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# Health Versus Trade: The Future of the WHO's Framework Convention on Tobacco Control

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# Health Versus Trade: The Future of the WHO's Framework Convention on Tobacco Control

ABSTRACT

*On October 16, 2000, the World Health Organization (WHO) began the first session of negotiations of its first international health treaty, the Framework Convention on Tobacco Control (FCTC). Scheduled for adoption in May 2003, the FCTC is a comprehensive multilateral treaty that will cover everything from tobacco smuggling to tobacco advertising and the extent of the liability of tobacco companies.*

*This Note argues that even-handed domestic measures implementing the FCTC will be protected from international, trade-based complaints because the World Trade Organization's dispute settlement system has given sufficient and appropriate content to the health exception to the normal trade rules under the General Agreement on Tariffs and Trade. Therefore, this Note suggests that, on balance, a new WHO judicial body would not substantially promote the goals of the FCTC, although treaties that are more technical than the FCTC may suggest a different answer.*

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## I. INTRODUCTION

Young women in Benson & Hedges T-shirts gave away free cigarettes to the crowd at a beach volleyball tournament in The Gambia, one of Africa's poorest countries.[1] The organizer of this youth event, held during the school holidays, was British American Tobacco (BAT), the producer of the two main cigarette brands in The Gambia: Piccadilly and Benson & Hedges.[2] As the cigarette representatives helped youngsters to light up, a British Broadcasting Corporation (BBC) news investigation observed that some of the consumers of the free cigarettes appeared to be underage.[3] Although samples were only supposed to be given to people over the age of 18, the young women did not check the age of the recipients.[4] When confronted, one woman responded, "We only give free cigarettes to big boys."[5]

Until recently, The Gambia had been one of the few countries to ban cigarette advertising.[6] After the ban was lifted about five years ago following a military coup, cigarette sales in The Gambia doubled almost overnight.[7] Now, in a nation where youth soccer teams cannot even afford soccer balls, multinational tobacco corporations market their products by handing out free cigarettes at football tournaments, music concerts, and parties.[8]

In response to the BBC news investigation, BAT stated that it

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1. *UK Tobacco Firm Targets African Youth*, BBC NEWS ONLINE, Sept. 20, 2000, *at* http://news6.thdo.bbc.co.uk/hi/english/health/newsid_933000/933430.stm.
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id. See also* World Health Organization (WHO) Tobacco Free Initiative, *Tobacco Control Country Profiles—Appendix B: Legislation, at* http://tobacco.who.int/page.cfm?sid=57 (listing domestic legislation regarding tobacco).
7. *UK Tobacco Firm Targets African Youth, supra* note 1.
8. *Id.*

would "re-brief" its Gambian programs to make sure that children under 18 did not receive free cigarettes.[9] Dr. James Mwanzia, the World Health Organization's (WHO) representative in The Gambia, commented, "It is the height of hypocrisy, because how do you sponsor a health event like a volleyball match and then give out cigarettes?"[10] Clive Bates, director of Action on Smoking and Health, remarked, "As soon as they think no one is looking, they are going after the teenage market."[11]

The Gambian experience is only one case of the global tobacco epidemic promoted by the tobacco industry. The seriousness of the tobacco epidemic cannot be doubted. In Africa, a recent WHO survey found that one in five children under the age of 15 now smoke.[12] Worldwide, smoking kills one in ten adults every year, making it the leading cause of preventable death.[13] Country-specific analyses of the tobacco industry by the World Bank in collaboration with the WHO find that tobacco addiction imposes high opportunity costs on many poor households, who spend significant proportions of their income on tobacco instead of on nutrition and other family needs.[14]

By 2030, the World Bank predicts that smoking will kill about one in six adults globally per year.[15] Most of the projected deaths will occur in low and middle-income countries.[16] As markets in industrialized countries decline, and as tobacco companies target developing countries and the world youth, the disease burden caused by tobacco usage increases at an alarming rate.[17] The WHO hopes to curb these threats to human health through its first treaty, the Framework Convention on Tobacco Control (FCTC or Convention).[18]

This Note argues that although certain discriminatory domestic measures have been struck down in the past under the dispute

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9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. WHO, *Economics of Tobacco Control*, at 2, WHO Doc. A/FCTC/WG1/2 (Aug. 20, 1999), *at* http://www.who.int.gb.fctc.wgl/PDFwgl/elt2.pdf (summarizing WORLD BANK, CURBING THE EPIDEMIC (1999)) [hereinafter *Economics of Tobacco Control*].
14. Intergovernmental Negotiating Body of the WHO Framework Convention on Tobacco Control, *Activities Since the Previous Session*, at 1, WHO Doc. A/FCTC/INB5/4 (Sept. 12, 2002), *at* http://www.who.int/gb/fctc/PDF/ inb5/einb54.pdf.
15. *Id.*
16. *Economics of Tobacco Control*, *supra* note 13, at 2.
17. WHO, *Opening Statement by the Director-General*, at 1-2, WHO Doc. A/FCTC/INB1/DIV/3 (Oct. 16, 2000), *available at* http://www.who.int/gb/fctc/inb1/ PDFinbl/e1inbd3.pdf; *Burden of Disease*, *at* http://tobacco.who.int/page.cfm?sid=47 (last visited Oct. 15, 2002).
18. WHO Tobacco Free Initiative, *The Framework Convention on Tobacco Control: A Primer*, WHO Doc. WHO/NCD/TFI/99.8 Rev. 3, *at* http://tobacco.who.int/ repository/stp41/Primeren.pdf [hereinafter *Primer*].

settlement system of the World Trade Organization (WTO), even-handed domestic measures implementing the FCTC should withstand scrutiny because WTO case law has given sufficient and appropriate content to the exception for health under Article XX of the General Agreement on Tariffs and Trade (GATT). This Note also argues that a new WHO judicial body would not be desirable at this point, although future, more technical treaties would present a stronger case for that type of organ.

Part II frames the debate surrounding global tobacco control. Part III introduces the WHO and its lawmaking prior to the FCTC. Part IV outlines the FCTC's substantive and procedural features and highlights sections of the FCTC that could lessen its effectiveness. Part V provides background about the international judicial system and the WTO's dispute settlement system. Part VI examines the WTO's trade agreements and decisions as they apply to the FCTC. Part VII argues that, on balance, a new WHO judicial body is not yet necessary to promote the goals of the WHO with respect to the FCTC.

Because the FCTC is scheduled for adoption in May 2003,[19] this Note assumes that a positive course of events will occur. For example, the U.S. adoption of the FCTC via the president's executive treaty power with the requisite concurrence of two-thirds of the Senate is assumed.[20] Another assumption is that domestic legislation in Member States accurately implements the terms of the treaty. This Note looks down the legal road to evaluate the possible conflicts with the FCTC and ways to promote the WHO's health objectives in the event that international disputes and judicial law-making follow the adoption of the FCTC.

## II. WHY SHOULD WE HAVE GLOBAL TOBACCO CONTROL?

Just as treating malaria cannot be done without understanding the behavior of its vector, the mosquito, an understanding of the tobacco business and the evolution of its business defenses is necessary to the cure for the tobacco epidemic, according to Dr. Gro Harlem Brundtland, Director-General of the WHO.[21] In the early

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19. WHO, *Secretariat Update: Provisional Timetable for the Negotiation Process and Projected Costs*, WHO Doc. A/FCTC/INB1/3 (Sept. 5, 2000), *available at* http://www.who.int/gb/fctc/inb1/PDFinb1/e1inb3.pdf [hereinafter *Secretariat Update: Provisional Timetable*]; Framework Convention Alliance, *Timetable*, *at* http://www.fctc.org/timetable.shtml (last visited Nov. 14, 2002).

20. U.S. CONST. art. 2, § 2, cl. 2. "[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur." *Id.*

21. Director-General's Office, *at* http://www.who.int/director-general (stating that Dr. Gro Harlem Brundtland took office on July 21, 1998, and her term of office is

stages of the debate about tobacco and tobacco control, the industry denied that tobacco was dangerous.[22] However, as researchers described the increased risks of heart disease and cancer with increasing certainty, the tobacco industry began to make economic arguments against tobacco control and to use secret financial and political strategies.[23]

Formerly confidential tobacco company strategy documents that are now publicly available demonstrate the scale and intensity of the industry's global efforts to protect the tobacco business.[24] They prove that the tobacco industry has systematically used secretive and unprincipled means to discredit legitimate organizations like the WHO that push for tobacco control.[25] Statements of tobacco objectives contain specific references to the WHO: "Attack W.H.O.," "[Try] to stop the development towards a Third World commitment against tobacco," "Discredit key individuals," "[Contain WHO's] funding from private sources," "Work with journalists to question WHO priorities, budget, role in social engineering, etc.," and "[Establish] ITGA [International Tobacco Growers Association] [as a] front for our third world lobby activities at WHO."[26] These documents state that "WHO's impact and influence is indisputable" and that the industry must contain, neutralize and reorient the WHO to protect the tobacco business.[27]

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five years); Dr. Gro Harlem Brundtland, *Response of the Director General to the Report of the Committee of Experts on Tobacco Industry Documents*, at 1, WHO Doc. WHO/DG/SP (Oct. 6, 2000), *at* http://tobacco.who.int/repository/stp58/inquiryDGres1.pdf; COMMITTEE OF EXPERTS ON TOBACCO INDUSTRY DOCUMENTS, TOBACCO INDUSTRY STRATEGIES TO UNDERMINE TOBACCO CONTROL ACTIVITIES AT THE WORLD HEALTH ORGANIZATION (July 2000), *at* http://tobacco.who.int/repository/stp58/who_inquiry.pdf [hereinafter TOBACCO INDUSTRY STRATEGIES].

22. Director-General's Office, *supra* note 21; Brundtland, *supra* note 21, at 1; TOBACCO INDUSTRY STRATEGIES, *supra* note 21.

23. *Burden of Disease*, *supra* note 15. *See also infra* notes 22-26.

24. TOBACCO INDUSTRY STRATEGIES, *supra* note 21, at 1-2. The available documents come from Philip Morris Companies, Inc. (Philip Morris), R.J. Reynolds Tobacco Company (RJR), Brown & Williamson Tobacco Company (B&W), American Tobacco Company (ATC), Lorillard Tobacco Company (Lorillard), the Tobacco Institute (TI), the Council for Tobacco Research (CTR) and the British American Tobacco Company (BAT). *Id.* at 2.

