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Date
21 June 2019

By email and by hand

Dear Sirs

**Smoking (Public Health) (Amendment) Bill 2019**

We act for British-American Tobacco Company (Hong Kong) Limited.

We refer to the letter from the Secretary for Food and Health to the Assistant Legal Adviser of the Legislative Council dated 15 May 2019 (LC Paper No. CB(2)1431/18-19(04)), in particular paragraphs 2 to 8 thereof which were made in response to our letter dated 18 February 2019 (the "**Response**"). The purpose of this letter is to comment on and provide BATHK's views in relation to the Response. We should be grateful if you could kindly table a copy of this letter for consideration by the members of the Bills Committee for the meeting on 25 June 2019.

Unless otherwise specified, terms defined in our previous submission dated 8 April 2019 (LC Paper No. CB(2)1175/18-19(11)) (the "**April Submission**") shall have the same meaning herein for ease of reference.

For the reasons detailed below, BATHK is of the view that the Response is inaccurate and misleading, in particular because it contains an incorrect statement of the relevant legal principles. Notwithstanding the Response, BATHK considers that the Government has failed to justify its proposal to restrict fundamental human rights and disregard Hong Kong's international obligations through the implementation of the Bill.

## 1. INCORRECT APPLICATION OF THE PROPORTIONALITY TEST

1.1 The Government stated in paragraph 4 of the Response that "[t]*he proposed full ban is not*

*disproportionate to the accomplishment of that legitimate aim* [i.e. for the protection of public health], *as there are no less restrictive measures that can achieve the very high level of public health protection*".

1.2 With all due respect, this is clearly inconsistent with the Government's position that was made public only four months before the Chief Executive's decision to introduce the Bill. In the Food and Health's Legislative Paper dated 12 June 2018, the Government stated that it had "*critically reviewed the scientific evidence, overseas practices and WHO recommendations*" and was of the view that Alternative Smoking Products should be subject to regulation, as opposed to an outright ban. This illustrates that the Government, after detailed study of the evidence, agreed that a less restrictive measure (namely, a regulatory regime) can still achieve the "*very high level of public health protection*" sought by the Government. This analysis applies equally to the analysis under Hong Kong's international WTO obligations discussed below, where the availability of less restrictive alternatives contradicts the claim of justification under Article XX of GATT.

1.3 In applying the proportionality test, the Government failed to assess the impact of the Bill on public health **overall**. The Government merely considered the alleged "*health risks and the gateway and renormalisation effects posed by*" Alternative Smoking Products (which are in any event not substantiated for reasons explained in paragraph 6.11.2 of the April Submission) without taking into account two important factors that would also affect public health, namely:

1.3.1 the potential benefits that Alternative Smoking Products can contribute to public health; and

1.3.2 the fact that the use of conventional cigarettes will still be permitted for sale after the implementation of the ban of Alternative Smoking Products that are potentially less harmful (and indeed, the Government could not provide any evidence that Alternative Smoking Products are more harmful than conventional cigarettes).

1.4 As stated in the April Submission, there is growing evidence on the harm reduction benefits offered by the use of THPs and e-cigarettes. These products are a potentially less harmful option for many conventional cigarette users and a means to assist smokers to quit smoking, thereby reducing the health impact caused by conventional cigarettes (and thereby facilitating the protection of public health).

1.5 Indeed, governments in major developing countries took into account these public health benefits when formulating policies on THPs and/or e-cigarettes. For example:

1.5.1 The New Zealand Government decided to regulate, rather than ban, e-cigarettes and other tobacco products. The Ministry of Health further "*encourages smokers who want to use vaping products to quit smoking to seek the support of local stop smoking services…*[which] *must support smokers who want to quit with the help of vaping products*";[1]

1.5.2 The Government of Canada enacted the Tobacco and Vaping Products Act on 23 May 2018 which legalised, *inter alia*, the manufacturing and sale of vaping products in Canada – which is the exact opposite of the total ban proposed by the Hong Kong Government;

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[1] New Zealand Ministry of Health (2018), *Ministry of Health position statement – Vaping products*, see: https://www.health.govt.nz/our-work/preventative-health-wellness/tobacco-control/vaping-and-smokeless-tobacco.

1.5.3 The US Food and Drug Administration announced on 30 April 2019 that it has authorised the marketing of one of the THPs, recognising that authorising these products for the US market "*is appropriate for the protection of the public health because, among several key considerations, the products produce fewer or lower levels of some toxins than combustible cigarettes*".[2] It further explained that this decision is based on a comprehensive analytical standard (notably absent in the Government's Response) which:

> *"requires the FDA to consider the risks and benefits to the population as a whole, including users and non-users of tobacco products. Importantly this includes youth. The agency's evaluation includes reviewing a tobacco product's components, ingredients, additives and health risks, as well as how the product is manufactured, packaged and labeled. The review for the … products took into account the increased or decreased likelihood that existing tobacco product users will stop using tobacco products, and the increased or decreased likelihood that those who do not use tobacco products will start using them*" (emphasis added); and

1.5.4 The United Arab Emirates previously banned the sales of e-cigarettes. However, after conducting a review of data on alternative smoking products, the United Arab Emirates lifted its ban following the new rule UAE.S 5030 in April 2019.[3]

1.6 In contrast, the Hong Kong Government has failed to take into account these harm reduction benefits that have been widely recognised by major governments around the world. It is important to note that whilst a total ban of these products might potentially reduce the associated health risks, it will at the same time remove all the harm reduction benefits that these products can contribute to public health. It would be wrong and irresponsible for the Government to selectively highlight the risks whilst ignoring the benefits in assessing whether the Bill would, on balance, make a meaningful contribution to the objective of protecting public health.

1.7 The Government also took an overly simplistic view in concluding that a total ban would reduce risks to public health. As mentioned in paragraph 1.3 above, the use of Alternative Smoking Products is not the only factor that would affect public health. Each factor carries different weight in terms of its effect on public health. Given that there are many more existing users of conventional cigarettes and that conventional cigarettes are more harmful than Alternative Smoking Products, the use of conventional cigarettes would, in fact, likely be the dominant factor that would affect public health. The Government has not conducted any study to assess how this dominant factor might affect public health in circumstances where Alternative Smoking Products are banned.

1.8 In particular, by imposing a blanket ban over Alternative Smoking Products while continuing to permitting the sale of conventional cigarettes, the Government might be sending a confusing and/or misleading message to the general public that it is safer (because it is legal) to smoke conventional cigarettes rather than to use Alternative Smoking Products (which will be banned). This may result in an undesirable effect of

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2 US Food & Drug Administration (2019), 'FDA permits sale of IQOS Tobacco Heating System through premarket tobacco product application pathway', see: https://www.fda.gov/news-events/press-announcements/fda-permits-sale-iqos-tobacco-heating-system-through-premarket-tobacco-product-application-pathway.

3 The National, 'UAE to allow sale of e-cigarettes and vaping devices': see: https://www.thenational.ae/uae/health/uae-to-allow-sale-of-e-cigarettes-and-vaping-devices-1.826798.

encouraging the public, especially previous conventional smokers who may have switched to Alternative Smoking Products, to switch back to conventional cigarettes.

1.9 On the other hand, there is evidence that the smoking population has decreased rapidly and markedly in jurisdictions where Alternative Smoking Products are legally permitted. As stated in the April Submission, a number of public health experts recently noted in a letter to the WHO, calling on it to reject prohibition and embrace 'tobacco harm reduction' and risk-proportionate regulation of tobacco and nicotine products, that "[m]*illions of smokers have moved from cigarettes to less harmful alternatives where the laws allow it. Where ANDS have been popular, we have seen rapid declines in adult smoking, for example in the United Kingdom, Sweden, the United States, and in Japan where cigarette consumption fell by 27 percent in the two years between first quarter 2016 and the same period in 2018 following the introduction of heated tobacco products.*"[4] In view of the evidence available, a ban of Alternative Smoking Products would be unlikely to have any **net** positive effect on public health overall, and hence could not satisfy the proportionality test.

1.10 As mentioned in the April Submission, the Government has the burden to demonstrate that any proposed restriction on fundamental rights is proportionate by passing the four-stage proportionality test. The Government, by failing to properly assess the impact of the full ban on the overall public health in Hong Kong (in particular the fact that a full ban on Alternative Smoking Products would unfairly eliminate the harm reduction benefits associate with these products and would in turn permit the continued use of more harmful, conventional cigarettes), cannot demonstrate that the ban is rationally connected to the protection of public health, which is the second stage of the proportionality test. In any event, for reasons already detailed in the April Submission (in particular paragraphs 6.11 and 6.12 thereof), a total ban is not necessary to protect public health and banning a potentially less harmful type of products would not give rise to any social benefit (or at the very least, any such benefit would be outweighed by the detrimental impact in restricting fundamental human rights concerning a person's dignity and autonomy), failing both the third and fourth stages of the proportionality test.

## 2. DEPRIVATION OF PROPERTY

2.1 As stated in the April Submission, the Bill amounts to deprivation of property which requires compensation from the Government. In response, however, the Government merely stated that "*it is the Government's assessment that the Bill would not give rise to deprivation of property requiring real value compensation under the Basic Law*" without giving any reasons to explain how it arrived at this assessment.

2.2 Further, the Government's argument that the Bill would likely satisfy the proportionality test under Articles 6 and 105 of the Basic Law (which is denied by BATHK), even if accepted by the Court, does not absolve the Government from its obligation to provide compensation. Although property rights protected under Articles 6 and 105 of the Basic Law may be subject to restrictions that are reasonably proportionate, Article 105 expressly provides for a right to compensation for "*lawful deprivation of their property*", i.e. a deprivation of property that passes the proportionality test.

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[4] Abrams et al. (2018), 'Letter from seventy-two specialists in nicotine science, policy and practice'.

## 3. BREACH OF HONG KONG'S CONSTITUTIONALLY GUARANTEED STATUS AS A FREE PORT

3.1 The Government purports to rely on the Smokeless Tobacco Products (Prohibition) Regulations to justify the Bill's restriction on the free movement of goods protected under Articles 114 and 115.

3.2 However, this is wholly misconceived for the following reasons:

3.2.1 The Smokeless Tobacco Products (Prohibition) Regulations were introduced prior to the implementation of the Basic Law. According to Article 8 of the Basic Law, all laws previously in force in Hong Kong shall be maintained only if they do not contravene the Basic Law. Whether the Smokeless Tobacco Products (Prohibition) Regulations are consistent with Articles 114 and 115 is still a question to be tested in Court.[5] The fact that the Smokeless Tobacco Products (Prohibition) Regulations exist, of itself, does not mean that that or another similar import ban is justified; and

3.2.2 The Government failed to cite any authority that Articles 114 and 1115 can be restricted in the way proposed by the Bill.

## 4. BREACH OF INTERNATIONAL OBLIGATIONS

4.1 The Government is also incorrect in stating that the proposed full ban under the Bill does not engage Article XI of GATT. The authorities have clearly established that the term "prohibition" under Article XI refers to a "*legal ban on the trade or importation of a specified commodity*".[6] It is beyond doubt that the ban of Alternative Smoking Products engages Article XI and further that it violates the provision without any justification under Article XX of GATT. Alternatively, even if the proposed ban were to be considered an internal measure banning sales (which does not seem to be the case for the Bill given it expressly provides for a ban on imports), rather than an external measure banning imports, the Government's proposal would still violate Article III of GATT without justification.

