Report by the WHO FCTC Knowledge Hub on Legal Challenges to inform the work of the Expert Group on Forward-looking Tobacco Control Measures

Background paper prepared by the McCabe Centre for Law and Cancer, in its capacity as the WHO FCTC Knowledge Hub on Legal Challenges, to inform the work of the Expert Group on Forward-looking Tobacco Control Measures (in relation to Article 2.1 of the WHO FCTC)

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Introduction

The tobacco industry frequently launches or threatens litigation against tobacco control measures, as a means of weakening, delaying or blocking their adoption. As recognized by the Conference of the Parties (COP) to the WHO Framework Convention on Tobacco Control (WHO FCTC) in decisions FCTC/COP6(19) and FCTC/COP6(18) and described in the accompanying report of the Convention Secretariat in document FCTC/COP/6/20, these legal challenges may take place in domestic courts as well as under trade and investment agreements, and are a common barrier to implementation of the Convention. The WHO FCTC Knowledge Hub on Legal Challenges assists Parties to the WHO FCTC to respond to these legal challenges, and it also assists the Convention Secretariat with its mandate to monitor legal challenges as established in decision FCTC/COP7(21).

The tobacco industry has an especially strong incentive to challenge expanded or intensified tobacco control measures and tobacco control measures that have the potential to significantly advance tobacco control, as those challenges prevent the wider adoption of those measures by other Parties. For example, when Australia became the first country to implement tobacco plain packaging, it faced legal challenges under international trade law, international investment law and in the High Court of Australia, aimed at deterring the adoption of tobacco plain packaging by other countries. All three cases were decided in favour of Australia, as were subsequent legal challenges to plain packaging in other early-adopting Parties. It can be expected that a key barrier to parties' implementation of forward-looking tobacco-control measures (FLMs) in relation to Article 2.1 of the WHO FCTC is likely to be legal challenges, as was the case in relation to tobacco plain packaging.

This paper reviews legal challenges to certain FLMs identified in a draft list provided by the Expert Group on Forward-looking Tobacco Control Measures, in line with COP decision FCTC/10(12) which invites the Knowledge Hubs to provide information to the Expert Group. As many FLMs are new proposals and may not necessarily have been implemented, we have also considered legal challenges to similar measures for other products (for example, phase-outs of other hazardous products) where relevant.

These legal challenges have been identified using desk research, primarily through a review of the tobaccocontrollaws.org website run by the Campaign for Tobacco Free Kids, the *2023 Global Progress Report on Implementation of the WHO Framework Convention on Tobacco Control*, and publicly available information about legal challenges that the Knowledge Hub is aware of through its work with Parties. Legal challenges were reviewed only in English, and unofficial translations were used for legal challenges that were not originally published in English. We have prioritized legal challenges from Parties but included litigation in non-Parties where illustrative. Some case summaries have been adapted from our Knowledge Hub website. **The information in this report is provided for informational purposes only and should not be considered as legal advice.**

Measures Parties can take to mitigate the risk of legal challenges to FLMs

As emphasized in the Punta Del Este Declaration of Fourth session of the Conference of the Parties to the WHO FCTC (COP4), Parties have a sovereign right to regulate for public health in international law.[1] The Knowledge Hub has found in a previous study conducted to support the Expert Group on Impact Assessment that Parties win the vast majority of legal challenges brought against their measures.[2] Parties should not be dissuaded from implementing FLMs by the threat of legal challenge.

Parties should consider the following practices to mitigate the risk of legal challenges:

(a) establishing cross-government coordination from the outset, noting that it is particularly important to coordinate with ministries with legal, trade or investment mandates early to ensure that measures are developed in a way that is robust to legal challenge and that non-health ministries are sensitized to the importance of their obligations under Article 5.3 of the WHO FCTC;

(b) documenting the rationale for an FLM and any available and relevant supporting evidence, which may include international evidence and recommendations by international bodies, including those developed through the COP and by the World Health Organization (WHO), and does not necessarily require Parties to conduct new local studies;

(c) following any required procedures for the adoption of the measure, where applicable, to prevent legal challenges on procedural grounds;

(d) mapping any relevant laws at different levels of government to ensure that laws at one level of government do not pose a barrier to implementation of FLMs by other levels of government; and

(e) ensuring that political commitment to tobacco control is maintained across levels and sectors of government, including commitment to FLMs.

This report also highlights that the WHO FCTC is an important part of the legal and evidentiary framework for courts that are hearing legal challenges. It further suggests that by identifying and describing FLMs and providing further information about the supporting evidence and experience of Parties in implementing them, the Expert Group's work could be a helpful resource for Parties that may face legal challenges to FLMs.

Legal challenges relating to identified FLMs

We identified several concluded legal challenges to FLMs, covering tobacco-free generation laws, flavour and additive bans, the single presentation requirement, the application of retail reduction schemes to individual retailers, levies on tobacco suppliers, and price controls.

[1] Decision FCTC/COP4(5).

[2] Published as: Zhou SY, Liberman JD, Ricafort E, The impact of the WHO Framework Convention on Tobacco Control in defending legal challenges to tobacco control measures, Tobacco Control 2019;28:s113-s118.

Tobacco Free Generation (birthdate-based sales restrictions)

Two legal challenges have been brought against tobacco-free generation laws implemented by subnational governments, one in the Philippines and one in the United States of America (which is a non-party to the Convention). In both cases, tobacco-free generation laws were implemented by municipalities, and complainants argued that the laws discriminated by age and conflicted with minimum legal purchasing age laws adopted at other levels of government.

