any other form." TPPA chapters define their scope in terms of "measures" covered.[291] While there are broader classes of policy—such as *actions* or *treatment*—an exception need only apply within the scope of a chapter.

"Specific tobacco products/classes"—The reference to products and tariff classifications could be interpreted to mean the proposed exception does not apply to restrictions that regulate services that are related to, but indirect and distinct from, the physical tobacco product. Tobacco companies have challenged measures that regulate services such as retail display and location of vending machines.[292]

- *Alternatives*—There are many ways to expand the class of protected measures while ensuring that the exception is limited to the context of tobacco control. The following are likely candidates, evaluated in order of increasing protection:
  - *"Measures that restrict contents, sale, distribution, advertising, or promotion of tobacco"*—The approach of defining a class of measures by listing stages in the supply chain is used in the Tobacco Control Act of 2009.[293] It delegates authority to regulate not only products but also tobacco-related services including restrictions on sale, distribution, advertising, or promotion of tobacco products.[294] No doubt, such a list expands protection. Defining a class with a list, however, has three shortcomings. First, each item in the list raises boundary questions; for example, what is a tobacco service? Second, the list creates an implied class, which may exclude innovative measures or the non-health components of a licensing scheme. The expression of one thing excludes another.[295] Lists invariably become incomplete or obsolete; an international agreement requires a more flexible approach. Third, linking a list of measures to a common purpose (e.g., "measures that restrict tobacco products") inserts a nexus and an objective into the exception prior to another nexus and objective (e.g., "in order to safeguard public health"). The result is an uncertain syntax that could spawn litigation.

---

[290] *See, e.g.*, KELSEY, *supra* note 38, app. 3 at 72-75 (describing tobacco control policies with trade and investment treaty implications); CHANGELAB SOLUTIONS, TOBACCO LAWS AFFECTING CALIFORNIA 7 (2012), *available at* http://changelabsolutions.org/sites/default/files/documents/2012_CALawsBooklet_FINAL_20120515.pdf.

[291] *See, e.g.*, Draft TPPA Investment Chapter, *supra* note 21, at art. 12.3; U.S.-Peru FTA, *supra* note 47, art. 11.1.

[292] *See, e*.g., Sinclair Collis Ltd., Petitioners, for Judicial Review of the Tobacco and Primary Health Servces (Scotland) Act 2010, [2011] CSOH 80, *available at* http://www.scotcourts.gov.uk/opinions/2011CSOH80.html.

[293] *See* Family Smoking Prevention and Tobacco Control Act § 906(d)(1).

[294] *Id.*

[295] *See* Clifton Williams, *Expressio Unius Est Exclusio Alterius*, 15 MARQUETTE L.REV. 191, 193 (1931); *see also* Karl N. Llewellyn, R*emarks on the Theory of Appellate Decision and the Rules of Canons About How Statutes Are to be Construed*, 3 VAND. L. REV. 395, 405 (1950).

- "*Tobacco-control measures*"—It is tempting to solve the list problem by protecting a class of "tobacco-control measures." *Tobacco control* is a defined term in the FCTC: "a range of supply, demand and harm reduction strategies that aim to improve the health of a population by eliminating or reducing their consumption of tobacco products and exposure to tobacco smoke."[296] This definition has a broad scope of protection (a range of strategies), but it also has a nexus (aim to improve) and a two-part health objective (reduce consumption or exposure). In short, the FCTC definition imports complexity that could create opportunities for litigation.
- *"Measures"*—The clearest approach is to protect the broad class of "measures" followed by a nexus that links to a health-related objective. The nexus and objective can be drafted to limit the class of protected measures, for example: "measures that aim or contribute to reducing use of tobacco products or harms."
- *Additional interpretive clause*—In order to reduce the threat of MFN claims, an interpretive clause can provide that if this exception applies to a measure, it is consistent with MFN treatment.

Additional interpretive clause—In order to reduce the threat of MFN claims, an interpretive clause can provide that if this exception applies to a measure, it is consistent with MFN treatment.

3. Additional Restrictions

One purpose of the U.S. proposal is to replace the necessity test of the GATT/GATS exception and its additional restrictions. In its place, the U.S. proposal applies to "origin-neutral, science-based restrictions."[297] These phrases restrict how the exception applies in addition to restrictions posed by the nexus and the health objective. In Charts 5 and 6, the "additional restrictions" appear before the nexus and objective in order to preserve the original syntax of the U.S. proposal as it was vetted in summary form.

USTR staff explained that regulations must be "*facially* neutral,"[298] and in *Clove Cigarettes*, the U.S. brief argued that the test should be "*facially* neutral."[299] In the written summary, however, the substantive test is "origin-neutral."[300]

The USTR staff explained that the FDA would conduct studies, literature reviews, and formal rulemaking procedures to establish the scientific evidence for stricter regulation on tobacco products.[301] USTR staff said the proposal requires "some science" as an alternative to the necessity test.[302]

---

[296] WHO FCTC, *supra* note 16, art. 1

[297] *TPP Tobacco Proposal*, *supra* note 112.

[298] Author's Notes, USTR Briefings, *supra* note 262.

[299] First Written Submission of the United States, *United States—Measures Affecting the Production and Sale of Clove Cigarettes*, ¶¶ 199-201, DS406 (Nov. 16, 2010) [hereinafter First Written Submission, *U.S.—Clove*], *available at* http://www.ustr.gov/webfm_send/2396.

[300] *TPP Tobacco Proposal*, *supra* note 112.

