

# 1. Introduction

## Andrew D Mitchell and Tania Voon

---

Although the harms of tobacco smoking have been long known, they continue to be felt around the world. Close to 6 million deaths are attributable to tobacco smoking and second-hand smoke each year:<sup>1</sup>

Tobacco kills more than tuberculosis, [HIV/AIDS] and malaria combined. In the next two decades, the annual death toll from tobacco is expected to rise to over 8 million, with more than 80% of those deaths projected to occur in low- and middle-income countries. If effective measures are not urgently taken, tobacco could, in the 21st century, kill over 1 billion people.<sup>2</sup>

Tobacco regulation thus forms a key part of responding to this acknowledged global epidemic.<sup>3</sup>

As tobacco regulation has intensified around the world, tobacco companies have used increasingly bold domestic and international legal challenges to defeat or delay stronger regulation. This volume offers a range of perspectives on these various legal challenges, exploring first the twin areas of international law that impact significantly on this field – international health law, and international trade and investment law<sup>4</sup> – and then the different jurisdictional backgrounds in which tobacco regulation operates. Part I of the book introduces the World Health Organization (WHO) in the context of tobacco control, including the key instruments of the *WHO Framework Convention on Tobacco Control* (WHO FCTC)<sup>5</sup> and the recently concluded *Protocol to Eliminate Illicit Trade in Tobacco Products*.<sup>6</sup> Part II addresses the implications for tobacco control of international trade law and international investment law, including under the World Trade Organization (WTO), and bilateral and regional agreements for the liberalisation of trade and investment. In Part III, the book showcases the current state of regulating tobacco in several countries and regions around the world. While not every continent could be represented, each chapter provides insights into the kinds of legal and political battles being faced locally in the pursuit of tobacco regulation. Some areas face similar challenges, while others present

unique circumstances. Africa, for example, which is not covered here, has relatively low smoking rates but must now fight upward trends created by economic growth and other factors (for example by preventing take-up of smoking and increase in the number of cigarettes smoked per smoker);<sup>7</sup> in contrast, several of the developed countries examined in Part III have succeeded in significantly reducing smoking rates but now face the challenge of maintaining and deepening those reductions (for example through smoking cessation).

The chapters in this volume were finalised at various times in 2013, and ongoing events throughout the year demonstrated the significance of the topic to the global community. As 2013 has drawn to a close, among the most significant international issues on the tobacco control landscape are the international legal challenges continuing against Australia and Uruguay. The challenge to Uruguay's tobacco packaging and labelling requirements is brought by a Philip Morris company in Switzerland<sup>8</sup> under a bilateral investment treaty between Switzerland and Uruguay,<sup>9</sup> as discussed elsewhere.<sup>10</sup> The corresponding challenge to Australia's mandatory standardised tobacco packaging requirements (so-called 'plain' tobacco packaging) is brought by Philip Morris Asia Limited<sup>11</sup> under a bilateral investment treaty between Australia and Hong Kong.<sup>12</sup> In addition, several countries (five at the time of writing) have challenged these Australian laws within the World Trade Organization.<sup>13</sup> We have explored elsewhere these trade and investment law challenges to plain packaging as implemented in Australia.<sup>14</sup> The chapters in this volume provide a wealth of material for better understanding these different legal challenges against Australia and Uruguay, including through background on the obligations of Australia and Uruguay as parties to the WHO FCTC in Part I, exploration of tobacco control issues under international trade and investment law in Part II, and closer examination of plain tobacco packaging in the domestic context of Australia (Chapter 14) and the regional context of Europe (Chapter 11) in Part III.