In the Philippines, the Philippine Tobacco Institute (PTI) challenged a local government ordinance in the City of Balanga, which prohibited the sale of tobacco products within the city of Balanga to any person born on or after 1 January 2000.[3] PTI argued that the ordinance was invalid as it contravened national legislation, violated the equal protection clause in the Philippine Constitution and was unduly oppressive. The Regional Trial Court of Bataan ruled in favour of PTI in 2019. It found that the ordinance discriminated between adults born before and after 1 January 2000, and the city had not shown that the risks of tobacco varied between these age groups. It found that the ordinance conflicted with the national law (which takes precedence under the Philippines Constitution), which established a minimum legal purchasing age as the age of majority. It also found that a provision in the law extending criminal liability to parents and those exercising parental authority violated substantive due process rights.

More recently, in the case of *Six Brothers Inc v. Town of Brookline*,[4] a tobacco retailer challenged a tobacco-free generation bylaw implemented by the Town of Brookline in Massachusetts, arguing that the local law conflicted with a state law that set a minimum legal purchasing age of 21, and that it discriminated on the grounds of date of birth. The challenge was rejected by the Massachusetts Superior Court at first instance, and this rejection was upheld by the Massachusetts Supreme Judicial Court in 2024. The Supreme Judicial Court found that state law as retaining the authority of local governments to enact by-laws restricting the sale of tobacco products in their towns, including complete bans, as long as they did not conflict with the state law's minimum age provision, and that the state law therefore did not prohibit the town from implementing an incremental prohibition over time in the by-law. The Supreme Judicial Court also held that the by-law did not discriminate based on year of birth as it did not burden a fundamental right or target a historically disadvantaged group. The by-law's classification based on year of birth was rationally related to the legitimate state interest of curbing tobacco use, especially among minors. The cutoff date could not be said to be arbitrary given the necessity of choosing some cutoff, and the by-law provided a rational alternative to an immediate outright ban by allowing for the phasing out of tobacco sales.

The differing results in the Balanga and Brookline cases are essentially due to the courts' differing findings on the powers of local governments in the presence of higher legislation, and the courts' different framings of the rationale for distinguishing by age. Key lessons for Parties implementing tobacco-free generation laws are:

- to ensure either they are implemented by the correct level of government or that laws at different levels provide appropriate flexibility for stronger measures at other levels; and

[3] Philippine Tobacco Institute v City of Balanga, CA-G.R. SP No. 159329, Court of Appeals, Manila, Special 15th Division (2019).

[4] Superior Judicial Court of Massachusetts, Slip opinion SJC-13434, 8 March 2024. Available via Action on Smoking and Health (US).

- to clearly explain the rationale for phasing out tobacco products by date of birth, including for instance by emphasizing the public health benefits of preventing uptake and not just the harms of tobacco more generally, or by linking tobacco-free generation laws to the ultimate goal of ending the tobacco epidemic.

Ban flavours/additives

Flavour and additive bans have also been the subject of several legal challenges.

Some of these legal challenges have focused on exemptions for menthol rather than bans per se. A key example at the international level is the US – Clove Cigarettes case at the World Trade Organization (WTO),[5] which was a dispute between two non-Parties to the WHO FCTC, Indonesia and the United States of America. In this WTO decision, the panel and Appellate Body found that a ban on flavours in the United States that contained an exemption for menthol was discriminatory, as it banned clove cigarettes predominantly manufactured in Indonesia but not menthol cigarettes predominantly produced in the United States. The parties to the dispute subsequently negotiated a settlement that left the flavour ban unchanged but provided Indonesia with a number of concessions in trade policy unrelated to tobacco. The key lesson of this case is that flavour bans should be comprehensive, with the panel finding that differences in regulation based on legitimate regulatory distinctions (including differences in public health) would not constitute discrimination, and taking note of the *Partial guidelines for implementation of Articles 9 and 10* (which recommended "prohibiting or restricting ingredients, including flavours, used to increase palatability in tobacco products", including flavours, without distinguishing between menthol and other flavours) despite both parties to the dispute being non-Parties to the WHO FCTC.

There are several legal challenges to more comprehensive flavour bans, which have been decided in favour of countries. For example, one component of the legal challenges to the European Union's 2014 Tobacco Products Directive was a challenge to a ban on characterizing flavours.[6] The European Court of Justice (ECJ) upheld the Tobacco Products Directive in its entirety, including the flavour ban on menthol. The ECJ specifically noted the *Partial guidelines for implementation of Articles 9 and 10*.[7] It found that flavour bans had an adequate legal basis, were proportional, and did not contravene any rights protected by European Union law.

In Brazil, several legal challenges have been launched against a regulation by ANVISA, the Brazilian health regulatory agency, that bans all flavours and additives in tobacco products other than sugar. In the most significant of these before the Supreme Federal Court of Brazil, that court upheld the ability of ANVISA to regulate tobacco products. It also rejected a legal challenge to the constitutionality of the regulation, finding that freedom of enterprise did not prevent conditions and limitations on private activities, in light of the public interest in protecting and promoting

[5] United States – Measures Affecting the Production and Sale of Clove Cigarettes, Panel Report, WT/DS406/R (2 September 2011); United States – *Measures Affecting the Production and Sale of Clove Cigarettes, Appellate Body Report*, WT/DS406/AB/R (4 April 2012).