[301] *See* Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, sec. 101(b)(3), § 906(d)(1), 123 Stat. 1776, 1796 (2009) (to be codified as amended at 21 U.S.C. § 387f).

[302] Author's notes, USTR Briefings, *supra* note 262.

a. Shortcomings

Origin-neutral—There is a difference between "origin-neutral" and "facially origin-neutral," the literal meaning of a regulation "on its face." Origin-neutral is sufficiently vague that it could encompass the meaning of national treatment, as expressed in Article III of GATT, Article 2.1 of the TBT Agreement, and elsewhere.[303] A government or an investor could argue that a regulation is not origin-neutral on a de facto basis, just as Indonesia successfully argued that the U.S. ban on clove cigarettes is a de facto violation of national treatment.

Science-based restrictions—In *Brazil—Tyres*, the European Commission (EC) argued that Brazil failed to establish the first prong of the necessity test, which requires that a measure contribute to its stated goal of protecting health.[304] Brazil sought to prove the measure's contribution (a ban on imports of retreaded tires) with a logical chain of cause and effect; fewer imports will stimulate the recycling of domestic tires, which in turn will reduce the number of scrap tires, which in turn will reduce the spread of disease-bearing mosquitoes.[305] The EC asserted that Brazil must quantify the "*actual* [not potential] contribution of the measure to its stated goals" and the importance of this contribution.[306] The Appellate Body upheld Brazil's qualitative logic "in a coherent sequence," *rather than* a quantitative, scientific analysis.[307] This interpretation was affirmed in *China—Audiovisual Products*.[308]

In short, the Appellate Body has ruled that the necessity test does not require "science-based" analysis, but rather, evidence of "a genuine relationship of ends and means between the objective pursued and the measure at issue. To be characterized as necessary, a measure does not have to be indispensable."[309]

If a dispute panel is called upon to interpret a "science-based" exception, it is likely to distinguish its meaning from *necessity*. This opens the door to a new round of litigation on two beneficial aspects of the *Brazil—Tyres* interpretation; the sufficiency of qualitative evidence and the efficacy of cumulative measures. In combination, these approaches are important because the effects of measures need to

---

[303] Article III(4) of the GATT provides:

> 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.

GATT, *supra* 125, at art. III(4) (emphasis added).

Article 2.1 of the TBT Agreement provides: "Members shall ensure that in respect of technical regulations, products imported from the territory of any Member shall be accorded treatment no less favourable than that accorded to like products of national *origin* and to like products originating in any other country." TBT Agreement, *supra* note 179, at art. 2.1 (emphasis added).

[304] ABR, *Brazil—Tyres*, *supra* note 144, ¶¶ 9-10.

[305] *Id.* ¶¶ 135-136.

[306] *Id.* ¶ 137 (emphasis added). According to the EC, it was necessary for the Panel to quantify the reduction of waste tyres resulting from the import ban in order to properly weigh and balance the contribution against other relevant factors. The relative ease of establishing a measure's contribution under the general necessity test (versus a quantitative science-based test) is illustrated by the Appellate Body's rejection of the EC's argument that the very indirect nature of the risk attributable to imported tyres should have called for a more diligent examination of the contribution made by the import ban to the reduction of the number of waste tyres. *Id.*

[307] *Id.* ¶¶ 150-153 (upholding the Panel's analysis as described in ¶¶ 148-149). To be clear, the Appellate Body and the panel held that Brazil must (and did) establish that its import ban makes a *material* contribution to the public health objectives, not merely an incidental contribution. *Id.* ¶ 150.

[308] ABR, *China—AV Products*, *supra* note 144, ¶¶ 250–254.

[309] ABR, *Brazil—Tyres*, *supra* note 144, ¶ 154, 210.

be judged over long time periods after implementation, usually in combination with other measures.[310]

The precedent for requiring science-based regulations exists in the WTO's Agreement on Sanitary and Phytosanitary Measures, which covers food-safety measures.[311] In *EC—Hormones*, the Appellate Body interpreted the SPS Agreement, which requires a measure to be "based on" scientific principles, scientific evidence, and a risk assessment.[312] In that context, the Appellate Body interpreted "based on" to be "a substantive requirement that there be a rational relationship between the measure and the risk assessment."[313] That rational relationship does not require science without dissent; governments may rely on qualified and reliable divergent opinions.[314]

This interpretation provides some support for USTR's assertion that *science-based* merely requires "some science."[315] Yet in *EC—Hormones*, the Appellate Body found that the EC's scientific basis was relevant but not persuasive.[316] The rational basis test was not met when studies relied on by the government were contradicted by studies that were more specifically relevant to the measure being challenged.[317] "Some science" is not the test; a dispute panel must find that the science is persuasive in the totality of evidence.

In *Clove Cigarettes*, the Appellate Body stressed that a dispute panel has a duty to consider all the evidence that disputing parties submit, not just the evidence submitted by the defending government.[318] The Appellate Body also stressed that panels "'are not required to accord to factual evidence of the parties the same meaning and weight as do the parties.'"[319] Ruling against the United States, the Appellate Body discounted the weight that the United States gave to survey data about the degree to which young smokers preferred clove over menthol flavoring in comparison to adults.[320] The Appellate Body also rejected the U.S. inference that banning menthol would shift demand into the black market.[321] It is not apparent how a "science-based" defense would have protected the U.S. measure.

---

[310] ABR, *Brazil—Tyres*, *supra* note 144, ¶¶ 150-155, 172; *see also* MCGRADY, *supra* note 124, at 156.

