MEMORANDUM

RE: [Redacted]

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Submitted by

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International rules on cross-border trade and investment are increasingly complex. There is the WTO, World Bank and UNCTAD, but also hundreds of bilateral investment treaties (BITs) and free trade arrangements ranging from GSP, EU EPAs and COMESA to ASEAN, CAFTA and TPP. Each has its own negotiation, implementation and dispute settlement system. Everyone is affected but few have the time and resources to fully engage. TradeLab aims to empower countries and smaller stakeholders to reap the full development benefits of global trade and investment rules. Through pro bono legal clinics and practica, TradeLab connects students and experienced legal professionals to public officials especially in developing countries, small and medium-sized enterprises and civil society to build lasting legal capacity. Through 'learning by doing' we want to train and promote the next generation of trade and investment lawyers. By providing information and support on negotiations, compliance and litigation, we strive to make WTO, preferential trade and bilateral investment treaties work for everyone.
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Executive Summary

This memorandum addresses the legal considerations arising with respect to three proposed [redacted] measures to be implemented in [redacted]. Each measure was assessed for consistency with the [redacted] obligations under international trade law, international investment law and the domestic law of [redacted].

1. [Redacted]

The first proposed measure is the implementation of [redacted], as based off the [redacted]. [redacted] restricts [redacted] on [redacted]. This raises considerations under the following:

- Article 2.2 of the Technical Barriers to Trade Agreement ('TBT');
- Article [redacted] of the Agreement on Trade-Related Aspects of Intellectual Property Rights ('TRIPS')'
- the investment provisions under the [redacted]; and
- [redacted].

Upon analysis, we conclude that [redacted] is a justifiable measure which contributes to protecting [redacted] through [redacted].

2. *Prohibition on the* [redacted]

The second measure proposes a [redacted]. [redacted] pose concern to communities and regulators in that they often evade existing regulatory measures on [redacted] and they are often [redacted]. The [redacted] raises considerations under the following:

- Article III:4, XI:1 and XX(b) of the General Agreement on Tariffs and Trade ('GATT');
- Article 2.1 and 2.2 of the TBT Agreement; and
- The investment provisions under [redacted].

Upon analysis, we conclude that [redacted] would likely be considered a justifiable measure which contributes to protecting [redacted]. The lack of scientific evidence with respect to [redacted] may mean the measure faces greater legal challenges, we nevertheless conclude that it is still justifiable.

3a. [redacted]

The third proposed measure suggests a [redacted]. This raises considerations under the following:

- Article XI:1 and XX(b) of the GATT;
- The investment provisions under [redacted]; and
- [redacted] of the Constitution of [redacted].

Upon analysis, we conclude that the ban, whilst highly trade-restrictive, is likely a justifiable measure which directly contributes to the protection of [redacted].

3b. *[redacted]*

Alternative to a [redacted], the imposition of a [redacted] on the [redacted] in [redacted] has been proposed. Currently, three [redacted] possess [redacted]; [redacted] proposes restricting this to just two. This raises considerations under the following:

- Article II, III, XIV and XVI of the General Agreement on Trade in Services ('GATS');
- The investment provisions under [redacted];
- [redacted] of the Constitution of [redacted]; and
- The Administrative Law of [redacted].

Upon analysis, we conclude that the [redacted] is likely inconsistent with a number of obligations under international trade and investment law, as it arguably operates in an unjustifiably discriminatory manner.

1. PROPOSED MEASURES

1. This section (p. 3 – p. 5) outlines and provides a background to each of the three proposed measures being contemplated by [redacted], being the:

[redacted]

2. This section outlines the current regulatory regime with respect to the proposed measures and explains the rationale behind the [redacted]

I. IMPLEMENTATION OF A [REDACTED]

3. [redacted] is considering the implementation of a [redacted].

4. [redacted]have found broad support from international institutions and have been implemented in a number of jurisdictions. [redacted]

5. [redacted] refers to [redacted]. The objectives of [redacted] include: [redacted]

6. [redacted]

Existing Domestic Regulation on [redacted]

7. [redacted] currently regulates the [redacted].

8. [redacted] broadly sets out the prescribed [redacted]

9. [redacted]

10. [redacted]

[redacted]

11. [redacted]

12. You have indicated that [redacted] may be interested in adopting [redacted]. This would be a sensible approach, as it is a simple model which captures all [redacted]. [redacted]. As will be discussed below, the [redacted] has [redacted].

13. You have also indicated that [redacted] is also interested in the [redacted] regime that [redacted].

1) [redacted]

14. [redacted]

15. [redacted]

2) [redacted] Model

16. [redacted].

17. [redacted]

18. Despite the extensiveness of the regime, it is important to note that this is not equivalent to [redacted].

II. PROHIBITION OF [REDACTED]

19. [redacted]. [redacted] is considering instituting a [redacted].

20. [redacted].

21. [redacted].

22. [redacted]

23. Both [redacted] pose significant concerns for regulators and communities, particularly as [redacted].

24. It is imperative to recognise that no legal challenge has yet been brought against any country which has instituted a [redacted]. As such, the analysis contained below of whether a [redacted] may breach international obligations is not based on directly applicable case law.

Domestic and International Regulation of [redacted]

25. [redacted].

26. [redacted].

27. [redacted].

28. [redacted].

29. [redacted]

Domestic and International Regulation of [redacted]

30. [redacted].

31. [redacted].

32. [redacted].

33. [redacted].

34. [redacted].

III. IMPOSITION OF A BAN OR [REDACTED] ON THE [REDACTED]

35. You have asked us to consider the legality of a complete prohibition on [redacted].

36. In the alternative, you have asked us to consider the legality of [redacted].

37. The imposition of either a ban or [redacted].

38. This section summarises the existing [redacted] and the proposed amendments outlined in the drafting instructions provided to the [redacted].

Existing Domestic [redacted] Regime

39. Existing laws in [redacted] require companies to [redacted].

40. We understand that an amendment has been proposed [redacted]

2. INTERNATIONAL TRADE LAW CONSIDERATIONS

41. This section (p. 6 – p. 25) analyses the legal risks and challenges which may arise under international trade law with respect to each of the proposed measures. This section explores the international trade obligations imposed upon [redacted] under four World Trade Organization ('WTO') Agreements, namely:

    - The General Agreement on Tariffs and Trade ('GATT');[1]
    - The Technical Barriers to Trade Agreement ('TBT Agreement');[2]
    - The General Agreement on Trade in Services ('GATS');[3] and
    - The Agreement on Trade-Related Aspects of Intellectual Property Rights ('TRIPS').[4]

42. Legal challenges brought under international trade law to the WTO are heard and settled by the WTO Dispute Settlement Body, which establishes a Panel to hear a case and render a decision. A WTO Member can appeal a Panel Report to the WTO Appellate Body.[5]

43. In preparing to adopt any of the proposed amendments to the existing [redacted] regime, [redacted] should be aware of the risk of legal challenge being brought against them before the WTO. [redacted]

I. GENERAL AGREEMENT ON TARIFFS AND TRADE ('GATT')

44. The *GATT* is a legal agreement between all member States of the WTO formed to reduce international trade barriers and tariff levels.

A) [redacted]

45. The proposed [redacted] regime does not engage any provisions of the *GATT*.

B) [redacted]

46. The [redacted] bans could face legal challenges for inconsistency with *GATT* Article XI:1 (Quantitative Restrictions) and *GATT* Article III:4 (Most-Favoured-National Obligations). If consistency with these provisions were to be the subject of a legal challenge, [redacted] would need to establish that the measures fall within the General Exceptions under *GATT* Article XX.

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[1] *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1A ('*General Agreement on Tariffs and Trade 1994*') ('*GATT*')
[2] *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1A ('*Agreement on Technical Barriers to Trade 1995*') ('*TBT Agreement*').
[3] *Marrakesh Agreement Establishing the World Trade Organization, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995)* annex 1B *('General Agreement on Trade in Services 1994') ('GATS').*
[4] *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1C ('*Agreement on Trade-Related Aspects of Intellectual Property Rights 1995*') ('*TRIPS Agreement*').
[5] World Trade Organization, 'The process — Stages in a typical WTO dispute settlement case' (Web Page) <https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c6s1p1_e.htm>. The Appellate Body is the highest adjudicative body in the WTO.

Article XI:1 (Quantitative Restrictions)

47. The [redacted] bans could be challenged for inconsistency with Article XI:1 of the *GATT*, which prohibits 'quantitative restrictions'. It reads as follows:

> 'No ***prohibitions*** or ***restrictions*** other than duties, taxes or other charges, whether made effective through [redacted]s, 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.'[6]

48. The Appellate Body confirmed in the case of *Brazil – Measures Affecting Imports of Retreaded Tyres* (*'Brazil – Retreaded Tyres'*) that blanket bans on imports constitute quantitative restrictions which, on their face, breach Article XI:1.[7] This was later reiterated by the Appellate Body in the case of *China – Measures Related to the Exportation of Various Raw Materials* ('*China – Raw Materials*'), where it was held that 'prohibition or restriction' includes 'a legal ban on the trade or importation of a specified commodity'.[8] As such, the implementation of a ban on the importation of both [redacted] raises issues of inconsistency with *GATT* Article XI:1.

49. However, in the event of a challenge against the ban under Article XI, [redacted] would be able to establish that the measure falls under one of the General Exceptions under Article XX and, as such, is not inconsistent with the *GATT*, which we discuss further below.

