

# The role of WHO, WTO and ISDS in global health governance explained through global regulation of tobacco

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## **Abstract**

**Background:** The main focus of this thesis is to discuss to what extent the global regulation of tobacco control is governed by state power and interests, and to what extent it is governed by both state and non-state actors and interests, from the perspective of two different analytical approaches - realism and global health governance (GHG). The thesis identifies the core actors affecting the global regulation of tobacco control and analysis their role and functions in this regulation.

**Research questions:** This study sought to respond to two research questions. The first question is: “What are the major actors affecting the global regulation of tobacco?” The second question is based on the perspectives of realism and global health governance: “What is the role of state and non-state actors and international regimes in global regulation of tobacco?”

**Methods/data:** In order to answer these research questions, we analyzed legal cases and documents through which we identified state actors and interests as well as non-state actors and interests and their role in global regulation of tobacco control. The thesis is a qualitative study based on a case study approach. The case study contains a set of legal cases between Australia and tobacco industry regarding Australia’s Tobacco Plain Packaging Act 2011. We have also supplemented the case study with secondary sources such as literature, scholarly journal articles, publications from international organizations and newspaper articles, as well as with other known cases regarding similar tobacco control measures implemented by other state governments.

**Results:** The findings showed that even though state power and interests seem to play a prominent role, non-state actors and interests are also in play with regard to tobacco control. Based on the outcomes of the analyzed legal cases we also concluded that health protection turned out to be prevailing factor over trade and investment. We also came up with some key observations based on these findings. For example, Fidler’s assertion - that states are not the only important actors in global health governance -, found support in our data, as we have seen tobacco companies using forum shopping, international legal regimes and governments to further their interests. The main conclusion is that the global health governance approach contributes to increase the understanding of the underpinnings and mechanisms of global tobacco regulation, and is thus an important and expedient supplement to the realist approach to international relations.

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## List of Abbreviations

BAT	British American Tobacco
BIT	Bilateral Investment Treaty
CIL	Customary International Law
DSU	Dispute Settlement Understanding
FDI	Foreign Direct Investment
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GHG	Global Health Governance
IHR	International Health Regulations
IMF	International Monetary Fund
MNCs	Multinational Companies
NGOs	Non-governmental organizations
PM	Philip Morris
TRIPS	Agreement on Trade Related Aspects of Intellectual Property
WHO	World Health Organization
WTO	World Trade Organization

# 1 Introduction

Global regulation of tobacco is one of the most recent global public health issues and highly debated topics in governments and international organizations around the world (Voon, Mitchell, Liberman & Ayres, 2012; WTO & WHO, 2002). It was prompted by a global tobacco epidemic and this increased awareness of tobacco-induced health problems. Therefore, the governments around the world and international organizations got involved in policy-making on the national and international level in order to reduce tobacco use and thereby cut the risk of people developing cancers, heart and lung disease. Today, global health is a foreign policy issue of first-order importance.

Global health is governed by several international legal regimes, such as international trade law, international environmental law, international humanitarian law and similar. In these “regime clusters” as Fidler (2010, p.1) calls them, multiple players such as states, intergovernmental organizations, and non-state actors address specific problems through different processes by applying various principles. Fidler (2010, p.3) defined the concept of global health governance as the following: “Global health governance refers to the use of formal and informal institutions, rules, and processes by states, intergovernmental organizations, and non-state actors to deal with challenges to health that require cross-border collective action to address effectively”. Basically, global health governance is a “regime complex” which is formed of several regime clusters that are often overlapping and, in some cases, competing.

Global health is an essential part of international relations; therefore, this thesis will compare one of the most popular international relations theories – realism against global health governance. While realism is a theory which describes world politics through a state-centric approach, global governance includes also other actors, such as international organizations (IGOs), multinational corporations (MNCs) and non-governmental organizations (NGOs) among others (Fidler, 2010). Realism acknowledges those actors but considers states as the only actors that really matter and as the only true competitors for leadership, influence, and resources in the anarchical environment of world politics. However, global health governance gives importance to other actors beside states and is considered to be a regime complex, which is of particular interest for this thesis.

This thesis will also describe the impact international legal regimes have on the regulation of tobacco and will study legal cases brought up in an international setting. Special emphasis is made on the legal cases between the Australian government and the tobacco industry. Regimes are identified by Krasner (1982, p.186) as a “set of implicit or explicit principles, norms, rules and decision-making procedures around which actors’ expectations converge in a given area of international relations.” This definition states that regimes are more than a set of rules. Furthermore, it presupposes a high level of institutionalization (Little R., 2014, p.292). Reus-Smit (2014, p.276) mentions three levels of institutions – constitutional, fundamental and issue-specific institutions or “regimes”. He explains that the regimes are in fact the most visible or noticeable of all international institutions because they define who constitute legitimate actors and what constitutes legitimate action in a given domain of international life. Reus-Smit (2014, p.276) states, that regimes present “concrete enactments in specific issue-areas of fundamental institutional practices, such as international law and multilateralism”. While Krasner (1982) gives GATT (now WTO) as an example of regime, Reus-Smit (2014) mentions also framework conventions and treaties. So essentially, regimes can be sets of rules and institutions that regulate international relations around the world.

Since tobacco presents both health and trade issue and is considered a business, three key regime clusters have been identified in the case of global tobacco regulation. Establishment of worldwide regimes was undeniably necessary in order to manage the various vectors of interdependence such as health, trade and direct investments activity (Fogarty E., 2013, p.3).

First of regimes is from the perspective of health. It includes World Health Organization (WHO) and its first treaty adopted under Article 19 of the WHO constitution - Framework Convention on Tobacco Control<sup>1</sup> (FCTC) (Dodgson, Lee & Drager, 2002). WHO is the central institution in global health, which is why it is an important regime cluster for this thesis. Besides that, this regime is mostly important because of WHO FCTC measure on plain packaging of tobacco products based on which Australia implemented Tobacco Plain Packaging Act 2011 in its national law.

The globalization of trade, commerce, and finance has expanded the impact of certain private enterprise sectors, including the tobacco industries. The World Trade Organization has bridged the

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<sup>1</sup> Opened for signature 21 May 2003, 2302 UNTS 166 (entered into force 27 February 2005).

gap between trade and health, which is why it is chosen as a second regime cluster. International trade law highly influences global health governance and is of great importance for global public health (Fidler, 2002). The WTO Agreements and its Dispute Settlement System are deeply implicated in the case between the Australian government and the tobacco industry because of the Australia's Tobacco Plain Packaging Act 2011, which will serve as a case study for this thesis.

Another perspective besides international organizations and states is from the side of businesses. Multinational corporations (MNCs), in this case transnational tobacco companies (TTCs), now play a significant role in diplomacy on intellectual property and trade in tobacco (Eckhardt, Holden & Callard, 2016). Some of the multinational corporations have financial resources much higher than those that are available to most of the low-income countries, which as a result can make them more powerful than those countries (Fidler, 2002). Therefore, multinational corporations are important actors in today's world politics as they can influence policy-making on both national and international level. Transnational tobacco companies are considered to be very powerful, which is why besides international trade regime, international investment law and Investor-State Dispute Settlement (ISDS) as a regime cluster is important for the case between Australia and tobacco industry. It involves regional, bilateral and multilateral trade agreements, and is especially important for this case because of its effect on intellectual property rights and foreign trade investments.

The main focus of this thesis is to discuss and compare two different perspectives – realism and GHG. We will do so in order to assess to what extent the global regulation of tobacco control is governed by state power and interests (realism), and to what extent it is governed by both state and non-state actors and interests (GHG). Therefore, the following research questions have been established:

1. Who are the major actors affecting the global regulation of tobacco?
2. What is the role of state and non-state actors and international regimes in global regulation of tobacco?

I will address these questions from the perspectives of realism and global health governance.

## 1.1 Background

The history of tobacco consumption dates as far back as to 5000 BC (Gately, 2003). Arrivals of Europeans to today's North America led to the discovery of tobacco and its cultivation, which was recognized as a great trading opportunity. In the 16<sup>th</sup> century, tobacco was introduced to Europe and its consumption quickly spread throughout Europe and the rest of the world (Billings, 2017). In the end of the 19<sup>th</sup> century and early 20<sup>th</sup> century little was known about the harmful effects of tobacco, and lung cancer was still a very rare disease. At that time, mass marketing and automated cigarette production popularized smoking and other types of tobacco consumption, what slowly led to a global lung cancer epidemic (Proctor, 2012).

The first published study that was supported by statistical evidence of the link between lung cancer and tobacco was in 1929 by Fritz Lickint of Dresden in Germany (Proctor, 2000). Tobacco manufacturers continued to dispute any connection between lung cancer and tobacco consumption at that time, so it remained widely used without any health concerns.

In the 1950s different types of research, from epidemiology, animal experiments, and clinical observation to chemical analysis, were conducted in order to determine if there really was a link between smoking cigarettes and cancer (Proctor, 2012). Proctor (2012, p.88) mentions that many tobacco companies also conducted their own research to determine the harms of tobacco and all of them showed clear results that tobacco contains harmful and cancerous chemicals. In this period, even though harms of tobacco consumption were proven through numerous studies, tobacco producers still refused to acknowledge it publicly.

However, medical authorities did inform the public about harmful effects of tobacco consumption. The Public Health Cancer Association advised people to stop smoking to prevent cancer. Some of the first cancer authorities that recognized a link between lung cancer and smoking were Norway, Sweden, Finland, Denmark and The Netherlands (Proctor, 2012).

According to the U.S. Department of Health and Human Services (2014), the tobacco revolution began in 1964 when United States Surgeon General's report was published. This report was a turning point as tobacco manufacturers finally admitted the harms of tobacco consumption. Today it is common knowledge and there is no doubt that tobacco is harmful. It does not just lead to lung cancer, but it increases the risk of developing cancer almost anywhere in the body, increases the

chance of having the chronic obstructive pulmonary disease (COPD), a stroke or developing other cardiovascular diseases, etc. (U.S. Department of Health and Human Services, 2014).

Tobacco consumption is not just harmful to health, but it is also costly to health care, which provides a strong incentive for governments to lower tobacco consumption. The World Bank (1999) has concluded in its report, *Curbing the epidemic: governments and the economics of tobacco control*, that tobacco control would be a highly cost-effective measure for national public health systems. Each year, tobacco consumption kills more people than HIV, malaria, and tuberculosis combined (WHO report, 2008, p.8). Because of these devastating statistics, tobacco is not only a threat to national public health, but it is also recognized as a global health issue. This forced WHO, an international organization concerned about global public health, to act on preventing and lowering tobacco consumption.

WHO has also released statistics in their report about tobacco-related deaths (WHO report, 2008). In 2008, the tobacco death toll counted 5.4 million deaths every year, more than 5 millions of those deaths resulted from the direct use of tobacco, while more than 600 000 are the result of second-hand smoking (WHO report, 2008). It is also an interesting fact that out of 1 billion smokers, 80% actually live in low- and middle-income countries. Taylor and Bettcher (2000) explain this fact as a result of various bilateral, regional, and international trade agreements which have reduced trade barriers for all kinds of industries, including tobacco industry. An empirical study was conducted, which showed that trade liberalization has led to increased cigarette smoking, particularly in low-income and middle-income countries (Taylor, Chaloupka, Guidon & Corbett, 2000).

Global trade and the expansion of the tobacco industry to new markets have contributed to a global tobacco epidemic which, as already mentioned increased rates of smoking that naturally led to increased risk of tobacco-related diseases as well (Yach & Bettcher, 2000). This shows that besides tobacco representing a global health issue, it is also considered a trade issue and there is a link between those two issues. As trade of goods and services is regulated by certain agreements, treaties and international law, so is the trade of tobacco. Given the transnational nature of the tobacco industry and the internationalization of policy-making, WTO plays an important role in the regulation of tobacco trade (Yach & Bettcher, 2000).

While the WTO offers several ways for companies to influence policy-making, it is not possible for them to initiate disputes with the governments directly (Eckhardt, Holden & Callard, 2016).

Only member states can initiate disputes. WTO's agreements are also not the only ones involved in regulation of trade between states. There are also economic unions, multilateral or bilateral free trade agreements and other trade blocs between the states that take part in the global trade. In cases when states have chosen to negotiate agreements such as bilateral investment treaties (BITs), the firms and governments can initiate dispute with the host government under the investor-state dispute settlement (ISDS) mechanisms if they believe their rights have been violated or that a government has breached certain rules at the expense of the firm (Johnson, Sachs and Sachs, 2015). Bilateral investment treaties (BITs) are international agreements which establish the terms and conditions in order to promote and protect private investments by nationals and companies of one state in another state (Juillard, 2001). These types of investments are called foreign direct investments (FDI). Foreign direct investment is particularly important for the tobacco industry, which has been involved in global trade since the 16<sup>th</sup> century. Especially, because today's tobacco companies are mainly headquartered in high-income countries, while manufacturing of their products is conducted in low-income countries, meaning their business is present in almost all countries in the world. Transnational tobacco companies are worth billions and billions of dollars, what gives them the power to influence world politics in one way or the other. This makes them important actors in global health governance, together with states and NGOs.

Tobacco has been a much-debated topic for many decades. The global tobacco epidemic has shown us devastating effects that tobacco and tobacco industry can have on global public health, which led to necessary global regulation of tobacco from different perspectives, health, and trade. It is interesting to see how tobacco is regulated from the side of the WHO - a specialized agency that is concerned with global public health, and the WTO, which is responsible for regulating global trade. For example, WHO has recognized the need for tobacco control and has adopted FCTC – its first treaty, which is simultaneously the first treaty concerning global public health. Adopting a treaty like FCTC represents a breaking point in governing global health and protection of global public health (Taylor & Bettcher, 2000).

The tobacco epidemic emphasized implications of international trade, WTO's agreements and bilateral investment agreements in policy-making and national public health measures. Tobacco control debates began to play a prominent role and have become particularly important in recent years for the WHO, WTO and for governments around the world. For example, some of the most prominent and heavily debated WTO disputes related to tobacco are the disputes brought by Cuba,

Dominican Republic, Honduras, Indonesia and Ukraine against Australia's Tobacco Plain Packaging Act 2011 (Eckhardt et al., 2016). We can also see examples of tobacco companies suing governments of Australia, Norway, UK and Uruguay for implementing certain national laws affecting tobacco industry through ISDS.

These examples show how complex the concept of global health governance can be. WHO, WTO and ISDS could be viewed as three different international regimes that are affecting global public health when it comes to global tobacco regulation. This thesis examines these regimes – WTO (international trade law regime), WHO (global health regime), ISDS (international investment law) and how they affect global tobacco regulation. In order to show implications of these international regimes in global tobacco regulation, we used the legal cases between tobacco industry and governments that have implemented measures, such as plain packaging into their national law.

The thesis is organized as follows: the introduction of the topic and background in chapter 1, chapter 2 introduces the main concept - global health governance and international theory - realism as part of the thesis' theoretical framework. In the same chapter under the subchapter 2.2, Methods and data, i.e. the methodology of the research is described. It answers the questions how and what data was collected and the reason why that data is used. In chapter 3 the thesis describes implications of different international regimes of relevance for tobacco control. It contains subchapters on three international legal regimes – WHO, WTO and ISDS. Chapter 3 also contains subchapter on legal cases which is further divided on cases from the Australia's national court, cases in the ISDS, WTO disputes, and other cases. At the end of the chapter there is subchapter that summarizes main findings. Chapter 4 discusses tobacco control and realism, tobacco control and global health governance, and implications of the study under three separate subchapters. It finishes with Chapter 5 - the conclusion of the thesis.

## **2 Theoretical framework, methods and data**

### **2.1 Theoretical framework**

Globalization is one of the most important terms that can describe today's world. Although it has many positive aspects like the movement of people, information and goods, which contributed to the rapid development, new discoveries, and knowledge, globalization also brought many challenges (IMF, 2000). Despite these positive effects, globalization has a negative impact on areas such as environment and health. For example, WHO research (Lance, et al., 2004) shows that increased trade among states requires numerous regulations in order to prevent spread of diseases, unfair conditions, exploitation of workers and natural resources.