Another key concern about tobacco control that has dominated domestic and international debate throughout 2013 arises from the *Trans-Pacific Partnership Agreement* (TPP) currently being negotiated between 12 countries, including the United States,<sup>15</sup> which will further liberalise trade and investment between the parties across a wide range of areas when the treaty is implemented.<sup>16</sup> Negotiations were expected to conclude in 2013<sup>17</sup> but are now likely to end in 2014.<sup>18</sup> If tobacco is included in the TPP along with other goods, this would likely mean that parties would accept obligations, for example, to reduce tariffs on tobacco imports, not to discriminate against imported tobacco products, and to treat foreign tobacco company investors fairly and equitably. The

potential for the TPP to apply to tobacco products has therefore raised concerns among many commentators from the perspective of public health,<sup>19</sup> while others have pointed out that many trade agreements recognise health objectives through explicit exceptions<sup>20</sup> and that domestically produced tobacco is generally no less harmful than imported tobacco.<sup>21</sup> The United States' role in conjunction with proposals to 'carve out' tobacco from the TPP<sup>22</sup> is examined in detail in Chapter 10 of this volume. A separate Malaysian proposal regarding tobacco has also now been put forward.<sup>23</sup>

The significance of the treatment of tobacco under the final TPP treaty is heightened by the likely inclusion of investor-state dispute settlement (ISDS) in the TPP, which will allow foreign investors to bring legal challenges against TPP parties alleging violation of the investment obligations under the treaty, just as has happened in the current cases against Australia and Uruguay mentioned above. The previous Australian Government's position had been, since 2011, not to pursue ISDS where this would provide foreign investors with greater protections than domestic investors<sup>24</sup> – a position reflected in a leaked draft text of the investment chapter of the TPP, which showed that only Australia would not be covered by the ISDS provisions being contemplated.<sup>25</sup> However, the new Australian Government elected in September 2013 has returned to the previous approach of including ISDS in international investment agreements on a case-by-case basis.<sup>26</sup> Evidence of implementation of this approach is seen in the conclusion in late 2013 of a preferential trade and investment agreement between Australia and Korea, which includes an ISDS mechanism.<sup>27</sup> In connection with the TPP, Australia has stated that ISDS is now on the table.<sup>28</sup> Because of the threat of a tobacco industry claim against TPP parties, if tobacco is included in a treaty including ISDS, the need for appropriate public health exceptions and clarification of the scope of parties' obligations becomes all the more apparent.

As foreshadowed above, Part I of this volume addresses tobacco control in the context of the World Health Organization in order to provide an understanding of the general international health landscape in which domestic tobacco control operates. In Chapter 2, Katherine DeLand, Gemma Lien and Heather Wipfli provide an insightful history and up-to-date reflection on the global significance of the WHO FCTC, a cornerstone of international tobacco control efforts with currently 177 parties.<sup>29</sup> This is followed in Chapters 3 and 4 by contrasting discussions of the legal significance of the WHO FCTC and its associated implementing guidelines and protocols by Chang-fa Lo and Jonathan Liberman respectively. While Lo points to the important role played by guidelines and protocols in extending the WHO FCTC, Liberman emphasises the

legally binding nature of the treaty and the significance of the guidelines in its proper interpretation under international law. Neil Boister ends Part I in Chapter 5 with a detailed examination of the rather surprising role played by the European Anti-Fraud Office in the development of the *Protocol to Eliminate Illicit Trade in Tobacco Products*.<sup>30</sup>

Part II of this volume contains five chapters exploring different aspects of the complex field of international trade law and international investment law as they relate to tobacco control measures. Todd Tucker begins in Chapter 6 with an elucidation of the legal challenge brought by Indonesia under the WTO dispute settlement mechanism against the United States ban on flavoured cigarettes. The WTO's Appellate Body found the United States in violation of some of its WTO obligations in that dispute – including article 2.1 of the WTO's *Agreement on Technical Barriers to Trade* (TBT Agreement)<sup>31</sup> – because of the discriminatory impact of the ban on imported products (specifically clove cigarettes, primarily imported from Indonesia) in comparison with 'like' domestic products (specifically menthol cigarettes, primarily produced in the United States and exempt from the ban).<sup>32</sup> The decision must be carefully examined in detail to be able to understand the nuances of its implications for tobacco control and public health more generally. Tucker cautions against the potential for WTO rulings to weaken domestic public interest regulation in areas such as tobacco control, where domestic politics and policy objectives must be carefully balanced. The dispute is continuing because the parties cannot agree on whether the United States has properly implemented the adverse ruling against it.<sup>33</sup> Specifically, rather than removing the exemption from the ban for menthol cigarettes, the United States is undertaking further investigations of the appropriateness of a ban from a health perspective, through its Food and Drug Administration.<sup>34</sup>

