HERBERT SMITH FREEHILLS

Clerk to Bills Committee on Smoking (Public Health) (Amendment) Bill 2019
Legislative Council Secretariat
Legislative Council Complex
1 Legislative Council Road
Central, Hong Kong

23rd Floor Gloucester Tower
15 Queen's Road Central
Hong Kong
T +852 2845 6639
F +852 2845 9099

www.herbertsmithfreehills.com

Our ref
6461/12474/310122546
Your ref

Date
08 April 2021

By email and by hand

Dear Sirs

Submission on the Smoking (Public Health) (Amendment) Bill 2019

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

We write to update the new Bills Committee (the "**Bills Committee**") which has been set up in the current session of the Legislative Council to study the Smoking (Public Health) (Amendment) Bill 2019 (the "**Bill**"). Amongst other things, the Bill seeks to ban the import, manufacture, sale, distribution and advertisement of Alternative Smoking Products (as defined in the Bill).

BATHK strongly opposes the Bill. The purpose of this letter is (i) to set out in summary BATHK's position regarding the Bill, which has been detailed in BATHK's previous submissions (set out in paragraph 1.12 below); and (ii) to draw the Bills Committee's attention to certain new international studies regarding Alternative Smoking Products which support BATHK's position.

We would be grateful if you could kindly table a copy of this letter for consideration by the members of the Bills Committee.

If you have any questions, please feel free to contact our Mr Dominic Geiser or Mr Trevor Ho.

1. SUMMARY OF BATHK'S POSITION

1.1 The Bill is irrational

1.2 BATHK strongly opposes the Bill which would effectively ban Alternative Smoking Products in Hong Kong outright. The Bill is neither evidence-based, nor rational, as it bans products that are potentially less harmful than traditional cigarettes, including electronic cigarettes ("**e-cigarettes**") and tobacco heating products ("**THPs**"), and ignores the potential harm reduction benefits associated with the use of such products.

1.3 Internationally, there is a substantial and growing body of evidence on the harm reduction benefits offered by Alternative Smoking Products, and particularly e-cigarettes and THPs. It is now widely accepted that (i) most of the harm associated with tobacco-based products is caused by inhaling the smoke produced by the combustion of tobacco and not nicotine itself; (ii) different tobacco and nicotine products can have vastly different risk profiles; and (iii) potentially reduced-risk products have an important role in reducing the projected harms of smoking. E-cigarettes and THPs 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.

1.4 However, while these harm reduction benefits have been widely recognised by major governments around the world, the Hong Kong Government has failed to take these into account in putting forward the Bill. Rather than being evidence-based, the Bill is driven by an irrational and outdated "*abstinence-only*" approach to tobacco control that ignores the potential public health benefits that tobacco harm reduction strategies can bring to help reduce the incidence of conventional cigarette smoking. Despite BATHK's repeated requests, the Government has not conducted any independent study to assess the health reduction benefits of e-cigarettes and THPs.

1.5 By imposing a blanket ban on 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 to smoke conventional cigarettes (because it is legal) rather than to use Alternative Smoking Products.

1.6 An approach that denies harm reduction benefits to consumers is not rational, ethical or conducive to the protection of public health.

1.7 The Bill is unconstitutional

1.8 BATHK further submits that the Bill is unconstitutional for the following reasons:

1.8.1 The Bill imposes a blanket ban on Alternative Smoking Products, regardless of one's age, the place or the purpose for which they are to be consumed. In doing so, the Bill disproportionately restricts the fundamental human right of privacy protected under Article 14 of the Hong Kong Bill of Rights, Article 17 of the International Convention on Civil and Political Rights and Article 39 of the Basic Law. The Bill would prevent a conventional smoker from exercising his or her freedom to consume these products (which are endorsed by leading health regulators and experts around the world as potentially less harmful alternatives to

cigarettes) in private, in order to switch away from smoking potentially more harmful conventional cigarettes.

1.8.2 The Bill violates Articles 6 and 105 of the Basic Law, which protect the right of private ownership of property and prohibit the unlawful deprivation of private property, including in this instance property such as BATHK's goodwill, registered trademarks, patents, and investments in its Alternative Smoking Products. Such deprivation is not necessary to achieve any legitimate aim of the Bill. It also exposes the Government to significant risks of claims and liabilities for compensation.

1.8.3 The Bill disproportionately restricts the free movement of goods and impermissibly threatens Hong Kong's constitutionally guaranteed status as a free port under Articles 114 and 115 of the Basic Law, without any legitimate necessity to achieve the objectives sought to be pursued in the Bill.

1.9 Further, the Bill breaches due process, by denying BATHK's legitimate expectation that the Government would regulate, rather than impose a blanket ban on, Alternative Smoking Products and that the Government would follow fair and proper regulatory processes (such as conducting a formal public consultation and Regulatory Impact Assessment to properly consider the impact, costs and benefits of the Bill) before introducing significant tobacco control reform.

1.10 Lastly, the Bill is inconsistent with Hong Kong's international obligations by breaching the General Agreement on Tariffs and Trade of the World Trade Organisation and Hong Kong's bilateral treaties, including, inter alia, the Investment Promotion and Protection Agreement signed between Hong Kong and the United Kingdom.

1.11 **Previous submissions**

1.12 BATHK has previously issued the following written submissions detailing BATHK's position in respect of the Bill, which are enclosed for the Bills Committee's reference:

1.12.1 Letter to the Legislative Council dated 18 February 2019;

1.12.2 Submission dated 8 April 2019 (LC Paper No. CB(2)1175/18-19(11));

1.12.3 Letter to the Bills Committee in the 2019-2020 legislative session dated 21 June 2019;

1.12.4 Letter to the Secretary for Food and Health dated 28 November 2019 (without enclosure);

1.12.5 Letter to the Secretary for Commerce and Economic Development dated 27 November 2019 (without enclosure); and

1.12.6 Letter to the Secretary for Food and Health dated 29 April 2020.

1.13 BATHK respectfully urges the Bills Committee to consider the abovementioned submissions in detail.

2. NEW INTERNATIONAL STUDIES REGARDING ALTERNATIVE SMOKING PRODUCTS

2.1 In addition to the evidence as set out in BATHK's previous submissions, we would like to draw the Bills Committee's attention to the following new international studies regarding the harm reduction benefits offered by the use of e-cigarettes and THPs.

2.2 In the report titled "Vaping in England: an evidence update including vaping for smoking cessation" issued in February 2021 by Public Health England[1], it was recognised that alternative nicotine delivery devices, such as nicotine vaping products, could play a crucial role in reducing the enormous health burden by cigarette smoking (at page 10). Further, it was found that vaping products are the most common aid used in an attempt to quit conventional smoking and are positively associated with successfully quitting, and that as vaping is more popular than licensed medication, the impact of vaping products at a population level may be greater than licensed aids (at page 154).

2.3 According to a recent research published by the World Vapers' Alliance and Consumer Choice Centre on 10 March 2021[2], it was found that with better regulations, nearly 200 million smokers worldwide could switch from conventional smoking to vaping, which evidence shows is at least 95% less harmful. The report also referred to the findings of Public Health England and noted that "*[i]n the UK, Public Health England, an agency of the Ministry of Health, is actively recommending smokers to switch to e-cigarettes. Due to these policies, the UK has been more successful in reducing smoking when compared to more restrictive countries. In the UK, approximately 25% fewer people smoke today than in 2013, when vaping became popular*". The report therefore urges governments worldwide to rethink their current approach towards e-cigarettes and THPs and view the same as an opportunity for public health improvement and saving lives.

2.4 In New Zealand, the Ministry of Health launched a new harm reduction campaign called "Vape to QuitStrong" on 7 March 2021 to encourage people to quit smoking tobacco by switching to vaping[3]. The campaign demonstrates that vaping can be a way to quit tobacco and that vaping is considerably less harmful than smoking tobacco, with the New Zealand government endorsing this approach to quitting conventional smoking.

3. CONCLUSION

3.1 In light of the above, BATHK respectfully urges the Government to withdraw the Bill. Before deciding to introduce the Bill in the same or amended form, and/or any other severe regulatory measures, it should first conduct a public consultation in relation to these matters. In this respect, BATHK continues to be committed to working together with the Legislative Council and the Government to establish a more appropriate regulatory regime that properly reflects the risk profile of e-cigarettes and THPs including their potential harm

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[1] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/962221/Vaping_in_England_evidence_update_February_2021.pdf. Public Health England is an executive agency of the Department of Health and Social Care, the Government of the United Kingdom.

[2] https://worldvapersalliance.com/from-smoking-to-vaping/

[3] https://www.hpa.org.nz/campaign/vape-to-quitstrong

reduction benefits, and respects the constitutionally protected rights and freedoms of Hong Kong residents.

Yours faithfully,

Herbert Smith Freehills

Encls.

HERBERT
SMITH
FREEHILLS

The Honourable Members of the Legislative Council
Legislative Council Complex 1
Legislative Council Road Central
Hong Kong

23rd Floor Gloucester Tower
15 Queen's Road Central
Hong Kong
T +852 2845 6639
F +852 2845 9099

www.herbertsmithfreehills.com

Our ref
6461/12474/31022546
Your ref

Date
18 February 2019

By email and by hand

Dear Sirs

Smoking (Public Health) (Amendment) Bill 2019 (the "Bill")

1. We act for British American Tobacco Company (Hong Kong) Limited ("**BATHK**").

2. We refer to the captioned Bill, which seeks amongst other things to ban the import, manufacture, sale, distribution and advertisement of Alternative Smoking Products (as defined in the Bill). We understand the Bill is to be tabled for a first reading in the Legislative Council on 20 February 2019. We should be grateful if you could kindly pass a copy of this submission for the members' consideration.

3. BATHK strongly opposes the Bill which would effectively ban Alternative Smoking Products in Hong Kong outright. The Bill is neither evidence-based, nor rational – it bans products that are potentially less harmful than traditional cigarettes, including electronic cigarettes ("**e-cigarettes**") and tobacco heating products ("**THPs**"), and ignores the potential harm reduction benefits associated with the use of such products. The Bill is also unconstitutional and contravenes the Basic Law; and is inconsistent with Hong Kong's international trade obligations.

4. British American Tobacco ("**BAT**") has long been working to develop potentially less harmful products that could help reduce the public health impact of smoking. To that end, it has invested in a whole new generation of alternative products, including THPs and e-cigarettes.

5. The Government previously agreed that these products should continue to be available for sale and consumption in Hong Kong. Indeed the Government proposed in June 2018 that they should be regulated in a way similar to traditional cigarettes. The Chief Executive also explained to the members of the Legislative Council on 12 July 2018 that these products, "*which* [are] *less harmful medically*", should be regulated and expressed her concerns that

a total ban might be inconsistent with Hong Kong's international trade obligations.[1]

6. However, notwithstanding her concerns and without providing any scientific justification or conducting any prior consultation with the industry or the general public, the Chief Executive drastically changed her position and unilaterally announced on 10 October 2018 in her 2018 Policy Address that the Government will introduce the Bill. The Bill is effectively tantamount to a blanket ban on e-cigarettes and THPs in Hong Kong – although the Bill does not directly prohibit use of Alternative Smoking Products and excludes enforcement in private domestic premises, the ban would make it practically impossible for any Hong Kong resident to legally transport, possess or purchase any of these products in(to) Hong Kong, all of which steps would be necessary to enable a Hong Kong resident to use these products, including to use them privately.

Tobacco harm reduction is an essential part of an effective tobacco control policy

7. BATHK submits that the Bill is irrational and disproportionate. Rather than being evidence-based, the Bill is being driven by an irrational and outdated ideology of an '*abstinence-only*' approach to tobacco control that ignores the potential public health benefits that tobacco harm reduction strategies can bring and undermines individual autonomy.

8. Internationally, it is accepted that most of the harm associated with tobacco is caused by inhaling the smoke produced by the combustion of tobacco and not nicotine itself.[2] There is also recognition that different tobacco and nicotine products can have vastly different risk profiles, and that potentially reduced-risk products have an important role in reducing the projected harms of smoking. For example, the findings of the 2007 report of the Royal College of Physicians (one of the oldest and most prestigious medical societies in the world) were unequivocal: "[i]*n this report we make the case for harm reduction strategies to protect smokers. We demonstrate that smokers smoke predominantly for nicotine, that nicotine itself is not especially hazardous, and that* ***if nicotine could be provided in a form that is acceptable and effective as a cigarette substitute, millions of lives could be saved***." (emphasis added)[3] Indeed subsequent reports by Royal College of Physicians, as well as other world's leading public health authorities, have echoed this view.[4]

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1 https://www.legco.gov.hk/yr17-18/english/counmtg/hansard/cm20180712a-translate-e.pdf

2 For a detailed discussion of the reduced risk potential of THPs and e-cigarettes, please refer to BATHK's previous submission to the Health Panel of the Legislative Council dated 16 May 2018 (LC Paper No. CB(2)1402/17-18(01) (Revised)).

3 Royal College of Physicians (2007). 'Harm reduction in nicotine addiction: helping people who can't quit. A report by the Tobacco Advisory Group of the Royal College of Physicians'.

4 For example, (a) Public Health England (2018), 'Evidence review of e-cigarettes and heated tobacco products 2018: A report commissioned by Public Health England'; (b) UK National Health Service (2016), 'Stop smoking treatments'; (c) Cancer Research UK (2016), 'E-Cigarettes in Stop Smoking Services'; (d) UK Royal College of Physicians (2016), 'Nicotine without smoke: Tobacco harm reduction'; (e) Committee on Toxicity (2017), 'Statement on the toxicological evaluation of novel heat-not-burn tobacco products'; (f) American Cancer Society (2018), 'American Cancer Society Position Statement on Electronic Cigarettes'; (g) US Food and Drug Administration (2018), 'Statement from FDA Commissioner Scott Gottlieb, M.D., on new enforcement actions and a Youth Tobacco Prevention Plan to stop youth use of, and access to, JUUL and other e-cigarettes'; and (h) New Zealand Ministry of Health (2018), 'Ministry of Health position statement – Vaping products' .