[311] Agreement on the Application of Sanitary and Phytosanitary Measures, Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 493 [hereinafter SPS Agreement]. *See generally* MCGRADY, *supra* note 124, at 175-200.

[312] SPS Agreement, *supra* note 311, at art. 2.2 ("Members shall ensure that any . . . measure is applied only to the extent necessary to protect . . . health, is based on scientific principles and is not maintained without sufficient scientific evidence"); *id.* at art. 5.1 ("Members shall ensure that their . . . measures are based on an assessment, as appropriate to the circumstances, of the risks to . . . health, taking into account risk assessment techniques developed by the relevant international organizations.").

[313] *See also* Appellate Body Report, *EC—Measures Concerning Meat and Meat Products (Hormones)*, ¶ 193, WT/DS26/AB/R, WT/DS48/AB/R (Jan. 16, 1998) [hereinafter ABR, *EC—Hormones*]; Appellate Body Report, *Japan—Measures Affecting Agricultural Products*, WT/DS76/AB/R, ¶¶ 74-75, (Feb. 22, 1999) [hereinafter ABR, *Japan—Agricultural*]; Appellate Body Report, *Australia—Measures Affecting the Importation of Salmon*, WT/DS18/AB/R, ¶¶ 119-123, (Oct. 20, 1998) [hereinafter ABR, *Australia—Salmon*].

[314] *Id.* ¶ 194.

[315] *See supra* text accompanying note 302.

[316] ABR, *EC—Meat*, *supra* note 313, ¶ 193.

[317] *See id.* ¶¶ 198-200; *see also* ABR, *Japan—Agricultural*, *supra* note 313, ¶¶ 74-75; ABR, *Australia—Salmon*, *supra* note 313, ¶ 126.

[318] ABR, *U.S.—Clove Cigarettes*, *supra* note 181, ¶ 149.

[319] *Id.*

[320] *Id.* ¶¶ 144-150.

[321] *Id.* ¶ 225.

In its comments on the TPPA, PMI supported "negotiations that promote . . . *science-based* regulations."[322] A science-based test invites the tobacco industry to generate specific scientific evidence to counter more general science upon which the health authorities rely.[323] The industry has generated studies to refute the efficacy of plain packaging and smoke-free restaurants.[324] The industry also argues that regulations cause a shift of smokers to the black market, which increases the health risk rather than abates it.[325] As noted above, a number of WTO delegations have echoed tobacco industry arguments about the need for scientific evidence, which foreshadows more trade disputes.[326]

Even in a resource-rich agency like the FDA, the scientific challenge of proving the contribution of a measure, or the lesser contribution of alternative measures, is formidable. For an innovative measure, the FDA undertakes "exhaustive scientific research demonstrating that its decisions are not 'arbitrary and capricious.'"[327] For measures that have been adopted elsewhere, researchers have found it difficult to find a control jurisdiction that has comparable demographics but different tobacco measures.[328] What they can study are the cumulative effects of multiple measures on health outcomes.[329] In these studies, the long-term effect of older measures is difficult to separate from the short-term effect of more recent measures.[330]

---

[322] PMI Submission, *supra* note 20.

[323] *See* ACTION ON SMOKING AND HEALTH (ASH) AUSTRALIA, COUNTERING TOBACCO TACTICS 9 (2010); ASH Austl., *Tobacco-Free University Campuses in Australia: Progress and Best Practices* (2009), *available at* www.ashaust.org.au/lv4/UniSurveySummary09.doc; Yussuf Saloojee & Elif Dagli, *Tobacco Industry Tactics for Resisting Public Policy on Health*, 78 BULL. WORLD HEALTH ORG. 902, 904 (2000); WORLD HEALTH ORGANIZATION, *supra* note 63, 10-11; Lisa Bero et al., *Lawyer Control of the Tobacco Industry's External Research Program*, 274 JAMA 241, 247 (1995) ("[I]ndustry-funded scientists had a coordinated plan for producing and publicizing data that supported the tobacco industry's position that tobacco use is not dangerous.").

[324] *See* DELOITTE, TOBACCO PACKAGING REGULATION – AN INTERNATIONAL ASSESSMENT OF THE INTENDED AND UNINTENDED IMPACTS (2011); WORLD HEALTH ORGANIZATION, *supra* note 63, at 17 (quoting M. Scollo et al., *Review of the Quality of Studies on the Economic Effects of Smoke-Free Policies on the Hospitality Industry*, 12 TOBACCO CONTROL 13-20 (2003)).

[325] *See Plain Packaging of Tobacco Products*, BRITISH AMERICAN TOBACCO, http://www.bat.com/group/sites/uk__3mnfen.nsf/vwPagesWebLive/DO7J7DCZ?opendocument&SKN=1 (last visited April 10, 2013); *see also Illicit Trade*, PLAIN PACKAGING OF TOBACCO PRODUCTS, http://www.plain-packaging.com/Templates/Blank_IllicitTrade.aspx (last visited May 22, 2012).

[326] For example, in the WTO's Committee on Technical Barriers to Trade, Colombia asserted that in the wake of more stringent packaging regulations, "it had not been scientifically proven that these labels directly induced a drop in consumption of tobacco." World Trade Org. Comm. on Technical Barriers to Trade, *Minutes of the Meeting of 15-16 June 2011*, ¶ 11, G/TBT/M/54 (Sept. 20, 2011). Other countries recently challenging the scientific basis or trade-restrictiveness of tobacco regulations include the Dominican Republic, Indonesia, China, Chile, Cuba, Nicaragua, Ukraine, Honduras, and the Philippines. *See id.*

[327] Editorial Bd., *FDA Should Do More with its Authority over Tobacco Products*, WASH. POST (Feb. 4, 2013), http://articles.washingtonpost.com/2013-02-04/opinions/36741269_1_tobacco-products-menthol-cigarettes-lawrence-deyton.

