

# BALANCING INTERESTS IN FREE TRADE AND HEALTH: HOW THE WHO'S FRAMEWORK CONVENTION ON TOBACCO CONTROL CAN WITHSTAND WTO SCRUTINY\*

## I. INTRODUCTION

Tobacco is one of the most widely consumed products in the world, and yet it has an extremely negative impact on human health. Worldwide, one in three adults, or approximately 1.1 billion people, smoke or consume other tobacco products, and between 82,000 and 99,000 young people take up smoking every day.<sup>1</sup> By the year 2020, it is projected that more people will die from tobacco-related diseases than from any other single disease.<sup>2</sup> In response to this, the World Health Organization (WHO) has established an ambitious goal: generate a treaty regime to reduce tobacco consumption.<sup>3</sup> In 1999, the WHO's legislative body, the World Health Assembly (WHA), unanimously passed an unprecedented resolution to convene negotiations for the development of The Framework Convention for Tobacco Control (FCTC), to be adopted by 2003.<sup>4</sup> The FCTC will be the first instrument in an incrementally developed regime whereby states ratify a framework convention and subsequent protocols designed to reduce the consumption of tobacco.<sup>5</sup> The FCTC and follow-up protocols will focus on measures to facilitate international coop-

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1. THE WORLD BANK, CURBING THE EPIDEMIC: GOVERNMENTS AND THE ECONOMICS OF TOBACCO CONTROL 13, 19 (1999) [hereinafter CURBING THE EPIDEMIC].

2. Christopher J. L. Murray & Alan D. Lopez, *Alternative Projections of Mortality and Disability by Cause 1999–2020: Global Burden of Disease Study*, 349 THE LANCET 1498, 1502 (1997).

3. For an early discussion of strategies of treaty-based tobacco control and the potential role of the WHO, see generally Allyn Taylor, *An International Regulatory Strategy for Global Tobacco Control*, 21 YALE J. INT'L. L. 257 (1996).

4. WORLD HEALTH ASSEMBLY, WHA Doc. 52.18 (May 24, 1999).

5. For a recent discussion of WHO plans to develop the FCTC, see Allyn L. Taylor & Douglas W. Bettcher, *WHO Framework Convention on Tobacco Control: a global "good" for public health*, 78 BULL. OF THE WORLD HEALTH ORG. 920 (2000).

eration and will place signatory nations under obligations to enact domestic legislation that will curb tobacco consumption.<sup>6</sup> Among the measures contemplated, there are several that will relate to international trade obligations.<sup>7</sup> For example, Article F of the current draft of the FCTC (Draft FCTC or Draft Convention) would encourage, but not require, signatory nations to eliminate duty-free sales of tobacco products and to increase taxes on tobacco products in order to reduce consumer demand.<sup>8</sup>

Tobacco control measures such as these are sure to draw criticism from the tobacco industry, which has consistently resisted regulation for decades,<sup>9</sup> as well as countries that rely on tobacco production for economic stability.<sup>10</sup> Additionally, it is likely that states that are major stakeholders in the tobacco industry and those that are home to powerful tobacco companies<sup>11</sup> will choose to challenge tobacco control measures adopted by an FCTC signatory as a violation of the free trade rules enforced by the World Trade Organization (WTO). The WTO, a robust international institution with a membership of over 140 states, has built a reputation as a zealous defender of the free trade regime.<sup>12</sup> In its relatively short history, the WTO, like the dispute settlement panels that operated under the WTO's predecessor, the General Agreement of Tariffs and Trade (GATT), has

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6. World Health Organization, *Chair's Text of a Framework Convention on Tobacco Control*, WHO Doc. A/FCTC/INB2/2 (Jan. 9, 2001), available at <http://www.who.int/gb/fctc/inb2/PDFInb2/e2inb2.pdf> (last visited Nov. 16, 2001) [hereinafter Draft FCTC].

7. *Id.*

8. *Id.*

9. A review of internal corporate documents reveals that as early as 1953, U.S. tobacco executives recognized that their industry was threatened by adverse medical research and regulation and, in response, they jointly hired public relations consultants to help allay public concern and to resist government regulation. Yussuf Saloojee & Elif Dagli, *Tobacco industry tactics for resisting public policy on health*, 78 BULL. OF THE WORLD HEALTH ORG. 902, 903-04 (2000).

10. For example, there may be resistance from the two countries for which tobacco generates a significant percentage of export earnings: Malawi (sixty-one percent) and Zimbabwe (twenty-three percent). CURBING THE EPIDEMIC, *supra* note 1, at 58.

11. The state-owned China National Tobacco Corporation, the world's most prolific cigarette producer, generated 24.6 percent of the world's cigarettes in 1997, while the second largest producer, Philip Morris, generated 13.7 percent. THE WORLD HEALTH ORGANIZATION, WORLD HEALTH REPORT 1999, at 71 (1999). The World Bank reports that forty-two percent of the world's tobacco was produced in China in 1997, while only 9.3 percent was produced in the United States. CURBING THE EPIDEMIC, *supra* note 1, at 58.

12. As of mid-December 2001, there were 143 WTO member states and thirty-three states, including the Russian Federation, that are not yet full members, but have observer status. The status of member and observer states is available on the WTO web site, [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm) (last visited Nov. 16, 2001).

consistently struck down state-sponsored measures which were ostensibly designed to protect human health or the environment when it found that such measures conflicted with free trade rules.<sup>13</sup> Accordingly, the WHO and other promoters of the tobacco control regime must direct their efforts carefully in promulgating the FCTC and follow-up protocols, in order to avoid conflicts with WTO-enforced free trade rules.

This paper discusses free trade principles and the prospects of developing an effective, global, tobacco control regime that is compatible with free trade rules. In order to understand why the WHO is promoting the FCTC, it is important to discuss briefly the impact of tobacco consumption. In terms of the economic impact of tobacco, the World Bank recently concluded that while it is difficult both to identify and quantify the impact on society, smokers do not bear the sum of the costs of their choice to smoke, and furthermore, smokers impose health and financial costs onto the nonsmoking portion of society.<sup>14</sup> Worldwide, tobacco consumption currently causes four million deaths annually, and it is estimated that by the year 2030, ten million people per year will die of tobacco-related diseases including lung cancer, emphysema, and heart disease.<sup>15</sup> Moreover, an important shift in the tobacco problem is occurring: in the developing world, where domestic regulation is typically weak, tobacco consumption is increasing even while it decreases in the developed world. It is projected that seven of every ten tobacco-caused deaths will occur in developing countries by the year 2030.<sup>16</sup> Bearing these figures in mind, it is not surprising that the WHO has embarked on a mission to develop a tobacco control regime.

The following discussion of the relationship between trade rules and the future tobacco control regime is divided into four sections. Section One outlines the basic principles of free trade, including the relevant trade agreements administered by the WTO, in particular the 1947 GATT<sup>17</sup> and the agreement on Technical Barriers to Trade (TBT).<sup>18</sup> A discussion of trade cases that illuminate these principles

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13. See discussion *infra* section III.

14. CURBING THE EPIDEMIC, *supra* note 1, at 34.

15. *Id.* at 22, 24.

16. *Id.* at 23.

17. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194 [hereinafter GATT].

18. Agreement on Technical Barriers to Trade, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 1 (1994) [hereinafter TBT]. The full text of the agreement is available

follows, and the section concludes with an analysis of the potential impact of the WTO free trade regime on tobacco control measures. Section Two includes an explanation of the tobacco control regime that the WHO is working to develop, including the FCTC, possible follow-up protocols, and a brief report on the progress of the FCTC. Section Three addresses each general category of tobacco control measure from the Draft FCTC that might conflict with free trade obligations, along with recommendations for drafting WTO-compliant tobacco control measures. The final section of this paper briefly analyzes the above sections and draws the following conclusions: the WTO agreements do not preclude effective development of a tobacco control regime; the current Draft FCTC does not conflict with free trade rules; and lastly, with careful and strategic planning, the WHO can develop effective, WTO-compliant, trade-related tobacco control measures for later FCTC protocols.

## II. PRINCIPLES OF FREE TRADE

### A. Development of the WTO, a Free Trade Institution

In 1817, the economist David Ricardo first articulated the theory that is fundamental to the principles of free trade law: comparative advantage.<sup>19</sup> According to this theory, in a world where governments put up no, or minimal, barriers to trade, efficient producers in each region will grow and expand production, capitalizing on their comparative advantage in the market, while inefficient producers will drop out, feeding the local efficient producers' demand for workers and resources.<sup>20</sup> Comparative advantage is "a powerful intellectual underpinning" of international economic law, in general, and of the 1947 GATT.<sup>21</sup> The GATT was to be administered by the International Trade Organization (ITO), a stillborn sibling of the two better-known Bretton Woods institutions, the International Monetary Fund (IMF) and the World Bank.<sup>22</sup> Although the ITO never came into existence, the GATT was a largely successful regime throughout the

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on the WTO website, [http://www.wto.org/english/docs\\_e/legal\\_e/17-tbt.pdf](http://www.wto.org/english/docs_e/legal_e/17-tbt.pdf) (last visited Nov. 16, 2001).