Article III:4 (National Treatment/Most-Favoured Nation Obligations)

50. The [redacted] bans may also face issues of inconsistency with Article III:4 of the *GATT*, which imposes an obligation on parties to ensure imported products are not exposed to discriminatory treatment vis-à-vis other imported products or domestically produced products. The provision reads as follows:

> 'The products… of any contracting party ***imported*** into the territory of any other contracting party shall be ***accorded treatment no less favourable*** than ***that accorded to like products of national origin*** in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use...'[9]

51. Pertinently, [redacted] are not manufactured domestically in [redacted], and therefore fall into the category of 'imported products'. [redacted] are manufactured domestically within [redacted].

52. In considering whether a breach of Article III:4 has arisen, a Panel would consider the following three elements:[10]

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[6] *GATT* (n 1) Article XI:1 (emphasis added).
[7] Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres,* WTO Doc WT/DS332/AB/R (3 December 2007) [3] ('*Brazil – Retreaded Tyres'*)
[8] Appellate Body Report, *China – Raw Materials*, WTO DOC WT/DS394/AB/R (30 January 2012) [319] ('*China – Raw Materials'*).
[9] *GATT* (n 1) Article III:4 (emphasis added).
[10] Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WTO Doc WT/DS161/AB/R (11 December 2000) [133].

- whether the imported and domestic products at issue are 'like products';
- whether the measure constitutes a 'law, regulation or requirement affecting their internal sale, offering for sale, purchase, transportation, distribution, or use'; and
- whether the imported products are accorded 'less favourable' treatment than that accorded to the like domestic products.

1) 'Like' products

53. The Appellate Body in *EC – Measures Affecting Asbestos and Products Containing Asbestos* ('*EC – Asbestos'*) established that 'no one approach' is established to determine likeness for the purposes of Article III:4, and that the assessment is often judged on a case-by-case basis.[11] No WTO Panel has conducted a 'likeness' assessment for the [redacted]market.

54. Regardless, the Appellate Body in *EC – Asbestos* confirmed that it is the extent of a 'competitive relationship' between the products which underpins 'likeness'.[12] To determine the extent of this competitive relationship, four categories of 'product characteristics' are relevant for conducting the case-by-case analysis, namely:

- the physical properties of the products;
- the extent to which the products serve the same, or similar, end-uses;
- the extent to which consumers perceive and treat the products as alternative means of performing particular functions in order to satisfy a similar want or demand; and
- the international classification of the products for tariff purposes.[13]

55. There is insufficient evidence to determine the extent of competition between [redacted] and [redacted] in [redacted] from a purely economic perspective. At the present time it would appear that there is little competition between the products, considering that the [redacted] usage rates are relatively low in the country. However, it is worth noting the potential for these products to gain greater market share in the region, particularly as many [redacted].

56. Applying the analysis from *EC – Asbestos,* we reach a tentative conclusion that whilst it is probable that [redacted] and [redacted] would be considered 'like products', [redacted] and [redacted] would not. The reasoning for these conclusions is addressed below.

i. Are [redacted] and domestically manufactured [redacted] 'like products'?

57. The 'likeness' between [redacted] and [redacted]seems relatively high. The four factors from *EC – Asbestos* are considered below.

58. The physical properties of the products are quite distinct, as [redacted] are [redacted], whereas [redacted] are [redacted].

59. 'End-use' refers to the 'extent to which products are *capable* of performing the same, or similar functions'.[14] [redacted]

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[11] Appellate Body Report, *EC – Measures Affecting Asbestos and Products Containing Asbestos*, WTO Doc WT/DS135/AB/R (12 March 2001) [102] ('*EC – Asbestos*').
[12] Ibid [103].
[13] Ibid [102].
[14] Appellate Body Report, *US – Measures Affecting the Production and Sale of Clove Cigarettes,* WTO Doc WT/DS406/AB/R (4 April 2012) [125] ('*US – Clove Cigarettes'*).

60. Consumer preferences and habits are heavily related to end-uses; it refers specifically to the 'extent to which consumers are willing to use the products to perform [those] functions'.[15] This is largely an assessment of substitutability. As [redacted]

61. Under the Harmonized Commodity Description and Coding System, which provides a standardisation mechanism for international tariff classification, [redacted] and [redacted] are listed under the same tariff classification chapter. [redacted] would ostensibly fall under the [redacted] category, and hence share very similar tariff treatment as [redacted].

62. On balance, it seems that there is reasonable argument to be made that [redacted] and [redacted] are sufficiently 'like' for the purposes of Article III:4.

ii. Are [redacted] and domestically manufactured [redacted] 'like' products?

63. Contrastingly, it is highly unlikely that [redacted] would be considered 'like' products to [redacted].

64. [redacted]and [redacted] share very few product characteristics. [redacted].

65. [redacted] and [redacted] also do not share many of the same 'end-uses', [redacted].

66. Furthermore, an analysis of consumer preferences and habits illustrates that [redacted] and [redacted] are likely not alike for the purposes of Article III:4. Very few consumers opt for [redacted] as a direct *substitute* for [redacted], since they satisfy different consumer desires. [redacted].

67. Finally, [redacted] are classified under a completely different tariff classification chapter than [redacted] in the Harmonized System. On balance, consumer preferences and tariff classifications seem to suggest that [redacted] and [redacted] would not be deemed 'like products' for the purposes of Article III:4. As such, the [redacted] would likely not contravene Article III:4.

2) Are the measures laws which affect the sale of the imported products?

68. The proposed bans are clearly laws which affect the internal sale and offering of sale of the imported [redacted], as the bans prevent them from gaining market access in [redacted].

3) Are the imported products accorded 'less-favourable' treatment vis-à-vis domestically produced [redacted]?

69. The Appellate Body in *EC – Asbestos* noted that a mere distinction between the domestic and imported products is insufficient to establish less-favourable treatment.[16] The treatment here, however, is clearly less-favourable, as [redacted] are completely denied market access within [redacted] whilst [redacted] remain permitted for both manufacture and sale.

70. Though dependent on how a Panel would conduct its 'likeness' analysis, the bans on [redacted] and [redacted] seems to give rise to issues with the most-favoured nation and national treatment obligations under Article III:4. As above with respect to *GATT* Article

[15] Ibid [125].
[16] *EC – Asbestos* (n 11) [100].

XI:1, if these measures are justifiable under Article XX, [redacted] will not be in breach of its obligations under Article III:4.

Article XX (General Exceptions)

71. Article XX of the *GATT* sets out a number of exceptions which render measures that are prima facie inconsistent with *GATT* as permissible. It reads as follows:

> Subject to the requirement that such ***measures are not applied*** in a manner which would constitute a ***means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail***, or a disguised restriction on international trade, ***nothing*** in this Agreement ***shall*** be construed to ***prevent the adoption or enforcement*** by any contracting party ***of measures***:
>
> …
>
> (b) ***necessary to protect human***, animal or plant ***life or health***…[17]

72. Establishing a successful defence under this provision requires consideration of three factors:[18]

- whether the proposed bans are designed as measures to protect human health;
- whether they are necessary to fulfil the [redacted] policy objective; and
- whether they are applied in conformity with the introductory proviso ('chapeau') of Art XX.[19]

1) Are the Bans Designed to Protect Human Health?

73. The importance of [redacted] has been consistently affirmed by the WTO Appellate Body as 'important to the highest degree'.[20] [redacted].

74. The framing of the objective is important for justification under Article XX. The objective that the measure is seeking to achieve is to protect [redacted] by preventing an increase in [redacted] usage and [redacted] caused by the introduction of [redacted].

75. [redacted]. As such, it is clear that the proposed ban on [redacted] are designed to fulfil the objective of protecting human health and particularly the objective of preventing increases in [redacted] usage.

76. The question of whether a ban on [redacted] is designed to protect human health is not as clear-cut compared with [redacted], as there is not as much of an evidence base in relation to the deleterious effects of [redacted] on human health. [redacted] do not contain [redacted] and are not regulated as [redacted] in most jurisdictions. [redacted]. [redacted]. It might therefore be argued that the ban is not directed at protecting human health, as [redacted] may in fact [redacted].

77. The Appellate Body has however recognised that a 'Member is not obliged, in setting health policy, automatically to follow what, at a given time, may constitute a majority scientific opinion.'[21] As such, simply because there is not yet scientific consensus as to the short- and

[17] *GATT* (n 72), Article XX(b) (emphasis added).
[18] Panel Report, *United States - Standard for Reformulated and Conventional Gasoline*, WTO Doc WT/DS2/R (29 January 1996) [6.20].
[19] GATT (n 1) Article XX(b).
[20] Ibid [179].
[21] *EC – Asbestos* (n 11) [178].

long-term health consequences of [redacted], this does not necessarily preclude regulation of [redacted]. Furthermore, whilst it does not explicitly turn attention to regulation of [redacted], the [redacted] explicitly lists [redacted]. As such, it can certainly be argued by [redacted] that a ban on [redacted] is a measure which can be shown to be advancing the objective of protecting [redacted] [redacted].

2) Are the Bans Necessary to Fulfil the [redacted] Objective?

78. Supposing that the bans are considered to be directed at [redacted], they must be shown to be 'necessary'. The Appellate Body in the case of *Colombia – Measures Relating to the Importation of Textiles, Apparel and Footwear* ('*Colombia – Textiles*') summarised the 'necessity' analysis, stating that it requires the balancing of the following factors:

- the relative importance of the interests or values furthered by the challenged measure;
- the extent to which the measure contributes to the achievement of its objective;
- the trade-restrictiveness of the measure; and
- the existence of less trade-restrictive, reasonably available alternatives which achieve the same level of protection as the proposed measure. [22]

79. In the case of *Brazil – Retreaded Tyres*, the Appellate Body held that of all interests, the protection of [redacted] is one of paramount importance.[23] As the proposed bans are directed at the protection of [redacted], this is a factor which should weigh heavily in favour of supporting the necessity of the measures.

