

4.2 SCARE TACTIC C: COURT AND LEGAL CHALLENGES

4.2.1 INTRODUCTION

The tobacco industry views well-designed and significant tax increases as a threat to the profit, growth and long-term sustainability of its business. As noted by PMI in 1985:

Of all the concerns there is one – taxation – that alarms us the most. While [other restrictions] ... do depress volume, in our experience taxation depresses it much more severely (44).

The industry is, however, less likely to launch direct legal challenges to excise taxes than to other tobacco control measures (see Box 4.2.1 for details), because taxation – and excise tax in particular – is a comparatively well-established regulatory measure; in many jurisdictions, taxes have been levied on tobacco products for more than a century. There is also less unanimity in opposition to taxes among tobacco industry actors, because differences in the market position of different tobacco companies affect their interests in tax policy. This, in turn, decreases the likelihood that they will act collectively on the issue (45). BAT's stated strategy in the early 1990s was

to influence governments with regard to the level and structure of tobacco taxation in order to promote market growth and to secure competitive advantage (46).

Nevertheless, tobacco industry actors will still legally challenge, or at least legally threaten, significant tax measures when vulnerabilities in their design, adoption or implementation are apparent.

Box 4.2.1 Court and legal challenges to tobacco tax measures

Evidence suggests that the tobacco industry and its allies instigate fewer legal actions against tax measures than against other tobacco control measures:

1. The Campaign for Tobacco-Free Kids' tobacco control laws database contains only a handful of cases concerning tobacco tax measures, but hundreds on other tobacco control topics. This pattern can also be seen in a 2018 review of tobacco control legal challenges that examined this and two other databases to select 96 cases relevant to the question of the WHO FCTC's usefulness in litigation (47). Only 6 of these 96 cases were challenges related to tax measures.

2. A 2013 systematic review of empirical studies on tobacco industry interference with tobacco tax policy found that only 9 of 36 relevant articles reported the specific use of litigation as a tobacco industry tactic (1). All 9 concerned constitutional challenges to earmarking provisions for tobacco tax initiatives in the United States (1).
3. A 2015 study on industry interference in LMICs cited legal challenges to tobacco control measures in 15 countries as examples of industry interference, but none of the challenges concerned a tobacco tax measure (48).
4. A 2016 analysis of papers published in systematic reviews of industry interference with tax and marketing measures found that only 5 of 65 papers concerning tobacco tax related to the use of litigation or threats of litigation to interfere with tobacco tax measures (49).

The tobacco industry makes extensive use of legal experts (1, 50–52) who study all relevant laws and regulations closely to determine their likely and arguable boundaries for the purpose of manipulating regulations and regulators (1, 50–52). Based on this expert advice, tobacco companies know when regulations remain within the bounds of both international and domestic obligations but can still argue that legally permissible tobacco control measures would be defeated in litigation if passed (48, 51–52). As the threat of a legal challenge alone can be used to the industry's advantage, recourse to litigation is seldom needed or desirable (1, 45, 48, 51, 53–56). Even when litigation is launched, the objective may be to delay or weaken a measure rather than to win on the merits of the case (1, 45, 48, 53). To counter actual and threatened legal challenges, policy-makers need to be aware of relevant legal obligations when preparing and implementing tobacco control measures. Fortunately, the tobacco industry playbook is relatively predictable. Tax and other tobacco control measures can thus be designed to strengthen the regulators' legal position against genuine threats and enable them to dismiss baseless industry threats.

4.2.2 COUNTRY EXPERIENCES WITH LEGAL CHALLENGES TO TOBACCO TAXATION

Legal obligations that are relevant to tobacco taxation include those under domestic law and international instruments such as international trade agreements and international investment agreements (IIAs).¹⁷ Some of the legal issues that a tax measure may encounter are outlined in Table 4.6. Case studies from various countries illustrate how these legal issues have and have not been avoided in the

17 Relevant international trade agreements include the WTO Agreement and custom unions such as the EU, the East African Customs Union and Mercosur. Relevant IIAs include bilateral investment treaties and the investment chapters in free trade agreements and within custom unions.

passage, design and implementation of tobacco taxes. These issues are not the norm, however, and should not give rise to undue apprehension. The case studies are rated as positive, mixed or negative based on the extent to which the legal decision upheld the taxation measure in question.