19. For a brief discussion of the theory and international economic law in general, see JOHN H. JACKSON, *THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS* 14–20 (2d ed. 1997, 3rd prtng. 1999).

20. *Id.* at 16.

21. *Id.* at 15.

22. *Id.* at 30–38.

cold war even though it lacked an implementing organization or an effective enforcement mechanism.<sup>23</sup> In the years just after the cold war, the WTO was developed.<sup>24</sup> The WTO still uses the rules of the original 1947 GATT, along with Supplementary Agreements and strengthened enforcement via a binding dispute settlement procedure.<sup>25</sup>

## B. The Free Trade Agreements

1. *The GATT.* The promotion of free trade is based on several principles that are embodied in the GATT rules. In the context of the prospective tobacco control regime, the most relevant provisions are Articles I, III, and XI. Article I of the GATT grants most favored nation status, according the right of equal treatment to all like products from any signatory nation.<sup>26</sup> In other words, a signatory country may not treat imports from one member state differently than imports of another member state. Article III provides that like products imported from a member state should be granted “national treatment,”<sup>27</sup> meaning that regulatory standards, taxes, and any other governmental restrictions must not discriminate between imported and domestic products. Article XI forbids quantitative restrictions on imports, including quotas and import or export licenses.<sup>28</sup> In general, member

23. Under the GATT dispute settlement procedure, consensus of the contracting parties was required in order to adopt a panel report, essentially granting the losing party in a dispute the power to veto an unfavorable report. Under the current dispute settlement process, a panel report is automatically adopted unless there is consensus among the contracting parties to *not* adopt the report. JACKSON, *supra* note 19, at 125.

24. Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 1 (1994), 33 I.L.M. 1125 (1994).

25. JACKSON, *supra* note 19, at 47.

26. Article I:1 of the GATT provides that “any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.” GATT, *supra* note 17, art. I(1).

27. The first sentence of Article III:2 explains that

[t]he 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* note 17, art. III:2.

28. Section 1 of Article XI provides:

No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the

states can make claims against other members if they suffer at the hands of another state that is violating any one of the above provisions. If there is no apparent violation of any other article of the GATT, members can make claims under Article XXIII on nullification or impairment.<sup>29</sup> Article XXIII allows a party to seek a judgment against another member state even if the opposing state has not specifically violated any GATT provision, but has still enacted some measure that impairs or nullifies the other's ability to enjoy the benefits of the treaty.<sup>30</sup>

While the majority of the GATT provisions are aimed at forbidding protectionism and trade-restrictive measures, there are exceptions in the agreement that allow the development and implementation of legitimate, but trade-restrictive, measures. The most undisputed exception is the Article XXI national security exception, which allows states to violate free trade obligations in order to protect their basic sovereignty.<sup>31</sup> Article XX sets out a series of different exceptions that allow states to adopt WTO-inconsistent measures, including section (b), which allows for measures that protect animal, plant, or human life and health.<sup>32</sup> Since it is possible that many tobacco control measures may impede free trade, it is important that the WHO and tobacco control promoters understand the language of the Article XX(b) exception. Article XX(b) has two parts, the heading, or "chapeau," and a following subsection. Read together, the chapeau and subsection (b) are as follows:

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territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.

GATT, *supra* note 17, art. XI.

29. Article XXIII provides:

[I]f any contracting party should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded as the result of

- (a) the failure of another contracting party to carry out its obligations under this Agreement, or
- (b) the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement, or
- (c) the existence of any other situation,

the contracting party may, with a view to the satisfactory adjustment of the matter, make written representations or proposals to the other contracting party or parties which it considers to be concerned. Any contracting party thus approached shall give sympathetic consideration to the representations or proposals made to it."

GATT, *supra* note 17, art. XXIII(1).

30. *Id.*

31. *Id.* art. XXI; JACKSON, *supra* note 19, at 229.

32. GATT, *supra* note 17, art. XX.

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: . . . (b) necessary to protect human, animal or plant life or health.<sup>33</sup>

The Article XX(b) exception has been employed in a series of GATT and WTO cases, but, until recently, attempts to utilize the exception to excuse trade restrictive measures aimed at protecting health or the environment have failed.<sup>34</sup> The major trade cases where an Article XX(b) exception defense has been rejected are discussed below, followed by an analysis of a recent case regarding the French ban on asbestos products.<sup>35</sup> In that case, the WTO Dispute Settlement Body panel accepted France's application of the Article XX(b) exception to defend its ban on asbestos as a reasonable measure to protect human health.<sup>36</sup> The Appellate Body upheld the panel's finding that France could place a ban on asbestos.<sup>37</sup> The significance of the Appellate Body and panel reports in the asbestos case are discussed below.<sup>38</sup>

2. *The WTO Supplementary Agreements.* The Uruguay Round produced a remarkable number of agreements, decisions, and declarations that work in conjunction with the GATT. Regarding the prospective tobacco regime, the most notable of the agreements include the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS),<sup>39</sup> the Agreement on Trade-Related Aspects of In-

33. *Id.* art. XX(b).

34. For recent discussions of the Article XX(b) exception and related trade cases, see generally Virginia Dailey, *Sustainable Development: Reevaluating the Trade vs. Turtles Conflict at the WTO*, 9 J. TRANSNAT'L L. & POL'Y 331 (2000); Ala'I Padideh, *Free Trade or Sustainable Development? An Analysis of the WTO Appellate Body's Shift to a More Balanced Approach to Trade Liberalization*, 14 AM. U. INT'L L. REV. 1129 (1999).

35. *Infra* section III.

36. WTO Dispute Settlement Body Panel Report on EC Measures Affecting Asbestos and Asbestos-Containing Products, WT/DS135/R (00-3353), 2000 WTO DS LEXIS 30 (Sept. 18, 2000), available at [http://www.wto.org/english/tratop\\_e/dispu\\_e/distab\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/distab_e.htm) (last visited Nov. 16, 2001) [hereinafter WTO Asbestos Dispute Settlement Body Panel Report].

37. WTO Appellate Body Report on EC Measures Affecting Asbestos and Asbestos-Containing Products, WT/DS135/AB/R (March 12, 2001), available at [http://www.wto.org/english/tratop\\_e/dispu\\_e/135abr\\_e.pdf](http://www.wto.org/english/tratop_e/dispu_e/135abr_e.pdf) (last visited Nov. 16, 2001) [hereinafter WTO Asbestos Appellate Body Report].

38. *Infra* section III F.

39. Agreement on the Application of Sanitary and Phytosanitary Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, LEGAL

tellectual Property Rights (TRIPS),<sup>40</sup> and the Agreement on Technical Barriers to Trade (TBT).<sup>41</sup> In general, the SPS agreement regulates the measures member states can take to protect plant, animal, and human health from diseases and pests, as well as measures to ensure safe food and beverages.<sup>42</sup> The SPS agreement includes language that touches on themes that would seem to relate to the tobacco control regime, but the SPS agreement is not applicable because tobacco products cannot be considered food or “disease causing organisms.”<sup>43</sup> The TRIPS agreement poses many questions regarding the conflict of health policy versus free trade in regards to drug patents.<sup>44</sup> However, it is not likely that the tobacco control regime will be developed in a manner that would compromise intellectual property rights of tobacco producers; thus, the TRIPS agreement itself will not likely be at issue for development of the FCTC.<sup>45</sup> The TBT agreement is more relevant because it deals with technical regulations and standards and the FCTC contains various tobacco control measures that would im-

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INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 1 (1994), available at [http://www.wto.org/english/docs\\_e/legal\\_e/15-sps.pdf](http://www.wto.org/english/docs_e/legal_e/15-sps.pdf) (last visited Oct. 10, 2001) [hereinafter SPS Agreement].

40. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 31 (1994), 33 I.L.M. 81 (1994).

41. TBT, *supra* note 18.

42. SPS Agreement, *supra* note 39.

43. Measures governed by the SPS Agreement are defined in Annex A as measures applied:

(a) to protect animal or plant life or health within the territory of the Member from risks arising from the entry, establishment or spread of pests, diseases, disease-carrying organisms or disease-causing organisms; (b) to protect human or animal life or health within the territory of the Member from risks arising from additives, contaminants, toxins or disease-causing organisms in foods, beverages or feedstuffs; (c) to protect human life or health within the territory of the Member from risks arising from diseases carried by animals, plants or products thereof, or from the entry, establishment or spread of pests; or (d) to prevent or limit other damage within the territory of the Member from the entry, establishment or spread of pests.

*Id.*

44. The WTO recently acted to help settle this issue, releasing a declaration at the WTO Ministerial Conference in November 2001. Article 4 of the Declaration stated:

We agree that the TRIPS Agreement does not and should not prevent Members from taking measures to protect public health. Accordingly, while reiterating our commitment to the TRIPS Agreement, we affirm that the Agreement can and should be interpreted and implemented in a manner supportive of WTO Members' right to protect public health and, in particular, to promote access to medicines for all.