4.2 Further, enclosed to this letter is a legal opinion by Professor Petros Mavroidis, a respected international trade and WTO legal scholar, which explains that imposing an import and sales ban on Alternative Smoking Products while permitting combustible tobacco products to be legal for sale, import, distribution and consumption would be in breach of WTO obligations. The legal opinion specifically refers to the proposed ban in Hong Kong as one of the examples of such ban. We respectfully request that this legal opinion be consulted carefully before the Government undertakes any action that would be illegal under international law. We provide Professor Mavroidis' conclusions in summary form here:

> *"In summary form, our conclusion is that an import ban on* [Alternative Nicotine Delivery Systems or "ANDS"] *violates Article XI of GATT, since it constitutes a prohibition on importation, and thus a prohibited zero import quota. In addition, assuming the measure is characterized as domestic sales ban, our conclusion remains that a sales ban on ANDS, while no ban has been imposed on* [Traditional Cigarettes or "TCs"], *violates Article III of GATT. Our conclusion is*

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5 The Court can and has after the implementation of the Basic Law declared some pre-1997 legislations to be incompatible with the Basic Law. See, for example, *Secretary for Justice v Yau Yuk Lung Zigo and Another* (2007) 10 HKCFAR 335.

6 Appellate Body Report, *China – Measures related to the exportation of various raw materials*, AB-2011-5 WT/DS394/AB/R at paragraph 319.

*based on the fact that ANDS and TCs are like products and a ban on imported ANDS, while allowing the sale of domestic TCs, amounts to Less Favourable Treatment for imported like products. As we explain in this Note, there is no need to inquire into the regulatory intent of the discriminatory ban on ANDS since any modification of the conditions of competition to the detriment of imported like products is prohibited.*

*Finally, we consider that the regulating Member will fail in trying to justify its measures under the general exceptions of Article XX of GATT, irrespective of whether the established violation concerns Article III or XI of GATT. There are good reasons to believe that the regulating Member will not meet the necessity-requirement, as it has to do in order to mount a successful defence of its otherwise GATT-inconsistent measure. The lack of contribution of the ban to the protection of health and the availability of less restrictive alternatives to a ban such as information campaigns and labelling render the ban unnecessary, it seems. In any case, even if the regulating Member were to be successful in demonstrating the "necessity" of the ban on ANDS, its measure will fail the requirements of the chapeau of Article XX of GATT. This is so because, the ban is a disguised restriction on trade and applied in a manner that constitutes unjustifiable discrimination: in the name of protecting human health (and/or public morals), the regulator will be banning the sale of certain goods while not banning the sale of like goods that are at least as harmful to health and probably much more harmful to health. Thus, it will find it impossible to explain why its decision to ban some and not other (more harmful) products, is rationally connected with the health objective of the measure. In sum, the measure is in violation of the GATT/WTO commitments of the regulating Member. The precautionary principle is of no relevance to the applicable GATT/WTO obligations and cannot, therefore, be invoked to save the measure."* (emphasis added)

4.3 Other than Articles XI and III of GATT and the obligations explained in the April Submission, there are further international obligations which the Government has disregarded and/or failed to comply with in introducing the Bill:

4.3.1 First, Article V of GATT requires there to be freedom of transit through the territory of each contracting party, via the routes most convenient for international transit, and must not cause any unnecessary delays. It has been held that this requires WTO members to extend "*unrestricted access via the most convenient routes for the passage of goods in international transit whether or not the goods have been trans-shipped, warehoused, break-bulked, or have changed modes of transport*".[7] The proposed section 15DD in Clause 23 of the Bill, however, does not permit transhipment of Alternative Smoking Products to be stored temporarily in Hong Kong pending export unless the product remains in a vessel (if transported by sea) or in the aircraft or air transhipment cargo (if transported by air). Nevertheless, we are instructed that the majority of the tobacco related cargos come to Hong Kong by land and/or sea and would need to be removed from the vehicle or vessel pending the next transit or transhipment. This would be prohibited if the Bill is passed, resulting in an impermissible restriction on access to the most convenient routes for the passage of goods in international transit protected under GATT Article V; and

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7 Panel Report, *Colombia – Indicative prices and restrictions on ports of entry*, WT/DS366/R at paragraph 7.401.

4.3.2 Second, under Article 2.9 of the Agreement on Technical Barriers to Trade, Hong Kong, as a member of WTO, is required to notify other WTO members, through the WTO Secretariat, at an early appropriate stage of proposed technical regulations that may have a significant effect on other WTO members' trade. The Bill prohibits import of goods from other WTO members bearing certain characteristics (e.g. goods capable of generating aerosol from tobacco) constitutes a technical regulation for this purpose.[8] However, insofar as we are aware, the Government has failed to comply with this important obligation to notify other WTO members of the Bill and allowing them to provide comments on the Bill.

In view of the above, and for reasons explained in the April Submission, the Government has incorrectly applied the proportionality test and failed to assess the overall impact of a full ban on public health. Notwithstanding that the Government acknowledged the existence of other less restrictive measures (such as the regulatory regime proposed by the Government in June 2018) which could also achieve a very high level of public health protection, the Government disregarded those measures and instead insisted on introducing the Bill that disproportionately restricts fundamental human rights and the free movement of goods guaranteed by the Basic Law. The Government also failed to comply with Hong Kong's international obligations in introducing the Bill. BATHK therefore respectfully urges the Government to withdraw the Bill and to work with all stakeholders to establish an evidence-based, appropriate regulatory regime that properly reflects the risk profile of Alternative Smoking Products and respects the constitutionally protected rights and freedom of Hong Kong residents.

Yours faithfully,

Herbert Smith Freehills

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[8] Appellate Body Report, *European Communities – Measures affecting asbestos and Asbestos-containing products*, AB-2000-11, WT/DS135/AB/R.

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# Alternative Nicotine Delivery Systems (ANDS) such as e-cigarettes and heated tobacco products

## Legal Opinion on Consistency of their Ban with WTO Law

**Petros C. Mavroidis**

## Terms of Reference and Executive Summary

I am a professor of WTO Law at Columbia Law School, New York and at the University of Neuchâtel. I am associate editor of the Journal of World Trade, on the editorial board of The World Trade Review, and several Columbia Law journals. I recently served as chief co-rapporteur at the American Law Institute (ALI) for the project "Principles of International Trade Law: The WTO" (2013).

I am the author and editor of several books on international trade law. My most recent publication is The Regulation of International Trade, MIT Press, 2016, which won the 2017 Certificate of Merit in a Specialized Area of International Law from the Executive Council of the American Society of International Law (ASIL). I have also written around 80 articles referenced in peer-reviewed journals, and 80 chapters in books. A full CV is attached.

I was asked to opine on the consistency of a measure that would ban the importation and sale of novel tobacco products such as heated tobacco products as well as other new types of "electronic nicotine delivery systems" including e-cigarettes ("ENDS"). E-cigarettes are handheld devices that heat a liquid containing nicotine and flavours that are heated to form a vapour, which is inhaled to simulate the experience that smokers have but do not involve tobacco and often do not even look like a traditional cigarette. Heated tobacco products only heat tobacco and generate a nicotine-containing vapour. These products produce an aerosol that provides nicotine as well as a sensation similar to that of smoking traditional cigarettes (TC), but do not involve the burning of tobacco, and are thus non-combustible products.

Both novel products come under the generic term of "Alternative Nicotine Delivery Systems" (ANDS), a term that has been used by health experts for grouping these non-combustible products.[1] Recently, independent health experts have found that ANDS play an important role in a harm reduction strategy, precisely because they function as a less harmful alternative to smoking TCs.[2] Health experts, consequently, have called for a positive, less restrictive

[1] See, "Letter from seventy-two specialists in nicotine science, policy and practice - Innovation in tobacco control: developing the FCTC to embrace tobacco harm reduction", 1 October 2018, p. 2, Available at https://clivebates.com/documents/WHOCOP8LetterOctober2018.pdf.

[2] There are various studies, which support the view that ANDS, while addressed primarily to smokers and aiming to act as substitute for TCs, are less of a health concern than TCs, see, for example, https://www.annualreviews.org/doi/10.1146/annurev-publhealth-040617-013849. This observation is important for various parts of the legal analysis included in this Note. How can, to provide but an illustration, a measure be judged necessary to protect human health, if it addresses the lower risk for human health (that represented from

regulatory approach to ANDS. Indeed, it goes beyond the scope of this legal opinion, but it appears that the international legal regime on the right to health would indeed require a less rather than a more restrictive regime for these products. Depriving smokers of this less harmful alternative would go against the internationally protected right to health of those that smoke.[3] In sum, there is no doubt, as these letters as well as a recent scientific study also demonstrate,[4] that ANDS may provide an alternative to traditional cigarettes, since the risk to human health is likely to be reduced.

An import and sales ban is under consideration against ANDS in, for example, Singapore and Hong Kong (China).

For the purposes of this Note, I use the English translation of the Singaporean law as an accurate description of the measure, the consistency of which with the relevant WTO law I will analyse as an example.

The question is whether the ban on ANDS is consistent with the relevant WTO law. As the measure stands, it would be characterized as import embargo, since the letter of the law leaves us in no doubt that imports of ANDS will not be allowed in Singapore.

One cannot exclude, nevertheless, that a panel characterizes the measure as a domestic sales ban of ANDS. In this case, the domestic sales ban, would simply be enforced at the border (and would cover imported ANDS).

The legal test for consistency of an import ban, and a domestic sales ban, under the GATT, is not identical. We will be examining the consistency of the measure with WTO law under either scenario.

In addition, if the measure does not take the form of a simple ban, but, rather, the form of a technical regulation that lays down product characteristics of tobacco products and related

consumption of ANDS), while leaving un-addressed the higher risk emanating in the consumption of the substitute product, namely, TCs?

[3] See, "Letter from seventy-two specialists in nicotine science, policy and practice - Innovation in tobacco control: developing the FCTC to embrace tobacco harm reduction", 1 October 2018, Available at https://clivebates.com/documents/WHOCOP8LetterOctober2018.pdf.

[4] https://journals.sagepub.com/doi/pdf/10.1177/2397847318773701.

products, such as arguably ANDS, the consistency of the measure could also be examined under the disciplines of the Agreement on Technical Barriers to Trade (TBT Agreement). Very similar considerations relating to discrimination and the requirement that the measure be "necessary" to fulfil the legitimate health objective as discussed in this note would apply under, in particular Articles 2.1 and 2.2 of the TBT Agreement respectively. In particular, Article 2.2 requires that a technical regulation not be more trade restrictive than necessary. Given the potential contribution to harm reduction offered by ANDS as highlighted by independent health experts, a measure that effectively bans ANDS or that imposes the same restrictions that are justified on TCs would have a very trade restrictive effect on these novel products in an emerging market. Therefore, even applying the same restrictions on ANDS as are applied to TCs necessarily appears to be violating this important provision given its highly trade restrictive character of a measure that would go against the health objective of harm reduction. Given that we are considering a straightforward ban on ANDS, we will not further address the TBT Agreement in this Note.

