

Singapore Management University Institutional Knowledge at Singapore Management University

Research Collection School Of Law

School of Law

7-2014

Tobacco Control in ASEAN

Locknie HSU

Singapore Management University, lockniehsu@smu.edu.sg

DOI: <https://doi.org/10.4337/9781783471522.00016>

Follow this and additional works at: https://ink.library.smu.edu.sg/sol_research



Part of the [Asian Studies Commons](#), [International Law Commons](#), and the [Law and Society Commons](#)

Citation

HSU, Locknie. Tobacco Control in ASEAN. (2014). *The Global Tobacco Epidemic And the Law*. 142-165. Research Collection School Of Law.

Available at: https://ink.library.smu.edu.sg/sol_research/1314

This Book Chapter is brought to you for free and open access by the School of Law at Institutional Knowledge at Singapore Management University. It has been accepted for inclusion in Research Collection School Of Law by an authorized administrator of Institutional Knowledge at Singapore Management University. For more information, please email libIR@smu.edu.sg.

Tobacco control in ASEAN

Locknie Hsu

I INTRODUCTION

Almost 30 per cent of the adult population of the Association of Southeast Asian Nations (ASEAN) smokes. All but one of the ASEAN members are currently parties to the *WHO Framework Convention on Tobacco Control* (WHO FCTC).¹ The outlier is Indonesia, the most populous of the ten ASEAN countries. Multilaterally, all ten ASEAN members are World Trade Organization (WTO) members and subject to its trade rules. Regionally, ASEAN is in the process of accelerated economic integration, with the aim of establishing the ASEAN Economic Community (AEC) in 2015.² A Common Effective Preferential Tariff (CEPT) system, set up under the ASEAN Free Trade Area (AFTA) arrangement, has existed since 1992,³ propelling members towards trade liberalisation and elimination of tariffs. At the same time, ASEAN has been negotiating trade and investment treaties with external partners, which have separate liberalisation targets and implications. In tandem, the overarching ASEAN Strategic Framework on Health and Development (2010–15)⁴ was established under the ASEAN Socio-Cultural Community (ASCC) Blueprint,⁵ to introduce and implement health-related initiatives in ASEAN. One area of focus of this framework is healthy lifestyles.⁶ In 2010, under these auspices, ASEAN health ministers committed to addressing tobacco control as a priority to promote healthy living. As a result, legislative and non-legislative initiatives have been introduced. In July 2012, ASEAN health ministers announced that tobacco would not be included in tariff liberalisation of the AFTA.

ASEAN's mosaic of tobacco control laws and regulations is therefore a work in progress, as the region continues to step up economic integration and liberalisation aggressively while managing important health issues such as those relating to tobacco control. This chapter examines the tobacco-related laws and policies of this dynamic and diverse region, including both tariff and non-tariff means of control.

II ASEAN AS AN ECONOMIC COMMUNITY

ASEAN is a vast economic market. Realisation of the economic potential and attraction of this market led leaders to begin a process of economic integration in the early 1990s, with the first significant, legally binding step in this direction being the establishment of the AFTA in 1992.⁷ This established, among other arrangements, the CEPT system of tariffs within ASEAN to promote a freer flow of goods in the region.

The agreements establishing the AFTA provided for gradual integration among its members. The six founding members of ASEAN – Brunei Darussalam, Indonesia, Malaysia, Philippines, Singapore and Thailand – committed to speedier dismantling of trade barriers than the four members who joined ASEAN later – Cambodia, Lao PDR, Myanmar and Vietnam. Members were permitted to provide for a number of exclusions and limitations, depending on their areas of economic sensitivity. At various stages over the years, timelines for tariff reductions or eliminations and other forms of liberalisation have been provided to move the integration process forward.⁸

In 2003, in Bali, ASEAN leaders signed the *Declaration of ASEAN Concord II* treaty (the *Bali Concord*) to establish an ‘ASEAN Community ... comprising three pillars, namely political and security cooperation, economic cooperation, and socio-cultural cooperation’.⁹ In 2007, the ASEAN Economic Blueprint was published to further flesh out the roadmap for implementation of the *Bali Concord* objectives.¹⁰ Of the three pillars, the economic pillar is most pertinent for present purposes, as it deals with economic barriers and initiatives that have a bearing on tobacco control within ASEAN. However, as health-related issues fall under the socio-cultural pillar, some decisions thereunder are pertinent to tobacco control as well.

To implement the AEC, members entered into the *ASEAN Trade in Goods Agreement* (ATIGA)¹¹ to accelerate integration in trade in goods.

A Tobacco Trade and ASEAN

ASEAN members have maintained import and other barriers to tobacco products, as have many other countries. At the time of establishment of the AFTA and, later, the ATIGA, there was no specific discussion of economic integration and its relationship with tobacco control.¹² With the tobacco control issue increasingly moving to the forefront globally (partly due to implementation obligations of countries under the WHO FCTC and partly due to the prominent legal challenges brought against certain states for their tobacco control laws), it became a formal topic of

discussion and for action for ASEAN health ministers in 2012. In July 2012, the health ministers announced that members would withdraw tobacco products from the tariff liberalisation plan under the AFTA.¹³

This would be significant for two reasons: it would represent a departure from the liberalisation exercise of the AFTA, and it would expressly recognise tobacco control as a legitimate health measure at an ASEAN-wide level. It would also have a significant impact on certain ASEAN members (such as Indonesia) where there are both domestic and foreign-owned tobacco product companies, which currently enjoy the zero or low tariffs on such products in the region due to the CEPT scheme.¹⁴ However, there appear to have been no further public statements on the implementation of this 2012 announcement so far. The ATIGA therefore continues to include tariff commitments on tobacco products, as can be seen from the ASEAN members' ATIGA Tariff Schedules of 2009.¹⁵

It should be noted that article 19.2(h) (read with article 22.2) of the ATIGA expressly allows a member state to exclude products placed in Schedule H from tariff commitments for reasons provided under article 8 (a general exceptions provision). Article 8(b), in particular, is an exception resembling article XX of the *General Agreement on Tariffs and Trade 1994* (GATT 1994),¹⁶ in that it covers measures necessary for the protection of human health. Hence, article 19 clearly provides ASEAN members with the means to exclude from tariff concessions products that affect human health.

Below is a summary of the ASEAN members' ATIGA commitments on tariffs for tobacco products, based on their published schedules:

1. Brunei Darussalam has committed to reduce all tobacco tariffs to zero as of 2010.
2. Cambodia has committed to reduce all tobacco tariffs to 0–5 per cent by 2015.
3. Indonesia has committed to reduce all tobacco tariffs to zero as of 2012.
4. Lao People's Democratic Republic has committed to reduce all tobacco tariffs to 5 per cent by 2015.
5. Malaysia has committed to reduce all tobacco tariffs to 5 per cent as of 2010.
6. Myanmar has committed to eliminate tariffs completely on several tobacco products as of 2013. For the remaining products, the commitment is to reduce tariffs (depending on the product line) to between 0 and 5 per cent by 2015.