Table 4.6 Potential legal issues for tobacco tax measures

VULNERABILITIES	LEGAL OBLIGATIONS	CASE STUDIES
Inadequate consultation and other procedural vulnerabilities	Domestic procedural law	1, 2
	Due process protections for investors under IIAs	None
	Procedural requirements under WTO Agreements and Custom Unions	3
Discrimination against imports or investors	Nondiscrimination obligations under WTO Agreements and Customs Unions	8, 9, 10
	Nondiscrimination obligations under IIAs	11
Investment incentives or inducements	Arbitration mechanisms under investor-state contracts	12
	Fair and equitable treatment clauses of IIAs	None
Other substantive breaches	Constitutional rights and restrictions on taxation	4
	Statutory restrictions on the imposition of taxation	6
	Expropriation clauses of IIAs	5
	Ultra vires (the scope of legal authority)	7

Avoiding procedural vulnerabilities in tax laws

Procedural defects can be avoided by taking great care in progressing and implementing regulatory or legislative provisions. Procedural concerns pose a dilemma for tobacco control regulators. Article 5.3 of the WHO FCTC and the COP guidelines for its implementation state that policy-makers and regulators should interact with the tobacco industry only when and to the extent strictly necessary (57). For taxation measures, interaction might be necessary because consultative and deliberative processes could be prescribed under domestic constitutional provisions and procedures for good governance, due process requirements of IIAs and some international trade agreements. The tobacco industry may use these requirements as leverage to delay, distort or hijack the rule-making process in contravention of Article 5.3. Accordingly, interactions with the tobacco industry should be limited to strictly necessary consultation conducted in a transparent or public manner but with care that this does not come at the expense of a measure's defensibility. The proper balance will depend on the jurisdiction in question, since constitutional, statutory and applicable international legal obligations vary.

CASE STUDY 1 (MIXED):**Industry manipulation of legislative procedures**

In 2012, a bill stipulating, among other things, the creation of a new specific excise tax on cigarettes passed its final reading in Costa Rica’s Legislative Assembly. Passage of the bill had, however, proceeded under “urgency” and notwithstanding a pending constitutional enquiry (a constitutional query is meant to prevent passage of a bill).¹⁸

ISSUE	MAJORITY DECISION	MINORITY DECISION	LESSON
Whether the court could consider the enquiry despite passage of the bill and the effect the bill’s passage could have despite the enquiry.	The enquiry was taken up by the Supreme Court’s Constitutional Division’s majority (58). The signing and publication of the bill by the executive was suspended by the Constitutional Division pending their decision on the merits of the case – which, in the end, found any question of the bill’s constitutionality baseless (58).	The enquiry was inadmissible by reason of having been filed too late and notice of its filing having not been received by the legislature prior to the reading of the bill (58). In disagreement with the majority, the minority held that the court could not consider the enquiry or suspend the bill’s signing by the executive – the final step in becoming law.	This challenge demonstrates how the tobacco industry’s defenders may attempt to frustrate and impede a tax measure’s passage. In this case, the challenge seemed to have been a delaying tactic, as it was posted on the same day as the final reading of the bill. Its authors may have either wanted its pending nature to cause the legislature to delay or, as occurred, to create conditions for a procedural and constitutional challenge in the absence of delay. All the grounds of the challenge itself were found to be without merit. Although such frivolous challenges cannot be prevented, they can and should be anticipated to ensure that they do not lead to a tax measure’s defeat.

18 “Urgency” is a procedure under which a bill is progressed through a legislature in an expedited fashion.

CASE STUDY 2 (POSITIVE):**Adhering to domestic procedural requirements**

Kenya's tobacco control regulations required the tobacco industry to pay a levy to compensate the state for health care and other negative externalities of smoking. In a 2016 challenge brought against these regulations, the plaintiff, BAT, was unsuccessful on every count (59–60). Even though the levy was not considered a tax measure by the court, the case study is instructive on how regulators may safeguard tax measures against procedural challenges.

ISSUES	LAWS AND ARGUMENTS	DECISIONS	LESSONS
Whether the government's consultations on the measure were adequate.	Asserting that the Constitution and the Statutory Instruments Act together meant that "appropriate consultations with persons who are likely to be affected" were required because of the measure's likely substantial effect on business. BAT claimed that this standard was not met. Kenya's government claimed that it was under no obligation to undertake special or extensive consultation with the tobacco industry.	The judge found in favour of Kenya's government, noting that (1) the requirement to consult does not imply that any particular view needs to prevail; (2) dissatisfaction with the level of consultation is not decisive; (3) on the facts, industry was allowed, and often invited, to send representatives to all relevant public consultative meetings and parliamentary committee hearings; and (4) consultation on the regulations was adequate (59).	The tobacco industry carefully scrutinizes legislative and regulatory processes for defects. In this case, Kenyan government officials appropriately distanced themselves from the tobacco industry by not permitting its representatives special consideration but did permit their attendance at public meetings and the ability to submit their views under usual procedures. In this way, both the principles behind WHO FCTC Article 5.3 and the requirement for consultation under Kenyan law were observed.

