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Seventh Session of the Conference of the Parties to the WHO Framework Convention on Tobacco Control,  
7-12 November 2016, New Delhi

## FCA Policy Briefing

### Tobacco Control in Trade and Investment Agreements

#### Key Recommendations

- COP7, at the minimum, should acknowledge that
  - Discussion of the FCTC in trade and investment negotiations (as done in the TPPA) is a step in the right direction, if not considered a “best practice”.
  - Parties that manage to explicitly protect their ability to implement the WHO FCTC within the text of trade and investment agreements should be lauded and emulated.
- If COP7 intends to set a standard in this area, it should adopt a Decision requesting Parties ensure, on their own or in co-operation with other Parties, including regional trade blocs, that measures taken in furtherance of the WHO FCTC are fully protected when negotiating and signing trade and investment agreements.
- COP should explore a mechanism to formalize the process for the FCTC Secretariat to intervene on the health science elements of tobacco control measures that are challenged under trade and investment regimes.
- The FCTC Secretariat should also explore ways to engage the FCTC dispute provisions under Article 27, or alternative means of providing a forum under Article 23.5, to allow parties to engage other parties that facilitate industry interference in trade or investment fora.
- WHO, the Secretariat and other development partners should seek to raise funding to address awareness, conduct capacity building, and support Parties which are moving in the direction stated above. Such efforts not only potentially expand or retain another Parties’ regulatory space for tobacco control in the face of serious tobacco industry challenges, but will also provide global prominence to the FCTC.
- COP7 should also request that the Secretariat monitor industry interference at WTO and other trade institutions.

#### Principles

1. The FCTC represents a global consensus. The FCTC also clearly espouses ‘comprehensive multisectoral measures and coordinated responses’ to tobacco control. (Art 4.2 and Art 4.4). Parties to the FCTC should ensure that all branches of government, including ministries responsible for international trade and investment, work toward the goal of a world free from the death and disease caused by tobacco.

2. The FCA takes no position on the desirability of liberalizing trade rules in general. The FCA is, however, strongly opposed to giving the tobacco industry rights and privileges in any provisions in trade agreements that have the effect of giving the tobacco industry opportunities to frustrate or delay government policies designed to reduce tobacco consumption and protect public health.
3. There is no reason why states should expose themselves to the risk of future Investor-State Dispute Settlement (ISDS) challenges from tobacco companies – states are the ‘masters of their treaties’ – and there are means for states to reduce or remove the risks of future ISDS challenges by tobacco companies.
4. The initiation of a trade dispute by a Party to the FCTC against the non-discriminatory tobacco control regulations of another Party is a violation of the spirit of the FCTC.
5. Tobacco is the only consumer product that kills about half of its long-term users when used as intended. It should not be treated the same as other consumer products under trade and investment agreements.
6. The goals of free trade – including greater efficiency, increased production and lower prices – are not appropriate when applied to tobacco, since they would damage public health and frustrate the goals of the FCTC.
7. The goals of modern trade and investment agreements – including investor protection and rights – should not in any way benefit the tobacco industry. New rights and privileges for tobacco corporations will have devastating consequences for public health and future generations, and will be politically difficult to remove.
8. The tobacco industry's influence and ability to interfere with FCTC implementation is stronger at higher levels of policymaking. Trade officials may not be fully aware of the public health justification for increasingly tough regulation and control of the tobacco industry. The Secretariat highlights in report FCTC/COP/7/21 that investment policy design may not adequately reflect the requirements of tobacco control policies. International trade and investment rules and negotiations risk creating opportunities for the tobacco industry to gain access to and create “partnerships” with governments in order to erect barriers to the implementation of comprehensive tobacco control measures.
9. The tobacco industry has used its rights and privileges under trade and investment agreements in an attempt to block tobacco regulation in several countries and to discourage other FCTC Parties from considering similar regulations.
10. The tobacco industry has huge financial resources to pursue litigation against governments. The cost<sup>1</sup> of a trade or investment challenge is typically more than the tobacco control budgets of most FCTC Parties. Trade disputes further imply that there is a risk that economic sanctions could be imposed on governments that adopt advanced tobacco control measures.
11. Investment disputes are typically not transparent, and are conducted by a handful of arbitrators, mostly commercial lawyers, who have the power to award billions of dollars to tobacco,<sup>2</sup> but may have limited understanding of public health priorities in relation to tobacco control.
12. International arbitration tribunals give the tobacco industry an additional avenue to block tobacco regulations, beyond domestic courts. The tobacco industry need only win once; governments must win every time.
13. Protection of tobacco control policies within trade and investment agreements can be achieved while also taking into account broader public health matters in the text of the agreements.