25. *Id. See also* Marc Kaufman, *Negotiator in Global Tobacco Talks Quits, Official Said to Chafe at Softer U.S. Stands*, WASH. POST, Aug. 2, 2001, at A1 (explaining how the lead official of the U.S. delegation, Thomas E. Novotny, resigned after the second round of negotiations "rather than argue the case of the new [Bush] administration on tobacco issues" that included proposals of amendments that would make certain mandatory steps voluntary, disfavor health warnings in the native language, and soften restrictions on advertising aimed at children and smoking in public places).

26. TOBACCO INDUSTRY STRATEGIES, *supra* note 21, at 1.

27. *Id.*

Based on economics, the tobacco industry has argued that lower sales of tobacco cause the loss of thousands of jobs, a decrease in government revenues, and an increase in illegal activity—especially smuggling.[28] However, the World Bank noted that government intervention through tobacco control is justified due to the unique characteristics of tobacco consumers.[29] Unlike the average consumer, many smokers are young and addicted to tobacco, and therefore lack the normal capacity to make rational, self-interested decisions.[30] Many smokers also lack complete and accurate information about the risks of tobacco consumption.[31]

The World Bank concluded that tobacco control is very desirable because even small reductions in a disease burden of such large size bring highly significant health gains.[32] The World Bank deemed the tobacco industry's policy arguments to be unpersuasive, given that new jobs replace old jobs, tobacco taxes empirically increase government revenues, and tobacco taxes still reduce consumption and increase revenues in places where smuggling is high.[33]

The World Bank, therefore, recommended a "multi-pronged" approach to tobacco control.[34] It advised governments to combine taxes with non-price measures (such as advertising bans), information measures (such as mass media counter-advertising, warning labels and research dissemination), and restrictions on smoking in work and public places.[35] Other recommendations by the World Bank included widening access to nicotine cessation therapies, and making sure that tobacco control was prominently considered in the policies and programs of international agencies, such as the agencies of the United Nations.[36] The World Bank specifically requested that international agencies support the WHO's FCTC.[37]

## III. THE WHO AND ITS LEGAL WORK

In the half-century after its establishment in 1948, the WHO worked on the control of certain infectious diseases, the training of medical assistants, the implementation of an "essential drugs" policy, the initiation of primary health care, and the control and treatment of

28. *Economics of Tobacco Control*, *supra* note 13, at 2.
29. *Id.* at 3-4.
30. *Id.*
31. *Id.*
32. *Id.* at 10.
33. *Id.* at 8-9.
34. *Id.* at 10.
35. *Id.* at 6-7, 10.
36. *Id.* at 10.
37. *Id.*

the HIV/AIDS pandemic.[38] The WHO, however, used its constitutional powers to propose legally binding international law "sparingly."[39] Before the FCTC, the WHO's only notable contributions to binding international law were the International Health Regulations (IHR), concerning the control of three contagious diseases: cholera, plague, and yellow fever.[40]

The WHO has an amazingly expansive health mandate as a specialized agency of the United Nations.[41] The WHO Constitution defines its "wide international responsibilities" in the field of health generally as the "attainment by all peoples of the highest possible level of health."[42] Health is very broadly defined as "a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity."[43] "All necessary action to attain the

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38. H. Francis Shattuck, Jr. et al., *Section Recommendation and Report of the American Bar Association: III. World Health Organization*, 30 INT'L LAW. 686, 688-89 (1996).

39. Shattuck, *supra* note 38, at 690. *See also* David P. Fidler, *The Future of the World Health Organization: What Role for International Law?*, 31 VAND. J. TRANSNAT'L L. 1079, 1089-93 (1998). Article 19 of the WHO Constitution states:

> The Health Assembly shall have authority to adopt conventions or agreements with respect to any matter within the competence of the Organization. A two-thirds vote of the Health Assembly shall be required for the adoption of such conventions or agreements, which shall come into force for each Member when accepted by it in accordance with its constitutional processes.

WHO CONST. art. 19.

40. *See* Fidler, *supra* note 39, at 1089-90. The International Health Regulations were initiated in 1951, were revised twice, and are currently under revision again. Michelle Forrest, *Using the Power of the World Health Organization: The International Health Regulations and the Future of International Health Law*, 33 COLUM. J.L. & SOC. PROBS. 154, 162 (2000).

41. *See* U.N. CHARTER art. 57, ¶ 1; WHO CONST. pmbl.

42. WHO CONST. art. 1.

43. *See* WHO CONST. pmbl. The Preamble also states:

> The States Parties to this Constitution declare, in conformity with the Charter of the United Nations, that the following principles are basic to the happiness, harmonious relations and security of all peoples:
>
> Health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity.
>
> The enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition.
>
> The health of all peoples is fundamental to the attainment of peace and security and is dependent upon the fullest co-operation of individuals and States.
>
> The achievement of any State in the promotion and protection of health is of value to all.
>
> Unequal development in different countries in the promotion of health and control of disease, especially communicable disease, is a common danger.

objective of the Organization" is within the functions of the WHO.[44]

However, as almost all of the enumerated functions in the WHO Constitution are administrative, technical, or developmental in nature, it may not be surprising that the WHO has been more active in these methods of promoting health rather than in the making of international health law.[45] The exception to this rule is Article 2(k), an enumerated function stating that the WHO may "propose conventions, agreements and regulations, and make recommendations with respect to international health matters and to perform such duties as may be assigned thereby to the Organization and are consistent with its objective."[46]

The WHO began to address the issue of tobacco control by issuing resolutions—18 since 1986.[47] However, as non-binding international law, the resolutions had little effect.[48] In 1996, the World Health Assembly (WHA), the WHO's governing body, passed Resolution 49.17 to begin work on the FCTC.[49]

Reasons for the WHO's restraint from exercising its treaty power may be numerous. The WHO could have practiced self-restraint to avoid issues of non-compliance and unenforceability,[50] to maintain a

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> Healthy development of the child is of basic importance; the ability to live harmoniously in a changing total environment is essential to such development.
>
> The extension to all peoples of the benefits of medical, psychological and related knowledge is essential to the fullest attainment of health.
>
> Informed opinion and active co-operation on the part of the public are of the utmost importance in the improvement of the health of the people.
>
> Governments have a responsibility for the health of their peoples which can be fulfilled only by the provision of adequate health and social measures.

*Id.*

44. WHO CONST. art. 2(v).

45. WHO CONST. art. 2(a)-(v).

46. WHO CONST. art. 2(k).

47. Framework Convention Alliance, *Action by Governments* (June 2001), *at* http://www.fctc.org/actionGOVT.shtml; WHO Tobacco Free Initiative, *WHO Resolutions About Tobacco Control, at* http://www.who.int/toh/Library/whoresol.htm (last visited Oct. 15, 2002).

48. *Primer*, *supra* note 18, at 4-5 (stating that WHA resolutions have met with varying degrees of success and that the piecemeal implementation by states is too informal to be of any major consequence).

49. WHO Tobacco Free Initiative, *International Framework Convention for Tobacco Control*, WHA Res. 49.17 (May 25, 1996), *at* http://tobacco.who.int/page.cfm?tld=37 (last visited Nov. 14, 2002). The two other organs of the WHO are the Executive Board, the executive organ of the WHA, and the Secretariat, which consists of the Director-General and his staff. WHO CONST. arts. 9-37.

50. Fidler, *supra* note 39, at 1090-91. The IHR's global surveillance system broke down due to Member States who violated agreements both to report required information about disease outbreaks and not to excessively restrict the traffic of goods and people from Member States suffering from outbreaks. *Id.* Neither the WHO's

conscientiously "apolitical character,"[51] to move toward the development of national public health systems and away from specific issues,[52] or because of mistaken neglect.[53] The FCTC is now the WHO's first international health treaty in its half-century history and the first exercise of its power to propose conventions under Article 19 of the WHO Constitution.[54]

The WHO's more active engagement in politics may have been inevitable at some point, because health concerns are political issues. For example, environmental problems such as marine pollution, ozone depletion, desertification, acid rain, destruction of biodiversity, and trade in hazardous wastes are health issues and political issues.[55] Human rights violations such as governmental denial of necessary medical assistance to individuals, subjection of people to compulsory health measures or torture, and other physical abuses are similar examples.[56]

Political conflicts occur especially when health concerns interfere with trade. The trade in tobacco today has been compared to the opium trade with China in the early 1900s and the early trade of alcohol to Africa.[57] In the future, trade conflicts with health are likely to arise with issues such as the standards for the safety, purity, and potency of biological and pharmaceutical products; the regulation of the trade of blood and human organs; the trade of health information, services, and products over the Internet; and the protection of the intellectual property of pharmaceutical companies.[58]

Globalization and the growth of international law may also have made the timing for the WHO's action ripe. As the scope of international law broadens beyond the traditional international law issues of diplomacy, trade, and war to include human rights and

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Constitution nor the IHR provide the WHO with enforcement powers when rules are violated. *Id.*

51. Shattuck, *supra* note 38, at 692.

52. *Id.* at 690.

53. *See* Fidler, *supra* note 39, at 1099-1103.

54. *See Primer*, *supra* note 18, at 3. *See also* WHO CONST. art. 19. Article 19 reads:

> The Health Assembly shall have authority to adopt conventions or agreements with respect to any matter within the competence of the Organization. A two-thirds vote of the Health Assembly shall be required for the adoption of such conventions or agreements, which shall come into force for each Member when accepted by it in accordance with its constitutional processes.

WHO CONST. art. 19.

55. Fidler, *supra* note 39, at 1097-98.

56. *See id.* at 1122-23.

57. Matt Parker, *Blowing Smoke? A Reappraisal of U.S. Tobacco Policy in China*, 21 U. PA. J. INT'L ECON. L. 211, 212 (2000).

58. Fidler, *supra* note 39, at 1109-10.

environmental protection agreements, international consensus regarding health law becomes more and more probable.[59] This growth in international law may have contributed to the WHO's decision to use international law to achieve its objectives by creating the FCTC.

Politically-neutral means—such as providing technical assistance, creating standard classifications, coordinating international efforts, and providing emergency and humanitarian relief used in other circumstances—can only go so far.[60] The tobacco industry has not hesitated to use legal and political means—and even illegal means—to promote the tobacco business.[61] If the WHO does not actively use legal and political means, then the WHO will be reacting to the legislation of tobacco companies and its apolitical stance will function as a self-imposed straightjacket on its own efforts to promote health.[62] Therefore, as the WHO moves from neutrality toward complaint and law-making, the WHO should also think about ways to defend the FCTC from attack through international adjudication.

## IV. THE SUBSTANCE AND PROCEDURE OF THE FCTC

The FCTC is a framework convention, which is a different name for a treaty.[63] Unlike a resolution, for example, a treaty and a convention are legally binding.[64] The FCTC was sketched by the Working Group of the FCTC and then negotiated by the

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59. *See id.* at 1094, 1118.

