

# JUR5850

## Autumn 2010

You are the legal advisor of Monia during negotiations of a bilateral Free Trade Agreement (FTA). The two countries participating in the negotiations, Monia and Servia, are members of the WTO. The FTA will include chapters on trade in goods, including a separate chapter on technical barriers to trade, trade in services and investment protection.

A green coalition government came to power in Monia following an election in the autumn of 2010. The FTA negotiations were hotly debated during the election campaign, and the new government issued instructions to the negotiation team. The instructions contain a proposal for a general exception to be made applicable to the whole agreement. The wording of the provision is as follows:

'Nothing in this Agreement shall be interpreted as restricting the right of a contracting party to adopt or implement non-discriminatory measures relating to protection of the environment.'

You are asked by the head of the negotiation team to provide a legal opinion on the following issues:

1. What would be the differences between the proposed exception in the FTA and parallel provisions in relevant agreements under the WTO Agreement? Your main focus shall be on Article XX of GATT and Article XIV of GATS (see annex attached).
2. In light of the differences between the rules of the WTO and the proposed provision of the FTA, what would be the legal implications for the rights and obligations under the WTO Agreement of including such a provision in the bilateral FTA?

It is now December 2012, and the FTA has entered into force. Both countries are parties to the ICSID Convention. On 10 December 2011, the World Health Assembly of the World Health Organization unanimously adopted the Declaration on Combating Excessive Sugar Consumption. Operative Paragraph 5 provides that all States should take all necessary measures to restrict the advertising and packaging of products with high sugar content.

Monia has the 7th highest obesity level in the world despite being a middle-income country. On 1 July 2012, the Parliament of Monia passed the Health Promotion Act. Section 4 of the legislation requires that all products with a sugar content of more than 30 % cannot be advertised. Section 7 prohibits any design or information on packaging other than the name of the product and its ingredients.

The company Sweets'R'Us is registered in Monia and is owned by a local entrepreneur. It has 44 % of the Monian market in sweets and chocolates. Sweets'R'Us has a franchise agreement with Sweets'R'Us International, which is registered in Servia. The franchise agreement has extensive provisions on how the local business is to be operated with an annual royalty payment based on sales. Their main competitors are Eltsen - which is registered in Servia and has 26 % of the Monian market, and small local sweet and chocolate producers whose products are usually sold from small stores who display the sweets and

chocolates in glass jars.

Sweets'R'Us International and Elsten are concerned about the legislation but do not want a direct dispute with the Government of Monia. Sweets'R'Us have tried negotiating a solution directly with the Government, whereby advertising in printed media is possible and some designs can be included on packaging. This has been rejected by Monia. Sweets'R'Us then asks you to provide legal advice on the likelihood of successful international arbitration proceedings against Monia, in particular:

3. Is Sweets'R'Us an investor for the purposes of international arbitration under the ICSID Convention?
4. What substantive legal claims may be successful and why or why not?