7. The Philippines has committed to reduce all tobacco tariffs to zero as of 2010.
8. Singapore has committed to apply zero tariffs to tobacco products from the date of entry into force of the ATIGA, ie May 2010.
9. Thailand has committed to reduce all tobacco tariffs to zero as of 2012.
10. Vietnam has scheduled all tobacco products under 'category H', identified in article 19(2)(h) of the ATIGA as goods not subject to import duties reduction or elimination, by virtue of reasons under article 8 (the general exceptions provision). It is the only ASEAN member to have scheduled all its tobacco products under 'category H' to date.

Should the health ministers' announcement of July 2012 become a reality, one might expect to see a change to the schedules of the nine members which have so far not scheduled tobacco products as category 'H' exclusions.

Apart from intra-ASEAN obligations under the ATIGA, ASEAN member states have trade liberalisation obligations to non-ASEAN trade partners in separate free trade agreements (FTA).¹⁷ These contain separate liberalisation commitments that may include tobacco-related products, services and investments.

ASEAN is presently negotiating a *Regional Comprehensive Economic Partnership* (RCEP) agreement.¹⁸ ASEAN states are also pursuing FTA negotiations as individual states, while a small number of others (Brunei Darussalam, Malaysia, Singapore and Vietnam) are participating in negotiations for a Trans-Pacific Partnership Agreement (TPP), which includes the United States, a tobacco-exporting country.

B WTO Obligations and ASEAN

All ASEAN members are members of the WTO and subject to obligations under its multilateral agreements. These include the GATT 1994, the *General Agreement on Trade in Services* (GATS),¹⁹ the *Agreement on Sanitary and Phytosanitary Measures* (SPS Agreement)²⁰ and the *Agreement on Technical Barriers to Trade* (TBT Agreement).²¹ Some disputes relating to ASEAN members with regard to tobacco control measures have arisen, both under the original GATT 1947²² system and under the WTO system. Under the GATT 1947 system, the US complained about Thailand's fiscal measures before a panel in *Thailand – Cigarettes*.²³ As a result of this action, Thailand had to amend its measures to ensure that they were non-discriminatory. More recently, under the WTO system, the

Philippines successfully challenged Thailand's measures affecting imported cigarettes in *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines*.²⁴ The TBT Agreement was used in a tobacco-related challenge in the WTO brought by Indonesia against the United States. In *US – Clove Cigarettes*,²⁵ Indonesia challenged US regulations affecting the import of Indonesian clove cigarettes. This culminated in a decision by the Appellate Body requiring the US to bring its measures into conformity with the TBT Agreement.²⁶

SPS Agreement and TBT Agreement-type commitments that may have a bearing on tobacco control measures also exist in certain ASEAN FTAs. An example is the *ASEAN–Australia–New Zealand Free Trade Area*, in which ASEAN members and their trade partners, Australia and New Zealand, reaffirm the SPS Agreement and TBT Agreement rights and obligations, making such rights and obligations applicable under the FTA.²⁷

III ASEAN-WIDE TOBACCO CONTROL INITIATIVES

The ASCC has produced a number of tobacco control initiatives. For example, the *2009 ASEAN Strategic Framework on Health and Development (2010–2015)* included the promotion of healthy lifestyles within ASEAN for implementation under the ASCC Blueprint, with tobacco control as one of six focus areas mentioned.²⁸ In March 2012, a specific initiative was announced at the World Conference on Tobacco or Health held in Singapore, namely, the ASEAN Focal Points on Tobacco Control,²⁹ to help implement the ASCC and to promote a smoke-free ASEAN. Pursuant to that initiative, a group has met annually since 2010 to discuss health cooperation initiatives.³⁰ An ASEAN Bi-Annual Work Plan on Tobacco Control was also launched at the conference.³¹

Separately, a non-governmental alliance known as the Southeast Asia Tobacco Control Alliance (SEATCA) has been working across different sectors to promote and accelerate tobacco control within the ASEAN region. SEATCA has been highly active with various initiatives, including the ASEAN Focal Points on Tobacco Control, which aim to help member states implement the WHO FCTC recommendations and tobacco control 'best practices'.

The ASEAN Community has evolved in such a way that public health issues – such as tobacco control – fall within a separate pillar from the AEC, and are part of the ASCC, under the control of the ASEAN health ministers. In 2002, the Regional Action Plan on Healthy ASEAN Lifestyles was announced, in which tobacco control was expressly

identified as a 'priority area'.³² The 'Programme of Work' in the plan stated the following broad target:

Tobacco control – to develop and implement national action consistent with the Framework Convention on Tobacco Control, as appropriate, for example, on smuggling, taxation, product advertising, distribution, sale, and agricultural production ...

At the same time, ASEAN's participation in the WTO and in multiple FTAs necessarily complicates the introduction of trade and investment-related measures affecting tobacco products and related services. Assessing the legality of a contemplated measure is a multi-factorial exercise requiring consideration of all relevant provisions and any applicable exceptions or carve-outs.

There is a need therefore to ensure coherence between the work of economic officials and health officials, at both regional and multilateral levels. Within ASEAN, officials implementing the AEC and ASCC need to work collaboratively in dealing with tobacco control measures under the economic and socio-cultural 'pillars'. In trans-regional negotiations such as those regarding the TPP, as well as in multilateral discussions in the WTO and WHO, ASEAN needs to develop a coherent and united stand with regard to the place of tobacco control and the WHO FCTC within trade negotiations.

IV AN OVERVIEW OF NATIONAL TOBACCO CONTROL METHODS IN ASEAN MEMBERS

ASEAN members employ a number of national measures in tobacco control. These include border measures such as tariffs, as well as internal measures such as taxes and sale, packaging and use restrictions.

A Tax Measures

ASEAN countries utilise a variety of fiscal tools for tobacco control. These include excise taxes, value-added or goods and services taxes, and others.³³ Except in Brunei Darussalam and Singapore, import tariffs are also imposed on top of these taxes. These measures can significantly affect the affordability of cigarettes and related products.³⁴

However, establishment of the AFTA and its CEPT tariff scheme (and more recently, the ATIGA) have, as mentioned, created pressure and commitments on ASEAN members to reduce or eliminate their import

tariffs on tobacco products, allowing for more affordable imports to enter their borders.³⁵

B Non-Tax Measures

While the import of cigarettes and other common tobacco products is permitted in ASEAN, some tobacco products are specifically prohibited. In Singapore, for example, the import and sale of chewing tobacco is prohibited.³⁶

Like other countries, authorities have to deal not only with more familiar tobacco products but also emerging products with health risks associated with the use of tobacco or nicotine in them. One such example is the relatively new product 'electronic cigarettes' (or 'e-cigarettes'). The treatment of such products within ASEAN is not presently uniform.

In Singapore, for example, the importation of 'imitation tobacco products' is prohibited.³⁷ Section 16(1) of the *Tobacco (Control of Advertisements and Sale) Act* defines such products as follows:

any confectionery or other food product or any toy or other article that is designed to resemble a tobacco product or the packaging of which is designed to resemble the packaging commonly associated with tobacco products.³⁸

Within this provision, the authorities include items such as e-cigarettes, which mimic many features of conventional cigarettes but do not contain all the chemical substances in them.³⁹

In contrast, e-cigarettes are permitted (and increasingly popular) in the Philippines, although the authorities are becoming more concerned about their use.⁴⁰

Other non-tax means of control reflect various aspects of the WHO FCTC such as the use and expansion of smoke-free zones within each country; prohibiting advertisements; prohibiting misleading information on packaging, promotional and sponsorship activities; strict packaging requirements; ingredient controls; point-of-sale controls; age controls.⁴¹ Within some of these measures, some difficult issues arise due to modern technology and communication tools, such as the possibility and ease of cross-border advertising through the Internet and the availability of such advertisement on common devices such as personal computers and mobile telephones. Such matters are discussed later in relation to challenges for ASEAN states.