60. Shattuck, *supra* note 38, at 689-92.

61. TOBACCO INDUSTRY STRATEGIES, *supra* note 21; *UK Tobacco Firm Targets African Youth*, *supra* note 1.

62. TOBACCO INDUSTRY STRATEGIES, *supra* note 21, at 7. For example, one tobacco industry consultant proposed that the industry try to "mitigate the impact" of the WHO's policy against tobacco in the Third World "by pushing them [sic] into a more objective and neutral position." *Id.*

63. *Primer*, *supra* note 18, at 4. "A treaty is an international legal agreement concluded between States in written form, and governed by international law." *Id.* A framework convention is a type of treaty that usually involves more general obligations. *Id.* A protocol usually "supplements, clarifies, amends or qualifies an existing international agreement" (typically a framework convention). *Id.* "A resolution is an expression of common interest of numerous states in specific areas of international cooperation." *Id.*

64. *Id.* Regulations, such as the IHR, are legally binding as well. However, the WHO's regulation power under Article 21 is limited to five specific areas, whereas the WHO's convention power under Article 19 contains no similar restriction. *See* WHO CONST. arts. 19, 21. Article 21 gives the WHO regulation authority concerning sanitary and quarantine requirements, nomenclatures, diagnostic standards, standards with respect to safety, purity, and potency, and product advertising and labeling. WHO CONST. art. 21. For the text of Article 19, see note 54.

Intergovernmental Negotiating Body (INB) of the FCTC in four sessions.[65] A fifth round was held October 14, 2002 through October 25, 2002.[66] The FCTC and its possible related protocols are scheduled for adoption in May 2003.[67]

### A. *The Substance of the FCTC*

The FCTC remains under negotiation.[68] Its substantive

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65. *See Secretariat Update: Provisional Timetable*, *supra* note 19. The first session of the INB was held October 16, 2000 through October 21, 2000; the second session was held April 30, 2001 through May 5, 2001; the third session was held November 22, 2001 through November 28, 2001. *Timetable*, *supra* note 19. An additional fourth session of negotiations met from March 18-23, 2002. Intergovernmental Negotiating Body, *List of Documents Available*, *at* http://www.who.int/gb/fctc/E/E_inb4.htm (last visited Oct. 6, 2002). The World Health Assembly (WHA), an organ of the WHO, established a Working Group and an Intergovernmental Negotiating Body (INB) for the FCTC by resolution in WHA 52.18. WHO CONST. art. 9(a); WHO, *Method of Work*, at 1, WHO Doc. A/FCTC/INB1/4 (Sept. 5, 2000), *at* http://www.who.int/gb/fctc/inb1/PDFinb1/e1inb4.pdf. The WHA gave the INB further direction in WHA 53.16. *Method of Work*, *supra*. The Working Group's meetings included "representatives from 153 Member States (representing 95% of the world's population) . . . as well as observers from the Holy See, Palestine, organizations of the United Nations system" and non-governmental organizations. WHO Tobacco Free Initiative, *Framework Convention on Tobacco Control*, *at* http://tobacco.who.int/page.cfm?pid=40 (last visited Oct. 15, 2002). "The Intergovernmental Negotiating Body is open to participation by all WHO Member States, regional economic integration organizations, and observers." WHO Tobacco Free Initiative, *Intergovernmental Negotiating Body*, *at* http://tobacco.who.int/page.cfm?sid=36 (last visited Oct. 15, 2002). The WHO has 191 Member States and 2 Associate Members (Puerto Rico and Tokelau) as of May 1, 1998 (46 African, 36 from the Americas, 22 Eastern Mediterranean, 51 European, 10 South East Asian, and 28 Western Pacific States). WHO, Member States of the World Health Organization (as at 21 October 2002), at http://www3.who.int/whosis/member_states/member_states.cfm?path=whosis,member_states&language=english (last visited Nov. 13, 2002).

66. *Secretariat Update: Provisional Timetable*, *supra* note 19; *Timetable*, *supra* note 19.

67. *Secretariat Update: Provisional Timetable*, *supra* note 19.

68. WHO, *New Chair's Text of a Framework Convention on Tobacco* Control, WHO Doc. A/FCTC/INB5/2 (June 25, 2002), *at* http://www.who.int/go/fctc/E/E_inb5.htm [hereinafter *New Chair's Text, INB5*]. The following is an outline of the current working text:

Preamble

PART I: INTRODUCTION

Art. 1: Use of terms

Art. 2: Relationship between this Convention and other agreements and legal instruments

PART II: OBJECTIVE, GUIDING PRINCIPLES AND GENERAL OBLIGATIONS

Art. 3: Objective

Art. 4: Guiding principles

Art. 5: General obligations

PART III: MEASURES RELATING TO THE REDUCTION OF DEMAND FOR TOBACCO

Art. 6: Price and tax measures to reduce the demand for tobacco

Art. 7: Non-price measures to reduce the demand for tobacco

Art. 8: Protection from passive smoking

Art. 9: Regulation of contents of tobacco products

Art. 10: Regulation of tobacco product disclosures

Art. 11: Packaging and labeling of tobacco products

Art. 12: Education, communication, training and public awareness

Art. 13: Advertising, promotion and sponsorship of tobacco products

Art. 14: Demand reduction measures concerning tobacco dependence and cessation

PART IV: MEASURES RELATING TO THE REDUCTION OF THE SUPPLY OF TOBACCO

Art. 15: Illicit trade in tobacco products

Art. 16: Sales to minors

Art. 17: Elimination of tobacco subsidies and provision of government support for other economically viable activities

PART V: PROTECTION OF THE ENVIRONMENT

Art. 18: Protection of the environment

PART VI: LIABILITY AND COMPENSATION

Art. 19: Liability and compensation

PART VII: SCIENTIFIC AND TECHNICAL COOPERATION AND COMMUNICATION OF INFORMATION

Art. 20: Research, surveillance, monitoring and exchange of information

Art. 21: Reporting and exchange of information

Art. 22: Cooperation in the scientific, technical and legal fields and provision of related expertise

PART VIII: INSTITUTIONAL ARRANGEMENTS AND FINANCIAL RESOURCES

Art. 23: Conference of the Parties

Art. 24: Secretariat

Art. 25: Relations between the Conference of the Parties and competent international and regional intergovernmental organizations

Art. 26: Financial resources

PART IX: SETTLEMENT OF DISPUTES

Art. 27: Settlement of disputes

PART X: DEVELOPMENT OF THE CONVENTION

Art. 28: Amendments to this Convention

provisions include tobacco price and tax measures, the regulation of content and packaging, and disclosures to reduce the demand for tobacco, as well as measures regarding subsidies, smuggling, and sales to minors to reduce the supply of tobacco.[69] Related measures cover advertising, promotion, sponsorships, licensing, and information exchange.[70] However, as the FCTC is still under negotiation, many terms of the FCTC remain undecided.[71] Less controversial sections dealing with customary procedures for the development of the Convention and its final clauses have settled.[72] Parties still have yet to reach consensus on key issues such as the non-price measures to reduce the demand for tobacco—especially packaging and labeling—and measures providing for compensation and liability—particularly the liability of tobacco companies.[73] Countries such as Japan want the complete deletion of some of these provisions.[74]

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Art. 29: Adoption and amendment of annexes to this Convention

PART XI: FINAL PROVISIONS

Art. 30: Reservations

Art. 31: Withdrawal

Art. 32: Right to vote

Art. 33: Protocols

Art. 34: Signature

Art. 35: Ratification, acceptance, approval, formal confirmation or accession

Art. 36: Entry into force

Art. 37: Depositary

Art. 38: Authentic texts

*Id.*

69. *Id.*

70. WHO, *Division of Responsibilities Among Working* Groups, WHO Doc. A/FCTC/INB2/DIV/6 (Apr. 30, 2001), *at* http://www.who.int/gb/fctc/inb2/PDFinb2/einb2d6.pdf.

71. WHO, *Drafting and Negotiation of the WHO Framework Convention on Tobacco Control: Textual Proposals and Definitions Submitted for the New Chair's Text by 15 May 2002*, WHO Doc. A/FCTC/INB5/3 (Aug. 5, 2002), *at* http://www.who.int/gb/fctc/ PDF/inb5/einb53.pdf [hereinafter *Drafting and Negotiation of the WHO FCTC, INB5*]. For previous drafts, *see* WHO, *Co-Chairs' Working Papers: Final Revisions*, Working Group 2, at 1, WHO Doc. A/FCTC/INB4/2(a) (Jan. 24, 2002), *at* http://www.who.int/gb/fctc/inb4/PDFinb4/einb42a.pdf [hereinafter *WG2 Co-Chairs' Working Papers: Final Revisions*]; WHO, *Co-Chairs' Working Papers: Final Revisions*, Working Group 3, at 1, WHO Doc. A/FCTC/INB4/2(b) (Jan. 24, 2002), *at* http://www.who.int/gb/fctc/inb4/PDFinb4/einb42b.pdf.

72. *Drafting and Negotiation of the WHO FCTC, INB5*, *supra* note 71, at 17-18.

73. *Id.* at 4-10, 12-15.

74. *Id.* at 2, 13.

Overall, as it might be expected, the substance of the FCTC has grown less demanding as the drafts have been negotiated.[75] Early drafts generally provided mandatory language, such as "shall", in their provisions.[76] Subsequent drafts began adding qualifying language, such as "shall endeavor to," "to the extent possible," "as appropriate," and "in accordance with its capabilities and national law" to provisions, particularly with respect to contested areas such as packaging and labeling.[77]

Significantly, the definition of the FCTC's rules with relation to international trade, one of the FCTC's guiding principles that had been debated in previous sessions, appears to be near agreement.[78] In earlier negotiations, proposed principles relating the FCTC's measures to international trade rules ranged from clearly prioritizing the tobacco control measures over other international agreements, requiring that health measures be in accord with "existing international obligations," or requiring that measures not be "arbitrary or unjustified" means of trade discrimination.[79] The FCTC, as it now stands, seems to be in favor of requiring that tobacco control measures will not result in "arbitrary or unjustified discrimination" in international trade.[80] This refers to familiar language in international trade law, namely the language found in the chapeau of the general exceptions to GATT under Article XX.[81] Part VI of this Note addresses the relationship of GATT's exceptions to the FCTC.

B. *The Procedures of the FCTC*

The present draft of the FCTC has clarified procedural questions from earlier drafts. For example, the FCTC presently provides that parties cannot make reservations to the FCTC, which had not been addressed in earlier drafts.[82] A reservation is a unilateral statement

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75. WHO, *Provisional Texts of Proposed Draft Elements for a WHO Framework Convention on Tobacco Control*, WHO Doc. A/FCTC/WG2/3 (Feb. 29, 2000), *at* http://www.who.int/gb/fctc/E/E_wg2.htm; *New Chair's Text, INB5*, *supra* note 68.