80. The next consideration is the extent to which the measures actually contribute to protecting [redacted]. Where there exists a 'genuine relationship of [redacted] and means' between the objective and the measure, it is likely that a measure will be considered to be making a necessary contribution to the achievement of the objective.[24] A complete ban on the sale, importation and manufacture of these [redacted] in [redacted] would certainly make a significant contribution to the achievement of reducing the supply of [redacted] and minimising the harm caused by [redacted]. In a country with low enforcement capacity such as [redacted], it can be argued that only a complete ban on sale and importation would ensure that these [redacted] do not [redacted] negatively impact [redacted].

81. The measures are naturally extremely trade-restrictive as they operate as comprehensive bans. The Appellate Body in *Brazil – Retreaded Tyres* confirmed that an import ban, being severely trade-restrictive, can only be considered necessary if it is 'apt' to make a 'material contribution' to its objective.[25] This threshold can be met as long as the measure in question materially contributes to the objective in a manner that is not marginal or insignificant.[26]

82. The greater the contribution of a measure to its objective, the more 'necessary' it will be found to be.[27] [redacted]

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[22] Appellate Body Report, *Colombia – Measures Relating to the Importation of Textiles*, *Apparel and Footwear*, WTO Doc WT/DS461/AB/R (7 June 2016) [5.71-5.74] ('*Colombia – Textiles*').
[23] *Brazil – Retreaded Tyres* (n 7) [179].
[24] Ibid [145].
[25] *Brazil – Retreaded Tyres* (n 7) [151].
[26] *Brazil-Retreaded Tyres* (n 7) [151].
[27] Appellate Body Report, *China-Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WTO Doc WT/DS363/AB/R (21 December 2009) ('*China-Publications and Audiovisual Products'*) [251-253]

83. Following this reasoning, a strong argument can be made that the bans on [redacted] and [redacted] in [redacted]. As such, an argument can be posed that [redacted] should be afforded a degree of deference to [redacted].

84. A measure will be necessary where there are no other reasonably available alternatives which would achieve the objective to the same degree. [redacted].

85. Reasonably available alternatives must not be merely theoretical in nature, incapable of implementation nor impose an undue burden on a Member in its implementation (e.g. prohibitive costs or substantial technical difficulties).[28] Undue burdens exclude mere administrative difficulties.[29] Furthermore, alternatives must be capable of achieving the level of protection that the Member [redacted] to achieve.[30] If none of the alternative measures would enable [redacted] to achieve their desired level of [redacted] protection, the alternatives will be held to not be 'reasonably available'.[31] A strong argument can be made that the imposition of [redacted] or [redacted] would not [redacted], which is the 'desired level' of protection being sought.

86. On balance, despite the relatively high trade-restrictiveness of the bans, it is likely a Panel would find that the measures are necessary to achieve the objective of protecting [redacted] in [redacted].

3) Are the Bans Arbitrary or Unjustifiably Discriminatory?

87. The introductory proviso (the 'chapeau') of Article XX necessitates that a measure cannot constitute 'arbitrary or unjustifiable discrimination' between countries where the 'same conditions prevail' or cannot amount to a 'disguised restriction' on international trade.

88. It is unlikely that the ban would be considered to constitute 'arbitrary or unjustifiable discrimination' between countries, as the ban is applied in an even-handed manner. All [redacted] and [redacted] are banned, regardless of country of origin. An argument may be raised that the bans are unjustifiably discriminatory since [redacted], undermining the [redacted] objective. However, the Appellate Body in *Brazil – Retreaded Tyres* suggested that if the discrimination is 'rationally connected' to the objective of the measure, then it will likely be justifiable.[32] The objective is to protect [redacted] by preventing an increase in [redacted] and [redacted]. The discrimination is likely justifiable as the measure bans the [redacted] which are the subject of the objective. [redacted]. As such, it is unlikely that the [redacted] bans are unjustifiably discriminatory.

89. On the above, there is a strong argument to be made that the bans, whilst highly trade-restrictive, are provisionally justifiable under Article XX(b) of the *GATT* as measures enacted with the objective of protecting human health.

C) Ban on [redacted]

[28] Appellate Body Report, *United States-Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WTO Doc WT/DS285/AB/R (7 April 2005) [308] ('*US-Gambling*').
[29] *China - Publications and Audiovisual Products* (n 38) [326-327].
[30] *EC - Asbestos* (n 21) [174-175].
[31] This view was reiterated by the Appellate Body in *Brazil – Retreaded Tyres* (n 23) [170].
[32] *Brazil – Retreaded Tyres* (n 7) [229] – [230].

90. Similar to the [redacted] bans, a ban on [redacted] would likely raise issues of inconsistency with Article XI of the GATT, as the ban would result in a prohibition on the importation of [redacted] [redacted].[33]

91. As outlined above at para. 71, the [redacted] exception in GATT Article XX can render lawful any inconsistency.[34]

1) Is the Ban Directed at [redacted]?

92. As a complete ban on [redacted] is not a [redacted] measure, nor suggested in the [redacted], it might be argued that such a policy has a weak evidentiary basis in its contribution to [redacted]. However, while [redacted] assist in providing the evidentiary basis in demonstrating that measures have a clear bona fide [redacted] purpose, these are not critical per se in ensuring legality.

93. Bans are an example of [redacted]. It is clear that the ban is being introduced as a [redacted]. Therefore, is likely that the nexus between the measure and protection of human health is established.

2) Is the Ban Necessary to Achieve the [redacted] Objective?

94. The next issue to be determined is whether the ban is necessary to protect [redacted]. This requires the balancing of relevant factors such as the extent of contribution that the ban will have in upholding [redacted], and the trade restrictiveness of the ban. This is to be interpreted in light of the importance of the interests and values of protecting [redacted].[35] A key consideration is whether there are any less trade-restrictive measures that are 'reasonably available' and that can achieve the same level of protection of [redacted].[36]

95. A ban, by its very nature, is trade-restrictive to the highest degree. The measures here directly impact the volume of imports of [redacted] into [redacted], affecting access to markets. Indeed, the higher the trade-restrictiveness of the measure, the less likely that a measure will be considered necessary.[37] However, the greater the contribution a measure makes to the objective pursued, the more likely it is to be characterised as 'necessary'.[38] A complete ban on [redacted] would mean that [redacted] are no longer sold within [redacted], which clearly contributes to the objective of reducing [redacted] consumption to a high degree.

96. Most importantly, the WTO gives wide deference to states in setting the 'level of protection' of the relevant objective.[39] [redacted]. Where [redacted] has decided on the level of protection of [redacted] against [redacted] it wishes to effect, the WTO cannot question the appropriateness of such a chosen level of protection.[40] Rather, in determining whether a measure is overly trade-restrictive, a WTO panel may only determine whether there are reasonably available, less trade-restrictive alternative measures that achieve the *same level of protection* of [redacted] as the measure in question.

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[33] *GATT* (n 1) Article XI:1.
[34] Ibid Article XX(b).
[35] *Brazil - Retreaded Tyres'* (n 7) [156].
[36] Ibid.
[37] *Colombia-Textiles* (n 22) [5.95-5.117].
[38] *China - Publications and Audiovisual Products* (n 27) [251-253].
[39] *EC - Asbestos* (n 11) [168].
[40] Mitchell and Henckels (n **Error! Bookmark not defined.**) 134.

97. Importantly, because the level of protection set by [redacted] here is very high, there are arguably no alternative measures able to achieve the same level of protection as the ban.

98. We therefore consider that there is a strong argument that the ban is 'necessary' under Article XX(b) *GATT*.

3) Is the Ban Arbitrary or Unjustifiably Discriminatory?

99. As noted above, Article XX and its 'chapeau' impose conditions on the application of the ban itself. The ban cannot be applied in a manner that constitutes 'arbitrary or unjustifiable discrimination' between countries where the same conditions prevail, or a 'disguised restriction' on international trade.[41]

100. Here, there is no discrimination between countries. The ban would affect all [redacted] regardless of country of origin. The chapeau is unlikely to pose a problem to legal compatibility.

D) [redacted] on [redacted]

101. The proposed [redacted] system does not engage any of the provisions of the *GATT*.

II. Technical Barriers to Trade Agreement ('TBT Agreement')

102. The *TBT Agreement* obliges Parties to ensure that their 'technical regulations' are non-discriminatory and do not create unnecessary obstacles to trade. A 'technical regulation' is 'a document which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method.'[42]

103. This section analyses relevant Articles of the *TBT Agreement* which have been considered by the WTO with respect to [redacted] measures, or which may be relevant to any challenge to [redacted]' [redacted]

104.

105. regime.

A) [redacted] Regime

106. WTO jurisprudence suggests that the implementation of [redacted] measures by [redacted] would not give rise to any breach of *TBT Agreement* obligations.

107. [redacted]

Article 2.2

[41] *GATT* (n 1) Article XX.
[42] TBT Agreement (n 2) Annex 1.1.

108. [redacted]

109. [redacted]

1) Are [redacted] Measures a Technical Regulation?

110. [redacted]

2) Do the Measures Fulfil a Legitimate Objective?

111. Article 2.2 clearly establishes that one such 'legitimate objective' of a technical regulation is the 'protection of human health and safety'.[43]

112. [redacted]
113.

3) Are [redacted] Measures More Trade-Restrictive than Necessary to Fulfil the Legitimate Objective?

114. [redacted]

115. [redacted]

116. [redacted]

117. Whether something is *more* trade restrictive than necessary can be established through a comparative analysis of other possible alternative measures. If the alternative measures can be shown to be not less trade restrictive, do not make an equivalent contribution to achieving the measure, or are not 'reasonably available', then the [redacted] measures would not be more trade restrictive than necessary.