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<sup>1</sup> Estimated cost is at least US\$3-8 million. Uruguay’s costs in its litigation with Philip Morris International were US\$10 million. Legal fees in investment disputes could reach up to \$56 million while investor claims could reach up to billions of dollars in damages.

<sup>2</sup> Furthermore, decisions are not appealable to domestic courts.

## Background

There are over 3,000 international investment agreements across the globe, meaning that most nations have signed up to providing protections to foreign investors. Most of these agreements include provisions for Investor-State Dispute Settlement (ISDS) which give corporate investors the right to bring legal actions before supra-national tribunals challenging government public interest regulations, including tobacco control measures. Since the FCTC came into force, trade and investment agreements continue to be entered into, many of which include the same ISDS provisions. At the same time, modern trade and investment agreements have moved beyond traditional trade matters, such as non-discrimination and the removal of technical barriers to trade, to include granting rights for the private sector to participate in rulemaking, enhanced protections in favour of intellectual property owners, and specific processes to be observed by governments before issuing regulations. There is a clear danger that such provisions, designed to protect legitimate commercial interests, may in practice be used by the tobacco industry in attempts to frustrate policies to protect public health and find ways to circumvent the principles of FCTC Article 5.3.

At the core of the friction between the FCTC and global trade law is the incompatibility of the goals of international trade – to increase the flow of goods and services – and the goals of the FCTC – to decrease consumption – in the unique case of tobacco. Efforts to increase trade in tobacco products are incompatible with FCTC obligations.

There is a solid *prima facie* case of industry interference at the World Trade Organization (WTO) and other trade fora. Tobacco industry positions are being represented in closed door sessions by governments which are party to the FCTC and which are known to or are likely to receive technical assistance from the industry in their interventions.

Despite the steadfast position of civil society organisations (CSOs) to ensure that health takes precedence over profit, the original International Negotiation Body (INB) of the FCTC was unable to come to consensus on specific language to describe the relationship between trade and tobacco control. General language on the nexus between the FCTC and other international law was agreed in FCTC Article 2, and the Preamble iterates Parties' intention to prioritise public health.

While the issue of trade and investment has been discussed by the Conference of the Parties (COP) in terms of steps to be taken to deal with disputes, arguments and existing agreements, no specific plan has been adopted to ensure that future trade and investment agreements would not further undermine implementation of the FCTC. The concerns surrounding future such agreements are vastly different from existing ones. Instead of dealing with a multitude of potential disputes that have arisen or are likely to arise from existing agreements, Parties have the unique opportunity to prevent future trade and investment agreements from being used by the tobacco industry to undermine the vision of the FCTC.

Since the trade discussion at COP6, there have been important developments that should inform COP7:

- Negotiations for the Trans-Pacific Partnership Agreement (TPPA) concluded with an option for parties to deny the benefit of ISDS in respect of any claim brought against a tobacco control measure. If ratified, the TPPA would be the world's largest trade agreement, and the first multilateral agreement to remove tobacco control measures from ISDS.

- Uruguay was successful in its legal defence against PMI's ISDS arbitration against Uruguay's packaging regulations. The tribunal's findings were helpful for public health in myriad ways, but three findings are particularly pertinent to the potential friction between the FCTC and trade law. First, the arbitrators prioritised public health, saying "[t]he responsibility for public health measures rests with the government and investment tribunals should pay great deference to governmental judgments of national needs in matters such as the protection of public health". Second, the tribunal recognised the FCTC as a valid source of scientific best practices and cited Uruguay's legal obligations under the treaty. And third, the tribunal found that manufacturers and distributors of harmful products such as cigarettes can have no expectation that new and more stringent regulations will not be imposed.
- The investment arbitration claim brought by Philip Morris against Australia's plain packaging laws was dismissed by the tribunal on jurisdictional grounds, noting that the company's claim was an "abuse of rights".
- Australia and Singapore have agreed (although not yet ratified) to amend their existing bi-lateral trade and investment agreement to exempt tobacco, adding the following Article:

#### ARTICLE 22

##### Tobacco Control Measures

No claim may be brought under this Section in respect of a tobacco control measure<sup>19</sup> of a Party.