76. *See* sources cited *supra* note 75.

77. *Id.*

78. *WG2 Co-Chairs' Working Papers: Final Revisions*, *supra* note 71, at 3-7; *Drafting and Negotiation of the WHO FCTC, INB5*, *supra* note 71, at 2-3.

79. *WG2 Co-Chairs' Working Papers Final Revisions*, *supra* note 71, at 3-7.

80. *Drafting and Negotiation of the WHO FCTC, INB5*, *supra* note 71, at 2-3.

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

82. *New Chair's Text, INB5*, *supra* note 68, at 20. For previous versions of FCTC procedures, see WHO, *WHO Framework Convention on Tobacco Control: Textual Proposals with Respect to Article J (Compensation and Liability), Article S (Development of the Convention), and Article T (Final clauses)*, at 8-10, WHO Doc.

by a state that allows it to exclude or modify certain provisions to the treaty as applied to that state while accepting a treaty.[83]

Generally, reservations are acceptable as long as they are not incompatible with the object and purpose of the treaty.[84] In the majority of treaties, reservations are generally minor.[85] When reservations are more substantive, they may govern important issues such as dispute settlement.[86] In areas such as human rights, for example, reservations have been highly substantive and, therefore, reservations could have been substantive in the FCTC.[87]

The present FCTC also provides a stricter "out" for states by requiring them to withdraw from the FCTC after written notice and three years, instead of one year as in an earlier draft.[88] When a party withdraws from a treaty, the treaty is no longer binding on that party.[89]

Article 27 covers the settlement of disputes over the FCTC.[90] Article 27 retains the emphasis on negotiation and mediation of its predecessor, Article R, but adds an interesting feature.[91] Article R suggested options such as mediation by a third party, compulsory arbitration in accordance with procedures to be adopted by the FCTC's Conference of the Parties, or submission to a conciliation committee.[92] A later version of Article R suggested a provision stating that "the FCTC shall take priority" in the case of conflict between the FCTC and the application of another international agreement, such as a trade agreement.[93] Instead, Article 27 provides: "This Article does not preclude the application of the dispute

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A/FCTC/INB3/5 (Oct. 19, 2001), *at* http://www.who.int/gb/fctc/inb3/PDFinb3/e1inb35.pdf [hereinafter Textual Proposals *with Respect to Articles J, S, and T*].

83. WHO, *Elements of a WHO Framework Convention on Tobacco Control*, at 31, WHO Doc. A/FCTC/WG1/6 (Sept. 8, 1999), *at* http://www.who.int/gb/fctc/wg1/PDFwg1/e1t6.pdf [hereinafter *Elements of a WHO FCTC*].

84. Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, art. 19(3), 115 U.N.T.S. 332, 8 I.L.M. 679.

85. INTERNATIONAL LAW: CASES AND MATERIALS 488 (Lori F. Damrosch et al. eds., 4th ed. 2001) [hereinafter INTERNATIONAL LAW].

86. *Id.*

87. *Id.*

88. *New Chair's Text, INB5, supra* note 68, at 20; *Textual Proposals with Respect to Articles J, S, and T, supra* note 82, at 8-10.

89. *Elements of a WHO FCTC, supra* note 83, at 31.

90. *New Chair's Text, INB5, supra* note 68, at 18.

91. *Id.*; WHO, *Chair's Text of a Framework Convention on Tobacco Control*, at 13, WHO Doc. A/FCTC/INB2/2 (Jan. 9, 2001), *at* http://www.who.int/gb/fctc/PDF/inb2/e2inb2.pdf [hereinafter *INB2 Chair's Text*].

92. *INB2 Chair's Text*, supra note 91, at 13.

93. WHO, *Co-Chairs' Working Paper: Inventory of Textual Proposals Made at the Second Session of the Intergovernmental Negotiating Body, Merged with the Chair's Text*, at 22, WHO Doc. A/FCTC/INB3/2(c) (July 25, 2001), *at* http://www.who.int/gb/fctc/PDF/inb3/einb32c.pdf.

settlement provisions of any other treaty in force between two or more of the Parties in relation to disputes covered by those provisions." In contrast to the solution proposed in the prior version of Article R, this provision anticipates dispute settlement under other treaties, such as the WTO's dispute settlement system.

Early in the FCTC's first session of negotiations, concerns were expressed about the relationship between international trade and tobacco law.[94] Parties suggested that the text should clarify the relationship between the convention and other international agreements.[95] Parties also suggested that developing countries should be protected from the effects of international trade in tobacco, and that developed countries exporting tobacco should be accountable to them.[96]

However, the present FCTC shows no signs of taking any of these proposals very seriously.[97] Any clarification of the FCTC's relationship to other treaties has been more implied than express.[98] Developing countries have not been provided special mention or protection, and the liability of tobacco companies is still very contested.[99]

In the event that the FCTC causes a debate about its provisions that negotiation between the parties cannot solve, they may bring their dispute to an international court.

## V. INTERNATIONAL DISPUTE SETTLEMENT, THE INTERNATIONAL JUDICIAL SYSTEM AND THE WHO

### A. *International Dispute Settlement*

Negotiation remains the primary means for the prevention and settlement of disputes between states. Legal methods do not provide certain valuable benefits to states, such as privacy, cost effectiveness, more control by the parties, and the avoidance of "winner-loser" situations.[100] On the other hand, diplomatic methods have been

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94. WHO, *Proposed Draft Elements for a WHO Framework Convention on Tobacco Control: Provisional Texts with Comments of the Working Group*, at 3, WHO Doc. A/FCTC/INB1/2 (July 26, 2000), *at* http://www.who.int/gb/fctc/PDF/inb1/e1inb2.pdf.

95. *Id.*

96. *Id.*

97. *New Chair's Text, INB5, supra* note 68.

98. *Id.*

99. *Id.*

100. IMPROVING WTO DISPUTE SETTLEMENT PROCEDURES: ISSUES AND LESSONS FROM THE PRACTICE OF OTHER INTERNATIONAL COURTS AND TRIBUNALS 29, 31 (Friedl Weiss ed., 2000) [hereinafter IMPROVING WTO DISPUTE SETTLEMENT PROCEDURES].

criticized as being too power-oriented and less sensitive to the merits of the dispute.[101] Legal means may protect weaker actors against power-politics and unworthy claims by stronger actors.[102] Other methods of dispute resolution include arbitration and judicial settlement by domestic courts.[103]

### B. *The International Judicial System*

International courts vary widely in terms of size, continuity, jurisdiction, standing, applicable law and procedure, binding aspect of outcomes, and composition of judges.[104] The Benelux Court of Justice admits a very small number of Member States while the "principal judicial organ" of the United Nations, the International Court of Justice (ICJ), has jurisdiction of universal scope.[105] The International Tribunal for the Law of the Sea decides cases in accordance with the U.N. Convention on the Law of the Sea, while the International Criminal Court applies international criminal and humanitarian law.[106]

The ICJ is the classic international court and the United Nations' principal judicial organ.[107] Permanence, creation by an international legal instrument, use of international law, use of pre-existing procedure, and legally binding outcomes characterize the ICJ.[108] The most significant restriction on cases before the ICJ is that the parties must be states.[109] The ICJ also offers advisory opinions at the request of any body authorized by the UN Charter to make such a request, such as the WHO.[110]

### C. *The WHO as a Party Before the ICJ*

Currently, the WHO has no judicial body of its own.[111] The

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101. *Id.* at 29.

102. *Id.*

103. *Id.* at 31.

104. PICT Research Matrix, *at* http://www.pict-pcti.org/matrix/Matrix.html (last visited Nov. 13, 2002).

105. *See* Cesare P.R. Romano, *The Proliferation of International Judicial Bodies: The Pieces of the Puzzle*, 31 N.Y.U. J. INT'L L. & POL. 709, 713 (1999); PICT Research Matrix Introduction, *at* http://www.pict-pcti.org/matrix/matrixintro.html (last visited Nov. 13, 2002); PICT Research Matrix, *supra* note 104.

106. PICT Research Matrix, *supra* note 104.

107. INTERNATIONAL LAW, *supra* note 86, at 820; Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993 [hereinafter ICJ Statute].

108. Romano, *supra* note 105, at 713-14.

109. ICJ Statute, *supra* note 107, art. 34, cl. 1.

110. ICJ Statute, *supra* note 107, art. 65.

111. *See generally* WHO CONST. arts. 9-37.

WHO Constitution provides that disputes about the interpretation of the WHO Constitution not settled by negotiation or by the WHA will be referred to the ICJ unless the parties agree otherwise.[112] Thus, states could use the ICJ to rule on a dispute over a WHO treaty such as the FCTC.

The WHO has exercised its power to request an advisory opinion from the ICJ on two occasions.[113] In 1980, during political tension in the Middle East, the WHO wanted to know whether the transfer of its Egypt office to Jordan would violate a 1951 agreement with Egypt that contained a requirement of two-years notice (Egypt case).[114] In 1986, the WHO questioned the legality of nuclear weapons use under international law and under the WHO Constitution (Nuclear Weapons case).[115] Both cases suggest that the WHO belief that the ICJ might support the WHO in a politically difficult dispute and that the ICJ intended to show the WHO that it was clearly mistaken.

The Egypt case and the Nuclear Weapons case demonstrate the WHO's effort to resolve politically difficult questions through the international judicial system. In the Egypt case, the WHO wanted to move its Egypt office due to the increasingly tense situation in the Middle East after the 1978 Camp David Agreement.[116] The ICJ issued an advisory opinion deciding that the parties were required to "consult together in good faith" and to give each other reasonable notice in the event of a transfer, but refrained from actually deciding the question of whether the 1951 notice provision applied to the WHO's transfer from Egypt.[117]

The Egypt case demonstrated that the WHO could not expect the ICJ to definitively decide a politically-sensitive question before it, even when the ICJ was being asked to do traditional judicial work involving treaty interpretation.[118] Dissenting, Judge Morozov argued that that the ICJ should not have issued an opinion at all, because the dispute had the type of political character that the Court should avoid handling.[119] However, the WHO again exercised its advisory

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112. WHO CONST. art. 75.

113. International Court of Justice, Case Summary, *Interpretation of the Agreement of 25 March 1951 Between the WHO and Egypt, Advisory Opinion of 20 December 1980, at* http://www.icj-cij.org/icjwww/idecisions/isummaries/iwhomessummary 801220.htm (last visited Nov. 13, 2002) [hereinafter *Summary: Egypt Agreement*]; International Court of Justice, Case Summary, *Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion of 8 July 1996, at* http://www.icj-cij.org/icjwww/idecisions/isummaries/ianwsummary960708.htm (last visited Oct. 15, 2002) [hereinafter *Summary: Nuclear Weapons*].