Within ASEAN, packaging requirements are well established, though with differing levels of stringency.

Table 9.1 Overview of ASEAN pictorial warning measures

ASEAN member	Main tobacco control legislation	Whether pictorial warning mandatory and if so, minimum percentage of packaging front and back
Brunei Darussalam	<i>Tobacco Order 2005 and Regulations</i>	Yes, 75% (from September 2012) ¹
Cambodia	<i>Tobacco Control Act 2010*</i>	Yes, 30%
Indonesia	<i>Law No 36/2009 on Health</i> ^{*2}	Yes (40%, with new 2012 Regulations, to take effect from June 2014) ³
Lao PDR	<i>Law of Tobacco Control 2009 and Decision on Printing of Health Warnings on Cigarette Packets and Cartons</i> ^{*4}	No*
Malaysia	<i>Control of Tobacco Products Regulation 2004</i>	Yes, top 40% for front and top 60% for back
Myanmar	<i>Control of Smoking and Consumption of Tobacco Product Law 2006⁵ (effective 4 May 2007)*</i>	No*
Philippines	<i>Tobacco Regulation Act 2003*</i>	No*
Singapore	<i>Tobacco (Control of Advertisements and Sale) Act 2011 and Tobacco (Control of Advertisements and Sale) (Labelling) Regulations 2012</i>	Yes, 50%
Thailand	<i>Tobacco Products Control Act 1992; Non-Smokers' Health Protection Act 1992⁶</i>	Yes, 85% (2013) ⁷
Vietnam	<i>Tobacco Control Law of 2012, Decision No 1315/QD-TTg⁸</i>	Yes, from 1 May 2013, 50% ⁹

* Source: Author's compilation from Southeast Asia Tobacco Control Alliance, *The ASEAN Tobacco Control Report* (June 2012) 5.

Notes:

- Tobacco (Labelling) (Amendment) Regulations 2012* (Brunei Darussalam).
- See Arientha Primanitha, 'Tobacco Bill Requires Graphic Warnings to be Displayed on Cigarette Packaging in Indonesia', *Jakarta Globe* (online), 9 January 2013; Tommy Dharmawan, 'A New Breakthrough on Tobacco Control', *Jakarta Post* (online), 26 January 2013; Sara Schonhardt, 'Is Indonesia, One of Big Tobacco's Last Frontiers, Closing?', *The Christian Science Monitor* (online), 4 March 2013.

- 3 *Tobacco Regulation Peraturan Pemerintah/PP No 109 of 2012, Protection of Materials Containing Form of Addictive Substances Tobacco Products for Health*, effective 24 December 2012, <http://www.depkes.go.id/downloads/InfoTerkini_PP109_2012_Tentang_Tembakau.pdf>.
- 4 Lao People's Democratic Republic, Ministry of Health, *Decision on Printing Health Warnings on Cigarette Packets and Cartons* (23 May 2006) <<http://seatca.org/dmdocuments/Laos%20-%20Decision%20on%20Health%20Warnings.pdf>>.
- 5 Southeast Asia Tobacco Control Alliance, *The ASEAN Tobacco Control Report 2012* (June 2012) 4 <<http://seatca.org/dmdocuments/ASEAN%20Tobacco%20Control%20Report%202012.pdf>>.
- 6 BE 2535 (1992), available at Tobacco Control Laws <<http://www.tobaccocontrolaws.org/files/live/Thailand/Thailand%20-%20Non-smokers%20HPA%20.pdf>>.
- 7 Southeast Asia Tobacco Control Alliance, *Regional Alliance Congratulates Thailand's Health Minister on 85% Health Warnings on Cigarette Pack* (11 March 2013) Tobacco Control Resource Center <<http://seatca.org/?p=2213>>.
- 8 Southeast Asia Tobacco Control Alliance, *The ASEAN Tobacco Control Report 2012* (June 2012) 4 <<http://seatca.org/dmdocuments/ASEAN%20Tobacco%20Control%20Report%202012.pdf>>.
- 9 C Quyen, 'Health Warnings in Pictures to be Printed on Cigarette Packs', *VietnamNet Bridge* (29 January 2013) <<http://english.vietnamnet.vn/fms/society/58290/health-warnings-in-pictures-to-be-printed-on-cigarette-packs.html>>.

V CHALLENGES FACING ASEAN: WHO FCTC IMPLEMENTATION AND OTHER ISSUES

A Diversity within ASEAN

A number of challenges face ASEAN members in implementing WHO FCTC obligations, where they apply. Within the ten ASEAN members, there is a wide diversity in cultures, languages spoken and economic means (and, accordingly, differences in public funding available for tobacco control initiatives). There are also differences in the business interests of member states; some members have tobacco growers and state-run monopoly tobacco bodies, while others do not.⁴²

It has also been reported that in Asian countries, including the ASEAN states, 'tobacco has an important cultural role, and in particular among men, the exchange of cigarettes is often used in social interactions'.⁴³ In addition, children and teenagers may be exposed to tobacco products through easy access at points of sale (especially where there is no minimum age requirement for purchase, such as in Indonesia)⁴⁴ and through family members, and thus may be tempted to begin smoking.

These cultural and familial aspects may signal a challenge for which legislation may not be the most effective solution. Instead, 'soft' non-legal approaches to inculcate change may be necessary.⁴⁵

B Levels of Corruption

Another challenging problem within ASEAN states that may affect tobacco control is corruption.⁴⁶ According to the Corruption Perceptions Index 2012 published by Transparency International,⁴⁷ ASEAN's rankings are as shown in Table 9.2.

Table 9.2 ASEAN corruption perception rankings

Global rank	Country
5	Singapore
46	Brunei Darussalam
54	Malaysia
88	Thailand
105	Philippines
118	Indonesia
123	Vietnam
157	Cambodia
160	Lao PDR
172	Myanmar

With significant corruption perception levels in several ASEAN countries, the possibility of interference with policymaking is real and needs to be tackled effectively.

C Possible Next Steps

Relatively up-to-date report cards dating from 2011–12 provided by all ASEAN members to the WHO (except for Indonesia, which remains outside the WHO FCTC) show that the implementation of tobacco control measures under the WHO FCTC recommendations has been proceeding at non-uniform speed within ASEAN, with Singapore and Thailand being among those leading with more wide-ranging measures than others.⁴⁸

Some have questioned the legal status of the recommendations in the guidelines for implementing the WHO FCTC articles – and hence whether they are binding – because specific steps in the recommendations are being challenged in international arbitrations, as being violations of investment

treaty commitments (such as expropriations of intellectual property through plain packaging) or as being unconstitutional.