WTO Declaration on the TRIPS Agreement and Public Health, WT/MIN(01)/DEC/W/2, art. 4 (Nov. 14, 2001), available at [http://www-chil.wto-ministerial.org/english/thewto\\_e/minist\\_e/min01\\_e/mindecl\\_trips\\_e.pdf](http://www-chil.wto-ministerial.org/english/thewto_e/minist_e/min01_e/mindecl_trips_e.pdf) (last visited Nov. 16, 2001).

45. For a brief discussion of the conflict regarding international intellectual property rights and health policy, especially HIV/AIDS, see David P. Fidler, *Neither Science Nor Shamans: Globalization of Markets and Health in the Developing World*, 7 IND. J. GLOBAL LEGAL STUD. 191, 209–13 (1999).

pose regulations, from labeling requirements to regulations on the actual contents of tobacco products.<sup>46</sup>

3. *The Agreement on Technical Barriers to Trade.* The TBT agreement focuses on the issue of regulations and standards for products, and aims to allow reasonable imposition of regulations that do not excessively impede efficient production and international trade in products, while granting member states the ability to impose regulations to protect certain interests. Article 2.2 of the Agreement provides:

Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfill a *legitimate objective*, taking account of the risks non-fulfillment would create. Such legitimate objectives are, *inter alia*: national security requirements; the prevention of deceptive practices; *protection of human health or safety*; animal or plant life or health, or the environment. *In assessing such risks, relevant elements of consideration are, inter alia: available scientific and technical information, related processing technology or intended end-uses of products.*<sup>47</sup>

Additionally, the agreement establishes that it is preferable to base technical regulations on relevant international standards. Article 2.4 of the TBT Agreement explains that member states should use international standards as a basis for their regulations unless such an application would be ineffective or inappropriate,<sup>48</sup> and Article 2.9 imposes requirements for members to give notice and allow other members to comment when they promulgate regulations for which there are no international standards or when the regulations differ from existing standards.<sup>49</sup>

### III. RELEVANT GATT AND WTO DECISIONS

The above review of free trade rules illuminates a central principle that the WTO will enforce—nondiscrimination. That is, most favored nation status and national treatment rules forbid member states from discriminating against imported products from member coun-

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46. Draft FCTC, *supra* note 6, art. G:1(b).

47. TBT, *supra* note 18, art. 2.2 (emphasis added).

48. *Id.* art. 2.4.

49. *Id.* art. 2.9.

tries, or from discriminating against imported products generally.<sup>50</sup> However, both the GATT and the TBT contemplate exceptions for measures to protect human health. The GATT Article XX(b) exception is allowed so long as there is no “arbitrary or unjustified discrimination” or “a disguised restriction on international trade,” and as long as the health measure is “necessary.”<sup>51</sup> Article 2.2 of the TBT has slightly different language, allowing “legitimate” exceptions that do not create “unnecessary obstacles to trade.”<sup>52</sup> In order to better understand the principles of free trade obligations and, more importantly, the criteria for successfully applying exceptions like Article XX(b), several relevant trade cases are discussed below.

#### A. GATT Panel Decision: *Thailand Cigarettes*

In 1966, the government of Thailand passed the Tobacco Act, which forbade tobacco imports without a license.<sup>53</sup> In the decade preceding the dispute in question, Thailand had granted no import licenses, prompting the United States to file a complaint with the GATT.<sup>54</sup> The United States requested that the GATT panel find the restriction on cigarette imports a violation of GATT Article XI:1 on quantitative restrictions, and argued, *inter alia*, that the Article XX(b) exception did not apply.<sup>55</sup> Thailand countered that Article XX(b) applied because the prohibition on cigarettes was an “objective of public health policy.”<sup>56</sup> In reaching its decision, the GATT panel sought advice from the WHO on the actual impact of cigarette consumption,<sup>57</sup> and in its findings, the panel acknowledged that “smoking constituted a serious risk to human health and that consequently, measures designed to reduce the consumption of cigarettes [fall] within the scope

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50. See GATT, *supra* note 17, arts. I, III.

51. *Id.* art. XX(b).

52. TBT, *supra* note 18, art. 2.2.

53. Thailand—Restriction on Importation of and Internal Taxes on Cigarettes, Nov. 7, 1990, GATT B.I.S.D. (37th Supp.) at 200 (1991) [hereinafter GATT Thailand Cigarettes Report].

54. *Id.*

55. *Id.* at 201. Article XI:1 of the GATT states:

No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas import or export licenses or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.

GATT, *supra* note 17, art. XI:1.

56. GATT Thailand Cigarettes Report, *supra* note 53, at 206.

57. *Id.* ¶ 50.

of Article XX(b).”<sup>58</sup> However, the panel noted that Article XX(b) requires that the measure be “necessary,” and a measure to protect health could not be considered “necessary” if a reasonable alternative that would not conflict with free trade rules could be employed.<sup>59</sup> The panel suggested an alternative means to curb consumption of cigarettes based on evidence offered by the WHO that restrictions on advertising can reduce cigarette consumption: a general ban on tobacco advertising by both foreign and domestic tobacco companies.<sup>60</sup> Based in part on its finding that the Thai measures to reduce tobacco consumption were not consistent with the term “necessary” found in Article XX(b), the panel ruled in favor of the United States.<sup>61</sup> The panel did not proceed to discuss whether the import ban was arbitrary or unjustified discrimination, or a disguised restriction on trade.

#### B. GATT Panel Decision: *Tuna Dolphin*

In the first of two cases dealing with U.S. efforts to protect dolphins, Mexico challenged the United States for its enforcement of a special provision of the Marine Mammal Protection Act of 1972 (MMPA).<sup>62</sup> The Act prohibited the import of tuna that had been harvested by chasing and surrounding dolphins with “purse-seine” nets, a fishing method that was effective for netting tuna, but commonly resulted in the collateral “taking” of dolphins.<sup>63</sup> The United States invoked the Article XX(b) exception, arguing that the provision of the MMPA was “necessary” to protect the life and health of dolphins.<sup>64</sup> The panel found that the United States could not prove necessity because it failed to show that it had “exhausted all options reasonably available” to devise dolphin protection measures that would be consistent with the GATT.<sup>65</sup> Several other countries lodged additional complaints against the United States in 1994, because the United States had also imposed a secondary boycott on products made from

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58. *Id.* ¶ 73.

59. *Id.* ¶ 74.

60. *Id.* ¶ 78.

61. *Id.* ¶ 87.

62. United States—Restrictions on Imports of Tuna, Sept. 3, 1991, GATT B.I.S.D. (39th Supp.), at 155, 162 ¶¶ 3.1–3.5 (1993) [hereinafter GATT Tuna Dolphin Report]. The challenged provision is codified at 16 U.S.C. §§1361–1407 (1988).

63. See Tuna Dolphin Report, *supra* note 62, ¶ 2.2.

64. *Id.* ¶ 3.33.

65. *Id.* ¶ 5.28.

tuna imported from countries that used purse-seine nets.<sup>66</sup> The U.S. plea for an exception under Article XX(b) in this case was also dismissed for failure to prove necessity.<sup>67</sup>

### C. WTO Appellate Body Report: *Reformulated Gasoline*

With the advent of the WTO in 1995, the WTO Dispute Settlement Body was established, and shortly thereafter its highest tribunal, the Appellate Body, reviewed a WTO panel report that involved an Article XX(b) claim.<sup>68</sup> Venezuela and Brazil brought a claim against the United States for its enforcement of provisions of the Clean Air Act, which granted domestic gasoline producers three ways to report the quality of their gasoline while allowing importers only one costly method.<sup>69</sup> The Appellate Body upheld the findings of the panel generally, including the findings that the U.S. regulations violated national treatment principles under Article III of the GATT and that the regulations could not be considered “necessary to protect human . . . life or health” under the Article XX(b) exception.<sup>70</sup> The panel conceded that “a policy to reduce air pollution resulting from the consumption of gasoline was a policy within the range of those concerning the protection of human, animal and plant life or health. . . .”<sup>71</sup> However, the panel ruled that the United States failed to prove that its measures were “necessary,” because the application of slightly more exacting standards to domestic and imported gasoline would allow the United States to achieve the goal of maintaining the desired level of clean air without discriminating against imported gasoline.<sup>72</sup> Additionally, the panel found that the United States had not demonstrated that there were no other measures that could have been enacted to enforce standards for foreign gasoline that were less inconsistent with Article III.<sup>73</sup> The Appellate Body made a significant

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66. GATT Dispute Settlement Panel Report on U.S. Restrictions on Imports of Tuna, 33 I.L.M. 839, 876–86 (June 16, 1994).

67. *Id.* at 896–99.

68. WTO Appellate Body Report on U.S. Standards for Reformulated and Conventional Gasoline, 35 I.L.M. 603, 611–13 (Apr. 29, 1996), available at [http://www.wto.org/english/tratop\\_e/dispu\\_e/gasoline.wp5](http://www.wto.org/english/tratop_e/dispu_e/gasoline.wp5) (last visited Oct. 22, 2001) [hereinafter WTO Reformulated Gasoline Appellate Body Report].