Avoiding procedural issues in tax administration

CASE STUDY 3 (NEGATIVE):

Contravening procedural requirements in international obligations

In 2010, a WTO panel held that Thailand violated the Customs Valuation Agreement (CVA) by the process it used to value cigarettes that Phillip Morris (PM) Thailand imported into the country from a related party, PM Philippines. Customs values are important as they are the tax base for tariffs and can feed into the base for other taxes levied against the value of the good, such as ad valorem excise taxes and VAT. Transaction values declared by PM Thailand were rejected by Thai tax authorities as influenced by the relationship between the parties and a customs value determined by deduction was substituted (61).

ISSUE	LEGAL OBLIGATION	DECISION	LESSONS
Whether Thailand adequately consulted with PM Philippines before rejecting its declared transaction value (61).	The CVA requires good faith exchange of reasons and information, with opportunities for response (61).	Thailand had failed to properly explain its reasons for rejecting the transaction value, as well as its belief that price was influenced by the relationship between the two parties (61). This was a violation of the CVA. Thailand did not appeal these findings.	Thailand's authorities needed to take greater care in their dealings with the tobacco industry to ensure they met the pertinent procedural obligations. In this instance, a specific and high standard of consultation – the provision of detailed reasons and an opportunity for response – was prescribed by the CVA and Thailand failed to meet it.

Ensuring compliance with substantive requirements

Rules found in domestic and international law also establish substantive obligations. This subsection focuses on substantive obligations found in domestic law. International obligations concerning discrimination and investment incentives are considered in the next subsections.

CASE STUDY 4 (POSITIVE):

Tax measure found to be consistent with the Constitution

The Chilean government introduced a substantial increase in tobacco and fuel excise, and in 1995, a coalition of taxpayers brought a Constitutional challenge to the measure (62).

ISSUE	DECISION	LESSON
Whether the tax was, per article 19 of the Chilean Constitution, "obviously disproportionate or unjust" (62).	The excise tax increase did not violate the Constitution, as it was neither confiscatory nor manifestly irrational.	Generally applicable excise taxes are not vulnerable to challenges for being excessive, unfair or disproportionate.

CASE STUDY 5 (POSITIVE):

Failure to grant tax rebates not an expropriation under an IIA

This case study is an example of a claim for breach of an expropriation clause in an investment treaty. Such clauses protect foreign investors against measures that can be construed as directly or indirectly seizing an investment or depriving it of its value (63). In the case, an investor was, for more than a decade, denied tax rebates by the Mexican government. This affected the profitability of the business of purchasing and reselling Mexican cigarettes abroad, and the investor brought the claim to an investment agreement arbitral tribunal in 2002 (64).

ISSUE	DECISION	LESSONS
Whether Mexico's failure to grant rebates to the investor exceeded the bounds of valid regulation to constitute indirect expropriation of the investor's investment (65).	There was no expropriation. The arbitral tribunal noted that not all business problems are violations: the investor had no right to participate in the "grey market" export of cigarettes and there were sound reasons to restrict that market (65). Further, the investor was able to participate in other business ventures and actually continued to have business success (65).	Claims of indirect expropriation made under IIAs are unlikely to be successful, as generally applicable tax measures are a legitimate form of regulation. A mere loss of profit will not suffice. Claims of expropriation will not succeed unless a substantial or significant deprivation of the investment results.

CASE STUDY 6 (NEGATIVE):**A regulation contrary to superior domestic legislation**

In 2011, an Indonesian tobacco industry association group, FORMASI, challenged a new excise regulation. Since 2009, the government had been implementing a tiered specific excise tax system based on a set of characteristics (size of production, type of cigarettes and price levels). In 2011, excise rates were increased in nearly all of the 19 tiers, but the reference prices were not accordingly adjusted. This gave rise to a legal issue.