9. A recent letter from a group of 72 independent specialists in nicotine science, policy and practice, calling on the World Health Organisation ("**WHO**") to embrace innovations in technology in the fight against diseases caused by smoking, also stated: "[i]*n the field of tobacco control and public health, the world has changed significantly since the Framework Convention on Tobacco Control was signed in 2003. It is impossible to ignore or dismiss the rise of Alternative Nicotine Delivery Systems (ANDS). These are established and new technologies that deliver nicotine to the user without combustion of tobacco leaf and inhalation of tobacco smoke. These technologies offer the prospect of significant and rapid public health gains through 'tobacco harm reduction'. Users who cannot or choose not to quit using nicotine have the option to switch from the highest risk products (primarily cigarettes) to products that are, beyond reasonable doubt, much lower risk than smoking products (e.g. pure nicotine products, low-toxicity smokeless tobacco products, vaping or heated tobacco products). We believe this strategy could make a substantial contribution to the Sustainable Development Goal to reduce premature deaths through non-communicable diseases (SDG Target 3.4).*"[5]

10. The concept of tobacco harm reduction is also firmly embedded in the WHO Framework Convention on Tobacco Control ("**FCTC**"). Specifically, in defining tobacco control, Article 1(d) of the FCTC recognises that "*tobacco control*" concerns not just "*a range of* [tobacco] *supply, demand*" measures, but also the adoption of "*harm reduction strategies that aim to improve the health of a population by eliminating or reducing their consumption of tobacco products and exposure to tobacco smoke*". The Government in its Legislative Council Brief (FH CR 1/3231/19) omits to mention that other than prohibition, the FCTC Conference of the Parties in fact also proposed its Contracting Parties to consider other types of regulation as appropriate (such as restrictions or regulations) on new generation products such as e-cigarettes and THPs.[6] Accordingly, the Government, as a party to which the FCTC applies (through China), is obliged to consider harm reduction strategies as part of a tobacco control strategy and should not filter the information without giving the full picture and transparency to the members of the Legislative Council and the public for evaluation.

11. The Government has failed to assess the impact of the Bill on public health overall or to value appropriately the rights of adult consumers. The Government has not tested BAT's THPs but merely cited results for the products of other companies in its legislative document. According to BAT, its THPs heat at a much lower temperature at around 240°C (as opposed to 350°C of other similar products selectively used by the Government for testing), and the testing results could be very different if proper methodologies are followed. BATHK has not been given the equal opportunity of having BAT's THPs being tested or properly assessed, nor even a chance to have an open dialogue with the Government to explain the science of its products. The Government should not use one company's product testing results as the "objective" base of a blanket prohibition of all different products in the market. In any event, a blanket ban on a product cannot be justified merely by a concern that some risk may be associated with the use of the product. Due regard must be given to the overall balance of the harms and the benefits arising from interventions. In addition, the world's leading health regulators and experts have opted for reasonable regulation on e-cigarettes and THPs, bearing in mind the potential public health

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5 Abrams et al. (2018), 'Letter from seventy-two specialists in nicotine science, policy and practice'.
6 https://www.who.int/fctc/cop/sessions/cop8/FCTC__COP8(22).pdf

benefits of providing smokers with access to such products. Indeed, data from the UK[7], where there are substantial regulatory freedoms in relation to these products indicate that it has experienced vast reductions in smoking prevalence.

The Bill is unconstitutional and contravenes local and international law

12. The Bill disproportionately restricts the fundamental human right of privacy protected under Article 14 of the Hong Kong Bill of Rights, Article 17 of the International Convention on Civil and Political Rights ("**ICCPR**") and Article 39 of the Basic Law, by imposing a blanket ban on THPs and e-cigarettes, regardless of one's age, the place or the purpose for which they are to be consumed. For example, a person cannot even exercise one's freedom to consume these products (because one has no means to acquire them legally in Hong Kong in the first place when the Bill comes into effect), in private, in order to switch away from smoking conventional cigarettes.

13. The Hong Kong Court[8] has recognised that the concept of "privacy" under the ICCPR is indistinguishable to the concept of "private life" under Article 8 of the European Convention of Human Rights ("**ECHR**"), which has observed that: "*...the ability to conduct one's life in a manner of one's own choosing may also include the opportunity to pursue activities perceived to be of a physically or morally harmful or dangerous nature for the individual concerned*" and that "*even where the conduct poses a danger to health, or arguably, where it is of a life-threatening nature, the case-law of the Convention institutions has regarded the State's imposition of compulsory or criminal measures as impinging on the private life of the applicant within the scope of Article 8(1) and requiring justification in terms of the second paragraph*".[9]

14. The Bill also amounts to a complete deprivation of private property protected under Articles 6 and 105 of the Basic Law, including BATHK and BAT's goodwill, registered trademarks and investments in its THPs and e-cigarettes. If the Bill is passed, BATHK could not sell, nor could Hong Kong residents purchase, import or use, *glo*[10] or *Neostiks* in Hong Kong,[11]

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7 For example: Institute for Economic Affairs (2017), 'Vaping Solutions: An easy Brexit win'; West R et al. (2016), 'Estimating the population impact of e-cigarettes on smoking cessation in England'; Beard E et al. (2016), 'Association between electronic cigarette use and changes in quit attempts, success of quit attempts, use of smoking cessation pharmacotherapy, and use of stop smoking services in England: time series analysis of population trends'.

8 *Democratic Party v Secretary for Justice* [2007] 2 HKLRD 804.

9 *Pretty v United Kingdom* [2002] 2 FLR 45 at [62]. The UK Supreme Court (whose decisions are highly persuasive in Hong Kong) has also held in *McCann v State Hospitals Board for Scotland* [2017] 1 WLR 1455 that a comprehensive ban on smoking in a hospital (in which convicts with mental disorder were detained) engaged the right to private life under Article 8 of the ECHR. The present case is even stronger – the Bill seeks to impose a comprehensive ban on the use of products that are potentially less harmful than the use of traditional cigarettes.

10 *glo* is BAT's battery-powered THP product. It heats specifically-designed tobacco sticks called *Neostiks*.

11 Although BATHK has not yet completed its launch of *glo* and *Neostiks*, these products are currently widely available for purchase outside Hong Kong (including in countries such as Japan and Korea) and can be brought into Hong Kong legally by individuals as long as appropriate duties are paid. It has been held that a manufacturer of goods sold abroad, but whose goods were brought into the local jurisdiction by private individuals, would be considered as having established sufficient market within the local jurisdiction to have its goodwill protected in the local market (*La SociÉtÉ Anonyme Des Anciens ÉTablissements Panhard Et Levassor v Panhard Levassor Motor Company, Limited* [1901] 2

and all of BAT and BATHK's goodwill and investments in *glo* and *Neostiks* will become worthless in Hong Kong. Hence, the Bill does not merely restrict BAT and BATHK's property rights – it goes as far as to completely deprive of BAT and BATHK's property rights constitutionally protected under Articles 6 and 105 of the Basic Law and such deprivation is not necessary to achieve any legitimate aim of the Bill. Any objective to prevent youth from accessing these products could be achieved by, for example, restricting sales of these products to minors. The Bill also exposes the Government to significant risks of claims and liabilities for compensation.

15. The Government has not properly consulted all stakeholders. It is inappropriate to treat submissions received for the previous regulatory proposal to regulate Alternative Smoking Products (which is an entirely different framework to the newly proposed blanket ban) as public consultation for the current Bill. This practice is in breach of the principles of procedural justice by not giving relevant stakeholders (such as trade participants, retailers and consumers) a fair opportunity to express their views on the Bill, particularly when the Bill has the effect of depriving certain stakeholders of their fundamental human rights as well as fundamental property rights.

16. The Bill also disproportionately restricts the free movement of goods and impermissibly threatens Hong Kong's constitutionally guaranteed status as a free port under Articles 114 and 115 of the Basic Law, without any legitimate necessity to achieve the objectives sought in the Bill. The European Court of Justice ("**ECJ**") found in *Rosengren and Others* v *Riksaklagaren*[12] that a ban imposed by the Swedish Government on the importation of alcoholic drink by private individuals into Sweden engaged Article 34 of the Treaty on the Functioning of the European Union (the European counterpart to Articles 114 and 115 of the Basic Law). The ECJ also found that the Swedish Government could not show that the complete ban on import of alcoholic drink by private individuals was necessary to achieve the declared objective of protecting public health, or that the public goal could not be achieved by a less extensive prohibition, such as a restriction based on age. Hence, the ban was held to be a disproportionate restriction on the free movement of goods and, therefore, unconstitutional. Similar considerations apply to the Bill. It is plainly not necessary to impose a blanket ban on these products – any objective of the Bill can be achieved by less extensive restrictions, including an age restriction on purchasing products as applies to conventional cigarettes.

17. Furthermore, the Bill is inconsistent with Hong Kong's international trade obligations (again a concern apparently shared by the Chief Executive)[13]. The absolute ban on the importation of e-cigarettes and THPs as proposed by the Bill is in violation of Article XI of the General Agreement on Tariffs and Trade ("**GATT**") of the World Trade Organisation.[14]

Ch. 513). The goodwill attached to *glo* and *Neostiks* is therefore constitutionally protected in Hong Kong. The trademarks of *glo* and *Neostiks* are also registered under Trade Mark Ordinance (Cap. 559), and hence, legally protected as personal property in Hong Kong.

12 (Case C-170/04) [2007] ECR I-4071.

13 In her explanation to the members of the Legislative Council on 12 July 2018 the Chief Executive stated that: "*But as far as a complete ban is concerned, Hong Kong does have to recognize her trade obligations in an international environment, because if conventional cigarettes are even more harmful, but they are allowed to be sold in Hong Kong under certain regulation, to go into a total ban of another form of tobacco product which is less harmful medically would raise many challenges. So, we have to really strike a balance.*"

14 Article XI of the GATT of the WTO, of which Hong Kong is a member, provides that:

The blanket ban will also prohibit legitimate importations of these products for export purpose,[15] despite this kind of transhipments will not impact the domestic market or the consumers in Hong Kong.

18. The Bill also amounts to a complete deprivation of the investments of foreign investors, such as BAT, in breach of bilateral agreements signed by Hong Kong, including, *inter alia*, the Investment Promotion and Protection Agreement ("**IPPA**") signed between Hong Kong and the United Kingdom.[16] BATHK has invested substantial resources in Hong Kong based on the Government's previous proposal to regulate (instead of ban) Alternative Smoking Products, including brand designs, personnel recruitment, logistic planning and other administrative work. Various BAT entities have also invested in Hong Kong including on research and development, vendor sourcing, trademark and patent registrations, etc. The Government's inconsistent policy moves have caused BAT substantial damage to the investments made in Hong Kong.

19. Rather than banning these new technologies, the Government should develop appropriate regulatory pathways for bringing high quality potentially reduced-risk products to market and supporting smokers who want to switch. Any legitimate concerns about safety and quality and youth access can be addressed by appropriate product regulations of which there is growing international experience, including from the European Union, the US, Canada, the UK and New Zealand. A real opportunity exists for the Government to drive change that could benefit the lives of millions of smokers, rather than creating a legacy of further failed tobacco policy by taking the "all or nothing" (or "zero sum game") extreme approach.

20. BATHK therefore respectfully urges the Government to withdraw this Bill. Before deciding to introduce this Bill and/or any other severe regulatory measures, it should first conduct a public consultation in relation to these matters. In this respect, BATHK is committed to working together with the Legislative Council and the Government to establish a more appropriate regulatory regime that properly reflects the risk profile of e-cigarettes and THPs and respects the constitutionally protected rights and freedoms of Hong Kong residents.

Yours faithfully,

Herbert Smith Freehills

"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."

15 The Bill prohibits import of Alternative Smoking Products to be stored temporarily in Hong Kong (outside an aircraft, a specified cargo transhipment area or vessel) solely for the purpose of export.

16 The IPPA signed between Hong Kong and the United Kingdom provides that:
"Investments and returns of investors of each Contracting Party shall at all times be accorded fair and equitable treatment… Neither Contracting Party shall in any way impair by unreasonable or discriminatory measures the… use, enjoyment… of investment in its area of the other Contracting Party" (IPPA Article 2(2)).
"Investors of either Contracting Party shall not be deprived of their investment… except lawfully, for a public purpose related to the internal needs of that Party on a non-discriminatory basis and against compensation." (IPPA Article 5).

HERBERT
SMITH
FREEHILLS

Date
18 February 2019
Letter to
The Honourable Members of the Legislative Council

cc: Professor Sophia CHAN, JP
Secretary for Food and Health
Food and Health Bureau,
18/F, East Wing,
Central Government Offices,
2 Tim Mei Avenue, Tamar,
Hong Kong
(By email and by hand)

Ms. CHENG Teresa, GBS, SC, JP
Secretary for Justice
Department of Justice
5/F, Main Wing, Justice Place,
18 Lower Albert Road, Central,
Hong Kong
(By email and by hand)

HERBERT
SMITH
FREEHILLS

Clerk to Bills Committee on Smoking (Public Health) (Amendment) Bill 2019
Legislative Council Secretariat
Legislative Council Complex
1 Legislative Council Road
Central, Hong Kong

23rd Floor Gloucester Tower
15 Queen's Road Central
Hong Kong
T +852 2845 6639
F +852 2845 9099

www.herbertsmithfreehills.com

Our ref
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Your ref

Date
08 April 2019

By email and by hand

Dear Sirs

Submission on the Smoking (Public Health) (Amendment) Bill 2019

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

We write in connection with the deputation meeting of the Bills Committee (the "**Bills Committee**") in relation to the Smoking (Public Health) (Amendment) Bill 2019 (the "**Bill**") on 13 April 2019 (the "**Meeting**"). Amongst other things, the Bill seeks to ban the import, manufacture, sale, distribution and advertisement of Alternative Smoking Products (as defined in the Bill).