69. *Id.*

70. GATT, *supra* note 17, art. XX(b); WTO Reformulated Gasoline Appellate Body Report, *supra* note 68, at 612.

71. WTO Dispute Panel Report on U.S. Standards for Reformulated and Conventional Gasoline, 35 I.L.M. 274, 296 (Jan. 29, 1996).

72. *Id.* ¶ 6.27.

73. *Id.* ¶ 6.28.

declaration in its holding, explaining that the WTO seeks to balance interests in free trade and health:

It is of some importance that the Appellate Body point out what this [ruling] does not mean. It does not mean, or imply, that the ability of any WTO Member to take measures to control air pollution or, more generally, to protect the environment, is at issue. That would be to ignore the fact that Article XX of the General Agreement contains provisions designed to permit important state interests—including the protection of human health, as well as the conservation of exhaustible natural resources—to find expression.<sup>74</sup>

#### D. WTO Appellate Body Report: *Shrimp Turtle*

The United States again found itself defending legislation designed to protect marine wildlife in the *Shrimp Turtle* dispute. India, Malaysia, Pakistan, and Thailand petitioned the WTO Dispute Settlement Body to review U.S. federal legislation that prohibited the import of shrimp from countries that typically harvested shrimp with methods that killed sea turtles.<sup>75</sup> The law allowed shrimp to be imported if a country could show that its shrimping fleet used turtle-excluder devices.<sup>76</sup> The panel found that the U.S. law violated Article XI:1 of the GATT and that the United States had failed to prove a right to an exception under section (g) of Article XX.<sup>77</sup> Article XX(g) provides an exception for measures “relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.”<sup>78</sup> The Appellate Body reversed the panel’s finding that the claim under Article XX(g) failed, ruling that the turtle-protection measure *could* be defended under section (g).<sup>79</sup> The Appellate Body proceeded to outline a second step for Article XX analysis, looking to the chapeau of the article which would also apply in an Article XX(b) case.<sup>80</sup> The Appellate Body ruled that the U.S. law was a form of “unjustifiable discrimination” because it not only required nations to adopt essen-

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74. WTO Reformulated Gasoline Appellate Body Report, *supra* note 68, at 633–34.

75. WTO Appellate Body Report on U.S. Import Prohibition of Certain Shrimp and Shrimp Products, 38 I.L.M. 118, 118 (Oct. 12, 1998), available at [http://www.wto.org/english/tratop\\_e/dispu\\_e/58abr.pdf](http://www.wto.org/english/tratop_e/dispu_e/58abr.pdf) (last visited Oct. 22, 2001) [hereinafter WTO Shrimp Turtle Appellate Body Report]. The law in question was a regulation promulgated under the Endangered Species Act of 1973, Pub. L. No. 93-205 (codified at 16 U.S.C. §§ 1531–44 (1999)).

76. *Id.* ¶ 3.

77. *Id.* ¶ 7. The United States did not make an Article XX(b) claim.

78. GATT, *supra* note 17, at 262.

79. WTO Shrimp Turtle Appellate Body Report, *supra* note 75, at 157.

80. *Id.* ¶¶ 161–65.

tially the same regulations as those in place in the United States, but because it also forbade import of shrimp harvested using turtle-excluder devices, if the shrimp came from ships flagged by an uncertified country.<sup>81</sup>

#### E. WTO Appellate Body Report: *Meat Hormones*

In 1997, a dispute focusing on health related regulations arose between Canada, the United States, and the European Community (EC) regarding a series of EC directives that forbade the sale of imported or domestic meat derived from hormone treated farm animals.<sup>82</sup> Because the regulations in question dealt with food, the Dispute Settlement Body and the Appellate Body applied the SPS Agreement in its analysis.<sup>83</sup> The Appellate Body ruled that the EC had failed to show that it satisfied Article 5.1 of the SPS Agreement, which requires that measures to protect health be based on a scientific risk assessment.<sup>84</sup> Article 2 of the SPS Agreement sets out principles much like those found in the Article XX(b) exception, allowing, to the extent necessary, measures designed to protect human health<sup>85</sup> and taking scientific risk assessment into account.<sup>86</sup> Having found that the EC did not base its regulations on any kind of risk assessment, the Appellate Body did not even proceed to make an Article 2 analysis to consider whether the ban on hormone treated meat was a measure necessary to protect health.

#### F. WTO Panel Report: *Asbestos*

Until the year 2000, the WTO had yet to rule that any health measure or environmental protection measure was allowable as “necessary” and justifiable discrimination under the Article XX(b) exception. The WTO finally delivered a decision allowing an application of the Article XX(b) exception with the panel report on the French general ban on asbestos and asbestos-containing products, which found that a violation of the Article III national treatment principle was al-

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81. *Id.*

82. WTO Appellate Body Report on EC Measures Concerning Meat and Meat Products (Hormones), WT/DS26/AB/R, WT/DS48/AB/R, (98-0099), AB-1997-4, 1998 WTO DS LEXIS 5 (Jan. 16, 1998) ¶¶ 1–3, available at [http://www.wto.org/english/tratop\\_e/dispu\\_e/hormab.pdf](http://www.wto.org/english/tratop_e/dispu_e/hormab.pdf) (last visited Oct. 22, 2001) [hereinafter WTO Meat Hormones Appellate Body Report].

83. *Id.* ¶ 253.

84. *Id.*

85. SPS Agreement, *supra* note 39, art. 2.1.

86. *Id.* art. 2.2.

lowed under the Article XX(b) exception.<sup>87</sup> The Appellate Body report that followed upheld the panel's Article XX(b) ruling, which preserved France's right to ban asbestos, and reversed one of the panel's findings that was favorable to France's opponent in the case, Canada.<sup>88</sup> The asbestos dispute originated with a 1996 decree by the French Government banning the manufacture, processing, sale, and import of asbestos and asbestos-containing products, with the stated aim of protecting the health of workers and consumers.<sup>89</sup> The EC, representing France, defended the decree on a number of grounds. While the panel found that France's decree did in fact violate Article III:4 national treatment principles, it found in favor of the EC on the basis of its Article XX(b) defense.<sup>90</sup>

The panel explained that the EC, as defending party, bore the burden of making a *prima facie* case that the measure was justified, and that Canada would have to rebut that case in order to prevail.<sup>91</sup> The panel then proceeded to consider four elements of the Article XX(b) exception: it inquired whether the decree was (1) aimed at the "protection of human life and health;" (2) whether the decree was "necessary;" and under the chapeau of Article XX, whether the decree was (3) a "means of arbitrary or unjustifiable discrimination" or (4) a "disguised restriction on international trade."<sup>92</sup> Under the first element, Canada contended that there was insufficient scientific evidence that the type of asbestos products it manufactured posed a risk to health.<sup>93</sup> However, the panel found in favor of France, allowing that "a decision-maker responsible for taking public health measures might reasonably conclude that [asbestos-containing products] posed a risk. . . ."<sup>94</sup> Under the second element, the panel was convinced that France's decree was "necessary," even if it might be possible to handle Canadian asbestos-containing products safely, because leaders "might have reasonable doubts" that they could ensure safe handling.<sup>95</sup> Regarding the third element of the Article XX(b) test, the panel noted that the decree was applied evenly between domestic producers and imports, and accordingly there was no discrimination

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87. WTO Asbestos Dispute Settlement Body Panel Report, *supra* note 36, ¶ 9.1.

88. See WTO Asbestos Appellate Body Report, *supra* note 37, ¶ 192.

89. WTO Asbestos Dispute Settlement Body Panel Report, *supra* note 36, ¶¶ 2.3–2.5.

90. *Id.* ¶ 3.291.

91. *Id.* ¶¶ 3.244, 8.177.

92. *Id.* ¶¶ 3.474, 8.177–8.240.

93. *Id.* ¶ 3.323.

94. *Id.* ¶ 8.193.

95. *Id.* ¶ 8.211.

to consider.<sup>96</sup> The panel added that if discrimination had been shown, the analysis would have proceeded to determine whether the discrimination was arbitrary or unjustified.<sup>97</sup> On the fourth and final element, the panel declared that because a showing of discrimination was lacking, it was not necessary to consider whether the decree constituted a disguised restriction on trade.<sup>98</sup> The panel report concluded with a discussion and denial of Canada's nullification or impairment claim, noting that because so many similar, developed countries recognized the health risks associated with asbestos and had enacted restrictive regulations, Canada could have reasonably expected France to enact similar regulations.<sup>99</sup>

The Appellate Body report that followed the panel report upheld the reasoning of the panel on the Article XX(b) claim, and reversed the finding of the panel that there had been an Article III:4 violation in the first place.<sup>100</sup> The panel's Article III:4 finding was based on the theory that asbestos products were "like" other, less harmful microfiber products.<sup>101</sup> The Appellate Body criticized this finding on several grounds but, most importantly, it found that the panel should not have denied the EC's request to include the risks "posed by the product to human health" in the consideration of "likeness."<sup>102</sup> The Appellate Body explained:

in examining the "likeness" of products, panels must evaluate *all* of the relevant evidence. We are very much of the view that evidence relating to the health risks associated with a product may be pertinent in an examination of "likeness" under Article III:4 of the GATT 1994.<sup>103</sup>

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96. *Id.* ¶¶ 8.224, 8.227.