Globalization cause states around the world to be involved in the international market and international economy. Indeed, most states are highly dependent on international markets, but in order to achieve stability on the market, there is a need for mechanisms and tools which can regulate it (Weiss, Seyle & Coolidge, 2013; Fidler, 2002). Therefore, policy-making of national governments is affected by various rules, laws, and agreements that have been established at the international level. In order to have functioning international markets, economic policies of the states have to be in accordance with those of other states (Jackson and Sørensen, 2013, p.7). To achieve this, states had to interact with other states and develop relationships among themselves. The interdisciplinary study that is concerned with these relationships is called international relations. International relations are concerned with economic, political, social, and other aspects between two or more states (Grieco, Ikenberry & Mastanduno, 2015, p.2). Jackson and Sørensen (2013, p.4) define international relations not just as a study of relationships and interactions between states, but also activities and policies of national governments, nongovernmental organizations (NGOs), international organizations (IGOs), and multinational corporations (MNCs).

It is not questionable if there is interdependence between states and non-state actors, and that coordination and cooperation among them are necessary in order to achieve stability in the world. However, there are opposing views regarding the concept of anarchy and world state with the absence of authority. Firstly, there is international relations theory called realism, which views world politics as an anarchical environment where the states are principal actors primarily

concerned with their own national interest (Jackson and Sørensen, 2013). Realism's state-centric approach to world politics gives little or no importance to non-state actors. Quite contrary to realism is the concept of global governance which includes both state and non-state actors as crucial in world politics. The following sections discuss these views on world politics further.

### **2.1.1 Realism**

Realism is one of the most dominant international relations theories. It differs the most from the concept of global governance. Realism has existed as a theory since the ancient past, and it is one of the first theories in international relations that remains relevant even today in the age of globalization. Dunne and Schmidt (2014, p.101) state that "realism is the dominant theory of international relations because it provides the most powerful explanation for the state of war that is the regular condition of life in the international system". Hence, Thucydides, Machiavelli, Hobbes and many other classical realists share the same view on international relations. They believe that acquiring and possessing the power is the main aim of political activity, what they call "power politics" (Jackson and Sørensen, 2013, P.66). Realists share common assumptions: that the international state system is an anarchy, that there is no higher authority or world government, that there is constant struggle among the states for domination and security. They also believe that the states are the main actors in international relations, while all other actors as individuals, international organizations (IGOs), nongovernmental organizations (NGOs) are not that important in world politics (Jackson and Sørensen, 2013; Grieco et al., 2015).

Jackson and Sørensen (2013, p.67) explain that according to realist thinking there is a hierarchy of power among the states and their normative core is national security and state survival. In fact, they stress that above everything else, national interest is actually the final arbiter in judging foreign policy. Baylis, Smith and Owens (2014, p.4) agree with this explanation stating that realism has been a dominant way of explaining world politics in the last hundred years. They add that states are legally sovereign actors, which means there is no actor above the state that can compel it to act in a specific way, while other actors as MNCs and IGOs have to work within the framework of interstate relations. From the realists' point of view, each state is trying to maximize their national interest and that's where the struggle for power begins. The realist perspective is that all international laws such as conventions and agreements are conditional and depend on the pure

willingness of the state to follow them. If some international laws or agreements would conflict with vital national interest, they would be set aside (Baylis et al., 2014).

Grieco et al. (2015, p.356) claim that because of globalization, multinational corporations have become major players in the world economy and are challenging the sovereign authority of national governments, but according to realist theory, states will remain the dominant actors in world politics. Realists argue that states struggled in the past as well and that they overcame those challenges, and therefore they will also overcome the current challenges such as globalization and struggle for power with multinational corporations (Grieco et al., 2015). They believe that sovereign states still have many advantages over non-state actors, such as multinational corporations and international organizations.

Some argue that national security has been challenged by the forces of globalization and that states as privileged actors are in decline relative to non-state actors such as transnational corporations (Baylis, 2014, p.240; Dunne & Schmidt, 2014, p. 102.). While globalization surely has affected world politics, Dunne and Schmidt (2014, p.111) state that the importance of realism is not diminished by the dynamics of globalization and that the state will continue to be dominant actors in world politics. Globalization has affected world politics in the way that economic interdependence has made wars less likely, but globalization should still be seen as the part of world politics where states struggle for power. Regarding the perspective on international law, realists believe that the absence of a central authority to legislate, adjudicate, and enforce it downplays the value and efficiency of international law (Reus-Smit, 2014, p.285).

While realism is a state-centric approach to world politics, global governance provides a different perspective on world politics, from the notion of international relations. Dingwerth and Parrberg (2006) explain that while the concept of international relations is by definition primarily concerning states as main actors in world politics and pays little attention to non-state actors, notion of global governance does not have such hierarchy. Global governance gives equal importance to NGOs, transnational corporations (TNCs), and intergovernmental organizations (IGOs). Another difference they noticed is that international relations separate international interaction from the interaction of other levels, while global governance has a view on world politics more as a multilevel system where local, national and global political processes are inseparably linked (Dingwerth & Parrberg, 2006).

However, even though realism is not counting the possibility of non-state actors reshaping the nature of international relations and influencing world affairs, the impact of non-state actors on international relations, states and their policies is unquestionable (Fidler, 2002). Non-state actors such as multinational corporations (MNCs) are shaping the policy-making in national governments through lobbying or trade and this way achieves power in world politics (UN, 2014). Therefore, traditional approaches as realism which considers international state system to be anarchical and state-centric seems inadequate to completely explain today's world politics.

#### *2.1.1.1 Analytical approach based on realism*

Based on the realism approach I would expect the interests of the states to be a deciding factor in global regulation of tobacco (Grieco et al., 2015). According to the realists' view, other factors or institutions are not expected to override national state interests and power regarding tobacco control. That being said, if it's in the interest of the state to protect its national public health, that state would implement a measure for tobacco control, regardless of such national law being contradictory to international law or bilateral and multilateral agreements they signed. If a state has a strong interest in the tobacco industry because it is a big part of that state's economy, the state would support the tobacco industry regardless of signing and ratifying WHO FCTC. The states would simply not implement measures for tobacco control or just not ratify WHO FCTC at all, such examples of states that did not ratify FCTC are Cuba, Switzerland and USA. Switzerland and USA are both headquarters of the biggest transnational tobacco companies, while the tobacco industry is one of Cuba's top agriculture industries. Therefore, according to realism, states will always do what is in their national interest regardless of international legal regimes, institutions or other non-state actors.

### **2.1.2 Global governance**

Global governance is a concept with a perspective on world politics that is different from the conventional notion of international relations. A common view of global governance is that there should be involvement of non-state actors as well as a set of laws, regulations or rules designed to tackle global problems, which cannot be solved by state actors alone (Fidler, 2010; Weiss, 2013). While international relations are explaining the behavior and actions of states in a world of political anarchy, global governance focuses on norms, rules, and standards to govern behavior and shape relations of state and non-state actors. Dodgson, Lee and Drager (2002, p.6) defined governance

“as the actions and means adopted by a society to promote collective action and deliver collective solutions in pursuit of common goals”. In the case of global health governance, the common goal would be promotion and protection of the health of the world’s population.

However, it is important to distinguish between international and global governance. Inter- is a prefix occurring in loanwords from Latin, where it meant “between” and “among” (Inter-, n.d.). Therefore, when we say international, it is meant among the states, states are the only actors, while global involves also non-state actors, like NGOs, MNCs and the independent effect of international regimes/institutions such as the WTO and the WHO. Fidler (2002, p. 8) interprets international governance as a governance model that involves international organizations as well. It means that in relations between states, rules can be applied directly or indirectly through international organizations. When it comes to global governance, the difference is that the rules don’t affect just states, but also non-state actors.

Because of globalization, combating communicable and non-communicable diseases requires mechanisms that can protect and promote public health on the global level. Therefore, in order to regulate the relations between states as well as the activities and behavior of non-state actors, some common ground rules should be determined by law. International law, therefore, plays an important role in public health governance, both on national and global level. Fidler (2002, p.7) as well as many other public health experts, emphasize the importance and necessity of law for public health governance on both levels, national and global. In his discussion paper, Fidler (2002, p.37), explains the role of international law in protecting and promoting public health on a global basis. He argues that even though the law is appreciated in supporting public health nationally, that public health law has suffered from neglect in the whole world and whether GHG succeeds or fails depends on effective national public health governance.

Fidler (2002, p.12) defines international law as the rules that govern international relations between sovereign states, but at the same time he points out the controversies that it is not really law because it cannot be enforced. Rather international law serves as an instrument to help organize and stabilize relations between the states in the condition of anarchy. The most important sources of international law are mentioned to be treaties and customary international law (CIL).

Treaties are defined by Vienna Convention on the Law of Treaties (1969) as “an international agreement between States in written form and governed by international law”. While obligations

stated in treaties are binding, they are only binding on those states that have joined the treaty and gave consent to be bound. States that are not part of the treaty are not bound by its rules under international law. On the contrary to treaties, customary international law is unwritten rules of international law that develops from patterns of state behavior and plays a less significant role.

International law is a crucial mechanism for global governance, but to understand the importance of its role in global governance, it is necessary to understand international relations as well, even though there are theoretical differences. Fidler (2002, p.7) states that the most basic function of international law is to set the ground rules for state interaction. However, global governance raises a question of responsibility, to who are the states and MNCs accountable to follow rules, norms or guidelines, and what happens in the case of disagreements. Woods (2014, p.253) lists UN and WTO as examples of international organizations that are reducing international conflict, promoting mutual understanding and common interests, and resolving disputes. Besides WTO's Dispute Settlement System, ISDS is another instrument that can be used to resolve potential conflicts which can arise in international trade concerning foreign investments. International law is the main tool for resolving these disputes and therefore it plays a significant role in the anarchical environment of international relations because it provides order and stability.

Because this thesis is primarily describing the role of different regimes on global tobacco regulation, it is important to grasp the concept of global health governance. The concept of global health governance is quite hard to define fully. There are several different definitions of global health governance, but because we are analyzing the impact of chosen international legal regimes on tobacco regulation, as well as involvement of international organizations, Fidler's definition seems the most appropriate. Fidler's (2010, p.3) states that "Global health governance refers to the use of formal and informal institutions, rules, and processes by states, intergovernmental organizations, and non-state actors to deal with challenges to health that require cross-border collective action to address effectively."

As it was mentioned before there are three different regimes and therefore three different sides of regulation of tobacco – health, trade and business side. While in realism these regimes are just instruments states are using, in global health governance IGOs, NGOs and MNCs are considered to be actors, not just instruments. From the global health governance perspective these non-state

actors are competing for leadership and influence in world politics as well. In fact, non-state actors today have more influence on global health than ever before (Weiss, Seyle & Coolidge, 2013).

Lee, Sridhar and Patel (2009) stress the importance of global health governance in regimes which are designed to achieve non-health objectives such as WTO and bilateral trade agreements, especially when it comes to intellectual property rights. They also explain how regional and bilateral trade agreements are becoming a more important part of trade and health governance. For example, in 2009, Lee, Sridhar and Patel (2009, p.4) identified over 250 regional and bilateral trade agreements which govern more than 30% of world trade.

At the WHO's 59th World Health Assembly, the governments of the member states were urged to make sure that trade and health interests are balanced and coordinated, especially in the aspects of international trade related to international health (WHO, 2006). Lee et al. (2009) claim that this responsibility is mainly on institutions which are governing trade and health policy, but organizations, institutional mechanisms, formal and informal rules, and decision-making processes that collectively manage trade and health issues are equally important.

#### *2.1.2.1 Analytical approach based on global health governance*

Based on GHG approach we would expect non-state actors to have an important effect on global regulation of tobacco control. Global governance is a relatively new concept in comparison to realism but the growing number of non-state actors such as TNCs, IGOs and NGOs and their influence is undeniable. The global governance approach is used to explain the role of non-state actors in global tobacco regulation as well as their interests and influences on the outcomes of certain decisions. For example, some MNCs are much more powerful and have more financial resources than some poorer countries (Fidler, 2002). Tobacco industry is especially powerful, as it influences decisions and policy-making in states through lobbying, the economic benefits they bring, and strategies such as forum shopping and intimidation tactics of bringing lawsuits (Eckhardt & De Bièvre, 2015; Eckhardt, Holden & Callard, 2016). Besides TTCs, international organizations such as WTO and WHO are influencing the trade of tobacco and affecting national health policies, which gives them power to influence law-making both on global and national level (Fidler, 2002; Roemer, Taylor & Lariviere, 2005). While realism explains the role of state actors and interests in global regulation and tobacco control, global health governance gives insight into complexity of relationship between non-state and state actors in regard to global tobacco regulation

(McInnes & Lee, 2012). From the perspective of global health governance, the non-state actors and interests are also included in governing the global regulation of tobacco control besides state actors and interests (Fidler, 2010). Furthermore, the non-state actors, such as TTCs, can work through governments and use international legal regimes as instruments to further their interest. However, as we will see in our findings, international legal regimes can also act independently.

## **2.2 Methods/data**

This thesis is a qualitative study based on document analysis. The study followed a case study approach in order to uncover to what extent mechanisms in play, that is global regulation of tobacco control is governed by state actors and interests and non-state actors and interests from the perspective of two different analytical approaches – realism and GHG.

We chose case study approach as it can play a crucial role in relation to the understanding of how global regulation of tobacco control is governed by various actors and interests. According to Burns (1997:364), “to qualify as a case study, it must be a bounded system, an entity itself”. Case study offers opportunity to examine mechanisms and observe patterns within a specific context. APA Manual (2010) defines case studies as reports of case materials obtained while working with an individual, a group, a community, or an organization. Case studies are used to illustrate a problem, indicate a means for solving a problem, and to shed light on needed research or theoretical matters (APA Manual, 2010).

Therefore, in order to answer our research questions, what are the major actors affecting the global regulation of tobacco and what is the role of state and non-state actors and international regimes in global regulation of tobacco, we chose case study of Australia and tobacco industry. We chose this particular case study because it includes many regimes and actors in global tobacco regulation. This provided us an opportunity to examine various regimes and involvements of many actors involved in how global tobacco regulation is governed. We will analyze the case study from two different perspectives, realism and global health governance, because these approaches provide us different understandings of the role of actors and their interests.

This particular case study is regarding Australia’s implementation of tobacco plain packaging legislation, which was the first country to implement such tobacco control measure. This case study may also help be a reflection point for other tobacco control measures and regulation of

tobacco in global setting. In our case study we can see how Australia's decision to implement such law was encouraged and supported by WHO and influenced by adoption of FCTC. Furthermore, the case study shows involvement of non-state actors and interests such as tobacco companies, role of ISDS and WTO. It also shows us implications for international trade law and international investment law regimes. More importantly, we made some observations from our case study, such as use of forum shopping, governments and these regimes as instruments by tobacco companies, as well as their tactics to influence global regulation of tobacco control. Case study research can reveal important features of patterns in resistance to implementation of tobacco control measures by tobacco companies and how WHO's FCTC influenced and changed protection of public health against harmful effects of tobacco consumption. Besides Australia's case study, we have also used some supplementary cases. By comparing supplementary cases and our case study we are in the better position to establish the final conclusion of the study.

We used legal cases and official documents derived from states and organizations. By using such primary sources, we can be sure of authenticity and credibility of the study. However, it is hard to draw generalized conclusions about motivation and interests of tobacco companies such as Philip Morris and governments. This is the main limitation of this study. We have also supplemented the primary sources with other secondary sources such as scholarly journal articles, literature and newspapers in order to enhance the validity of the case study findings. The limitation of using such secondary sources could be perhaps personal bias of their authors. Nevertheless, this study does not aim to make all-encompassing claims about one analytical approach being more relevant than the other. The aim is to understand the selected cases in depth in order to identify various actors and their interests as well as how they influence global regulation of tobacco. Another aim is to describe their roles and interests from two different perspectives, realism and global health governance.