BATHK strongly opposes the Bill. The Bill is irrational and is not evidence-based – it bans products that are potentially less harmful than conventional cigarettes, including tobacco heating products ("**THPs**") and electronic cigarettes ("**e-cigarettes**"), and effectively ignores the potential harm reduction benefits associated with the use of such products. The Bill is also unconstitutional and contravenes the Basic Law in that it violates the fundamental human right of privacy and right of private property, disproportionately restricts the free movement of goods and impermissibly threatens Hong Kong's guaranteed status as a free port. The Bill is inconsistent with Hong Kong's international trade obligations. Furthermore, the Government has failed to follow a proper process with the Bill, in breach of BATHK's legitimate expectation and its duty to consult.

Please find below a detailed submission of BATHK on the Bill for consideration by members of the Bills Committee at the Meeting. We should be grateful if you could kindly table a copy of this submission for the Meeting.

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1. EXECUTIVE SUMMARY

1.1 British American Tobacco ("**BAT**") has long been working to develop potentially reduced-risk products ("**PRRPs**") that could help reduce the public health impact of smoking. To that end, it has invested in a range of PRRPs, including THPs and e-cigarettes. They are different to conventional cigarettes – they do not combust, and therefore, they produce significantly fewer toxicants than conventional cigarettes. The reduced-risk potential of THPs and e-cigarettes as compared to conventional combustible cigarettes has been widely recognised by public authorities (see section 2 below).

1.2 Under the current legislative framework, it is legal to import and sell THPs and e-cigarettes in Hong Kong, subject to certain regulations, such as payment of duties and registration. The Government has also previously agreed that these products should continue to be available for sale and consumption in Hong Kong, and proposed in June 2018 that they should be regulated in a way similar to conventional cigarettes. The Chief Executive also explained to the members of the Legislative Council on 12 July 2018 that these products, "*which* [are] *less harmful medically*", should be regulated, and expressed her concerns over a blanket ban being imposed, including concerns relating to Hong Kong's trade obligations (see section 3 and paragraphs 4.1 to 4.2 below).

1.3 However, notwithstanding her concerns, and without providing any scientific justification or conducting any prior consultation with the industry or the general public, the Chief Executive drastically changed her position and unilaterally announced on 10 October 2018 in her 2018 Policy Address that the Government will introduce the Bill. The Bill is effectively a blanket ban of Alternative Smoking Products in Hong Kong, and extends even to their private use (see paragraphs 4.3 to 4.7 below).

1.4 BATHK submits that the Bill is irrational and disproportionate in banning products that emits substantially less toxicants than conventional cigarettes whilst at the same time allowing people to smoke conventional cigarettes. An approach that denies harm reduction benefits to consumers is not rational, ethical or appropriate for the protection of public health. There are alternative regulatory approaches that are available to support smokers in quitting conventional smoking, while minimising the potential risks presented by their use, as proposed by many experts and implemented in other countries (see section 5 below).

1.5 BATHK also submits that:

1.5.1 The Bill is **unconstitutional** in that:

(A) It disproportionately restricts the fundamental human right of privacy protected under Article 14 of the Hong Kong Bill of Rights, Article 17 of the International Convention on Civil and Political Rights ("**ICCPR**") and Article 39 of the Basic Law, by imposing a blanket ban on Alternative Smoking Products, regardless of one's age, the place or the purpose for which they are to be consumed. The Bill would prevent a conventional smoker from exercising his or her freedom to consume these products (which are endorsed by leading health regulators and experts around the world as potentially less harmful alternatives to cigarettes) in private, in order to switch away from smoking conventional cigarettes (see section 6 below).

(B) It amounts to a complete deprivation of private property protected under Articles 6 and 105 of the Basic Law, including BATHK and BAT's goodwill, registered trademarks, patents, and investments in its Alternative Smoking Products. Such deprivation is not necessary to achieve any legitimate aim of the Bill. It also exposes the Government to significant risks of claims and liabilities for compensation (see section 7 below).

(C) It disproportionately restricts the free movement of goods and impermissibly threatens Hong Kong's constitutionally guaranteed status as a free port under Articles 114 and 115 of the Basic Law, without any legitimate necessity to achieve the objectives sought to be pursued in the Bill (see section 8 below).

1.5.2 The Bill is **in breach of due process,** by denying BATHK's legitimate expectation that the Government will regulate, rather than impose a blanket ban on, Alternative Smoking Products and that the Government would follow fair and proper regulatory processes, such as conducting a formal public consultation and Regulatory Impact Assessment to properly consider the impacts, costs and benefits of the Bill, before introducing significant tobacco control reform (see section 9 below).

1.5.3 The Bill is **inconsistent with Hong Kong's international obligations** by breaching the General Agreement on Tariffs and Trade ("**GATT**") of the World Trade Organisation ("**WTO**") and Hong Kong's bilateral treaties, including, *inter alia*, the Investment Promotion and Protection Agreement ("**IPPA**") signed between Hong Kong and the United Kingdom (see section 10 below).

1.6 BATHK therefore respectfully urges the Government to withdraw this Bill which is irrational, in breach of due process and inconsistent with Hong Kong's international obligations. It should then conduct a public consultation in relation to these matters and review the responses received before deciding to introduce any regulatory reform. In doing so, it should engage with manufacturers of such products, as well as other stakeholders. BATHK would be happy to share their insights on best practices from their dealings with different types of regulatory frameworks around the world.

2. INTRODUCTION

2.1 BATHK is a member of the BAT group of companies and is responsible for the importation, distribution and sale of tobacco products in Hong Kong.

2.2 BAT has long been working to develop PRRPs that can help potentially reduce the public health impact of smoking and has invested in a range of PRRPs, including THPs and e-cigarettes. BAT is one of the major suppliers of these products in a number of countries. BATHK has already commenced preparation to launch these products, in particular *glo*, one of BAT's THPs, in Hong Kong based on the proposed regulation of these new tobacco products by the Government which was submitted to the Panel on Health Services of Legislative Council (the "**Health Panel**") in June 2018.

THPs

2.3 THPs are devices that heat rather than burn tobacco. Unlike conventional cigarettes (which combust tobacco at a temperature higher than 800°C), THPs heat tobacco (typically at a temperature between 240-350 °C) to produce a nicotine-containing aerosol that is inhaled. Unlike the smoke emitted from a lit cigarette, THPs' aerosol is composed mainly of water, humectant (e.g. glycerol), nicotine and flavourings.

2.4 *Glo* is composed of an electronic battery powered device which heats specially designed tobacco sticks, Neostiks, to approximately 240°C. The consumer inserts the Neostik into the *glo* device and turns it on by means of a button which initiates the heating of the tobacco. Once the initial heating phase is completed, the Neostik is ready to be consumed.

2.5 When used as directed and intended, Neostiks neither ignite nor burn. The electronically-controlled heating, in combination with the uniquely processed tobacco, prevents combustion from occurring. The Neostiks are not smoked; they do not combust and produce no ash. The reduction in temperature, and the fact there is no burning, results in the production of aerosol containing fewer as well as a lower level of toxicants, the majority of which are at significantly lower levels than in cigarette smoke. This offers the potential for significant harm reduction when compared to cigarettes. Indeed, the science BAT has done to date on *glo* shows that it emits approximately 90-95% less toxicants[1] than the smoke of a reference cigarette in terms of the nine harmful toxicants the World Health

[1] 'British American Tobacco publishes a series of studies supporting the reduced-risk potential of glo' published by Dr Marina Murphy of British American Tobacco in November 2017; 'Tobacco heating products overview of the scientific assessment of glo' prepared by British American Tobacco (available in enclosure 5 in LC Paper No. CB(2)1402/17-18(01) (Revised)). Also see Forster et al., (2017) Assessment of novel tobacco heating product THP 1.0. Part 3: Comprehensive chemical characterisation of harmful and potentially harmful aerosol emissions. This is an independently peer-reviewed study, published in the journal of Regulatory Toxicology and Pharmacology.

Organisation ("**WHO**") recommends to reduce in cigarette smoke.[2] There is also a substantial reduction in the number and level of second hand environmental toxicants emission for *glo* use compared to cigarette smoking.

2.6 The reduced-risk potential of THPs as compared to conventional combustible cigarettes has been recognised by public authorities and experts. For example:

2.6.1 In 2018, Public Health England ("**PHE**"), an executive body of the UK Department of Health, published an evidence review of e-cigarettes and THPs in which it concluded that "[c]*ompared with cigarette smoke, heated tobacco products are likely to expose users and bystanders to lower levels of particulate matter and harmful and potentially harmful compounds.*"[3]

2.6.2 In 2017, the UK Committee on Toxicity of Chemicals in Food, Consumer Products and the Environment ("**COT**") published a toxicological evaluation of two THPs on the market in the UK, in which it found that "[i]*nvestigations on both products showed a decrease in the harmful and potentially harmful compounds (HPHCs) in the aerosol generated by the device to which the user would be exposed, compared to the HPHCs in the mainstream smoke from a conventional cigarette. For both products, there were some HPHCs where the reduction was approximately 50%, but the reduction in a number of other HPHCs was greater than 90%, with many of the compounds being below the limits of detection or quantification for the assays used.*"[4]

2.6.3 A study by Caponnetto et al.[5] which investigated carbon monoxide in the exhaled breath ("**eCo**") of participants after use of two THPs found "*no eCO elevations during inhalation testing with HTPs* [Heated Tobacco Products] *under investigation in any of the study participants. Our findings concur with findings from e-cigarette studies as well as from manufacturer and independent data on HTPs.*" The authors concluded that "*it is our opinion that non-combustible nicotine sources – that are significantly less harmful than conventional cigarettes – can be a viable solution for those who, for whatever reason, cannot or do not want to give up nicotine, or who want to cut back on smoking or quit altogether. Therefore, switching to combustion-free products has the potential to act as a gateway out of smoking. The personal preference for a particular product (e.g., e-cigarette vs HTP vs smokeless tobacco products) can play a critical role in increasing the likelihood of successfully abstaining from cigarette smoking…As for e-cigarettes, health professionals should consider all the options available to a smoking patient and opt for the ones that provide the greatest probability of quitting for good, including HTPs.*"

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2 This is a comparison between the smoke from combusted tobacco in a standard 3R4F reference cigarette (approximately 9 mg tar) and the vapour from heated tobacco in glo, in terms of the nine types of harmful components the WHO recommends to reduce. See also (1) Statement on the toxicological evaluation of novel heat-not-burn tobacco products by Committee on Toxicity – COT2017/04; December 2017; and (2) Toxicological evaluation of novel heat-not-burn tobacco products – non-technical summary.

3 PHE (2018), *Evidence review of e-cigarettes and heated tobacco products 2018: A report commissioned by Public Health England*.

4 COT (2017), *Statement on the toxicological evaluation of novel heat-not-burn tobacco products*.

5 Caponnetto et al. (2018), *Carbon monoxide levels after inhalation from new generation heated tobacco products*.

E-cigarettes

2.7 E-cigarettes contain no tobacco at all, do not rely on combustion, and, as a consequence, no smoke or tobacco tar is formed when the e-liquid is "vaped". BAT launched its first vapour product, Vype e-cigarette, in 2013 and is one of the world's leading e-cigarette companies.

2.8 An increasing number of health experts agree that vaping e-cigarettes is less harmful than smoking conventional cigarettes. For example:

2.8.1 A recent systematic review of the scientific literature undertaken by the National Academies of Sciences, Engineering, and Medicine for the U.S. Food and Drug Administration concluded, *inter alia*, that: "[t]*here is conclusive evidence that completely substituting e-cigarettes for combustible tobacco cigarettes reduces users' exposure to numerous toxicants and carcinogens present in combustible tobacco cigarettes.*"[6]

2.8.2 The PHE (2018) report recognised that "[v]*aping poses only a small fraction of the risks of smoking and switching completely from smoking to vaping conveys substantial health benefits over continued smoking. Based on current knowledge, stating that vaping is at least 95% less harmful than smoking remains a good way to communicate the large difference in relative risk unambiguously so that more smokers are encouraged to make the switch from smoking to vaping*" and that there have been "*no identified health risks of passive vaping to bystanders*" (emphasis added).[7]

2.8.3 The Scottish National Health Service in collaboration with several other public health bodies and NGOs, including Action on Smoking and Health Scotland, Cancer Research UK, and the UK Centre for Tobacco and Alcohol Studies, published a statement in 2017 in which it stated that "[t]*here is now agreement based on the current evidence that vaping e-cigarettes is* ***definitely less harmful*** *than smoking tobacco. Although most e-cigarettes contain nicotine, which is addictive, vaping carries less risk than smoking tobacco. Thus, it would be a good thing if smokers used them* ***instead*** *of tobacco.*"[8] (emphases in original)

2.8.4 A study funded by Cancer Research UK (2017) found that people who swapped smoking regular cigarettes for e-cigarettes or nicotine replacement therapy for at least six months had much lower levels of toxic and cancer causing substances in their body than people who continued to use conventional cigarettes.[9]

2.8.5 A study by Levy et al., (2017)[10] modelled the population impact in the future if more smokers in the US switched to e-cigarettes. They estimated that taking into account several parameters such as cessation, initiation and relative harm, switching cigarette smokers to e-cigarette use over a 10-year period would lead to 1.6 to 6.6 million fewer premature deaths in the US under a pessimistic and

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6 The National Academies of Sciences, Engineering, and Medicine (2018), *Public Health Consequences of E-Cigarettes*.