[328] For studies that use other jurisdictions as a control reference, see Abascal et al., *supra* note 218, at 1580 (comparing Uruguay and Argentina); Pierce et al., *Effectiveness of Antismoking Campaigns in Australia*, 80 AM. J. PUB. HEALTH 565, 565 (1990) (comparing Melbourne and Sidney); Biener, Harris & Hamilton, *supra* note 218, at 353 (comparing Massachusetts with the rest of the United States except California).

[329] *See* Abascal et al., *supra* note 218, at 1580 (the study was able to compare comprehensive tobacco-control measures in Uruguay with relatively fewer measures in Argentina); Warner, *supra* note 217, at 649; Biener, Harris & Hamilton, *supra* note 218, at 353.

[330] Warner, *supra* note 217, at 649; *see also* Brian R. Flay, *Mass Media and Smoking Cessation*, 77 AM. J. PUB. HEALTH 153, 153 (1987) (discussing the problem with assessing program effects on knowledge, attitudes, or behavior of individual smokers).

Influence on interpretation of the GATT/GATS exception—There is some concern that a science-based test in the tobacco exception would influence the way that dispute panels under the TPPA—and perhaps even the WTO—would interpret the GATT/GATS health exception.[331] There are arguments on both sides of this point. Both start with the doctrine of effective treaty interpretation; a dispute panel should notice the deliberate choice of an exception for tobacco regulations as compared with health measures in general.[332]

Harmful influence—There are two arguments that requiring science-based evidence in the tobacco exception would influence interpretation of the health exception—within a TPP dispute if not the WTO.

First, the USTR's announced purpose for the exception is to provide a "safe harbor" to defend tobacco control regulations than would be the case using the GATT/GATS exception.[333] If a science-based test is supposed to be easier than the necessity test, it implies that the necessity test requires a standard of evidence that is *more stringent* than the tobacco exception. Thus, the argument is that a science-based exception might undermine the Appellate Body's interpretation that the necessity test does not require scientific evidence to establish the contribution of a measure.

Second, both the health exception and the proposed tobacco exception aim to protect public health.[334] Thus, it could be argued that if science-based evidence is necessary to defend tobacco measures, it is necessary for other health measures as well.[335] Alternatively, if tobacco measures are singled out for special protection, other health measures can be seen as less deserving of deference by negative inference.[336]

Not a harmful influence—Two arguments rebut these concerns. First, to give meaning to a distinct "science-based" standard, a dispute panel should assume that it has a different purpose and meaning than the necessity test.[337] The "science-based" standard can be understood as a higher standard, not a lower (easier) one. There are trade and health rationales to support this view. From a trade perspective, the burden of proof is higher to balance the risk of abusing protection that is broader than the baseline health exception. That is, it would prevent protectionism in treating a product as deserving of exceptional treatment. From a health perspective, tobacco is so deadly that science can establish the effectiveness of cumulative measures. That may not the case with more indirect threats to health.

---

[331] McGrady, *Clarification of US Proposal on Tobacco in the TPP*, *supra* note 270; Benn McGrady, *Tobacco in the Trans-Pacific Partnership Agreement*, TRADE, INVEST. & HEALTH (Nov. 29, 2012), http://www.oneillinstitutetradeblog.org/tobacco-in-the-trans-pacific-partnership-agreement/?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+oneill-tih+%28Trade%2C+Investment+and+Health%29

[332] *See* ABR, *U.S.—Gasoline*, *supra* note 214, at 23.

[333] *See supra* text accompanying note 114.

[334] *See supra* text accompanying note 262.

[335] *See* McGrady, *Clarification of US Proposal on Tobacco in the TPP*, *supra* note 270.

[336] Strawbridge, *supra* note 113, at 13.

[337] *See* ABR, *EC—Hormones*, *supra* note 313, ¶ 164 (observing, in reference to the SPS Agreement, which requires measures to be "based on" international standards in Article 2.2 and "conform to" international standards in Article 2.4, that "Article 3.3 once again refers to measures 'based on' international standards. The implication arises that the choice and use of different words in different places in the SPS Agreement are deliberate, and that the different words are designed to convey different meanings. A treaty interpreter is not entitled to assume that such usage was merely inadvertent on the part of the Members who negotiated and wrote that Agreement").

Second, the harmful influence arguments assume that a TPPA dispute panel would depart from the prevailing interpretation by the Appellate Body that scientific evidence is not required to defend a measure as necessary (contributing to its health objective) under the GATT/GATS health exception. Even if a TPPA panel were to do so, it is much less likely that in a subsequent WTO dispute, the Appellate Body would depart from its own established jurisprudence in favor of a TPPA panel's interpretation of exceptions that do not appear in any WTO agreement.

On balance, it is difficult to fathom how the U.S. proposal, if adopted, would influence the Appellate Body's jurisprudence that under the necessity test, a country should be able to establish the contribution of its measure based on qualitative reasoning and *not* scientific evidence.[338]

b. Alternatives

Several alternatives would avoid the significant shortcomings of the additional restrictions:

- Make the discrimination test "*facially* origin neutral," rather than "origin neutral."[339]
- Do not use a science-based test. As an alternative, use "contribute or aim to" as a nexus.
- Preface the science-based test with self-judging terms of deference (see below).
- Add an interpretive clause in response to concerns that a tobacco exception might adversely influence interpretation of the GATT/GATS health exception, for example: "For greater certainty, this exception applies in addition to other exceptions; it has no effect on operation of other exceptions."