We analyzed the dispute between Australia and tobacco industry because this is the first case that highlights tobacco control measures that are relevant in WHO, WTO and ISDS. This case is in regard to tobacco plain packaging measure, that will serve as an illustration of tobacco control and GHG. The aim was to trace state actors and interests, as well as non-state actors and interests in order to explain their role in governance of global tobacco regulation. We also supplement this case with other examples.

Data collection for this case study entailed two main research strategies: document analysis and literature review. According to APA Manual (2010), literature reviews are critical evaluations of material that has already been published. By organizing, integrating, and evaluating previously published material, literature reviews show the progress of research toward clarifying a problem. It can be arranged by grouping research based on similarity in the concepts or theories of interest and methodological similarities among the studies reviewed. Literature reviews are used to define and clarify the problem, summarize previous investigations in order to inform the reader of the state of research, identify relations, contradictions, gaps, and inconsistencies in the literature, as well as to suggest the next step or steps in solving the problem (APA Manual, 2010).

The legal cases were selected based on their involvement in global tobacco control particularly for the plain packaging measure. We used the following type of documents: legal cases, legal documents and public documents from international organizations and governments. Document review started with a search in the WHO website (<http://www.who.int/en/>) in order to find certain WHO publications, FCTC document and Guidelines for implementation of Article 11 of the WHO FCTC. We also used the WHO website to find other relevant information about WHO, tobacco control and global tobacco epidemic.

Firstly, we identified all the relevant cases where Australia's Tobacco Plain Packaging Act 2011 was challenged, since this was our primary case study. We searched through legal database of the Australia's High Court website (<http://www.hcourt.gov.au>) and Australian Legal Information Institute (AustLII) website (<https://www.austlii.edu.au>) in order to find relevant cases in regards to tobacco plain packaging as well as *Tobacco Plain Packaging Act 2011*, Hearings, Written notifications of claim by plaintiffs, Defendant responds, Final judgments and all other procedurals regarding two cases that we found – Case No. S389/2011 and Case No. S409/2011. Firstly, the cases in the High Court of Australia have been analyzed since those cases present introduction to the whole issue and debates around regulation of tobacco and tobacco control measure – plain packaging of tobacco products. These cases were between Australian government and tobacco industry, and they concern the Australian national law *Tobacco Plain Packaging Act 2011*. The analyzed cases are the following: Philip Morris Limited v The Commonwealth of Australia; British American Tobacco Australasia Limited & Ors v The Commonwealth of Australia; Van Nelle Tabak Nederland BV & Anor v The Commonwealth of Australia; JT International SA v The Commonwealth of Australia.

After analyzing the cases from the Australia's national court, we searched through the database of the Permanent Court of Arbitration (<https://pca-cpa.org/en/cases/>) where we found the case Philip Morris Asia Limited (Hong Kong) v. The Commonwealth of Australia. This case was investment arbitration that was conducted on the Permanent Court of Arbitration under UNCITRAL Arbitration rules 2010, which proceedings were commenced under the bilateral investment treaty 1993 Agreement between the Government of Hong Kong and the Government of Australia for the Promotion and Protection of Investments. This treaty we found through Australian Government website (<http://dfat.gov.au/pages/default.aspx>). The arbitration concerns the effects on the Claimant's investments in Australia of the enactment and enforcement by Australia of the Tobacco Plain Packaging Act 2011 and the implementing regulations known as the Tobacco Plain Packaging Regulations 2011. Finally, we searched WTO disputes related to Australia's plain packaging law through WTO website (<https://www.wto.org/index.htm>), where we found the following WTO disputes:

- DS434: Australia — Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging (Ukraine)
- DS435: Australia — Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging (Honduras)
- DS441: Australia — Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging (Dominican Republic)
- DS458: Australia — Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging (Cuba)
- DS467: Australia — Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging (Indonesia)

In order to supplement our findings, we also identified some other relevant cases based on the similar tobacco plain packaging measure. We searched both, database on the website <https://www.italaw.com> and database through *Investment Policy Hub by United Nations*

*Conference on Trade and Development* (<http://investmentpolicyhub.unctad.org>), where we found the case Philip Morris Brand Sàrl (Switzerland), Philip Morris Products S.A. (Switzerland) and Abal Hermanos S.A. (Uruguay) v. Oriental Republic of Uruguay. This case was an arbitration conducted in the International Center for Settlement of Investment Dispute (ICSID) concerning Switzerland - Uruguay BIT (1988) concerning tobacco control plain packaging measure.

We identified two other similar cases. Case Philip Morris Norway AS v the Norwegian State, which can be found through EUR-Lex website (<http://eur-lex.europa.eu/homepage.html>) and the case British American Tobacco & others v Department of Health found through Courts and Tribunals Judiciary website (<https://www.judiciary.gov.uk>).

Following document analysis, we used WTO website<sup>2</sup> to find general information about WTO, DSU, WTO agreements and WTO publications. We also searched through WHO website in order to find WHO publications and reports. We searched databases of PubMed<sup>3</sup>, Taylor & Francis Online<sup>4</sup>, NLM catalogues<sup>5</sup>, BMJ Journals<sup>6</sup> Google Scholar<sup>7</sup>, Google search engine<sup>8</sup>, OECD publications, *JSTOR*<sup>9</sup>, *Tobacco Journal International*<sup>10</sup>. We also used Australian government parliamentary library<sup>11</sup> and *University of Oslo Library search*<sup>12</sup>.

In order to find a relevant literature, we used following key word: transnational tobacco companies, global tobacco epidemic, non-state actors, international legal regimes, WTO, WHO, FCTC, ISDS, Philip Morris, British American Tobacco, bilateral investments treaty, foreign direct investment,

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<sup>2</sup> <https://www.wto.org>

<sup>3</sup> <https://www.ncbi.nlm.nih.gov/pubmed/>

<sup>4</sup> <http://taylorandfrancis.com/>

<sup>5</sup> <https://www.ncbi.nlm.nih.gov>

<sup>6</sup> <http://journals.bmj.com>

<sup>7</sup> <https://scholar.google.com>

<sup>8</sup> <https://www.google.com>

<sup>9</sup> <https://www.jstor.org>

<sup>10</sup> <http://www.tobaccojournal.com/home.php3>

<sup>11</sup> Australian government parliamentary library

<sup>12</sup> <https://www.ub.uio.no/english/>

plain packaging, tobacco control, global tobacco regulation, WTO disputes, international law, investment-state dispute settlement, international relations, global health governance, realism.

General business news sources include articles from *Financial Times*, *Bloomberg News*, *Reuters*, *The Economist*, *The Guardian*, *The West Australian* and *The Sydney Morning Herald*. Through writing the thesis, we also used snowball method to expand the literature and gather more data. We did so by analyzing sources mentioned in articles that we found through searching mentioned databases.

## **3 Findings**

### **3.1 Introduction**

In this chapter we will describe in more detail the three international legal regimes in global health governance, which we identified as relevant and important for tobacco regulation. We will use legal cases in order to illustrate implications of WHO FCTC, WTO law, and international investment law/ISDS for global regulation of tobacco control. The main case study is that between Australia and the tobacco industry as it includes implications of all three international legal regimes. The cases are focused on the plain packaging measure in the context of global regulation of tobacco control and are divided into three parts - constitutional challenges at Australian High Court, disputes under ISDS, and WTO disputes. We will also mention some supplementary cases regarding tobacco control which are relevant to the case study. At the end of the chapter we will summarize the findings. We are doing this in order to address our research question. We will present analysis and findings in order to assess to what extent the mechanisms in play, i.e. global regulation of tobacco control is governed by state power and interests (realism) or the state and non-state actors and interests (GHG).

### **3.2 International legal regimes of relevance for tobacco control**

#### **3.2.1 World Health Organization (WHO) and tobacco control**

Globalization influences world politics, economics, and the environment, which means it also has a great impact on global public health and how it is governed. After the formation of the United Nations, three diplomats from China, Norway, and Brazil recognized a need for global health organization that would regulate and protect global public health (Sze, 1988). This is how the World Health Organization was established in 1948. It was the first specialized organization under auspices of the United Nations to which every member of the United Nations has subscribed (WHO, 1946). WHO soon became an important actor in global health governance.

The WHO regulates international public health, and it has six main areas of work: health systems, promoting health through the life-course, non-communicable diseases, communicable diseases, corporate services, preparedness, surveillance, and response (WHO, n.d.b). As of 2016, it counts 194 member states (WHO, 2016a). As stated by the *Constitution of WHO* (1946), the overall aim

of the organization is the attainment of the highest possible level of health of every human being regardless of their race, religion, political belief, economic or social status.

While every WHO member state had to accept the Constitution of WHO (1946), which is binding, WHO is mainly using “soft law” (Fidler, 2010). One of the WHO’s core function is to develop global guidelines and recommendations, which are based on scientific grounds and evidence (WHO, n.d.b). In this way, WHO impacts national health policies of its member states. However, there are exceptions where the WHO has used hard law instead of soft law to promote and protect global public health; two examples are the Framework Convention on Tobacco Control (FCTC) and International Health Regulations (IHR).

Because this thesis revolves around different regimes and how they are affecting tobacco being seen as a health and trade issue, the focus is on FCTC. The WHO became highly implicated into resolving tobacco issue since the mid 1990s when two public health researchers, Ruth Roemer and Allyn Taylor, got the idea of how WHO could utilize its constitutional authority through developing international conventions in order to protect global health (Roemer, Taylor & Lariviere, 2005). They recommended using the framework convention-protocol approach to tackle the global tobacco epidemic. Framework convention is a legally binding treaty that establishes the general norms and institutions of the regime for its parties, while it leaves the setting of more specific commitments to more detailed agreements usually called protocols (Bodansky, 1999). WHO’s first binding treaty, Framework Convention on Tobacco Control (FCTC), was in fact, a major step in the fight against the global tobacco epidemic. It went so far that tobacco was named as the world’s single greatest preventable cause of death in the WHO report on global tobacco epidemic in 2008 (WHO report, 2008, p.8).

Global trade in combination with the profitability of tobacco manufacturers and addictiveness of nicotine, prompted the tobacco epidemic to spread all over the world (WHO, 2009b). In the WHO’s publication History of the World Health Organization Framework Convention on Tobacco Control, it was stated that “by the 1990s, the tobacco epidemic was a public health problem of epic proportions” (WHO, 2009a, p.1). Confronting public health issues on a global level, such as the tobacco epidemic, requires legally binding international instruments. Evidence-based environmental treaties inspired Roemer to introduce the idea of using international treaty law as a public health approach in the WHO to tackle the global tobacco epidemic (Roemer, Taylor &

Lariviere, 2005). In May 1996, the 49<sup>th</sup> World Health Assembly adopted resolution WHA49.17 requesting to initiate the development of a framework convention in order to promote and protect international public health (WHO, 2009a). This was in accordance with Article 19 of the WHO Constitution<sup>13</sup> which 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.”* (International Health Conference, 1946).

The framework convention-protocol approach is primarily appropriate because of its flexibility. It works on the principle that states adopt firstly the framework convention, which calls for cooperation in order to achieve common aims, and then separate protocols concerning specific measures necessary to achieve those aims (Joossens, 2000). This means that there is no single document or basic framework, but that each issue is dealt with under separate agreements through the addition of protocols and annexes to that framework. Taylor and Bettcher (2000) explain that this approach to international law-making consists of actually two components. First is the framework convention that consists of general obligations and an institutional structure for global governance, and the second is protocols which supplement, clarify or specify further commitments.

The WHO Framework Convention on Tobacco Control is the first treaty negotiated under the auspices of the World Health Organization (WHO, 2009a). It was adopted by the 56<sup>th</sup> World Health Assembly in 2003 in Geneva, Switzerland and the Convention was opened for signatures. On 27<sup>th</sup> February 2005 WHO FCTC came into force. The treaty is legally binding in 180 ratifying countries, which made it one of the most rapidly embraced treaties in UN history. It aims to reduce demand and supply of tobacco in order to protect public health (WHO FCTC, 2005).

Measures to reduce the demand for tobacco are contained in articles 6-14 in the WHO FCTC. Convention contains price and tax measures as well as non-price measure to reduce the demand for tobacco. Those are:

- Protection from exposure to tobacco smoke;

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<sup>13</sup> Constitution of the World Health Organization’, Basic Documents (45th ed Supplement, October 2006) Article 19.

- Regulation of the contents of tobacco products;
- Regulation of tobacco product disclosures;
- Packaging and labelling of tobacco products;
- Education, communication, training and public awareness;
- Tobacco advertising, promotion and sponsorship; and,
- Demand reduction measures concerning tobacco dependence and cessation.

While measures for reduction of supply are contained in articles 15-17:

- Illicit trade in tobacco products;
- Sales to and by minors; and,
- Provision of support for economically viable alternative activities.

However, there are still challenges in implementing the treaty fully, such as legal challenges from tobacco industry, lack of political support, scarce human and financial resources and the rise of the use of alternative tobacco products (Nikogosian & Costa e Silva, 2015). These challenges are mostly present in developing countries.

One of the challenges is also limitations of WHO in global health governance (Taylor, 2002; Ng & Ruger, 2011). Previously, the WHO and the World Bank were considered to have central roles in global health governance because the WHO represents the main source of health expertise, while the World Bank represents the main financial source. However, some public health experts believe shift of power from the WHO to the WTO became more prominent because of all the binding agreements by WTO which cover some health issues. For example, Fidler (2002) argues that there is a shift of power from World Health Organization to World Trade Organization concerning international law and global public health area. He states (2002, p.26) that: “the combination of the multiple interfaces between the WTO agreements and public health, combined with the revolutionary dispute settlement mechanism, put the WTO in a much more powerful international legal position than WHO with respect to global public health. From the international legal perspective, the center of power for GHG has shifted from WHO to the WTO.”

### **3.2.2 World Trade Organization (WTO) and regulation of tobacco**

According to Fidler (2002, p.44), the most important international legal mechanism for GHG is the treaty. Additionally, Fidler (ibid) explains different international legal regimes and the importance of their role in global health governance. One of those regimes is international trade law which is primarily under the auspices of the WTO. There are several multilateral trade agreements under the WTO that affect global public health: General agreement on Tariffs and Trade (GATT), General Agreement on Trade in Services (GATS), Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement), Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and Agreement on Technical Barriers to Trade (TBT Agreement). An updated GATT<sup>14</sup> is the WTO agreement governing trade in goods. It sets the fundamental rules of trade liberalization for goods and for this thesis it is important because it regulates the trade of tobacco products (WHO & WTO, 2002). GATS is important because of its implications in health services and systems. It aims to liberalize trade in services among the other aims. It is applicable for our case in relation to restrictions on cigarette advertising (WHO & WTO, 2002). SPS Agreement regulates use of trade-restricting health measures related to animal, plant and human health. Regarding the case study on tobacco control the Agreement on Agriculture is important because of government support for tobacco production.

However, TRIPS and TBT Agreement are the most relevant for our case study as they form the basis of the formal challenges brought against Australia in the WTO dispute settlement system. TRIPS establishes minimum standards for protecting and enforcing intellectual property rights, such as patents, copyright, trademarks, geographical indications, and industrial designs. It is important for tobacco in relation to trademark protection and the disclosure of product information. The disputes initiated by Cuba, Indonesia, Dominican Republic, Ukraine and Honduras against Australia are mostly in regard to two parts of the TRIPS agreement – trademarks and geographical indications.

A trademark is a sign, or a combination of signs used to distinguish the goods or services of one enterprise from another. Australia's plain packaging legislation imposes strict format requirements on word trademarks, such as Marlboro or Camel. It also bans the use of figurative marks such as

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<sup>14</sup> Marrakesh Agreement Establishing the World Trade Organization, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1A.

colors and logos. Another reason why TRIPS is important is because of geographical indications. Geographical indication does not only say where the product comes from, but it also identifies the product's special characteristics as a result of the product's origins, such as Cuban cigars. For instance, the countries in the mentioned disputes referred to the part of the TRIPS which states "a Member shall not diminish the protection of geographical indications that existed in that Member immediately prior to the date of entry into force of the WTO Agreement."