7 PHE (2018), *Evidence review of e-cigarettes and heated tobacco products 2018: A report commissioned by Public Health England*, at Chapter 4.

8 http://www.healthscotland.scot/publications/e-cigarettes-consensus-statement.

9 Shahab et al., (2017) *Nicotine, Carcinogen, and Toxin Exposure in Long-Term E-Cigarette and Nicotine Replacement Therapy Users.* Ann Intern Med, *390-400.*

10 Levy et al., (2017) *Potential deaths averted in USA by replacing cigarettes with e-cigarettes.* Tobacco Control. Aug 30.

optimistic scenario respectively. The authors concluded that "*a strategy of replacing cigarette by e-cigarette use can yield substantial gains, even with conservative assumptions about related risks. Most important, an e-cigarette substitution strategy provides the justification to redouble efforts to target cigarette use, as it is called for by the WHO Framework Convention for Tobacco Control.*" (emphasis added)

2.9 In view of the reduced harm from the use of e-cigarettes, an increasing number of governments and public health authorities support the use of e-cigarettes as an effective way for people to quit smoking. For example:

2.9.1 The PHE (2018) report found that "[i]*n the first half of 2017, quit success rates in England were at their highest rates so far observed and for the first time, parity across different socioeconomic groups was observed. It is plausible that EC* [e-cigarettes] *have contributed to this*" and that "[w]*hile caution is needed with these figures, the evidence suggests that ECs have contributed tens of thousands of additional quitters in England.*"[11]

2.9.2 The UK National Health Service supports the use of e-cigarettes in quit-attempts, referring to e-cigarettes on its "Stop smoking treatments" website, and stating that "*research has found that e-cigarettes can help you give up smoking, so you may want to try them rather than the medications listed above…*"[12].

2.9.3 A briefing note by Cancer Research UK (2016), "E-Cigarettes in Stop Smoking Services" recommends that "[S]*top Smoking Services are currently seeing a reduction in the number of clients and one contributing factor is likely to be the increase in e-cigarette use. These services should be accepting of e-cigarette use and support those who wish to use them alongside behavioural support as an aid to stop smoking.*" [13] (emphasis added)

2.9.4 The Royal College of Physicians has stated that "*smokers who use nicotine products as a means of cutting down on smoking are more likely to make quit attempts. Promoting wider use of consumer nicotine products, such as e-cigarettes, could therefore substantially increase the number of smokers who quit.*"[14]

2.9.5 Health Canada's current tobacco control strategy states "*[t]raditional cessation approaches are not the only tools available to help Canadians transition away from smoking cigarettes, the most deadly nicotine delivery system. A harm reduction approach aims to reduce the negative consequences of cigarette smoking by recognizing the potential benefits of using less harmful alternatives*". It adds "***Vaping is less harmful than smoking.*** *Completely replacing cigarettes with a vaping product will significantly reduce a smoker's exposure to toxic and*

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11 PHE (2018), *Evidence review of e-cigarettes and heated tobacco products 2018: A report commissioned by Public Health England*, at Chapter 4.

12 http://www.nhs.uk/conditions/smoking-(quitting)/Pages/Treatment.aspx .

13 Cancer Research UK (2016), *E-Cigarettes in Stop Smoking Services*. Available at: https://www.cancerresearchuk.org/sites/default/files/e-cig_in_sss_0.pdf.

14 UK Royal College of Physicians (2016), Nicotine without smoke: Tobacco harm reduction.

cancer-causing chemicals. Adults can access vaping products containing nicotine as a less harmful alternative to smoking."[15] (emphasis in the original)

2.9.6 The New Zealand Ministry of Health states that "[s]*mokers switching to vaping products are highly likely to reduce their health risks and for those around them*" and "[s]*top smoking services should support smokers using vaping products to quit.*[16]

2.10 For a detailed illustration of the reduced risk potential of PRRPs, please refer to BATHK's previous submission to the Health Panel dated 16 May 2018 (LC Paper No. CB(2)1402/17-18(01) (Revised)).

3. THE CURRENT REGULATORY FRAMEWORK

3.1 Tobacco products are currently regulated under the Smoking (Public Health) Ordinance (Cap. 371) ("**SPHO**"). Under Part 3 of the SPHO, it is permissible to sell cigarettes and tobacco products in Hong Kong, provided that certain packaging and tar yield requirements are complied with.

3.2 THPs are a type of tobacco product. Under the current regulatory regime, it is **legal** to import and sell THPs in Hong Kong, provided that appropriate duty is paid. BATHK has therefore already commenced preparation to launch one of its THPs, i.e. *glo*, in Hong Kong.

3.3 As e-cigarettes do not contain tobacco, they are not regulated under the SPHO. However, e-cigarettes that contain nicotine may potentially be regulated under the Pharmacy and Poisons Ordinance (Cap. 138). Nevertheless, it is still **legal** to import and sell e-cigarettes containing nicotine in Hong Kong provided that the relevant regulations are complied with.

4. THE BILL

4.1 On 12 June 2018, the Food and Health Bureau issued a Legislative Paper to the Health Panel in relation to its proposal to regulate e-cigarettes and new tobacco products (including THPs) in a way similar to the current regulatory regime of cigarettes and tobacco products, i.e. the provisions in the SPHO.[17] In doing so, the Government agreed that the import and sale of e-cigarettes and THPs **should be legally permitted**, subject to similar regulations that apply to conventional cigarettes and tobacco products.

4.2 On 12 July 2018, the Chief Executive explained to the members of the Legislative Council of the Government's proposal to regulate new tobacco products. The Chief Executive stated that:

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15 Health Canada (2018), *Overview of Canada's Tobacco Strategy*, see: https://www.canada.ca/en/health-canada/services/publications/healthy-living/canada-tobacco-strategy/overview-canada-tobacco-strategy.html.

16 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.

17 LC Paper No. CB(2)1578/17-18(05) (https://www.legco.gov.hk/yr17-18/english/panels/hs/papers/hs20180619cb2-1578-5-e.pdf).

> "*... the Food and Health Bureau is proposing to strengthen regulation, such that these products are being regulated, at least on par with the conventional cigarettes for the protection of public health.*
>
> *Right now, the Secretary for Food and Health is consulting the sector, listening to various views, and we hope to take into account these views and introduce amendments to the Smoking (Public Health) Ordinance in the coming legislative session.*
>
> *But as far as a complete ban is concerned, Hong Kong does have to recognize her trade obligations in an international environment, because if conventional cigarettes are even more harmful, but they are allowed to be sold in Hong Kong under certain regulation, to go into a total ban of another form of tobacco product which is less harmful medically would raise many challenges. So, we have to really strike a balance.*"[18] (emphasis added)

4.3 The proposal was tabled at the Health Panel, and deliberations were based on the said proposal.

4.4 Notwithstanding these remarks by the Chief Executive, on 10 October 2018, without any prior consultation with the members of the tobacco industry or the general public, the Chief Executive unilaterally announced in her 2018 Policy Address that the Government would submit proposed legislative amendments to ban the import, manufacture, sale, distribution and advertisement of e-cigarettes and other smoking products. This is a complete change of position from the Chief Executive's remarks that were made only three months earlier which confirmed the Government's intention to regulate, not ban, such products.

4.5 The Bill and related Legislative Brief were then introduced to the Legislative Council and the Bills Committee in February and March 2019 respectively without consulting the Health Panel again.

4.6 Although the Bill does not specifically restrict the possession, purchase and use of Alternative Smoking Products, once implemented, it would be practically impossible for any individual to legally possess, purchase or use any of these products in Hong Kong (and in the case of existing users, at least when they have consumed all of the existing products that they have legally purchased) given that they would no longer be able to legally purchase them in Hong Kong or import them into Hong Kong for private use. In other words, the Bill is effectively a blanket ban on the use of Alternative Smoking Products in Hong Kong. This not only represents a drastic change in the Government's position but it is also inconsistent with the approach taken by leading countries around the world, such as in most countries in Europe, the UK, the US, Japan, S. Korea, Canada and New Zealand.

4.7 For the reasons explained below, it is clear that the Bill is unconstitutional, irrational, in breach of due process and inconsistent with Hong Kong's international trade obligations.

5. THE BILL IS IRRATIONAL

5.1 BATHK submits that the Bill is irrational. Rather than being evidence-based, the Bill is being driven by an irrational and outdated concept of an '*abstinence-only*' approach to tobacco control that ignores both the potential public health benefits that tobacco harm reduction strategies can bring, and undermines individual freedoms. There are alternative

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18 https://www.legco.gov.hk/yr17-18/english/counmtg/hansard/cm20180712a-translate-e.pdf.

regulatory approaches that are available to support smokers in quitting conventional smoking, while minimising the potential risks presented by their use, as proposed by many experts and implemented in other countries.

5.2 Internationally, it is accepted that most of the harm associated with tobacco is caused by inhaling the smoke produced by the combustion of tobacco and not nicotine itself.[19] There is also recognition that different tobacco and nicotine products can have vastly different risk profiles, and that PRRPs have an important role in reducing the projected harms of smoking. For example, the findings of the 2007 report of the Royal College of Physicians (one of the oldest and most prestigious medical societies in the world) were unequivocal: "[i]*n this report we make the case for harm reduction strategies to protect smokers. We demonstrate that smokers smoke predominantly for nicotine, that nicotine itself is not especially hazardous, and that* ***if nicotine could be provided in a form that is acceptable and effective as a cigarette substitute, millions of lives could be saved***." (emphasis added)[20]

5.3 Sweanor[21] et al. summarised the global public health implications of tobacco harm reduction, stating: "*The relative safety of smokeless tobacco and other smokefree systems for delivering nicotine demolishes the claim that abstinence-only approaches to tobacco are rational public health campaigns*" and concluded that "***Applying harm reduction principles to public health policies on tobacco/nicotine is more than simply a rational and humane policy. It is more than a pragmatic response to a market that is, anyway, already in the process of undergoing significant changes. It has the potential to lead to one of the greatest public health breakthroughs in human history by fundamentally changing the forecast of a billion cigarette-caused deaths this century***." (emphasis added)[22]

5.4 A recent letter from a group of 72 independent specialists in nicotine science, policy and practice, calling on the WHO to embrace innovations in technology in the fight against diseases caused by smoking, also states: "[i]*n the field of tobacco control and public health, the world has changed significantly since the Framework Convention on Tobacco Control was signed in 2003. It is impossible to ignore or dismiss the rise of Alternative Nicotine Delivery Systems (ANDS). These are established and new technologies that deliver nicotine to the user without combustion of tobacco leaf and inhalation of tobacco smoke. These technologies offer the prospect of significant and rapid public health gains through 'tobacco harm reduction'. Users who cannot or choose not to quit using nicotine have the option to switch from the highest risk products (primarily cigarettes) to products that are, beyond reasonable doubt, much lower risk than smoking products (e.g. pure nicotine products, low-toxicity smokeless tobacco products, vaping or heated tobacco products). We believe this strategy could make a substantial contribution to the Sustainable*

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19 For a detailed discussion of the reduced risk potential of THPs and e-cigarettes, please refer to BATHK's previous submission to the Health Panel of the Legislative Council dated 16 May 2018 (LC Paper No. CB(2)1402/17-18(01) (Revised)).

20 Royal College of Physicians (2007). 'Harm reduction in nicotine addiction: helping people who can't quit. A report by the Tobacco Advisory Group of the Royal College of Physicians'.

21 David Sweanor, J.D., is a renowned public health advocate and Advisory Committee Chair of the University of Ottawa Centre for Health Law, Policy and Ethics. He has over 30 years' experience in public health policy, including spearheading the development of efforts to reduce cigarette smoking in Canada and globally.

22 Sweanor D, Alcabes P, Drucker E (2006), *Tobacco harm reduction: how rational public policy could transform a pandemic*, International Journal of Drug Policy 18 (2007) 70-74.

Development Goal to reduce premature deaths through non-communicable diseases (SDG Target 3.4)."[23]

5.5 The concept of tobacco harm reduction is also firmly embedded in the WHO Framework Convention on Tobacco Control ("**FCTC**"). Specifically, in defining tobacco control, Article 1(d) of the FCTC recognises that "*tobacco control*" concerns not just "*a range of* [tobacco] *supply, demand*" measures, but also the adoption of "*harm reduction strategies that aim to improve the health of a population by eliminating or reducing their consumption of tobacco products and exposure to tobacco smoke*". Accordingly, the Government, as a party to which the FCTC applies (through China), is obliged to consider harm reduction measures as part of an overall tobacco control strategy.

5.6 The Bill is also irrational in the following aspects:

5.6.1 As explained in paragraphs 2.5 and 2.8 above, the use of THPs (such as *glo* and Neostiks) and e-cigarettes result in the emission of substantially less toxicants than conventional cigarettes. It is unreasonable, and indeed illogical, for the Government to adopt a blanket ban on all Alternative Smoking Products, whilst at the same time allowing people to smoke conventional cigarettes;

5.6.2 The Bill implements a blanket ban on all Alternative Smoking Products, the definition of which is extremely wide under the current Bill and does not take into account the specific health impacts of each such product. For example, it is wide enough to cover a device which generates an aerosol that contains no tobacco whatsoever;

5.6.3 The Government has not considered or responded to the significant volume of scientific evidence of the harm reduction benefits offered by THPs and e-cigarettes. BATHK has previously made public submissions to the Health Panel on 16 May 2018 enclosing a large volume of evidence which has apparently not been considered.[24] The Government has not explained why a blanket ban is required and favoured over regulation, notwithstanding the evidence submitted; and

5.6.4 We note that the Government only chose to conduct testing on one of the THPs among the many different THPs manufactured by different manufacturers and available in the international market, and each product could be very different and carry different risk levels. For example, whilst the Government noted that iQOS (the only product tested) burns the tobacco stick at about 260°C, we are instructed that BAT's *glo* would heat Neostiks at a lower temperature of approximately 240°C and consequently would be likely to produce fewer toxicants and lower levels of those toxicants. The substance and composition of Neostiks may also be different with that of iQOS. BATHK in fact provided samples of its THPs (i.e. *glo* and Neostiks) to the Government for laboratory testing in April 2018. However, all samples were returned untested by the Government in November 2018. The Government's approach in relying on only one product to impose a blanket ban on other products from a range of different manufacturers (which they have ignored and refused to test) is plainly unfair to other market participants, and is irrational. This approach also illustrates that the Government

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

24 LC Paper No. CB(2)1402/17-18(01): https://www.legco.gov.hk/yr17-18/english/panels/hs/papers/hs20180521cb2-1402-1-e.pdf.

has not properly considered the health effects of all types of Alternative Smoking Products before deciding to introduce the Bill.