ISSUE	DECISION	LESSONS
Whether new excise regulations breached a 57% ceiling for the rate of excise on the retail sale price of tobacco products under the superior Excise Law (66–70). The challenge specified that excise exceeded this ceiling for hand-rolled domestic clove cigarettes (kreteks) (68, 71).	The Court found in favour of the tobacco industry association, and the government was required to immediately revoke the 2011 regulation. (69–70).	It is advisable to stay within the rules and be aware of legal hierarchies – including superior domestic legislation. The tobacco industry scrutinizes all increases in tobacco taxes. In this case, a breach of a legislative requirement for a single category of tobacco product resulted in Indonesia suffering lost revenue and a setback in its efforts to reduce tobacco consumption.

Ensuring a tax measure is within an authority's legal power

A tax measure is *ultra vires* when it goes beyond the legal power of the enacting body. As with case study 6, this is a legal issue that involves legal hierarchies. In *ultra vires* cases, however, instead of centring on conflict between inferior and superior law, the issue is whether an authority that enacts a tax measure is authorized to do so. This issue may arise when a tax measure is enacted by a subnational jurisdiction or by an executive acting under a statutory delegation.

CASE STUDY 7 (NEGATIVE):**Tobacco taxation contrary to the Australian Constitution**

ISSUE	DECISION	LESSONS
Whether New South Wales' licensing and penalty fees regime constituted an excise tax by other means contrary to the Australian Constitution's exclusive grant of that power to the federal government (72).	The court found that state licensing fees were excise taxes and that this was contrary to the Australian Constitution (72).	Authorities enacting tobacco tax measures must act within the scope of their legal power.

Avoiding discrimination against imports and foreign investments

Although inherently discriminatory, customs duties may be used subject to the agreed upper limits in a country's trade agreements. Excise and other taxes designed with the aim of raising tobacco prices to reduce demand and advance human health should be origin-neutral: they should not seek to tax local products less than foreign products or aim to treat foreign products differently from one another. Tobacco tax measures are pursuing objectives other than health when they aim to raise the price of imports more than that of local products or seek to burden favoured market participants less than others. Solely health-protective tobacco taxes will not ordinarily violate Articles III:2 and I:1 of the GATT (the WTO's General Agreement on Tariffs and Trade), which prohibit discriminatory taxation (in light of general exceptions). Nor will solely health-protective tobacco taxes directly violate anti-discrimination protections for investors found in the national-treatment (NT), most-favoured-nation (MFN), expropriation and fair-and-equitable-treatment (FET) clauses of IIAs (63, 73–74). It is possible to make claims for breach of international obligations on grounds other than discrimination, but such claims are generally highly unlikely to succeed.

CASE STUDY 8 (NEGATIVE):

BAT v Uganda (2017 East African Court of Justice)

DISCRIMINATION	LESSON
Uganda established a higher level of excise taxes on imported cigarettes – including those from Partner states of the East African Customs Union (75) – than on local cigarettes. Its implementation was discrimination contrary to Article 15 of the Customs Union Protocol (75).	Differential taxation explicitly based on origin can be construed as protectionist discrimination in violation of international obligations. The tobacco industry can also turn to international trade agreements outside of the WTO – in particular, customs union mechanisms.

Difficulties arise when ostensibly origin-neutral and health-protective tobacco taxes result in dissimilar taxation of tobacco products (73). Discrimination does not exist simply because there is dissimilar taxation – the taxation must adversely impact imported goods more than local products, the imports of one nation more than another or a particular investor's products more than comparable products. Where dissimilar taxation between product categories results in discrimination, the tax will ordinarily still be lawful if the dissimilar taxation is based solely on a legitimate regulatory distinction between the product categories in question.¹⁹

¹⁹ The precise applicable rules vary depending on the nature of the legal obligations in question. Under the GATT, dissimilar taxation of like or directly competitive products can be justified based on scientifically grounded distinctions between products under Article III:2 and, in the alternative, discrimination that is necessary under the explicit carve-out for health-protective measures, Article XX(b) (73). For the MFN and NT clauses of IIAs, differential taxation can be argued as nondiscriminatory on the basis that difference in harm means the products are not "alike" or, in the alternative, discrimination is justified based on scientific evidence of differences in harm and rational reasons for the health-protective role of differential taxation (63).

Where discrimination is inadvertent, lack of an intention to discriminate is not sufficient as a defence for breach of obligations under IIAs or the GATT (73, 76). Policy-makers should carefully scrutinize measures to determine:

1. whether an aspect of a tax measure's design or implementation may be more to the detriment of imports or foreign investors than of local products or domestic investors;
2. whether the potentially discriminatory aspect of the tax measure serves any useful purpose in supporting the tax measure (i.e. it is needed to achieve the health goal);
3. whether there is any reasonable alternative that could achieve the same effect without the potential for discrimination; (i.e. it is indispensable) and
4. when it is needed and indispensable there is a good chance that it will be defensible.