Agreement on Technical Barriers to Trade (TBT Agreement) encourages WTO member states to adopt health-protective international standards and discourages use of technical standards for protectionist purposes. It tries to ensure that regulations, standards, testing and certification procedures do not create unnecessary obstacles. TBT Agreement is applicable to tobacco control in relation to product requirements such as packaging and labelling (WHO & WTO, 2002; Fidler, 2002). Cuba, Honduras, Ukraine, Indonesia and Dominican Republic argued that by imposing strict regulations such as those in Australia's Tobacco Plain Packaging Act 2011, might create obstacles to international trade of tobacco products and make their tobacco products less favorable.

These agreements in combination with the WTO's dispute settlement system, provide a unique contribution to the stability of the global economy, but also impact global health governance (WTO, 2015). In comparison to the WTO, the WHO differs significantly in a sense that it does not have such a strong dispute settlement system as the WTO. One would believe that the WHO is lacking legal power to enforce laws because WHO prefers to use "soft law". It is believed that non-binding norms could harden into binding law through its gradual acceptance by states while keeping harmony without causing frictions among the states and challenges which could emerge when introducing treaties (Fidler, 2002). While this approach by WHO is probably preferable by WHO member states, it also represents a challenge. While some WHO member states do base their national policies and laws on WHO's recommendations and guidelines, still many member states do not. Even though failure to implement WHO's recommendations is not considered as violating or breaching of any treaty, actions like this could harm both global and national public health.

However, the WHO has international regulatory power through binding regulations that are adopted by the World Health Assembly (Fidler, 2002). These binding regulations function as an opt-out system, instead of the usual opt-in system, where member states sign and ratify treaty, in order for treaty to come into force (WHO 1946; Vienna Convention on the Law of Treaties 1969). If member states do not take these actions, the treaty simply cannot bind them, while regulations

under the WHO Constitution are binding for all WHO member states unless they contract out of those regulations. This means that every regulation adopted under Article 21 of the WHO Constitution is basically an international agreement (Fidler, 2002).

Concern about shift of power is simply because of possible prioritization of trade issues over health issues in the case if there would be contradictions between the WTO's trade agreements and the WHO's rules and regulations (Fidler 2002; Frankel & Gervis, 2013). The tobacco industry would naturally exploit such contradictories. However, on the Fifth High-Level Symposium on Global Health diplomacy in 2011, Pascal Lamy, then Director-General of the WTO, publicly stated that WTO rules and the implementation of the WHO FCTC are not incompatible (WHO, n.d.a). At the same symposium, the Director-General of WHO, Dr. Margaret Chan, proposed taking a stand against Big tobacco, and supporting countries that were taking measures to protect their populations. These two different regimes, international trade agreements by WTO and WHO's FCTC, are both playing important roles in global health governance and should not be seen as one regime being more "powerful" or important than the other, as they are both interconnected.

According to Fidler (2002), international trade law is another international legal regime that affects global public health. International trade is a very complex area, which is regulated by various bilateral and multilateral agreements (Fidler, 2002). While international trade law is primarily concerned with regulating international trade, interconnection between multilateral trade agreements and public health should not be ignored. For instance, there are several WTO agreements that influence health and health policies. The role of international trade law regime in global health governance is particularly interesting for the case study between Australia and the tobacco industry. Because tobacco is both a health-and-trade issue, this case illustrates the impact of the international trade regime in global health governance regarding tobacco control. Tobacco disputes are an example of the application of trade rules. While trade liberalization, such as eliminating or reducing tariffs and other barriers to imported tobacco, contributed to the spread of tobacco epidemic, WTO Agreements have a great impact on tobacco control. Even though raising tariffs is contradictory to the general goal of trade liberalization, governments can use WTO's consistent, non-discriminatory measures, such as internal taxes and other tobacco control measures in order to reduce tobacco consumption (WTO & WHO, 2002).

The WTO is the only international organization, which regulates and deals with the rules of world trade. It was established on 1 January 1995 and was created by GATT negotiations (Irwin, 1995a). Its predecessor organization, the General Agreement on Tariffs and Trade (GATT 1947), helped to establish a strong international trading system. GATT was formed in order to boost economic recovery after the World War II. Restriction of national trade policies and reduction or elimination of tariffs through GATT increased international trade significantly (Irwin, 1995b). Through several rounds of trade negotiations, GATT was becoming more and more liberal until 1995 when GATT was updated and became the WTO's umbrella agreement for trade in goods (WTO, n.d.a).

In comparison to GATT, WTO had more explicit rules and guidelines as well as a stronger dispute settlement system, which is more developed than the one that was available under GATT (Grieco et al., 2015, p.276). Grieco et al. (2015, p.275) state that WTO's dispute settlement system is one of the most important developments in multilateral trade diplomacy. As of 2016 WTO consists of 164 member states (WTO, n.d.b). Its objective is to help producers of goods and services, exporters, and importers conduct their business and open trade for the benefit of all (WTO, 2015).

Some of the main WTO's activities are:

- Reducing and eliminating barriers to trade (e.g. import tariffs)
- Negotiating and governing the rules of international trade (e.g. antidumping)
- Administering and monitoring the application of the WTO's agreed rules for trade in goods, trade in services, and trade-related intellectual property rights
- Monitoring members' trade policies and application of the agreements
- Settling disputes among the members (WTO, n.d.c)

WTO regulates international trade through its agreements, which are negotiated and signed by member states and later ratified in their parliaments. The success of WTO could mainly be thanked to its Dispute Settlement system (WTO, n.d.d). The system provides a binding and enforceable mechanism through which WTO members can enforce their trade rights. Without it, rules otherwise could not be enforced, and the WTO would be less effective. Dispute settlement is the central pillar of the multilateral trading system. The primary objective of the DSB is not to make rulings, but rather to settle disputes, preferably through a mutually agreed solution that is consistent with the WTO Agreement (Article 3.7 of the DSU). The WTO members have agreed they will use

the multilateral system of settling disputes instead of acting unilaterally in case if one of the members is violating trade rules (WTO, 2015).

If member states were acting unilaterally, things could get out of control very quickly. For example, if one member state accuses another member state of breaking WTO rules, then the accusing member could violate WTO rules as well by introducing trade barriers as a countermeasure (WTO, n.d.e). The accusing member could justify this countermeasure as a response to the other member's violation and it could be considered legal under the traditional international law. The problem begins if the accused member disagrees whether its measures actually violated any of the WTO obligations, and propose another countermeasure against the accusing member. The accusing member, which is the original complainant can consider this second countermeasure illegal as well, adopting a further countermeasure. This could continue indefinitely and lead to "trade war" (WTO, n.d.e).

For the dispute settlement system to function effectively, it is important that all settlements have to be conducted in an efficient and timely manner (World Trade Organization, 2017, p.255). Also, a preferred solution is that the countries concerned try to settle the dispute by themselves on a mutually agreed solution. Therefore, as the first stage in every case, it is recommended to have consultations between the concerned government rather than immediately going to full-blown formal WTO proceedings (Australian Government, n.d.). Parties should always attempt to negotiate a settlement before adjudication. This is due to both efficiency and cost-effectiveness. Consultations and mediation are available in other stages as well since the bilateral settlement is always encouraged. Adjudication is to be used only when the parties cannot work out a mutually agreed solution.

If consultations were unsuccessful and parties could not agree on the solution, Member states can initiate a formal WTO complaint under WTO dispute procedures (Australian Government, n.d.). In this case, a panel is set up and panelists appointed. If it is decided that disputed trade measure breaches WTO agreement or its obligation, the final report is released, and it becomes the Dispute Settlement Body's ruling or recommendation within 60 days, unless a consensus rejects it. Both sides can appeal the report, which is appealed to the Appellate Body. Even though appeals cannot reexamine existing evidence or examine new issues and they are only based on

points of law as legal interpretations, the appeal can uphold, modify or reverse the panel's legal findings and conclusions (WTO, 2015).

When the dispute is finally settled, the dispute settlement body adopts the report and the “losing” country is expected to change its practices accordingly to the WTO's agreements (WTO, 2015). If for some reason, it is not possible, and the losing country cannot determine mutually acceptable compensation, the complaining country can seek permission from Dispute Settlement Body to impose sanctions or countermeasures against the offending member (Grieco et al., 2015, p.275).

Furthermore, the WTO has some fundamental principles of the trading system besides promoting fair competition, free trade and encouraging development. Firstly, trade should be without discrimination, which has two rules – most favored nation (MFN) principle and the national treatment principle. Under most favored nation principle countries cannot discriminate between their trading partners, which means they cannot grant someone special favor as lowering customs duty rate for one of their products without doing the same for all other WTO members (WTO, 2015). However, there are exceptions to the rule. Countries can have free trade agreements which can apply only to goods traded within the group, thus discriminating against goods from outside. By national treatment principle, it is meant that foreign and domestic actors should be treated equally. Foreign actors should have the same rights when it comes to their goods, services, copyrights, and patents which have entered the domestic market as the domestic actors (WTO, 2015).

Even though the WTO is considered a successful organization, it still has to deal with some issues. For example, its staff mainly contains trade specialists who have been criticized for favoring trade interests over other non-trade issues such as health (Guzman, 2004). There are also other significant challenges. For example, key areas of world trade like agriculture are highly protected, while others like trade in services, investment, and intellectual property, have only basic agreements in place and large gaps in coverage (Grieco et al., 2015, p.276).

As already mentioned, the WTO has a major role in global health governance. Its multilateral trade agreements affect global public health directly and indirectly. However, the main focus here is on how WTO Agreements affect tobacco regulation. Most relevant WTO Agreements for tobacco regulation are the Agriculture Agreement, TBT, TRIPS, GATS and GATT Article XX (b) (WTO/WHO, 2002). This will be described when discussing the WTO's disputes “Australia —

Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging”. Cuba, Honduras, Indonesia, Dominican Republic and Ukraine are five states that requested consultations with the WTO on the grounds that Australia's Plain Packaging Measures appear to be inconsistent with its obligations under provisions of the TRIPS Agreement, the TBT Agreement and the GATT 1994.

General Agreement on Tariffs and Trade 1994 (GATT 1994) is considered the WTO’s principal rule-book for trade in goods (WTO, n.d.a). The Technical Barriers to Trade (TBT) Agreement is another WTO’s agreement relevant to the case. Its main objective is to ensure that technical regulations, standards, and other divergent measures states use to regulate their markets, do not create obstacles to trade or discriminate against foreign imports in order to protect domestic industries. The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) requires WTO Members to establish minimum standards for protecting and enforcing intellectual property rights such as copyrights, patents, and trademarks (WTO & WHO, 2002). These rules serve not just for the regulation of trade but also for the protection of business’s intellectual property. This is the main reason why this agreement is important for the case study between Australia and tobacco industry. Tobacco companies claimed that their intellectual property would be unconstitutionally acquired by the Commonwealth of Australia if Tobacco Plain Packaging Act 2011 would be implemented into national law.

TRIPS is the agreement that contains the most obligations believed to be breached under implementation of Australia’s Plain Packaging Act according to complaining states<sup>15</sup>. It was negotiated in the Uruguay Round and it came into effect on 1 January 1995. The TRIPS Agreement is a minimum standards agreement, which means if Members wish to have more extensive protection of intellectual property, they are allowed to do so within their own legal system (Annex

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<sup>15</sup> See Request for the Establishment of a Panel by Ukraine, Australia—Certain Measures Concerning Trademarks and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging, WT/DS434/11 (Aug. 17, 2012) (panel established but not yet composed Sept. 28, 2012); Request for the Establishment of a Panel by Honduras, Australia—Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging, WT/DS435/16 (Oct. 17, 2012) (in consultations Apr. 4, 2012); Request for the Establishment of a Panel by the Dominican Republic, Australia—Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging, WT/DS441/15 (Nov. 14, 2012) (in consultations July 18, 2012). In May 2013 Cuba requested consultations with Australia. Request for Consultations from Cuba, Australia—Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging, WT/DS458/1 (May 7, 2013).

1c Agreement on Trade-Related Aspects of Intellectual Property Rights as amended on 23 January 2017). It presents the most comprehensive multilateral agreement on intellectual property. According to the TRIPS agreement, intellectual property rights are usually divided on:

- Copyright and rights relates to copyright (i.e. the rights of authors of literary and artistic works, the rights of performers, producers of phonograms, and broadcasting organizations);
- Industrial property (i.e. trademarks, geographical indications, patents, industrial designs, and trade secrets).

Australia's Plain Packaging Act raised many questions about its compatibility with the WTO's Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) since it imposed very strict format requirements on word trademarks and banned the use of figurative marks such as colors and logos. However, the WTO members have the right to implement measures in order to achieve legitimate policy objectives, such as the protection of human health and safety, or protection of the environment (WTO, 2015). The question is under which condition such objectives can justify trade restrictions.

### **3.2.3 Investor-state dispute settlement (ISDS) and tobacco control**

Global governance does not just include IGOs as non-state actors, but also NGOs and multinational corporations (MNCs). States and intergovernmental institutions were at the center of global governance, but since the 1980s the growth of diverse non-state actors changed the dynamics and outcomes of world politics (Falkner, 2011). In fact, these non-state actors present challenges to policy makers.

Globalization has led to the growth of the global economy and has created ever more MNCs and thus foreign direct investment (FDI) flows (Falkner, 2011). Many empirical studies conclude that FDI can contribute more than domestic investment to productivity and income growth in host countries (OECD, 2002). Investments can also bring jobs, technology and capital into states' economies, which is why states around the world are so fiercely competing through financial and regulatory incentives to attract and keep investment (Johnson, Sachs and Sachs, 2015). However, according to Falkner (2011) it is difficult to create global governance regimes for MNCs that compare in strength and coverage to the international regimes for trade and finance. He mentions that there are governance systems for international business activity such as within the World

Trade Organization and in bilateral or regional trade agreements. That is why there is a need for Investor-State dispute settlement (ISDS) - a mechanism included in international investment agreements to ensure that commitments that countries have made to one another, to protect mutual investments are respected (European Commission, 2015). Nonetheless, MNCs are increasingly using ISDS to challenge the legal and regulatory systems and policymaking of the contracting states, which represents serious risk to the ability of states to govern in the public interest (Johnson, Sachs & Sachs, 2015).

A few major corporations are dominating the world's tobacco market. Those are mainly Chinese, American, British and Japanese transnational companies (Taylor and Bettcher, 2000). The global reach they achieve all over the world is believed to be enhanced by international trade liberalization. The Uruguay Round (1986-1994) included for the first time liberalization of unmanufactured tobacco (Chaloupka, 1998; Taylor et al., 2000). The Uruguay Round brought the biggest reform of the world's trading system since the creation of GATT (1947). The establishment of the World Trade Organization created new international trade regime through numerous new multilateral agreements addressing various trade issues, including tobacco (Chaloupka, 1998; Taylor et al., 2000). However, Chaloupka (1998) and Taylor et al. (2000) are not the only ones that believed that reduction in tariffs and other barriers to trade would contribute to globalization of tobacco epidemic. Asma et al. (2011) and The World Bank (1999) in its report *Curbing the epidemic - governments and the economics of tobacco control*, stated that tobacco epidemic spread worldwide through mix of trade liberalization, global marketing and communications, and direct foreign investment.

IMF (1993, p.86) defines direct investment as an “international investment that reflects the objective of a resident entity in one economy obtaining a lasting interest in an enterprise resident in another economy. (The resident entity is the direct investor and the enterprise is the direct investment enterprise.)”. Foreign direct investment (FDI) represents a key element in globalization. It provides the means for creating direct, stable and long-lasting links between economies (OECD, 2008). Terms and conditions of FDI are established by various bilateral investment treaties (BIT). In fact, many countries are turning to regional trade agreements and bilateral free trade agreements (FTAs) as alternatives to global trade agreements, which are becoming more and more complex and increasingly difficult to complete (Grieco et al., 2015).

Regional trade agreements, such as the North American Free Trade Agreement, the European Union, and the Association of South-East Asian Nations, are acting together with global trade agreements by further mandating trade liberalization at the regional level (Roemer, 1997). Reducing trade barriers, that is trade liberalization, has led to increased trade in tobacco and tobacco products. Tobacco industry saw opportunity in direct foreign investment and variety of bilateral, regional and international trade agreements to acquire new markets, particularly those in developing countries with cash-hungry governments (Taylor et al., 2000).