1 Point-of-sale display prohibitions

A number of countries have taken steps to ban visual displays of such products at their point of sale. These measures have given rise to legal actions. The tobacco industry has sought to challenge such a measure within the European Free Trade Area (EFTA)⁴⁹ after Norway, an EFTA member, chose to introduce such a ban.⁵⁰ In September 2011, the EFTA Court ruled in favour of a visual display ban in the European Economic Area (EEA) states in *Philip Morris Norway AS v The Norwegian State*, provided certain prerequisites were met.⁵¹

A number of ASEAN members such as Singapore are now considering prohibiting the display of tobacco products at points of sale.⁵² Within ASEAN, Thailand has already introduced such a ban.⁵³ No doubt the litigation elsewhere will offer ASEAN valuable insight into the types of arguments raised, and the reasoning used by the deciding tribunals.

2 Plain packaging

So far, no ASEAN member has announced that it will introduce plain packaging. No doubt, ASEAN members are keenly observing the disputes being faced by Australia and Uruguay in this regard. Australia's introduction of mandatory plain packaging for cigarettes in 2012 has so far been challenged in three forums: in the Australian national court system, in investment treaty arbitration and, most recently, at the WTO. Except for the national court action, the disputes are ongoing. In the case of the national court challenge, the Australian measures were challenged, unsuccessfully, as being unconstitutional.⁵⁴ Australia is also facing investment treaty arbitration brought against it under the Australia–Hong Kong Bilateral Investment Treaty,⁵⁵ and trade actions under the WTO brought by the Dominican Republic, Honduras, Ukraine, Cuba and, most recently, Indonesia.⁵⁶

With the numerous bilateral investment treaty and FTA obligations of ASEAN and its component states, these disputes will offer invaluable lessons on the applicability of various provisions and exceptions which may be *in pari materia* with those affecting ASEAN states.

3 Control of advertising and promotion through the Internet, social media, films and educational institutions

(a) *Domestic* By now, most ASEAN states have some form of restrictions over the domestic advertising of tobacco products.⁵⁷ This includes

even Indonesia, the only non-WHO FCTC party, which passed a new tobacco control law in January 2013.⁵⁸ In Indonesia, however, sponsorship of cultural and sporting events, with blatant accompanying publicity for tobacco brands, remains possible.⁵⁹

(b) *Cross-border* Article 13 of the WHO FCTC requires a ‘comprehensive ban of all tobacco advertising, promotion and sponsorship’ where this is constitutionally possible. This includes the prohibition of cross-border advertising, promotion and sponsorship. The guidelines on implementing article 13 state that the ban should include the placing of advertisements ‘on the Internet or another cross-border communications technology by any person or entity *within* the territory of a Party’⁶⁰ and to ‘any person or entity that broadcasts tobacco advertising, promotion and sponsorship that could be received in another State’.⁶¹ The guidelines also elaborate on the requirement to ban cross-border advertising, promotion and sponsorship from *entering* a Party’s territory under article 13.7 of the WHO FCTC. Australia, for example, introduced a prohibition on Internet advertising of tobacco products in September 2012. This includes dissemination through the Internet via a computer as well as via a mobile telephone.⁶²

While ASEAN members do control ‘mainstream’ domestic advertising of tobacco products, such as advertisements in print and on radio and television,⁶³ advertising on the Internet and social media (such as Facebook and Twitter) remains largely unregulated. Such use of the Internet remains available, and promotional clips or scenes on the use of tobacco products are easily viewable.⁶⁴

In Singapore, the *Smoking (Control of Advertisements and Sale of Tobacco) Act* prohibits advertising of tobacco products, and the prohibition turns on what amounts to ‘publishing’ matters covered by the Act. The Act defines ‘publish’ as follows:

‘publish’, with its grammatical variations, in relation to an advertisement, includes issuing, showing, displaying, exhibiting or making known an advertisement in any manner whatsoever.⁶⁵

Relatedly, the Act defines an ‘advertisement’ as follows:

‘advertisement’ includes any notice, circular, pamphlet, brochure, programme, price-list, label, wrapper or other document and any announcement, notification or intimation to the public or any section thereof or to any person or persons made –

(a) orally or in writing;

- (b) by means of any poster, placard, notice or other document affixed, posted up or displayed on any wall, billboard or hoarding or on any other object or thing;
- (c) by means of producing or transmitting sound or light and whether for aural or visual reception or both;
- (d) by means of any writing on any vehicle, ashtray, calendar, cigarette-lighter, clock or any other object or thing; or
- (e) in any other manner whatsoever ...⁶⁶

Unlike the Australian provision mentioned earlier, this definition makes no express reference to advertising conveyed via the Internet or mobile telephony. While para (c) could possibly be invoked, and para (e) is literally wide enough to include such advertising, the opening paragraph itself appears to be rather limited, judging from the illustrative words given.⁶⁷

During a recent parliamentary debate, questions on Internet advertising of tobacco products and on-screen smoking received a relatively non-committal answer from the then health minister, which suggests that the existing advertising provisions mentioned above may not cover Internet advertising.⁶⁸

Increasing restrictions on traditional promotion channels will be likely to cause tobacco entities to use social and new media more. A potential challenge is how to pre-empt this before it takes root in currently unregulated media such as Facebook, Twitter, and YouTube videos. This is one issue already foreseen by the New Zealand Government as it considers more tobacco control regulations.⁶⁹

A related issue is online, cross-border sale of tobacco products. As Internet purchasing increases, the variety of goods available and their accessibility across borders will grow. A review of popular Internet purchasing sites revealed that a variety of cigarettes, cigars and related products are available for order online. Article 11 of the *Protocol on Illicit Trade in Tobacco Products* attempts to address such Internet sales and suggests regulatory measures.⁷⁰

(c) *Smoking in films and radio and television programmes* There is no evident control over the screening of films or television containing smoking scenes. From Hollywood to Bollywood, heroes and villains are often shown to be smoking on screen. While some calls on film-makers have been made, this is largely unaddressed within ASEAN at the moment.⁷¹ By contrast, it has been reported that China has restricted smoking in films and television programmes.⁷²

(d) Sponsorship through ‘corporate social responsibility’ programmes – tobacco promotion control in leisure activities and in educational institutions While tobacco-linked sponsorship has been restricted or prohibited in ASEAN, some forms of sponsorship of education programmes can still be observed.⁷³ For developing countries in ASEAN, educational opportunities are highly prized. The link between tobacco and education is therefore particularly dangerous, given that there could be a strong temptation to promote education through tobacco sponsorship, whether through financial support or scholarships in the name of tobacco entities.

In Singapore, such sponsorship is not permitted. Further, to address the risk of children and youths being exposed to smoking addiction, Singapore law specifically prohibits the use of tobacco products by persons below 18 years of age, as well as the sale or *giving* of tobacco to them.⁷⁴ This addresses exposure risks both in and outside of educational institutions.

With the recent introduction of compulsory financial contributions by tobacco entities to national ‘tobacco control funds’ in ASEAN states (such as those newly established in Lao People’s Democratic Republic and Vietnam), if such funds could be used to help support educational institutions, it would alleviate the need for direct sponsorship by tobacco entities. Such funds could also strongly promote aggressive non-smoking initiatives among those most vulnerable or susceptible to adopting the smoking habit in that particular community, such as children and youths.