4. Deference

The U.S. proposal contains no terms of deference. It is reported though that business groups, however, are concerned that the U.S. proposal would be interpreted as evidence of intent to show more deference to tobacco-control measures than would otherwise be the case, particularly in the context of deciding whether a measure rises to the level of indirect expropriation or a denial of fair and equitable treatment.[340]

From a health perspective, the additional restrictions (origin-neutral, science-based) increase the burdens of defending a measure. If the restrictions are kept, the exception can be strengthened by making it self-judging, e.g., "*measures that it considers appropriate* to impose a science-based level of protection."

---

[338] *See* Strawbridge, *supra* note 113, at 13.

[339] *See* First Written Submission of the United States, *United States—Measures Affecting the Production and Sale of Clove Cigarettes*, ¶¶ 199-201, WT/DS406 (Nov. 16, 2010). For an analysis that stresses the importance of prohibiting only facial discrimination in order to preserve the balance of domestic regulatory autonomy, see Request for Permission to Submit Information the Appellate Body by Non-Parties & Information for Submission to the Appellate Body on Behalf of O'Neill Institute for National and Global Health Law, Georgetown University Law Center, *United States—Measures Affecting the Production and Sale of Clove Cigarettes*, 2-5, WT/AN-2012-1/DS406 (Jan. 26, 2012), *available at* http://www.law.georgetown.edu/oneillinstitute/documents/2012-01_Clove%20Cigarettes.pdf (Article 2.1 of the TBT Agreement should be interpreted in a manner that does not upset the existing balance between domestic regulatory autonomy and respect for commitments (the balance between rights and obligations).

[340] Strawbridge, *supra* note 113, at 10.

5. Nexus

The U.S. proposal's nexus is "in order to"—as in regulations that restrict tobacco products *in order to* safeguard public health. The plain meaning of "in order to" is to bring about a desired end.[341] Alternatives include shorter forms that serve as synonyms of *in order to*: "to," "for,"[342] or "that."[343] It is conceivable that these terms could be interpreted narrowly in the sense that a measure is adopted *primarily* or *only* to protect health. An alternative that anticipates that argument is:

- *"That contribute or aim to"*—A measure that contributes to protecting health meets this objective, even if it was not originally adopted for health reasons (e.g., a licensing scheme). In addition, a measure that aims to protect health meets this objective, even if it would be difficult to isolate the measure to prove its contribution.

5. Objective

The objective of the U.S. proposal is to "safeguard public health."[344] Combined with the nexus *in order to*, rather than *necessary to*, a defending country should be able to demonstrate a connection of most tobacco-control regulations to the end of protecting public health. This may be more difficult, however, with regulations that serve objectives in addition to protecting health, such as business licensing, revenue, or consumer protection.

a. Alternatives

If the U.S. proposal is strengthened in terms of protection (e.g., to protect all measures), trade negotiators may be more sensitive to a business critique that the exception is too broad. Some tobacco-control advocates have proposed using a tobacco-specific objective, for example, "to prevent or reduce tobacco use or its harms."[345] Reducing harms speaks to the impact of smoking on non-smokers and society as a whole (e.g., the burden of health costs). Considering that reducing tobacco use is inclusive of prevention, which is reducing use in the future, this alternative can be shortened: "*to reduce tobacco use or its harms*."

Chart 6 summarizes the alternatives in this section with a column for each element of the exception. Within a column, the alternatives for specific terms are keyed with outline numbers: [2a], [2b], etc. The bottom of the chart provides several examples of how the alternatives can be combined.

---

[341] "Order – P3, *in order to*, b.(a) With a view to the bringing about of (something), for the purpose of (some desired end). Obs." *Order Definition*, OXFORD ENGLISH DICTIONARY ONLINE, http://www.oed.com.

[342] "To – III. Expressing the relation of purpose, destination, result, effect, resulting condition or status.; 8. a. Indicating aim, purpose, intention, or design" *To Definition*, OXFORD ENGLISH DICTIONARY ONLINE, http://www.oed.com. "For; for the purpose of; with the view or end of; in order to. (Now often replaced by for.)" *For Definition*, OXFORD ENGLISH DICTIONARY ONLINE, http://www.oed.com.

[343] "That – II. 3. a. Introducing a clause expressing purpose, end, aim, or desire: with simple subjunctive (arch.), or with may (pa. tense might), should, rarely shall." *That Definition*, OXFORD ENGLISH DICTIONARY ONLINE, http://www.oed.com.

[344] *See supra* text accompanying note 262.

[345] Comment from Joseph Brenner & Ellen Shaffer, Dirs., Ctr. for Pol'y Analysis on Trade & Health, to the Office of the U.S. Trade Representative, Comments Concerning Proposed United States-Trans-Pacific Partnership Trade Agreement, USTR-2009-0041, at 17 (Jan. 25, 2010).