Another reason why bilateral and regional trade agreements are preferred instead of global trade agreements, is because such agreements can contain provisions otherwise excluded from global trade agreements. For example, Vanderbilt (2013) mentions that the TRIPS Agreement does not include a comprehensive agreement on investment and therefore does not characterize intellectual property as an investment asset, while many BITs do consider it to be an investment asset.

Because host countries could use their sovereignty to acquire parts or all of the investment from the foreign investor, there was a need for Investor-State Dispute Settlements (ISDS), which are supposed to protect foreign investors from such opportunistic behavior (Schjelderup & Stähler, 2017). Similar to WTO disputes between member states, disputes between investors and foreign countries require adjudication. In the case of bilateral free trade agreements, dispute settlement. System is Investor-State Dispute Settlement (ISDS) which plays a crucial role in legal regimes. ISDS provisions are contained in many international agreements, including free trade agreements, bilateral investment treaties, and multilateral investment agreements (Pohl, Mashigo & Nohen, 2012). ISDS represents a neutral international arbitration mechanism that ensures protection of mutual investments and that the commitments between the countries are respected (European Commission, 2015; Office of the US trade representative, 2015).

Companies cannot sue states or have a dispute with countries in WTO's Dispute Settlement System, but they can do so through investor-state dispute settlement. ISDS is important in today's global trade because it protects businesses and their investments in foreign countries. For instance, multinational corporations (MNCs), such as transnational tobacco companies (TTCs), have started to use it in order to shape policy-making in governments in developing and developed countries (Schjelderup & Stähler, 2017; McNeill et al., 2017). Therefore, the institutions of investment arbitration to resolve investor-state disputes constitute the core of the modern investment regime,

which plays a significant role in global health governance, especially regarding tobacco control and protection of national public health (Kim, 2016).

The rise in conflicts between multinational corporations and governments about the legality of policy changes led to the dramatic increase of ISDS cases in the last decade (Schjelderup & Stähler, 2017). There are several particular cases which can give a better insight into conflicts regarding tobacco regulation. For example:

- Bilateral investment treaty (BIT) between Hong Kong and Australia is the basis of Philip Morris's dispute against the government of Australia.<sup>16</sup>

BIT between Hong Kong and Australia is important for the case study between Australia and tobacco industry and is discussed further as part of investment treaties, ISDS regime and tobacco control.

### 3.3 Legal cases

Global regulation of tobacco and its implication for global health governance, is shown through recent legal challenges by transnational tobacco companies against the Australian government. This legal battle is named by media as "Australia vs. Big Tobacco"; it contains a set of cases, in which tobacco companies are either directly challenging Australian government in the courts or indirectly over other states. Therefore, these cases are useful to describe the impact of different international legal regimes on global regulation of tobacco. Besides cases concerning Australia, some other similar cases from other countries will be used as supplementary documentation.

This set of cases is revolving around Australian government adopting one particular FCTC's measure and implementing it as a new national law. The measure in question is regarding Article 11 of the Convention - Packaging and labeling of tobacco product.

In addition to guidelines in Framework Convention on Tobacco Control (FCTC), the WHO has also published separate guidelines for implementation of certain measures, where it is described more into depth how Member states should implement it. *Guidelines for implementation of Article*

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<sup>16</sup> See Agreement Between the Government of Australia and the Government of Hong Kong for the Promotion and Protection of Investments, Austl.-H.K., Sept. 15, 1993, 1748 U.N.T.S. 343.

11 of the WHO FCTC on "Packaging and labelling of Tobacco Products"<sup>17</sup> was adopted in the third session by the Conference of the Parties (COP) in 2008 (decision FCTC/COP3(10)). Under *Article 6 of the Convention*, packaging and labelling of tobacco products is considered to have a great potential in impacting reduction in demand for tobacco products among other measures such as raising taxes on tobacco products.

The overall success of the FCTC measures offered Australia the incentive to implement these guidelines in their own national law. The Australian government decided to take harsher measures to protect and promote public health by discouraging people from using tobacco products, so the Government went one step further and proposed implementation of the new law - *Tobacco plain packaging act 2011* (Voon et al., 2012). By adopting the guidelines, Australia became the first country to fully implement plain packaging (WHO, 2016b). Australia's law on plain packaging derived from the Article 11 of the Convention and the *Guidelines for implementation of Article 11 of the WHO FCTC on "Packaging and labelling of Tobacco Products"*.

The Parliament of Australia passed the government's proposed plain packaging legislation, which was assented on 1 December 2011 and after that, signed into Australian national law (Tobacco Plain Packaging Act 2011). With this legislation, Australia banned the use of any branding, logos, brand imagery, trademarks, colors or promotional text on tobacco products and packaging. It is only permitted to print the brands' name, but in size, font and place on the pack, which are determined by the law (Tobacco Plain Packaging Act 2011). Another proposed rule regarding the packaging is the color of the packaging, which can be only in one color – drab dark brown (PANTONE 448C). This color is proven by study to be the most repellent color, especially to young people (Wells, 2012). The full details and guidelines of plain packaging are contained in the document *Tobacco Plain Packaging Act 2011, No.148, 2011*, which can be found in its electronic version of the Act in ComLaw website at <http://www.comlaw.gov.au/>.

However, even though the Australian government wanted to act in the best interest of its national public health, *Tobacco Plain Packaging Act 2011* raised several international trade law issues (Garvel & Gervais, 2013). Lowering the smoking rate means only one thing for the tobacco industry: lower sales and less profit. Implementation of regulations and laws such as Tobacco Plain

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<sup>17</sup> WHO Framework Convention on Tobacco Control Conference of the Parties, 'Guidelines for Implementation of Article 11 of the WHO Framework Convention on Tobacco Control', FCTC/COP3(10) (22 November 2008).

Packaging Act 2011 indeed harms the tobacco industry. Therefore, it was expected from Big tobacco to start suing Australia on many different grounds because this law will cost tobacco producers billions of dollars (Fooks & Gilmore, 2014). Big tobacco is a term that applies to the five largest tobacco industry companies which dominate global tobacco trade. It includes Philip Morris International, British American Tobacco, Imperial Brands, Japan Tobacco International, and China Tobacco.

While the harms of tobacco are already well known, the tobacco industry also brings some benefits such as, employment and tax revenue for governments. According to the *Final Budget Outcome 2013/2014*, government revenue from total tobacco excise tax collected was approximately \$A8.5 billion (Australian government, 2014). However, another aspect is constantly growing costs of health care services in the world, either due to the aging population or developing new technologies. Tobacco as the most preventable cause of death in the world and the cause of many diseases, causes an increase in the use of healthcare services and therefore higher healthcare costs (Fishman et al., 2003). Thus, there is an incentive for governments to lower tobacco consumption in order to reduce health care costs. Many measures have been taken by WHO and member states to lower tobacco consumption in the previous three decades, from banning advertisement and smoking in public places to changing the packaging and labeling guidelines for tobacco products (Paoletti et al., 2012). Australia took an extra step in lowering smoking rate to its minimum in order to promote and protect public health, and so it became the first country in the world to impose plain packaging law (World Health Organization, 2016). This action by the Australian government presents a revolution and one of the breaking points in history in the battle against the tobacco industry. If Australia manages to overcome all challenges induced by the tobacco industry, it can serve as example for all the other states in the world to act the same. For example, after Australia adopted the Guidelines, France and United Kingdom introduced the plain packaging measure. Four other countries announced their intent to introduce plain packaging, while nine countries are already in process of implementing it (WHO, 2016c).

### 3.3.1 Constitutional challenges to tobacco plain packaging in the High Court of Australia

A constitutional challenge means that a law is being challenged in court in order to see if it violates or is inconsistent with the constitution of the state. In this case, several tobacco companies brought

legal challenges against Australia's plain packaging laws in the High Court of Australia, claiming these laws are unconstitutional under Constitutional law of the Commonwealth of Australia, and therefore should be voided.

As already mentioned, Australia's new national law - Tobacco Plain Packaging Act 2011 raised certain questions regarding its compatibility with some international trade and investment laws, which will be showed through following cases. The tobacco industry strongly opposed the Government's proposal to require plain packaging of tobacco products (Thomas, 2010).

The same day *Tobacco Plain Packaging Act 2011* (Cth)<sup>18</sup> received Royal Assent, several tobacco companies - Philip Morris Limited<sup>19</sup>, British American Tobacco Australasia Limited & Ors<sup>20</sup>, Van Nelle Tabak Nederland BV & Anor<sup>21</sup>, JT International SA<sup>22</sup> filed writ of summons on High Court of Australia because of the newly implemented national law. This was the first time the tobacco industry challenged the Australian government on the High Court of Australia, which is the highest court in the Australian judicial system. Its function is to interpret and apply the law of Australia, to decide cases of special federal significance, including challenges to the constitutional validity of laws, and to hear appeals, by special leave, from Federal, State and Territory courts (High Court of Australia, n.d.).

Constitutional challenges to tobacco plain packaging brought by the tobacco industry are referred to in case No. S389/2011 - British American Tobacco Australasia Limited & Ors v The Commonwealth of Australia and its related matter case No. S409/2011 – JT International SA v. Commonwealth of Australia, while Philip Morris Limited, Van Nelle Tabak Nederland BV and Imperial Tobacco Australia Limited were granted leave to intervene (Appeal Short Particulars,

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<sup>18</sup> No 148 of 2011.

<sup>19</sup> Philip Morris Limited v Commonwealth of Australia, Writ of Summons (filed 20 December 2011, High Court of Australia, Melbourne Registry).

<sup>20</sup> British American Tobacco Australasia Limited, British American Tobacco (Investments) Limited, and British American Tobacco Australia Limited v Commonwealth of Australia, Writ of Summons (filed 1 December 2011, High Court of Australia, Sydney Registry).

<sup>21</sup> Van Nelle Tabak Nederland BV and Imperial Tobacco Australia Limited v Commonwealth of Australia, Writ of Summons (filed 6 December 2011, High Court of Australia, Sydney Registry).

<sup>22</sup> JT International SA v Commonwealth of Australia, Writ of Summons (filed 15 December 2011, High Court of Australia, Sydney Registry).

2012). The plaintiffs in the case No. S389/2011 involved British American Tobacco Australasia Limited as First Plaintiff, British American Tobacco (Investments) Limited as Second Plaintiff and British American Tobacco Australia Limited as Third Plaintiff, which will further be referred as Plaintiffs. These two cases examine if plain packaging laws are constitutionally valid under Constitutional law of the Commonwealth of Australia.

The Plaintiffs argued that the Australian Government deprives them of their constellation of rights relating to the production, packaging and marketing of certain tobacco products in Australia, through the plain packaging measure (Submissions of the Plaintiffs, 2012 - Case No. S389/2011; Case No. S409/2011). According to the Plaintiffs, by imposing restrictions on the color, shape and finish of retail packaging for tobacco products and restricting the use of trademarks on its packaging, there has been an acquisition of their intellectual property such as trademarks, copyright and patents (Submissions of the Plaintiffs, 2012)<sup>23</sup>. During the hearings, the tobacco companies argued that the measures in *Tobacco Plain Packaging Act 2011* will result in unconstitutional acquisition of property rights by the government otherwise than on just terms.<sup>24</sup>

The Plaintiffs referred to Section 51(xxxi) of the Constitution of Australia which states:

The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:

...

(xxxi) the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws;

Within the meaning of s 15(xxxi) of the Constitution, Plaintiffs defined term “property” as every species of valuable right and interest, as well as any tangible or intangible thing which the law protects under the name of property, thus according to the Plaintiffs term “property” involves intellectual property as well (Submissions of the Plaintiffs, 2012)<sup>25</sup>. For example, in case S389/2011, British American Tobacco Australasia alleges four types of statutory intellectual

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<sup>23</sup> JT International SA v. Commonwealth of Australia; British American Tobacco Australasia Limited and Ors v. The Commonwealth of Australia

<sup>24</sup> Philip Morris Limited v The Commonwealth of Australia; British American Tobacco Australias Limited & Ors v The Commonwealth of Australia; Van Nelle Tabak Nederland BV & Anor v The Commonwealth of Australia; JT International SA v The Commonwealth of Australia [2012] HCA Trans 43 (23 February 2012).

<sup>25</sup> JT International SA v. Commonwealth of Australia; British American Tobacco Australasia Limited and Ors v. The Commonwealth of Australia

property rights: its trademarks which are registered pursuant to the *Trade Marks Act* 1995 (Cth), their design registered under the *Design Act* 2003 (Cth), their patents registered pursuant to the *Patents Act* 1990 (Cth), as well as British American Tobacco's (BAT) copyright in certain images, which copyright the Commonwealth does not admit. BAT also lists its goodwill, reputation and retail packaging as other categories of property (Submissions of the Plaintiffs, 2012)<sup>26</sup>.

This means that the legislative power of the Commonwealth Parliament found in s 51(xxxi) of the Constitution empowers the Parliament to make laws with respect to the acquisition of property on just terms, upon which restraint tobacco companies sought to rely upon. Having this in mind they challenged the validity of the Tobacco Plain Packaging Act 2011, arguing that some or all of the provisions of the Act were invalid because the Commonwealth allegedly acquired their intellectual property rights and goodwill other than on just terms (Judgment Summary, 2012)<sup>27</sup>.

The particular provision of the Act in question is section 15 of the *Tobacco Plain Packaging Act 2011 – Acquisition of property*, which states that this Act would not result in an acquisition of property otherwise than on just terms, but it will continue to apply in relation to the retail packaging of tobacco products and the appearance of tobacco products.

Since mentioned, tobacco companies believe that their intellectual property rights were acquired otherwise than on just terms because of the new law under Tobacco Plain Packaging Act 2011, they aimed for the ruling that will order the government to withdraw the plain packaging law (Submission of the Plaintiffs, 2012)<sup>28</sup>.

In the publication of Submissions of Plaintiffs of the case No. S389 of 2011, Plaintiffs identified two issues that arose. First question is if some or all of the provisions of the *TPP Act*, apart from s. 15 of the *TPP Act*, would result in acquisition of any and what property of the plaintiffs otherwise than on just terms (within the meaning of s. 51 (xxx) of the *Constitution*). While the second one is whether s. 15 of the *TPP Act* is a valid law of the Commonwealth.

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<sup>26</sup> *ibid*

<sup>27</sup> *JT International SA v Commonwealth of Australia; British American Tobacco Australasia Limited v The Commonwealth of Australia* ([2012] HCA) Case Summary [2012] HCASum 30 (15 August 2012)

<sup>28</sup> *JT International SA v. Commonwealth of Australia; British American Tobacco Australasia Limited and Ors v. The Commonwealth of Australia*

The Defendant claimed that even if the Plaintiffs' property has been acquired by the TPP Act, objects in section 3(1) of the TPP Act and the means identified in section 3(2) of the TPP Act are within the scope of the Commonwealth's legislative power pursuant to sections 51(i), (xx) and (xxix) of the Constitution and are appropriate or reasonably necessary to achieve those goals. Therefore, section 51(xxxi) of the Constitution would not require the provision of just terms on any such acquisition.

While in the publication of Submissions of Plaintiffs of the case No. S409/2011, which is related matter to case No. S389/2011, the Plaintiff – JT International identified following issues in its proceeding:

1. Does JTI own “property” within s 51(xxxi) of the Constitution?
2. Has there been an “acquisition” of that property within s 51(xxxi)?
3. Is there a “regulatory benefit exception” to s 51 (xxxix)?
4. Are “just terms” provided for the acquisition?

JTI summarized the effect of the TPP Act, which would eliminate all distinguishing features of tobacco packaging such as JTI's Trade Marks and Get Up (Submissions of the Plaintiffs, 2012)<sup>29</sup>.