In summary form, our conclusion is that an import ban on ANDS violates Article XI of GATT, since it constitutes a prohibition on importation, and thus a prohibited zero import quota. In addition, assuming the measure is characterized as domestic sales ban, our conclusion remains that a sales ban on ANDS, while no ban has been imposed on TCs, violates Article III of GATT. Our conclusion is based on the fact that ANDS and TCs are like products and a ban on imported ANDS, while allowing the sale of domestic TCs, amounts to Less Favourable Treatment for imported like products. As we explain in this Note, there is no need to inquire into the regulatory intent of the discriminatory ban on ANDS since any modification of the conditions of competition to the detriment of imported like products is prohibited.

Finally, we consider that the regulating Member will fail in trying to justify its measures under the general exceptions of Article XX of GATT, irrespective of whether the established violation concerns Article III or XI of GATT. There are good reasons to believe that the regulating Member will not meet the necessity-requirement, as it has to do in order to mount a successful defence of its otherwise GATT-inconsistent measure. The lack of contribution of the ban to the protection of health and the availability of less restrictive alternatives to a ban such as information campaigns and labelling render the ban unnecessary, it seems. In any case, even if the regulating Member were to be successful in demonstrating the

"necessity" of the ban on ANDS, its measure will fail the requirements of the chapeau of Article XX of GATT. This is so because, the ban is a disguised restriction on trade and applied in a manner that constitutes unjustifiable discrimination: in the name of protecting human health (and/or public morals), the regulator will be banning the sale of certain goods while not banning the sale of like goods that are at least as harmful to health and probably much more harmful to health. Thus, it will find it impossible to explain why its decision to ban some and not other (more harmful) products, is rationally connected with the health objective of the measure. In sum, the measure is in violation of the GATT/WTO commitments of the regulating Member. The precautionary principle is of no relevance to the applicable GATT/WTO obligations and cannot, therefore, be invoked to save the measure.

To the extent that there exists a more general regime under public international law in favour of a right to health, it seems clear that this measure is inconsistent with such a right as it deprives smokers of products that are likely to be less harmful to health and that fulfil a similar end use. This was highlighted in a letter of seventy-two independent health experts, as discussed below.

## 1. Import Ban on ANDS

Since we deal with an import ban, the relevant provision is Article XI of GATT. Consequently, the legal question before us is, whether an import ban on ANDS is consistent with this provision.

Article XI.1 of GATT reads:

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

Since the early GATT case France-Import Restrictions, it is clear that measures expressed in numbers (e.g., 1,000 tons of widgets; or, 1,000 litres of widgets) are considered quotas, that is, one of the three forms that a quantitative restriction can revert into.

In *India – Quantitative Restrictions*, the panel (§5.129), when interpreting the term "restriction" appearing in the body of Article XI of GATT, clarified that this term covers both import- as well as export restrictions. We quote the relevant passage:

> [T]he text of Article XI:1 is very broad in scope, providing for a general ban on import or export restrictions or prohibitions 'other than duties, taxes or other charges'. As was noted by the panel in Japan –Trade in Semi-conductors, the wording of ArticleXI:1 is comprehensive: it applies 'to all measures instituted or maintained by a [Member] prohibiting or restricting the importation, exportation, or sale for export of products other than measures that take the form of duties, taxes or other charges.' The scope of the term 'restriction' is also broad, as seen in its ordinary meaning, which is 'a limitation on action, a limiting condition or regulation'.

A ban on imports of ANDS is obviously a covered "prohibition" on importation, as it imposes a zero quota.

There is no need to demonstrate that the measure has had certain trade effects, even if it would be quite obvious that a measure that bans all imports has an effect on trade.

Nor does the regulatory intent matter. In other words, it is irrelevant that a Member such as Singapore did not seek to protect a domestic industry.

Standing case law already from the GATT-era (Japan – Trade in Semi-conductors; US – Superfund) has confirmed the above, and has consistently held that there is no room for reviewing the regulatory intent within the four corners of complaints under Article XI of GATT.

This analysis leads to the conclusion that an import ban of ANDS is not consistent with WTO Members' obligations under Article XI of GATT.

*Conclusion under GATT Article XI*

A ban on imports of ANDS is a violation of Article XI of GATT.

## 2. Sales Ban on ANDS

The challenged measure could be re-phrased, as we have suggested in the introduction to this Note, and presented as a sales (as opposed to an import-) ban. The Interpretative Note ad Article III of GATT reads:

> Any internal tax or other internal charge, or any law, regulation or requirement of the kind referred to in paragraph 1 which applies to an imported product and to the like domestic product and is collected or enforced in the case of the imported product at the time or point of importation, is nevertheless to be regarded as an internal tax or other internal charge, or a law, regulation or requirement of the kind referred to in paragraph 1, and is accordingly subject to the provisions of Article III.

If the measure, thus, were re-designed to read that "sales of ANDS are prohibited within the sovereignty of …", it could be enforced at the border with respect to imported ANDS, just like an import embargo. It will, in other words, operate as an import ban, even though the legal nature of the measure suggests that it qualifies as a behind the border non-tariff barrier.

Contrary to the scenario discussed under Section 1, the measure, as re-phrased here, applies to both imported, as well as domestic goods.

In this scenario, the relevant legal question is whether there is treatment less favourable for imported goods when compared to treatment afforded to domestic "like" goods.

A sales ban is a domestic (behind the border) measure, and as such, it must observe the discipline embedded in Article III.4 of GATT. A sales ban as envisaged here is covered by the disciplines of Article III.4 since it is undoubtedly a law, regulation or requirement affecting commerce (i.e. the products' internal sale, offering for sale, purchase, transportation, distribution or use).

The sequence established (in the sense of order of analysis), is to first examine what is the class of goods that are considered "like", and then, examine if imported goods have been afforded "less favourable treatment" (LFT).

## 2.1 Are ANDS and Traditional Cigarettes Like/Directly Competitive or Substitutable (DSC) Goods?

For the purposes of our discussion, we assume that the claim is that the sales ban concerns ANDS (domestic and imported), and does not concern domestic and imported traditional cigarettes (TCs). So, while TCs irrespective of origin can be sold in a given market, ANDS cannot.

The question we address here is whether an imported ANDS, and a domestic TC are like products. In this vein, we can draw strong parallels with *EC – Asbestos*, the leading case under Article III.4 of GATT, which dealt with a dyad of goods of this sort.

The term "like products" appears in both Article III.2 as well as III.4 of GATT. The former provision distinguishes between "like" and "directly competitive products". Both terms refer to the competitive relationship between domestic and imported goods, the first to an intense, and the second to a looser competitive relationship. In *Japan – Alcoholic Beverages II*, the Appellate Body held that two goods are like, if they are in a strong competitive relationship. The latter could be evidenced, for example, when two goods share the same elaborate classification. In this case, the Appellate Body held that, sharing the same six-digit classification, was enough of an indication supporting a finding of likeness (pp. 23-24). In a subsequent case, in *Philippines – Distilled Spirits*, the Appellate Body underscored that it was not necessary to share the same six-digit classification for two goods to be like. What mattered was that they were in a strong competitive relationship (§§182, and 226 *et seq.*).

In our case, TCs and ANDS do not share the same six-digit classification. The former come under HS 2402, whereas ANDS can come under various headings. In fact, there is still quite a bit of debate on where these new products should be classified. This debate is still ongoing before the World Customs Organization (WCO).

As per the ruling on *Philippines – Distilled Spirits* though, the fact that ANDS and TCs do not share the same six-digit classification, is not determinative of whether the goods are

"like" one another.[5] More important than classification, the adjudicator will have to look into other criteria before concluding whether this is or is not the case, such as, among others, physical characteristics, end uses, and consumer preferences.

We submit that in this case, the answer is clear. In *EC – Asbestos*, the Appellate Body held that the term "like" in Article III.4 of GATT should be understood as encompassing not only "like" as per Article III.2 of GATT, but also directly competitive or substitutable ("DCS") goods as per the same provision (§§98-100). Consequently, even goods in looser competitive relationship can still be considered "like" as per Article III.4 of GATT.

Competitive relationship is of course, a matter of appreciation by consumers. Case law has consistently underscored that, in the context of claims discussed under Article III of GATT, it is consumers that will decide whether two goods are competing with each other. Products' physical characteristics, end uses, and, of course preferences of consumers are key factors, as per standing case law, in deciding on the competitive relationship across two goods. ANDS, on the one hand, and TCs, on the other, share the same end use of delivering nicotine. "Satisfying an addiction to nicotine" and "creating a pleasurable experience associated with the taste of the cigarette and the aroma of the smoke" are end-uses of TCs that were recognized by the Appellate Body in *US – Clove Cigarettes*. Similarly, satisfying nicotine cravings and creating a pleasurable experience with the taste and aroma of the vapour are end-uses that apply to ANDS.[6] There is ample empirical evidence to this effect. The Appellate Body has ruled that the evidence on end-uses (and of consumer preferences) of the products is especially relevant in cases where the evidence relating to properties, nature and quality of the products indicates that the products at issue are physically different.[7]

What about price? Consumers, after all, are typically characterised by scarcity of monetary resources, and purchases by definition comport an opportunity cost. In *Korea – Alcoholic Beverages*, the Appellate Body relegated them to second order concern (§§114 et seq.). So,

[5] Nor is it so that because of a "like" product conclusion, the tariff classification of these products needs to be the same. Tariff classification is not what is driving the likeness determination and vice versa. The fact that products are "like" product does not in any way require that they be treated the same for tariff classification purposes. The latter is simply a matter of customs law and principles which focus on the physical characteristics of the product rather than their competitive relationship.

[6] Appellate Body Report, *US – Clove Cigarettes*, para. 132.

[7] Appellate Body Report, *EC – Asbestos*, para. 118.

while important, it is not the decisive concern in the eyes of the Appellate Body. At any rate, the fact that consumers use these products to serve a similar end-use and the fact that they are normally sold through similar distribution channels at similar retail places suggests that the two goods we discuss here (ANDS, TCs) are like goods.

And what about health concerns? How do they influence choice by consumers? In *EC – Asbestos*, the Appellate Body held that a reasonable consumer would always prefer a health-promoting over a health-impairing good (that could share the same intended function), and hence the two goods should be regarded unlike. In that case, the Appellate Body was dealing with construction material some made of asbestos (health-impairing), and some of fibres (health-promoting).

Would this reasoning apply here to support a conclusion that ANDS and TCs are not "like" products? The short answer is no. In *EC – Asbestos*, the Appellate Body was dealing with a different situation: consumers knew that some construction material is carcinogenic and some is not. This is not the case here. Both TCs and ANDS represent a risk to human health, even if the risk is of a different nature and degree.

Therefore, and since both products serve the same purpose, reasonable consumers will treat TCs and ANDS as like goods. Since imported ANDS and domestic TCs are like goods, the question we need to now address is whether the ban on ANDS constitutes LFT. We turn to this issue in what now follows.[8]

[8] Although like products require similar treatment in terms of taxation and laws and regulations affecting the sale of the product, it would not be correct to conclude that different excise tax treatment or a different regulatory regime could not be necessary, adequate and proportionate. In fact, in the situation under examination, it would seem permissible and rational to apply a different, more favourable tax and regulatory regime to potentially less harmful, "like products", such as ANDS, since such a different treatment would be justified as necessary for the protection of health and any distinctions would be related to this objective of health protection given the role played by ANDS in a harm reduction strategy. In fact, precisely because of that, most countries have been imposing significantly less burdensome taxes for these different, but competitively "like products" and have not imposed the same strict regulations on ANDS as have been applied to TCs, since this would mean the failure of the new categories. By way of example, most recently, the US FDA in its decision to allow the sales of Heated Tobacco Products in the United States as "appropriate" to protect public health and allowed for forms of advertising via social media different from what is the case for TCs. See, https://www.fda.gov/tobacco-products/premarket-tobacco-product-applications/premarket-tobacco-product-marketing-orders A more lenient regulatory treatment has also been proposed in Canada. See https://www.newswire.ca/news-releases/new-tobacco-and-vaping-products-legislation-receives-royal-assent-683483681.html Canada's Bill S-5 allows for more flavours for vapour than for cigarettes (which is none including no menthol) as well as some advertising freedoms that are not afforded to combustibles such as sponsorships and celebrity endorsements. This different, more favourable approach can be justified in light of the text of Article XX of the GATT that nothing prevents the adoption of measures necessary to protect health.