97. *Id.* ¶ 8.230.

98. *Id.* ¶ 8.237.

99. *Id.* ¶ 8.303.

100. WTO Asbestos Appellate Body Report, *supra* note 37, ¶ 192. Article III:4 of the GATT in its entirety 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. The provisions of this paragraph shall not prevent the application of differential internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product.

GATT, *supra* note 17.

101. WTO Asbestos Appellate Body Report, *supra* note 37, ¶ 84.

102. *Id.* ¶ 113.

103. *Id.*

The finding of the Appellate Body that asbestos products were not “like” alternative, less harmful products extinguished Canada’s Article III:4 claim and ostensibly made the Article XX(b) findings of the panel moot.<sup>104</sup> Nevertheless, the Appellate Body upheld the Article XX(b) findings.<sup>105</sup> In its discussion of the Article XX(b) claim, the Appellate Body addressed several of Canada’s appeals that followed the panel report, including an argument that the EC must “quantify” the risk associated with asbestos products in order to argue that asbestos products pose a risk to human health.<sup>106</sup> The Appellate Body considered Canada’s contention that the level of protection sought by France’s decree was unreasonable, and perhaps unattainable, because alternative products would also pose a risk to health.<sup>107</sup> Additionally, Canada had made an appeal that the panel erred in finding that “controlled use” of asbestos products was not a reasonable alternative to the ban.<sup>108</sup> The Appellate Body countered that there is no general requirement to quantify a risk to health in order to prove that a measure is “necessary.”<sup>109</sup> The Appellate Body also rejected Canada’s argument that the level of protection sought by the decree was questionable, stating, “WTO Members have the right to determine the level of protection of health that they consider appropriate in a given situation.”<sup>110</sup> Regarding the claim that there were reasonable alternatives to the ban on asbestos, the Appellate Body confirmed that a measure will not withstand scrutiny if an alternative measure not inconsistent with the GATT is available.<sup>111</sup> Nonetheless the Appellate Body found:

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.’ Such an alternative measure would, in effect, prevent France from achieving its chosen level of health protection.<sup>112</sup>

In reaching this conclusion, the Appellate Body explained that the determination of whether a measure is “necessary” will be affected by the importance and value of the interest protected by a given meas-

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104. *Id.* ¶ 192.

105. *Id.*

106. *Id.* ¶ 165.

107. *Id.* ¶ 168.

108. *Id.*

109. *Id.* ¶¶ 169–74.

110. *Id.* ¶ 168.

111. *Id.* ¶ 171.

112. *Id.* ¶ 174.

ure.<sup>113</sup> Citing language from an earlier case, the Appellate Body declared:

“the more vital or important [the] common interests or values” pursued, the easier it would be to accept as “necessary” measures designed to achieve those ends. In this case, the objective pursued by the measure is the preservation of human life and health through the elimination, or reduction, of the well known, and life threatening, health risks posed by asbestos fibres. The value pursued is both vital and important to the highest degree.<sup>114</sup>

#### IV. POTENTIAL IMPACT OF THE WTO ON TOBACCO CONTROL MEASURES

Protests in late 1999 and 2000 against the WTO and other institutions associated with globalization demonstrated that many activist groups think that free trade rules are not compatible with such social programs and policies as the WHO tobacco control initiative.<sup>115</sup> Although anti-trade forces have been effective in stalling trade talks and capturing the public’s attention, their allegations that free trade principles run counter to protection of human health and the environment have been rightly criticized.<sup>116</sup> The free trade rules and jurisprudence reviewed above suggest that the WTO free trade regime gives ample room to governments to promulgate tobacco control measures under a WHO-sponsored tobacco control regime. Additionally, the WTO has indicated to the WHO that it will support international health regulations. At the Third Session of the United Nations Ad Hoc In-

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113. *Id.* ¶ 172 (citing WTO Appellate Body Report on Korean Measures Affecting Imports of Fresh, Chilled and Frozen Beef, WT/DS161/AB/R, WT/DS169/AB/R, (00-5347), AB-2000-8, 2000 WTO DS LEXIS 36, ¶ 162 (Jan. 10, 2001), available at [http://www.wto.org/english/tratop\\_e/dispu\\_e/161-169abr\\_e.pdf](http://www.wto.org/english/tratop_e/dispu_e/161-169abr_e.pdf) (last visited Oct. 24, 2001)) (citations omitted).

114. *Id.*

115. The protests at the Seattle Round of the WTO (November 1999), the World Economic Forum in Davos, Switzerland (February 2000), and the World Bank/IMF meetings in Washington, D.C. (April 2000) were widely reported. The following articles discuss each event, as well as the impact of the protests: Joseph Kahn & David Sanger, *Trade Obstacles Unmoved, Seattle Talks End in Failure*, N.Y. TIMES, Dec. 4, 1999, at A6; *The New Trade War*, THE ECONOMIST, U.S. Ed., Dec. 4, 1999, at 25–26; *The World’s View of Multinationals*, THE ECONOMIST, U.S. Ed., Jan. 29, 2000, at 21–22; *Today’s Pig is Tomorrow’s Bacon*, THE ECONOMIST, U.S. Ed., Apr. 22, 2000, at 24.

116. New York Times commentator Thomas L. Friedman called the work of protestors in Seattle “a fools errand,” and explained that protesting organizations could “make a difference today using globalization—by mobilizing the power of trade.” Thomas L. Friedman, *Senseless in Seattle*, N.Y. TIMES, Dec. 1, 1999, at A23. For a discussion of the anti-trade movement, see Susan Tiefenbrun, *Free Trade and Protectionism: The Semiotics of Seattle*, 17 ARIZ. J. INT’L & COMP. L. 257 (2000).

teragency Task Force on Tobacco Control held in December, 2000, a WTO representative explained:

the WTO has never put into question the level of health or environmental protection that its members have chosen to pursue. What is sometimes put into question in the WTO is the approach that a country takes to achieve a certain level of protection—but not the level itself . . . . WTO rules provide significant leeway for countries to put measures in place to protect human health and the environment.<sup>117</sup>

The November 2001 WTO Ministerial Conference in Doha, Qatar, reiterated in its Ministerial Declaration that the Article XX(b) exception allows countries to pursue public health objectives, stating that “under WTO rules no country should be prevented from taking measures for the protection of human, animal or plant life or health. . . .”<sup>118</sup> Nonetheless, it may still be a challenge for the WHO to develop tobacco control measures that do not conflict with free trade principles. In order to develop WTO-compliant measures, it is necessary to consider basic principles derived from the language of the relevant GATT and WTO agreements, as well as the trade cases. The WTO representative speaking at the Third Session of the Interagency Task Force identified two principles of free trade that should be considered in order to evaluate health protecting measures: nondiscrimination and necessity.<sup>119</sup> This paper adds to this analysis the principle of reasonableness, given the importance the Dispute Settlement Body attributed to this factor in the *Asbestos* and *Hormones* cases.<sup>120</sup> If a tobacco control measure does not conflict with these three principles under international trade law, it should not suffer adverse treatment by the Dispute Settlement Body. A brief review of each of these principles follows.

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117. *Report of the Third Session, Global Videoconference* (Dec. 8, 2000), United Nations Ad Hoc Interagency Task Force on Tobacco Control, available at <http://tobacco.who.int/en/united-nations/un-reportiii.html> (last visited Oct. 7, 2001).

118. WTO Ministerial Declaration, WT/MIN(01)/DEC/W/1, art. 6 (Nov. 14, 2001), available at [http://www-chil.wto-ministerial.org/english/thewto\\_e/minist\\_e/min01\\_e/mindecl\\_e.pdf](http://www-chil.wto-ministerial.org/english/thewto_e/minist_e/min01_e/mindecl_e.pdf) (last visited Nov. 15, 2001).

119. The nondiscrimination test, according to the representative, should consider the principles of most favored nation status and national treatment, while the necessity test “has to do with the extent to which a measure that is taken by a country to achieve a certain objective is truly necessary.” *Id.*

120. The principle of reasonableness is applied in the WTO *Asbestos* Dispute Settlement Body Panel Report, *supra* note 87, ¶¶ 8.193, 8.211; WTO *Asbestos* Appellate Body Report, *supra* note 37, ¶ 174; and WTO *Meat Hormones* Appellate Body Report, *supra* note 82, ¶ 250.