114. *Summary: Egypt Agreement, supra* note 113.

115. *Summary: Nuclear Weapons, supra* note 113.

116. *Summary: Egypt Agreement, supra* note 113 (Morozov, J., dissenting).

117. *Id.*

118. *Id.*

119. *Id.*

opinion power in the more politically troublesome Nuclear Weapons case, where the ICJ echoed Judge Morozov's concern.[120]

The Nuclear Weapons case was the first case ever in which the ICJ refused the request for an advisory opinion from a specialized agency of the United Nations.[121] The ICJ held that the WHO was authorized to request the advisory opinion and that the requested opinion was indeed on a legal question.[122] However, the Court refused the request because the legal question did not arise within the scope of the activities of the WHO.[123]

The ICJ reasoned that in light of the context, object, and purpose of the WHO Constitution, the WHO was competent to address and request opinions regarding measures to remedy negative effects on health, but not to challenge the legality of the causes of such effects.[124] The Court relied on the principle of speciality that limits the scope of international organizations.[125] The Court relied on the structure of the U.N. system, in which the United Nations is vested with powers of general scope, while autonomous subsidiary organizations, such as the WHO, are vested with sectorial powers.[126] The Court argued that questions regarding the use of force and the regulation of armament and disarmament are within the competence of the United Nations—not within the competence of specialized agencies.[127]

The ICJ voted to deny the request to interpret the legality of nuclear weapons as violations of international law and of the WHO Constitution.[128] As ICJ Judge Oda wrote, the advisory function is to be used to resolve specific cases of conflict, not general matters of international law.[129] Judge Oda also noted that the WHO's request was drafted without agreement among the delegates in the WHA, and also noted that the WHO's legal counsel had repeatedly objected to bringing the request before the ICJ on the grounds that the WHO was not competent to bring the matter to the court.[130]

The WHO learned that international courts cannot be expected to decide political, rather than legal, issues. The Egypt and Nuclear Weapons cases demonstrated that neither the ICJ nor any international court can rubberstamp mere policy. Therefore, clearly,

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120. *See Summary: Nuclear Weapons*, *supra* note 113.
121. *Id.* (Weeramantry, J., dissenting).
122. *Id.*
123. *Id.*
124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.*
128. *Id.*
129. *Id.*
130. *Id.*

the FCTC's success depends on its ability to stand on its own as binding international law among other binding international laws.[131]

## VI. THE WTO'S DISPUTE SETTLEMENT SYSTEM

The ICJ's general international law jurisdiction seems to make the ICJ an appropriate place to resolve international conflicts between trade and non-trade interests.[132] However, these types of international trade conflicts have more often been brought before the WTO Dispute Settlement Body (DSB) Panels and Appellate Body (AB).[133] The compulsory jurisdiction of the WTO's dispute settlement system is the primary source of its popularity.[134]

Like the ICJ, the WTO courts only decide cases where the parties are states.[135] Unlike the ICJ and other international courts, however, the WTO exercises compulsory jurisdiction over contending parties; its judgments can be enforced through trade sanctions if the other party fails to comply.[136] The WTO dispute settlement system also differs in that it has two tiers: the DSB acts as the usual fact-finding court of first resort, and the AB hears appeals from DSB decisions.[137]

The current WTO dispute settlement system should be distinguished from the panels that preceded it under the General Agreement on Tariffs and Trade (GATT).[138] Before the Final Act Embodying the Results of the Uruguay Round of Trade Negotiations that created the WTO dispute settlement system in 1994, the GATT panels heard trade complaints brought under GATT since 1947.[139] However, the earlier GATT panels were characterized more by diplomacy than by procedure, and frequently veered from the text of the treaty and imposed arbitrary tests when interpreting, for example, the environmental exceptions to GATT.[140]

With the creation of the WTO dispute settlement system in 1994, the DSB was given more procedural and legal substance, and the AB

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131. *See infra* Part III.

132. IMPROVING WTO DISPUTE SETTLEMENT PROCEDURES, *supra* note 100, at 42.

133. *Id.* at 41.

134. *Id.*

135. PICT Research Matrix, *supra* note 104.

136. Julie H. Paltrowitz, *A "Greening" of the World Trade Organization? A Case Comment on the Asbestos Report*, 26 BROOK. J. INT'L L. 1789, 1796 (2001).

137. Carrie Wofford, *A Greener Future at the WTO: The Refinement of WTO Jurisprudence on Environmental Exceptions to GATT*, 24 HARV. ENVTL. L. REV. 563, 567-68 (2000).

138. *Id.*

139. *Id.*

140. *Id.* at 568-69.

was created to hear appeals from DSB panel decisions.[141] The new rules adopted a single source of procedure for resolving disputes, the Dispute Settlement Understanding, and endorsed the use of customary rules of interpretation of international law, such as the ordinary meaning rule of the widely-respected Vienna Convention.[142] Further, the new system promoted more-informed decisions and freedom from political partiality by requiring panelists and members of the AB to possess more experience, such as "demonstrated expertise in law, international trade and the subject matter of the covered agreements [(GATT)] generally" and the prohibition of the selection of panelists from the disputing states.[143]

As commentators have noted, there has been a change in the WTO jurisprudence, as well as a structural change in the WTO.[144] Tobacco control proponents remain very wary of the WTO because of the weak reasoning in the old GATT decisions, and because of newer WTO decisions from the DSB and AB that ultimately found that the challenged domestic environmental measures violated GATT.[145] As discussed below, the newer WTO cases rejected the trade violations, not the environmental purposes behind the measures.[146] The decisions left open the possibility that a properly-executed environmental measure could prevail over the ability of states to trade without restriction, as seen in the cases discussed below.[147]

### A. *FCTC Measures as Exceptions to GATT's Rules Against Trade Restrictions*

Disputes before the WTO bodies originate from a violation of some trade agreement, usually GATT.[148] Under GATT, for example, domestic products and foreign imports should receive the same treatment, and imports should not be subject to quantitative restrictions, quotas, or total bans.[149] A State with a trade-restrictive measure would defend its measure by arguing that it fit into one of the general exceptions allowed under GATT's Article XX.[150]

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141. *Id.*
142. *Id.*; INTERNATIONAL LAW, *supra* note 85, at 507.
143. Wofford, *supra* note 137, at 569-71.
144. *See* Paltrowitz, *supra* note 136; Wofford, *supra* note 137.
145. San Francisco Tobacco Free Project, *How Might the WTO Impact the FCTC?*, *at* http://sftfc.globalink.org/wtoimpact.html (last visited Oct. 15, 2002).
146. Wofford, *supra* note 137, at 575.
147. *See infra* Parts VI.B.-E.
148. Laura Yavitz, *The World Trade Organization Appellate Body Report, European Communities—Measures Affecting Asbestos and Asbestos-Containing Products, Mar. 12, 2001, WT/DS135/AB/R*, 11 MINN. J. GLOBAL TRADE 43, 47 (2002).
149. *Id.*; GATT arts. I, III, XI.
150. Yavitz, *supra* note 148, at 48.

Presently, the FCTC only requires that domestic tobacco control measures be "effective legislative, executive, administrative, or other measures," in addition to prohibiting the free distribution of tobacco products.[151] Almost all of the FCTC's key provisions have become increasingly permissive.[152] For example, the second session of the Intergovernmental Negotiating Body (INB) drafted Articles I.8 through I.12 of the FCTC, eliminating youth tobacco sales without qualification.[153] The first sentence of Article I.8 read, "Each Party shall prohibit tobacco sales to persons under the age of 18."[154] Later proposals to the text of Article I.8 included qualifiers that remain in the present Article 16: "Each Party shall [take appropriate measures to] prohibit tobacco sales [and supply] to [persons under the age of 18] / [minors as determined by domestic law]."[155] States still retain substantial autonomy in choosing the type of tobacco control measures to adopt under the FCTC.

Although the terms of the FCTC are still unsettled, the WTO's trade rules and exceptions have been established. Any domestic tobacco control measure must meet the requirements for exceptions listed under Article XX.[156] Article XX contains an introduction, or chapeau, and lists ten specific exceptions to GATT.[157] The chapeau to Article XX reads:

> 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 [within the following ten exceptions].[158]

Of the ten exceptions, the exceptions commonly cited, particularly in environmental and health disputes, are Articles XX(b), XX(d), and

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151. *New Chair's Text, INB5, supra* note 68.

152. *Id. Compare* WHO, *Revised Co-Chairs' Conference Papers from Working Group 1 During the Third Session of the Intergovernmental Negotiating Body*, at 8-9, WHO Doc. A/FCTC/INB4/5 (Jan. 24, 2002), *at* http://www.who.int/gb/fctc/inb4/PDFinb4/einb45a.pdf [hereinafter *Revised Co-Chairs' Conference Papers from WG1 During INB3*], *with INB2 Chair's Text, supra* note 91, at 3, 6-8, *and* WHO, *Co-Chairs' Working Paper: Inventory of Textual Proposals Made at the Second Session of the Intergovernmental Negotiating Body, Merged with the Chair's Text: Working Group 2*, at 7-15, WHO Doc. A/FCTC/INB3/2(b) (July 25, 2001), *at* http://www.who.int/gb/fctc.PDF/inb3/einb32b.pdf.

153. *INB2 Chair's Text, supra* note 91, at 7.

154. *Id.*

155. *Revised Co-Chairs' Conference Papers from WG1 During INB3, supra* note 1512, at 8; *New Chair's Text, INB5, supra* note 68, at 11.

156. GATT art. XX.

157. *Id.*

158. *Id.* (emphasis added).

XX(g), that protect domestic measures:

> (b) necessary to protect human, animal or plant life or health; . . .
>
> (d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement. . . . .
>
> (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.[159]

Although no formal requirement that the WTO bodies must be constrained by precedent exists, the DSB Panels and the AB in fact refer to the reasoning of earlier cases and rely on such reasoning when deciding cases.[160] As noted above, the AB also interprets treaties according to the Vienna Convention rule that "a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[161] By applying this general rule of interpretation, the AB formed a two-tiered test for Article XX exceptions in its decisions in the *Gasoline*,[162] *Shrimp*,[163] *Asbestos*,[164] and *Shrimp Compliance*[165] cases.[166]

The AB established the two-tiered Article XX test in *Gasoline*, analyzed the specific exception most relevant to the FCTC—Article XX(b)'s health exception—in *Asbestos*, and expanded on the elements of the second step in *Shrimp* and *Shrimp Compliance*.[167] In *Gasoline*, the AB stated that the burden of proving an Article XX exception rested on the party invoking the exception, and established the following test: 1) the challenged measure must fit into one of Article XX's ten specific exceptions, and 2) the measure must meet the requirements of the Article XX chapeau.[168]

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159. Wofford, *supra* note 137, at 566-67.

