
Tobacco and International Trade

Lisbon, 22 September 2014

Trade and tobacco farming

- Virtually all tobacco leaf is traded internationally and therefore depends on a well-functioning international trading system
- International trade rules are legal tools to limit discriminatory and unnecessary measures, including trade-distorting measures and attacks against tobacco farming
- Product regulation in one country can have trade distorting implications on leaf (e.g. ingredients ban; plain packaging)

Needs:

- Fully leverage the international trading system to protect economic interests
- Protect the integrity of the system, in order to maintain ability to use it in the long term

Overview of the international trading system

- Rights and obligations agreed by consensus between governments
- Main sources of international trade and investment law:
 - **WTO** provides a level playing field for **all WTO members**, a committee structure where concerns can be raised and a dispute settlement system which ensures a high level of compliance
 - **Free Trade Agreements** provide better trading conditions than the WTO and disciplines that may go beyond WTO rules
 - **Bilateral Investment Treaties** ensure stable and secure investment environment

Current use of international trading system re. tobacco

- WTO
 - Concerns raised against specific tobacco regulations in WTO Committees
 - Past and ongoing tobacco related cases under the Dispute Settlement Mechanism
- FTAs
 - Improved market access and rules for tobacco
- BITs
 - Secure investment environment
 - 2 ongoing tobacco related investment arbitrations
- Domestic regulatory measures
 - e.g. EU TPD

WTO cases

- 'Australia plain packaging'
- 'US clove'
- 'Thailand customs valuation'
- 'DR internal tax'

BIT arbitrations

- PMI v. Uruguay on 'Single presentation'
- PMI v. Australia on plain packaging

Key messages on international trade

- International trade rules allow countries to defend economic interests impacted by excessive regulation in another country
- Only a very limited number of tobacco control measures have been subject to legal challenges based on claims of violation of international trade and investment rules
- Concrete threats of exclusion of tobacco from international trade and investment agreements
- **There is no inherent conflict between regulations in the public interest and international trade rules**

Role of the international trading system

- Opposing views on international trade:
 - “Obstacle” to public interest regulation
- vs.
 - Level playing field – rule of law – limit to discriminatory and excessive regulation

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International trade versus public health during the FCTC negotiations, 1999-2003

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Conclusion—The absence of an explicit FCTC trade provision was due to a political compromise rather than the impact of international trade agreements and decisions on public health and lack of consensus among health advocates. This failure to include an explicit trade provision in the FCTC suggests that the public health community should become more involved in trade and health issues at all levels of governance and press the FCTC Conference of the Parties for clarification of this critical issue.

Threats

- Health over trade
- Exclusion of tobacco from international trade and investment agreements
- FCTC as “international standard”
- New approach to dispute settlement

WHO/TCA arguments for exclusion

Why tobacco should not be excluded

Exclusion consequences

- Weakening of the global trade regime
 - Current level of import duties will be maintained
 - Non-tariff barriers to trade remain, e.g. no mutual recognition of testing/measuring
 - No access to WTO+ protection, e.g. TBT and Intellectual property
 - No access to dispute settlement provisions
- Exclusion of tobacco setting a precedent
 - More extensive exclusion of tobacco in future agreements
 - Exclusion of a wider range of product groups

Exclusion proposals in practice

- Exclusion proposals in FTAs
 - Market access exclusion (no duty liberalization), e.g. ASEAN 2012
 - Regulatory exclusion or differentiated treatment (no regulatory protection like dispute settlement, investment protection, intellectual property), e.g. US TPP proposal 2013, EU-Singapore 2013
 - Both (total exclusion of tobacco from the scope of the agreement), Malaysian TPP proposal 2013
- Risk of exclusion from BITs
 - EU consultation on investment in TTIP
 - TPP?
- FCTC efforts

FCTC efforts against international trade (past)

2010



Conference of the Parties to the
WHO Framework Convention
on Tobacco Control

Fourth session
Punta del Este, Uruguay, 15–20 November 2010

19 November 2010

DECISION

FCTC/COP4(5) Punta del Este Declaration on the Implementation of the WHO Framework Convention on Tobacco Control

Recalling the preamble of the Constitution of the World Health Organization, which states that the enjoyment of the highest attainable standard of health is one of the fundamental rights of every

Recognition that the 2001 Doha WTO Ministerial Declaration applies to public health more broadly, including tobacco control

consumption and exposure to tobacco smoke cause death, disease and disability affecting all segments of the population in every country in the world, particularly the younger population;

Recognizing that measures to protect public health, including measures implementing the WHO FCTC and its guidelines fall within the power of sovereign States to regulate in the public interest, which includes public health;

Taking into account the fact that Article 5.3 of the WHO FCTC states that: "in setting and implementing their public health policies with respect to tobacco control, Parties shall act to protect these policies from commercial and other vested interests of the tobacco industry in accordance with national law"¹²,

Recalling Article XX (b) of The General Agreement on Tariffs and Trade (GATT 1947) which states that nothing in the agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures necessary to protect human health, 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;

2012

Proposed by Philippines
16/11/12

AGENDA ITEM 7.4.1
Matters relating to Trade and Investment Agreements

Draft Decision

The Conference of the Parties,

Reiterating their determination to give priority to their right to protect public health (FCTC preamble)

Noting the ongoing proliferation of free trade agreements and investment agreements and the challenges Parties face before various international bodies

2. To assure Parties of the primacy of public health over trade in all existing trade-related disputes in other international bodies where tobacco and tobacco products are concerned

3. To remind Parties, that in the course of future negotiations on free trade and investment agreements and other trade-related arrangements, to explicitly exclude tobacco and tobacco-related products from the coverage of the same