118. [redacted]

119. [redacted]

120. [redacted]

121. [redacted]

122. [redacted]

B) [redacted] Ban

123. [redacted]

124. As a threshold issue, the question arises as to [redacted] comes within the definition of a technical regulation.

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[43] TBT Agreement (n 2) art 2.2. For the full wording of Article 2.2, please see above at para. **Error! Reference source not found.**.

125. [redacted], the defining feature of a technical regulation is its 'laying down' of 'product characteristics'.[44] If a measure is simply an outright product ban without reference to any defining product characteristics, a measure is less likely to be considered a 'technical regulation'[45] and therefore would fall outside of the ambit of the TBT Agreement.

126. However, it has been argued that 'if market access for a given class of [redacted] is made *dependent* on the existence or absence of given product characteristics, then this measure constitutes a technical regulation.'[46] As such, we analyse this proposed measure for consistency with the TBT Agreement.

127. A measure which imposes a mandatory ban on the sale and importation of *certain* [redacted] if they possess the unique characteristic of being a [redacted] appears to be a measure which 'lays down' or 'prescribes' product characteristics 'with which compliance is mandatory', which would satisfy the requirements of a 'technical regulation'. The measure is 'framed negatively'; it is 'prescriptive' in the sense that it permits any [redacted] product [redacted]. Such 'negative' prescriptions have been found in the case of *EC – Asbestos* to constitute 'technical regulations'.[47] A ban on [redacted] may, on this analysis, be a technical regulation.

128. Contrastingly, a ban on [redacted] may not constitute a technical regulation following this analysis. [redacted] do not constitute a type of [redacted] with particular product characteristics in the way [redacted] do. A ban would simply deny market access to an entire class of products rather than be a measure requiring mandatory compliance with certain product characteristics or processes. It is therefore unlikely a ban on [redacted] would fall within the anticipated ambit of the TBT Agreement.

129. The imposition of a complete ban on [redacted] gives rise to considerations under two Articles of the TBT: the 'national treatment and most-favoured-nation obligations' under Article 2.1, and the 'trade-restrictiveness' obligations under Article 2.2.

Article 2.1 (Most-Favoured-Nation/National Treatment Obligations)

130. Article 2.1 of the TBT Agreement provides:

> 'Members shall ensure that in respect of technical regulations***, products imported*** from the territory of any Member shall be ***accorded treatment no less favourable than that accorded to like products of national origin*** and to like products originating in any other country.'[48]

131. [redacted] are currently not manufactured locally within [redacted], and are therefore solely 'imported' products. [redacted], by contrast, are locally manufactured by two companies within [redacted]. As such, the legality of a ban on the importation and sale of [redacted] must be assessed in light of Article 2.1 of the TBT. This Article obliges Members to ensure imported products are afforded treatment 'no less favourable' than treatment afforded to domestic products, or products imported from other countries. The analysis is conducted very similarly to the analysis of GATT Article III:4, which was discussed with respect to the [redacted] bans above at para. 50.

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[44] *TBT Agreement* (n 2) Annex 1.1.
[45] *EC – Asbestos* (n 11) [71].
[46] Ming Du, 'What is a Technical Regulation in the TBT Agreement?' (2015) 6 *European Journal of Risk Regulation* 396, 398.
[47] *EC – Asbestos* (n 11) [72].
[48] TBT Agreement (n 2) Article 2.1 (emphasis added).

132. [redacted]

1) Is the Ban a Technical Regulation?

133. In paragraph 127, we concluded that a ban on [redacted] would likely constitute a technical regulation.

2) Are [redacted] and [redacted] 'Like Products'?

134. The 'like products' analysis under the TBT is very similar to the analysis conducted under GATT Article III:4. In paragraph 62, we concluded that [redacted] are likely to be considered 'like products' to domestically manufactured [redacted].

3) Is the Treatment Accorded to [redacted] Less Favourable than that Accorded to 'Like Products' of Domestic or International Origin?

135. If the 'likeness criteria' is satisfied, Article 2.1 prohibits 'less favourable' treatment of [redacted] vis-à-vis [redacted], unless that treatment stems from a 'legitimate regulatory distinction'.[49]

136. It is likely that a ban on [redacted] would constitute less-favourable treatment when compared to the treatment given to domestically manufactured [redacted], as these remain permitted for sale and no proposal is made to restrict their presence on the market.

137. [redacted]

4) Does the Less Favourable Treatment Stem from a Legitimate Regulatory Distinction?

138. For the ban on [redacted] to be considered valid under Article 2.1, a legitimate regulatory distinction between [redacted] and domestically manufactured [redacted] must be found.

139. [redacted]

140. This interpretation may pose an issue for the proposed ban on [redacted]. In the event of a legal challenge, [redacted] would need to argue that, should the panel find that [redacted] and [redacted] were 'like', the distinction made between [redacted] and [redacted] is legitimate.

141. To overcome this hurdle, the objective of the measure must be emphasised. [redacted]

142. [redacted]

143. [redacted]

144. Finally, the regulatory distinction and the associated measures must be applied in an 'even-handed' manner and the distinction must not constitute 'arbitrary or unjustifiable discrimination'.[50] The ban would equally affect imported and any locally produced [redacted]; it would very likely be considered 'even-handed'. It is also not arbitrary or

[49] Ibid [174].
[50] *US – Clove Cigarettes* (n 14) [182].

unjustifiably discriminatory, as it seeks to implement a legitimate policy objective of preventing the future initiation of [redacted] use, a goal reflected in the [redacted].

Article 2.2

145. A challenge brought against the ban under Article 2.2 would require the consideration of three factors:

- whether the ban is a 'technical regulation';
- whether the ban fulfils a 'legitimate objective'; and
- whether the ban is 'more trade-restrictive than necessary to fulfil the legitimate objective'.[51]

146. As noted above in paras. 127–129, it is likely that the ban on [redacted] would constitute a technical regulation, whereas a ban on [redacted] would not.

1) Does the Ban on [redacted] Fulfil a Legitimate Objective?

147. Article 2.2 indicates that the protection of human health is a 'legitimate objective' for which a technical regulation may be adopted.[52] [redacted] As such, a ban on [redacted] would likely be considered to be a measure implemented with the aim of fulfilling the legitimate objective of protecting [redacted].

2) Is the Ban More Trade-Restrictive Than Necessary to Fulfil the Objective?

148. Although a complete product ban constitutes a particularly trade-restrictive measure, it is also a measure which contributes significantly to the objective of protecting human health by [redacted]. There is no more effective way of protecting human health than [redacted]. Further, the risks of non-fulfilment of the objective are [redacted].

149. The analysis conducted above at paras. 78-86 with respect to *GATT* Article III:4 is clearly analogous for the purposes of Article 2.2 and leads us to conclude that the bans would not be *more* trade-restrictive than necessary to fulfil the objective of reducing [redacted] use and [redacted] through reducing product supply.

C) Ban on [redacted]

150. As the ban does not constitute a 'technical regulation', the ban does not give rise to any considerations under the *TBT Agreement*.

D) [redacted] on [redacted]

151. As the [redacted] system does not constitute a 'technical regulation', the [redacted] system does not give rise to any considerations under the *TBT Agreement*.

III. General Agreement on Trade in Services ('GATS')

[51] Please refer above to para. **Error! Reference source not found.** for the text of Article 2.2.
[52] TBT Agreement (n 2) art 2.2.

152. The GATS was adopted to ensure that international trade law obligations extended to the service sector of the global economy.

153. Under the GATS, 'service' is defined broadly to include services in all sectors.[53] This is further clarified by the Services Sectoral Classification List (W/120) and Central Product Classification System ('CPC'), which includes services incidental to manufacturing.[54] The [redacted] companies operating in [redacted] clearly perform services incidental to manufacturing (e.g. wholesale trading, distribution). As such, it is likely that considerations under GATS may arise with respect to the measures below.

154. GATS defines trade in services as the supply of services in four modes, of which two are relevant: cross-border supply (e.g. services flowing from the territory of other WTO members to the [redacted]) and commercial presence of service suppliers of a WTO member in [redacted] (e.g. foreign entities operating in the territory of [redacted]).[55]

A) [redacted] Regime

155. The proposed [redacted] regime does not conflict with any provisions of the GATS.

B) [redacted] Ban

156. The proposed ban on [redacted] and [redacted] does not conflict with any provisions of the GATS.

C) Ban on [redacted]

157. The proposed ban on [redacted] does not conflict with any provisions of the GATS.

D) [redacted]

158. In our view, this proposal engages the GATS.[56] The proposed [redacted] is likely to affect cross-border supply of [redacted], as it will restrict the flow of services provided by a particular [redacted] company [redacted] into [redacted]. The [redacted] would also affect the supply of services arising from commercial presence of foreign [redacted] companies in [redacted].

159. The key obligations under GATS that would be engaged by the proposed [redacted] are Articles II (Most-Favoured Nation Treatment), III (Transparency), XVI (Market Access) and XVII (National Treatment).

160. Articles II and XVII enshrine the core principles of non-discrimination in trade relating to services, that of Most-Favoured Nation ('MFN') and national treatment obligations.[57] [redacted] Article III requires the prompt publication of all relevant measures and obligations which pertain to trade in services covered by GATS under an obligation of transparency.

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[53] *GATS* (n 3).
[54] *Services Sectoral Classification List*, WTO Doc MTN.GNS/W/120 (10 July 1991).
[55] Ibid.
[56] *GATS* (n 3) Article I.
[57] GATS (n 3) Article II, XVII.

161. Article XVII (national treatment) applies only to WTO members that have explicitly committed themselves to granting 'national treatment' in respect of the specific service sector concerned, listed in the Schedule of Specific Commitments. [redacted] has not made specific commitments in relation to the manufacturing, distribution, sale and import/export of [redacted]-related services.