4 Other specific issues within ASEAN

Apart from the above challenges, there are further challenges which relate to the economic profile or regulator’s position in some ASEAN states.

(a) Members that are host to tobacco growers or tobacco businesses Within ASEAN, Indonesia, Malaysia, the Philippines and Thailand are tobacco growers, apart from being host to tobacco sale and export companies.⁷⁵ With the exception of Malaysia, where the grower industry is much less significant in terms of output and employment, such states have an additional, real challenge of ensuring that efforts to comply with the WHO FCTC and its guidelines are not hampered by the interests of tobacco businesses.

(b) State bodies in potential conflict of interest positions In some ASEAN countries, there are state-related bodies that are involved in the tobacco trade, and conflicts of interest can arise in the state’s regulation

of tobacco. In Thailand, with a long history beginning in 1939, the Thailand Tobacco Monopoly (TTM), a state enterprise, operates under the auspices of the Ministry of Finance. Thai law previously granted the TTM a monopoly to produce cigarettes within Thailand, but this changed following pressure from trade partners such as the United States.⁷⁶

D Health Exceptions: A Regulatory and Negotiating Strategy for FTAs

With tobacco industry entities raising legal challenges frequently against state actions on tobacco control, an important consideration for ASEAN would be whether general exceptions of the kind found in GATT article XX can offer legal protection.

There are major general exceptions relating to public health in ASEAN trade and investment treaties.⁷⁷ These include the following:

1. article 9 of *the Agreement on the Common Effective Preferential Tariff (CEPT) Scheme for the ASEAN Free Trade Area (AFTA)* (CEPT Agreement);⁷⁸
2. article 12 of *the Framework Agreement on Enhancing ASEAN Economic Cooperation 1992*; ⁷⁹
3. the 1995 Protocol to amend the CEPT Agreement included all manufactured and agricultural goods within the CEPT Scheme (see amended article 3 of the CEPT Agreement);
4. article 8(b) of ATIGA and Chapter 8 of the SPS Agreement, especially article 81(3); and
5. article 17 of the *ASEAN Comprehensive Investment Agreement*.

Some ASEAN treaties signed with external partners, such as the *ASEAN–China Comprehensive Investment Agreement*, also contain a general exception provision which protects necessary health measures.⁸⁰ It has been rightly pointed out that ASEAN countries should be mindful of the ‘necessity’ requirement under public health exceptions resembling article XX(b) of the GATT 1994, when formulating or introducing tobacco control measures.⁸¹

Interestingly, in a side letter relating to the Services Chapter of the *Australia–United States Free Trade Agreement*,⁸² the following was expressly noted by the two signatories, with reference to their negotiations on Chapter 10 (Investment) and Chapter 11 (Cross-Border Trade in Services):

During the negotiations, the Parties discussed the objectives behind the regulation of *retail trade services of tobacco products*, alcoholic beverages, and firearms. *Such regulations will typically fall within the exceptions provided under the sub-paragraphs (a), (b) and (c)(iii) of Article XIV of GATS, as incorporated in the Agreement.*⁸³

As the above is expressed by the signatories to be an integral part of the FTA, it forms an important express link between each party's regulation of trade services of tobacco products, and *inter alia*, the *health* exception of GATS article XIV(b). By contrast, there is no equivalent statement regarding the general exception in article 22.1 of the FTA, which incorporates article XX of the GATT 1994 and its interpretative notes. Nonetheless, this side letter language forms an interesting basis for other negotiating parties to argue for a parallel, express linkage between regulation of trade of tobacco *products* and an article XX(b) GATT-type provision, as a minimum.

In the ASEAN–Japan FTA,⁸⁴ tobacco products have been excluded altogether from the tariff liberalisation commitments of some ASEAN member states.⁸⁵

The negotiating parties to the TPP comprise Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, Vietnam and the United States, with the most recent additions being Canada, Mexico and Japan. The following points are noteworthy within this group:

1. Only four are ASEAN members – Brunei Darussalam, Malaysia, Singapore and Vietnam (and are therefore subject to ASEAN treaty commitments).
2. Among the ASEAN participants, Brunei Darussalam and Singapore do not apply tobacco import tariffs, but otherwise have strong tobacco control laws.
3. Some participating countries have strong private interests in tobacco production and export, such as the US and Japan.
4. Of the 12 participating countries, only the US, though a signatory, is not a party to the WHO FCTC.⁸⁶

In a press release of May 2012, the United States Trade Representative (USTR) set out a proposal on how the TPP might approach tobacco products.⁸⁷ Three salient points from this proposal are mentioned here. First, that tariff phase-outs would be applicable to such products under the TPP. Although subsequent to this proposed position, there have been calls for the TPP to exclude tobacco products from tariff elimination

requirements, there has been no change from the initial announcement on this point.⁸⁸

Secondly, it was proposed that the TPP ‘would explicitly recognize the unique status of tobacco products from a health and regulatory perspective’. It is not clear what this would entail, although it appears to at least have been intended to pave the way for an express statement separating tobacco products in some way from other products under the TPP.

Thirdly, the following ‘safe harbour’ was put forward:

The proposal would include language in the ‘general exceptions’ chapter that allows health authorities in TPP governments to adopt regulations that impose origin-neutral, science-based restrictions on specific tobacco products/classes in order to safeguard public health. This language will create a safe harbor for FDA tobacco regulation, providing greater certainty that the provisions in the TPP will not be used in a manner that would prevent FDA from taking the sorts of incremental regulatory actions that are necessary to effectively implement the Tobacco Control Act, while retaining important trade disciplines (national treatment, compensation for expropriations, and transparency) on tobacco measures.⁸⁹

Since this proposal, polarised views have emerged, and there appears to have been no official negotiating draft tabled on this as yet. One concern arising from the above proposal by its specific reference to ‘health authorities’ – as opposed to any government authority – is that non-health authority tobacco control measures, such as tax and intellectual property measures, would be excluded from this ‘safe harbor’.⁹⁰

In August 2013, the United States made a new proposal on tobacco for the negotiations, maintaining the market access element. The proposal also envisages a general exception for matters necessary to protect human life or health, and a provision that states that the TPP parties understand that the general exception applies to tobacco health measures. The proposal further provides that prior to challenging a TPP party’s tobacco regulatory measure, health authorities of the concerned parties are to meet to discuss the measure.⁹¹ Malaysia has reportedly provided a counter-proposal, which seeks to carve tobacco out from the TPP.⁹² The issue of tobacco in the TPP is discussed further in Chapter 10 of this volume.

Finally, in some treaties, indirect expropriation is defined and limited to exclude non-discriminatory regulatory action taken to protect health.⁹³

For ASEAN, therefore, it is imperative that a clear negotiating stance on tobacco control measures and any applicable exceptions, whether in the form of a general health exception similar to GATT article XX(b) or

a specific exception applicable to tobacco products and their regulation, be developed and implemented.