REQUEST the Convention Secretariat

1. To call Parties' attention to the mechanisms for dispute settlement under Article 27 of the FCTC and to first resort to the use of such mechanisms

2. To assure Parties of the primacy of public health over trade in all existing trade-related disputes in other international bodies where tobacco and tobacco products are concerned

3. To remind Parties, that in the course of future negotiations on free trade and investment agreements and other trade-related arrangements, to explicitly exclude tobacco and tobacco-related products from the coverage of the same

FCTC efforts against international trade (ongoing)

2013-14

- WHO **AMRO REGION** 'FCTC implementation workshop' – September 2013

Parties request that this issue be discussed by the Bureau of the COP, as well as at the next COP to be held in October 2014 in the Russian Federation, in order to develop and adopt a relevant resolution.

- WHO **EURO REGION** 'FCTC implementation workshop' – March 2014
- FCTC 'Workshop on trade and investment issues relevant to implementation of the FCTC' – March 2014
- WHO **WEPRO REGION** 'FCTC implementation workshop' – April 2014
- WHO **AFRO REGION** 'Workshop on International Trade and Investment Law, Health and Tobacco Control' – June 2014

“Issues covered include the packaging - the need to move towards plain packaging with graphic warnings rather than colourful alternatives. This saw more reps committed to enforce in their respective countries plain packaging as a result of this discussion.”

Source: Fiji Live <http://fijilive.com/news/2014/04/west-pac-countries-to-lift-tobacco-control-efforts/57428.Fijilive>



International trade at COP6

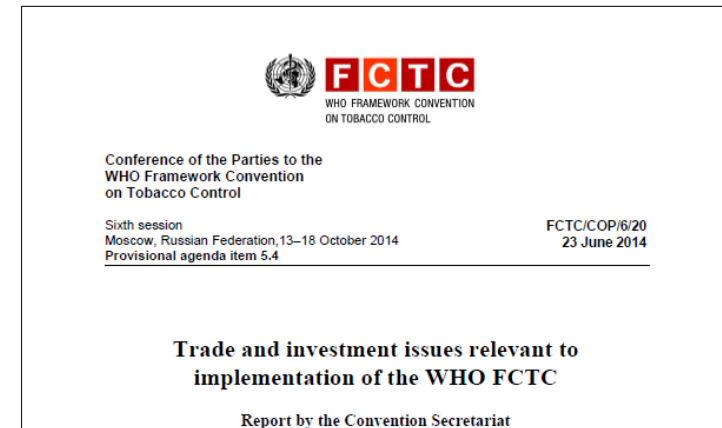
- FCTC Report on trade and investment issues published on 14 August 2014



5. Reporting, implementation assistance and international cooperation

- 5.1 Reporting arrangements under the WHO FCTC
Document FCTC/COP/6/17
- 5.2 International cooperation for implementation of the WHO FCTC
Document FCTC/COP/6/18
- 5.3 Sustainable measures to strengthen implementation of the WHO FCTC: report by the working group
Document FCTC/COP/6/19
- 5.4 Trade and investment issues, including agreements, and legal challenges in relation to implementation of the WHO FCTC
Document FCTC/COP/6/20

- 4.2 Guidelines for implementation of Article 6 of the WHO FCTC: "Price and tax measures to reduce the demand for tobacco": report by the open-ended intersessional drafting group
Document FCTC/COP/6/7



8. The use of international forums to pursue legal challenges to tobacco control measures has also prompted ongoing discussion about how tobacco control should be addressed in the negotiation of new free trade and investment agreements. In response to these challenges, and the tobacco industry's observed practices of lobbying to influence negotiation of new agreements, some Parties to the WHO FCTC have proposed specific measures to prevent such agreements being used to challenge tobacco control measures, including explicitly excluding tobacco and tobacco products from future coverage of trade and investment treaties.

9. One Party requested that the provisional agenda for the fifth session of the COP encourage substantive discussions on dealing with tobacco and tobacco products during negotiations on free trade and investment agreements. The COP's consideration and guidance in relation to this item will aid future work.

Consequences for tobacco farming

Health over trade

- Health rules would trump trade rules, no protection for internationally traded leaf

Exclusion from FTAs/BITs

- No improved duties or rules for tobacco
 - E.g. Leaf from Zambia to EU: 0% duty (EPA/GSP), Leaf from Brazil to EU: 10%-18,4% duty
- Tobacco sector disadvantaged for investments

FCTC as an international standard

- FCTC does not prescribe standards, pretext to implement unjustified, excessive and non-science based trade restrictive measures

Use FCTC to solve trade disputes for tobacco

- FCTC has no functioning dispute settlement system
 - Tobacco disputes will be left with a system that doesn't exist

➤ Exports of tobacco at peril

Opportunities

- WTO
 - Better coordination with, and between, governments and industry
- FTAs
 - Proactively work to ensure that tobacco is not excluded
- FCTC
 - Active protection of international trade system
- UN
 - Active engagement in tobacco farming discussions
- Regional organizations



International trade at COP6

Objectives:

- Avoid adoption of declaration/resolution at COP6 that establishes/calls for:
 - “Health over trade”
 - Exclusion of tobacco from trade/investment agreements
 - FCTC and guidelines as “international standard”
 - Use FCTC instead of other international dispute settlement mechanisms for tobacco disputes

Rationale:

Protect the standing of tobacco as integral part of the international trading system.

Solution:

“Mounting a counter campaign”. Creation of a coalition of like minded countries to protect the interest of tobacco producing countries.