Chart 6: Alternatives to the U.S. Proposal for a Tobacco Exception

1. Scope	2. Protection	3. Additional restrictions	4. Deference	5. Nexus	6. Objective
U.S. Proposal					
[1] Language in the general exceptions chapter: *Unclear whether it applies to all chapters and articles*.	[2a] allows health authorities in TPP governments [2b] to adopt [2c] regulations [2d] on specific tobacco products/ classes	that impose [3a] origin-neutral, [3b] science-based restrictions	[4] *none*	[5] in order to	[6] safeguard public health.
First alternative for key terms					
[1] *Add to the chapters covered by the exception:* For purposes of [*listed chapters plus*] … investment, intellectual property, regulatory coherence, etc.	[2a] [nothing prevents] a party [2b] from adopting or enforcing [2c] measures [2d] *none*	[3a] [that are] facially origin-neutral [3b] *none – see "contribute or aim to" as a nexus*	[4] *none*	[5] to	[6] protect public health
Second alternative for key terms					
[1] Nothing in this Agreement	[2a] [nothing prevents] a party [2b] from adopting or enforcing [2c] measures	[3a] *none* [3b] *none*	[4] *none*	[5] that contribute or aim to	[6] reduce tobacco use or its harms
Third alternative for key terms					
[1] Nothing in this Agreement	[2a] applies to [2c] measures	[3a] *none* [3b] *none*	[4] that a party [it] considers appropriate	[5] to	[6] protect public health
Examples of how alternatives can be combined					
Nothing in this Agreement prevents a party from adopting or enforcing … … measures that contribute or aim to reduce use of tobacco products or harms. … measures that it considers appropriate for science-based protection of public health. … measures that it considers appropriate to reduce use of tobacco products or harms. Nothing in this Agreement applies to measures that contribute to or aim to reduce tobacco use or its harms. *Interpretation clauses:* For greater certainty, . . . … this exception applies in addition to other exceptions; it has no effect on operation of those exceptions. … this exception applies to all obligations including any duty to compensate for direct or indirect expropriation. … if this exception applies to a measure, it is consistent with MFN treatment.					

V. TOBACCO EXCLUSIONS IN THE TPPA

A. COMPARING EXCEPTIONS WITH EXCLUSIONS

A shortcoming of any exception, as an affirmative defense, is that it works with considerable effort and expense in protracted litigation. The necessity test is complex; its uncertainty provides opportunitites to litigate and lobby, which is the tobacco industry's strategy to chill regulatory progress.

By comparison, excluding tobacco-control measures from the TPPA is a stronger safeguard because it limits the cost and risk of litigation to the preliminary question of whether a measure fits the excluded class. By limiting jurisdiction, an exclusion also blocks use of MFN to incorporate more favorable treatment of tobacco in other treaties. The means of controlling abuse of an exclusion is its narrow focus on tobacco, the only consumer product that causes disease and death when used as directed. Chart 7 compares the evaluation of various exceptions with a full carve-out. It shows that if the strongest elements of an exception are combined, it can be virtually as strong as a full carve-out. The distinction between the strongest exception and a full carve-out is that the latter can resolve a dispute at the first stage of determining jurisdiction; while a strong exception operates at a later stage of litigation, after determining that a measure violates a trade or investment rule.

Chart 7: Comparing Exception with Carve-Out

Evaluation Criteria for Protecting Health	**Exception—Various Options**			**Full Carve-Out**
	U.S. Proposal	**GATT/GATS**	**Strongest Alternative**	
Provide a defense to violations				
Scope: add investment, new chapters	No	No	Yes	Yes
Protect: tobacco/health regulations	Yes	Yes	Yes	Yes
Protect: legislation	No	Yes	Yes	Yes
Protect: non-health measures	No	Unclear	Yes	Yes
Protect: pre-existing measures	No	Yes	Yes	Yes
Deference: add terms of deference	No	No	Yes	Yes
Nexus: avoid necessity	Yes	No	Yes	Yes
Nexus: avoid science/effect	No	Yes	Yes	Yes
Add. restrictions: avoid them	No	No	Yes	Yes
Avoid harm to GATT/GATS except	Unclear	Yes	Yes	Yes
Avoid litigation cost and risk	No	No	Possibly	Yes

B. ALTERNATIVE EXCLUSIONS

Full carve-out—As quoted above, some organizations seek to exclude "tobacco" from trade and investment agreements.[346] Read literally, such an exclusion might apply to tobacco leaf (as opposed to regulation of a tobacco product) and possibly to a tobacco company. This analysis focuses more narrowly on excluding tobacco-control *measures* – not the plant and not a company. It is regulatory measures to which the non-tariff chapters of a trade or investment agreement apply. Exclusion of tobacco-control measures would not affect how a trade agreement applies to other kinds of measures that might affect tobacco companies (e.g., taking land for building a highway).[347]

Partial exclusions generally—There are numerous alternatives for partial exclusions, and since they exclude rather than balance interests, they focus on the elements of scope and protection. If they define a specific class, there is no need for elements of deference, nexus, objective or additional restrictions. It is common for countries to exclude certain FTA articles or chapters with respect to sensitive products. For example, the U.S.-Dominican Republic-Central America Free Trade Agreement (CAFTA) provides for parties to exclude products from the scope of national

[346] *See, e.g.*, WCTOH Decleration, *supra* note 109.
[347] *See* Rojid et al., *supra* note 89, at 11.

treatment; excluded products include coffee, fuel, wood, and weapons.[348] It is even more common to exclude sensitive products from tariff schedules: Vietnam, Association of Southeast Asian Nations (ASEAN) FTA, Malaysia (ASEAN FTA), and Jordan (United States-Jordan FTA) have excluded tobacco.[349] The United States excluded sugar in its FTA with Australia, and Korea excluded rice in its FTA with the United States.[350]

A full exclusion—a "carve-out"—could be drafted in different ways. For example:

- "*This Agreement does not apply to tobacco-control measures*."[351] This is the most succinct approach. As noted above, however, "tobacco control" can be read to imply that measures must contribute to a health objective, which could complicate its interpretation.
- "*This Agreement does not apply to any measure with respect to tobacco products and related services, intellectual property, or investments."* Expanding upon Australia's reservation (discussed below), this approach focuses on general classes of measures. It avoids the complications how a measure relates to a health objective.