162. Likewise, Article XVI GATS concerning market access restrictions are similarly inapplicable as they are qualified by the fact that no specific commitments relating to [redacted]-related services have been made in the Schedule of Specific Commitments.[58]

163. Nonetheless, the obligations under Articles II and Article III obligations still apply regardless of the lack of specific commitments made with regards to [redacted]-related services.[59]

Article II

164. The MFN obligation requires [redacted] to accord to service suppliers of any other WTO member treatment 'no less favourable' than it would accord to like service suppliers from any other WTO member.[60] The MFN obligation ensures that discrimination between 'like' service suppliers from different countries is prohibited, so as to ensure that equality of opportunity to supply services is afforded under international trade law, regardless of the country of origin.

165. In determining if there has been a breach of Article II, a Panel would consider:

- Whether the services are 'like services'; and
- Whether there has been less-favourable treatment afforded to service suppliers from other countries.

1) Likeness

166. The MFN obligation only applies between 'like' services and service suppliers.[61] It is likely that the services supplied by the [redacted] companies will be considered 'like' services.

167. As per the Appellate Body decision in *Argentina-Measures Relating to Trade In Goods and Services* ('*Argentina-Financial Services'*), likeness refers to the sharing of identical or similar characteristics or qualities, and can be determined on the basis of a strong competitive relationship between the services and service suppliers in question.[62] It is uncontentious that all [redacted] companies currently operating in [redacted] are providing 'like services' and are 'like service providers' as they [redacted].

2) Discrimination and 'No Less Favourable' Treatment

[58] Ibid.
[59] Ibid Article II, III.
[60] Ibid Article II.
[61] Ibid Article II:1.
[62] Appellate Body Report, *Argentina-Measures Relating to Trade In Goods and Services*, WTO Doc DS453/AB/R (14 April 2016) [6.21-6.26] ('*Argentina-Financial Services'*).

168. Discrimination under the MFN obligation in GATS Article II covers both instances of *de jure* (directly apparent from the law itself) and *de facto* (arising from actual application/effects of the law) discrimination.[63]

169. The [redacted] policy does not overtly discriminate between service suppliers based on nationality. However, there might be an instance of *de facto* discrimination. The practical effect of the [redacted] regime would result in the [redacted].

170. *Argentina-Financial Services* provides critical guidance on when a situation of discrimination might arise. The Appellate Body found that whether or not discrimination arises under Article II [redacted] on whether the measure modifies the 'conditions of competition' resulting in less favourable treatment for a supplier of a WTO member than others. This involves 'careful scrutiny of the measure' such as the design, structure and expected operation and effects of any proposed measure.[64] This analysis is to be done without consideration into the regulatory objectives or concerns, as regulatory objectives are more appropriately considered under the GATS Article XIV exemptions.[65]

171. Assuming a finding of 'likeness' is established as above, there may be arguments in favour of a finding of discrimination in breach of MFN obligations. It may be argued that conditions of competition between service suppliers would have been modified to the detriment of [redacted] in particular. The regime would offer less favourable treatment to the service suppliers of [redacted]. This effectively modifies the conditions of competition in favour of the other two companies.

Article III

172. Article III is a procedural obligation. If the [redacted] is adopted, Article III would require [redacted] to promptly publish the relevant measures.[66]

Article XIV

173. In the event inconsistency with MFN obligations is found, the [redacted] may be nevertheless be permissible under WTO law under the general exceptions in Article XIV GATS, in particular the [redacted] exception.[67]

174. The jurisprudence under Article XX GATT (see above) is relevant for the analysis of justifiability of measures under Article XIV GATS.[68] As no case has yet come before the WTO regarding the [redacted] exception in Article XIV(b) GATS, GATT jurisprudence is instructive.[69]

175. In determining whether a measure is justifiable under GATS Article XIV, a Panel would consider three elements:

- whether the proposed [redacted] designed to protect [redacted];

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[63] Appellate Body Report, *European Communities-Regime for the Importation, Sale and Distribution of Bananas*, WTO Doc WT/DS27/AB/R (9 September 1997) [231-234].
[64] *Argentina – Financial Services* (n 62) [6.127].
[65] Ibid [6.114-6.115].
[66] GATS (n 3) Article III.
[67] GATS (n 3) Article XIV(b).
[68] *US – Gambling* (n 28) [291].
[69] World Trade Organisation, 'WTO Analytical index: GATS-Article XIV (Jurisprudence)' *World Trade Organisation* (Web Page) <https://www.wto.org/english/res_e/publications_e/ai17_e/gats_art14_jur.pdf>.

- whether the proposed [redacted] necessary to promote [redacted]; and
- whether the measure is applied in an arbitrary or unjustifiably discriminatory manner (conformity with the 'chapeau').

176. In our view, issues of inconsistency arise with respect to the necessity of such a measure due to the possibility of 'reasonably available alternatives'. There is also a question whether the measure would comply with the requirements of the chapeau to Article XIV.

1) Is the [redacted] Directed at the [redacted] Objective?

177. Just as with Article XX GATT, a WTO member raising the exception would need to establish that the [redacted] regime was indeed directed at a [redacted] objective, with any analysis to focus on the design, structure and operation of the [redacted] regime.[70]

178. WTO jurisprudence consistently recognises a sovereign right of states to regulate in the interests of [redacted]. We recommend that [redacted] make the objective of this measure more explicit by enshrining the [redacted] in its [redacted] legislation, rather than implementing it only in policy and/or administrative decision-making.

179. We note that while the [redacted] addresses [redacted] (predominantly [redacted]), the [redacted] makes no reference to a [redacted] system. It is unclear whether the measures would lead to [redacted].

180. If legislation clearly establishes that the purpose of the [redacted] is to [redacted] in [redacted] by reducing the commercial operations of [redacted] consistent with the [redacted], it may be found that the [redacted] regime is indeed directed at human health.

2) Is the [redacted] Necessary to Achieve the [redacted] Objective?

181. Although [redacted] is a key aim of the [redacted], the extent of the [redacted] regime's contribution to this objective appears not to be established. Some economic modelling would ideally need to be undertaken to predict the extent to which the proposed measure would [redacted].

182. As the Appellate Body held in *Brazil - Retreaded Tyres*, it can be sufficient for a government to demonstrate that a measure is 'apt to produce a material contribution' to the achievement of the [redacted] objective due to the [redacted], which means that each individual measure should not be viewed in isolation.[71] It is arguable that, as a [redacted] measure, the [redacted] regime complements the [redacted] measures that [redacted] has already implemented or is contemplating.

183. It might be argued that the level of protection sought by [redacted] in implementing a [redacted] of [redacted] can similarly be achieved through reasonably available alternatives.[72] These include: [redacted].

184. The Appellate Body has held that any alternative measures will not be 'reasonably available' where they impose undue burdens such as prohibitive costs or substantial technical

[70] *US-Gambling* (n 28) [292].
[71] *Brazil-Retreaded Tyres* (n 7) [151].
[72] *US-Gambling* (n 28) [308].

difficulties; however, mere administrative costs or change of existing measures do not mean that an alternative is not reasonably available.[73]

185. In our view, a WTO panel may find that these alternative measures would not involve prohibitive costs or substantial technical difficulties. The [redacted]. This would achieve the same outcomes and objectives of [redacted].

186. A [redacted] may not necessarily [redacted]. The [redacted].

187. Hence, a [redacted] can more effectively achieve a reduction of [redacted] if its focus was shifted to [redacted].

188. For instance, the government could consider imposing [redacted].

189. In fact, a [redacted] would be a policy of general application that does not raise discrimination issues. Furthermore, this precludes the possibility of [redacted].

190. This proposed measure would also be consistent [redacted].

191. However, changing the focus of the [redacted] to [redacted] can raise a breach of Article XI of the GATT as it will constitute a quantitative restriction. Nonetheless, it is likely that as a policy of general application being directed to a [redacted] objective, it may be justifiable under Article XX(b) of GATT.

192. We therefore are of the view that there is a significant risk that a WTO Panel would hold that there are 'reasonably available alternative' measures that are less trade-restrictive than a [redacted].

3) Is the [redacted] Arbitrary or Unjustifiably Discriminatory?

193. In the event that [redacted] was able to establish the necessity of the measure, a further issue arises with respect to the 'chapeau' of Article XIV.[74]

194. Arguably, the application of the [redacted] could be considered to constitute an arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services.

195. The principles relating to the interpretation of the chapeau of GATT Article XX are relevant here.[75]

196. In *Brazil-Retreaded Tyres*, the analysis of 'arbitrary and unjustifiable' discrimination focuses on the cause or rationale for the discrimination and whether or not it bears a rational connection to, or would undermine, that objective.[76] In our view, the implementation of the [redacted] policy and its discriminatory effects may be argued to be justifiable and not arbitrary.

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[73] Ibid.
[74] Ibid [356].
[75] Panel Report, *European Union and Its Member States- Certain Measures Relating To The Energy Sector,* WTO Doc WT/DS476/R (10 August 2018) [7.1244] *('EU-Energy Package')*.
[76] *Brazil – Retreaded Tyres* (n 7) [226]-[228].

197. In *Brazil-Retreaded Tyres*,[77] certain treaty countries were exempt from the import ban on retreaded tyres imposed by Brazil. Similarly, in the case of *EC – Measures Prohibiting the Importation and Marketing of Seal Products* ('*EC – Seal Products*')[78] indigenous hunters were exempt from the ban on the sale of seal products. In both these cases the Appellate Body found the exemptions had no rational connection to, or undermined the [redacted] objective sought to be protected by each measure, and were thus unjustifiable. The [redacted] does not provide for any exceptions, and the above cases can therefore be distinguished. It can be argued that the [redacted], in seeking to [redacted], does have a rational connection to the [redacted] objective of [redacted]. This is because the [redacted] legislation itself has a clear, similar object of [redacted].