160. *Id.* at 590.

161. *See* sources cited *supra* note 142; WTO Report of the Appellate Body: United States—Standards For Reformulated And Conventional Gasoline, WT/DS2/AB/R (Apr. 29, 1996), 35 I.L.M. 603, 620-21 [hereinafter *Gasoline* AB Report].

162. *Gasoline* AB Report, *supra* note 161, at 626.

163. WTO Report of the Appellate Body: United States—Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R (Oct. 12, 1998), 38 I.L.M. 118, 152 [hereinafter *Shrimp* AB Report].

164. WTO Report of the Appellate Body: European Communities—Measures Affecting Asbestos and Asbestos Containing Products, WT/DS135/AB/R (Mar. 12, 2001), 2001 WL 256081, at *43 [hereinafter *Asbestos* AB Report].

165. WTO Report of the Appellate Body: United States—Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 of the DSU by Malaysia, WT/DS58/AB/RW (Oct. 22, 2001), 2001 WL 1261572, at *23-35 [hereinafter *Shrimp Compliance* AB Report].

166. Wofford, *supra* note 137, at 585.

167. *Gasoline* AB Report, *supra* note 161; *Shrimp* AB Report, *supra* note 162; *Asbestos* AB Report, *supra* note 163; *Shrimp Compliance* AB Report, *supra* note 165.

168. *Gasoline* AB Report, *supra* note 161, at 626-27.

As the AB noted, the first step of the test is easier than the second.[169] Generalizing the AB's analysis of Article XX(g), a domestic measure would fit into a specific exception and pass the first prong of the exceptions test when a balanced reading of the words of the specific exception that was neither too expansive nor too emasculated, and case-by-case scrutiny of the factual and legal context of the measure, revealed that the measure fit the specific exception.[170]

The AB carefully distinguished the requirements of the chapeau from the other substantive rules of GATT as a "further and separate" question not collapsible into any other issue.[171] The AB found that the chapeau's purpose was to prevent the abuse of the exceptions to defeat substantive rules of GATT (relying on the drafting history of Article XX), that the particular exceptions must be applied reasonably with due regard to the legal duties and rights of the parties, and that the chapeau asks less about the specific contents of the measure, but more about the manner in which the measure is applied.[172]

### B. *The* Gasoline *AB Report*

In *Gasoline*, the challenged measure was a U.S. law—an Environmental Protection Agency (EPA) regulation known as the Gasoline Rule—that established certain baseline levels of permissible pollutants for domestic and foreign producers of gasoline, purportedly to reduce air pollution in the United States.[173] Venezuela, and later Brazil, challenged the assignment of the statutory baseline to imported gasoline, arguing that the statutory baseline was stricter than the individual baselines given to domestic producers who were in operation for more than six months in 1990.[174] The United States appealed the DSB Panel's denial of the applicability of Article XX(g), but did not challenge the Panel's findings that the exceptions in Articles XX(b) and XX(d) did not apply.[175]

When the AB pointed out that the United States could have offered the option of individual baseline pollution levels to Venezuela and Brazil, as well as domestic producers, or created some other identical measure, the United States argued that the verification and

169. *Id.* at 622.

170. *Id.*

171. *Id.* at 627. To do otherwise would be to "empty the chapeau of its contents and to deprive the exceptions in paragraphs (a) to (j) of meaning." *Id.*

172. *Id.* at 629.

173. *Id.* at 606; WTO, *Venezuela, Brazil versus US: Gasoline, at* http://www.wto.int/english/tratop_e/envir_e/edis07_e.htm (last visited Oct. 15, 2002).

174. *Venezuela, Brazil versus US: Gasoline, supra* note 173.

175. *Gasoline* AB Report, *supra* note 161, at 613.

enforcement of individual baselines for foreign producers was too "impracticable" and difficult for the EPA. Further, the United States argued that the domestic application of the statutory baseline would have been "physically and financially impossible" given the magnitude of changes that would be required in almost all U.S. refineries.[176]

The AB agreed with the DSB Panel and found that the U.S. arguments were unpersuasive.[177] The United States did not show that its usual techniques and procedures for determining the origin and tracking of international goods were inadequate to make foreign trade data here sufficiently reliable, as it was in other contexts such as in the enforcement of anti-dumping laws.[178] Moreover, the AB inferred from the U.S.'s lack of knowledge about the possibility of cooperation with foreign refinery and government cooperation that the United States failed to explore cooperation with foreign producers before asserting the impossibility of individual baselines for foreign gasoline.[179] Further, the AB compared U.S. recognition of the domestic difficulty in applying the statutory baseline with the U.S. practice in requiring foreign producers to abide by the statutory baseline. The AB found that the United States had not accorded equivalent consideration to foreign producers of gasoline when requiring them to abide by the stricter standard.[180] Because of these two omissions, the AB held that although the *Gasoline* Rule related to the conservation of exhaustible natural resources and, therefore, fell under Article XX(g), the United States violated the Article XX chapeau's prohibitions on "unjustifiable discrimination" and "disguised restriction on international trade."[181] Therefore, the measure failed the second part of the two-tiered test.

The AB declared that the three elements in the chapeau—"arbitrary discrimination," "unjustified discrimination," and "disguised restriction" on international trade—were to be read "side-by-side."[182] The AB reasoned that "arbitrary and unjustified discrimination" contained elements in common with "disguised restriction."[183] "Disguised restriction" was broader than "concealed or unannounced" discrimination in international trade, and that it could include restrictions amounting to "arbitrary and unjustified

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176. *Id.* at 632.
177. *Id.* at 631-33.
178. *Id.* at 631.
179. *Id.*
180. *Id.*
181. *Id.* at 632-33.
182. *Id.* at 627.
183. *Id.*

discrimination."[184] In *Shrimp* and *Shrimp Compliance*, the AB differentiated "unjustified discrimination" from "arbitrary discrimination," but offered no further analysis of the contents of "disguised restriction."[185]

### C. *The* Asbestos *AB Report*

In *Asbestos*, Canada, the second largest producer and world's leading exporter of white asbestos, appealed a DSB Panel holding that a decree by the Prime Minister of France banning "the manufacture, import, domestic marketing, exportation, possession for sale, offer, sale and transfer" of all varieties of asbestos fibres for the protection of consumers and a similar ban for the protection of workers was justified under the Article XX(b) exception.[186] France was Canada's biggest European consumer of asbestos, importing 30,000 metric tons per year.[187] The European Union estimated that 2,000 people in France died each year from cancer caused by asbestos exposure.[188]

Canada chose to appeal the first step of the two-tiered test—the Article XX(b) exception for health—rather than the purportedly more-difficult second step involving the Article XX chapeau.[189] Canada advanced four arguments against the "necessity" of the decree to protect life or health under the Article XX(b) exception in the first part of the two-step exceptions test.[190] First, Canada argued that the chrysotile asbestos products did not pose a risk to human health.[191] Second, Canada argued that the DSB Panel should be required to "quantify" the risk of asbestos, and not rely on the "hypotheses" of the French authorities.[192] Third, Canada argued that the Decree would not serve its purpose in halting the health risks of asbestos because substitutes for asbestos also posed health risks yet to be defined.[193] Fourth, Canada argued that the DSB Panel should have found that the "controlled use" of asbestos was a reasonably available alternative to the Decree.[194]

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184. *Id.* at 629.
185. *Shrimp* AB Report, *supra* note 163, at 161-74; *Shrimp Compliance* AB Report, *supra* note 165.
186. Paltrowitz, *supra* note 136, at 1816-18, 1826.
187. *Id.* at 1817.
188. *Id.*
189. *Asbestos* AB Report, *supra* note 164, at *46, ¶ 164.
190. *Id.*
191. *Id.*
192. *Id.*
193. *Id.*
194. *Id.*

The AB rejected each of these assertions.[195] Upholding the Panel's finding that the decree protected human life or health from a health risk, the AB found expert, scientific support for the Panel's finding that asbestos created a human health risk, and found no evidence to show that the Panel had abused its discretion in evaluating the evidence.[196] In addressing the measure's "necessity," the AB again dismissed Canada's claim of insufficient evidence, finding "more than sufficient" evidence to prove that chrysotile asbestos products posed a "significant" risk to human life or health.[197] The AB stated that the Article XX(b) exception did not require that the risk be quantified, but that the risk to human health could be evaluated in quantitative or qualitative terms.[198] The AB found that the Panel relied on scientific evidence to assess the nature and character of the risk, and did not merely rely on the "hypotheses" of French authorities.[199] Therefore, Canada's second necessity argument failed.

The AB stated that it was "undisputed that WTO Members have the right to determine the level of protection of health that they consider appropriate in a given situation" and that the level chosen by France was a "halt" to the spread of asbestos-related health risks.[200] The AB further noted, "By prohibiting all forms of amphibole asbestos, and by severely restricting the use of chrysotile asbestos, the measure at issue is *clearly designed and apt* to achieve that level of health protection."[201] The AB dismissed Canada's third argument—that the undefined risk of substitute products was a barrier to considering the question of whether the decree would reduce the health risk of asbestos—but addressed the concern about substitute products by noting that the scientific evidence indicated that the substitute products were less risky than asbestos.[202]

The AB used a sliding scale to determine whether a measure was "necessary." [203] The more "vital" or "important" the common interest or end pursued, the easier it would be for the AB to accept measures as "necessary" to achieve those ends.[204] Because the objective in this case was "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 was "both vital and

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195. *Id.* at *46-49, ¶¶ 166-75.
196. *Id.* at *44-45, ¶¶ 158-63.
197. *Id.* at *46, ¶166.
198. *Id.* at *46, ¶ 167.
199. *Id.*
200. *Id.* at *47, ¶ 168.
201. *Id.* (emphasis added).
202. *Id.*
203. *Id.* at *47-49, ¶¶ 170-75.
204. *Id.*

important in the highest degree."[205]

The AB applied a balancing test considering several factors to determine whether an alternative measure was a "reasonably available" alternative required by GATT.[206] Factors taken into account in the balancing would include the difficulty of implementation (other than "administrative" difficulty), the degree of inconsistency with GATT, and the extent to which the alternative measure "contributes to the realization of the end pursued."[207] The AB held that the alternative measure of "controlled use" would not achieve France's chosen level of health protection because scientific evidence showed that a significant residual health risk could still exist in some circumstances—particularly with respect to the users of cement products containing asbestos.[208] Therefore, because "controlled use" of asbestos did not "achieve the same end" of health protection, the European Union established a prima facie case that there was no "reasonably available alternative" to the ban of the decree.[209]

In *Asbestos*, the AB reserved a certain amount of leeway to states regarding their domestic health measures. By permitting "qualitative" proof of a health risk—determining the "reasonableness" of available alternatives based on the domestic health objectives of the state, rather than a more objective standard, and not requiring a state to defend its alternate health plan—the AB lowered the bar for the first step of the exceptions test using Article XX(b), particularly when the state's purpose was to preserve human life and health. However, both the *Asbestos* DSB Panel and AB decisions raise troubling questions about the more difficult second step of the test, the "arbitrary and unjustified means" clause in the Article XX chapeau.