[6] Republic of Poland v European Parliament and Council of the European Union, Case C-358/14, Judgment of the Court (Second Chamber), 4 May 2016; Philip Morris Brands SARL v Secretary of State for Health, Case C-547/14, Judgment of the Court (Second Chamber), 4 May 2016.

[7] Case C-358/14, 175-178, Case C-547, paras 43–49.

health, and the right of consumers to information.[8] Because the decision on constitutionality was decided on a five-to-five basis, with five justices in favour and five justices opposed, it is not binding on lower tribunals. However, since the decision of the Federal Supreme Court, these findings have been affirmed in lower courts as well.[9]

Further discussion of the cases in the WTO and the European Union (EU) is included in WHO's Tobacco product regulation: basic handbook (2018).

Ban on new tobacco products, brands and variants

There are several cases concerning bans on particular new tobacco products that have appeared on the market in a given country, including products such as snus, gutka and shisha. Many of these cases are compiled by WHO in the publication: Litigation relevant to regulation of novel and emerging nicotine and tobacco products: case summaries.

The 2014 EU Tobacco Products Directive provides Member States with the ability to prohibit a "certain category" of tobacco or related products on public health grounds and on the basis of their specific situation, which could be applied to many categories of novel tobacco products. This provision was challenged by Philip Morris Brands SARL in its challenge to the validity of the EU Tobacco Products Directive overall. Philip Morris argued that this provision did not harmonize the rules for the free movement of goods in the internal market and therefore did not have an adequate legal basis under EU law.[10] The European Court of Justice rejected this challenge, finding that the directive allowed Member States to prohibit certain tobacco products while requiring harmonization of the rules applying to products that remained on the market, and thus could still be said to be implemented under the EU's powers to harmonize the internal market.

The primary legal challenge to single presentation requirements (that is, a ban on brand variants other than the primary brand) is the challenge brought by Philip Morris International against the single presentation requirement in Uruguay.[11] In this decision, a number of Philip Morris entities challenged Uruguay's graphic health warnings and single presentation requirement, arguing principally that the measures expropriated their trademarks and failed to provide them with fair and equitable treatment.

The *Philip Morris v Uruguay* Tribunal found in favour of Uruguay on all grounds. It found that the graphic health warnings and single presentation requirement were evidence-based, non-discriminatory measures implementing the WHO FCTC that fell within Uruguay's right to regulate. It noted that neither measure substantially deprived Philip Morris of its investments in Uruguay, and it clarified that trademarks are negative rights to prevent infringement by others, not positive rights that can be exercised against the state. The measure was therefore not an expropriation. The Tribunal found that the measures were evidence-based, non-discriminatory measures furthering implementation of WHO FCTC Article 11 and were therefore reasonable and could not be said to be arbitrary. As Uruguay had not made specific commitments to freeze its regulatory

[8] National Confederation of Industry (Confederação Nacional da Indústria) v. ANVISA, Direct Action of Unconstitutionality (ADI) 4874, Judgment of 1 February 2018.

[9] See e.g. Case no 0046408-58.2012.4.01.3300, Federal Regional Tribunal for the 1st region, Decision of 2 February 2021 (Brazil). We have not reviewed a translation of this case; information about the outcome and a copy of the decision in Portuguese was obtained through contact with the WHO/PAHO country office in Brazil in 2021.

[10] Case C-547/14.

[11] Philip Morris Brands Sarl v Oriental Republic of Uruguay, ICSID Case N. ARB/10/7, Award, 8 July 2016.

framework in place, the measures therefore did not constitute a breach of the fair and equitable treatment standard. The Tribunal also found that the measures were not "unreasonable and discriminatory", that Uruguay had not committed to protect Philip Morris' trademarks from regulatory change, and that Philip Morris's Uruguayan subsidiary had not been denied justice in its domestic courts. It ordered Philip Morris to pay most of Uruguay's costs for defending the case.

Specifically in relation to the single presentation requirement, the Tribunal found that the measure furthered the goal in Article 11(a) of the WHO FCTC of ensuring the packaging and labelling of tobacco products was not misleading. Although Uruguay did not provide detailed evidence to the Tribunal regarding its adoption of the single presentation requirement, the majority of the Tribunal found that it was enough to show that the single presentation requirement "was an attempt to address a real public health concern, that the measure taken was not disproportionate to that concern and that it was adopted in good faith",[12] and that the single presentation requirement did not breach the fair and equitable treatment standard. The tribunal specifically noted that international investment law does not prevent a country from being the first to adopt a measure, and that the evidence base for a measure can include international cooperation through the WHO FCTC.[13] The Tribunal also found unanimously that the single presentation requirement did not expropriate Philip Morris' trademarks, as although it impacted trademarked brand variants, the relevant question was whether it substantially deprived Philip Morris of the whole business in Uruguay – which it did not.[14] As a bona fide non-discriminatory public health measure, the measure also fell within Uruguay's sovereign right to regulate and therefore would not have constituted an expropriation in any case.[15]

One arbitrator dissented in relation to the single presentation requirement and the fair and equitable treatment standard, finding that the single presentation requirement was arbitrary and therefore breached the fair and equitable treatment standard. The dissenting decision was based in part on the lack of mention of single presentation requirements in the WHO FCTC and the guidelines for implementation of the WHO FCTC. This was combined with lack of a contemporaneous record of the studies/evidence base relied on, as well as the fact that the measure did not capture equally misleading "alibi" brands (that is, new brands with a similar appearance to the banned brand variants).[16] These critiques in the dissent do not necessarily apply to the evidence base as it has evolved since Uruguay adopted these measures in 2008–2009, and it should be remembered that the majority decided that the single presentation requirement was reasonable in light of its rationale to prevent misleading pack design. Further, Uruguay subsequently adopted plain packaging, which addressed the problem of misleadingly designed alibi brands by standardizing the design of all packs.[17]

[12] Paras 407–409.