6. BREACH OF THE FUNDAMENTAL HUMAN RIGHT OF PRIVACY

The Bill is a clear restriction on the right to privacy

6.1 The right to privacy is a fundamental human right protected by Article 14 of the Hong Kong Bill of Rights, Article 17 of the ICCPR and Article 39 of the Basic Law, which provide, *inter alia*, that "[n]*o one shall be subjected to arbitrary or unlawful interference with his privacy*".

6.2 Privacy is the "*secluded part of every person's life in which, without outside interference, he or she may act independently*".[25] The Hong Kong Court has recognised that the concept of "privacy" under the ICCPR is indistinguishable to the concept of "private life" under Article 8 of the European Convention of Human Rights.[26]

6.3 The European Court of Human Rights has considered the nature of the right to privacy / private life as follows:

6.3.1 "[t]*he concept of "private life" is a broad term… It covers the physical and psychological integrity of a person*";

6.3.2 "*the notion of personal autonomy is an important principle underlying the interpretation of* [the guarantees of right to private life]";

6.3.3 "*The very essence of the* [European Convention of Human Rights] *is respect for human dignity and human freedom… the Court considers that it is under Article 8 that notions of the quality of life take on significance*"; and

6.3.4 "*The Court would observe that the ability to conduct one's life in a manner of one's own choosing may also include the opportunity to pursue activities perceived to be of a physically or morally harmful or dangerous nature for the individual concerned. The extent to which a State can use compulsory powers or the criminal law to protect people from the consequences of their chosen lifestyle has long been a topic of moral and jurisprudential discussion, the fact that the interference is often viewed as trespassing on the private and personal sphere adding to the vigour of the debate. However, even where the conduct poses a danger to health, or arguably, where it is of a life-threatening nature, the case-law of the Convention institutions has regarded the State's imposition of compulsory or criminal measures as impinging on the private life of the applicant within the scope of Article 8(1) and requiring justification in terms of the second paragraph*" (emphasis added).

6.4 In other words, a person's autonomy in respect of one's own private life is constitutionally guaranteed in Hong Kong. A person should be free to conduct one's own life in a manner of one's own choosing. This includes, for example, the food and drink that one consumes, as well as the activities that one chooses to do, even if the food/drink might negatively impact one's own health or if the activity might pose danger to one's own life.

6.5 The Government now intends to implement the Bill which is effectively a blanket ban on the use of Alternative Smoking Products. This has the practical effect of prohibiting an

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25 *Democratic Party v Secretary for Justice* [2007] 2 HKLRD 804.

26 *Democratic Party v Secretary for Justice* [2007] 2 HKLRD 804.

individual (capable of understanding the risks involved in the same and exercising his or her own autonomy) from using Alternative Smoking Products, even privately in one's own home, and even when alone (and therefore not affecting any members of the public). Whilst the use of these products might affect one's own health, the same is also true for smoking conventional cigarettes and the consumption of food or drink, notably alcohol, neither of which are banned. Indeed in this case, the proposed ban cannot be justified in any way because the Hong Kong Government is denying smokers the opportunity to move away from conventional cigarettes to PRRPs. The intended ban clearly intrudes such person's autonomy and human dignity and is in clear violation of the fundamental human right to privacy.

6.6 Indeed, the UK Supreme Court (whose decisions are highly persuasive in Hong Kong) has recently held that a comprehensive ban on smoking in a hospital (in which convicts with mental disorder were detained) engaged the right to private life under Article 8 of the ECHR.[27] The present case is even stronger – the Bill seeks to impose a comprehensive ban on the use of products that are potentially less harmful than the use of conventional cigarettes.

6.7 We wish to note that the Bill gives rise to an issue that is of fundamental public importance and with far-reaching implications. The issue is not just relevant to the ban on Alternative Smoking Products. The Bill sets precedent and opens a gateway to any future proposal of the Government to ban other personal activities, including private consumption of unhealthy food/alcohol and the private participation of life-threatening activities, with the same purported rationale – to restrict Hong Kong residents from taking part in activities that the Government considers harmful, even in circumstances where the individual concerned understands and accepts the risk involved in the activities and where the activities do not affect any other people. Hence, the Government's purported restriction of the right to privacy under this Bill must be carefully considered.

<u>The restriction on the fundamental right to privacy is disproportionate</u>

6.8 Since the Bill imposes a restriction on the fundamental right to privacy, the Government must discharge the burden to demonstrate that the restriction is proportionate, i.e.:[28]

6.8.1 the restriction must pursue a legitimate aim;

6.8.2 the restriction must also be rationally connected to that legitimate aim;

6.8.3 the restriction must be no more than necessary to accomplish that legitimate aim; and

6.8.4 the social benefit gained is not outweighed by the detrimental impact of the restriction.

6.9 In respect of the aim of the Bill, the Government noted the following in its Legislative Council Brief for the Bill:

6.9.1 "*4. The Food and Health Bureau submitted a proposal to the Legislative Council ("LegCo") Panel on Health Services ("HS Panel") on the regulation of alternative smoking products in June 2018. The proposal was heavily criticised by the*

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27 *McCann v State Hospitals Board for Scotland* [2017] 1 WLR 1455.

28 *Hysan Development Company Limited and Others v Town Planning Board and Another* (FACV 21/2015, 26 September 2016).

medical professions, education sector, parents and many members of the public. They were worried that allowing the sale of alternative smoking products with restrictions would not be adequate to protect public health, and would bring about very negative impact and pose health risks on children and adolescents in particular. A non-binding motion was passed at the HS Panel meeting on 19 June 2018, urging the Government to impose a full ban." (emphasis added);

6.9.2 "*5. Meanwhile, there is increasing evidence that both e-cigarettes and HNB products are definitely harmful to health and may bring about gateway effects...*" (emphasis added);

6.9.3 "*7. International studies have also concluded that the tar and nicotine yields in HNB products are comparable to conventional cigarettes. Even Philip Morris International's ("PMI") in vivo clinical data failed to show a statistically detectable difference between iQOS (short for "i Quit Ordinary Smoking", the HNB product developed by PMI) and conventional cigarette users for 23 of the 24 biomarkers of potential harm among American adults....*" (emphasis added);

6.9.4 "*8. While awaiting studies on the gateway effect of the newly introduced HNB products to accumulate, a US study examined consumers' perception about iQOS in Japan and Switzerland. Through expert interviews, product and marketing analysis and focus groups, the study concluded that iQOS was marketed as a "sophisticated, high tech and aspirational" product. Youth and young adults are more interested in such product positioning and this approach raises concern about youth appeal...*" (emphasis added);

6.9.5 "*9. On the other hand, WHO has tightened its guidelines on tobacco control. Further to the seventh session of the Conference of the Parties ("COP") to the WHO Framework Convention on Tobacco Control ("FCTC") which proposed, in November 2016, to its Contracting Parties to consider applying regulatory measures to, inter alia, prohibit the manufacture, importation, distribution, sale, presentation, etc., of e-cigarettes, the eighth session held in October 2018 proposed the same for HNB products.*"

6.10 It appears that the aim of the Bill is to:

6.10.1 Prevent children and adolescents from using Alternative Smoking Products (the "**Children Concern**");

6.10.2 Prevent the opening of a gateway to the consumption of conventional cigarettes (the "**Gateway Concern**");

6.10.3 prevent access to products with tar and nicotine yields that are comparable to conventional cigarettes (the "**Harm Concern**"); and/or

6.10.4 Respond to the alleged guideline of the WHO to prohibit Alternative Smoking Products (the "**FCTC Concern**").

6.11 However, in respect of:

6.11.1 The Children Concern – it is essential to have careful regard for the evidence and to properly assess to risks and benefits of any proposed intervention. Such an assessment would need to include, identifying the extent and patterns of any youth usage; assessing the extent to which any such usage is harmful, including whether the use is merely experimental or long term; and assessing the extent to

which any increased usage of PRRPs is displacing more harmful cigarette use by youth and adult smokers. In failing to undertake such an assessment, the Government cannot demonstrate that the Bill is adequate, necessary or proportionate. Indeed, contrary to the position asserted by the Chief Executive, the PHE (2018) report found that "[d]*espite some experimentation with these devices among never smokers, EC are attracting very few young people who have never smoked into regular use*" and that "*EC use among never smokers in GB remains very rare at less than 1%, similar to the level of use of NRT. Among never smokers who have ever used EC, a minority have used nicotine-containing liquids and the vast majority have not progressed to regular use.*"[29] A US study published by Kozlowski et al., (2017)[30] also concluded that "*risks for youth posed by e-cigarettes likely fall far short of those feared by the products' opponents*" and that, currently "*youth use of e-cigarettes is unlikely to increase the ranks of future cigarette smokers.*" Other studies also indicate that regular youth use is concentrated in young people who smoke[31] and there is evidence that young people use vaping products to reduce harm and to quit smoking[32]. In the 2018 United States Annual Review of Public Health, the authors also note: "[u]*nder all but the most implausible scenarios, population simulation modeling estimates millions of life years saved by employing the principles of harm minimization and switching smokers to safer ANDS products.*"[33] In any event, it is clear that a blanket ban of these products is not necessary at all and is excessive. A prohibition of sale of these products based on the age, **similar to the restriction imposed on sale of conventional cigarettes, would be more than sufficient to achieve this purpose**;

6.11.2 The Gateway Concern – the Government only claimed that the use of THPs "*may bring about gateway effects*" (emphasis added) and stated in paragraph 28 of Annex B of the Legislative Council Brief that "[t]*he presence of nicotine from the heating of real tobacco in HNB should bring about possibly stronger gateway and renormalisation effect, despite the lack of scientific evidence at this stage*" (emphasis added). In other words, the Government has openly admitted that there is currently no scientific evidence on any alleged gateway effect from the use of THPs. To the contrary, evidence suggests that e-cigarettes and THPs have provided a gateway out of smoking for millions of smokers. As a number of public health experts recently noted in a letter calling on the WHO to reject prohibition and embrace 'tobacco harm reduction' and risk-proportionate regulation of tobacco and nicotine products: "[m]*illions of smokers have moved from cigarettes to less harmful alternatives where the laws allow it. Where ANDS*

29 McNeill A, Brose LS, Calder R, Bauld L & Robson D., *Evidence review of e-cigarettes and heated tobacco products 2018. A report commissioned by Public Health England.* London: Public Health England, 2018

30 Kozlowski et al. (2017), *Adolescents and e-cigarettes: Objects of concern may appear larger than they are*. Drug & Alcohol Dependence, 174:209-14.

31 Villanti et al. (2016), *Frequency of Youth E-Cigarette and Tobacco Use Patterns in the United States: Measurement Precision is Critical to Inform Public Health*, Vol. 19, Nicotine and Tobacco Research. Oxford University Press.

32 Shiffman S and Sembower MA (2017), *PATH Data: Harm Reduction is Teens' Top Reason for Using e-cigarettes*.

33 Abrams et al (2018), *Harm Minimization and Tobacco Control: Reframing Societal Views of Nicotine Use to Rapidly Save Lives*, Annu. Rev. Public Health 2018. 39:193–213.

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."[34];

6.11.3 The Harm Concern – as stated in paragraphs 2.6 and 2.8 above, the reduced-risk potential of Alternative Smoking Products as compared to conventional combustible cigarettes has been widely recognised by international public authorities. Although the Government appears to disagree with this view, the Government admitted in paragraph 7 of the Legislative Council Brief that certain THPs are at least "*comparable to conventional cigarettes*", as opposed to being more harmful. The Government has not explained what "*comparable*" means (e.g. whether the Government considers a difference of, say 30%, to be "*comparable*"). In any event, even if, on the Government's view (which is disagreed by BATHK), they are "*comparable*", the Government has not provided any justification as to why THPs should be banned whilst "*comparable*" conventional cigarettes should be permitted; and

6.11.4 The FCTC Concern – other than prohibition, the FCTC Conference of the Parties in fact also proposed its Contracting Parties to consider other types of regulation as appropriate (such as restrictions or regulations) on new generation products such as THPs. It did not require Contracting Parties to only consider prohibition as the only means.

6.12 Further, in considering whether the restriction is proportionate, it is important to bear in mind that:

6.12.1 The right to privacy is a fundamental human right concerning a person's dignity and autonomy, a right which must be respected by the Government. The role of the Government is to protect the welfare of the general public, but not to interfere with an individual's autonomy; and

6.12.2 The Bill effectively imposes a blanket restriction on the use of Alternative Smoking Products. A person is prohibited from using these products at all regardless of one's age, the place or the purpose for which they are to be consumed. A person cannot even exercise one's freedom to consume these products alone, in private, for the purpose of switching away from smoking conventional cigarettes. The extent of the constitutional right which the Bill seeks to restrict is therefore very significant.

6.13 In view of the above, it is clear that the Bill disproportionately infringes the fundamental human right to privacy, and is therefore unconstitutional.