Philip Morris Limited, Van Nelle Tabak Nederland BV and Imperial Tobacco Australia Limited all intervened in the interest of the Plaintiffs in the case No. S389/0211. However, on 15 August 2012, the High Court pronounced orders in two matters, case No. S389/2011 and case No. S409/2011, concerning the *Tobacco Plain Packaging Act* 2011. The majority of the High Court held that the Act is not contrary to s 51(xxxi) and remains valid. The reasoning behind this was delivered later that year on 5<sup>th</sup> of October in judgment summary:

A majority of the Court held that to engage s 51(xxxi) an acquisition must involve the accrual to some person of a proprietary benefit or interest. Although the Act regulated the plaintiffs' intellectual property rights and imposed controls on the packaging and presentation of tobacco products, it did not confer a proprietary benefit or interest on the Commonwealth or any other person. As a result, neither the Commonwealth nor any other person acquired any property and s 51(xxxi) was not engaged.

This means that the Court decided there was no acquisition of property, in this case intellectual

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<sup>29</sup> JT International SA v. Commonwealth of Australia

property rights, because there is an important distinction between a taking of property and its acquisition<sup>30</sup>. While taking involves deprivation of property seen from the perspective of its owner, acquisition involves receipt of something seen from the perspective of the acquirer. Therefore, acquisition is not made out by mere extinguishment of rights<sup>31</sup>. The Court explained that the interest or benefit accruing to the Commonwealth or another person must be proprietary in character and that the Commonwealth has not acquired any benefit of a proprietary character because of the operation of the TPP Act on the plaintiffs' property rights.<sup>32</sup>

By concluding all this, on August 15 2012, the High Court of Australia rejected a constitutional challenge to the legislation passed in November 2011 that will require plain packaging of cigarettes. The High Court has awarded costs against the tobacco companies that were estimated to run into hundreds of thousands of dollars, which means the case No. S389/2011 and case No. S409/2011 were adjudicated in favor of the Australian Government.

### 3.3.2 Investor-State Dispute Settlement

The plaintiffs in both cases as well as the tobacco companies that were granted the right to intervene, were not satisfied with the outcome of judgment. The decision was not just adjourned in the favor of defendant, but the plaintiffs had to pay the defendant's costs as well as demurrer in this action (*JT International SA v Commonwealth* [2012]). However, TTCs did not just challenge Australia's tobacco plain packaging legislation on the national court, but also on an international court. Philip Morris proceeded to sue Australia through an outside tribunal by using a provision available to foreign companies under trade agreements, which are not available to Australian companies (Martin, 2016). The following case falls under Investor-State Dispute Settlement regime because it is regarding foreign direct investment and bilateral investment treaty.

The case *Philip Morris Asia Limited (Hong Kong) v. The Commonwealth of Australia* is an investment arbitration, which was conducted under United Nations Commission on International

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<sup>30</sup> *JT International SA v Commonwealth of Australia; British American Tobacco Australasia Limited v The Commonwealth* [2012] HCA 43. Date of Order: 15 August 2012 Date of Publication of Reasons: 5 October 2012 S409/2011 & S389/2011

<sup>31</sup> *ibid*

<sup>32</sup> *ibid*

Trade Law (UNCITRAL) Arbitration rules 2010<sup>33</sup>. Philip Morris Asia Limited was a pursuant to the Agreement between the Government of Hong Kong and the Government of Australia for the Promotion and Protection of Investment, which was the first investor-state dispute brought against Australia. The administering institution was Permanent Court of Arbitration (PCA). The tribunal was composed of three arbitrators. Australia's arbitrator was Professor Don McRae of the University of Ottawa, Philip Morris Asia appointed Professor Gabrielle Kaufmann-Kohler and the presiding arbitrator appointed by The Secretary-General of the Permanent Court of Arbitration was Professor Dr. Karl-Heinz Böckstiegel.<sup>34</sup>

Philip Morris is a US-based company, but as it could not sue Australia under US-Australia Free Trade Agreement because that clause was not in the agreement, Philip Morris decided to use provisions under Australian treaty series 1993 No 30 which is a Hong Kong-Australia investment treaty<sup>35</sup>. Under this treaty, Australia couldn't seize Hong Kong's based company's property.<sup>36</sup> It is interesting how Philip Morris made use of ISDS provision in Hong Kong-Australia investment treaty. It basically showed a loophole of ISDS provisions through which giant corporations can abuse such clauses in trade agreements. Just nine months prior to the lawsuit, Philip Morris put its Australia's business in hands of its Hong Kong based Philip Morris Asia's division and claimed that the seized property in question was the trademarks on their cigarette packages.<sup>37</sup> Rearranging its assets, Philip Morris Australia actually became Hong Kong investor in Australia and managed to sue Australia on international tribunal.

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<sup>33</sup> Philip Morris Asia Limited v. Commonwealth of Australia (PCA Case N° 2012-12), PCA Press Release (May 16, 2016).

<sup>34</sup> Philip Morris Asia Limited v. Commonwealth of Australia (PCA Case N° 2012-12), Award on Jurisdiction and Admissibility (December 17, 2015).

<sup>35</sup> Agreement between the Government of Hong Kong and the Government of Australia for the Promotion and Protection of Investments, signed 15 September 1993, 1748 UNTS 385 (entered into force 15 October 1993).

<sup>36</sup> *ibid*

<sup>37</sup> Australia's response to the notice of arbitration

Philip Morris Asia Limited (PML) in its *Written Notification of Claim*<sup>38</sup> pursuant to Article 10 of the Agreement between the Government of Hong Kong and the Government of Australia for the Promotion and Protection of Investments, dated 15 September 1993, argues that:

- PML has a right to use registered and unregistered trademarks, copyright works, designs, know-how, trade secrets and product packaging as it is considered intellectual property.
- Plain packaging legislation contravene protection of the investments, as the intellectual property and goodwill, that Australia has undertaken to protect by the Hong Kong-Australia BIT.
- Philip Morris' products are not distinguishable to the consumer from the products of its competitors if the intellectual property is not used, thus leaving PML a manufacturer of undifferentiated commodity
- There is lack of credible evidence that plain packaging legislation will actually achieve legislation's stated objectives
- Plain packaging act, 2011 is not fair and equitable as it contravenes Article 2(2) by the Hong Kong-Australia BIT.
- Australia has breached its international obligations under the Article 20 of the Agreement on Trade Related Aspects of Intellectual Property Rights ("*TRIPS*")<sup>39</sup>, the Paris Convention for the Protection of Industrial Property ("*Paris Convention*")<sup>40</sup> and the Article 2.2 of the Agreement on Technical Barriers to Trade ("*TBT*")<sup>41, 42</sup>

To summarize, PML is suing Australian Government based on interference with PML's Investments, lack of credible evidence and violation of international law. According to PML, new

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<sup>38</sup> The Australian Attorney-General's Department and Department of Foreign Affairs and Trade released this notice online: <https://www.ag.gov.au/Internationalrelations/InternationalLaw/Documents/Philip-Morris-Asia-Limited-Notice-of-Claim-27-June-2011.pdf>.

<sup>39</sup> Marrakesh Agreement Establishing the World Trade Organization, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1C.

<sup>40</sup> Opened for signature 14 July 1967, 828 UNTS 306 (entered into force 26 April 1970).

<sup>41</sup> Marrakesh Agreement Establishing the World Trade Organization, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1A.

<sup>42</sup> Written Notification of Claim by Philip Morris Asia Limited to The Commonwealth of Australia.

treaty transforms their subsidiary in Australia from a manufacturer of branded products to a manufacturer of commoditized products, which diminishes the value of its investments in Australia causing them financial loss. This financial loss is described in the Claimant's Notice of Arbitration, para. 8.3 as "an amount to be quantified but of the order of billions of Australian dollars".<sup>43</sup>

On its Statement of Claim, PML requested that the Tribunal should order Australian Government to either cease and discontinue all steps toward enacting plain packaging legislation, or refrain from applying them against PM Asia's investments. If the Tribunal does not order either one of the alternatives, PML requested to be awarded damages of at least [USD] 4,160 million, plus compound interest.<sup>44</sup>

In its *Response to the Notice of arbitration*, Australia rejected the claims made by PM Asia and provided the arguments that are defending its right to implement the tobacco plain packaging measure. Australia reasoned that the implementation of plain packaging legislation is a part of a comprehensive government strategy to reduce smoking rates in Australia in order to protect its public health<sup>45</sup>. Since tobacco is highly addictive, causes death and many chronic diseases, it presents a significant economic burden on governments and their national health care systems, which is why protection of public health is one of the primary objectives to all governments (Ekpu & Brown, 2015). Besides national interest, Australia also has a strong support from WHO and FCTC Secretariat for implementing plain packaging as an effective public health measure.<sup>46</sup> In the Response to the Notice of Arbitration, Australia argued that the Act is based on a broad range of studies and reports by both Australian and international public health experts, even though PM Asia claim that there is lack of credible evidence about the effectiveness of the plain packaging legislation. Australia responded as well that there are evidences that the use of logos, design and colors increases attractiveness to consumers, and decreases the effectiveness of health warnings. Furthermore, Australia claims that the Plain Packaging Act 2011 does not prevent product

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<sup>43</sup> Australia's Response to the Notice of arbitration. 2011.

<sup>44</sup> Award on Jurisdiction and Admissibility 2015.

<sup>45</sup> Australia's Response to the Notice of Arbitration. 2011.

<sup>46</sup> *ibid.*

differentiation as it does not eliminate branding since tobacco companies still have the ability to place brand's names.

The Australian Government rejected PM Asia's claims that it has breached any of the obligations under BIT stating that the investor cannot make out a claim for a breach of the fair and equitable treatment standard or of the expropriation in circumstances where a host State has announced that it is going to take certain regulatory measures in protection of public health. Australia argues also that even if it did, which it states that it did not, breach of multilateral treaties such as TRIPS, TBT and Paris Convention, is not a matter for an arbitral tribunal constituted under Article 10 of the BIT.<sup>47</sup>

Besides rejecting all of the PM Asia's claims for breaching obligations under BIT, Australia submitted jurisdictional objections about why the claims under the Hong Kong agreement should fail. Australia alleged that Philip Morris Asia had acquired its shares in Philip Morris Australia in early 2011 in the full knowledge of the government's decision in 2010 to introduce plain packaging<sup>48</sup>. By acquiring its shares, Philip Morris Australia became wholly owned by Philip Morris Asia, which is Hong Kong based, and therefore falling under obligations of the Hong Kong-Australia investment treaty. Australia argues that this should be considered as an abuse of rights, since PMA's investment was made only in order to be able to bring an arbitration claim under the bilateral investment treaty. Australian Government announced its decision to implement plain packaging on 29 April 2010, while Philip Morris Asia acquired its shares in Philip Morris Australia on 23 February 2011, therefore being in full knowledge of government's announcement.

Australia requested the tribunal to declare that it has no jurisdiction over PM Asia's claims, to dismiss claims in their entirety and to order that PM Asia bear the costs of the arbitration, including Australia's costs of legal representation and assistance, pursuant to article 42 of the UNCITRAL arbitration rules.<sup>49</sup>

On 17<sup>th</sup> of December 2015, in Award on Jurisdiction and Admissibility, the Tribunal issued a unanimous decision agreeing with Australia that the tribunal has no jurisdiction to hear Philip

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<sup>47</sup> Australia's Response to the Notice of Arbitration. 2011.

<sup>48</sup> Australia's Response, above n 15, [30].

<sup>49</sup> Australia's Response to the Notice of Arbitration. 2011.

Morris Asia's claim<sup>50</sup>. The tribunal concluded that Philip Morris Asia's arbitration claim constitutes an abuse of rights, since an investor has changed its corporate structure to gain the protection of an investment treaty at a point when a specific dispute was foreseeable. In this case, Philip Morris Asia acquired an Australian subsidiary, Philip Morris (Australia) Limited, for the purpose of initiating arbitration under the Hong Kong Agreement challenging Australia's tobacco plain packaging laws. This concluded the arbitration in Australia's favor (Australian Government, n.d.).<sup>51</sup>

President of the Australian Council on Smoking and Health, Mike Daube, said the decision was "a massive win for public health and the global tobacco companies have opposed plain packaging more ferociously than any other measure we have seen" (Metherell, 2012).

This dispute caused Australia to invest a lot of financial resources to defend itself in this tribunal against a corporate sovereignty claim. It has been expected that the Australian government spent more than [AU]\$50 million of taxpayer money for defending plain packaging law (Probyn, 2015). However, because such disputes are financial burdens that many governments are unwilling to pay, the governments tend to settle quickly and give corporations what they want rather than risking paying even more due to tribunal's fine. This is one of the reasons why ISDS is highly criticized.

The Economist (2014), in its article "The arbitration game", has described this disadvantage of the investor-state dispute settlement. The Economist (ibid) has stated that: "If you wanted to convince the public that international trade agreements are a way to let multinational companies get rich at the expense of ordinary people, this is what you would do: give foreign firms a special right to apply to a secretive tribunal of highly paid corporate lawyers for compensation whenever a government passes a law to, say, discourage smoking, protect the environment or prevent a nuclear catastrophe. Yet that is precisely what thousands of trade and investment treaties over the past half century have done, through a process known as Investor-State Dispute Settlement (ISDS)."

Because of the reasons mentioned above, Australian government decided in 2011 to discontinue the practice of seeking inclusion of investor state dispute settlement provisions in trade

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<sup>50</sup> Award on Jurisdiction and Admissibility 2015. para 589.

<sup>51</sup> Award on Jurisdiction and Admissibility 2015. para 585.

agreements. In its *Trade Policy Statement of 2011* (p.14), the Gillard Government announced that the foreign and domestic business will be treated equally under the law, which means that foreign businesses will not have greater legal right than those available to domestic ones. The Australian government has also stated that it “has not and will not accept provisions that limit its capacity to put health warnings or plain packaging requirements on tobacco products” (Trade Policy Statement, 2011, p.14). When the government has announced that it will not confer greater rights on foreign businesses through investor-state dispute resolution provisions, it meant that Australian businesses in foreign countries will not be able to seek legal rights and sue those countries through ISDS (Voon et al., 2012). Therefore, Australian businesses on foreign market will have to make their own assessments and decide whether or not to invest in those countries.

### 3.3.3 World Trade Organization

While the case Philip Morris Asia Limited (Hong Kong) v. The Commonwealth of Australia was a great win, it was not the end of the fight for Australia. Philip Morris accused Australia of breaching WTO Agreements on the Permanent Court of Arbitration.<sup>52</sup> However, this accusation was unsuccessful and not taken into consideration, as tribunal argued it was not a matter for an arbitral tribunal constituted under Article 10 of the BIT. Private individuals or companies do not have direct access to the dispute settlement system, even if they may often be the ones most directly and adversely affected by the measures which are allegedly violating the WTO Agreement. Only WTO Member states can bring disputes, but transnational tobacco companies can still be involved indirectly in the disputes and influence WTO’s Dispute Settlement System. They can be involved indirectly through lobbying governments to initiate disputes, financing governments, and providing legal support and resources.

There are many speculations that transnational tobacco companies (TTCs) are financing and encouraging other countries to sue Australia. Australian Health Secretary, Jane Halton says that the tobacco industry is providing legal advice to Ukraine and Honduras in their challenges to Australia's new tobacco plain packaging rules at the World Trade Organization (Nebehay, 2012). Philip Morris has admitted to covering legal costs for the Dominican Republic, while British American Tobacco (BAT) is doing the same for Ukraine and Honduras (Martin, 2013). In fact,

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<sup>52</sup> Written Notification of Claim by Philip Morris Asia Limited to The Commonwealth of Australia.

PM said they are openly supporting governments that challenged Australia on plain packaging and BAT said that they are happy to provide legal support to member states (Thompson, 2012). This means TTCs are indirectly involved in WTO's Dispute Settlement System and have direct effect on tobacco control.

Disputes WT/DS434 by Ukraine, WT/DS435 by Honduras, WT/DS467 by Indonesia, WT/DS441 by Dominican Republic and WT/DS458 by Cuba on the matter *Australia – Certain Measures concerning Trademarks and other Plain Packaging Requirements Applicable to Tobacco Products and Packaging* are probably the most important out of all legal battles regarding the plain packaging. If the WTO Dispute Settlement Body reaches a decision in a dispute challenging Australia's tobacco plain packaging law in Australia's favor, it could mean all governments could follow Australia's example and implement similar measure in their national law.