The case studies below provide examples of discrimination arising in connection with a tobacco tax measure.

CASE STUDY 9 (NEGATIVE):

Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines (2010 WTO panel)

The facts of this case are presented in case study 3. This case study examines claims of discrimination rather than the procedural issues.

DISCRIMINATION	EXPLANATION	LESSONS
Thailand implemented its policy for determining the tax base for VAT on cigarettes inconsistently (61).	Thailand applied a methodology in fixing the tax base, in particular a marketing cost component, of imported cigarettes that differed from that for local products (61). This resulted in the marketing cost component for the imported cigarettes being higher than it would have been under the general methodology. This difference in treatment was insufficiently justified and therefore considered discriminatory.	As there is potential for inadvertent discrimination when the base for an ad valorem tax is fixed, tax base determinations must be consistent and well-reasoned (61). This case study demonstrates how policy-makers need to take care in designing and implementing ad valorem taxes to ensure they are nondiscriminatory and legally defensible.

<p>Thailand's VAT rebate policy imposed a potentially higher tax burden and also created more burdensome administrative requirements for imported cigarettes (61).</p>	<p>Resellers of cigarettes produced by a government entity were granted an exemption from VAT (61). Although resellers of imported cigarettes would be eligible for a tax credit on their VAT, this was not an automatic process (61). The distinct treatment of resellers of imported cigarettes and those of local cigarettes resulted in the risk that there would be a higher VAT burden for the former (61). The distinct treatment also imposed an additional administrative burden on resellers of imported cigarettes and altered conditions of competition (61).</p>	<p>Rules for the collection and enforcement of tax obligations should be the same, or as similar as practicable, in both form and effect for domestic and imported tobacco products.</p>
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CASE STUDY 10 (NEGATIVE):

Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes (2004 WTO panel; 2005 WTO Appellate Body)

Under article XX(d) of the GATT, discrimination that is necessary to secure compliance with a legitimate tax measure will be justified provided there is no less-discriminatory alternative. In this case, this justification was used unsuccessfully.

DISCRIMINATION	EXPLANATION	LESSONS
<p>The Dominican Republic's tax stamp regulations were discriminatory towards imported goods (77). Under the regulations, all cigarette packs had to be affixed with tax stamps, but imported cigarettes were to be affixed with tax stamps under the supervision of local tax authorities following importation, while locally manufactured cigarettes could be affixed with a tax stamp in the course of production.</p>	<p>This de facto distinction between local and imported products modified the conditions of competition to the detriment of imported cigarettes by (1) increasing costs for importers and (2) impairing the aesthetics of imported products (77). The panel did not consider this discrimination justified: it was not necessary for the enforcement of tax measures, because less restrictive alternatives were available such as permitting importers to affix tax stamps during the course of production (Dominican Republic – measures affecting) (77). The panel's findings were upheld on appeal (78).</p>	<p>Policies crafted to ensure compliance with tax measures need to also be nondiscriminatory. Discrimination claims can arise when compliance costs are higher for imports than for local products and this de facto distinction is avoidable. It is important to consider whether less burdensome alternatives may achieve the same objective.</p>

CASE STUDY 11 (NEGATIVE):***Feldman Karpa v Mexico* (2002 ICSID [International Centre for Settlement of Investment Disputes] Arbitral Tribunal)**

Arbitral tribunals have accepted differences in treatment accorded to investors protected by IIAs when there is a legitimate connection between the distinctions drawn and public welfare objectives (76). The facts of this case are presented in case study 5. This case study examines aspects of the case involving the investor's claim of discrimination, rather than the substantive issue of expropriation. Claims of discrimination are made on different grounds than claims for expropriation, which is why the case was decided differently on this claim.

DISCRIMINATION	LESSONS
Denial of foreign investors' claims for tax rebates. Tax rebate claims were granted to similar local investors (65), which was a violation of an IIA's national treatment clause (65).	Foreign and local investors must be treated similarly, and consistent and well-documented policies must be used to guide administrative decisions. The denial of the rebates may have been justified, but the government was unable to establish this due to a lack of documentation.