### A. Nondiscrimination

The obligations under GATT Article I, concerning most favored nation status, and Article III, regarding national treatment, essentially require that measures do not accord different treatment to like products on the basis of their origin.<sup>121</sup> If there is no discrimination, there is no case against a measure under Articles I and III.<sup>122</sup> However, a tobacco control measure may violate either of those articles and still survive WTO scrutiny under Article XX(b).<sup>123</sup> Because the chapeau of Article XX also speaks of “arbitrary or unjustifiable discrimination” and “disguised restriction[s] to trade,”<sup>124</sup> some measure of discrimination may be allowed, so long as it is not found to be arbitrary or unjustified, or a disguised restriction to trade.<sup>125</sup>

### B. Necessity

Assuming that a tobacco control measure relies on the GATT Article XX(b) exception (or the Article 2.2 exception of the TBT) it will have to be shown that the measure is necessary to achieve the health objectives in question.<sup>126</sup> It is not clear how the provision will be applied in future panel and Appellate Body reports. For example, in the *Thailand Cigarettes* case, the GATT panel applied it in a manner that was relatively unforgiving of Thai health policy.<sup>127</sup> Alternatively, in applying the provision in the *Asbestos* case, the WTO Dispute Settlement Panel implied that a determination of necessity would not be extensively reviewed, so long as the decision to enact a measure is motivated by a reasonable determination.<sup>128</sup> The trade cases demonstrate that a measure will usually withstand Dispute Settlement Body necessity analysis if it has the following qualities: (1) it is aimed at meeting a specific objective; (2) it is the least trade-restrictive measure available; and conversely, (3) there are no other

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121. GATT, *supra* note 17.

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*; TBT, *supra* note 18, art. 2.2.

127. GATT Thailand Cigarettes Report, *supra* note 53, at 223.

128. WTO Asbestos Dispute Settlement Body Panel Report, *supra* note 36, ¶¶ 8.195–8.222.

less restrictive measures available that would meet the same objective.<sup>129</sup>

### C. Reasonableness

In the event that a tobacco control measure relies on the GATT Article XX(b) exception or the TBT Article 2.2 exception, the Dispute Settlement Body may apply a reasonableness analysis in several ways. This standard is a relatively easy one to satisfy, and it is noteworthy that the *Asbestos* panel referred to reasonableness on several points, even considering reasonableness in its analysis of necessity.<sup>130</sup> If, for example, a measure does impose some kind of discrimination, reasonableness will be considered in the process of determining whether the measure is arbitrary or unjustified, or a disguised barrier to trade.<sup>131</sup>

## V. POTENTIAL TOBACCO CONTROL MEASURES

### A. The Framework Convention on Tobacco Control

In the past five years, the WHO has worked to devise a tobacco control regime, developing the current FCTC and follow-up protocol strategy.<sup>132</sup> The tobacco control regime will be implemented on a step-by-step basis, starting with a simple framework to be followed by a series of binding protocols.<sup>133</sup> WHO preparatory materials explain that in the FCTC, “[s]tates . . . [will] adopt a framework convention that calls for cooperation in achieving broadly stated goals, leaving open the possibility that the parties to the convention will subsequently conclude separate protocols containing specific measures de-

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129. GATT Thailand Cigarettes Report, *supra* note 53, at 223; GATT Tuna Dolphin Report, *supra* note 62, at 191; WTO Reformulated Gasoline Appellate Body Report, *supra* note 68, at 614.

130. WTO Asbestos Dispute Settlement Body Panel Report *supra* note 36, ¶¶ 164–75, 8.207.

131. GATT, *supra* note 17, art. XX(b).

132. The World Health Assembly passed a resolution calling for the development of a tobacco control convention on May 25, 1996. *International Framework Convention for Tobacco Control*, World Health Assembly, WHA 49.17 (1996).

133. The step-by-step implementation strategy has been used successfully in the case of environmental treaty regimes. *See, e.g.*, Kyoto Protocol to the Framework Convention on Climate Change, Dec. 10, 1997, 37 I.L.M. 22; United Nations Framework Convention on Climate Change, May 9, 1992, S. TREATY DOC. No. 102-38, 31 I.L.M. 849; Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, S. TREATY DOC. No. 100-10, 1522 U.N.T.S. 3; Vienna Convention for the Protection of the Ozone Layer, Mar. 22, 1985, T.I.A.S. No. 11,097, 1513 U.N.T.S. 293.

signed to implement those goals.”<sup>134</sup> Specific terms for the protocols, however, will not be ripe for discussion until the FCTC is signed by enough countries to enter into force, and negotiations for the protocols commence. The most recent version of the Draft FCTC was released by the WHO in January 2001.<sup>135</sup> While it is certain that the eventual terms of the FCTC may differ from the current draft, the essential provisions pertinent to this discussion likely will not change.

1. *The Draft Convention.* The Draft Convention currently lacks a preamble, but the general aim of the FCTC is expressed in Article C, which states that “[t]he ultimate objective of this Convention and related protocols is to provide a framework for integrated tobacco control measures.”<sup>136</sup> Notably, there is also language in the Draft FCTC that expresses respect for free trade rules: Article D(5) on “Guiding Principles” declares that “[t]obacco-control measures should not constitute a means of arbitrary or unjustifiable discrimination in international trade.”<sup>137</sup> The terms of this article bear an obvious resemblance to the language of GATT Article XX(b),<sup>138</sup> and theoretically, Article D(5) should ensure that all enacted tobacco control measures fit within the allowed exception to trade principles. However, before inquiring into the subject of tobacco control measures that may involve trade law, and possibly require application of exceptions under the WTO agreements, it will be useful to review the scope of measures contemplated in the current Draft FCTC.

The Draft FCTC would impose general, nonbinding obligations on signatory states under Article E, including an obligation to pass domestic legislation and make public policy according to the terms of the FCTC.<sup>139</sup> Articles F through I cover a variety of measures that would serve to reduce the impact of tobacco on public health, through

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134. Luk Joosens, *Improving Public Health Through an International Framework Convention on Tobacco Control*, FRAMEWORK CONVENTION ON TOBACCO CONTROL, TECHNICAL BRIEFING SERIES, PAPER 2, WHO Doc. WHO/NCD/TFI/99.2, at 15 (1999).

135. Draft FCTC, *supra* note 6.

136. The text of Article C in its entirety declares:

The ultimate objective of this Convention and of the related protocols is to provide a framework for integrated tobacco-control measures to be implemented through the engagement of the Parties in order continually and substantially reduce the prevalence of tobacco use and thus protect present and future generations from the devastating health, social, environmental and economic consequences of tobacco consumption and exposure to tobacco smoke.

Draft FCTC, *supra* note 6, at 1.

137. *Id.*

138. GATT, *supra* note 17, art. XX(b).

139. Draft FCTC, *supra* note 6, at 2.

a series of strategies ranging from taxation to regulations to prevent exposure to second-hand smoke.<sup>140</sup> It should be reiterated that while these articles of the Draft FCTC discuss the following measures, they do not impose an obligation on signatory states to enact the measures wholesale. Instead, each signatory will take on a general obligation to adopt measures “to the extent possible within the means at its disposal and its capabilities.”<sup>141</sup> A table describing the substantive tobacco control measures follows.

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140. *Id.* at 3–8.

141. Under the section on general obligations, Article E:2 in its entirety explains that [t]o this end each Party shall, to the extent possible within the means at its disposal and its capabilities: (a) establish or, where it already exists, reinforce, and adequately finance a national coordinating mechanism for tobacco control, with inputs from relevant government and civil society sources; (b) adopt legislative, executive and administrative measures and cooperate with other Parties in harmonizing appropriate policies; (c) reduce tobacco consumption and exposure to tobacco smoke in accordance with the provisions of this Convention and, as relevant, its protocols.

*Id.* at 2.

TOBACCO CONTROL MEASURES INCLUDED IN THE  
CURRENT DRAFT OF THE FRAMEWORK CONVENTION  
ON TOBACCO CONTROL<sup>142</sup>

ARTICLE	PROVISION(S)
<b>F</b>	<b><i>Price and Tax measures to reduce the demand for tobacco</i></b> 2(a) Prohibition of duty free sales of tobacco 2(b) Imposition of taxes to reduce tobacco consumption
<b>G</b>	<b><i>Nonprice measures to reduce the demand for tobacco</i></b> 1(a) Passive smoking regulations (second-hand smoking) 1(a) Regulations of contents of tobacco products 1(a) Regulation of tobacco-product disclosures 1(a) Packaging and labeling 1(a) Education, training, and awareness 1(a) Advertising, promotion, and sponsorship
<b>H</b>	<b><i>Demand reduction measures concerning tobacco dependence and cessation</i></b>
<b>I</b>	<b><i>Measures related to the supply of tobacco</i></b> Points 1 to 7, illicit trade in tobacco (smuggling and counterfeiting) Points 8 to 12, elimination of sales to and by young persons Points 13 to 15, licensing (of domestic retail sales)

2. *Tobacco Control Measures Relating to International Trade Obligations.* The FCTC tobacco control measures from the table above cover a range of policy issues, several of which would not conflict with free trade principles. For example, if a state signs the FCTC and a later protocol that expands the general obligation under Article G:1(a), requiring domestic legislation to protect citizens from second-hand smoke, there could be no trade conflict with another state that imported tobacco products to that country.<sup>143</sup> Measures under Article H, requiring signatories to organize smoking cessation programs, would also be free from scrutiny under trade law.<sup>144</sup> Such measures

142. *Id.* at 3–8.