198. However, the Appellate Body considered that procedural fairness was a relevant consideration in whether or not a measure constituted 'arbitrary and unjustifiable' discrimination.[79] In *US-Shrimp*, the measure was found to be arbitrary and unjustifiable as it was adopted without the opportunity for input of affected entities ('*ex parte*') and no reasons were publicly provided.[80]

199. Problems hence arise if the [redacted] is not set out in legislation and is maintained as an internal government policy, due to transparency concerns regarding the decision-making process.

IV. AGREEMENT ON TRADE-RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS ('TRIPS')

200. The TRIPS Agreement seeks to protect and enforce intellectual property rights and regulates their exploitation and protection.

A) [redacted] Regime

201. [redacted]

Article [redacted]

202. [redacted]

203. [redacted]

Article [redacted]

204. [redacted]

205. [redacted]

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[77] Ibid.
[78] Appellate Body Report, *EC – Measures Prohibiting the Importation and Marketing of Seal Products*, WTO Doc WT/DS401/AB/R (22 May 2014). (*'EC – Seal Products'*).
[79] Appellate Body Report, *United States-Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc WT/DS58/AB/R (12 October 1998) [180-181] (*'US-Shrimp'*).
[80] World Trade Organisation, 'WTO Analytical index: GATS-Article XIV (Jurisprudence)' *World Trade Organisation* (Web Page) <https://www.wto.org/english/res_e/publications_e/ai17_e/gats_art14_jur.pdf> [191].

1) [redacted]

206. [redacted]

2) [redacted]

207. [redacted]

3) [redacted]

208. [redacted]

4) [redacted]

209. [redacted]

210. [redacted]

211. [redacted]

212. [redacted]

213. [redacted]

214. [redacted]

215. [redacted]

B) [redacted] Ban

216. The proposed ban on [redacted] and [redacted] does not engage any provisions under the TRIPS Agreement.

C) Ban on [redacted]

217. The proposed ban on the operation of [redacted] does not engage any provisions under the TRIPS Agreement.

D) [redacted]

218. The proposed [redacted] on the operation of [redacted] does not engage any provisions under the TRIPS Agreement.

3. INTERNATIONAL INVESTMENT LAW CONSIDERATIONS

219. [redacted]

220. This section analyses the investment law obligations to which [redacted] is party that may pose potential legal risks to the implementation of the proposed measures. The [redacted] is assessed in this section.

The [redacted]

221. [redacted] is party to the [redacted], a [redacted]. [redacted] contains an investment chapter with substantive provisions relating to, amongst other things, expropriation and fair and equitable treatment.

222. Under investment treaties, a foreign investment from one treaty party (the 'home state') that operates in another treaty party (the host state') is afforded various standards of protection.

223. [redacted] of [redacted] provides for the types of investments covered. It is likely that any investment made by a [redacted] company from another [redacted] member state, operating in [redacted], are covered under these provisions.[81]

224. We are unaware of any investments in the [redacted] industry made [redacted].

225. We note that [redacted] has no provisions for investor-state dispute settlement. Rather, [redacted] provides only for inter-state dispute settlement procedures.[82] This precludes the risk of the [redacted] bringing direct claims under the investment treaty, [redacted].

226. However, caution should be exercised. The [redacted]

227. While [redacted] firms may employ the use of state proxies in furtherance of their claims under investment treaties, there are factors militating against this. In particular, state parties are well aware of the intangible costs to diplomatic relations that can arise from engaging in state-state investment disputes.[83] Crucially, there remains the potential for reciprocity, such that states pursuing a claim today might be susceptible to other investment law claims against them in the future.[84] This acts as a filter against vexatious claims under investment treaties, typically brought under the investor-state dispute resolution framework.[85]

228. Nevertheless, it is not inconceivable that an investment claim could be brought by other state parties to [redacted], particularly if the [redacted] provides funding for these states to act as state proxies in challenging [redacted].

229. These considerations should serve as helpful long-term considerations in assessing the level of legal risk of each of these proposed measures.

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[81] *[redacted]* (n **Error! Bookmark not defined.**).
[82] Ibid.
[83] Jurgen Kurtz, 'The Merits and Limits of Comparativism: National Treatment in International investment Law and the WTO' in Stephan W. Schill (ed), *International Investment Law and Comparative Public Law* (Oxford University Press, 2010) 252-254.
[84] Ibid.
[85] Ibid.

Precedents in International Investment Law: [redacted]

230. [redacted]

231. Ultimately, while investment law decisions lack precedential value,[86] the [redacted] case should provide reassurance and guidance in interpreting the [redacted] Agreement clauses and the legality of [redacted] under the Agreement.[87] Investment tribunals look to core principles of past decisions for guidance,[88] [redacted].

A) [redacted] Regime

1) Expropriation

232. Article 13, Chapter 9 of [redacted] provides for a guarantee of protection against direct and indirect forms of expropriation, except where the expropriation is made for public purposes, is non-discriminatory, encapsulates due process measures and adequate, effective and prompt compensation is made.[89]

233. Indirect expropriation occurs where there has been 'substantial deprivation' of the value, use or enjoyment of an investment.

234. [redacted].

235. However, there is a strong case against an argument that [redacted] constitute an indirect expropriation [redacted].

236. The [redacted] measures are arguably also a [redacted].

237. Hence, it is likely to be established that there cannot be [redacted].

The Police Powers Doctrine

238. Regardless of whether [redacted] is established, it can be argued that all the measures in question are a valid exercise of [redacted] police powers and hence, cannot constitute expropriation.[90]

239. The 'police powers' doctrine recognises that measures undertaken within the sovereign right of states to regulate cannot amount to expropriation.[91] [redacted]

240. The police powers doctrine is a principle embedded in customary international law.[92] While the police powers doctrine is not expressly stated in [redacted], it may be argued [redacted] that the expropriation clause in [redacted] is to be interpreted in light of relevant rules of

[86] There is no formal doctrine of stare decisis in international law such that a tribunal is bound to follow the approach of other tribunals. This is because the system of investor-state arbitration lacks an appellate mechanism to discipline first-instance decisions or adjudicate appeals against such decisions. There is no hierarchy of tribunals in international investment law due to the ad-hoc composition of tribunal members and the choice of applicable law to a dispute as core exercises of party autonomy.

[88] Ibid.
[89] *[redacted]*
[90] Ibid [287].
[91] Ibid [290-291].
[92] Ibid [287].

international law[93] consistent with Article 31(3)(c) of the Vienna Convention of the Law on Treaties (VCLT)[94]. This includes customary international law.

241. There is significant recognition in customary international law that if a state's regulatory measures are an exercise of its police powers, it is not an indirect expropriation and compensation is not payable.[95] In order for there to be a valid exercise of police powers, [redacted] would need to establish that:

- The measures were adopted to protect public welfare;
- The measure is non-discriminatory; and
- The measure is proportionate to the objective it is meant to achieve.

i. Protection of Public Welfare

242. [redacted]

243. For the purposes of the police powers doctrine, it is not necessary to be able to decisively 'prove' the effect of individual measures in isolation. There is consistent jurisprudence and recognition of the complexities in [redacted] evidence that individual measures can act in a complementary manner and a measure's effects cannot be isolated. What is key is that a proposed regulation is a [redacted] measure that is directed to the objectives of reducing [redacted] use and 'capable of contributing' to its achievement'.

244. Here, it is important to have reference to the [redacted]. A country that implements [redacted] is likely to be found to be [redacted]. The [redacted] is thus of paramount importance in providing the legal and evidentiary basis for a country's regulatory measures, as well as establishing the reasonableness of such measures.

245. The [redacted] measures derive their basis from [redacted].

246. These measures are without doubt, able to be established as directed towards the [redacted] and undoubtedly capable of contributing to its achievement. As the [redacted], we consider that [redacted] will have no difficulty with respect to this element of the legal test, particularly in light of [redacted].

ii. Discrimination and Proportionality

247. The doctrine of police powers also suggests that a challenged measure should be proportionate to its objective.

248. The focus on proportionality lies with whether there is a 'reasonable relationship of proportionality between the means employed and the aims sought to be realised'.[96] A measure might be disproportionate if the subject bears an 'individual and excessive

[93] Ibid [290-301].
[94] *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) Art 31(3)(c).
[95] Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (Oxford University Press, 2nd ed, 2012) 120.
[96] E.g. *Azurix Corp. v The Argentine Republic (Award)* (ICSID Arbitral Tribunal, Case No ARB/01/12, 14 July 2006) [311].

burden'.[97] Proportionality analysis is used to evaluate the justifications for what would otherwise be prohibited measures.[98]

249. Other tribunals have made reference to the need for 'obvious disproportionality' in order for general regulatory measures made in the pursuance of general welfare to be challenged.[99] [redacted] Furthermore, as this standard of 'obvious disproportionality' is a relatively high threshold, measures with clear social or general welfare purposes like achieving a [redacted] objective will likely be generally accepted without any imposition of liability.[100]

250. It must be noted that the application of the proportionality test by investment tribunals remains inconsistent[101] While the 'obvious disproportionality' threshold is relatively high, inconsistency across Tribunals renders it difficult to ascertain how a tribunal might rule on the proportionality of the [redacted]. The test of proportionality involves subjective value judgements, leading to uncertainty of outcomes.[102]

251. It is possible that a Tribunal may favour the approach taken in [redacted].

252. [redacted]

253. However, this is not likely to be an issue with regard to [redacted]. The measures will likely be found not to be 'obviously disproportionate' to their stated objective, due to their strong [redacted].