Avoiding the investment incentives trap

Investor-state contracts between the tobacco industry and governments should be avoided. They are not merely “contractual” in the domestic law sense, as even in the absence of an applicable IIA, they can be internationalized to provide investors the right to (1) remove dispute settlement from the state's court in favour of independent arbitration and (2) remove the dispute from the state's legal framework in favour of general principles of law (63, 76). Commitments under these clauses cannot, therefore, be legislatively moderated or extinguished, nor can liability be limited within domestic courts that may be more likely to favour the state's right to regulate in favour of public health (76).

Investor-state contracts and other noncontractual inducements can be further internationalized by umbrella clauses within IIAs. Such clauses make renegeing on undertakings assumed towards investors a breach of the IIA (76). Moreover, even in the absence of an umbrella clause, contracts and inducement can underpin a claim for legitimate expectation and breach of fair and equitable treatment and can also strengthen an investor's claim for indirect expropriation (63). Arbitral awards make clear that although taxes can be expected to vary and tobacco will be regulated, investors can have the legitimate expectation that states will abide by formal inducements and written contractual undertakings.

A common clause within investor-state contracts, the stabilization clause, is ruinous to evidence-based tobacco control's most effective measure: excise tax increases. Stabilization clauses purport to freeze specific domestic law from the time

of investment (63). Seemingly less onerous, economic equilibrium clauses require contracting states to compensate for regulatory changes that negatively affect an investment's value (63). There is little difference in effect between these two types of clauses: liability for the cost of breaching an equilibrium economic clause can be onerous enough to make it fiscally challenging and politically unpalatable.

CASE STUDY 12:

An investor-state contract

A state entered into an investment agreement with a TTC in 2001 on the privatization of its state-owned tobacco enterprise and creation of a joint venture. This investment was to provide economic benefits under the agreement: the joint venture would increase exports and profit using the TTC's cash and expertise while also ensuring prioritization of local employment, manufacturing and resources. The final investor-state contract included a form of economic equilibrium clause under which any increase in the excise tax rates applied to the company's tobacco products before a set date would be compensable. While the agreement was not removed from the state's law, it provided for independent arbitration in case of a dispute over its compensation. In addition, there is a bilateral investment treaty between the host state and another state in which the TTC's subsidiary has residence that includes a FET clause – this could buttress, if needed, the protection provided by the stand-alone arrangements of the investor-state contract. There were similar less-formal inducements offered to a separate TTC.

The extent to which incentives have been granted to the tobacco industry is unknown, but contracts and inducements are likely to be offered in the context of the privatization of state-owned tobacco interests and in dealings between investors and state-owned tobacco enterprises (63). Although countries have been entrapped by their incentives to industry, the investor-state contract provides the clearest example of how undertakings and inducements with the tobacco industry undermine tobacco control (56, 79–80). States should avoid offering industry incentives and, in particular, entering into contractual undertakings with the industry. More systematically, government should consider avoiding IIAs that elevate incentives and inducements above sensible and reasonable regulation.

4.2.3 CONCLUSIONS

Health-protective and origin-neutral tobacco excise taxes are legally defensible, and industry threats are usually baseless. There are, however, certain rules governing procedure, design and consultation that governments may need to consider:

1. Governments should be aware of the standard of consultation required under domestic law and any applicable international obligations (case studies 1, 2 and 3).

It is important to distance the tobacco industry from the policy-making process to the extent that this is permissible. Do not grant the industry special consideration, but do ensure that it is consulted with as required – for example, by providing public meetings, timely information and the ability to submit industry views – while being aware of potential procedural manipulation (case studies 1, 2 and 3).

2. Excise tax is generally safe from challenges that claim it is confiscation or expropriation under domestic or international law (case studies 4 and 5). But express limits on taxation can be found in other laws or a country's constitution or in the limits of the power to tax granted to an authority (case studies 6 and 7).
3. Explicit and de facto discrimination against foreign tobacco products or investors must be avoided in the design, implementation or enforcement of tax measures (case studies 8, 9, 10 and 11). Legal issues may arise not from the tax measure itself, but rather from ancillary measures that support its implementation (case studies 9 and 10).
4. Explicit differentiation between products based on their effect on health may be challenged as discrimination if it falls heaviest on imported products and has to be justified on the basis of evidence of impact on health and a lack of alternatives.
5. Investment incentives in the form of inducements or contractual undertakings should not be offered, as these may be binding (case study 12) or may ground a challenge under an IIA; they are also contrary to the WHO FCTC Article 5.3 Guidelines.

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