### 2.2 Does the Sales Ban Afford Less Favourable Treatment to Imported ANDS?

Case law has established that the LFT-requirement embedded in Article III.4 of GATT incorporates the categoric imperative of Article III.1 of GATT to avoid applying domestic measures so as to afford protection to domestic production, without requiring a demonstration of such protectionist intent or effect. In *EC – Bananas III*, the Appellate Body held to this effect that (§ 216):

> Article III:4 does not specifically refer to Article III:1. Therefore, a determination of whether there has been a violation of Article III:4 does not require a separate consideration of whether a measure afford[s] protection to domestic production.

In *EC – Seal Products*, the Appellate Body was evaluating the consistency of a measure conditioning access of seal products upon the satisfaction of certain process-related requirements. In §§5.109-110 of its report, the Appellate Body dismissed the relevance of regulatory intent, when discussing whether the challenged measure was affording LFT to imported (like) goods in the following manner:

> The proposition that distinctions may be drawn between imported and like domestic products without necessarily according less favourable treatment to the imported products implies only that the "treatment no less favourable" standard, under Article III:4, means something more than drawing regulatory distinctions between imported and like domestic products. There is, however, a point at which the differential treatment of imported and like domestic products amounts to "treatment no less favourable" within the meaning of Article III:4. The Appellate Body has demarcated where that point lies, in the following terms:
> [T]he mere fact that a Member draws regulatory distinctions between imported and like domestic products is, in itself, not determinative of whether imported products are treated less favorably within the meaning of Article III:4. Rather, what is relevant is whether such regulatory differences distort the conditions of competition to the detriment of imported products. If so, then the differential treatment will amount to treatment that is "less favourable" within the meaning of Article III:4. In the light of the above, we do not agree with the European Union's reading of the Appellate Body's statement in EC–Asbestos. Specifically, we do not consider that the Appellate Body's statement that a Member may draw distinctions between imported and like domestic products without necessarily violating

> Article III:4 stands for the proposition that the detrimental impact of a measure on competitive opportunities for like imported products is not dispositive for the purposes of establishing a violation of Article III:4.

It follows that detrimental impact suffices in and of itself to meet the LFT-requirement. The relevant detrimental impact is the impact on "competitive opportunities". The impact is thus to be determined in the sense of the potential (as opposed to occurrence) for adverse trade effects. This suffices in and of itself to meet the LFT-requirement. In this respect, we recall also that Article III of GATT aims to protect competitive conditions, and not quantified or quantifiable trade targets. It, therefore, protects latent or potential competition as well as actual competition. Consequently, a ban on sales of imported ANDS (a like product to domestic TCs) and the consequential absence of sales ban for domestic TCs qualifies as LFT.

Furthermore, the GATT panel report on US – Superfund has dismissed the relevance of trade effects when it comes to demonstrating a violation of Article III.4 of GATT. In *Korea – Various Measures on Beef*, the Appellate Body confirmed this finding (§267). The consequence is quite straightforward. The complainant has to show differential treatment, without having to show how it has actually affected imported goods. In this vein, the absence of domestic production is irrelevant as well. A domestic ban violates Article III.4 even if there is no domestic production of either ANDS or TCs. What matters is that consumers view TCs and ANDS in a given market as like products and LFT is accorded to ANDS. And, of course, similar measures would violate Article I.1 as well, since this provision explicitly extends the coverage of the MFN clause to matters coming under the aegis of Article III of GATT.

*Conclusion under GATT Article III*

When the ban on ANDS is viewed as a domestic sales ban that is covered by the disciplines of Article III.4 of GATT, the conclusion is once again that it violates the relevant GATT/WTO commitment of the regulating Members since it imposes less favourable treatment on imported ANDS that are like domestic TCs. Neither the regulatory intent nor the lack of domestic production of TCs is relevant in this respect.

### 2.3 Preliminary Conclusion

Our analysis so far supports the conclusion that, no matter whether expressed as an import ban, or as a sales ban, a prohibition of ANDS to access a market, while allowing for the sale of TCs is inconsistent with the GATT.

In the first case, the measure will be in violation of Article XI of GATT, and in the second case, the measure will violate Article III of GATT.

The regulator, assuming no recourse to a request for waiver is made, can only defend its policies by invoking Article XX of GATT. We turn to this discussion in what now follows.

## 3. Responding to Invocation of Article XX of GATT

The party invoking Article XX of GATT (the WTO member imposing the import/sales ban) carries the associated burden of proof. In *US – Gasoline*, the Appellate Body explained that the party invoking this provision, will have to satisfy a two-tiered test (p. 22):

> first, provisional justification by reason of characterization of the measure under XX(g); second, further appraisal of the same measure under the introductory clauses of Article XX.[9]

Thus, as explained further below, the party adopting the measure would have the burden of proof of the following:

- That the measure falls within one of the subparagraphs of Article XX (e.g. public health or public morals);
- That the measure is "necessary" to achieve that aim;
- That the measure does not constitute arbitrary or unjustifiable discrimination between countries where the same conditions prevail; and
- That the measure is not a disguised restriction on international trade.

The party complaining about the import and sales ban will have, of course, the opportunity to rebut the arguments and evidence presented by the regulating party. Since the ball is on the

[9] In US-Shrimp (§§119-120) provided the rationale for this approach, which is now well embedded in case law.

other side, we will have to first explore the possible legal justifications that the original defendant might raise. As we will show in what now follows, the legal test for consistency stays the same, irrespective of the potential justification raised.[10]

### 3.1 Potential Justifications

A successful defense of measures under Article XX of GATT requires that the party invoking this provision meets cumulatively the requirements of the sub-paragraph invoked, as well as those embedded in the chapeau of the provision.

The sub-paragraphs of Article XX of GATT contain various possible justifications of an otherwise GATT-inconsistent measure. To justify the import/sales ban, the importing State could, in principle, raise one of the following two grounds:

- XX(b), the likeliest option, since it aims to protect human health, which is very much the rationale for a ban on ANDS;
- XX(a), a less likely, but possible option, if it raises the argument that ANDS violate public morals, since smoking and anything related to it such as the use of ANDS for example, is incompatible with the prevailing standards of right and wrong.

Both provisions include a necessity-test, hence it is irrelevant if the importing state invokes one or the other alternative. It will still have to meet the requirements of the same test. If it fails to do so, then complainant prevails. If it manages to meet the requirements of the necessity-test, then it will also have to meet the requirements of the chapeau-test.

### 3.2 Is an Import Embargo/Sales Ban Necessary?

To respond to the question whether an import/sales ban can be provisionally justified under Article XX(b), or XX(a) of GATT, we need to circumscribe briefly the case law understanding of the necessity-requirement. In doing that, we will be explaining whether the challenged measure meets the test, as developed in case law.

[10] In what follows, we present an exhaustive discussion of all potential justifications that the regulator might raise.

### 3.2.1 Means are Justiciable, not Ends

As long as the ends are among those set out in Article XX, the WTO will not question the legitimacy of the ends but will examine only whether the means are designed to address these ends and have the required relationship with the ends in question. This is the direct consequence of the negative integration character of the GATT contract. In *Korea – Various Measures on Beef*, the Appellate Body put it in eloquent terms (§176):

> It is not open to doubt that Members of the WTO have the right to determine for themselves the level of enforcement of their WTO-consistent laws and regulations.

This means that, in case of litigation, WTO courts cannot question, neither why the importer aims at promoting public health/morals, nor the level of protection/enforcement sought. They can only ask whether an import/sales ban serves the achievement of the intended regulatory objective.

By deciding on the level of enforcement, a WTO member ipso facto prejudges the means it can use to attain it: a very demanding level of enforcement would give little scope for measures other than an embargo. This is precisely the situation we are facing in this case. And yet, in *Brazil – Retreaded Tyres*, the Appellate Body put a dent in the right to use the most drastic measures, even if the requested level of enforcement is quite high. In light of the importance of this issue for the facts of this case, we will explain this point in sufficient detail.

In this report, the Appellate Body held that measures like an import/sales ban would be accepted, only if the party adopting them managed to prove that they have made a "material contribution" to the attainment of the objective (§150):

> As the Panel recognized, an import ban is "by design as trade-restrictive as can be." We agree with the Panel that there may be circumstances where such a measure can nevertheless be necessary, within the meaning of Article XX(b). We also recall that, in Korea–Various Measures on Beef, the Appellate Body indicated that "the word 'necessary' is not limited to that which is 'indispensable.'" Having said that, when a measure produces restrictive effects

> on international trade as severe as those resulting from an import ban, it appears to us that **it would be difficult for a panel to find that measure necessary unless** it is satisfied that the measure is apt to make a material contribution to the achievement of its objective. Thus, we disagree with Brazil's suggestion that, because it aims to reduce risk exposure to the maximum extent possible, an import ban that brings a marginal or insignificant contribution can nevertheless be considered necessary. (emphasis added)

It seems to us, that the Appellate Body wanted to convey that, for a very restrictive measure to be accepted as necessary, it must make a real (material, in its parlance) contribution to the attainment of the stated objective. In other words, unless that measure was used, the objective would either not have been attained, or its attainment would have been severely eviscerated. In this vein, the Appellate Body sees a trade-off between two competing propositions:

- On the one hand, it cannot prejudge the level of enforcement sought, but
- On the other, it does not allow the use of very restrictive measures, unless they are really really necessary to achieve the stated objective.

Consequently, the message that the Appellate Body wanted to convey here, is that it would not lightheartedly accept the most egregious cases of market segmentation. One would have intuitively thought that some sort of measurement of the contribution would be necessary. The Appellate Body took the view that this measurement can also take the form of a qualitative assessment that is supported by sufficient evidence.

In *EC – Seal Products* as well, the panel underscored that it would find it hard to reconcile total bans on sales with the necessity requirement, absent a finding to the effect that the challenged measure had made a material contribution to the attainment of the stated objective (§§7.633 *et seq.*). It then found that the challenged measure, for various reasons, "may have contributed to a certain extent" to the attainment of the objective, because it would reduce the overall demand for seal products (§§7.637–638).[11] The Appellate Body, in a lengthy passage (§§ 5.211 *et seq.*) found nothing wrong with the panel's conclusion that the measure may have contributed to the objective (§ 5.225).

[11] This panel ultimately concluded that the EU measure, although it was in its view necessary to protect public morals, it still violated the chapeau of Article XX of GATT.