[13] Para 396.

[14] Para 283–284.

[15] Para 307.

[16] Philip Morris Brands Sarl v Oriental Republic of Uruguay, ICSID Case N. ARB/10/7, Concurring and Dissenting Opinion of Arbitrator Born, 8 July 2016, paras 82–179.

[17] Law no. 19723 (Uruguay), translation available here.

Retail reduction

We identified one legal challenge in relation to retail reduction, which largely concerns the specifics of how a retail reduction scheme applied to an individual retailer and was not a more general challenge to the measure.

In *Vékony v Hungary*,[18] the European Court of Human Rights examined a 2012 Hungarian law which consolidated the existing 42 000 tobacco retailers into a state monopoly with 6800 licenced retailers. The legal challenge was brought by an individual grocer who had held a tobacco licence previously (constituting one third of the grocery business) but had been denied a licence under the new scheme without being offered a reason. The Constitutional Court had upheld the government's decision to deny a licence, noting the public health rationale of the law including its basis in the WHO FCTC and its aim of reducing access to tobacco products by minors.

However, the European Court of Human Rights found that the cancellation and subsequent non-issuance of a licence to the applicant interfered with his right to peaceful enjoyment of his possessions under Article 1 of Protocol 1 of the European Convention on Human Rights. The Court considered that the former licence was a possession that had been interfered with, and that in light of the severe consequences for the individual applicant and the 20 years the applicant had spent retailing tobacco as part of a general grocery business, it was not sufficient to have only 10 months between the enactment of the law and the deadline for the applicant to stop selling tobacco, which started three months after he had been informed he would not be issued a new licence. It also found a number of procedural faults with the process for granting new licences, including that the holding of a previous licence was not taken into account in the issuing of a new one, that five new licences had been granted to another applicant thus reducing the licences available to others, that the requirements for a licence were not transparent, and that there had not been any public scrutiny or legal remedy available regarding decisions to issue licences under the new system. These changes had therefore imposed an excessive individual burden on the applicant, who was awarded 10 000 euros in pecuniary damages and 5000 euros for non-pecuniary damages. The majority describes this as compensation for the loss of future earnings but a concurring opinion emphasizes that the compensation is for the loss of earnings had there been a longer transition period and not for a general loss of future earnings.[19]

In relation to principles applying to licencing, the Court noted that "proceedings related to the renewal or invalidation of licences that are arbitrary, discriminatory, or disproportionately harsh violate the second paragraph of Article 1 of the Protocol". Furthermore, authorities must follow a "genuine and consistent policy" regarding licensing. "… The lack of safeguards against arbitrariness and the lack of a reasonable opportunity of putting the case of the persons affected to the responsible authorities for the purpose of effectively challenging the measures interfering with their possession … as well as the question of lawfulness of the applicant's own conduct … are issues to be taken into consideration".[20] The court also notes that the burden on the applicant must be "weighed against the general interest of the community, that is, public health considerations in the instant case. In this context, the States enjoy a wide margin of appreciation".[21]

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[18] Vékony v Hungary, Application no 65681/13, Judgment, 1 July 2015.

[19] *Vékony v Hungary*, Majority opinion, paras 39–41, Joint concurring opinion of Judges Spano and Kjolbro para 11.

[20] *Vékony v Hungary*, para 34.

[21] *Vékony v Hungary*, para 35.

It is important to note that this case was not considered as a challenge to the scheme as a whole.[22] Rather, the case centred on the impact of the scheme on the applicant as an individual, and on the procedure involved in implementing the scheme. A scheme that addressed the critiques of the Court, for example by allowing for longer notice/transition time, providing more information to the applicant or the public on criteria for issuing licences under the new scheme, and taking into account the prior holding of a licence under the new scheme would likely have been assessed differently according to the principles in this case. A key lesson for Parties seeking to implement such measures is to consider how existing licensees will be transitioned to a new system (including, if appropriate, support for economically viable alternative activities for individual sellers in line with Article 17 of the WHO FCTC), and to ensure clear communication of how the transition will be implemented.

Tobacco supplier profit surtax/health levy/user fee

Levies on tobacco can take many different forms, so any legal challenge would be based on the specifics of a given levy/user fee/profit surtax. However, legal challenges to levies often focus on the taxation powers of the state.

One indicative case is the legal challenge to Kenya's Tobacco Control Regulations,[23] which includes a "solatium compensation contribution" which charges a levy of 2% of the tobacco products manufactured or imported, payable to the Kenyan Tobacco Control Fund. British American Tobacco (BAT) challenged the provision on solatium compensation contributions for lacking sufficient basis in the Act (which established that the contribution would be paid to the Tobacco Control fund but not its amount) and argued that because it was a tax it would need to be levied in legislation under the Kenyan Constitution. BAT also argued that the solatium compensation contribution deprived it of property, that it was disproportionate and arbitrary, and that it violated the East African Community Treaty. The High Court, Court of Appeal, and Supreme Court all decided in favour of the Kenyan Government and dismissed the legal challenges. The Supreme Court found that the solatium compensation contribution had been provided for in the Act, that it was not a tax given that it was levied for a specific purpose and not for general revenue, and that the solatium compensation contribution did not raise any constitutional issues.[24] It upheld the finding of the Court of Appeal that the WHO FCTC provided a legal basis for the levy under the Constitution. In 2024, another legal challenge was launched to the regulations but was swiftly dismissed in November 2024 for lack of any grounds and due to the Supreme Court having already decided the challenge in 2019.[25]

Price controls for tobacco products and devices

In 2010, the European Commission challenged minimum tobacco prices in France.[26] The European Court of Justice found that the minimum price law was inconsistent with EU law, in particular a 1995 EU directive establishing the structure of tobacco taxes in EU Member States. It

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[22] *Vékony v Hungary*, para 31.