143. *Id.* at 3.

144. *Id.* at 5–6.

would escape trade law conflicts mainly because they would not be directed at the products themselves and would place no restrictions on the sale or import of tobacco products. Having such a secondary relationship to tobacco products, it would be difficult to demonstrate that these measures posed any impediment to trade. However, some of the most effective measures for reducing tobacco consumption would likely spark controversy. For example, price and tax measures, such as those described in Article F,<sup>145</sup> could generate opposition in the trade context.<sup>146</sup> Mindful of this distinction between tobacco control measures, after passing the FCTC, the WHO will need to consider the merits of promulgating protocols that are less likely to generate controversy under free trade rules.

There are five types of tobacco control measures contemplated in the Draft FCTC that may generate disputes if a signatory state enacts them voluntarily under the FCTC or by obligation under a follow-up protocol: tax measures under Article F;<sup>147</sup> regulations on the contents of tobacco products under Article G:1(b);<sup>148</sup> regulations on the packaging and labeling of tobacco products under Article G:1(d);<sup>149</sup> regulations on advertising, promotion, and sponsorship under Article G:2;<sup>150</sup> and measures to deter smuggling under Article I.<sup>151</sup> Although the Draft FCTC does not contain a requirement that signatory states enact domestic legislation or regulations under Articles F through I,<sup>152</sup> eventual protocols will place binding obligations on signatory states. Therefore, it makes sense to discuss the types of protocols that may follow the FCTC as well as the general progress of the FCTC. The last section of this paper discusses the five types of tobacco control measures and describes the careful tailoring that will be necessary in order to avoid controversy or adverse treatment by the WTO Dispute Settlement Body.

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145. *Id.* at 3.

146. The WHO advocates setting minimum tax rates on tobacco products as a means of deterring consumption, especially among young children, who demonstrate highly elastic demand for tobacco products relative to price. Luk Joosens, *From Public Health to International Law: Possible Protocols for Inclusion in the Framework Convention on Tobacco Control*, 78 BULL. OF THE WORLD HEALTH ORG. 930, 931 (2000).

147. Draft FCTC, *supra* note 6, at 3.

148. *Id.*

149. *Id.* at 4.

150. *Id.* at 5.

151. *Id.* at 6–8.

152. *Id.* at 3–8.

## B. Protocols to the Framework Convention

The WHO has contemplated promulgating a number of protocols to follow the FCTC. For the most part, protocols will expand upon the issues covered in the Draft FCTC. Potential issues that may eventually be addressed in follow-up protocols include pricing and taxes, smuggling, duty-free tobacco, advertising, product testing, labeling, and information sharing.<sup>153</sup> At the first meeting of the Intergovernmental Negotiating Body, WHO Director General, Dr. Gro Harlem Brundtland, mentioned six types of interventions closely related to the issues above that may be developed into protocols: 1) excise taxes; 2) bans on advertising, sponsorship, and marketing; 3) controls on smoking in public places; 4) expanded access to means of quitting; 5) counter-advertising; and 6) controls on smuggling.<sup>154</sup>

## C. Progress of the FCTC

The WHO declared in its 1999 World Health Report that it plans to adopt the FCTC and key protocols by 2003.<sup>155</sup> It is expected that the following organs would be formed under the FCTC: a secretariat, a scientific subsidiary, an implementation mechanism, and a dispute settlement body.<sup>156</sup> The technical aspects of the regime have been discussed at the meetings of a WHO working group established to draft the FCTC and protocols.<sup>157</sup> The latest session of negotiations of the FCTC intergovernmental negotiating body commenced in April of 2001.<sup>158</sup>

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153. Joosens, *supra* note 146, at 930.

154. Gro Harlem Brundtland, *Opening Statement, Framework Convention on Tobacco Control, First Meeting of Intergovernmental Negotiating Body*, (Oct. 16, 2000), available at [http://www.who.int/director-general/speeches/2000/20001016\\_tobacco\\_control.html](http://www.who.int/director-general/speeches/2000/20001016_tobacco_control.html) (last updated May 15, 2001).

155. THE WORLD HEALTH ORGANIZATION, *supra* note 11, at 78.

156. Taylor & Bettcher, *supra* note 5, at 925–26.

157. When the World Health Assembly formed the Intergovernmental Negotiating Body by resolution WHA52.18, in 1999, it also formed a working group, which would prepare and draft language for the FCTC. *WHO Framework Convention on Tobacco Control Report of the Working Group*, WHO Doc. A/53/12 (Apr. 26, 2000).

158. The provisional agenda was released on February 14, 2001. *Intergovernmental Negotiating Body on the WHO Framework Convention on Tobacco Control*, WHO Doc. A/FCTC/INB2/1 (Feb. 14, 2001).

## VI. DESIGNING MEASURES COMPATIBLE WITH FREE TRADE OBLIGATIONS

The ultimate success of the WHO tobacco control measures will depend in part on development of FCTC protocols that are WTO-compliant, and the following measures, which are possible subjects of FCTC protocols, all have the potential to conflict with free trade principles. Based on the principles and lessons derived from the above analysis of international trade rules, recommendations for drafting WTO-compliant protocols are offered below.

### A. Tax Measures

Article F of the Draft FCTC asks signatory states to eliminate tax-free and duty-free sale of tobacco and, concurrently, to set a tax rate on tobacco products that will “achieve a stable and continuous reduction in tobacco consumption.”<sup>159</sup> Theoretically, a protocol on this issue could make it mandatory to eliminate tax-free and duty-free sales and might include a schedule of tax rates to be applied to tobacco products. In general, the free trade regime will allow the imposition of taxes, so long as there is not a finding of discrimination between like products on the basis of origin, under the doctrines of most favored nation status and national treatment. For example, if a tax is applied evenly on all cigarettes, it would be hard for another country to charge discrimination. Additionally, taxes are free from the scrutiny that quotas would face under Article XI of the GATT. On the other hand, under Article XX(b) it is easy to imagine how discrimination between domestic and imported tobacco products would be perceived as “arbitrary or unjustified” or as a “disguised barrier to trade.” Ultimately, signatories under the future tobacco control regime can enact good faith domestic legislation in order to levy tobacco taxes with little fear of conflict with the free trade rules.

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159. Article F of the Draft FCTC in its entirety reads:

(1) The Parties recognize that price measures are an effective mechanism to reduce tobacco consumption, and that progressive harmonization of tobacco product prices is an important means of discouraging illicit traffic in tobacco products. (2) Each party shall, to the extent possible within the means at its disposal and its capabilities, adopt legislative, executive and administrative measures, and cooperate with other Parties in harmonizing appropriate tax policies, in order to reduce tobacco consumption and exposure to tobacco smoke. Such measures and policies shall include the following: (a) prohibition of tax-free and duty-free sales of tobacco products; (b) imposition of taxes on tobacco products so as to achieve a stable and continuous reduction in tobacco consumption; (c) adoption of other price and tax measures that may be recommended by the Conference of the Parties.

Draft FCTC, *supra* note 6, at 3.

## B. Regulation of Contents

Article G:1(b) calls for signatories to cooperate to develop, harmonize, and eventually adopt, standards for “testing and measuring, designing, manufacturing and processing” tobacco products.<sup>160</sup> The standards developed for a regulation of contents protocol may have an impact on trade and will be contested if they are perceived as discriminatory. To survive WTO Dispute Settlement Body scrutiny, a challenged standard may have to be defended in terms of the GATT Article XX(b) exception. For example, given the arbitrary nature of setting specific limits on the nicotine content of cigarettes, a challenging WTO member state may argue that the standard is “arbitrary and unjustified.” However, if a panel followed the reasoning of the *Asbestos* Panel, it might defer to the judgement of the defending state, especially if that state had adopted an internationally agreed upon standard.

Because standards are regulated under the TBT agreement, the imposition of standards on tobacco products may require an alternative analysis. Annex 1 of the TBT agreement explains that regulations on product characteristics are “technical regulations,” which are governed by the TBT agreement.<sup>161</sup> The essential elements of the GATT Article XX(b) exception are also present in the TBT agreement, and it is likely that good faith tobacco control standards or regulations would survive TBT review. Article 2.2 of the TBT agreement allows “technical regulations . . . not . . . more trade-restrictive than necessary to fulfill a legitimate objective, taking account of the risks non-fulfillment would create” assuming that the risk assessment takes available scientific and technical information into account.<sup>162</sup>

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160. Article G:1(b) of the Draft FCTC in its entirety reads:

(1) Each Party shall, to the extent possible within the means at its disposal and its capabilities, adopt legislative, executive and administrative measures, and cooperate with other Parties in harmonizing appropriate non-price policies, in order to reduce tobacco consumption and exposure to tobacco smoke. Such measures and policies shall include the following: . . . (b) adoption of standards for testing and measuring, designing, manufacturing and processing such products, and cooperation in the development and harmonization of such standards under the auspices of the World Health Organization.