7. DEPRIVATION OF CONSTITUTIONALLY PROTECTED PROPERTY RIGHTS

7.1 The Court of Final Appeal acknowledged that Articles 6 and 105 of the Basic Law expressly protect private property rights.[35] These rights are fundamental to a capitalist economy which is protected by Article 5 of the Basic Law.

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

35 *Hysan Development Company Limited and Others v Town Planning Board and Another* (FACV 21/2015, 26 September 2016).

7.2 In *Michael Reid Scott v The Government of HKSAR*,[36] the Court found that property for the purposes of Article 105 of the Basic Law is a very wide concept and requires a "*wide and purposive interpretation*". Similar to property rights protected under Article 1 of the First Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, the protection of property rights clearly extends to intangible properties, such as goodwill in a business.[37]

7.3 Although BATHK has not yet completed its launch of its THPs, *glo*, as explained in paragraph 2.2 above, these products are currently widely available for purchase outside Hong Kong (including in countries such as Japan and Korea) and can be brought into Hong Kong legally by individuals as long as appropriate duties are paid. **It has been held that a manufacturer of goods sold abroad, but whose goods were brought into the local jurisdiction by private individuals, would be considered as having established sufficient market within the local jurisdiction to have its goodwill protected in the local market.**[38] The goodwill attached to *glo* and Neostiks is therefore constitutionally protected in Hong Kong. The trademarks of *glo* and Neostiks are also registered under Trade Mark Ordinance (Cap. 559), and hence, legally protected as personal property in Hong Kong together with the registered patents.

7.4 If the Bill is passed, BATHK would not be permitted to sell, nor could Hong Kong residents legally purchase or import, and thus use, *glo* or Neostiks in Hong Kong. All of BAT and BATHK's goodwill, patents, and investments in *glo* and Neostiks will become of no meaningful or economic use, and hence, worthless in Hong Kong. Hence, the Bill does not merely restrict BAT and BATHK's property rights – it goes as far as to completely deprive BAT and BATHK of their goodwill, trademarks and investments in *glo* and Neostiks, which are property rights constitutionally protected under Articles 6 and 105 of the Basic Law. As such, similar to the infringement of the right to privacy, the Government must demonstrate that the Bill is proportionate to the extent of it imposing restrictions on those constitutional rights.

7.5 As demonstrated in paragraphs 6.8 to 6.13 above, it is clear that the Bill is disproportionate. In this connection, we wish to add that the restriction of property rights to be imposed by this Bill is even more disproportionate than the Government's previous reform relating to the increase in size of the graphic health warnings on cigarette packets – BATHK will be effectively denied the right to apply any of the *glo* and Neostiks trademarks (which are specific to THPs) at all to its THPs. There would remain absolutely no commercial value or utility in these trademarks in BAT/BATHK's Hong Kong market if the blanket ban was implemented.

7.6 Apart from the protection mentioned above, Article 105 of the Basic Law also requires the Government to protect the "*right to compensation for lawful deprivation of their property*" (emphasis added). This means that, even if the Bill is proportionate, the Government will still be liable to pay compensation for the complete deprivation of BAT and BATHK's goodwill, trademarks and investments in *glo* and Neostiks. The same also applies to other Alternative Smoking Products manufactured by other tobacco companies, exposing the Government to significant risks of claims and substantial liabilities.

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36 HCAL 188/2002, 7 November 2003.

37 See for example, *R (Nicholds) v Security Industry Authority* [2007] 1 WLR 2067 at [73].

38 *La SociÉtÉ Anonyme Des Anciens ÉTablissements Panhard Et Levassor v Panhard Levassor Motor Company, Limited* [1901] 2 Ch. 513.

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

8.1 Articles 114 and 115 of the Basic Law expressly guarantee Hong Kong's status as a free port and protect free trade and free movement of goods:

Article 114

The Hong Kong Special Administrative Region shall maintain the status of a free port and shall not impose any tariff unless otherwise prescribed by law.

Article 115

The Hong Kong Special Administrative Region shall pursue the policy of free trade and safeguard the free movement of goods, intangible assets and capital.

8.2 The Bill imposes a blanket ban on all import of smoking products. It is indisputable that the Bill engages Articles 114 and 115.

8.3 Indeed, prohibitions on the sales/import of tobacco and alcohol products have been found to engage the European counterpart to Articles 114 and 115 of the Basic Law, i.e. Article 34 of the Treaty on the Functioning of the European Union ("**TFEU**"), which provides that "*Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between member states.*"

8.4 For example, in *R (Sinclair Collis Ltd) v Secretary of State for Health*[39], a prohibition on the sale of tobacco from automatic vending machines in the United Kingdom was found to engage Article 34 TFEU for impeding on the claimant's ability to import tobacco vending machines into the United Kingdom. The European Court of Justice (the "**ECJ**") similarly found in *Rosengren and Others v Riksaklagaren*[40] that a ban imposed by the Swedish Government on the importation of alcoholic drink by private individuals into Sweden engaged Article 34 TFEU.

8.5 Where the free movement of goods is restricted, the ECJ held that "*it is for the national authorities to demonstrate that those rules are consistent with the principle of proportionality, that is to say, that they are necessary in order to achieve the declared objective, and that that objective could not be achieved by less extensive prohibitions or restrictions, or by prohibitions or restrictions having less effect on intra-Community trade*" (emphasis added).[41]

8.6 Applying this proportionality analysis, the ECJ in *Rosengren* found that the Swedish Government could not show that the complete ban on import of alcoholic drink by private individuals was necessary in order to achieve the declared objective of protecting public health, or that the public goal could not be achieved by a less extensive prohibition, such as a restriction based on age. Hence, the ban was held to be a disproportionate restriction on the free movement of goods, and therefore, unconstitutional.

8.7 Similar considerations apply to the Bill. As explained in paragraphs 6.8 to 6.13 above, it is plainly not necessary to impose a blanket ban on these products. Less extensive restrictive measures are available, including age restriction on sale and use (held in *Rosengren* to be an alternative means) and appropriate marketing restriction.

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39 [2012] QB 394.
40 (Case C-170/04) [2007] ECR I-4071.
41 *Rosengren and Others v Riksaklagaren* (Case C-170/04) [2007] ECR I-4071 at [50].

8.8 As such, the Bill disproportionately restricts the free movement of goods protected under the Basic Law, and impermissibly threatens Hong Kong's constitutionally guaranteed status as a free port.

9. BREACH OF DUE PROCESS

9.1 The Government's previous representation to regulate new tobacco products, rather than ban them outright, gave rise to a legitimate expectation that it will still be legal to import and sell Alternative Smoking Products in Hong Kong. In reliance of this legitimate expectation, BATHK has commenced preparation for the launch of its THPs, namely, *glo* and Neostiks, in Hong Kong and incurred considerable expenses as a result.

9.2 The Government's unilateral and complete change in position in October 2018 represents a clear departure from the legitimate expectation. The Government has not at any time sought to consult BATHK or other members of the tobacco industry. The introduction of the Bill is therefore in breach of due process.[42]

9.3 Further, the Bill represents a significant departure from the Government's existing policy on regulation of tobacco and nicotine products. BATHK, as well as other members of the tobacco industry, has a legitimate expectation that the Government would follow fair and proper regulatory processes, such as conducting a formal public consultation and Regulatory Impact Assessment (to properly consider the impacts, costs and benefits of the Bill) before any significant tobacco control reform such as the Bill. However, the Government had neither produced any consultation document for the public to consider the Bill nor invited the public to submit their views on the same before introducing the Bill, which deviates from the long-established standards and consultation practices adopted by the Food and Health Bureau. Moreover, notwithstanding that the Government first introduced its proposal to regulate Alternative Smoking Products in the Health Panel, it proceeded to introduce the Bill directly in the Legislative Council without any attempt to consult with members of the Health Panel.

9.4 The Bill is therefore introduced by the Government in breach of due process and the legitimate expectation of BATHK.

10. INCONSISTENCY WITH HONG KONG'S INTERNATIONAL OBLIGATIONS

10.1 As referred to in paragraph 4.2 above, the Chief Executive explained to the members of the Legislative Council on 12 July 2018 that:

"*But as far as a complete ban is concerned, Hong Kong does have to recognize her trade obligations in an international environment, because if conventional cigarettes are even more harmful, but they are allowed to be sold in Hong Kong under certain regulation, to go into a total ban of another form of tobacco product which is less harmful medically would raise many challenges. So, we have to really strike a balance.*" (emphasis added)

10.2 In other words, the Chief Executive is aware that the Bill, constituting a blanket ban of Alternative Smoking Products, is inconsistent with Hong Kong's trade obligations.

10.3 Indeed, as will be illustrated below, the Bill is:

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42 *Ng Siu Tung & Others v Director of Immigration* (2002) 5 HKCFAR 1.

10.3.1 In breach of the GATT of the WTO;

10.3.2 In breach of Hong Kong's bilateral treaties, including the IPPA signed between Hong Kong and the United Kingdom; and

10.3.3 In any event not required by the WTO FCTC.

The Bill is in breach of the GATT

10.4 Article XI of the GATT of the WTO, of which Hong Kong is a member, provides that:

"*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.*"

10.5 Unlike the current legislative regime for conventional cigarettes which includes the imposition of duties (which is permissible under Article XI), the Bill constitutes a complete and absolute ban on the importation of Alternative Smoking Products. This is clearly captured by Article XI.

10.6 Further, in view of the following factors, the Bill cannot be saved by the general exceptions permitted under Article XX(b) of the GATT for measures that are necessary to protect human health:

10.6.1 The threshold for the "necessity" test is high – the WTO Appellate Body has recognised that a "necessary" measure is "*located significantly closer to the pole of **'indispensable'** than to the opposite pole of simply 'making a contribution to'*" (emphasis added).[43]

10.6.2 The WTO Appellate Body has recognised that an import ban is "*by design as trade-restrictive as can be*" and 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*" (emphasis added).[44]

10.6.3 To demonstrate that an import ban brings about a material contribution or is indispensable to the achievement of its objective, the Government has to support it by evidence, data, quantitative projections or qualitative reasoning based on a set of hypothesis that are tested and supported by sufficient evidence.[45] The Government has, however, adduced none of these. To the contrary, there is a significant volume of evidence showing that THPs and e-cigarettes emit significantly lower level of toxicants than conventional cigarettes and are potentially less harmful alternative to conventional smokers (see paragraphs 2.5

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43 Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R, WT/DS169/AB/R (11 December 2000), para. 161; see also Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, WT/DS332/AB/R (3 December 2007), para. 141.

44 Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, WT/DS332/AB/R (3 December 2007), para 150.

45 Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, WT/DS332/AB/R (3 December 2007), para 151.

and 2.8 above). These all point against any suggestion that the Bill brings about any material contribution or is indispensable to the protection of public health.

10.6.4 Further, less restrictive alternative measures are available, such as setting appropriate product safety standards and ensuring that robust laws are put in place that prevent the sale of Alternative Smoking Products to minors. The availability of these far less restrictive alternative measures plainly illustrates that it is not necessary to implement a blanket ban on the import of Alternative Smoking Products.

10.7 In light of the above, the Government faces considerable difficulties to justify that an import ban of these potentially reduced risk products is necessary to protect public health. The Bill is therefore in breach of the GATT.

The Bill is in breach of international bilateral agreements

10.8 The Bill is also in breach of the bilateral agreements signed by Hong Kong. For example, the IPPA signed between Hong Kong and the United Kingdom provides that:

10.8.1 "*Investments and returns of investors of each Contracting Party shall at all times be accorded fair and equitable treatment... Neither Contracting Party shall in any way impair by unreasonable or discriminatory measures the... use, enjoyment... of investment in its area of the other Contracting Party*" (IPPA Article 2(2)).

10.8.2 "*Investors of either Contracting Party shall not be deprived of their investment... except lawfully, for a public purpose related to the internal needs of that Party on a non-discriminatory basis and against compensation.*" (IPPA Article 5).

10.9 For reasons explained in section 5 above, the Bill is not only unreasonable but also irrational. The unreasonable measure to be introduced by the Bill, which results in effectively a complete deprivation of the investments of foreign investors, such as BAT (which is based in the United Kingdom), is in clear breach of IPPA Article 2(2).

10.10 Further, IPPA Article 5 requires any lawful deprivation of foreign investment to be compensated. For reasons similar to paragraph 7.6 above relating to Article 105 of the Basic Law, the Bill would expose the Government to potentially significant liability for compensation to foreign investments in Alternative Smoking Products.

11. OTHER POLICY CONSIDERATIONS

11.1 Apart from the above legal issues, BATHK wishes to highlight the following policy considerations, all of which militate against the introduction of the Bill:

11.1.1 There is ample evidence from many developed government departments or authoritative bodies on the reduced risk potential of Alternative Smoking Products, indicating that these products can be a less harmful option for many conventional cigarette users;[46]

11.1.2 The WHO FCTC Conference of the Parties merely recommended in the eighth session that Contracting Parties should consider regulatory measures as

[46] For a detailed discussion of the reduced risk potential of THPs and e-cigarettes, please refer to our previous submission to the Health Panel dated 16 May 2018 (LC Paper No. CB(2)1402/17-18(01) (Revised)).

appropriate to local laws. Hong Kong has one of the lowest rates of smoking around the world.[47] Further, Hong Kong adult consumers are sensible and can and should not be unfairly prevented from making their own decision as to what products to consume. The current proposed extreme measure does not suit Hong Kong local circumstances;

11.1.3 There are around 40 countries around the world (mostly developed countries) that have allowed the sales of these Alternative Smoking Products;

11.1.4 As stated in paragraph 5.6.4 above, the Government's testing of THPs was tilted towards one company's product, and excluding BAT's THPs. In any event, the Government has not disclosed the testing methodology. It should be noted that the testing methodology for THPs should not be equivalent to those adopted for conventional cigarette;

11.1.5 As stated in paragraph 6.11.2 above, the Government has produced no evidence of the alleged gateway and renormalization effects from THPs. Further, many of the surveys or researches conducted by the Government on the Alternative Smoking Products are not published despite repeated requests by various parties. BATHK urges the Government to fully publish all relevant surveys, reports or studies quoted by the Government in the Bill with full transparency to the members of the Bills Committee and members of the public; and

11.1.6 BAT never targets its products, whether conventional cigarette or Alternative Smoking Products, to minors. The Children Concern does not justify a blanket ban of these products as it can be sufficiently addressed by restricting sales of the Alternative Smoking Products to minors in Hong Kong.