[23] BAT v Cabinet Secretary for Health, Petition (Application) no. 5 of 2017, Judgment, Supreme Court of Kenya, 26 November 2019.

[24] *BAT v Cabinet Secretary for Health*, paras 116–121.

[25] *BAT v Cabinet Secretary for Health*, Petition (Application) no. 5 of 2017, Ruling of the Court re Application of James Gicheru Kariuki and Others, Supreme Court of Kenya, 22 November 2024.

[26] European Commission v France, Case C-197/08, Judgment of the Court (Third Chamber), 4 March 2010.

found that France should have implemented its policy goals through excise taxes instead of the minimum price, and that under the terms of the directive, France could not implement a policy that impeded competition between tobacco manufacturers. This case was specific to the fact that EU harmonizes tobacco taxes at a regional level. The 1995 EU Directive in this case has since been replaced by the 2011 EU Tobacco Tax Directive. The key lesson from this case is that price measures may be harmonized at a regional level, and Parties based in those regions will need to coordinate at a regional level in order to implement such measures.

Increase smoke-free venues (private homes, vehicles, multi-unit housing) and reduce third-hand-smoke exposure

There are a significant number of cases challenging Article 8 implementation and these largely have been decided in favour of government; a selection of cases is provided by the Knowledge Hub. These legal challenges typically make arguments regarding privacy, property or autonomy of smokers, and are resolved in favour of governments due to the strong countervailing interest in public health or the human right to health. Many of these arguments may recur in relation to new smoke-free venues.

Some Article 8 cases have specifically examined the expansion of smoke-free requirements to private spaces. Typically, these have been limited to settings where the state owes a duty of care to residents, including hospitals and mental health facilities and prisons.

Several common law jurisdictions have examined challenges to the application of smoking bans to persons held involuntarily in hospitals and mental health facilities.

- In *B v Waitemata District Health Board*,[27] a patient held in a mental health facility challenged the smoke-free policy of the (New Zealand) Waitemata District Health Board, which prohibited smoking on its grounds and thus prohibited smoking by patients in intensive mental health care who were confined to their units for the duration of treatment. The applicant argued that the 1990 Smoke-Free Environments Act required the provision of a smoking area in the hospital and that his rights to be treated with humanity and respect for dignity, freedom from cruel or disproportionately severe treatment, freedom from discrimination on the basis of disability, and right to a home or private life were infringed by the policy. The Supreme Court found that the Smoke-Free Environments Act permitted but did not require the provision of smoking areas in mental health facilities, and it found that it did not breach the New Zealand Bill of Rights Act. In relation to the right to be treated with humanity and dignity, Court found that the hospital provided appropriate management of nicotine withdrawal symptoms including through providing appropriate nicotine replacement therapies, undertook a broad consultation process and had obligations to protect others in the facility from exposure to tobacco smoke. It also found that the smoking ban did not meet the threshold for cruel, degrading or disproportionately severe treatment or punishment, that the applicant was not discriminated against on the basis of disability because the rule applied to all present on the facility, that the right to a private life did not include the right to smoke while involuntarily detained for short periods, and if it did the restrictions would be proportionate.

[27] [2017] NZ 88.

- *In De Bruyn v. Victorian Institute of Forensic Mental Health*,[28] a patient in involuntary detention in a mental health treatment facility challenged the implementation of a smoke-free policy in the facility, arguing that it infringed his right to be treated with humanity and with respect for his inherent dignity under the Victorian Charter of Human Rights and Responsibilities (a subnational human rights charter in Australia). The Court found that the smoking ban did not infringe on the right, because it had been introduced for the benefit of both present and future staff and patients who would otherwise be exposed to tobacco smoke, implemented across the whole hospital and did not single out an individual, was accompanied by the provision of nicotine replacement therapy, and had been implemented after careful consultation and consideration. The court also found that the smoking ban did not constitute involuntary medical treatment and that the plaintiff had been treated appropriately for someone who was not convicted.