Partial scope: Investor-state dispute resolution—Australia inserted a note in the draft investment chapter that excludes Australia from ISDS. Other countries could add themselves to this note.

Partial investor protections—There are a number of precedents to exclude certain investor protections. In its BIT with the United States, Turkey generally reserves the right to limit the extent to which U.S. companies "may establish, acquire interests in or carry on investments with respect to tobacco."[352] Canada excludes measures that protect cultural industries from its FTAs through an annex to define the scope of exemption, a general exception, and a reference to the UN cultural convention (UNESCO).[353]

Reservations—TPP countries can unilaterally reserve the right to regulate tobacco services and investment (also known as "take reservations") in Annex I and II of the TPPA.[354] Annex I covers existing measures, so using this annex would limit

---

[348] The Dominican Republic-Central America-United States Free Trade Agreement, Dom. Rep.-Cent. Am.-U.S., Annex 3.2, Aug. 5, 2004, Office of the U.S. Trade Representative, http://www.ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta/final-text.

[349] United States-Jordan Free Trade Agreement, U.S.-Jordan, Annex 2.1, Oct. 24, 2000, Office of the U.S. Trade Representative, http://www.ustr.gov/trade-agreements/free-trade-agreements/jordan-fta/final-text.

[350] *See* REMY JURENAS, CRS REPORT FOR CONGRESS: AGRICULTURE IN U.S. FREE TRADE AGREEMENTS: TRADE WITH CURRENT AND PROSPECTIVE PARTNERS, IMPACT, AND ISSUES 27 (2008) (stating that United States excluded sugar); *id.* at 35 (stating that Jordan excluded tobacco); *id.* at 37 (stating that Korea excluded rice).

[351] WHO FCTC, *supra* note 16, at art. 1(e); *see* U .S.-Peru FTA, *supra* note 48, at art. 22.3.1 ("Except as set out in this Article, nothing in this Agreement shall apply to taxation measures.").

[352] Treaty between the United States of America and the Republic of Turkey Concerning the Reciprocal Encouragement and Protection of Investments, U.S.—Turk., art. 2.2, Dec. 3, 1985, SEN. TREATY DOC. NO. 99-19 [hereinafter U.S.-Turk. BIT] (stating that national treatment applies to an investment "once established"); BEYZA BANU OZDILEK, MFN TREATMENT AND ITS SCOPE (2006).

[353] *See* Cultural Industries Sectoral Advisory Group on International Trade, *New Strategies for Culture and Trade Canadian Culture in a Global World*, DEP'T OF FOREIGN AFFAIRS & INT'L TRADE CAN. (Feb. 1999), *available at* http://www.international.gc.ca/trade-agreements-accords-commerciaux/fo/canculture.aspx?lang=en&view=d.

[354] *See, e.g.*, U.S.-Austl. FTA, *supra* note 57, Annex II ("Australia reserves the right to adopt or maintain any measure with respect to wholesale and retail trade services of tobacco products, alcoholic beverages, or firearms.").

the effectiveness of the reservation as new measures or amendments are adopted. Annex II covers existing and future classes of measures, which need not be individually listed.

A reservation excludes individual measures (e.g., a specific law), types of measures (e.g., tobacco-control measures) or economic sectors (e.g., distribution and advertising services) from certain rules in the chapters on investment and cross-border services.[355] The rules from which measures can be reserved include: national treatment, most-favored-nation treatment, local presence, performance requirements, senior management and boards of directors, and market access.[356] Among the rules from which measures cannot be reserved are: expropriation, fair and equitable treatment, and disciplines on domestic regulation.[357]

Australia has previously reserved measures with respect to the sector of wholesale and retail trade services from market access rules in cross-border services. Australia, however, did not reserve measures on advertising services, packaging services or the other rules under Annex II.[358] New Zealand and Singapore have only reserved tobacco-control measures with respect to national treatment of distribution services.[359] Other countries that have full or partial bans on tobacco advertising could unilaterally reserve measures in the advertising, distribution and packaging sectors.

A more fail-safe approach for Annex II would be a horizontal reservation—to "reserve the right to adopt or maintain any measure with respect to services for tobacco products or tobacco-related investments" for "all sectors" and "all obligations" (Investment and Cross-Border Services).

VI. CONCLUSION

Six chapters of the TPPA potentially threaten tobacco-control measures. They expand market access or protect the industry with WTO-plus rules that can be used in later rounds of litigation:

1. *Investment*—expands investor-state arbitration for U.S.-based tobacco companies.
2. *Intellectual property*—adds a new right to use trademarks with a place name (e.g., Marlboro).
3. *Cross-border services*—expands the service sectors to which trade rules apply (e.g., packaging, distribution, and advertising); potentially limits domestic regulation.

---

[355] *See* Rojid et al., *supra* note 89, at 11.

[356] U.S.-Peru FTA, *supra* note 47, at art. 10.13, 11.6, Annex II (Explanatory Notes, art. 1).

[357] As a potential rule that limits regulation see generally N.Z.-Malay. FTA, *supra* note 53, at art. 8.18 ("[E]ach Party shall ensure that such a measure: (a) is based on objective and transparent criteria, such as competence and the ability to supply the service; (b) is not more burdensome than necessary to ensure the quality of the service; and (c) does not constitute a disguised restriction on the supply of the services.").