On 13 March 2012, Ukraine was the first Member state that requested consultations with Australia through WTO's Dispute Settlement concerning certain Australian laws and regulations that impose trademark restrictions and other plain packaging requirements on tobacco products and packaging (Australian Government, 2016). It is interesting to note that even though Ukraine's tobacco industry is powerful, it has zero trade of any tobacco products with Australia (Hermant, 2012). Soon after, four other states followed Ukraine and requested consultations with Australia through WTO's Dispute Settlement on the same matter. In mentioned disputes, Ukraine, Honduras, Indonesia, Dominican Republic and Cuba are arguing that Australia's *Tobacco Plain Packaging Act 2011* is inconsistent with Australia's WTO obligations under the *Agreement on Trade-Related Aspects of Intellectual Property Rights*, the *Agreement on Technical Barriers to Trade* and the *General Agreement on Tariffs and Trade 1994*. Besides Australia's Tobacco Plain Packaging Act 2011, states challenged its implementing Tobacco Plain Packaging Regulations 2011, the Trade Marks Amendment (Tobacco Plain Packaging) Act 2011, and all further regulations, related acts, policies or practices that have been adopted by Australia to implement the two key measures. According to Ukraine, Cuba, Honduras, Dominican Republic and Indonesia, Australia's comprehensive tobacco regulatory regime appears to be inconsistent with a number of Australia's obligations under the TRIPS Agreement, TBT Agreement and GATT 1994.

In summary, the disputes contained the following arguments: Australia failed to give effect to certain provisions in the agreements; imported tobacco products have treatment less favorable than

that accorded to like products of national origin and; Australia accords to nationals of other Members treatment less favorable than it accords to its own nationals with respect to the protection of intellectual property (WT/DS434; WT/DS435; WT/DS467; WT/DS441; WT/DS458). Some of the other arguments is that Australia imposes requirements relating to the marking of imported cigar products which materially reduce their value and/or unreasonably increase their cost of production, and that the measures constitute an unnecessary obstacle to trade and are more trade restrictive than necessary to achieve the stated health objectives (ibid).

According to the complainants' claims, Australia is diminishing the level of protection and does not provide effective protection against acts of unfair competition with respect to geographical indications and creates confusion among consumers related to the origin of the good (ibid). Complainants are also arguing that by regulating the physical features of the patented packs, the measures prevent the normal exploitation and thus the enjoyment of the patent rights for tobacco products in a manner that discriminates based on the field of technology; and that the measures prevent owners of registered trademarks that are "well known" from enjoying the rights conferred by a trademark; capable of distinguishing the goods or services of one (ibid).

In 2012 when Ukraine requested the establishment of a panel, DSB deferred it. After Ukraine's second request, the panel was composed in 2014. However, on 28 May 2015, the Panel received a request from Ukraine to suspend the proceedings in *Australia – Certain Measures concerning Trademarks and other Plain Packaging Requirements Applicable to Tobacco Products and Packaging* (WT/DS434) pursuant to Article 12.12 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU). Australia supported Ukraine's decision that the suspension will be with a view to finding a mutually agreed solution. (WT/DS434/16, communication from chair).

However, other states did not suspend their proceedings. On 1 December 2016, the Chair of the panel informed the DSB that due to the complexity of the legal and factual issues that arise in this dispute, the panel expected to issue its final report to the parties not before May 2017 (Communication from the Chairperson of the Panel, 2017).

The entire procedure is confidential, which covers the consultations (Article 4.6 of the DSU), the panel procedure until the circulation of the report (Articles 14.1 and 18.2 of the DSU and paragraph 3 of the Working Procedures in Appendix 3 to the DSU), and the proceedings of the Appellate

Body (Article 17.10 of the DSU). However, WTO Member states that have interest in the issue but are not parties of the dispute, can access the dispute settlement as third parties. 35 countries reserved their third-party rights in the dispute “Australia – certain measures concerning trademarks, geographical indications and other plain packaging requirements applicable to tobacco products and packaging”<sup>53</sup>.

The Panel expected to issue its final report to the parties by the end of the third quarter of 2017 (Communication from the Chairperson of the Panel, 2017). However, even though the final report is not yet available to the public as of writing, there are speculations and reports by media that World Trade Organization upheld Australia’s right to impose law on plain packaging (Miles & Geller, 2017; Baschuk, 2017). This means that Australis’s Plain Packaging Act 2011 is not in violation of WTO rules and that it qualifies as a legitimate public health measure.

### 3.3.4 Other cases

There are other cases, which may shed light on the role of international regimes in tobacco control, such as the case No. ARB/10/7 Philip Morris Brand Sàrl (Switzerland), Philip Morris Products S.A. (Switzerland) and Abal Hermanos S.A. (Uruguay) v. Oriental Republic of Uruguay<sup>54</sup>. It is about an international investment agreement, more precisely bilateral investment treaty (BIT) between Switzerland and Uruguay on the Reciprocal Promotion and Protection of Investments (Switzerland-Uruguay BIT) dated 7 October 1988<sup>55</sup>. Philip Morris initiated a dispute to the World Bank’s International Centre for Settlement of Investment Disputes (ICSID) on the basis of Article 10 of the Switzerland-Uruguay BIT which entered into force on 22 April 1991, and Article 36 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, dated 18 March 1965, which entered into force on 14 October 1966 (the ICSID Convention).

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<sup>53</sup> Argentina, Brazil, Canada, Chile, China, the Dominican Republic, the European Union, Guatemala, Honduras, India, Japan, Korea, Malaysia, Mexico, New Zealand, Nicaragua, Norway, the Philippines, the Russian Federation, Singapore, Chinese Taipei, Thailand, Turkey, Ukraine, the United States, Uruguay, Zimbabwe Ecuador, Indonesia, Nigeria, Saudi Arabia, South Africa and Peru.

<sup>54</sup> FTR Holdings SA (Switzerland), Philip Morris Products SA (Switzerland) and Abal Hermanos SA (Uruguay) v Oriental Republic of Uruguay, ICSID Case No ARB/10/7, registered 26 March 2010

<sup>55</sup> Request for arbitration ICSID case No. ARB/10/7

Philip Morris argued that Uruguay had violated the terms of the bilateral investment treaty with Switzerland, where it has its headquarters, claiming that Uruguay's anti-smoking legislation devalues its cigarette trademarks and investments in the country under said BIT<sup>56</sup>. The matter is surrounding the measures that Uruguay adopted regarding packaging and labelling of tobacco products. The measures are the *Single Presentation Requirement (SPR)*, which precludes tobacco manufacturers from marketing more than one variant of cigarette per brand family, and the *80/80 Regulation*, which increases the size of graphic health warnings appearing on cigarette packages, further referred to as "Challenged Measures"<sup>57</sup>. As a party to FCTC, Uruguay was supported by WHO to impose such stricter requirements based on FCTC's established Guidelines of Article 11 and 13 of the Convention. In fact, WHO encourages Parties to implement measures beyond those required by this FCTC and its protocols. Both WHO and FCTC Secretariat were involved in this case and supported Uruguay. It is also important to mention that Switzerland signed but it has not yet ratified FCTC.

Since Uruguay is a developing country and still pursued to fight for its right to protect its public health against powerful TTC such as Philip Morris, it was named by media The David-Goliath battle (Olivet & Villareal, 2016). Thankfully to former New York City Mayor Michael Bloomberg, who provided Uruguay's lawsuit with financial support, Uruguay managed to win the case (Mander, 2016). Philip Morris has annual revenues of more than \$80bn, while Uruguay's GDP is not even \$50bn (Mander, 2016). Many developing countries like Uruguay cannot finance legal costs and in fear of being sued by tobacco companies, they would most probably settle and sacrifice their national public health. Therefore, Uruguay's case is considered also as an example of great importance for fighting the tobacco epidemic.

TTCs sued other countries such as Norway (Philip Morris v Norway)<sup>58</sup> and UK (BAT v DoH)<sup>59</sup>. Both cases were challenges to governments' policies relating to tobacco control. The case Philip Morris v Norway was brought before Oslo District Court in 2010. In this case Philip Morris

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<sup>56</sup> Philip Morris Brand Sàrl (Switzerland), Philip Morris Products S.A. (Switzerland) and Abal Hermanos S.A. (Uruguay) v. Oriental Republic of Uruguay

<sup>57</sup> Award Philip Morris v. Uruguay

<sup>58</sup> Philip Morris Norway AS v. The Norwegian State

<sup>59</sup> British American Tobacco & others v Department of Health, neutral citation number [2016] EWHC 1169 (Admin)

Norway challenged Norway's ban on the display of tobacco products at retail establishments after Tobacco Control Act was amended in 2009. The case concerned the question of whether the prohibition on the visible display of tobacco products and smoking accessories was in conflict with the EEA Agreement.<sup>60</sup> In 2012 the government has won the case and was entitled to compensation for its costs in the sum of NOK 1,364,200. The case *BAT v DoH* was brought in England before High Court of Justice. This case was regarding *The Standardized Packaging of Tobacco Products Regulations 2015*. The Claimants challenged the Regulations as unlawful under international law, EU law and domestic common law. However, the judge rejected the Claimants' submissions.

Besides suing, TTCs are intimidating and threatening other countries such as Uganda Namibia, Togo, Gabon, Democratic Republic of Congo, Ethiopia and Burkina Faso (Boseley, 2017). They did so by sending letters to the governments of these countries accusing them of breaching their own laws and/or international trade agreements and threatening them to cause damage to the economy.

### **3.4 Summarizing main points (findings)**

WHO FCTC is surely influencing member states and their policies regarding implementing tobacco control. While states are already implementing and adopting both supply reduction and demand reduction provisions of the WHO FCTC, Australia was the first one to adopt Article 11 of the FCTC and implement plain packaging as part of their national law (WHO, 2016b). States are realizing the importance and necessity of implementing tobacco control in order to protect their national public health and are starting to take steps to reduce tobacco consumption. However, there are certain challenges. Transnational tobacco companies (TTCs) are part of a very powerful and lucrative industry, and as such are influencing policy-making and certain decisions as well. TTCs are non-state actors, but it is undeniable they are influencing national policies of the governments around the world, either through lobbying, contributions to the economies or simply by suing and threatening countries.

We examined three sets of challenges tobacco industry brought against the Australia's plain packaging legislation. First was constitutional challenge brought by Philip Morris, British

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<sup>60</sup> Case E-16/10 - Philip Morris Norway AS v Staten v/Helse- og omsorgsdepartementet

American Tobacco, Imperial Tobacco and Japan Tobacco in the High Court of Australia. Second was the investment challenge by Philip Morris against Australia regarding Hong Kong – Australia bilateral investment treaty. Finally, there are WTO disputes brought by Ukraine, Honduras, Cuba, Indonesia and the Dominican Republic. We examined a few supplementary cases as well, such as BAT v DoH, Switzerland v Uruguay and Philip Morris v Norway. These cases illustrate even further how the three mentioned international legal regimes (WTO, WHO and ISDS) are influencing international tobacco regulation.

The conclusion which can be drawn from the judgments of the cases is that it seems like the tobacco industry is losing legal battles but that they are nevertheless influencing international tobacco regulation. The tobacco industry might have lost the legal battles, but in the process of their legal battle against Australia, some states have postponed the implementation of plain packaging in fear that tobacco industry might start disputes against them as well (Stacey & Kuchler, 2013; Sparrow, 2013) . Even though there are many arguments for the realist point of view that state's power and interests are dominating international relations, the cases illustrate that it is undeniable that in addition to state actors, non-state actors are hugely influencing world politics.

## 4 Discussion and conclusion

### 4.1 Tobacco control and realism

According to realism theory, the powerful states and their interest are the prevailing factor in world politics (Dunne & Schmidt, 2014). Realists believe that states are main actors in world politics, while non-state actors serve merely just as instruments for states to achieve their national interests. From the perspective of realism, this means that global regulation of tobacco control is governed by state actors and interests. However, realists acknowledge involvement of non-state actors, but they believe legal international regimes are just instruments that states can use in order to do what is in their interest. From our findings, we can see implications of international legal regimes – WHO, WTO and ISDS – for Australia’s Tobacco Plain Packaging Act 2011. From the legal cases we saw how Australia used these international legal regimes as instruments to achieve its aim to implement the Act as a national law and therefore protecting its public health and national interests.

Another assumption from realism is that world politics is an anarchical environment where states struggle for power. One of the indications of this is underrepresentation of developing countries in the WTO dispute processes (Eckhardt, Holden & Callard, 2016). This means that powerful developed countries may influence policy-making on international level that would suit their national interests. Fidler (2002) states another possible reason why powerful states may have the upper hand in international policy-making is namely because powerful non-state actors are mostly based in developed countries. This means the non-state actors such as MNCs and NGOs in developed countries have more resources to lobby governments and international organizations. International law-making seems elitist also because rich and powerful states affect health and trade by using bilateral and multilateral trade agreements such as TRIPS, to negotiate agreements that favor their national interests more than they favor the interests of less powerful states. From our findings we can see that mostly powerful and developed states such as Australia, have interests in protecting their national health, while less developed states such as Ukraine, Indonesia, Honduras, Cuba and Dominican Republic have interests to protect their tobacco industry. From the unofficial results of WTO disputes regarding matter *Australia – Certain Measures concerning Trademarks and other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, it seems like Australia managed to defend implementation of its new national law. Australia is a developed

country that has interest in having strict laws for tobacco regulation in order to protect its national public health. Australia used its power and financial resources to implement tobacco regulation in its national law and defend itself in the disputes against, not just transnational tobacco companies, but also less powerful states.

Also, through the legal cases regarding Australia's Tobacco Plain Packaging Act 2011, we can see how Australia used WHO FCTC as an instrument to support its national interests, that is to protect its national public health. The results of the legal cases did not just show that powerful states can decide how to shape their national policies, but because Australia's example led other states to implement similar national laws, the legal cases illustrate how powerful countries can influence the decision-making process in other states as well. Ng and Ruger (2011) argue that states continue to be vital because they decide what is negotiated internationally and implemented domestically, because member states fund and support organizations such as the WHO and WTO. Powerful countries have more representatives in international organization and more resources available to influence procedures in international organization, and thus negotiate international law that favors them more but may hurt economies of developing countries. Power and financial resources influence law-making and therefore resulting legislation may favor wealthy countries (Ng & Ruger, 2011).

A number of developing countries are highly dependent on certain industries such as tobacco, which is why they are more reluctant to accept certain international and national laws. Because of globalization, national laws in other countries affect the economies of developing countries that try to protect the tobacco industry interests. Ukraine, Honduras, Indonesia, Cuba and Dominican Republic are all countries that have strong tobacco industries. While they might have no trade in tobacco with Australia or very negligent amount of exports of tobacco to Australia, implementation of tobacco control measures in Australia as we saw led other countries to implement similar laws. Those other countries may have more significant trade in tobacco with tobacco industry dependent countries, which is why low-income countries are opposing tobacco control policies. Low-income countries that are opposing tobacco control through WTO disputes, such as Indonesia, Cuba, Honduras, Dominican Republic and Ukraine, are all important tobacco exporters and hence may benefit economically from the lifting of trade barriers on tobacco products elsewhere. A noteworthy observation is that some of the most vocal tobacco control opponents in the WTO are indeed important tobacco producers and exporters. For instance,

Indonesia is the world's fourth most important tobacco producer and 12th on the list of most important tobacco exporters (Eckhardt, Holden & Callard, 2016).