- In *McCann v The State Hospitals Board for Scotland*,[29] a patient detained in a mental health facility challenged the comprehensive smoking ban on both indoor and outdoor areas of a state hospital in Scotland. The applicant argued that the decision was inconsistent with relevant provisions of mental health legislation, infringed his right to respect for his private life, and discriminated against him as compared to those in prison, other hospitals or members of the public. The Supreme Court of the United Kingdom found that the hospital had followed procedures under an older Act rather than the current mental health legislation and that the searches and seizures of tobacco products were therefore not authorized by law. It found that the smoking ban engaged the right to a private life, and both the ban and its enforcement through search and confiscation of tobacco products would have been a proportionate response in light of its promotion of the health of patients and staff at the hospital, except that it had not been validly made under the relevant mental health legislation. It did not consider that the smoking ban discriminated against the applicant on any of the suggested grounds. The Court in B v Waitemata District Health Board, discussed above, considered that the decision in McCann turned largely on the fact that the search and confiscation actions had not had a valid legal basis, and that in the absence of these features the McCann case supported the proportionality of smoking bans in mental health facilities.[30]

Several other cases examine smoking bans in mental health facilities in the United Kingdom and reach varying conclusions based on the individual circumstances of the applicants.[31]

There are also several cases relating to smoking bans in prisons, largely about the specific powers of correctional facilities to regulate smoking under their enabling legislation:

- In *Taylor v Attorney General*,[32] a smoking ban on prisons was declared invalid because it could not be implemented under the Corrections Act. The High Court of New Zealand found that the Smoke-Free Environments Act 1990 governed smoking in prisons rather

[28] [2016] VSC 111.

[29] [2017] UKSC 31.

[30] *B v Waitemata District Health Board*, paras 115, 116, 133–135.

[31] *R (N) v. Secretary of State for Health* [2009] EWCA Civ 795 (not found to engage any relevant rights), CM, Re Judicial Review [2013] ScotCS CSOH_143 (27 August 2013) (found to breach individual applicant's rights as applicant was detained indefinitely but comprehensive smoke-free policy itself not found invalid).

[32] [2013] NZHC 1659.

than the Corrections Act; that Act required prisons to have a policy on smoking in prison cells and otherwise exempted them from the provisions on smoke-free workplaces. The Court found that the ban under the Corrections Act conflicted with the more limited regulation of smoking in prisons under the Smoke-Free Environments Act. The case demonstrates the importance of regulating smoking in prisons through the right legislative instruments.

- In *Correctional Service of Canada v Mercier*,[33] prison inmates challenged a ban on smoking in indoor and outdoor areas prisons in Canada. At the first instance the Federal Court found that the Commissioner of the Correctional Service of Canada did not have the power to ban smoking in outdoor areas because it was not proportionate to the goals of ensuring health and welfare. On appeal, Federal Court of Appeals of Canada considered that the ban had been validly made under the Commissioner's power to make rules for health and welfare and that the judge should not have intervened in the Commissioner's determination that a total ban was the most appropriate way to achieve this goal. The inmates also raised several arguments under the Canadian Charter of Rights and Freedoms which were not heard because they had not been validly notified to the attorneys-general of the provinces.

These cases may provide helpful principles on extending smoke-free areas to private areas of custodial settings, although due to the level of control by the state over such persons and the vulnerability of such persons compared to the general population, they have limited applicability to other settings such as multi-unit housing.

It is important to note that there is also a significant body of litigation brought by persons who are exposed to second-hand smoke in prisons and mental health facilities as well as other private spaces such as multi-unit housing.[34] In many countries, governments will owe legal duties to expand smoke-free areas to these spaces as a result of this litigation. It is important that consideration of legal challenges in this area is not limited to those legal challenges seeking to block smoke-free areas and also considers litigation seeking to reduce exposure to tobacco smoke.

Trade and investment litigation relating to similar measures on other products

Product bans and phase-outs

No country has faced a legal challenge for banning or phasing out tobacco products altogether, given the limited number of countries that have implemented this measure. However, many other hazardous products have been phased out, and there are several instructive trade and investment law cases on the principles applying to bans on hazardous products.

In the trade context, the key case is that of *EC – Asbestos*, where Canada challenged the European Community (now the European Union) over France's ban on asbestos and asbestos-containing products.[35] The ban applied to both imports and domestically produced products. The

[33] 2010 FCA 167.

[34] A list of such cases can be generated from the Campaign for Tobacco Free Kids' Tobacco Control Laws Database.

[35] *European Communities — Measures Affecting Asbestos and Products Containing Asbestos*, Report of the Appellate Body, WT/DS135/AB/R (12 March 2001).

WTO panel found that the ban on asbestos did not violate the General Agreement on Tariffs and Trade because it was justified by the health exception under article XX(b) of the General Agreement on Tariffs and Trade (GATT). The Appellate Body upheld this finding, and it also found that chrysotile asbestos was not like an alternative product (PCG fibres) because of the differing health risks of the products, further affirming that there was no discrimination between asbestos and alternative products that remained on the market. Although the Appellate Body found that the panel should have undertaken its analysis under the Technical Barriers to Trade (TBT) Agreement rather than the GATT, and did not redo the analysis under the TBT, it affirmed the overall conclusion that France could ban asbestos in line with the WTO agreements, and strongly emphasized the right of members to regulate to protect health and to determine their own level of protection against health risks. For example, in its analysis of alternative measures, the Appellate Body found that "France could not reasonably be expected to employ any alternative measure if that measure would involve a continuation of the very risk that the Decree seeks to 'halt'",[36] and thus that there was no reasonably available alternative to banning asbestos.

Although WTO Appellate Body decisions are not binding on WTO Members other than the parties to the dispute, EC – Asbestos suggests that the WTO dispute settlement panels and the Appellate Body will recognize that bans on hazardous products are legitimate, provided they apply in a non-discriminatory manner to all relevant products regardless of their country of origin and are undertaken for a bona fide public health purpose.