[358] *See supra* note 354.

[359] Agreement Between New Zealand and Singapore on a Closer Economic Partnership, N.Z.-Sing., Annex 2, Nov. 14, 2000, N.Z. Ministry of Foreign Affairs & Trade, http://www.mfat.govt.nz/Trade-and-Economic-Relations/2-Trade-Relationships-and-Agreements/Singapore/Closer-Economic-Partnership-Agreement-text/index.php (explaining that New Zealand's schedule of commitment excluding agricultural raw materials, live animals, food products, beverages, tobacco and wool and putting restriction on national treatment and Singapore's schedule of commitment excluding food, beverages, tobacco and sale of motor vehicle and putting restriction on national treatment).

4. *Regulatory coherence*—promotes industry stakeholder participation in decision-making; promotes regulatory impact assessments that the industry uses to litigate.
5. *Technical barriers to trade*—potentially limits how governments cooperate in setting standards or guidelines for tobacco control.
6. *Tariffs*—expands market access in countries with high tobacco tariffs (Vietnam).

Six elements of the GATT/GATS exception create a complex formula for defending tobacco measures:

1. *Scope*—Based on the U.S. model for free trade agreements, the baseline health exception applies to selected chapters of the agreement, but not to specific rules being used to litigate against tobacco-control measures (including the investment chapter, among others).
2. *Protection*—Tobacco investors use MFN to incorporate rules from outside the primary agreement that provide more favorable treatment. The draft TPPA investment chapter excludes procedural treatment from MFN, but MFN would still apply to substantive investor rights.
3. *Deference*—There are no terms of deference to non-WTO treaties in the WTO exception.
4. *Nexus*—The necessity test creates uncertainty with stages that enable litigation to challenge the contribution of a measure, weigh that contribution against its trade restrictiveness, and identify less restrictive alternatives. Some scholars predict that investment arbitrators would apply the necessity test with less deference than trade panels.
5. *Objective*—Some measures serve multiple purposes, including non-health purposes like revenue or business licensing; their connection to protecting health may be indirect.
6. *Additional restrictions*—Even a "necessary" measure can be challenged as having a discriminatory effect in the market as applied. This works against incremental change and measures that freeze the market at its current stage of development.

The exception provides opportunities to litigate each element. Win or lose, the threat of costly litigation has long been part of the tobacco industry's strategy to constrain implementation of tobacco-control measures.

To create a safe harbor for its agency regulations, the United States informally proposed a tobacco exception. This, however, does not protect legislation or measures adopted by tax, licensing or customs authorities. In place of the necessity test, it requires scientific evidence, a burden of proof that *necessity* does not require. The U.S. proposal would not protect against the WTO dispute the United States lost, the WTO claims against Australia, or the investment claims against Australia or Uruguay.

This article identifies alternatives for each element in the U.S. proposal. Here is the original summary compared to alternative elements in several possible combinations:

- *Original summary of the U.S. proposal*—
  Language in the general exceptions chapter that allows health authorities to adopt regulations on specific tobacco products or classes that impose origin-neutral, science-based restrictions in order to safeguard public health.
- *Alternatives—several of many possible combinations*—
  Nothing in this Agreement prevents a party from adopting or enforcing . . .

> . . . measures that contribute or aim to reduce use of tobacco products or its harms.
>
> . . . measures that it considers appropriate for science-based protection of public health.
>
> . . . measures that it considers appropriate to reduce use of tobacco products or its harms.

Nothing in this Agreement applies to measures that contribute to or aim to reduce tobacco use or its harms.

- *Additional interpretive clauses* – For greater certainty,

  . . . this exception applies in addition to other exceptions; it has no effect on operation of those exceptions.

  . . . this exception applies to all obligations including any duty to compensate for direct or indirect expropriation.

  . . . if this exception applies to a measure, it is consistent with MFN treatment.

The more elegant alternative to a complex exception is to simply exclude tobacco-control measures. An exclusion is better protection than a defense; it contains litigation. If the political will is lacking for a full exclusion, there are several ways to draft a partial exclusion. TPP countries could follow Australia's lead by opting-out of ISDS (generally or with respect to tobacco-control measures), and countries can take reservations from rules on market access and discrimination in the chapters on services and investment.

Even if Uruguay and Australia win their trade and investment disputes, the precedent will not end such litigation. Defenses that rest on trade flexibilities or exceptions flex in both directions; they provide a defense and also an opportunity to to balance trade against health interests. Further, the tobacco industry will continue to have an advantage in resources to litigate for the purpose of chilling or diverting tobacco-control measures.

Whether it supports or opposes effective safeguards for tobacco control, the U.S. government will play a decisive role. Upon passage of Tobacco Control Act in 2009, President Obama committed his administration to work with the WHO and other nations "to fight this epidemic on a global basis. He acknowledged the "constant and insidious barrage of advertising." [360] Yet in the years since, U.S. negotiators have worked to expand market access for advertising and distribution, expand trademark protections, reduce tariffs, and expand investor rights—all to the benefit of tobacco companies at home and abroad. The TPP is an opportunity to strike a balance in favor of health and against tobacco litigation.

---

[360] Barack Obama, President, Remarks by the President at the Signing of the Family Smoking Prevention and Tobacco Control Act (June 22, 2009) (transcript available at http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-at-the-signing-of-the-family-smoking-prevention-and-tobacco-control-act/.