This is the last contribution of case law to this discussion. There is of course, some distance between "material contribution", and "contribution to a certain extent". One possible explanation of the more relaxed attitude of the Appellate Body in *EC – Seal Products*, the more recent case, could be that the measure anyway was in manifest contradiction with the requirements of the chapeau of Article XX (which we discuss later). Furthermore, even though the Appellate Body did use different language to express the same concept, it did not signal deviation from the standard established in *Brazil – Retreaded Tyres*.[12]

As a result, the finding that recourse to drastic measures like embargoes, will be accepted only if the contribution to the attainment of the regulatory objective is substantial, is, in our view, still good law. Therefore, the regulating party must prove that the ban will make a "material" or close to indispensable contribution to the health objective. As discussed below, this is not likely to be proven given the reduced risk nature of ANDS compared to TCs.

### 3.2.2 The Importance of the Objective Pursued Matters

The Appellate Body asked this question about the relevance of the importance of the policy objective for the first time, in its report on *Korea – Various Measures on Beef*. We quote from §162:

> It seems to us that a treaty interpreter assessing a measure claimed to be necessary to secure compliance of a WTO-consistent law or regulation may, in appropriate cases, take into account the relative importance of the common interests or values that the law or regulation to be enforced is intended to protect. The more vital or important those common interests or values are, the easier it would be to accept as "necessary" a measure designed as an enforcement instrument.

This was confirmed in *EC – Asbestos* (§172).

This being said, the importance of the objective in terms of its impact on the review process should not be over-estimated. What the Appellate Body wanted to convey here, is simply

[12] In *EC – Seal Products*, the Appellate Body confirmed this understanding in §5.215, footnote 1300.

that, when going through its "weighing and balancing" process, it will control also for the importance of the objective sought. Thus, the importance of the objective sought, does not emerge as the decisive factor in deciding whether the necessity-requirement has been met or not. It will affect the standard of review, that much is clear, but it will complement and not substitute for the remaining analysis under Article XX of GATT.

### 3.2.3 Necessary Means Close To Indispensable

In an often-cited passage, the Appellate Body, in its report on *Korea – Various Measures on Beef* (§§161 *et seq.*), explained that the term "necessary" should be understood as closer to the term "indispensable" rather than to the term "making a contribution". The more a measure contributes to realizing an objective the easier it will be for an adjudicator to pronounce on its necessity.

In the same passage, the Appellate Body held that the less a measure has an impact on international trade, the closer it comes to its understanding of "necessity".

What do we make of this analysis for the case we discuss here? The import/sales ban must ideally contribute significantly to the objective (protection of human health/public order) while, at the same time not restrict international trade that much.[13] The measure definitely does not meet the second leg of the test, since a ban by definition has the maximum restrictive impact on international trade. As far as the first leg of the test is concerned, the lack of contribution of the ban to the protection of health renders the ban unnecessary, it seems. An assessment of the contribution of the measure that focuses only on the potential harm caused by the consumption of ANDS is one-sided and ignores the substitution effect that ANDS have for consumers who would otherwise smoke the potentially riskier TCs because of the unavailability of ANDS.

As noted by the seventy-two independent health experts in their letter to the WHO/FCTC, "[a] lost opportunity for a public health gain represents a real harm to public health, and

[13] This passage is reminiscent of the theory of first-best instruments to address distortions, but the agreement does not require the adoption of first-best instruments.

should be recognised as such".[14] Indeed, in a related letter to the WHO, a number of independent health experts explained that "[m]illions of smokers have moved from cigarettes to less harmful alternatives where the laws allow it. Where ANDS have been popular, we have seen rapid declines in adult smoking, for example in the United Kingdom, Sweden, the United States, and in Japan where cigarette consumption fell by 27 percent in the two years between first quarter 2016 and the same period in 2018 following the introduction of heated tobacco products".[15]

Therefore, ANDS play an important positive role in a harm reduction policy that offers what these experts believe to be a safer alternative for smokers. To ban ANDS while allowing ordinary TCs would undo the positive effect on smoking caused by the availability of ANDS. A measure can never be necessary to fulfil the objective or be justifiable if it goes against that objective.[16] In presence of a ban (import- or sale) of ANDS, the only reasonable consequence is that TC users do not have the opportunity to switch to a potentially less harmful alternative to smoking TCs.

### 3.2.4 Absolute As Opposed To Relative Necessity

In *China – Publications and Audio-visual Products*, the Appellate Body provided a comprehensive analysis of the understanding of the necessity-requirement in relative terms, and not in absolute terms (§327). In other words, if an alternative measure is reasonably available that provides an equivalent contribution to the fulfilment of the legitimate objective, the measure will not be necessary. This is how it would work in our case.

The defendant would have to make a prima facie case to the effect that its measure (import/sales ban) is necessary to protect human health, taking into consideration, however, that that the sales of TCs (the riskier product) is already taking place. This fact alone appears to make the prima facie requirement very difficult, if not impossible, to meet. If the

[14] See, "Letter from seventy-two specialists in nicotine science, policy and practice - Innovation in tobacco control: developing the FCTC to embrace tobacco harm reduction", 1 October 2018, p. 2, Available at https://clivebates.com/documents/WHOCOP8LetterOctober2018.pdf.

[15] See, Letter from Professor Abrams and Professor Niaura of the NYU College of Global Public Health, "WHO should reject prohibition and embrace 'tobacco harm reduction' and risk-proportionate regulation of tobacco and nicotine products", 3 September 20187, p.2, Available at: https://clivebates.com/documents/WHOCOP8LetterSeptember2018.pdf.

[16] WTO Appellate Body Report, *Brazil – Retreaded Tyres*, para. 228.

complainant can point to another measure that could achieve the same objective without also creating a similarly restrictive effect on international trade (say, labelling requirements on the health externalities from use of any such products or related information campaigns), then the defendant will have one additional hurdle to overcome. It will have to explain why such alternatives are not reasonably available to it. To do this, it would have to, for example, show that financing a campaign to raise awareness of the risks, as suggested by the complainant, would entail as consequence a financial burden it could not possibly sustain (this is the "hardship"-test, that the Appellate Body has been referring to in this and related case law).[17] This is an argument that would be nearly impossible to sustain in light of the fact that governments run such campaigns all the time. In any case, the costs of such labelling requirements would be borne by the producers and importers of the products, and not the government. Therefore, the argument must fall. The availability of less restrictive alternatives to a ban such as labelling requirements or information campaigns on the health externalities are additional reasons why the ban must be unnecessary.

### 3.2.5 Preferring a GATT-Consistent rather than a GATT-Inconsistent Option

The *Thailand – Cigarettes* dispute, a GATT panel case of 1990, stands for the proposition that a measure is not necessary, if a GATT-consistent or less GATT-inconsistent alternative exists. There are strong similarities between this and the case under consideration in this Note. Thailand had imposed an import ban on cigarettes, while allowing for the sale of domestic cigarettes in its market. When challenged, it argued that its embargo on the importation of cigarettes, while restricting the overall quantity of cigarettes sold in its market, was justified by the fact that it aimed to ensure the quality of cigarettes imported. The panel (§75) felt that Thailand could have ensured its objective (good quality of cigarettes sold and restrictions on demand), through the use of non-discriminatory, and hence GATT-consistent, measures (non-discriminatory labeling, etc.). In so doing, the GATT panel even went against the suggestions of the World Health Organization, which had effectively advocated in favour of banning imported manufactured cigarettes.

[17] In *Dominican Republic – Import and Sale of Cigarettes*, the Appellate Body almost verbatim exported the allocation of the burden of proof as per *US – Gambling*, in the trade in goods-context as well (§70).

In our case, if the objective of the importer was to protect human health/public morals, then the most appropriate way to do it, would be to warn (potential) consumers of the alleged danger that consumption of ANDS represents to health. It could have chosen a GATT-consistent option, that is. By imposing an import/sales ban on ANDS only, it does not serve the regulatory objective unilaterally set.

### 3.3 Preliminary Conclusion

It is difficult to conclude in definitive manner whether the defendant will manage to successfully demonstrative substantive compliance with the relevant sub-paragraphs of Article XX, even though the better arguments lie with a negative response. This is so for two important reasons, namely, because:

- drastic measures only exceptionally will be allowed;
- a GATT-consistent option could probably help it reach its objective.

In our view, there are thus good reasons to believe that the regulating member will not meet the necessity requirement, as it has to do in order to mount a successful defence of its otherwise GATT-inconsistent measure. The lack of contribution of the ban to the protection of health and the availability of less restrictive alternatives to a ban such as information campaigns and labelling render the ban unnecessary.

But let us assume for the sake of argument that the defendant has managed to demonstrate that its measures pass the first leg and are necessary to achieve their objectives. This is not the end of the road, as we have already suggested. The defendant must also demonstrate that its measures meet the requirements of the chapeau. We turn to this discussion in what now immediately follows.

### 3.4 Does an Import Embargo/Sales Ban Meet the Requirements of the Chapeau?

For a WTO member to successfully discharge its burden of proof under the chapeau of Article XX, it must demonstrate that its measures do not constitute an arbitrary, or unjustifiable discrimination, or a disguised restriction of trade. The third requirement is of

course distinct from the first two, which concern degrees of discrimination. Case law though, is quite fuzzy as to whether these two requirements are distinct, or overlapping. In *US – Shrimp (Article 21.5–Malaysia)*, the Appellate Body held that these three requirements are distinct (§118). And yet, the same Appellate Body, in its report on *US – Shrimp*, held the opposite (§150).

We submit that this discussion is inconsequential. What matters is what the substantive content of the three terms amounts to.

### 3.4.1 Substantive Consistency and Application

We quote §625 of the Appellate Body report on *China – Rare Earths*, which is probably the best explanation of the standard of review adopted when examining claims of inconsistency with the chapeau:

> Although… the focus of the inquiry is on the manner in which the measure is applied, the Appellate Body has noted that whether a measure is applied in a particular manner "can most often be discerned from the design, the architecture, and the revealing structure of a measure." It is thus relevant to consider the design, architecture, and revealing structure of a measure in order to establish whether the measure, in its actual or expected application, constitutes a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail.

An enquiry into the design, architecture, and revealing structure of the challenged measure is thus warranted in order to decide on its consistency with the chapeau. For the purposes of our discussion, this would mean that a panel would look into the ban on ANDS of course, as well as into the rationale for the measure (public health/public morals).

### 3.4.2 The "Plat de Resistance": the Even-Handedness Requirement

On its face, the chapeau of Article XX of GATT imposes a requirement of even-handedness. We quote the relevant passage:

> … the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, …[18]

The question that naturally arises, is whether the term "discrimination" should be co-extensive to the manner in which "so as to afford protection" has been understood in the case law regarding Article III of GATT.

In *US – Gasoline*, the Appellate Body addressed this issue directly, and found that the legal test for consistency is not identical across the two provisions (Articles III and XX).
On p. 26 in the same report, the Appellate Body explained itself as to where it saw the difference in the legal test:

> We have above located two omissions on the part of the United States: to explore adequately means, including in particular cooperation with the governments of Venezuela and Brazil, of mitigating the administrative problems relied on as justification by the United States for rejecting individual baselines for foreign refiners; and to count the costs for foreign refiners that would result from the imposition of statutory baselines. In our view, these two omissions go well beyond what was necessary for the Panel to determine that a violation of Article III:4 had occurred in the first place.