254. Furthermore, a crisis of legitimacy of the current investor-state dispute resolution model and groundswell of discontent towards its skewed structures favouring investors over states may lead to a more cautious approach by Tribunal members.[103] It is likely that a Tribunal would be inclined to apply a proportionality analysis that is not overly intrusive on host state autonomy and prevents the substitution of individual Tribunals' views for that of national authorities.[104]

255. A deferential approach to the assessment of proportionality is likely to be the preferred approach. [redacted]

256. [redacted]

257. We therefore conclude that [redacted]

258. Provided that measures are shown to be suitable and necessary to attain legitimate objectives like [redacted], a tribunal is likely to defer to a government in the evaluation of the relative importance of the host states' regulatory objectives vis-a-vis their expropriatory effect.[105] [redacted] measures are hence likely to be found to be not 'obviously disproportionate'.

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[97] Ibid.
[98] Caroline Henckels, 'Indirect Expropriation and the Right to Regulate: Revisiting Proportionality Analysis and the Standard of Review in Investor-State Arbitration', (2012) 15(1) *Journal of International Economic Law* 223, 226.
[99] *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v Argentine Republic (Decision on Liability)* (ICSID Arbitral Tribunal, Case No. ARB/02/0, 3 October 2006) [189].
[100] *LG&E v Argentina* (n 99) [195].
[101] Baxter Roberts, Michael Feutrill and Kanaga Dharmananda, *A Practical Guide to Investment Treaties- Asia Pacific* (LexisNexis, 2015) 57.
[102] Henckels (n 98) 250.
[103] Tim R Samples, 'Winning and Losing in Investor-State Dispute Settlement', (2019) 56(1) *American Business Law Journal* 115, 137-140.
[104] Henckels (n 98) 239.
[105] Henckels (n 98) 253.

259. It is hence unlikely that expropriation of [redacted] investments can be established, as the [redacted] measures are likely to be found to be a valid exercise of police powers.

2) Fair and Equitable Treatment

260. [redacted] provides that [redacted] must to accord investors the 'customary international law minimum standard of treatment of aliens, including fair and equitable treatment and full protection and security'.

261. [redacted]

262. [redacted].

i. Arbitrariness

263. Arbitrariness is defined as the 'wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety'. This is a very high threshold.

264. [redacted]

265. As an evidence-based measure [redacted], the [redacted] measures seem clearly reasonable, rather than arbitrary.

266. Furthermore, as long as it can be established that there is a rational connection between the proposed measures and the [redacted] objectives they pursue, the measures will not be considered arbitrary. The [redacted] measures clearly are not arbitrary due to [redacted], establishing the rational connection.

267. [redacted]

268. The [redacted] measures are hence likely not to be found to be arbitrary.

ii. Legitimate Expectations

269. In recent years, tribunals have generally found that a claim of breach of legitimate expectations cannot be made out unless the government has made a *specific* undertaking or representation to induce the making of an investment. We recommend that the government take care not to make any such representations.

270. It might be argued that investors had a legitimate expectation that the regulatory climate in [redacted] would not change drastically, and that under the FET standard, [redacted] must provide a 'reasonably stable and predictable legal system'.[106]

271. However, tribunals have recognised that states retain the power to make general regulations in response to changing circumstances. [redacted]

272. [redacted]

273. In order to strengthen the prospects of [redacted].

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[106] Roberts, Feutrill and Dharmananda (n 101) 56-57.

274. It is hence unlikely that any of the measures will breach the FET standard relating to the legitimate expectations of investors.

275. On the whole, [redacted] measures are unlikely to trigger a breach of the [redacted] obligations that guarantee investments against expropriation or fair and equitable treatment standard.

B) [redacted] Ban

1) Expropriation

276. It could also be argued that a ban on [redacted] and [redacted] would also 'substantially deprive' the value, use and enjoyment of the [redacted] investments in [redacted] as it removes an entire class of products that the [redacted] produce from access to [redacted] market.

277. It is likely that 'substantial deprivation' may be established in the instance of the ban on [redacted], [redacted] and the operation of [redacted] in [redacted], as well as the proposed [redacted].

278. Once again, there will not be expropriation if it can be established that the [redacted] ban is a valid exercise of [redacted] police powers.

Police Powers

i. Protection of Public Welfare

279. While the [redacted] makes no reference to a [redacted].

280. Furthermore, a tribunal will generally afford deference to developing countries with limited technical and economic resources to establish conclusive scientific evidence of an evidence-based measure capable of contributing to [redacted] outcomes. [redacted]

281. A ban on [redacted] arguably has a rationale consistent with [redacted], particularly [redacted]. A prohibition on [redacted] is consistent with [redacted].

282. As there is [redacted], the question is less clear-cut. However, the [redacted] may be justified if it is framed as a [redacted] Furthermore, there is some international consensus surrounding regulation of [redacted], especially [redacted] This provides a level of justification for [redacted].

283. Despite the mixed scientific evidence, it can hence be argued that the [redacted] is indeed a regulatory measure for the bona fide purpose of protecting [redacted].

ii. Proportionality

284. A ban on [redacted] is not *obviously* disproportionate due to the importance that [redacted] places on the achievement of [redacted] as a [redacted] outcome, coupled with the fact that the ban on [redacted] is consistent with the rationale [redacted].

285. However, issues may arise as to the proportionality of a ban on [redacted], given that there is mixed scientific evidence concerning [redacted].

2) Fair and Equitable Treatment

i. Arbitrariness

286. Lastly, [redacted] it is likely that the determination of arbitrariness and reasonableness will afford a degree of deference to the appropriateness of policy measures undertaken by [redacted], particularly in the field of [redacted]. [redacted]

287. In this regard, it is highly likely that the ban on [redacted] and [redacted] can be found to have sufficient justification as [redacted].

ii. Legitimate Expectations

288. As discussed **Error! Reference source not found.**, it is highly unlikely that a ban on [redacted]/[redacted] would be in breach of the legitimate expectations of investors.

289. On the whole, no issues are likely to arise with regards to the ban on [redacted]. However, due to the mixed scientific evidence behind the regulation of [redacted], potential issues concerning the proportionality of the ban on [redacted] are to be taken note of.

C) Ban on [redacted]

1) Expropriation

290. Assuming that [redacted] is in force and that an investor from [redacted] has made an investment in [redacted] in [redacted], the proposed ban on [redacted] could be argued to be depriving the investment of any effective utility or benefits that they had expected from their investments. The [redacted] are no longer in control of commercial activities relating to [redacted] in [redacted] due to [redacted].

291. Once again, there will not be expropriation if it can be established that the ban is a valid exercise of [redacted] police powers.

Valid Exercise of Police Powers?

i. Protection of Public Welfare

292. It may be argued that the ban on [redacted] is implemented with the intention of regulating [redacted]. This is a rationale consistent with [redacted], in particular, [redacted]. The ban is 'capable of contributing to' [redacted] and achievement of [redacted] outcomes, as considered above in the international trade law analysis.

ii. Proportionality

293. As above in paragraph 248, a measure will be disproportionate if the subject bears an 'individual and excessive burden'.

294. While [redacted] may argue that the ban imposes an excessive burden in restricting their market access and operations in [redacted], it might be argued that these companies do not bear an individual burden as the measures are general in nature.

295. It is hence unlikely that the ban on [redacted] constitutes expropriation due to such a measure being likely to be found to be a valid exercise of police powers.

2) Fair and Equitable Treatment

i. Arbitrariness

296. As above in paragraph 263, the measures will not be considered arbitrary if it can be established that there is a rational connection between the proposed measures and the [redacted] objective. As the ban on [redacted] has a rationale consistent with the [redacted], the proposed ban appears clearly reasonable than arbitrary.

297. Lastly, as established, a tribunal will likely afford a degree of deference to the appropriateness of policy measures in the field of [redacted]. Measures are unlikely to be found to be arbitrary unless there is a 'manifest lack of reasons for the legislation'. It is likely the ban on [redacted] may still be found to be rational and not arbitrary.

298. Furthermore, a ban might be a novel measure well in advance of international practice. However, because it is arguably rational and not discriminatory, it will likely not breach the FET standard.

ii. Legitimate Expectations

299. As elaborated **Error! Reference source not found.** , in our view it cannot be established that the ban on [redacted] triggers a breach of the legitimate expectations of investors.

300. On the whole, no issues are likely to arise with the ban on [redacted] with regards to expropriation and the fair and equitable treatment standard.

D) [redacted]

1) Expropriation

301. Similarly, excluding a [redacted] under the proposed [redacted] can also be argued to be a 'substantial deprivation'.

302. If the [redacted] precludes a [redacted], it would arguably amount to a 'total and permanent deprivation' of the investment.[107] Under the current regime, [redacted].

303. Likewise, there will not be expropriation if it can be established that the [redacted] is a valid exercise of [redacted] police powers.

Police Powers?

[107] *Wena Hotels Ltd v Arab Republic of Egypt* (Award) (ICSID Arbitral Tribunal, Case No. ARB/98/4, 8 December 2000) [99].

i. Protection of Public Welfare

304. Like the arguments raised with regards to the ban on [redacted] above, the proposed [redacted] can similarly also be argued to be capable of contributing to the [redacted] objective.

ii. Proportionality

305. One might argue that the [redacted] regime is disproportionate, because the [redacted] may essentially serve the same purposes and achieve the same outcomes as a [redacted].

306. The effects of the proposed [redacted] are arguably tantamount to de facto discrimination. As discussed above, discrimination will mean that there no valid exercise of police powers can be established. We therefore are of the view that (based on the assumptions stated in [redacted] above), there is a significant risk that this measure would be held to be an expropriation, requiring the payment of compensation.

2) Fair and Equitable Treatment

i. Arbitrariness

307. Unlike the other proposed measures, the [redacted] might be found to have a 'manifest lack of reasons' due to its lack of substantive justification in scientific evidence and a lack of utility vis-à-vis the [redacted] .