Lukasz Gruszczynski goes on in Chapter 7 to assess whether the WHO FCTC could constitute an 'international standard' for the purposes of the TBT Agreement, a question that could arise in the current WTO challenges involving Australia's plain tobacco packaging scheme. Article 2.2 of the TBT Agreement requires that WTO members' 'technical regulations' not be 'more trade-restrictive than necessary to fulfil a legitimate objective' such as 'protection of human health'. Article 2.5 states that '[w]henver a technical regulation is prepared, adopted or applied for one of the legitimate objectives explicitly mentioned' in article 2.2 'and is in accordance with relevant international standards, it shall be rebuttably presumed not to create an unnecessary obstacle to international trade'. If the WHO FCTC and its associated guidelines constitute an international standard, this would lend weight to a WTO

member such as Australia responding to a challenge against a tobacco control measure under article 2.2. Article 2.2 may be particularly significant for Australia because, unlike the United States flavouring ban, plain tobacco packaging does not obviously discriminate in its effects against imported products. Gruszczynski concludes that ‘there are good grounds for regarding the WHO FCTC and its guidelines as “relevant international standards” for the purpose of the TBT Agreement’.

In Chapter 8, Lin examines the implications of ISDS for tobacco control measures, concluding that the structure and operation of the ISDS system does not provide an appropriate forum for resolving challenges to such measures. Chapters 9 and 10 provide a suitable lead in to Part III of the volume, with Locknie Hsu examining tobacco control in the ten countries that make up the Association of Southeast Asian Nations, and Jamie Strawbridge addressing tobacco and trade policy under the Obama Administration in the United States. Both chapters address issues concerning international trade while focusing on challenges for tobacco control in particular regions. Both chapters include discussion of the importance of the TPP negotiations for tobacco control.

Part III of this volume provides case studies of tobacco control in particular areas of the world. Chapters 11 and 14 focus on the specific case of plain tobacco packaging, with Peter Henning and Leonid Shmatenko evaluating the potential for plain packaging in the European Union in Chapter 11, and Mark Davison explaining the failed challenge to plain packaging in Australia’s highest court in Chapter 14. These chapters offer useful comparisons of one particular tobacco control measure in different geographic, legal and political contexts. Chapters 12 and 13 focus on the Americas, with masterful explications of tobacco control in Canada by Rob Cunningham and in Latin America by Oscar Cabrera and Juan Carballo. The book concludes with a focus on Asia, looking at the different circumstances faced in Taiwan and India in Chapters 15 (by Chuan-Feng Wu) and 16 (by Amit Yadav and Deepthi Singh) respectively.

We hope that Part III of this volume in particular will offer lessons for other countries and regions, illustrating the difficulties that have been faced by tobacco control over the years in different places, and the solutions and steps that have been taken to overcome these difficulties. Together with the broader international law discussions in Parts I and II, the volume is intended to offer hope for the ongoing international disputes, clarifying the relevant complex areas of law and showing how they can interact effectively with domestic policy. Celebrations of the endgame for tobacco are arguably premature<sup>35</sup> – much more remains to be done – but the progress made to date in tobacco control can

nevertheless be acknowledged and the path cleared for its continuation, despite legal hurdles.