The AB in *Asbestos* did not conduct a complete Article XX analysis because Canada did not appeal the DSB Panel's finding that the French ban did not violate the Article XX chapeau.[210] However, the DSB Panel's tortured treatment of the chapeau in *Asbestos* set the stage for the AB's analysis of the chapeau in *Shrimp Compliance*.[211] The AB's silence is even more glaring given the *Asbestos* DSB Panel's unorthodox treatment of the Article XX chapeau's "arbitrary and

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205. *Id.* at *48, ¶ 172.
206. *Id.* at *48, ¶¶ 173-74.
207. *Id.* at *48, ¶ 172.
208. *Id.* at *48, ¶ 174.
209. *Id.* at *48, ¶¶ 172-75 (emphasis added).
210. *Id.* at *43-49, ¶¶ 155-75.
211. WTO Report of the Panel: European Communities—Measures Affecting Asbestos and Asbestos Containing Products, WT/DS135/R, 2000 WL 1449942 (Sept. 18, 2000) [hereinafter *Asbestos* DSB Report].

unjustified discrimination" and "disguised restriction" clauses.[212] The AB was extremely quick to correct the DSB's changed chapeau analysis in *Shrimp*, so its omission in *Asbestos* is notable.[213]

In *Asbestos*, the DSB Panel began a normal Article XX analysis by citing *Gasoline* and *Shrimp*, and by analyzing whether the French ban met the specific exception in Article XX(b).[214] However, after the Panel found that the ban met the requirements of XX(b), the Panel first commented that the chapeau asked about the "manner" of the domestic measure application, but concluded that France had not acted in "bad faith" or in an "unreasonable," "improper," or "abusive" manner.[215] The Panel then split its "arbitrary and unjustifiable discrimination" analysis into two parts: "discrimination" and "arbitrary and unjustifiable."[216]

The Panel editorialized that the "context" of the chapeau's first clause suggested that a determination of "discrimination" was appropriate, even though the decisive question was whether the measure was "arbitrary or unjustifiable" and did not involve the question of whether "discrimination" existed.[217] Although the DSB Panel explored the meaning of the admittedly-superfluous element of "discrimination," attempting to differentiate it from the meaning of "discrimination" in the context of the original GATT violation, the Panel ended with a restatement of the irrelevance of the exercise.[218] The Panel then "concluded" that Canada did not rebut the European Community's prima facie case that the French ban was not "arbitrary or unjustifiable discrimination."[219]

Noting that the AB interpreted the "disguised restriction" in the chapeau's second clause broadly, the Panel stated that the actual scope of the words was undefined.[220] The Panel cited *Gasoline* for the proposition that determinations of "arbitrary or unjustifiable discrimination" and "disguised restriction" shared similar considerations.[221] To avoid confusing the standards of the chapeau with substantive trade rules, the Panel posited that the word "disguised," rather than "restriction," was the key to understanding "disguised restriction," and further cited another AB report for factors suggesting "disguise"—the design, architecture, and revealing

212. *Asbestos* DSB Report, *supra* note 211, at *441.
213. *Shrimp* AB Report, *supra* note 163, at 150-53, ¶¶ 114-22.
214. *Asbestos* DSB Report, *supra* note 212, at *441, ¶ 8.167.
215. *Id.* at *453, ¶ 8.224.
216. *Id.* at *454, ¶ 8.226.
217. *Id.* at *455, ¶ 8.229.
218. *Id.* at *454, ¶ 8.227.
219. *Id.* at *455, ¶ 8.229.
220. *Id.* at *455, ¶¶ 8.232-33.
221. *Id.* at *456, ¶ 8.235.

structure of a measure.[222] However, instead of pursuing this line of reasoning, the Panel decided that it was "unnecessary" to determine whether discrimination might constitute a disguised restriction because no discrimination had been identified. As discussed below, the *Asbestos* Panel's confusing treatment of the chapeau was a function of the AB's limited chapeau analysis in *Shrimp*. After the *Asbestos* DSB Panel and AB decisions, the *Shrimp Compliance* AB incorporated the *Asbestos* Panel's concerns in its conclusions about the chapeau.

### D. *The* Shrimp *and* Shrimp Compliance *AB Reports*

In *Shrimp*, the United States passed a law, Section 609, for the protection of sea turtles that banned the importation of shrimp and shrimp products harvested with technology that endangered turtles.[223] The only exceptions to the import ban were for products from harvesting nations that either had a regulatory scheme and incidental take-rate comparable to the scheme and take-rate of the United States, or for products from fishing environments that did not present a threat to sea turtles.[224] These provisions essentially meant that fishermen harvesting shrimp mechanically in jurisdictions with any of the five sea turtle species were required to use turtle excluder devices, or TEDs, all the time as practiced in the United States.[225] India, Malaysia, Pakistan, and Thailand challenged Section 609 as violating the chapeau by discriminating among exporting countries regarding negotiations and phase-in periods, and by omitting a serious attempt to reach a cooperative multilateral agreement.[226] The United States argued that Section 609 met the requirements of Article XX(g) and the chapeau, or in the alternative, that it was protected by Article XX(b).[227]

The AB found that Section 609 met the requirements of Article XX(g), and therefore it did not analyze the measure in terms of Article XX(b). The AB found, however, similar to *Gasoline*, that Section 609 violated both parts of the chapeau's "arbitrary and unjustifiable discrimination" clause.[228] The AB applied the two-step test set out in *Gasoline* and then distinguished "unjustifiable"

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222. *Id.* at *456, ¶ 8.236.
223. Conservation of Sea Turtles; Importation of Shrimp, Pub. L. No. 101-162, 103 Stat. 1037.
224. WTO, *India etc. versus U.S.: 'Shrimp-Turtle'*, *at* http://www.wto.int/english/tratop_e/envir_e/edis08_e.htm (last visited Oct. 15, 2002).
225. *Id.*; *Shrimp* AB Report, *supra* note 163, at 118.
226. *Shrimp* AB Report, *supra* note 163, at 133, ¶¶ 40-42.
227. *Id.* at 129, ¶ 25.
228. *Id.* at 160, ¶ 146.

discrimination from "arbitrary" discrimination.[229]

Section 609 was held to be "unjustifiable" discrimination for three reasons.[230] First, it was coercive both in substance and in its effects.[231] By nature, an import prohibition is ordinarily the heaviest "weapon" in a Member's trade measure armory.[232] The United States again failed to enter into serious, across-the-board negotiations before enforcing the import ban—just as it did in *Gasoline*.[233] In its actual effect, the ban forced other foreign governments to change their policies and adopt policies identical to the United States.[234]

Second, the United States inflexibly applied Section 609.[235] Although the United States was supposed to find "comparable" regulatory schemes acceptable, in practice the United States required identical regulatory schemes.[236] The AB, citing four international agreements that discourage states from establishing unilateral environmental measures, said that the United States should have seriously considered the different situations of affected states and offered the implied flexibility that was missing in practice.[237]

Third, the United States preferentially implemented the measure by giving 14 Caribbean and Western Atlantic states more phase-in time and technical assistance than all other states.[238] The cumulative effect of these acts and omissions made Section 609 a means of "unjustifiable" discrimination.[239]

Section 609 was also a means of "arbitrary" discrimination for three reasons.[240] First, as above, the United States' inflexible and unilateral manner in applying Section 609 was arbitrary, as well as unjustifiable.[241] Second and third, the United States lacked fair and transparent procedures in its "singularly informal and casual" certification process, such as an appeals procedure or the issuance of formal, written, reasoned decisions explaining why applications for certification were accepted or rejected.[242] Therefore, although the shrimp import ban met the general characteristics of Article XX(g) in

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229. *Id.* at 161-75, ¶¶ 150-86.
230. *Id.* at 166-72, ¶¶ 161-76.
231. *Id.* at 166, 171, ¶¶ 161, 171. "The standards of the chapeau . . . project both substantive and procedural requirements." *Id.* at 165-66, ¶ 160.
232. *Id.* at 171, ¶ 171.
233. *Id.* at 167-71, ¶¶ 166-72. This omission was more egregious than in *Gasoline* because Section 609 specifically provided for such negotiation. *Id.*
234. *Id.* at 166, ¶ 161.
235. *Id.*
236. *Id.* at 166, ¶ 162.
237. *Id.* at 166-70, ¶¶ 161-69.
238. *Id.* at 171-72, ¶¶ 173-75.
239. *Id.* at 172, ¶ 176.
240. *Id.* at 172-74, ¶¶ 177-84.
241. *Id.* at 172-73, ¶ 177.
242. *Id.* at 173-74, ¶¶ 180-84.

the first part of the two-tiered test, it failed at least two of the three clauses in the chapeau and could not be justified under Article XX.[243]

The *Shrimp* AB's finding made sense in the context of *Shrimp*. In *Shrimp*, the U.S. TED law was "unjustifiable" because it coerced foreign governments to change their policies, did not allow foreign governments flexibility to change their policies, and contained preferential treatment for certain countries.[244] The U.S. TED law's inflexibility and lack of fair and transparent measures for certification also led the *Shrimp* AB to conclude that the U.S. TED law was arbitrary.[245]

However, in the *Asbestos* context, these criteria make less sense. *Asbestos* is distinguishable from *Shrimp* on its facts because the French ban on asbestos did not "coerce" Canada to change domestic policies or methods by which Canada performed its asbestos business, nor did it dictate a strict range of change for Canada to adopt. However, the AB noted in *Shrimp* that the "coercive" effect of import prohibitions and an arguably-complete ban on asbestos imports would, in fact, have a much greater coercive effect on Canada's domestic business "policies" than requiring the use of equipment like the TEDs. If *Shrimp*'s explanations of "arbitrary or unjustifiable" were strictly applied, then the health measure in *Asbestos* could have been insufficiently distinguishable from the U.S. TED law in *Shrimp*, and could potentially have suffered the same fate.