VI CONCLUSION

Tobacco control in ASEAN has been growing steadily, thanks to national initiatives and to participation in the WHO FCTC and its associated initiatives. The relatively recent focus on tobacco control at the ASEAN health ministers' level and ASEAN-wide actions to regulate tobacco, particularly under the auspices of the ASCC, are important new directions. As the majority of ASEAN members continue to implement the requirements of the WHO FCTC, one can expect more measures to be introduced. Domestically, the majority of ASEAN members will be grappling with further implementation of WHO FCTC obligations in various aspects of tobacco control. An area receiving relatively little attention in ASEAN at the moment but vital in the tobacco control discussion is the use of the Internet, social media and films for cross-border advertising, promotion and sale of tobacco products, especially among younger consumers. The discrepant resources and priorities within ASEAN states create a potential hurdle to a unified approach on this front.

At the same time, forces that may act to promote the sale and use of tobacco products such as trade-liberalising FTAs form part of ASEAN's calculus in tackling tobacco control. Such agreements aim to reduce barriers to movement of goods, services and investments, including those related to tobacco, with the potential result of greater access to such goods by consumers in ASEAN.

Though the ongoing TPP negotiations involve only a small number of ASEAN countries, they are critical because the treatment of tobacco control in a final TPP agreement will have implications for both the tobacco-exporting and tobacco-importing participants, for future acceding parties, as well as for future treaties should the TPP be used as a sort of negotiating 'template'. There is therefore an important and urgent opportunity in these negotiations to fashion provisions that satisfactorily take into account participants' tobacco regulatory expectations (and, indeed, obligations, such as those under the WHO FCTC) and the public health dimension to such a trade treaty. The ongoing bilateral and multilateral tobacco control disputes will offer important legal and policy lessons, and these developments, together with initiatives such as the TPP, are no doubt being keenly watched by ASEAN.

NOTES

1. Opened for signature 16 June 2003, 2302 UNTS 166 (entered into force 27 February 2005) (WHO FCTC).
2. See *Declaration of ASEAN Concord II (Bali Concord)*, signed 7 October 2003, and ASEAN Economic Blueprint, adopted by ASEAN leaders at the 13th ASEAN Summit, 20 November 2007, Singapore.
3. *Agreement on the Common Effective Preferential Tariff (CEPT) Scheme for the ASEAN Free Trade Area*, signed and entered into force 28 January 1992.
4. Endorsed by the 10th ASEAN Health Ministers Meeting, 22 July 2010, Singapore.
5. Endorsed by the 14th ASEAN Summit on 1 March 2009, Thailand.
6. ASEAN, *Operationalisation of ASEAN Strategic Framework on Health Development 2010–2015* <http://www.globinmed.com/index.php?option=com_content&view=article&id=103894:operationalisation-of-asean-strategic-framework-on-health-development-2010-2015&catid=265&Itemid=316>.
7. *Framework Agreement on Enhancing ASEAN Economic Cooperation*, signed 28 January 1992 (entered into force 28 January 1992); *Agreement on the Common Effective Preferential Tariff Scheme for the ASEAN Free Trade Area*, signed 28 January 1992 (entered into force 28 January 1992).
8. See Chia Siow Yue, 'Accelerating ASEAN Trade and Investment and Integration: Progress and Challenges' in Philippe Gugler and Julien Chaisse (eds) *Competitiveness of the ASEAN Countries, Corporate and Regulatory Drivers* (Edward Elgar Publishing, 2010); Hadi Soesastro, 'Implementing the ASEAN Economic Community (AEC) Blueprint' in Hadi Soesastro (ed) *Deepening Economic Integration – The ASEAN Economic Community and Beyond* (Research Project Report 2007-1-2, ERIA, 2008) 47 <http://www.eria.org/publications/research_project_reports/images/pdf/PDF%20No.1-2/No.1-2-part2-3.pdf>. For a discussion of tobacco control efforts in Asia generally, see Judith MacKay, Bungon Rithhiphakdee and K Srinath Reddy, 'Tobacco Control in Asia' (2013) 381(9877) *The Lancet* 1581.
9. *Bali Concord*, above n 2.
10. *Bali Concord*, above n 2.
11. *ASEAN Trade in Goods Agreement (ATIGA)*, signed 26 February 2009, entered into force 17 May 2010.
12. For an overview of the position in ASEAN as at 2002, see William Onzivu, 'The Public Health Implications of the Association of Southeast Asian Nations (ASEAN) Legal Regime on Tobacco Control' (2002) 4(2) *Australian Journal of Asian Law* 160.
13. 'ASEAN Agrees to Withdraw Tobacco from AFTA', *The Star Online*, 9 July 2012 <<http://www.thestar.com.my/News/Nation/2012/07/09/Asean-agrees-to-withdraw-tobacco-from-Afta.aspx>>.
14. See above n 3.
15. See, eg, *Annex 2: Tariffs under the ASEAN Trade in Goods Agreement (ATIGA) Cambodia* <<http://www.asean.org/images/2012/Economic/AFTA/annex/Annex2-Cambodia.pdf>>, which shows a commitment to reduce the tariffs to 0–5 per cent by 2015.
16. *General Agreement on Tariffs and Trade*, LT/UR/A-1A/1/GATT/2 (signed 30 October 1947), as incorporated in *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1A (*General Agreement on Tariffs and Trade 1994*).
17. ASEAN has signed FTAs with Australia and New Zealand, China, Korea, Japan and India. The texts of these FTAs are available at: International Enterprise Singapore, *About FTAs* <http://www.fta.gov.sg/sg_fta.asp>.

18. The RCEP negotiating states comprise ASEAN and those trade partners mentioned in n 17; see generally International Enterprise Singapore, *Factsheet: The Regional Comprehensive Economic Partnership (RCEP)* <http://www.fta.gov.sg/press_release%5CFACTSHEET%20ON%20RCEP_final.pdf>.
19. *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1B (*General Agreement on Trade in Services*).
20. *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1A (*Agreement on the Application of Sanitary and Phytosanitary Measures*).
21. *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995), annex 1A (*Agreement on Technical Barriers to Trade*).
22. *General Agreement on Tariffs and Trade*, opened for signature 30 October 1947, 55 UNTS 187 (entered into force 1 January 1948).
23. Panel Report, *Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes*, WTO Doc DS10/R – 37S/200 (adopted 7 November 1990) (*Thailand – Cigarettes*).
24. Appellate Body Report, *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines*, WTO Doc WT/DS371/AB/R (adopted 15 July 2011).
25. Appellate Body Report, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, WTO Doc WT/DS406/AB/R (adopted 24 April 2012).
26. See Chapter 6 of this volume.
27. *Agreement Establishing the ASEAN–Australia–New Zealand Free Trade Area (AAN-ZFTA)*, signed 27 February 2009, [2010] ATS 1 (entered into force 1 January 2010) ch 5.
28. See ASEAN, above n 6.
29. See Secretary-General of ASEAN, ‘ASEAN Secretary-General towards the Vision of a Smoke-Free ASEAN’ (Speech delivered at the 15th World Conference on Tobacco or Health, Singapore, 22 March 2012) <<http://www.asean.org/news/asean-secretariat-news/item/asean-secretary-general-towards-the-vision-of-a-smoke-free-asean>>.
30. See, eg, ‘AFPTC Meets in Cambodia’ (31 May 2013) 3 *ASEAN e-Health Bulletin* (online) 2: <<http://www.asean.org/images/3rd%20issue%20of%20asean%20e-health%20bulletin%20f.pdf>>.
31. 15th *World Conference on Tobacco or Health*, Singapore (20–24 March 2012).
32. ASEAN, *Regional Action Plan on Healthy ASEAN Lifestyles* <<http://www.asean.org/communities/asean-socio-cultural-community/item/regional-action-plan-on-healthy-asean-lifestyles>>.
33. Raphaella Prugsamat et al, *ASEAN Tobacco Tax Report Card* (29 February 2012) Southeast Asia Initiative on Tobacco Tax, Table 4 <<http://seatca.org/dmdocuments/ASEAN%20tax%20Report%20card%202012.pdf>>, which sets out the various component taxes applicable in each ASEAN country.
34. For a study on excise taxes and affordability within certain ASEAN countries, see Sophapan Ratanachena and Ulysses Dorotheo, *Affordability of Cigarettes and the Impact of Raising Excise Taxes in Southeast Asia: Cambodia, Indonesia, Lao PDR, the Philippines, Thailand and Vietnam* (January 2012) Southeast Asia Initiative on Tobacco Tax <<http://seatca.org/dmdocuments/Affordability-final-11-01-56-web.pdf>>.
35. For a discussion on the effect of the AEC, its liberalisation requirements and objectives, and tobacco control, see Sophapan Ratanachena, *The AEC’s Impact on Tobacco Tax in ASEAN and its Threat to Public Health* (26 July 2012) ICIRD <<http://www.icird.org/2012/files/papers/Sophapan%20Ratanachena2.pdf>>.
36. *Tobacco (Control of Advertisements and Sale) Act* (Singapore, ch 309, 2011 rev ed).