Of interest to our discussion, is the Appellate Body's view that the two omissions, which go beyond what was necessary to find violation of Article III, should be taken into account in order to find violation of the chapeau. The requirement thus, for even-handedness under the chapeau, is quite elaborate. This in turn, entails an even higher burden for the party invoking the chapeau when drawing regulatory distinctions in treatment.

We now turn to the interpretation of the term "disguised restriction of trade". There are some banal interpretations that have seen the light of day, of no or marginal interest to our

[18] It is of course, debatable whether "disguised restriction of trade" should be treated as part and parcel of the even-handedness requirements. Arguably, it is a distinct requirement. In this Note, I will treat it as part of it though, since this is how case law has discussed it so far. In my view though, it is distinct requirement. The way I personally understand the legal discipline in the chapeau of Article XX, it contains two distinct elements: an element of even-handedness, which invites comparison of treatment of a particular good in countries (including the regulating country) where the same conditions prevail; and a separate requirement to avoid disguised restrictions of trade, which is akin to abuse of law. This requirement amounts to a legal imperative to use means for stated ends, and not in order to advance other, hidden objectives.

discussion. In *US – Gasoline*, the Appellate Body rejected the interpretation that the term "disguised restriction of trade" is limited to concealed or unannounced restrictions only. It upheld, in other words, the idea that the obligation to avoid disguised restrictions of trade is not a mere exercise in transparency.

What is then "disguised restriction of trade" all about? Case law has provided a framework to use when addressing claims that a measure falls short of this requirement. We turn once again to the Appellate Body report on *US – Gasoline* (p. 25):

> … the kinds of considerations pertinent in deciding whether the application of a particular measure amounts to "arbitrary or unjustifiable discrimination," may also be taken into account in determining the presence of a "disguised restriction" on international trade. The fundamental theme is to be found in the purpose and object of avoiding abuse or illegitimate use of the exceptions to substantive rules available in Article.

This view is reminiscent of the French doctrine of "abus de droit".[19] In other words, in the name of protecting one of the values embedded in the body of Article XX, WTO members should not, in under-handed manner, promote the interests of local produce. "Abus de droit" falls squarely within the parameters of this statement: use an instrument not for the intended, and acceptable, function, but for a different one (un-intended, as well as un-acceptable).

How does all this relate to our discussion?

Article XX, unlike the provisions regarding obligations assumed under the GATT, does not prescribe instruments that must be disciplined in a specific way. It enlists grounds, which, if genuinely pursued, allow WTO members to deviate from the disciplining of instruments as per the obligations assumed (Articles I, II, III, XI of GATT).

We have established that ANDS and TCs are like goods. We have also established that banning the former, and allowing the sale of the latter amounts to LFT. Even if we assume that the defendant has met its burden under Article XX(a)/XX(b) of GATT, it cannot pass the hurdle of the chapeau. A measure, which allows the sale of TCs and ANDS is a disguised

[19] The Appellate Body, in its report on *Brazil – Retreaded Tyres*, endorsed this analysis in §§224 *et seq.*

restriction of trade, and/or an unjustifiable, and arbitrary discrimination that thus violates the GATT. This is why: if the purpose is to protect public health, it simply cannot be that between two like goods, only half of them are banned. If the purpose is protection of health, all like products (ANDS, and TCs alike) must be banned/disciplined, unless there are good reasons for a regulatory distinction that is necessitated by the health objective such as providing a less stringent regime for ANDS given their potential role in a harm reduction strategy.[20] If only ANDS are banned, consumption of TCs will increase because of the role in a harm reduction policy played by ANDS that substitute for TCs, as we have discussed earlier, and the regulatory purpose will be defeated, since overall consumption at best will remain unaffected. By failing to do as much, the defendant has ipso facto failed to meet the requirements of the chapeau.

There is an additional argument in favour of this conclusion under the chapeau. In *Brazil – Retreaded Tyres*, the Appellate Body held that if the adjudicator concludes that the basis for the measure bears no rational connection with the objective pursued, then it has to find that the chapeau has been violated (§227). Under the terms "arbitrary-", "unjustifiable discrimination", and "disguised restriction of trade", the Appellate Body saw a minimum requirement that must be satisfied as well: rational connection between end sought, and means in place.[21]

The "rational disconnect" standard appeared yet again in *EC – Seal Products*. There, Canada had argued that the European Union was not pursuing protection of animal welfare, when it allowed the killing of seals by the Inuit community of Greenland. The Appellate Body interpreted first the Canadian claim as a statement to the effect that, a rational disconnect between the means (imports of seal products from these brutally killed seals) and the objective (protection of animal welfare) existed, as a result of the only partial exclusion of seal products from the EU market, when the objective was to ban all goods produced following unacceptable methods of harvesting seals (§5.319).

[20] Recall, that it is not the complainant who has to demonstrate that the defendant is operating a disguised restriction of trade, or operating an arbitrary and/or unjustifiable discrimination. It is the defendant, i.e. the member imposing the ANDS ban that must prove that it does not. Consequently, the complainant does not have to demonstrate, for example, that the defendants' producers of TCs will profit from limited competition.

[21] Irrespective whether we base ourselves on the "rational disconnect" thesis, or the substitution effect discussed earlier, the analysis is the same: there is no need to inquire into trade effects.

This case thus, is quite relevant for our discussion here. As in *EC – Seals Products*, the regulating state here is facing two types of products, both of which allegedly represent a health risk. And yet, it bans only one of them, the less risky one. The question of rational disconnect is posed in almost identical terms across the two cases.

Under this case law, consequently, the regulating state by not addressing the reasons why it bans ANDS but not TCs, is violating the rational-disconnect obligation.

In other words, under the chapeau, the regulating state will have to explain why there is one sauce for the goose so to speak, and one for the gander. What explains in other words, the ban on sales of ANDS and the permission to trade TCs? The regulating state cannot avoid this question. And we have difficulty seeing how it could ever explain this given that, in the opinion of the above quoted seventy-two health experts, the banned ANDS are less risky than the permitted TCs.

Consequently, a ban on ANDS would violate the requirements included in the chapeau of Article XX of GATT, even if the ban applied to all imports and domestic ANDS alike, since it would be excluding TCs from its scope.

Furthermore, the MFN (most favoured nation) requirement is explicitly embedded in the chapeau, which requests absence of discrimination across countries, where the same conditions prevail. This term has been consistently understood as prohibiting discriminatory behaviour.

In the WTO-era, the Appellate Body in *US – Gasoline* discussed the issue whether this requirement should be understood as referring exclusively to exporting countries or, conversely, whether it should encompass the regulating country as well. Although the Appellate Body did not formally rule on this issue on this occasion, it saw no reason to deviate from the prevailing practice, which privileged the latter interpretation (pp. 23–24):

> It was asked whether the words incorporated into the first two standards "between countries where the same conditions prevail" refer to conditions in importing and exporting countries, or only to conditions in exporting countries. The reply of the United States was to the effect that it interpreted that phrase as referring to both the exporting countries and importing

> countries and as between exporting countries. At no point in the appeal was that assumption challenged by Venezuela or Brazil. we see no need to decide the matter of the field of application of the standards set forth in the chapeau nor to make a ruling at variance with the common understanding of the participants.

Finally, there is once again no need to demonstrate actual trade effects or to measure their significance. What matters is that the even-handedness requirement has been violated, irrespective of the trade volumes that will be eventually reduced.

One final comment is warranted at this stage. One might not exclude that the regulating state invokes the precautionary principle, arguing that, since the risk from ANDS has not been precisely assessed, its measures are necessary to address, on precautionary grounds, the potential risk. This argument it seems to me, is easy to thwart. The precautionary principle has not been recognized in the GATT legal order in any of the reports issued so far and the Appellate Body found that the "precautionary principle" had not yet attained authoritative formulation outside the field of international environmental law "did not release Members from their WTO obligations".[22]

[22] Appellate Body Report, *EC – Hormones*, paras. 123-125. See also Appellate Body Report, *Japan – Apples*, para. 233.

## 4. Brief Concluding Remarks

In this Note, we discussed the consistency of an import/sales ban on ANDS with the relevant WTO rules, when no similar prohibition on the same of TCs has been put into place.

Our conclusions are as follows:

- An import ban on ANDS, mandated by a formal law, violates Article XI of GATT, since
    - it constitutes a prohibition on importation, and thus a prohibited zero import quota;
    - it is attributable to the importing WTO member;
    - there is no need to show trade effects, and
    - the regulatory intent of the ban is irrelevant;
- A sales ban on ANDS, mandated by a formal law, violates Article III of GATT, since
    - ANDS and TCs are like products;
    - a ban on imported ANDS, while allowing the sale of TCs, amounts to LFT for imported like products;
    - there is no need to demonstrate trade effects and it is thus irrelevant if the banned products represent only a small volume of trade; and
    - the regulatory intent of the discriminatory ban on ANDS is not relevant under Article III of GATT, since any modification of the conditions of competition to the detriment of imported like products is prohibited even if there is no evidence of any protectionist intent;
- The regulating WTO member may seek to justify its measures by invoking Article XX(b) and/or Article XX(a). Both provisions include the same "necessity" test for consistency, and thus, it is simply irrelevant if the importing WTO member will invoke one or the other, or both of them. There are good reasons to believe that the defendant will not meet the necessity-requirement, as it has to do in order to mount a successful defence of its otherwise GATT-inconsistent measure. The lack of contribution of the ban to the protection of health, and the availability of less restrictive alternatives to a ban such as information campaigns and labelling support a finding that the ban is unnecessary;

- In any case, even if the regulating member were to be successful in demonstrating the "necessity" of the ban on ANDS, this will not suffice to justify the ban. We examined in particular the consistency of the measure under the chapeau of Article XX of GATT, and found that the ban on ANDS will fail to meet the chapeau requirements, since
    - the ban is a disguised restriction on trade for two, distinct reasons relating to the substantive basis for the difference in treatment as well as the procedural explanation for the different treatment:
        - because the regulating state, in the name of protecting human health (and/or public morals) is banning the sale of certain goods while not banning the sale of like goods that are, according to many scientists, much more harmful to health; and
        - because it has not explained its decision to ban some and not other, more harmful products, and is unlikely to be able to provide the required reasoned and reasonable explanation that is rationally connected with the health objective of the measure.
    - the ban is also an unjustified and/or arbitrary discrimination, since the importing WTO member has banned the sales of some imported products, as opposed to other like products that are more harmful to health, without any reasoned and reasonable explanation that is rationally connected with the health objective of the measure.