Under this framework, the *Asbestos* Panel's prefacing comment before its chapeau analysis makes more sense.[246] By looking at the "manner" in which the domestic measure was applied and finding that France had not acted in "bad faith," or in an "unreasonable," "improper," or "abusive" manner, the Panel was in fact suggesting additional content to the current "arbitrary or unjustifiable" analysis under *Shrimp*. The *Asbestos* Panel was attempting to distinguish the U.S.' "bad faith" (in unilaterally using trade as a tool to push its environmental scheme onto other countries without concern as to the effects of such use) from France's plainly national agenda (in banning a life-threatening substance for the benefits of its citizens).

In *Shrimp Compliance*, the AB clarified *Shrimp* and met some of the *Asbestos* Panel's concerns.[247] The AB stated that in order to avoid the "unjustifiable" discrimination between member states, the nature and extent of the U.S. duty to negotiate with states was to negotiate in serious "good faith" without disparity in the amount of active participation and financial support in its negotiations, and without

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243. *Id.* at 174-75, ¶¶ 186-88.
244. *See supra* notes 230-39.
245. *See supra* notes 240-42.
246. *See supra* note 215.
247. *Shrimp Compliance* AB Report, *supra* note 165, at *23-35.

any requirement that the United States actually conclude an agreement with the member state.[248] The AB found that a domestic measure must be flexible in design and application in order to avoid being either "unjustifiable" or "arbitrary" discrimination among states.[249] However, flexibility meant that the United States could require "comparably effective," but not "essentially the same," practices of a state as a condition to trade rather than requiring that the United States tailor its measures to provide for each state's specific conditions.[250] The AB explicitly stated that to rule that no state could require some compliance with certain policies as a condition to trade would render most, if not all, of the Article XX exceptions "inutile."[251]

*Shrimp Compliance* improved on *Shrimp*'s interpretation of the chapeau requirements, and helps to further distinguish *Shrimp* from the *Asbestos* or FCTC case. Further interpretation of the "arbitrary and unjustifiable," as well as the "disguised," discrimination clauses by the AB should consider the *Asbestos* Panel's suggestions if they examine any domestic measures implementing the FCTC.

### E. *The Application to Tobacco Control*

To meet the exceptions to general international trade rules against quantitative restrictions, FCTC states must meet the two-step exceptions test. After *Asbestos*' explanation of Article XX(b), tobacco control measures should meet the requirements of the first prong: FCTC measures should be found necessary to protect human life and health by eliminating or reducing the well-documented and life-threatening health risks posed by tobacco.

A reading that could help to further distinguish *Asbestos*, and the FCTC, from *Shrimp* involves fleshing out the *Asbestos* AB's comment that the French ban on asbestos was "clearly designed and apt."[252] A state desiring tobacco control could argue that although the observation was made within the context of the Article XX(b) "necessity" of the measure, a "clearly designed and apt" measure, such as the French ban or a tobacco control measure, should exemplify a measure that is "undisguised" in design, architecture, or structure. Similarly, the clarity of the measure's design should be considered as evidence of its justified and non-arbitrary nature.

By contrast, unclear or "inapt" measures would certainly be arbitrary or unjustifiable because they would irrationally or

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248. *Id.* at *24-30.
249. *Id.* at *30-34.
250. *Id.*
251. *Id.* at *31.
252. *See supra* note 201.

incidentally interfere with trade. For example, vague, ambiguous, or overbroad measures would be examples of unclear, inept, and arbitrary, or unjustifiable measures. These elements could mirror the "relate to" requirement in Article XX(g), which would bar a domestic environmental measure that was "disproportionately wide in its scope and reach in relation to the policy objective."[253] In addition to the Panel's added four elements, these examples demonstrate the implicit limits to avoid the abuse of the exceptions—the chapeau's ultimate objective.

## VII. AN ALTERNATIVE TO THE WTO?

Should the WHO have its own adjudicatory organ? The creation of a judicial body would be consistent with the WHA's authority under Article 18(l) of the WHO Constitution, stating that a function of the WHA is to "establish such other institutions as it may consider desirable." In fact, the WHO has recently proposed a new body, the Committee of Arbitration, to interpret the IHR.[254]

The recent proliferation of international judicial bodies has created debate about the desirability of more international courts.[255] Opponents of the addition of more international courts argue that the ICJ should be the central organ of international law to promote structure and consistency throughout the varied body of international law.[256] However, two strong arguments support of the growing number of international courts.

First, because of the relative newness of international law, its authority is not yet solidified due to its selective acceptance and exercise.[257] Therefore, more international law should be created to encourage the use of, and to satisfy the demand for, international forums before prematurely constricting the supply of international law.[258] Second, a strict hierarchy has not been established, and different courts should compete for their positions in a hierarchy by "free competition," rather than a top-down "anointing" of the ICJ as

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253. Wofford, *supra* note 137, at 580.

254. *Future of the WHO*, *supra* note 39, at 1108.

255. Georges Abi-Saab, *Fragmentation or Unification: Some Concluding Remarks*, 31 N.Y.U. J. INT'L L. & POL. 919 (1999); Jonathan I. Charney, *The Implications of Expanding International Dispute Settlement Systems: The 1982 Convention on the Law of the Sea*, 30 AM. J. INT'L L. 69 (1996); Cesare P. R. Romano, *The Proliferation of International Judicial Bodies: The Pieces of the Puzzle*, 31 N.Y.U. J. INT'L L. & POL. 709 (1999).

256. Abi-Saab, *supra* note 255, at 920-25; Charney, *supra* note 255, at 70.

257. Charney, *supra* note 255, at 73-74.

258. *Id.*

the apex of the international dispute settlement system.[259]

The WHO could create its own judicial body for a number of reasons. For example, a WHO dispute settlement body could have more expertise and be more efficient and consistent than the ICJ in deciding technical matters.[260] The authority of the WHO regarding technical questions is evident in its constitutional functions, including the provision of technical assistance and support.[261] The WHO Constitution requires WHA members to be composed of "persons most qualified by their technical competence in the field of health."[262] Shared knowledge among the members of the WHO should enable the it to reach better decisions than courts without such expertise. Common knowledge could reduce differences in opinion, creating more consistency in the law.

Moreover, as the FCTC's proponent, the WHO would be the best-equipped to interpret the intended meaning of those treaties. A WHO judicial body could directly respond to legal challenges attempting to redraft the terms of the agreements, without having to rely on the abilities of an outside decisionmaker to correctly deduce its intent.

The WHO could establish an interpretive body—not subject to the limitations of other courts, such as the ICJ's jurisdictional restriction to cases involving states as parties.[263] New international courts, such as the European Court of Justice and the International Criminal Court, hear cases involving parties other than states, such as natural persons or corporations.[264] Given that the FCTC's biggest opponents are multinational tobacco corporations, the WHO could possibly benefit from this opportunity to exercise direct control over a complaint by a corporation.

However, the WHO has no "executive"-type enforcement power comparable to the WTO's dispute settlement system's threat of trade sanctions.[265] Without such sanctions, the benefits of a WHO opinion would be less tangible—perhaps merely the promotion of normative values of health at the expense of trade, the changing of cognitive perceptions about what is in a state's best interest, or as persuasive

259. *Id.* at 74.

260. Article 26 of the ICJ Statute states that the Court may form chambers of three or more judges to deal with particular categories of cases, for example, "labour cases and cases relating to transit and communications." ICJ Statute, *supra* note 107, art. 26.

261. WHO CONST. art. 2.

262. WHO CONST. art. 11.

263. ICJ Statute, *supra* note 107, art. 1.

264. PICT Research Matrix, *supra* note 104.

265. *See generally* WHO CONST.

authority to which domestic courts could cite.[266] It has been said that public international law works primarily through the "concurrence of decentralized pressures" generated by the international community,[267] and that the most lasting achievements in the areas of international human rights and environmental law have not been in the compliance of states, but rather have been made through the construction and recognition of their respective normative frameworks in treaties.[268] However, the promulgation of the FCTC itself has already served those roles. Given that the WTO has established a substantive shelter for health measures under Article XX(b), parties would not likely come before a merely-advisory court without enforcement powers.

## VIII. CONCLUSION

So far, the AB has applied the Article XX exceptions against a domestic measure that discriminated against foreign importers in favor of domestic producers (*Gasoline*), against a domestic measure that treated two importers differently (*Shrimp*), and in favor of a domestic measure necessary to human health that contained no preference between exporting countries or domestic producers (*Asbestos*). The AB established achievable protections for health measures in *Asbestos*, *Shrimp*, and *Shrimp Compliance*. Domestic measures implementing the FCTC that lack trade discriminations among foreign producers and domestic producers should be upheld under GATT's Article XX(b) exception.

In addition to the AB's consistent and rigorous legal interpretations and holdings regarding the Article XX exceptions, the AB has recognized the importance of non-trade objectives in its strong language at the end of *Gasoline*[269] and *Shrimp*.[270] These cases

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266. WHO, *Technical Briefing Series: What Makes International Agreements Effective? Some Pointers for the WHO Framework Convention on Tobacco Control*, at 34, WHO Doc. WHO/NCD/TFI/99.4, *at* http://tobacco.who.int/en/fctc/papers/paper4.pdf.

267. Charney, *supra* note 255, at 73.

268. *Future of the WHO*, *supra* note 39, at 1105.

269. *Gasoline* AB Report, *supra* note 161, at 633-34.

> It is of some importance that the Appellate Body point out what this 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. . . . WTO Members have a large measure of autonomy to determine their own policies on the environment (including its relationship with trade), their environmental

suggest that the WHO may be able to depend on the WTO to give a full amount of credit to the GATT's trade exceptions, and not to unduly thwart the progress of the FCTC on the basis of trade. Therefore, there is less cause to investigate alternatives to adjudication in the WTO until a less-duplicative scenario arises and, so far, the FCTC as it stands is sufficiently protected from objections on the basis of trade.

*Alyssa Woo**

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> objectives and the environmental legislation they enact and implement. So far as concerns the WTO, that autonomy is circumscribed only by the need to respect the requirements of the *General Agreement* and the other covered agreements.

*Id.*

270. *Shrimp* AB Report, *supra* note 163, at 174, ¶ 185.

> In reaching these conclusions, we wish to underscore what we have not decided in this appeal. We have *not* decided that the protection and preservation of the environment is of no significance to the Members of the WHO. Clearly, it is. We have *not* decided that the sovereign nations that are Members of the WTO cannot adopt effective measures to protect endangered species, such as sea turtles. Clearly, they can and should. And we have *not* decided that sovereign states should not act together bilaterally, plurilaterally or multilaterally, either within the WTO or in other international fora, to protect endangered species or to otherwise protect the environment. Clearly, they should and do.

*Id.*

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