37. See ASEAN, *Singapore* <<http://www.asean.org/communities/asean-economic-community/item/singapore-3>>.
38. *Tobacco (Control of Advertisements and Sale) Act* (Singapore, ch 309, 2011 rev ed).
39. See Health Sciences Authority (Singapore), *Highlights: Prohibition on Certain Products* (8 May 2013) <http://www.hsa.gov.sg/publish/hsaportal/en/health_products_regulation/tobacco/legislation/highlights___prohibition.html>.
40. See Sheila Crisostomo, 'E-cigarettes not Advisable for Smokers – DOH', *Philippine Star* (online) (21 January 2013).
41. See, eg, Health Promotion Board (Singapore), *National Tobacco Control Programme (NTCP)* (12 September 2012) <<http://www.hpb.gov.sg/HOPPortal/article?id=428>>; Health Promotion Board (Singapore), *Smoking Control Programmes for Adults* (3 April 2013) <<http://www.hpb.gov.sg/HOPPortal/programmes-article/2490#4>>.
42. See Isra Sarnitsart, 'ASEAN Regional Summary Report: AFTA and Tobacco' (Southeast Asia Tobacco Control Alliance, July 2006) <http://www.smoke-free.ca/trade-and-tobacco/Thailand/ASEAN%20Regional%20Summary%20Report_AFTA%20and%20Tobacco.pdf>.
43. Louisa Picco et al, 'Smoking and Nicotine Dependence in Singapore: Findings from a Cross-Sectional Epidemiological Study' (2012) 2012 41 *Annals Academy of Medicine* 325, 330.
44. Kate Hodal, 'Indonesia's Smoking Epidemic – an Old Problem Getting Younger', *The Guardian* (online), 23 March 2012 <<http://www.guardian.co.uk/world/2012/mar/22/indonesias-smoking-epidemic>>.
45. See, eg, 'Buying "Double Happiness" Reveals China's Tobacco Battle', *Bloomberg Businessweek* (online), 5 February 2013 <<http://www.businessweek.com/news/2013-02-05/buying-double-happiness-reveals-china-s-tobacco-battle>>.
46. See, eg, Campaign for Tobacco-Free Kids, *Indonesia: Tobacco Control Advocates Expose Corruption after Tobacco Clause Found Missing from the National Health Bill* <http://global.tobaccofreekids.org/en/industry_watch/case_studies/indonesia_tobacco_control_advocates>.
47. Transparency International Sri Lanka, *Sri Lanka Placed 79th in Global Corruption Perception Index* (5 December 2012) Transparency International <http://www.transparency.org/news/pressrelease/20121205_sri_lanka_placed_79th_in_global_corruption_perception_index>.
48. For the reports of the nine ASEAN members who are party to the WHO FCTC, see *Parties' Reports*, WHO Framework Convention on Tobacco Control <http://www.who.int/fctc/reporting/party_reports/en/index.html>.
49. EFTA states comprise Lichtenstein, Iceland, Norway and Switzerland.
50. *Act Relating to the Prevention of the Harmful Effects of Tobacco 1973*, Act No 14 of 9 March 1973, Norway, s 5: <<http://www.regjeringen.no/en/dep/hod/Subjects/the-department-of-public-health/norways-national-strategy-for-tobacco-co.html?id=451948>>.
51. *Philip Morris Norway AS v Ministry of Health and Care Services* (E-16/10) [2011] EFTA (12 September 2011).
52. In 2013, the Singapore Government gave indications that it was considering the banning of point-of-sale displays (Statement by the Singapore Minister for Health in Parliament, 12 March 2013). For other countries permitting point-of-sale displays such as the Philippines, see 'Advertising at Point-of-Sale Gone Berserk, A Case for Pack Display Ban' (November 2012) 10 *Tobacco Industry Surveillance* (online): <http://www.healthjustice.ph/uploads/F_POS_Handout_Nov2012.pdf>.
53. See Ministry of Public Health, Thailand, *Directive Procedures for Distribution of Tobacco Products* <<http://www.tobaccocontrolaws.org/files/live/Thailand/Thailand%20Tobacco%20Control%20Act%202001.pdf>>.