Dated:

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## Annex – Curriculum Vitae of Petros C. Mavroidis

# PERSONAL


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# WORK EXPERIENCE

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| 2003-Present | : | Edwin B. Parker Professor of Foreign and Comparative Law, Columbia Law School, New York. |
| 1996-Present | : | Professor of Law, University of Neuchâtel. |
| 2011-2016 | : | Professor at the European University Institute (EUI), Florence, Joint appointment at the Robert Schuman Centre and the Law Faculty (on leave from Columbia Law School) |
| 2009 (fall) | : | International Franqui Chair, Katolieke Universiteit van Leuven, Belgium. |
| 2003 (fall) | : | Visiting Professor, Woodrow Wilson School, Princeton University. |
| 1999-2000 | : | European University Institute (EUI), Florence, Italy; Visiting Professor, Chair for EC Competition Law. |
| 1999 (spring) | : | Visiting Professor, Université de Fribourg, Switzerland. |
| 1999 – Present | : | Chargé des cours, Institut d'Etudes Européennes, ULB, Brussels, Belgium. |
| 1996 – Present | : | Legal Advisor to the World Trade Organization (WTO). |
| July-August 1994 | : | OECD/DAFFEE, Advisor on Trade and Competition. |
| 1992-1996 | : | GATT/WTO, Legal Affairs Division. |
| 1991-1992 | : | University of Michigan, Ann Arbor; Visiting Scholar. |
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# COURSES TAUGHT

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2013: Developing Countries and DSU Reform (co-authored with Marc L. Busch), pp. 99-104 in Simon Evenett and Alejandro Jara (eds.), Building on Bali, a Work Programme for the WTO, VoxEU.org E-book http://www.voxeu.org/article/building-bali-new-voxeu-ebook

2014: Members Only: Embracing Diversity in the WTO (co-authored with Bernard M. Hoekman), VoxEU.org http://www.voxeu.org/article/members-only-embracing-diversity-wto

2016: Clubs and the WTO post-Nairobi: What is Feasible? What is Desirable? (co-authored with Bernard M. Hoekman) http://www.voxeu.org/article/clubs-and-wto-post-nairobi

## Social Science Research Network

My papers are available on SSRN at: http://ssrn.com/author=202909

# RESEARCH GRANTS

1. American Law Institute (1991-2012): Principles of International Trade: the Law of the World Trade Organization (WTO). The study was conducted and co-authored with Henrik Horn (chief co-editor) and Kyle W. Bagwell, Gene M. Grossman, Robert W. Staiger, and Alan O. Sykes.

2. Bruegel (2009-2010): Preferential Trade Agreements. The study was co-authored with Henrik Horn, and André Sapir and published by Bruegel. A shorter version appeared in the World Economy, 2010 (cited supra).

3. MISTRA (2007-2013): I participated in a research consortium (www.entwined.se) working on various issues regarding the intersection of trade (WTO) law and environmental policies with special focus on policies relating to climate change. The outcome of this research has appeared in academic journals as cited supra.

4. ASEAN (2011-2013): I participate in a research consortium aiming at improving the current dispute settlement system of the ASEAN.

5. World Bank (2000-2010): Research grant for the WTO data set (www.worldbank.org/trade/wtodisputes)

6. EUI (2011-PRESENT):Research grant for the WTO data set http://globalgovernanceprogramme.eui.eu/wto-case-law-project/

7. EUI (2010-PRESENT): Research grant for the WTO case law-project http://globalgovernanceprogramme.eui.eu/wto-case-law-project/

# HONOURS

## Doctor Honoris Causa

Honorary Doctor of Laws: University of Antwerpen (Anvers), Belgium, 2013.

Honorary Doctor of Laws: Gothenburg University, Sweden, 2010.

## Awards

American Society of International Law (ASIL) 'Certificate of Merit for a Work in a Specialized Area of Law' for the monograph 'The Regulation of International Trade', vols. 1 and 2, MIT Press: Cambridge, Massachusetts, 2017.

American Society of International Law (ASIL) 'Certificate of Merit for a Work in a Specialized Area of Law' for the monograph 'Trade in Goods', 2nd Edition, Oxford University Press: Oxford, UK, 2013.

International Franqui Medal (and Chair): University of Leuven, Belgium, 2009.

American Society of International Law (ASIL) 'Award of Highest Technical Craftsmanship' for The WTO Law, Practice and Policy (co-authored with Mitsuo Matsushita, and Thomas J. Schonbaum), Oxford University Press: Oxford, UK, 2005.

# MEMBERSHIP IN BOARDS

1. **International Academic Advisory Council, University of Gothenburg, School of Business, Economics, and Law:** Member of the Council.

2. **Council of the World Trade Law Association**: Member of the Board.

3. **Columbia Journal of Trans-National Law**: Member of the Board of Advisors.

4. **Columbia Journal of European Law**: Member of the Board of Advisors.

5. **Global Trade and Finance Series, Kluwer Publishing**: Member of the Advisory Board.

6. **Journal of World Investment and Trade**: Associate Editor (2002-2013); Editorial Advisory Board (2013-).

7. **Journal of World Trade**: Associate Editor.

8. **The World Trade Review**: Editorial Board.

9. **The Geneva Post Quarterly**: Editorial Board.

10. **Yearbook on International Investment Law and Policy**: Advisory Board.

11. **Journal of International Trade,** Board of Advisors.

# REPORTER FOR ACADEMIC ASSOCIATIONS

1. **American Law Institute (ALI):** Chief Co-Rapporteur in December 2001 to the project "Principles of Trade Law: The World Trade Organization" which was published in 2013.

2. **International Law Association (ILA), International Trade Law Committee (ITLC):** Rapporteur.

# MEMBER OF ACADEMIC ASSOCIATIONS

1. **American Law Institute** (**ALI**): Member (as of 2007).

2. **Centre for Economic Policy Research** (**CEPR**) Fellow (2003-2011).

3. **The Swiss Institute of Comparative Law**, Lausanne: Member of the Scientific Board (as of 2012).

# MISCELLANEOUS

1. **Court of Arbitration for Sport (CAS)**: Arbitrator (2007- ).

2. **Commission on Financial Fair Play**, UEFA, Member (2008- ).

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致尊貴的立法會議員：

**政府應該暫緩全禁加熱煙，重新諮詢研究民意取態**

作為香港吸煙愛好者大聯盟(下稱「本會」)謹此衷心致函各議員，要求議員認真考慮，建議政府暫緩全禁加熱煙，重新進行諮詢研究民意取態的訴求。

儘管政府多番強調其方案獲得很大的支持，本會觀察到《2019 年吸煙(公眾健康)(修訂)條例草案》法案委員會於四月舉行為期三日的公聽會上，支持和反對全禁的意見相若，以及委員會接獲過萬份意見書中，反對全禁的數量均超過支持意見，可見市民大眾在這個議題上取態南轅北轍，存在不可忽視的分歧。

**本會認為此時並非政府推動如此具爭議性的立法建議的最佳時候**，而是應該先確保政府有效施政，民生問題優先得到解決，聚焦紓解香港高企的民怨。本會懇請議員明察秋毫，促請政府分清政策的輕重緩急，務求盡快解決目前社會上最急逼的問題。謝謝！

香港吸煙愛好者大聯盟

王延華　謹啟

2019 年 6 月 21 日

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本人從事的公司行業是屬於物流轉口工作，由於客戶是電子煙配件材料國內廠家居多，不幸地亦受到政府的《2019年吸煙(公眾健康)(修訂)條例草案》影響. 客戶擔心風險，改為澳門和國內出貨轉口，公司業務即時下滑，我工作的公司亦現已經裁走了8成多同事，就是因為特區政府的朝令夕改政策，於2018年6月底7月頭，特首還是講規管電子煙，而到了去年10月施政報告時卻突然改了全禁，使我們行業受到重大損失及很多員工都有左生計。

附上最近有報章報導有關物流業的苦況給議員參看及希望重新考慮審視全面扼殺電子煙的法案，再次請各議員幫我地保住飯碗，可以繼續養家糊口，有工開，真是功德無量.... 十分感謝!

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我們從事於電子煙相關產品轉運的物流工作.只將入口的電子煙相關產品包裝整合後再出口去美加，歐洲，東南亞等地區。另外，中國近日在世貿 (WTO)[1] 遞交了有關電子煙的製造和包裝規管條文細節，既然中國政策亦同世界其他國家如美國，加拿大，紐西蘭，英國，日本，南韓，意大利等國家走向合理規管這些新型煙草產品，為何香港政要同世界先進國家府背道而馳 。

本會期望各位立法會議員以大局為重，促請局方不要再在此議題上撕裂社會。謝謝！

謹啟

2019年6月21日

[1] https://members.wto.org/crnattachments/2019/TBT/CHN/19_2560_00_x.pdf

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2019年6月21日

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都市日報 2019年5月14日 P10

殃及池魚

# 封殺電子煙物流大裁員

政府修例禁止進口電子煙，但被指事前未有諮詢物流業界。（資料圖片）

**政府早前提出修例，全面禁止進口及銷售電子煙。有從事相關產品的本港物流公司表示，自去年底消息出現後，生意額急跌逾九成，公司亦要裁減逾八成人手，又指其處理貨品未有在港銷售，形容修例如殺錯良民。**

Eric坦言，擔心自己也會被裁

Eric公司中一層的貨倉已丟空

因有租約不能棄租，估計白交租金近百萬元。

Eric為本港一間位於屯門的物流公司的中層管理人員，他表示，深圳為全球電子煙及相關配套產品的生產基地之一，該公司於兩年前開始集中從事相關產品的物流工作，產品由深圳入口後，先放在屯門貨倉，再轉往歐美、日本等國家，產品並未有在本港銷售。他說：「我哋真係做到快靚正，接單後可在一日後出貨，所以生意愈來愈好，去年中還投資購入智能化物流系統，希望應付日益增加的物流量。」

特首林鄭月娥於去年10月在施政報告公布，政府決定修訂法例，禁止進口、製造、售賣、分發和宣傳另類吸煙產品，他表示，消息一出，物流生意即一落千丈，「生產商為逃避風險，好多選擇直接在深圳出貨，公司處理的貨量，由高峰期每日700噸，急降至每日幾百公斤，跌幅逾九成。」

## 逾萬貨倉白白丟空

Eric表示，生意銳減，公司捱不住，於去年12月開始，共裁員五次，人手由高峰期逾百人，急降至現時不足20人，「公司參加了中高齡就業計劃，亦聘請了不少更生人士。他們都不想領取綜援，想繼續工作，但相信並不容易。」他又稱，公司在屯門工業區租用兩層數萬呎的貨倉，目前其中一層的貨倉已白白丟空，但

## 批未有向物流業諮詢

Eric表示，情況若惡化，難保自己也會被裁，「我都有小朋友要照顧，亦有樓要供，政府修例是想減少港人吸食電子煙，但我們的產品沒有在香港銷售，明顯是殺錯良民。」他批評，政府提出修例前，沒有向物流業界諮詢。

食衛局發言人未正面回應物流業界諮詢問題，只稱立法會現正審議的《2019年吸煙（公眾衛生）（修訂）條例草案》旨在禁止進口、製造、售賣、分發和宣傳另類吸煙產品；就入口而言，航空轉運貨物，以及過境人士，均可獲豁免。

## 業務轉交澳門 五百人將失業

# 電子煙例擬禁分發 港物流公司瀕倒閉

**新聞追擊**

*電子煙「禁令」尚未通過，本港分發轉口產業驚現倒閉潮！近年不少內地電子煙產品製造商，將貨品運到本港物流公司倉庫，經分拆包裝後轉口外國，惟近月政府提出修例建議，列明不允許分發工序，內地廠商隨即將分拆業務轉交澳門，本港因此失去每月十多億元生意，五百從業員相繼被裁退及面臨失業；業界期盼修例可豁免分發業務，以挽救行業和振興經濟。　記者：林家希　李殷*

食物及衞生局今年二月刊憲提出修例建議，擬禁止進口、製造、售賣及分發電子煙，加熱煙等新型煙草產品，雖然建議有待立法會議員審議及表決，但近期已導致本港分發轉口電子煙產品公司瀕臨滅亡。