12. CONCLUSION

12.1 In view of the above, the Bill is clearly irrational and disproportionate, violates the fundamental human right of privacy and right of private property, disproportionately restricts the free movement of goods, impermissibly threatens Hong Kong's guaranteed status as a free port, is in breach of due process and inconsistent with Hong Kong's international obligations. Before deciding to introduce this Bill, the Government should first conduct a public consultation in relation to these matters.

12.2 Rather than banning these new technologies, the Government should develop regulatory solutions for bringing high quality PRRPs including Alternative Smoking Products to market and supporting smokers who want to switch from conventional smoking. Any legitimate concerns about safety and quality, access by young people etc., can be addressed by product regulations of which there is growing experience in other countries, including in Europe, the UK, the US, Canada and New Zealand. A real opportunity exists for the Government to drive change that could benefit the lives of millions of smokers, rather than creating a legacy of further failed tobacco policy and potential harm to consumers and the economy.

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47 https://www.info.gov.hk/gia/general/201803/22/P2018032200255.htm.

12.3 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

cc: Professor Sophia CHAN, JP
Secretary for Food and Health
Food and Health Bureau,
18/F, East Wing,
Central Government Offices,
2 Tim Mei Avenue, Tamar,
Hong Kong
(By email and by hand)

cc: Ms. CHENG Teresa, GBS, SC, JP
Secretary for Justice
Department of Justice
5/F, Main Wing, Justice Place,
18 Lower Albert Road, Central,
Hong Kong
(By email and by hand)

HERBERT SMITH FREEHILLS

Clerk to Bills Committee on Smoking (Public Health) (Amendment) Bill 2019
Legislative Council Secretariat
Legislative Council Complex
1 Legislative Council Road
Central, Hong Kong

23rd Floor Gloucester Tower
15 Queen's Road Central
Hong Kong
T +852 2845 6639
F +852 2845 9099

www.herbertsmithfreehills.com

Our ref
6461/12474/31022546
Your ref

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

Encl

cc: Professor Sophia CHAN, JP
Secretary for Food and Health
Food and Health Bureau,
18/F, East Wing,
Central Government Offices,
2 Tim Mei Avenue, Tamar,
Hong Kong
Ref: FH CR 1/3231/19
(By fax (2840 0467), by email and by hand)

cc: Ms Wendy Kan
Assistant Legal Adviser
Legal Service Division
Legislative Council Secretariat
Legislative Council Complex, 1 Legislative Council Road

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

Central, Hong Kong
Ref: LS/B/11/18-19
(By fax (2877 5029), by email and by hand)

cc: Law Drafting Division
Department of Justice
3/F, East Wing, Justice Place
18 Lower Albert Road, Central
Hong Kong
Attn: Mr Manuel Ng, Senior Government Counsel and Miss Celia Ho, Government Counsel
(By fax (3918 4613), by email and by hand)

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:

Petros C. Mavroidis

Professor of WTO Law at Columbia Law School, New York, and at the University of Neuchâtel, Switzerland

Annex – Curriculum Vitae of Petros C. Mavroidis

PERSONAL

Nationality	:	Greek & Swiss
Marital status	:	Married to Suja Rishikesh, three daughters, Meera Natalia, Riya Valentina, Tara Eleni
Professional Address	:	Edwin B. Parker Professor of Foreign and Comparative Law Columbia Law School (fall semester) 435 West 116th street 10027 New York, NY United States University of Neuchâtel (spring semester) Faculty of Law Avenue du 1er-Mars 26 2000 Neuchâtel Switzerland
Telephone	:	+41 32 7181316/7181270 (Switzerland) + 1 212 8540067 (United States)
Fax	:	+41 32 7181271 (Switzerland) + 1 212 8547946 (United States)
Email address	:	pm2030@columbia.edu petros.mavroidis@unine.ch

EDUCATION

1992	:	Dr. iuris, University of Heidelberg, Germany.
1986	:	LL.M, University of California at Berkeley.
1983	:	Master's, Institut d'Etudes Européennes, U.L.B, Brussels.
1982	:	Ptihion (LL.B), University of Thessaloniki, Faculty of Law and Economic Science.

WORK EXPERIENCE

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.
1987-1988	:	Ministry of Trade, Greece.

1986-1987	:	A. A. Damaskinidis (Law Firm), Thessaloniki, Greece.
1983-1984	:	EC Commission, Legal Service (internship in the Department of External Relations).

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41. Legal Eagles? The WTO Appellate Body's First Ten Years, pp. 345–367 in Merit E. Janow, Victoria Donaldson & Alan Yanovich (eds.), The WTO: Governance,

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44. The Sounds of Silence, US–Carbon Steel, (co-authored with Gene M. Grossman), pp. 367–380 in Henrik Horn and Petros C. Mavroidis (eds.), The WTO Case Law, The American Law Institute Reporters' Studies, Cambridge University Press: Cambridge, UK, 2007.

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46. Here Today, Gone Tomorrow? Privatization and the Injury Caused by Non-Recurring Subsidies, US–Lead and Bismouth II, (co-authored with Gene M. Grossman), pp. 183–213 in Henrik Horn and Petros C. Mavroidis (eds.), The WTO Case Law, The American Law Institute Reporters' Studies, Cambridge University Press: Cambridge, UK, 2007.

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SHORTER NOTES

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The European Union as an International Actor, Columbia Journal of European Law, 6: 271-274, 2000.

OTHER PUBLICATIONS

2019: China and the WTO: Towards a Better Fit, with André Sapir, Bruegel, Brussels

2018: All Quiet in the Western (European Football) Front: Regulation of Football in the European Continent, EUI Working Papers, RSCAS, EUI: Fiesole, Italy, 2018/26
Summary reprinted in Oxford University Business Law Blog
https://www.law.ox.ac.uk/business-law-blog/blog/2018/07/all-quiet-western-european-football-front-regulation-football

CUTS-international.org

2012: Briefing Paper, On Compliance in the WTO, Enforcement Among Unequal Disputants (2012/4)

EUI

Data set on WTO dispute settlement
http://globalgovernanceprogramme.eui.eu/wto-case-law-project/

Dissenting Opinions in the WTO Appellate Body: Drivers of their Issuance and Implications for the Institutional Jurisprudence (with Evan Y. Kim), RSCAS 2018/51: EUI, Florence.

ICTSD (International Centre for Trade and Sustainable Development)

Opposites Attract: Bringing the Trade and Regulatory Communities Together
http://e15initiative.org/blogs/opposites-attract-bringing-the-trade-and-regulatory-communities-together/

VoxEU.org

2008: The WTO's Difficulties in Light of the GATT's History, VoxColumn, VoxEU.org, 29 July 2008

2013: Race for the WTO Director-General Job: Seven Candidates Speak, VoxEU.org, E-book (co-edited with Bernard M. Hoekman), April, http://www.voxeu.org/sites/default/files/file/WTO%20book(1).pdf

2013: Pay Attention to the WTO Leadership Contest: It Matters!, (co-authored with Bernard M. Hoekman), VoxEU, April 4, http://www.voxeu.org/article/pay-attention-wto-leadership-contest-it-matters

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-).

HERBERT SMITH FREEHILLS

Secretary for Food and Health
Food and Health Bureau
18/F, East Wing
Central Government Offices
2 Tim Mei Avenue, Tamar
Hong Kong

For the attention of Professor Sophia Chan, JP

23rd Floor Gloucester Tower
15 Queen's Road Central
Hong Kong
T +852 2845 6639
F +852 2845 9099

www.herbertsmithfreehills.com

Our ref
6461/12474/31022546
Your ref
FH CR 1/3231/19
Date
28 November 2019

By email and by hand

Dear Madam / Sir

Smoking (Public Health) (Amendment) Bill 2019 (the "Bill")

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

We refer to the Bill and our previous submissions to the Bills Committee on the Bill dated 8 April and 21 June 2019.

As mentioned in paragraph 5.6.4 of our submission dated 8 April 2019, our client previously provided samples of its tobacco heating products ("**THPs**") (i.e. *glo* and Neostiks) to the Commissioner of Customs and Excise for laboratory testing on 27 April 2018. However, in November 2018, these samples were returned to our client untested without any explanation, before the Government later decided to introduce the Bill.

The Government's approach in relying on the test result of only one product from a particular manufacturer, as justification to impose a blanket ban on all other products from a range of different manufacturers (including our client) which affects a number of industries, is plainly unfair and irrational. Each product could be very different and carry different risk levels. For example, whilst we understand that iQOS (the only product tested by the Government) heats the tobacco stick up to

350°C,[1] we are instructed that our client's *glo* would heat Neostiks at a significantly lower temperature of approximately 240°C and consequently would be likely to produce fewer toxicants and lower levels of those toxicants. The substance and composition of Neostiks may also be different with that of iQOS. There are also other THPs in the international market which the Government has ignored and failed to consider. It is entirely inappropriate for the Government to have failed to properly consider the health effects of all types of products before introducing the Bill.

As a matter of fact, similar testing has been conducted on THPs, including those of our client which the Government has failed to consider to date. For example, according to the articles published by the Regulatory Toxicology and Pharmacology,[2] the test results of THPs demonstrated, *inter alia*, that:

(a) in comparison to the University of Kentucky 3R4F Reference Cigarette (3R4F) (as referred to in paragraph 2.5 of our client's previous submissions to the Bills Committee dated 8 April 2019)[3] the toxicant levels in emissions from our client's THPs were significantly reduced across all chemical classes. For the nine toxicants proposed by the World Health Organization Study Group on Tobacco Product Regulation for mandatory reduction in cigarette emissions, the mean reductions in our client's THPs' aerosol were 90.6-99.9% per consumable, with an overall average reduction of 97.1%;[4]

(b) significant emissions reductions in comparison to conventional cigarettes were measured for our client's THPs, with levels of nicotine, acetaldehyde, formaldehyde and particulate matter being more than 90% reduced relative to cigarette smoke emissions within the laboratory conditions. The data shows that using our client's THPs has the potential to result in considerably reduced environmental emissions that affect indoor air quality relative to conventional cigarettes;[5] and

(c) mouth level exposure to nicotine free dry particulate matter and nicotine levels were significantly lower when using THPs than conventional cigarettes.[6]

We therefore respectfully urge the Government to conduct laboratory testing on our client's products, and take the testing results into account if the Government continues to pursue the Bill in the Legislative Council. Please find enclosed sample device and consumables from our client for this purpose.

To assist with the Government's testing, we further enclose our letter to the Commissioner of Customs dated 27 April 2018 which contained a detailed explanation of our client's products. The

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1 https://www.pmi.com/smoke-free-products/iqos-our-tobacco-heating-system

2 https://www.sciencedirect.com/journal/regulatory-toxicology-and-pharmacology/vol/93/suppl/C

3 LC Paper No. CB(2)1175/18-19(11).

4 Forster et al. (2018), 'Assessment of novel tobacco heating product THP 1.0. Part 3: Comprehensive chemical characterisation of harmful and potentially harmful aerosol emissions' *Regulatory Toxicology and Pharmacology* 93 (2018) 14-33.

5 Forster et al. (2018), Assessment of tobacco heating product THP1.0. Part 4: Characterisation of indoor air quality and odour' *Regulatory Toxicology and Pharmacology* 93 (2018) 34-51.

6 Gee et al. (2018), Assessment of tobacco heating product THP1.0. Part 8: Study to determine puffing topography, mouth level exposure and consumption among Japanese users' *Regulatory Toxicology and Pharmacology* 93 (2018) 84-91.

composition of our client's products and related scientific research can be found in the enclosures therewith.

As mentioned above, our client has in fact at a very early stage offered to assist the Government to understand its THPs by sending the relevant products for testing. The Government has, however, made a conscious decision not to test the same, and instead relied on the test results of a single particular product of its choice in introducing the Bill. The Government's decision not to test our client's THPs is disingenuous in the circumstances.

We look forward to receiving your response. If you have any queries in testing our client's products, please feel free to contact Mr Dominic Geiser or Mr Truman Mak of our office.

In the meantime, all our client's rights are reserved, including its right to produce a copy of this correspondence to the Bills Committee and/or the Court at the appropriate time.

Yours faithfully,

Herbert Smith Freehills

Encls.

cc: Clerk to Bills Committee on Smoking (Public Health) (Amendment) Bill 2019
Legislative Council Secretariat
Legislative Council Complex
1 Legislative Council Road
Central, Hong Kong
By email and by hand (excluding sample products)

HERBERT SMITH FREEHILLS

Secretary for Commerce and Economic Development
Commerce and Economic Development Bureau
22/F West Wing
Central Government Offices
2 Tim Mei Avenue
Tamar
Hong Kong

For the attention of Mr Edward Yau, GBS, JP

23rd Floor Gloucester Tower
15 Queen's Road Central
Hong Kong
T +852 2845 6639
F +852 2845 9099

www.herbertsmithfreehills.com

Our ref
6461/12474/31022546
Your ref

Date
27 November 2019

By email and by hand

Dear Sirs

Smoking (Public Health) (Amendment) Bill 2019 (the "Bill")

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

As the Secretary for Commerce and Economic Development may be aware, the Secretary for Food and Health has recently introduced the Bill in the Legislative Council to, amongst other things, ban the import, manufacture, sale, distribution and advertisement of Alternative Smoking Products (as defined in the Bill).