## NOTES

1. World Health Organization, 'WHO Global Report: Mortality Attributable to Tobacco' (World Health Organization, 2012) 4.
2. Ibid (citations omitted).
3. See generally, eg, World Health Organization, 'Report on the Global Tobacco Epidemic, 2013: Enforcing Bans on Tobacco Advertising, Promotion and Sponsorship' (World Health Organization, 2013).
4. See generally Benn McGrady, *Confronting the Tobacco Epidemic in a New Era of Trade and Investment Liberalization* (World Health Organization, 2012).
5. *WHO Framework Convention on Tobacco Control*, opened for signature 16 June 2003, 2302 UNTS 166 (entered into force 27 February 2005).
6. WHO FCTC Conference of the Parties, *Protocol to Eliminate Illicit Trade in Tobacco Products*, WHO Doc FCTC/COP5(1) (12 November 2012).
7. See generally Evan Blecher and Hana Ross, *Tobacco Use in Africa: Tobacco Control through Prevention* (American Cancer Society, 2013).
8. See, eg, *Philip Morris Brands Sàrl v Uruguay (Decision on Jurisdiction)* (ICSID Arbitral Tribunal, Case No ARB/10/7, 2 July 2013).
9. *Agreement between the Swiss Confederation and the Oriental Republic of Uruguay on the Reciprocal Promotion and Protection of Investments*, signed 7 October 1988, 1976 UNTS 389 (entered into force 22 April 1991).
10. Benn McGrady, 'Implications of Ongoing Trade and Investment Disputes: Philip Morris v Uruguay' in Andrew Mitchell, Tania Voon and Jonathan Liberman with Glyn Ayres (eds), *Public Health and Plain Packaging Of Cigarettes: Legal Issues* (Edward Elgar, 2012) 173.
11. See, eg, *Philip Morris Asia Ltd v Australia (Procedural Order No 7)* (Permanent Court of Arbitration, Case No 2012-12, UNCITRAL Arbitration Rules, 31 December 2012).
12. *Agreement between the Government of Hong Kong and the Government of Australia for the Promotion and Protection of Investments*, signed 15 September 1993, 1748 UNTS 385 (entered into force 15 October 1993).
13. *Australia – Certain Measures Concerning Trademarks and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging: Request for the Establishment of a Panel by Ukraine*, WTO Doc WT/DS434/11 (17 August 2012); *Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging: Request for the Establishment of a Panel by Honduras*, WTO Doc WT/DS435/16 (17 October 2012); *Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging: Request for the Establishment of a Panel by the Dominican Republic*, WTO Doc WT/DS441/15 (14 November 2012); *Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging: Request for Consultations by Cuba*, WTO Doc WT/DS458/1 (7 May 2013); *Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other*