Draft FCTC, *supra* note 6, at 3.

161. TBT, *supra* note 18.

162. The full text of Article 2.2 of the TBT provides:

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

The protection of human health or safety is listed among the “legitimate objectives.”<sup>163</sup> The necessity issue is present here, just as in Article XX(b), and reasonableness can be shown by satisfying the requirement that the risk assessment has a scientific basis and by showing that the objective of the regulation is to protect health. Under the TBT agreement, just as with the Article XX(b) exception, discrimination is not an issue, so proof of discrimination does not result in a defeat of a health measure. Thus, the dispositive issues derived from the agreement are reasonableness and necessity.

It should also be noted that the FCTC actually will fortify a state’s prerogative to enact regulations, because such regulations would not be unilateral, but rather a product of an international agreement. The language of Article 2.4 of the TBT agreement reveals this favorable view of international standards, in that it requires WTO member states to base their standards on international standards, when it is reasonable and when they are available.<sup>164</sup> Likewise the opinion of the Appellate Body in the *Meat Hormones* case demonstrates a procedural advantage for measures based on international standards: “Such a measure enjoys the benefit of a presumption (albeit a rebuttable one) that it is consistent with the relevant provisions of the *SPS Agreement* and of the *GATT 1994*.”<sup>165</sup> In the *Meat Hormones* case, the *SPS Agreement* was in question, but ostensibly the same principle would apply to the TBT agreement. The *Meat Hormones* case presents an additional lesson to drafters of a FCTC regulations protocol: the Dispute Settlement Body will defer to a reasonable policy decision to protect health so long as the decision is based on a scientific risk assessment. Given the wealth of scientific evidence that tobacco is detrimental to health, it will be easy to show that regulations on the contents of tobacco products are based on a scientifically sound basis.

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consideration are, *inter alia*: available scientific and technical information, related processing technology or intended end-uses of products.

TBT, *supra* note 18, art. 2.2.

163. *Id.*

164. Article 2.4 in its entirety reads:

Where technical regulations are required and relevant international standards exist or their completion is imminent, Members shall use them, or the relevant parts of them, as a basis for their technical regulations except when such international standards or relevant parts would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued, for instance because of fundamental climatic or geographical factors or fundamental technological problems.

TBT, *supra* note 18, art. 2.4.

165. WTO *Meat Hormones* Appellate Body Report, *supra* note 82, ¶ 17.

### C. Packaging and Labeling

The Article G:1(d) provision of the Draft FCTC calls for adoption of packaging and labeling requirements.<sup>166</sup> The TBT agreement will also apply in the case of disputes regarding these measures, as it would with measures regarding regulation of contents of tobacco products. Annex 1 of the TBT agreement also defines packaging and labeling regulations as “technical regulations” and as a result, these requirements will be analyzed in a manner similar to that which would be applied to assess regulations on the contents of tobacco products.<sup>167</sup> In general, imposition of labeling requirements should be relatively uncontroversial in terms of trade law. In its report, the *Thailand Cigarettes* panel even went so far as to explicitly declare:

Other countries [have] introduced strict, non-discriminatory labeling [sic] and ingredient disclosure regulations which [allow] governments to control, and the public to be informed of, the content of cigarettes. A non-discriminatory regulation implemented on a national treatment basis in accordance with Article III:4 requiring complete disclosure of ingredients, coupled with a ban on unhealthy substances, would be an alternative consistent with the General Agreement.<sup>168</sup>

### D. Advertising, Promotion, and Sponsorship

The World Bank reports that comprehensive bans on advertising of tobacco products could reduce tobacco consumption in high-income countries by more than six percent.<sup>169</sup> Article G:2 of the Draft FCTC lays out a plan to commit signatories to phase out commercial marketing of tobacco products. In terms of trade law, such bans are also relatively uncontroversial, and so long as they meet tests for nondiscrimination, an Article XX(b) defense may not even be necessary. Again, in the *Thailand Cigarettes* case, the panel laid out a roadmap for a defense of restrictions on tobacco advertising:

A ban on the advertisement of cigarettes of both domestic and foreign origin would normally meet the requirements of Article III:4. It might be argued that such a general ban on all cigarette advertising would create unequal competitive opportunities between the existing Thai supplier of cigarettes and new, foreign suppliers and was therefore contrary to Article III:4. Even if this argument were accepted, such an inconsistency would have to be regarded as un-

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166. Draft FCTC, *supra* note 6, at 4.

167. TBT, *supra* note 18, art. G:1(d).

168. GATT Thailand Cigarettes Report, *supra* note 53, at 224.

169. CURBING THE EPIDEMIC, *supra* note 1, at 50.

avoidable and therefore necessary within the meaning of Article XX(b) because additional advertising rights would risk stimulating demand for cigarettes.<sup>170</sup>

Notwithstanding the fact that international trade law allows restrictions on advertising, principles of free expression, which are constitutionally protected in many countries, may make it difficult to enact advertising bans. For example, the Canadian Supreme Court overturned a general ban on tobacco advertising in 1995, as did the European Court of Justice in October 2000.<sup>171</sup> In the United States, the Supreme Court recently upheld certain restrictions on sales of tobacco enacted in the state of Massachusetts, but found that the Massachusetts ban on outdoor tobacco advertising, such as billboards, was a violation of First Amendment freedom of expression rights.<sup>172</sup>

### E. Smuggling

Article I of the Draft FCTC regarding “[m]easures related to the supply of tobacco” focuses on the illicit trade of tobacco products, including smuggling and counterfeiting.<sup>173</sup> Section 2 of the article provides additional guidance to help avoid conflicts with trade law, declaring, “[t]he Parties agree that measures to this end shall be transparent, non-discriminatory and implemented in accordance with their international obligations.”<sup>174</sup> Section 3 imposes obligations that are uncharacteristically mandatory for the Draft FCTC, declaring that parties “shall adopt” measures to ensure that tobacco products are packaged with relevant information that would allow for tracing the path of smuggled cigarettes.<sup>175</sup> Section 5 imposes additional mandatory obligations on signatories to increase vigilance on cross-border tobacco trade and to enact or to strengthen criminal penalties for trafficking in smuggled tobacco products.<sup>176</sup>

Of the Draft FCTC obligations discussed in this section, the obligations regarding illicit trade in tobacco are the least controversial

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170. GATT Thailand Cigarettes Report, *supra* note 53, at 224 (citations omitted).

171. *RJR-Macdonald Inc. v. Canada*, [1995] 3 S.C.R. 199 (Can.); *Federal Republic of Germany v. European Parliament and Council of the European Union*, 2000 ECJ CELEX LEXIS 1846 (2000).

172. *Lorillard Tobacco Company v. Reilly*, 121 S.Ct. 2404 (2001).

173. Article I:1 explains that “[t]he Parties recognize that the elimination of all forms of illicit trade in tobacco products, including smuggling and counterfeiting, is an essential component of tobacco control.” Draft FCTC, *supra* note 6, at 6.

174. *Id.*

175. *Id.*

176. *Id.*

because trade law does not require that states abandon regulation of imports entirely, and principles of free trade do not protect otherwise illegal activity. Nevertheless, some of the anti-smuggling measures would impose packaging requirements, and the TBT agreement might be pertinent in a dispute over such requirements. Therefore, standard issues of discrimination, reasonableness, and necessity could be subject to analysis.

## VII. CONCLUSION

In spite of popular skepticism about the current free trade regime enforced by the WTO, there is ample evidence that the WTO agreements do not preclude the WHO's development of the Framework Convention for Tobacco Control or the follow-up protocols. In fact, a review of trade law principles shows that the WTO Dispute Settlement Body likely would uphold internationally developed measures on tobacco control. The language used in the GATT panel and WTO Dispute Settlement Body reports should encourage promoters of tobacco control. Recall, for example, the declaration of the panel in the *Thailand Cigarettes* case that "smoking constitute[s] a serious risk to human health and that consequently, measures designed to reduce the consumption . . . [fall] within the scope of Article XX(b)."<sup>177</sup> Given the free trade regime's demonstrated enthusiasm for the principles of international cooperation and recently demonstrated respect for good faith trade-restricting measures aimed at protecting human health, it seems certain that WTO-compliant tobacco control measures can be devised. However, that is not to say that the WTO will not vigorously defend free trade principles. Review of trade cases shows that the WTO Dispute Settlement Body will not hesitate to strike down measures designed to protect the environment or health if it finds they do not comply with trade rules. With this in mind, promoters of the tobacco control regime must take care to develop the FCTC, and especially the protocols, in a way that avoids trade disputes. Ultimately, it will be the individual states that are both party to the tobacco control regime and to the WTO that will actually run the risk of facing adverse Dispute Settlement Body judgments. However, the WHO is the architect that bears the responsibility for designing effective, WTO-compliant, tobacco control measures. The task will require care, but nevertheless, there are good

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177. GATT Thailand Cigarettes Report, *supra* note 53, at 222–23.

prospects for the development of a tobacco control regime that works in harmony with free trade rules.

Joseph N. Eckhardt