There are various legal issues with the Bill which are problematic, including the fact that it is contrary to the Government's established free trade policy in Hong Kong. British American Tobacco (together with its subsidiaries, the "**BAT Group**") has invested in a range of potentially reduced-risk products, including its tobacco heating products (such as *glo* and Neostiks) and electronic cigarettes (such as Vype). It is currently legal to import and sell these products in Hong Kong. However, if the Bill is passed it will become illegal to do so. A blanket ban on all import of these products will disproportionately restrict the free movement of goods and impermissibly threatens Hong Kong's constitutionally guaranteed status as a free port as protected under Articles 114 and 115 of the Basic Law. The blanket ban will also be in breach of the General Agreement on Tariffs and Trade ("**GATT**") of the World Trade Organisation ("**WTO**"), of which Hong Kong is a member, and international bilateral agreements signed by Hong Kong.

We have previously issued detailed written submissions regarding the Bill to the Bills Committee on 8 April 2019 (LC Paper No. CB(2)1175/18-19(11)). In those submissions, BAT Group has outlined its concerns on issues caused by the Bill which include disproportionate restrictions to free movement

of goods and inconsistency with Hong Kong's international trade obligations – these concerns are contained in sections 8 and 10 of the submissions. We enclose a copy of the submissions for your reference.

We also submitted a letter to the Bills Committee on 21 June 2019, which builds on our prior submissions and included our responses to questions raised by the Legislative Council's Legal Service Division. In particular, it elaborates further on the international laws violated by the Bill and includes a legal opinion by Professor Petros Mavroidis, an expert in the field of international economic law, on the incompatibility of the Bill with international law. We enclose a copy of this letter for your reference.

Further breaches of international obligations

In addition, there are further international obligations which the Government has disregarded and/or failed to comply with in introducing the Bill, which we set out below.

First, the rights and protections provided to intellectual property owners under the Agreement on Trade-Related Aspects of Intellectual Property Rights (the "**TRIPS Agreement**") are relevant. We have previously raised concerns about the WTO-inconsistent discrimination between foreign-produced Alternative Smoking Products and traditional, Hong Kong-produced combustible tobacco products. From the intellectual property perspective, the TRIPS Agreement also imposes obligations on WTO Members including Hong Kong to not discriminate in protection of intellectual property. For example, Articles 3 and 4 of the TRIPS Agreement take the National Treatment and Most-Favoured-Nation Treatment non-discrimination rules of the GATT and apply them "*with regard to the protection of intellectual property*" of nationals of other WTO Members. In respect of trademarks, Article 15.4 of the TRIPS Agreement makes clear that the nature of the product shall not be an obstacle to registration. And Article 27.1 of the TRIPS Agreement also makes patent rights enjoyable without discrimination as to the field of technology. Therefore, given that combustible tobacco products and their corresponding trademarks, patents, goodwill and other intellectual property rights are permitted and protected in Hong Kong, the ban of Alternative Smoking Products violates not only the GATT with respect to the products but could also be inconsistent with the TRIPS Agreement with respect to their intellectual property rights.

Second, the proposed ban on Alternative Smoking Products breaches bilateral investment treaties, for example the Investment Promotion and Protection Agreement ("**IPPA**") between Hong Kong and the United Kingdom. That treaty outlines the various types of "investment" that are covered by the treaty protections in the definition of that term in Article 1(e)(iv) as *"every kind of asset and in particular…intellectual property rights, goodwill, technical processes and know-how*". Therefore, intellectual property rights must be afforded the substantive protections in that treaty, which include "*fair and equitable treatment*" covering any impairment by unreasonable or discriminatory measures of the use or enjoyment of the investment (Article 2(2)) and the protection against unlawful expropriation without just compensation (Article 5). As explained in our prior submissions to the Bills Committee, this Bill is not only unreasonable but also irrational and effects a complete deprivation of intellectual property, in breach of the IPPA.

Third, 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) and constitutes a technical

regulation for this purpose.[1] 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 adequate time to provide comments on the Bill.

Fourth, 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*".[2] 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. Such restriction would also be inconsistent with existing arrangements under various Free Trade Agreements. This includes the preferential tariff treatment for such transhipment cargo in Hong Kong between Mainland China and certain countries (such as Korea and Australia) as provided by the Free Trade Agreement Transhipment Facilitation Scheme which seeks to facilitate, rather than to ban, such transhipment. It would be irrational to impose such restriction when such transhipment cargo has no domestic implication.

We understand from the Commerce and Economic Development Bureau's ("**CEB**") Mission Statement that it is CEB's mission to enhance Hong Kong's position as a leading international trade and business centre, foster a business-friendly environment and attract investment to Hong Kong. The anti-free trade move proposed by the Bill threatens Hong Kong's position as a leading international trade and business centre and deprives of foreign investments in Hong Kong. We therefore write to bring this matter to the Secretary for Commerce and Economic Development's attention, including the serious breaches of international law as described above, and respectfully urge him to consider making submissions to the Secretary for Food and Health and the Bills Committee.

We also note that the Hong Kong government has attempted to rely on the World Health Organisation's Framework Convention on Tobacco Control ("**FCTC**") to justify its proposed ban of Alternative Smoking Products.[3] This reliance on the FCTC, which covers "tobacco products", to support the proposed ban of e-cigarettes and other products is however misplaced. We enclose to this letter a legal opinion by Professor Jan Wouters, a leading international trade law and public international law scholar, which argues conclusively for the lack of applicability of the FCTC to alternative nicotine delivery systems such as e-cigarettes. Professor Wouters' opinion is based on his review of the customary international legal principles of treaty interpretation and counters the attempts to extend the FCTC beyond its limited coverage of traditional tobacco products, based on the following reasons:

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

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

3 See Legislative Council Brief, File Ref: FH CR 1/3231/19 (13 Feb. 2019), at para. 9, and paras. 15-16 of Annex B.

- The history of the FCTC confirms that alternative nicotine delivery systems (such as e-cigarettes and heated tobacco products ("**HTPs**")) were not covered by the FCTC at the time of adoption, since they did not exist as such.
- General rules of treaty interpretation confirm that, because they do not contain tobacco, e-cigarettes fall outside the scope of application of the FCTC based on (1) the ordinary meaning of the treaty's terms, (2) the current state of scientific knowledge and (3) the FCTC's object and purpose.
- HTPs, by contrast, meet the first part of the definition of covered tobacco products since they contain tobacco. However, they do not meet the second part of the definition, which requires that the tobacco products "are manufactured to be used for smoking, sucking, chewing or snuffing". HTPs do not involve burning or combustion, as recognised by public health authorities, and thus no burnt tobacco is "smoked" and instead an aerosol is vaped. The context as well as the object and purpose of the FCTC confirm that HTPs do not fall within the FCTC's scope of application.
- No subsequent action by the FCTC Conference of the Parties ("**COP**") amounts to a subsequent agreement or subsequent practice that brings non-tobacco products such as e-cigarettes within the remit of the FCTC.
- For HTPs, a single reference that appears to reflect the view that these products are covered "tobacco products" in one recital of the preamble of a single FCTC COP decision (FCTC/COP8/(22)) neither can amend the clear text of the treaty nor can be sufficient to amount to a subsequent agreement or subsequent practice within established international legal rules of treaty interpretation. Rather, FCTC Parties' widely divergent practice with respect to HTPs confirms that no such agreement exists (e.g. some parties promoted their use as part of a harm reduction strategy, while others treat them as ordinary tobacco products).

A proper interpretation of the FCTC that gives meaning and effect to the harm reduction principle enshrined in the plain language of its definition of tobacco control, and in line with the object and purpose of the treaty, requires that alternative nicotine delivery systems products not be banned but rather treated more favourably from a regulatory and taxation standpoint than combustible tobacco products (such as cigarettes). This would support adult consumers of combustible products to switch to alternative nicotine delivery systems.

If you have any questions, please feel free to contact our Mr Dominic Geiser or Mr Truman Mak.

Yours faithfully,

Herbert Smith Freehills

Encls

cc: Clerk to Bills Committee on Smoking (Public Health) (Amendment) Bill 2019
Legislative Council Secretariat
Legislative Council Complex
1 Legislative Council Road
Central, Hong Kong
By email and by hand

Secretary for Food and Health
Food and Health Bureau
18/F, East Wing
Central Government Offices
2 Tim Mei Avenue, Tamar
Hong Kong

For the attention of Professor Sophia Chan, JP

23rd Floor Gloucester Tower
15 Queen's Road Central
Hong Kong
T +852 2845 6639
F +852 2845 9099

www.herbertsmithfreehills.com

Our ref
6461/12474/31022546
Your ref
FH CR 1/3231/19
Date
29 April 2020

By email and by hand

Dear Madam / Sir

Smoking (Public Health) (Amendment) Bill 2019 (the "Bill")

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

We refer to the Bill and our previous submissions to the Bills Committee dated 8 April 2019 and 21 June 2019. We also refer to our letter to you dated 28 November 2019 and your reply letter dated 15 January 2020 (the "**Reply**").

We regret to learn from the Reply that you maintain your refusal of our clients' request for the Government to conducting laboratory testing of our client's tobacco heating products ("**THPs**") (i.e. *glo* and Neostiks) (the "**Request**"). As mentioned in our letter dated 28 November 2019, the Government's approach in relying on the test results of only one product from a particular manufacturer as the basis for and justification to impose a blanket ban on all other products from a range of different manufacturers (including our client) which affects a number of industries, is plainly unfair and irrational. It is wholly inappropriate, and unfair to our client and other manufacturers, for the Government to have failed to properly consider the health effects of all types of products by testing them before introducing the Bill.

With respect, your explanation for not acceding to our client's Request is misconceived. Our client's Request was not solely intended for the purpose of customs classification and duty assessment under the Dutiable Commodities Ordinance (Cap. 109). As mentioned in our letter dated 28 November 2019, our client requested the Government to conduct testing of the THPs in order to ascertain the substance, composition and potential effects of the particular THPs. The Request was primarily intended to help ensure that the Government conducted a comprehensive

assessment of all THPs across various manufacturers and brands, such that the Government could take a properly informed view rather than simply relying on the test results relating to only one particular product (i.e. iQOS) in the imposition of a blanket ban against all THPs. Our client maintains its position that it is entirely inappropriate for the Government to have failed to properly consider the health effects of all types of THPs before deciding to impose a blanket ban against all THPs.

Whilst we agree that a comprehensive assessment of health risks of any new tobacco products cannot be determined by laboratory testing alone, the Government should nonetheless conduct laboratory testing of all such products as part of their comprehensive assessment. Needless to say, the Government's own test results will be the most neutral and authoritative evidence regarding the potential health effects of any THPs. As set out in our letter to the Clerk to the Bills Committee on the Smoking (Public Health) (Amendment) Bill dated 21 June 2019 and our letter dated 28 November 2019, there is growing evidence on the harm reduction benefits offered by THPs which we believe the Government has failed to take into account. Conducting laboratory testing of THPs will verify this evidence, which will in turn allow the Government to better assess the factors relating to "scientific evidence" and "potential population impact" (which we agree with you as being relevant factors of your comprehensive assessment) in a fair and objective manner.

Further, pursuant to the guidance titled "Enforcement priorities for Electronic Nicotine Delivery Systems (ENDS) and other deemed products on the market without premarket authorisation" issued by the Food and Drug Administration of the U.S. Department of Health and Human Services in January 2020[1], removal of popular THPs from a market may be accompanied by an increase in black market versions of these products that may pose additional health and safety risks to consumers beyond those of authentic products. This is because such counterfeit products lack premarket authorisation and "*[a]dditional risks posed by these products include the potential that they contain harmful chemicals or constituents that are not present in other products, that they are manufactured using comparatively poor quality controls, and that they are designed in ways that facilitate modifications by distributors or users – all of which increase the risk of adverse events*". Therefore, a blanket ban against all THPs may pose additional health and safety risks to consumers in Hong Kong, as compared to a regulated market with proper assessment of the health risks of THPs. The proper course for a responsible government is to conduct independent laboratory testing in order to assess the respective health effects of each THP, and to authorise and regulate those THPs which may bring net positive health benefit to consumers in Hong Kong.

We respectfully urge the Government to properly consider the growing body of evidence on the harm reduction benefits offered by the use of THPs, as set out in our letter to the Clerk to the Bills Committee on the Smoking (Public Health) (Amendment) Bill dated 21 June 2019 (which was also sent to you) and as highlighted in our letter dated 28 November 2019. We also draw your attention to Public Health England's press release dated 4 March 2020 regarding its sixth independent e-cigarette report[2], in which Public Health England reiterated that regulated e-cigarettes are much less harmful than conventional cigarettes.

We also respectfully urge the Government to conduct laboratory testing of our client's THPs.

[1] https://www.fda.gov/media/133880/download.
[2] https://www.gov.uk/government/news/false-fears-preventing-smokers-from-using-e-cigarettes-to-quit. Public Health England is an executive agency of the Department of Health and Social Care, the Government of the United Kingdom.

We look forward to receiving your response. If you have any queries in testing our client's THPs, please feel free to contact Mr. Dominic Geiser or Mr. Trevor Ho of our office.

In the meantime, all of our client's rights are reserved, including its right to produce a copy of this correspondence to the Bills Committee at the appropriate time.

Yours faithfully,

Herbert Smith Freehills

Cc: Clerk to Bills Committee on Smoking (Public Health) (Amendment) Bill 2019
Legislative Council Secretariat
Legislative Council Complex
1 Legislative Council Road
Central, Hong Kong
By email and by hand