It is important that a phase-out of tobacco products applies to both domestic and imported tobacco products and across tobacco products imported from different trading partners. An early case on trade and tobacco control, the case of *Thailand – Cigarettes* under the GATT 1947, found that an import ban on cigarettes without a corresponding ban on domestic sales were inconsistent with the GATT, which is now incorporated as one of the WTO agreements.[37] However, despite finding that the import ban (implemented by denying all import licences over a period of 10 years) was inconsistent with the GATT because it did not accept the rationale for retaining domestic sales while banning imports, the panel noted that supply side control measures in general would be permissible, stating in relation to the Thai tobacco monopoly that: "The Thai Government may use this monopoly to regulate the overall supply of cigarettes, their prices and their retail availability provided it thereby does not accord imported cigarettes less favourable treatment than domestic cigarettes or act inconsistently with any commitments assumed under its Schedule of Concessions."[38] It should be noted that most trade agreements including the WTO Agreements also cover de facto discrimination, so parties seeking to phase out certain classes of tobacco products but not others should ensure that this does not inadvertently favour the types of tobacco products that are produced domestically or favour tobacco products produced by one trading partner over another.

In international investment law, the power to ban hazardous products on grounds of public health has also been seen as part of states' sovereign right to regulate. A key case in this field is *Chemtura v Canada*,[39] which concerns a challenge to a Canadian regulatory agency's cancellation of the registration of lindane, a pesticide used for treating seeds, on environmental and health

[36] *EC – Asbestos*, para 174.

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

[38] *Thailand – Cigarettes*, para 79.

[39] Chemtura Corporation (formerly Crompton Corporation) v Canada, PCA Case No. 2008-01, Award, 2 August 2010.

grounds. Chemtura, a United States company, brought a legal challenge under the North American Free Trade Agreement against Canada arguing that the cancellation of lindane's product registration indirectly expropriated Chemtura's investment in its Canadian subsidiary, that it had not been afforded fair and equitable treatment, and that the cancellation discriminated against United States producers of lindane. The tribunal found that no expropriation, breach of fair and equitable treatment, or discrimination had occurred. It considered the international context regarding lindane, including bans in multiple other countries and its listing as a chemical designated for elimination under the Stockholm Convention on Persistent Organic Pollutants and restrictions on its use under the Aarhus Protocol to the Convention on Long-Range Transboundary Air Pollution. It found that the actions of the regulatory agency in cancelling the registration of lindane had not been in bad faith or in breach of due process, and that Chemtura had been treated in good faith and on an equal footing with other lindane producers. It also found that there had been no expropriation, because Chemtura had not been substantially deprived of its Canadian business, and that even if it had been, the measures undertaken by Canada would have been a valid exercise of the sovereign right to regulate, as they had been motivated by the "increasing awareness of the dangers presented by lindane for human health and the environment".[40]

Given the well-established hazardous nature of tobacco products, the enormous burden of tobacco, and the existence of many well-established policy goals to drastically reduce prevalence and end the tobacco epidemic, similar principles may apply to a managed phase-out of tobacco products, provided no specific promises or commitments to the contrary are made to foreign investors. Although relating to graphic health warnings and a single presentation requirement for tobacco products, the case of Philip Morris v Uruguay discussed above (in relation to the single presentation requirement) affirms that bona fide, non-discriminatory public health regulations for tobacco control are part of states' sovereign right to regulate and are consistent with fair and equitable treatment obligations provided no specific commitments have been made to investors.

Restrictions on the taking of profits/profit surtaxes

There have also been investment disputes relating to windfall profit levies on oil, which may be relevant to profit surtaxes or restrictions on profit-taking of other products. In these cases, significant levies of up to 99% of revenue from price rises above a reference price were not considered to expropriate the investment, though they were considered to breach investor's legitimate expectations regarding previously negotiated investment contracts (which would probably not be in place for tobacco industry investors in Parties considering this measure).

Two cases, *Murphy v Ecuador (II)*[41] and *Burlington v Ecuador*,[42] examined challenges to a windfall profit levy in Ecuador which was imposed first at 50% and then at 99% of foreign oil revenues above a reference price, to capture the value of a rise in global oil prices. In all three cases, the investors' participation in oil production was governed by investment contracts with the Ecuadorian government, and the levy was imposed by legislation. The tribunals in both cases found that the 50% levy was consistent with international investment law: the *Murphy* cases found that the 99% levy breached the fair and equitable treatment standard in light of the agreements Ecuador had signed with the oil companies; while the *Burlington* case found that both

[40] *Chemtura v Canada*, para 266.

[41] Murphy Exploration & Production Company – International v. Republic of Ecuador, PCA Case No. 2012–16 (formerly AA 434), Partial Final Award, 6 May 2016.

[42] *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5.

the 50% and 99% levies were consistent with international investment law but found in favour of the investor on other grounds. The claims regarding the levy discussed here were not considered to fall within the tax policy carve-out of the relevant investment treaty in either case.

In the *Murphy (II)* case, the tribunals found that although the 50% levy took a significant proportion of revenues, it did not fundamentally change the terms of the investment contract. However, the 99% levy unilaterally changed the investment contract from a profit-sharing arrangement to a services contract, and it was thus a breach of the fair and equitable treatment standard because of its impact on the previously negotiated contract and the legitimate expectations of the investor.