- 20-%202005%20POS%20Directive.pdf>; *Advertisement, Sale Promotion and Sponsorship ban in Thailand*, WHO Country Office for Thailand <http://www.whothailand.org/en/Section3/Section104_312.htm>.
54. *JT International SA v Commonwealth; British American Tobacco Australasia Ltd v Commonwealth* [2012] HCA 43 (5 October 2012).
 55. *Agreement between the Government of Hong Kong and the Government of Australia for the Promotion and Protection of Investments*, 1748 UNTS 385 (signed 15 September 1993, entered into force 15 October 1993).
 56. See DS434, initiated by Ukraine (http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds434_e.htm); DS435, initiated by Honduras (http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds435_e.htm); DS441, initiated by the Dominican Republic (http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds441_e.htm); and DS458 initiated by Cuba (http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds458_e.htm).
 57. For the nine ASEAN states that are party to the WHO FCTC, reports on their regulation over domestic advertising, promotion and sponsorship can be found here: *Reporting on the Implementation of the Convention*, WHO FCTC <<http://www.who.int/fctc/reporting/en/>>.
 58. See *Global Tobacco Control Updates: Tobacco Control Regulation an Important Step Forward for Indonesia* (25 Jan 2013) Campaign for Tobacco-Free Kids <http://global.tobaccofreekids.org/en/global_updates/detail/2013_01_25_indonesia>.
 59. See Sarah Schonhardt, 'Is Indonesia, One of Big Tobacco's Last Frontiers, Closing?', *CNBC* (online), 4 March 2013 <<http://www.cnn.com/id/100516212>>.
 60. WHO, *WHO Framework Convention on Tobacco Control: Guidelines for Implementation* (WHO, 2013) 102–3.
 61. *Ibid* 102.
 62. *Tobacco Advertising Prohibition Amendment Act 2012* (Cth) s 15A.
 63. See, eg, *Smoking (Control of Advertisements and Sale of Tobacco) (Foreign Newspapers) (Consolidation) Notification 2000* (Singapore).
 64. For a discussion of cross-border Internet advertising and promotion of tobacco products, see Andrew T Kenyon and Jonathan Liberman, 'Controlling Cross-Border Tobacco: Advertising, Promotion and Sponsorship – Implementing the FCTC' (Legal Studies Working Paper No 161, Center for Media and Communications Law, University of Melbourne, August 2006) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=927551>.
 65. *Tobacco (Control of Advertisements and Sale) Act* (Singapore, ch 309, 2011 rev ed).
 66. *Ibid*.
 67. This is notwithstanding the use of 'includes' in this paragraph, if one were to apply the well-known *ejusdem generis* rule of interpretation.
 68. Statement by the then Singapore Minister for Health in Parliament (19 July 2010).
 69. For discussions on tobacco control and social media, see *Tobacco Product Marketing on the Internet* (28 November 2011) Campaign for Tobacco-Free Kids <<http://www.tobaccofreekids.org/research/factsheets/pdf/0081.pdf>>.
 70. The protocol was agreed by the Intergovernmental Negotiating Body of the Conference of the Parties of the WHO FCTC in April 2012 and adopted by the Conference of the Parties in November 2012: see *About the Protocol to Eliminate Illicit Trade in Tobacco Products*, WHO FCTC <<http://www.who.int/fctc/protocol/about/en/>>. The protocol is not yet in force at the time of writing.
 71. See, eg, *Malaysian Health Minister Calls for Non-smoking Films* (31 May 2011) ASEAN-China Free Trade Area <<http://www.asean-cn.org/Item/2926.aspx>>.
 72. See Wendy Zeldin, *China: More Control on Smoking on Screen* (23 February 2011) Library of Congress <http://www.loc.gov/lawweb/servlet/lloc_news?disp3_1205402534_text>; Agence France-Presse, *China Restricts Smoking in Films, TV* (13

- February 2011) xinmsn entertainment <<http://entertainment.xin.msn.com/en/celebrity/buzz/hollywood/article.aspx?cp-documentid=4639252>>.
73. In Malaysia, for example, the British American Tobacco Institute provides educational scholarships and other charitable causes: see *British American Tobacco Malaysia Foundation* (3 April 2012) British American Tobacco Malaysia <http://www.batmalaysia.com/group/sites/BAT_7RYJ8N.nsf/vwPagesWebLive/DO7SUKR2?opendocument&SKN=1>.
 74. *Tobacco (Control of Advertisements and Sale) Act* (Singapore, ch 309, 2011 rev ed) ss 10, 11.
 75. For information on Malaysia tobacco growers, see 'Nothing Positive about Tobacco Farming', *The Star Online* (online), 4 September 2012 <<http://biz.thestar.com.my/news/story.asp?file=/2012/9/4/business/11962646&sec=business>>.
 76. The two pieces of legislation passed in Thailand to reform tobacco control in 1992 are the *Tobacco Products Control Act*, BE 2535 and *The Non-Smokers Health Protection Act*, BE 2535. See generally Naowarut Charoenca et al, 'Success Counteracting Tobacco Company Interference in Thailand: An Example of FCTC Implementation for Low- and Middle-income Countries' (2012) 9 *International Journal of Environmental Research and Public Health* 1111.
 77. For a summary of the ASEAN health-protection treaty provisions as at 2002, see Onzivu, above n 12, 168–70.
 78. See above n 3.
 79. See above n 7.
 80. *Agreement on Investment of the Framework Agreement on Comprehensive Economic Cooperation between the People's Republic of China and the Association of Southeast Asian Nations*, signed 15 August 2009, entered into force 15 February 2010, article 16.1(b).
 81. World Health Organization, *Confronting the Tobacco Epidemic in a New Era of Trade and Investment Liberalization* (2012) 53–4.
 82. *Australia–United States Free Trade Agreement* (AUSFTA), signed 18 May 2004, [2005] ATS 1 (entered into force 1 January 2005).
 83. *Letter from Robert Zoellick to Mark Vaile* and vice versa, 18 May 2004. Text of letters available at: <http://www.ustr.gov/sites/default/files/uploads/agreements/fta/australia/asset_upload_file537_3899.pdf> (emphasis added).
 84. *ASEAN Japan Comprehensive Economic Partnership* (AJCEP), signed 14 April 2008, entered into force 1 December 2008 (except for Indonesia).
 85. See for example Malaysia's, Thailand's and Vietnam's Schedules of Commitments and explanatory Headnotes, available at *Overview of ASEAN JAPAN Comprehensive Economic Partnership*, Singapore Government <http://www.fta.gov.sg/fta_ajcep.asp?hl=38>.
 86. See *Parties to the WHO Framework Convention on Tobacco Control*, WHO FCTC <http://www.who.int/fctc/signatories_parties/en/>.
 87. See below n 89.
 88. See, eg, *No Free Trade for Cigarettes* (8 March 2013) *Framework Convention Alliance* <http://fctc.org/index.php?option=com_content&view=article&id=970:no-free-trade-for-cigarettes&catid=229:general-news&Itemid=233>; *Conflict between the TPP and the FCTC*, Southeast Asia Tobacco Control Alliance <http://seatca.org/dmdocuments/TPP%20&%20FCTC_Brief_Final.pdf>.
 89. Information of 18 May 2012, originally available at USTR website (no longer available as at September 2013). See, eg, Stanton Glantz, *USTR Abandons Plan to Protect Tobacco Control Measures under Trans-Pacific Partnership Trade Agreement* (16 August 2013) Center for Tobacco Control Research & Education <<http://www.tobacco.ucsf.edu/ustr-abandons-plan-protect-tobacco-control-measures-under-trans-pacific-partnership-trade-agreement>>.

90. See, eg, *Letter from Ginny Lyons and Kathleen Keenan to Ambassador Ron Kirk* (25 July 2012) <<http://ash.org/wp-content/uploads/2012/08/Vermont-Letter.pdf>>.
91. See *Fact Sheet: New US Proposal on Tobacco Regulation in the Trans-Pacific Partnership* (21 August 2013) United States Trade Representative <<http://www.ustr.gov/about-us/press-office/fact-sheets/2013/august/fact-sheet-tobacco-and-tpp>>. See also Thomas Bollyky, *The Tobacco Problem in US Trade* (5 September 2013) Council on Foreign Relations <<http://www.cfr.org/trade/tobacco-problem-us-trade/p31346>>.
92. See *TPP Agreement Negotiations and Tobacco* (18 September 2013) O'Neill Institute for National & Global Health Law <<http://www.oneillinstituteblog.org/tpp-agreement-negotiations-tobacco/>>.
93. The 2012 US Model BIT reflects such an exception: 'Except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations'; see Office of the Spokesperson, 'United States Concludes Review of Model Bilateral Investment Treaty' (Media Note, 2012/611, 20 April 2012); see also, eg, AANZFTA annex.