本港一家倉儲物流公司姓陳負責人透露，內地是全球電子煙產品主要生產國，廠家若出口產品，可按貨品總值獲取一定比例出口退稅，但由於外商採購數量不一，廠家若分別為每張定單的產品報關，須按定單數目支付手續費，因此近年紛向內地海關申請一張報關單，將大量產品運往本港物流公司倉庫保管，並委託按照定單分拆包裝產品，再轉口外國，「對內地廠家來說，這方法既省成本，也賺盡出口退稅，而且香港船期比較密，因此帶動本港倉儲、分拆及轉口業務，但『禁令』一出，全行面臨滅亡！」

### 每月失十多億生意

陳解釋，修例建議雖然允許電子煙產品「原封不動」轉口，但列明擬禁止在港「分發」，不少內地廠家得悉香港將於通過法例後禁止有關工序，近月已終止與本港公司合作，轉交澳門的公司分拆包裝，再安排貨車經港珠澳大橋經港轉口，「直接駛到貨櫃碼頭上船，不需要我們了！」

香港電子煙協會主席陳民輝表示，修例建議提出前，本港的分拆、包裝及轉口電子煙產品業務蓬勃，有三家大型及十多家小型公司，每月生意額共逾十億元，但近月不少公司已倒閉，估計每月生意額暴跌至約一億元，其中一家公司原有約一百八十名員工，近期已大輪裁員至僅剩約二十人，「全行約五百人，不少已失業，或即將失業。」

### 業界促豁免分發業務

陳民輝強調，本港儲存和分發的電子煙產品均全部出口，不會在港銷售，不應禁止有關工序，連累不少人失業，「與其修例禁止電子煙，不如加以規管。」另一物流公司姓張負責人表示，他不反對當局修例禁止進口、製造及售賣電子煙，但應豁免分發，因有關產品不在本地銷售，「希望政府聆聽業界聲音，保障行業生存和工人飯碗！」

對於業界要求豁免「先分發，後轉口」工序，食物及衞生局持不同意見。發言人表示，如果容許另類吸煙產品進口香港後再出口，需要設立周全的執法系統，以監視整個供應鏈，包括貨物登記及嚴謹追蹤產品，確保它們適時出口，而非流入黑市，惟有關執法工作要投入更多資源，並為整體執法工作施加不必要壓力。

■當局早前提出修例建議，擬禁止進口、製造、售賣及分發電子煙產品，但未禁止吸食。　資料圖片

■本港一家倉儲物流公司因電子煙「禁令」影響，分拆、包裝及轉口電子煙產品業務大減，貨倉內空無一物。　受訪者提供

# 電子煙產業鏈龐大 九成產品中國出口

**話你知**

全球九成電子煙產品均來自中國，當中六成產品經香港轉口往歐美等國家，為香港帶來不少收益，但因本港電子煙「禁令」影響，轉口業務會受到一定打擊。

全球電子煙產業鏈十分龐大，包括上游的電池、五金，發熱電阻及煙油等原材料供應商，中游的中國及外國電子煙設計製造商，下游則是遍布各國的代理商、經銷商和零售商，當中九成電子煙及加熱煙產品，均由中國出口至各國，但內地卻非銷售大國，一六年統計可見，內地電子煙消費僅佔全球百分之六，相反美國、英國和意大利，分別佔約四成三、一成二和百分之七。

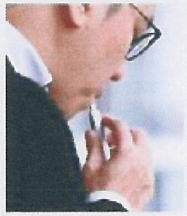
由於香港航運發達，船期頻密，加上電子煙廠家集中於毗鄰香港的深圳，因此六成產品均通過本港轉口往外國，但當局提出禁止電子煙修例建議後，若不豁免「分發」工序通過法例，分拆包裝業務勢被澳門完全取代。

■全球九成電子煙產品均來自中國，當中六成產品經香港轉口。　資料圖片

頭條日報 2019年5月27日 P08

■本港電子煙分發公司近期無生意，倉庫無貨物。

# 政府擬禁電子煙分發
# 港轉口產業現倒閉潮


■近年吸電子煙成新潮流。

**頭條直擊** 禁電子煙條例草案尚未在立法會通過，本港分發轉口產業驚現倒閉潮！近年不少內地電子煙產品製造商將貨品運到本港物流公司倉庫，經分拆包裝後轉口往外國，惟近月政府提出修例建議，列明不允許分發工序，內地廠商即將分拆業務轉交澳門，本港因此失去龐大生意，不少公司相繼裁員和結業。業界期盼修例可豁免分發業務，以挽救該行業。 記者：林家希 李殷

食衛局今年二月刊憲提出修例建議，擬禁止進口、製造、售賣及分發電子煙、加熱煙等新型煙草產品，雖然建議有待立法會議員審議及表決，但近期已導致本港分發轉口電子煙產品公司瀕臨滅亡。

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## 內地廠商轉往澳門分拆包裝

陳解釋，修例建議雖然允許電子煙產品「原封不動」轉口，但列明擬禁止在本港「分發」，不少內地廠家得悉香港將於通過法例後禁止有關工序，未雨綢繆，近月終止與本港公司合作，轉交澳門的公司分拆包裝，再安排貨車經港珠澳大橋運貨往本港，「直接駛到貨櫃碼頭上船，不需要我們了！」

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■電子煙分發公司管理層張先生，對近期業界倒閉潮感無奈。

陳民輝強調，本港儲存和分發的電子煙產品，全部均會出口，不會在本地銷售，不應禁止有關工序，連累不少人失業，「與其修例禁止電子煙，不如加以規管。」

另一倉儲物流公司姓張負責人表示，他不反對當局修例禁止進口、製造及售賣電子煙，但應豁免分發，因為有關產品不在本地銷售，「希望政府聆聽業界聲音，保障行業生存和工人飯碗！」

對於業界要求豁免「先分發、後轉口」工序，食衛局發言人回應稱，如果容許另類吸煙產品進口香港後再出口，需要設立周全的執法系統，以監視整個供應鏈，包括貨物登記及嚴謹追蹤產品，確保它們適時出口，而非流入黑市，惟有關執法工作要投入過多資源，並為整體執法工作施加不必要壓力。

Legislative Council Secretariat
Legislative Council Complex
1 Legislative Council Road
Central, Hong Kong
Smoking (Public Health) (Amendment) Bill 2019

Dear all members of Legislative Council,

**Re: Balanced Approach to Alternative Tobacco Products by Regulation**

I would like to ask the HK Government and Bills Committee to reconsider the proposed ban on e-cigarettes and alternative tobacco products. Regulation is more effective and gives a balanced approach for HK Government and for its HK Citizens.

We are a bar and week on week there are different consumers visiting the area and also choose to smoke. However some of my consumers currently have already switched to use these alternative tobacco products. This has benefitted my working environment and also my staff which some are non-smokers. As a business owner in the hospitality industry, I am on the forefront of both the tourism sector and see these products being used widely by tourists.

I'm not happy that The Government has not consulted us on the topic and then proposed a bill to ban all e-cigarettes and heated tobacco product.

Has the Food & Health Bureau considered views from the public or interested parties?

I'm quite confused on the topic also because if it were regulated, these products would not be reachable by youth. Also the recently I understand the US FDA have authorized sale of Heated Tobacco Products after doing a thorough long review.

I would kindly ask again for a public consultation especially during this sensitive time where a more balanced approach would help reduce the antigovernment sentiments and feelings in the public that the government are again making choices for the people without consulting them.

We had voiced our concerns to LegCo and the Government before, but the Government is still not listening to us.

I hope you can take the best action and support a balance approach for all parties in Hong Kong.

As such, we ask for regulation, not ban for alternative tobacco products for this balanced approach.

Thank you and best regards,

Amber Pun
General Manager

Assembly
6/21/2019

To all the members of HK Legislative Council

Clerk to Bills Committee on Smoking (Public Health) (Amendment) Bill 2019

Legislative Council Secretariat

Legislative Council Complex

1 Legislative Council Road

Central, Hong Kong

*Re: Regulate Alternative Tobacco Products Instead of Ban*

Dear all members of HK Legislative Council,

We had previously submitted our concerns on the HK Government's proposed ban on alternative tobacco products such as heated tobacco products. However, the HK Government has not listened to us.

I would like to request the government to openly consider the needs of smokers in Hong Kong by **regulating these alternative tobacco products such as Heat not Burn products (not ban them)!**

A regulation (not a ban) towards these products will provide a better alternative for smokers. Please allow me to share my thoughts.

As a bar owner in Hong Kong, I have noticed a many of my customers and employees using Heat Not Burn Products during the past years, and not cigarettes anymore. I can see the potential positive impact of these products which can improve the lives of smokers and even non-smokers nearby. These alternative tobacco products apparently have less lingering smell that will not upset people around us, especially the many non-smokers

With the current political environment in HK, the Government should take a neutral & balanced approach to protect public health. Also, I hope that the Government will regulate, not ban these heated tobacco products in Hong Kong!

Please listen to the concerns and thoughts of your HK Citizens (including the smokers).

Sincerely,

Caliente

21st June 2019

Amber Pun

General Manager

金保利有限公司
GOLDPOLY COMPANY LIMITED
香港灣仔港灣道6-8號瑞安中心16樓1608-11室
Room 1608-11, 16/F., Shui On Centre, 6-8 Harbour Road, Wanchai, Hong Kong.
電話: 2542 2082 (6線) Tel: 2542 2082 (6 Lines)
傳真: 2542 2419 Fax: 2542 2419

Date: June 21, 2019

To: all members of Legislative Council (LegCo)

Legislative Council Secretariat, Legislative Council Complex

1 Legislative Council Road

Central, Hong Kong

**Re: The Proposed Ban on Heated Tobacco Products**

**- Smoking (Public Health) (Amendment) Bill 2019**

As the Director of Goldpoly Company Ltd., a "Logistic Service Provider' company, I would like to request the LegCo members and the Bills Committee for Smoking (Public Health) (Amendment) Bill 2019 to regulate alternative tobacco products (such as Heated Tobacco Products) instead of banning it.

We believe that a well-rounded balanced approach where all parties 'interests are being considered is a better comprised style that can calm the current environment in Hong Kong. It is not an appropriate time to push another controversial bill.

We understand the proposed ban will not allow the Hong Kong smokers from choosing a better alternatives of cigarette products that produces less smell to themselves and to near-by non-smokers. This is the smoker's own choice to make and the Hong Kong Government should not take this choice away from them.

The proposed ban may disallow the importation of these alternative tobacco products and this will impose unnecessary constraints on our business environment and have a big negative impact on our business.

In addition, the ban contradicts the intention of the Hong Kong Government to develop Hong Kong as the major logistics hub in Asia and Hong Kong will lose more of its competitiveness as a Regional Hub to nearby countries such as Singapore.

In the logistics and warehouse businesses in Hong Kong, there are many workers that are smokers. These Heated Tobacco Products only heats tobacco and does not produces fire. We believe if smokers working in the logistics and warehouse business are allowed to switch to these products, it would reduce the potential fire risk in the logistics and warehouse businesses.

As such, I am writing to express our views that these heated tobacco products should be allowed to be sold in Hong Kong and be properly regulated instead of a complete ban.

Thank you for your attention.

Yours sincerely,

For and on behalf of
GOLDPOLY COMPANY LIMITED
金保利有限公司

.....
*Authorized Signature(s)*

Kevin Ng

Director, Goldpoly Company Ltd.