In the *Burlington* case, neither the 50% nor the 99% windfall levy was considered by the tribunal's majority to expropriate the investment, as the investment continued to be able to generate a return despite the greatly diminished profits, and thus the investor was not substantially deprived of its investment (one arbitrator dissented, finding that the 99% levy did expropriate the investment). Seizures of property to enforce unpaid levies were also not considered to constitute expropriation considering the finding that the levies themselves were not expropriatory. However, Ecuador later taking possession of the two blocks of land were considered to constitute an expropriation of the investment, and the dispute was decided overall in favour of the investor because of the taking of the land. Ecuador subsequently made a successful counterclaim for environmental damage caused by the investor.[43]

The outcomes of these cases are based on the terms of the contract between Ecuador and the foreign investors. Further, the levy was undertaken not based on health or environmental grounds, but to capture the value of rising oil prices. A windfall profit tax or profit restrictions on the tobacco industry would have a substantially different rationale and likely not be governed by an investment contract (noting that investment contracts with the tobacco industry are inconsistent with the *Guidelines for implementation of Article 5.3* of the Convention). The findings on fair and equitable treatment therefore have limited applicability to profit surtaxes on tobacco given they relate to specific commitments given to the investors; but the findings on expropriation may be applicable to levies on profit more generally.

A key point to note here is that these cases consider restrictions on profit implemented through levies, taxes and price policies. Different considerations may apply to Parties seeking to implement a not-for-profit model by transferring existing commercial businesses to a public or not-for-profit entity. This question is beyond the scope of the current report which is limited to decided cases.

Common arguments in tobacco industry legal challenges – further resources

Finally, many legal challenges by the tobacco industry are drawn from a common playbook, with recurring arguments regardless of the measure. These include arguments that a measure will result in illicit trade; arguments denying the evidence base supporting a measure; arguments about the impact of a measure on property, intellectual property, or business; arguments relating to personal freedoms of smokers; and procedural arguments such as whether a measure has been implemented by the right level of government or whether consultation requirements have been met. Legal challenges may be brought against the adoption of the measure, or in some cases may

[43] *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5 (Decision on Counterclaims).

be brought when Parties attempt to enforce the measure. These arguments can be expected to recur in relation to FLMs, but they will not be discussed in detail here. The following resources may provide more information in relation to responding to these arguments:

- WHO FCTC Knowledge Hub on Legal Challenges website
- Suzanne Zhou, Jonathan Liberman and Evita Ricafort, The impact of the WHO Framework Convention on Tobacco Control in defending legal challenges to tobacco control measures (2019) 28(Suppl2) Tobacco Control s113
- WHO, Litigation Relevant to Regulation of Novel and Emerging Nicotine and Tobacco Products: Case Summaries (2021)
- WHO, Tobacco product regulation: basic handbook (2018)

Cases cited

B v Waitemata District Health Board [2017] NZ 88.

BAT v Cabinet Secretary for Health, Petition (Application) no. 5 of 2017, Judgment, Supreme Court of Kenya, 26 November 2019.

BAT v Cabinet Secretary for Health, Petition (Application) no. 5 of 2017, Ruling of the Court re Application of James Gicheru Kariuki and Others, Supreme Court of Kenya, 22 November 2024.

Burlington Resources Inc. v Republic of Ecuador, ICSID Case No. ARB/08/5, Decision on Liability, 14 December 2012.

Burlington Resources Inc. v Republic of Ecuador, ICSID Case No. ARB/08/5, Decision on Counterclaims, 7 February 2017.

Case no 0046408-58.2012.4.01.3300, Federal Regional Tribunal for the 1st region, Decision of 2 February 2021 (Brazil).

Chemtura Corporation (formerly Crompton Corporation) v Canada, PCA Case No. 2008-01, Award, 2 August 2010.

CM, Re Judicial Review [2013] ScotCS CSOH_143 (27 August 2013).

Correctional Service of Canada v Mercier, 2010 FCA 167.

De Bruyn v Victorian Institute of Forensic Mental Health [2016] VSC 111.

European Commission v France, Case C-197/08, Judgment of the Court (Third Chamber), 4 March 2010.

European Communities — Measures Affecting Asbestos and Products Containing Asbestos, Report of the Appellate Body, WT/DS135/AB/R (12 March 2001).

McCann v The State Hospitals Board for Scotland [2017] UKSC 31.

Murphy Exploration & Production Company – International v Republic of Ecuador, PCA Case No. 2012-16 (formerly AA 434), Partial Final Award, 6 May 2016.

National Confederation of Industry (Confederação Nacional da Indústria) v ANVISA, Direct Action of Unconstitutionality (ADI) 4874, Judgment of 1 February 2018.

Philip Morris Brands SÀRL v Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, Award, 8 July 2016.

Philip Morris Brands SÀRL v Secretary of State for Health, Case C-547/14, Judgment of the Court (Second Chamber), 4 May 2016.

Philippine Tobacco Institute v City of Balanga, CA-G.R. SP No. 159329, Court of Appeals, Manila, Special 15th Division (2019).

R (N) v Secretary of State for Health [2009] EWCA Civ 795.

Republic of Poland v European Parliament and Council of the European Union, Case C-358/14, Judgment of the Court (Second Chamber), 4 May 2016.

Six Brothers v Town of Brookline, Slip opinion SJC-13434, 8 March 2024 (Superior Judicial Court of Massachusetts).

Taylor v Attorney General [2013] NZHC 1659.

Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes, Report of the Panel, DS10/R – 37S/200 (7 November 1990).

United States – Measures Affecting the Production and Sale of Clove Cigarettes, Panel Report, WT/DS406/R (2 September 2011).

United States – Measures Affecting the Production and Sale of Clove Cigarettes, Appellate Body Report, WT/DS406/AB/R (4 April 2012).

Vékony v Hungary, Application no 65681/13, Judgment, 1 July 2015.