- Plain Packaging Requirements Applicable to Tobacco Products and Packaging: Request for Consultations by Indonesia*, WTO Doc WT/DS467/1 (25 September 2013).
14. Tania Voon and Andrew Mitchell, 'Time to Quit? Assessing International Investment Claims Against Plain Tobacco Packaging in Australia (2011) 14(3) *Journal of International Economic Law* 515; Tania Voon and Andrew Mitchell, 'Face Off: Assessing WTO Challenges to Australia's Scheme for Plain Tobacco Packaging' (2011) 22(3) *Public Law Review* 218.
  15. The countries are Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States, and Vietnam: *Statement of the Ministers and Heads of Delegation for the Trans-Pacific Partnership countries* (10 December 2013) Australian Government, Department of Foreign Affairs and Trade <<http://www.dfat.gov.au/fta/tpp/131210-tpp-leadership-statement.html>>.
  16. See generally Tania Voon (ed), *Trade Liberalisation and International Co-operation: A Legal Analysis of the Trans-Pacific Partnership Agreement* (Edward Elgar, 2013); CL Lim, Deborah Elms and Patrick Low (eds), *The Trans-Pacific Partnership: A Quest for a Twenty-first Century Trade Agreement* (Cambridge University Press, 2012); Jane Kelsey (ed), *No Ordinary Deal: Unmasking the Trans-Pacific Partnership Free Trade Agreement* (Allen & Unwin, 2010).
  17. *Trans-Pacific Partnership Leaders Statement* (8 October 2013) Australian Government, Department of Foreign Affairs and Trade <<http://www.dfat.gov.au/fta/tpp/131008-tpp-leadership-statement.html>>.
  18. See *Statement of the Ministers*, above n 15.
  19. See, eg, Jane Kelsey, 'The Trans-Pacific Partnership Agreement: A Gold-Plated Gift to the Global Tobacco Industry?' (2013) 39 *American Journal of Law & Medicine* 237; Deborah Gleeson and Sharon Friel, 'Emerging Threats to Public Health from Regional Trade Agreements' (2013) 381 *The Lancet* 1507.
  20. See, eg, *General Agreement on Tariffs and Trade*, LT/UR/A-1A/1/GATT/2 (signed 30 October 1947), as incorporated in *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1A (*General Agreement on Tariffs and Trade 1994*) article XX(b).
  21. See, eg, Simon Lester, 'Free Trade and Tobacco: Thank You for Not Smoking (Foreign) Cigarettes' (15 August 2012) 49 *Free Trade Bulletin* 1, 4.
  22. Office of the United States Trade Representative, *Fact Sheet: TPP Tobacco Proposal* (18 May 2012); Office of the United States Trade Representative, *Fact Sheet: New US Proposal on Tobacco Regulation in the Trans-Pacific Partnership* (21 August 2013).
  23. 'Malaysia Poised to Table Complete Carveout from TPP for Tobacco Measures' (25 August 2013) *Inside US Trade* (online); Carey Biron, 'US, Malaysia Skirmish over Free-Trade Tobacco' (7 September 2013) *Inter Press Service* (online).
  24. Australian Government, Department of Foreign Affairs and Trade, *Gillard Government Trade Policy Statement: Trading Our Way to More Jobs and Prosperity* (April 2011) 14. See also Australian Productivity Commission, *Bilateral and Regional Trade Agreements: Productivity Commission Research Report* (2010) 271-4.
  25. Available at <[http://www.citizenstrade.org/ctc/wp-content/uploads/2012/06/tpp\\_investment.pdf](http://www.citizenstrade.org/ctc/wp-content/uploads/2012/06/tpp_investment.pdf)>.
  26. See, eg, Julie Bishop, *Free Trade Focus* (28 March 2013).
  27. Tony Abbott and Andrew Robb, 'Australia concludes FTA negotiations with the Republic of Korea' (Joint Media Release, 5 December 2013); *Korea-Australia FTA (KAFTA) – Key Outcomes* (2013) Australian Government, Department of Foreign Affairs and Trade <<http://dfat.gov.au/fta/akfta/fact-sheet-key-outcomes.pdf>> 3. (The treaty text itself is unavailable to the public at the time of writing.)

28. 'Minister: Australia Open to ISDS in TPP if Other Countries Give on Tariffs' (13 December 2013) 31(49) *Inside US Trade* (online).
29. *Parties to the WHO Framework Convention on Tobacco Control* (27 November 2013) WHO FCTC <[http://www.who.int/fctc/signatories\\_parties/en/](http://www.who.int/fctc/signatories_parties/en/)>.
30. See above n 6.
31. *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995), annex 1A (*Agreement on Technical Barriers to Trade*).
32. Appellate Body Report, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, WTO Doc WT/DS406/AB/R (adopted 24 April 2012) [298(a)(v)]. See also Tania Voon, 'International Decision: *United States – Measures Affecting the Production and Sale of Clove Cigarettes*' (2012) 106(4) *American Journal of International Law* 824.
33. WTO, *United States – Measures Affecting the Production and Sale of Clove Cigarettes: Recourse to Article 22.2 of the DSU by Indonesia*, WTO Doc WT/DS406/12 (13 August 2013). See also 'US, Indonesia Clash over Cross-Retaliation in Clove Cigarette Dispute' (6 September 2013) 31(35) *Inside US Trade* (online).
34. *Menthol in Cigarettes, Tobacco Products; Request for Comments*, 78 Fed Reg 44484 (24 July 2013). See also Jamie Strawbridge, 'US Implementation of Adverse WTO Rulings: A Closer Look at the Tuna-Dolphin, COOL, and Clove Cigarettes Cases' (30 October 2013) 17(23) *ASIL Insights* (online).
35. The *International Conference on Public Health Priorities in the 21st Century: The Endgame for Tobacco* was held in New Delhi, India, from 10 to 12 September 2013, under the auspices of the Public Health Foundation of India and Health Related Information Dissemination Amongst Youth (HRIDAY).