However, some developed countries may have mixed interests. The US, for example, is one of the most powerful nation states, but it has never signed FCTC. It has a comprehensive regulation of the tobacco industry such as *The Family Smoking Prevention and Tobacco Control Act*<sup>61</sup>, but at the same time it is among the top 5 tobacco producers in the world. The USA also has headquarters for many tobacco companies, among which are the corporate headquarters of Philip Morris International. Switzerland is another powerful country that has never signed FCTC, and it is the place of Japan Tobacco and Philip Morris International operational headquarters, while the UK has headquarters of two of the “Big tobacco” companies - Imperial Brands and British American Tobacco. Another deviation from differing interests between developing and developed countries is Uruguay. From analyzing supplementary legal cases, we saw that Uruguay, even though it is a less powerful country, imposed similar tobacco plain packaging law as Australia did. This illustrates how there is no clear pattern among the states and their interests. This leads us to conclusion that even though state power and interests seem to play a prominent role and that every country is acting in its best national interest and is using international legal regimes just as instruments, there might be also other actors and interests in play with regard to tobacco control

## 4.2 Tobacco control and GHG

From the perspective of global health governance, we would expect international legal regimes and non-state actors to have independent effect in the setting of global tobacco regulation. For example, states have to accept the rulings and follow the procedures decided by norm-setting institutions such as the WHO and the WTO. As we have seen from our findings, besides WTO, the WHO is the main institution that governs the global public health. Therefore, it has a great impact on how tobacco control is regulated in governments around the world.

The lack of clear pattern among the developing and developed countries and their interests lends support to the proposition that there are more actors besides states that might be involved in governing the global regulation of tobacco control (Eckhardt, Holden & Callard, 2016). If we refer

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<sup>61</sup> *Family Smoking Prevention and Tobacco Control Act*, 12 USC § 387 (2009).

back to the Fidler's definition of global health governance, we can see that in order to deal with the global challenge to health such as tobacco epidemic, cross-border collective action is required. This means that it is not just state actors that are included in this collective action, but according to Fidler (2002), non-state actors, intergovernmental organizations, formal and informal institutions and rules are included as well. In fact, because some aspects of international trade and international health are interconnected, governments were urged to ensure that trade and health interests are appropriately balanced and coordinated. Institutions that govern trade and health policy are responsible to achieve this balance through institutional mechanisms, formal and informal rules, and decision-making processes that collectively manage trade and health issues (Lee, Sridhar & Patel, 2009).

The tobacco epidemic is a serious global public health issue as we have seen from statistics presented in the first chapter of this thesis. As such, tobacco control is one of the top priorities in health protection and promotion worldwide. Global regulation of tobacco represents a good illustration of global health governance and it shows involvement of many different actors such as TTCs and IGOs. It is also important to mention the difference between two perspectives regarding international legal regimes. While from the realism perspective, international legal regimes serve as instruments for states, from global health perspective they may have independent effects on global regulations.

Global regulation of tobacco control can serve as an example that illustrates both the role of states and national interest and the role of non-state actors and interests. As an example of global tobacco regulation, we chose tobacco plain packaging measure, which recently became the most debated tobacco control measure. The most known legal battle is the one concerning Australia's Tobacco Plain Packaging Act 2011. We used these legal cases and disputes, as well as some supplementary cases, in order to show how non-state actors are involved in regulations on tobacco. While it was in Australia's interest to protect its national public health, this action to implement tobacco control measure regarding tobacco plain packaging is primarily influenced by the WHO FCTC and its measure from Article 11 Packaging and labeling of tobacco products. The WHO is a norm-setting institution and FCTC is the treaty by the WHO, which means that implementing tobacco control measures under FCTC is binding for all member states. WHO FCTC is the essential legal instrument for tobacco control. So far it is ratified in 180 states and it has led to the adoption of stronger national tobacco control policies worldwide. WHO did not just influence Australia to

implement the measure in question, but as we have seen from the disputes and legal cases it has also supported Australia during its legal disputes.

However, WHO is not the only institution/international legal regime which is governing global tobacco regulation. International trade regimes such as the WTO, became more important in governing global regulation of tobacco control, even though they are designed to achieve non-health objectives. Firstly, because WTO's policies such as the lowering of trade barriers, liberalized trade in tobacco products which accelerated spreading of tobacco epidemic and increased power of TTCs. Secondly, because global trade of tobacco is regulated by WTO and provisions in its agreements that protect health. In fact, WTO is the main institution which shapes the global trade and determines trade rules for tobacco products. Trade issues have long been recognized as important for tobacco control, and there have been a number of tobacco-related disputes within the WTO. In our case study we analyzed the most prominent and heavily debated WTO dispute settlement cases relating to tobacco brought in 2012 and 2013 by Cuba, Dominican Republic, Honduras, Indonesia and Ukraine against Australia's plain packaging rules. While outcomes of these disputes are still not official, there are speculations that Australia won.

Besides international trade law regime, international investment law regime and ISDS are particularly important for tobacco control. As we could see from our case study regional and bilateral trade agreements can contain provisions that are otherwise excluded from WTO agreements. At present, over 250 regional and bilateral trade agreements govern more than 30% of world trade (Lee, Sridhar & Patel, 2009). Such agreements provide opportunity for MNCs to get involved in governance of global tobacco regulation as well, as we could see from the legal cases Philip Morris v Australia, Philip Morris v Norway, Philip Morris v Uruguay and BAT v DoH.

Because of their increasing presence and participation in intergovernmental processes, non-state actors now enjoy more influence on global health governance than ever before (Falkner, 2011). The revolution in global health governance, such as creation of new international legal regimes and growth in funding for global health, has increased the quantity and diversity of players, which increased competition for leadership, influence, and resources (Fidler, 2010). Besides states, IGOs, MNCs and NGOs have long been involved in global health. Through the legal challenges brought

by the tobacco industry against Australia, we can see evidence of how TTCs are also working through institutions and that they are accepting the decisions from the WHO, the WTO and ISDS.

It is undeniable that tobacco companies have an incredible amount of influence on governments around the world. The act of suing powerful states such as Australia shows how powerful and resourceful tobacco companies really are. As we see in our findings, for some states national public health is more important, while for others are money and the jobs brought by the tobacco industry, more important. Such resources and influence gave opportunity to TTCs to be involved in governance of global tobacco regulations.

For example, some WTO Member states who brought WTO disputes against Australia don't even have any exports of tobacco to Australia or those export figures are so small that they are negligible. It is known from our findings that TTCs, Philip Morris and British American Tobacco engaged in a lobbying effort and convinced the governments of several WTO members, namely Cuba, the Dominican Republic, Honduras, Indonesia and Ukraine to file a WTO complaint against Australia's rules on plain packaging for tobacco products. For instance, TTCs admitted they are paying for legal fees for disputing countries (Nebehay, 2012). Philip Morris International confirmed they are paying the law firm Sidley Austin to represent the Dominican Republic, while British American Tobacco (BAT) is paying the legal expenses of Ukraine and Honduras (Eckhardt, Holden & Callard, 2016). In the findings we saw that TTCs are shaping national policies through lobbying efforts as well as exerting their influence through threats of lawsuits against governments, in order to press their interests in both high-income and low-income countries. The increasing bilateral, regional and multilateral trade and investment agreements seems as a part of the broader business strategies TTCs are using to exert their interests (Eckhardt, Holden & Callard, 2016). This means that fuller understanding of TTCs is central to effective FCTC implementation as TTCs play a huge role in global health governance.

Such effort to influence public health policies and increasing number of bilateral agreements and multilateral rules and procedures of the WTO gave opportunity also for a practice called forum-shopping of dispute settlements in international trade (Bush, 2007). This points to another aspect of how TTCs are trying to influence national and international public health policies and legal norms besides lobbying. Basically, TTCs can select among overlapping institutions and decide where to argue their case based on the preferential outcome of the dispute, or perhaps future value

of the precedent, after what they can use the resulting case law in future litigation against other members (Busch, 2007). In fact, research shows that firms engaged in transnational lobbying and foreign venue shopping in the context of WTO dispute settlement are usually multinational firms (Eckhardt & De Bièvre, 2015). Because of unresponsive home governments, firms try to obtain favorable policies through the multiple venues available within the institutions of the multilateral trading system (Eckhardt & De Bièvre, 2015). Domestic firms lobby foreign government in order to persuade it to bring a WTO case against its own government (Eckhardt & De Bièvre, 2015). This practice of transnational lobbying and forum-shopping may explain why states with no tobacco export to Australia, brought WTO disputes against it. It also may explain why TTCs have shifted their lobbying efforts from developed to developing countries, while most objections against tobacco control policies in the past in the WTO came from developed countries (Eckhardt & De Bièvre, 2015). Taken together, developing countries opposed tobacco control policies three times more often than developed countries (Eckhardt & De Bièvre, 2015).

This shows that tobacco industry does not just challenge states in order to influence their national policy-making, but also that TTCs such as Philip Morris and BAT can influence WTO disputes as well. Weishaar et al. (2012) identified and analyzed tobacco industry tactics to influence the FCTC and the governments. These tactics include lobbying national FCTC delegations and political actors via lobbying and infiltration of organizations with influence, intimidation tactics, stalling the process of tobacco control policy-making, obstructing effective implementation of tobacco control, claiming conflicts with trade agreements and alleging damaging economic consequences (Weishaar et al., 2012). We saw illustration of these tactics being used by Philip Morris and British American Tobacco through our findings from analyzing the legal cases.

Many scholars argue that in order to explain the role of different actors and their complex relationships, global health governance seems like an appropriate concept (Fidler 2010; Dingwerth and Pattberg, 2006; Falkner, 2011; Dodgson, Lee & Drager, 2002). McInnes and Lee (2012) state that “the global health governance landscape is increasingly fragmented and politicized as states and inter-governmental organizations no longer hold the monopoly over global health policy-making and implementation”. They argue that while the academic discipline of international relations could explain how the world was governed in the past, today it is necessary to broaden the perspective and include new actors and new issues such as global tobacco epidemic. McInnes and Lee (2012) explain that greater complexity and interconnectedness of the various non-state

and state actors requires new understandings that global health governance brings. The shift from international to global health governance brought questions that revolve around the continued dominance of states and state sovereignty, emergence of new transnational actors and new institutional mechanisms (Gneiting, 2016).

### **4.3 Implications from the findings**

From our findings we identified some noteworthy key observations and possible implications. Firstly, our findings confirmed the Fidler's definition that global health governance is a "regime complex" which is formed of several regime clusters that are often overlapping and competing, and that it is not governed by only one law. There are more regimes governing global health, but in our case, examining plain packaging of tobacco products as a tobacco control measure in the setting of global tobacco regulation, we identified three relevant international legal regimes. Those are international investment law, international trade law and the WHO FCTC. International legal regimes are highly important in global tobacco regulation because they are influencing decision-making processes in states and shape their national policies. We also confirmed that global tobacco regulation is governed by systems and IGOs such as ISDS, the WTO and the WHO. Furthermore, we found out that besides states, MNCs have a great impact on tobacco control both on national and global level.

This conclusion leads us to our second key observation which is that states are not the only actors in global tobacco regulation. We saw involvement of many different actors such as IGOs and MNCs. For example, one of the most important institutions that contributes to global regulation of tobacco is in fact the norm-setting organization WHO. By adopting FCTC, the WHO is setting the rules and norms regarding tobacco control which are affecting tobacco industry and the governments around the world. However, the WHO is not the only institution that affects national public health. In our findings we have seen also how TTCs are using governments to further their interests, such as financing and advising governments of Ukraine, Cuba, Honduras, Dominican Republic and Indonesia in their WTO disputes against Australia.

This illustrates our third key observation which is that the struggle for power in world politics is not just between states, but it is also substituted by non-state actors such as TTCs. Tobacco industry is very powerful and competitive when it comes to advancing their interests. We have seen how

tobacco companies are lobbying some governments, while threatening to sue other governments in order to influence global regulation of tobacco control. We have also seen the implications of international legal regimes being used not just by states but also non-state actors either directly or indirectly. Such examples are use of legal and economic power by tobacco companies in order to obstruct effective implementation of FCTC or claiming conflicts with trade agreements in order to stall tobacco control initiatives. There are also other tactics used by the tobacco industry such as alleging damaging economic consequences of the FCTC and targeting national FCTC delegations and political actors either through lobbying or infiltration of organizations.

Fourthly, we have observed that TTCs are also using different venues besides governments in order to accomplish their goals and interests. This practice is called forum shopping. For example, in our findings we have seen how Philip Morris challenged Australia's tobacco plain packaging legislation on Australia's national court and an international tribunal.

Fifth key observation is that tobacco companies shifted their focus from developed to developing countries. This is because they find it easier to influence and lobby governments of low income countries than those of high income countries.

Finally, from our findings we have seen that even though tobacco industry affects how tobacco control is regulated globally, at the end protection of public health prevailed. This observation is based on Australia's and other supplemented cases where governments managed to get the rulings in their favor against the tobacco industry.

Based on our findings we will also make a suggestion for a test case on the governance of tobacco control to be object of further research. This test case could be about China and international legal regimes because it is a powerful country with powerful tobacco industry. China is one of the rare countries that the highest power resides with the government (Hu, 2013). China has a strong interest in its tobacco industry, despite signing the WHO FCTC. In fact, Hu (2013) states that China presents a huge challenge to tobacco control, since it is the world's largest tobacco producer and consumer. He also states that one third of world's smokers live in China. It is by far the largest producer of tobacco in the world, producing 43% of the world total, which is more than the combined production of the next nine tobacco producing countries (Hu, 2013). He explains that tobacco is a state monopoly and the reduction of cigarette consumption would diminish the tobacco industry's contribution to the Chinese economy. The major economic conflict for the Chinese

government concerning implementation of the FCTC provisions is the government's ownership of the tobacco industry (Hu, 2013).

## 5 Conclusion

In this study, we have sought to respond to our research question related to how global regulation of tobacco control is governed from the perspective of two different analytical approaches - realism and GHG. In order to answer this research question, we analyzed legal cases through which we identified state actors and interests as well as non-state actors and interests and their role in global regulation of tobacco control.

The role of state-actors is to act in their best national interest. For some states their core interest is to protect the tobacco industry and therefore oppose tobacco control, while for other states the core interest is to protect their national public health through implementing tobacco control. This being said, countries that support the tobacco industry are mainly developing and low-income countries, while states that are pro tobacco control are mostly developed and high-income countries (Eckhardt, Holden & Callard, 2016). This study indicates that countries that are opposing tobacco control measures are usually developing countries where tobacco industry is deeply involved in policy-making through lobbying and which economies are highly dependent of the tobacco industry. However, not all developing countries are opposing tobacco control measures as we have seen from the Uruguay case. Furthermore, the findings show that almost all recent opposition against strengthening tobacco regulations within the WTO came from developing countries, which can be explained by transnational tobacco companies' shifting lobbying efforts from developed to developing countries. The shift occurred because of several reasons. Tobacco companies became more marginalized from the domestic policy-making process in most of the developed countries, which caused TTCs to look for other more indirect ways and forums to influence decision-making. The developing countries are important tobacco exporters and can benefit from lifting trade barriers on tobacco products elsewhere. The power of multinational tobacco companies and other international factors often prevent low income countries from adopting and implementing effective regulation, which caused them to have weak or nonexistent tobacco regulations (Taylor, 1996). Internationalization of policy-making and the transnational nature of tobacco companies enabled TTCs to seek alternative venues in order to achieve their corporate interests. Particular venues in question in this regard are WTO and ISDS mechanisms of bilateral treaties (BITs) as seen from the Philip Morris example. Even though it may be surprising that there are mostly low-income

countries that are initiating WTO disputes, since they are generally under-represented in the WTO disputes process, mentioned reasons could explain this.

Furthermore, developed states have interest to protect their national public health in order to protect human life as well as to reduce increasing healthcare costs. However, interests of the powerful states are more complex to identify since some states such as USA and Switzerland, that never signed FCTC, have strict tobacco control but are also headquarters to some of the biggest TTCs.

State power and interests seem to play a prominent role, but the findings show that other actors and interests are also in play with regard to tobacco control. Through outcomes of the legal cases we concluded that in practice, health protection turned out to be prevailing factor over trade and investment. Through our findings, we also saw influences of non-state actors such as TTCs, international legal regimes and institutions on decision-making processes on international and national level, as well as the complexity of their involvement in global tobacco regulation. Therefore, global health governance as an analytical approach seems like an appropriate concept that supplements the realist approach concerning global tobacco regulation.

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