308. Furthermore, its de facto discriminatory effect may further incline a tribunal towards a finding of breach of the FET standard, as discussed above.

ii. Legitimate Expectations

309. As elaborated **Error! Reference source not found.** , we do not think that it can be established that the [redacted] triggers a breach of the legitimate expectations of investors.

310. In summary, the [redacted] lacks a strong evidentiary justification and amounts to de facto discrimination. We consider that a tribunal may find that the measure constitutes expropriation and breaches the fair and equitable treatment standard. We recommend that [redacted] government exercise caution in considering whether to enact this regime.

4. DOMESTIC LAW CONSIDERATIONS

This section analyses considerations that may arise under the domestic law of [redacted] in relation to the proposed measures. These include:

- [redacted] of the Constitution of [redacted];
- [redacted] of the Constitution of [redacted] [redacted];
- [redacted] of the Constitution of [redacted] [redacted]; and
- Various considerations under administrative law.

A) [redacted] Regime

I. BACKGROUND

311. [redacted]

312. [redacted]

[redacted]

II. DOMESTIC CHALLENGES IN OTHER JURISDICTIONS

Domestic Challenges in [redacted]

313. [redacted]

314. [redacted]

315. [redacted]

Domestic Challenges in [redacted]

316. [redacted]

317. [redacted]

318. [redacted]

319. [redacted]

III. DOMESTIC CHALLENGES UNDER [REDACTED] DOMESTIC LAW

Constitution - [redacted]

320. [redacted] of [redacted] Constitution provides[redacted]. It reads:

[redacted]

321. If [redacted] is implemented, there is potential for an affected party to make a claim under this section. To show that the [redacted] measures are constitutionally valid the courts will have to consider whether:

[redacted]

1) [redacted]

322. [redacted]

2) [redacted]

323. Next, it must be determined if [redacted]

324. There is limited case law in [redacted] surrounding the interpretation of [redacted].

325. [redacted]

326. [redacted]

327. [redacted]

328. [redacted]

329. In our view it is unlikely that [redacted] would be regarded as [redacted] under [redacted] Constitution, and therefore [redacted] will not be enlivened.

330. Nevertheless, we address whether [redacted].

3) Is There [redacted]?

331. [redacted]

332. [redacted]

4) [redacted]

333. [redacted]

334. [redacted]

335. [redacted]

336. [redacted]

5) [redacted]

337. [redacted]

338. [redacted]

[redacted] of the Constitution

339. Furthermore, a claim may be raised under section [redacted] of the Constitution, which [redacted]

340. [redacted]

341. [redacted]

342. [redacted]

343. [redacted]

344. [redacted]

Summary

345. Due to [redacted], it is difficult to determine how the courts would decide a constitutional challenge against [redacted]. Nevertheless, [redacted].

346. [redacted]

B) redacted] Ban

347. The proposed ban on [redacted] and [redacted] does not give rise to any issues under the existing domestic law of [redacted].

C) [redacted]

I. Constitutional Challenges

The introduction of a [redacted] raises questions about whether this would constitute a breach of [redacted] of the Constitution. [redacted]

1) [redacted]

348. [redacted]

349. [redacted]

350. [redacted]

351. [redacted]

2) [redacted]

352. [redacted]

3) [redacted]

353. [redacted].

354. [redacted]

355. [redacted]

4) [redacted]

356. [redacted]

357. [redacted]

5) Access to the [redacted] Court

358. As discussed in [redacted], the [redacted] and the [redacted] must be effected by legislation that provides a right of access to the [redacted] Court to [redacted]

[redacted] of the Constitution

359. A claim under section [redacted] of the Constitution against the [redacted] may be raised.

360. [redacted]

361. [redacted]

II. ADMINISTRATIVE CHALLENGES

362. 'Judicial review' is the term used to describe the inherent powers of the superior courts to determine the validity of administrative decisions. These powers are set out in [redacted] A claimant can make a claim to the [redacted] Court for a 'mandatory order' (formally known as mandamus), a 'prohibiting order' (formally known as prohibition) or 'quashing order' (formally known as certiorari).

363. A [redacted] may be entitled to seek judicial review if the [redacted] makes a decision to [redacted].

1) Beyond the scope of power – *ultra vires*

364. [redacted] government and its officers cannot do anything they are not authorised by statute to do.[108] Therefore, the questions arise whether [redacted] would be considered beyond the legal authority (*ultra vires*) of the [redacted]. Whether a [redacted] is *ultra vires* will be determined by the power and language of the [redacted]. If the decision is ultra vires, a [redacted] will seek a quashing order, which nullifies the decision.

365. The purpose of the *[redacted] Act* is to [redacted]. As part of the regulation of the [redacted].

366. Section [redacted] of the [redacted] lists several factors that the [redacted].

367. [redacted]

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[108] *Entick v Carrington* [1765] EWHC KB J98.

2) Refusal to perform a public duty - fettering discretion

368. If a decision maker is given the power under statute to use their discretion to make a decision, this discretion must be exercised. [redacted].

369. A [redacted] may argue that by [redacted] the [redacted] has failed to exercise discretion through an inflexible application of policy. While a government authority is able to establish internal policies, this policy cannot strictly confine the exercise of discretion, and the decision should be based on the merits of the case.

370. If a [redacted], This would likely amount to a fettering of discretion.[109]

371. If the [redacted] is merely an internal policy, then grounds of judicial review may arise against [redacted] as *ultra vires* or a fettering of discretion. It may be desirable to implement the [redacted] through legislation to overcome these challenges.

D) Ban on [redacted]

I. Constitutional Challenges

372. A [redacted] may argue that a ban is a breach of [redacted] of the Constitution, as their [redacted].

373. The same considerations of the discussion under [redacted].

[109] Ibid per Lord Reed.

5. CONCLUSION

374. First, this memo examined the legal challenges that may arise if [redacted] implements a [redacted]. We concluded that the measures were unlikely to contravene Article 2.2 of the TBT Agreement, as the technical regulations imposed by [redacted] are necessary to fulfil the legitimate [redacted] objective of [redacted]. Moreover, we do not believe the measure contravenes [redacted] of the TRIPS Agreement [redacted].

375. The [redacted] measures were also considered under the investment law obligations, of expropriation and fair and equitable treatment, in [redacted]. Since there is no [redacted], and the measure is a valid exercise of police powers, there is no expropriation. We also do not believe there is a breach of the fair and equitable treatment standard as [redacted] is not arbitrary and unreasonable due [redacted] and its contribution to [redacted]. Furthermore, [redacted], it cannot be a legitimate expectation that measures like [redacted] would not be implemented.

376. This memo also considered whether [redacted] breaches [redacted]. We believe that the [redacted].

377. Secondly, this memo examined the legal challenges that may arise if [redacted] were to implement [redacted] and [redacted]. The proposed [redacted] were first assessed through the lens of international trade law, where it was found that legal challenges may arise by virtue of [redacted] obligations under Articles XI:1 and III:4 of the GATT, and Articles 2.1 and 2.2 of the TBT Agreement. Our analysis has led us to conclude that though the [redacted] would likely constitute *prima facie* breaches of Article XI:1 and III:4 of the GATT, they would be justifiable under Article XX(b) as measures directed at, and which make a material contribution to, the protection of [redacted] from [redacted].

378. We then considered the proposed bans in light of the international investment law obligations of expropriation and fair and equitable treatment arising under [redacted]. We concluded that though the bans would likely constitute a *prima facie* example of expropriation, they would likely be justifiable under the 'police powers' doctrine as measures instituted to protect public welfare. However, caution is advised with respect to the [redacted] ban, as it is underpinned by significantly less scientific evidence than a ban on [redacted] or other [redacted] and may be considered disproportionate. We conclude that bans also give rise to no concerns under the fair and equitable treatment standard.

379. Finally, this memo considered in detail the legal controversies that could arise with regards to the proposed ban on [redacted]. The ban was analysed under the framework of the GATT. While the ban prima facie breaches Article XI:1 of GATT as a quantitative restriction, we concluded that any breach could likely be justified under the exception in Article XX(b), despite its trade-restrictiveness.

380. Next, we analysed the obligations of protection against expropriation and the fair and equitable treatment standard under the [redacted] Agreement. Ultimately, because of the highly state-deferential approach to proportionality and arbitrariness likely to be taken by investment tribunals today, it is likely that the ban would be consistent with [redacted] obligations under international investment law.

381. Finally, as part of the ban, the [redacted].

382. This memo also analysed the proposed [redacted]. Having regard to [redacted] relevant obligations under the GATS, several issues arise. In particular, the *de facto* discriminatory effect from the application of the policy may breach most-favoured nation obligations under Article 2. While Article 14 serves as a potential avenue to justify such a breach on [redacted] grounds, it is asserted that the presence of other 'reasonably available' measures that are less trade-restrictive and achieve similar [redacted] outcomes means that the Article 14 exception is unlikely to be established. Furthermore, the discriminatory effect could also reinforce the fact that the measures constitute 'arbitrary and unjustifiable' discrimination.

383. Numerous issues also arise under [redacted] international investment law obligations in [redacted]. The discriminatory effect of the [redacted] would mean that both the guarantees against expropriation and fair and equitable treatment standard obligation will likely be breached.

384. As with the domestic constitutional challenges discussed in relation to the ban, it is unlikely that the [redacted] will be found to contravene [redacted] Constitution. Lastly, the proposed [redacted] could be subject to a judicial review challenge. This could be potentially on the grounds of the [redacted] acting ultra vires, or impermissibly fettering his/her discretion. Nonetheless, these controversies can easily be overcome by ensuring that the [redacted] is implemented through legislation rather than merely retaining it as an internal government policy.