<sup>19</sup> "Tobacco control measure" means a measure of a Party related to tobacco products (including products made or derived from tobacco), such as for their production, consumption, distribution, labelling, packaging, advertising, marketing, promotion, sale, purchase, or use, as well as fiscal measures such as internal taxes and excise taxes, and enforcement measures, such as inspection, recordkeeping, and reporting requirements. "Tobacco products" means products under Chapter 24 of the Harmonised System, including processed tobacco, or any product that contains tobacco, that is manufactured to be used for smoking, sucking, chewing or snuffing.

Given the gravity of the worsening global tobacco epidemic, the FCA urges Parties to consider ways to ensure that trade and investment agreements they negotiate will not delay, block, or undermine tobacco control measures of their own government as well as those of foreign governments. Efforts to institute a "whole of government" approach to the FCTC must include trade ministries, and obligations under Article 5.3 to protect policies from the interests of the tobacco industry must apply equally to trade policy.

#### **Secretariat report**

FCA applauds the Secretariat in its report (FCTC/COP/7/21) for making the case for the need to address trade and investment agreements that create novel obligations that are more far-reaching than existing ones. However, some recommendations in its report are not consistent with its premise.

For instance, the views expressed in the report reflect a focus on investment agreements' investor-state dispute settlement mechanisms, while issues identified in the report cover other aspects of trade and investment agreements, such as regulatory coherence and extended intellectual property obligations. It also reflects a presumption that public health exceptions are effective or sufficient to protect tobacco control measures from a highly litigious industry that is prepared to bring abusive claims, or to reduce tobacco industry interference.

The policy options in relation to treaty design are not only limited in scope but also fail to provide a wide range of examples from existing agreements. Agreements with tobacco exclusions or reservations of various forms will be useful to provide guidance to Parties. The scope of options for treaty design can also be further expanded to include the broad range of strategies utilised in the fields of public health, environment, labour and culture.

The report mentions the option of protecting tobacco control within trade and investment agreements but fails to note its value in raising the profile of tobacco control and in opening the doors for multisectoral consultations in all other countries negotiating the trade agreement where such a proposal is made. Such consultations could further reduce tobacco industry interference, which is the most challenging part of FCTC implementation.

Finally, the report suggests investing in external capacity (WHO, Secretariat and Knowledge Hubs) to provide support to countries to address this issue. It bears stressing that trade and investment negotiations are typically confidential, and hence the governments and the civil societies involved must be encouraged to build their own financial and technical capacity to address this issue.

FCA also thanks the Secretariat for its report on the settlement of disputes (FCTC/COP/7/20), and looks forward to the COP's discussion on this issue, especially as it relates to trade disputes.

## **Recommendations**

There is no reason why states should expose themselves to the risk of future ISDS challenges from tobacco companies – states are the 'masters of their treaties'. There are ways of reducing or removing the risks of future ISDS challenges by tobacco companies, with some options for treaty design outlined in the Secretariat report 21.

Regarding future trade and investment agreements and challenges in relation to FCTC, COP7 should request the Secretariat to commission a report that focuses primarily on trade negotiation interventions and agreement or treaty design options specific to tobacco control.<sup>3</sup> Some options presented in the report already speak to the issue of "future trade agreements" and specifically to tobacco control. These are: exclusion of tobacco, denial of the benefits of ISDS in respect of tobacco control measures, clarification of obligations, and lodging reservations. These may be further elaborated with an inventory of examples where such options have safeguarded tobacco control specifically. These options should also be ranked in accordance with their ability to address the various identified frictions between trade and investment agreements and FCTC

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<sup>3</sup> At COP6, Parties were asked to co-operate to explore options to "minimise risk" of suit. The report shows misunderstanding of this request. Reading the COP6 decision as a whole and understanding the context in which it was proposed, one would understand that the stated Decision is intended to address the knowledge gap in tobacco treatments in trade and investment agreements in the context of trade negotiations. Hence, COP6 also called for Parties to take public health, "in the context of FCTC," into account when negotiating trade and investment agreements. □

implementation. COP7 should also request an elaboration of options for treaty design that are being utilised in the field of environment, labour and culture to protect and promote treaty implementation.

COP7, at the minimum, should acknowledge that:

1. Discussion of the FCTC in trade and investment negotiations (as done in the TPPA) is a step in the right direction, if not considered a “best practice.”
2. Parties that manage to explicitly protect their ability to implement the WHO FCTC within the text of trade and investment agreements, should be lauded and emulated

If COP7 intends to set a standard in this area, it should request Parties ensure, on their own or in co-operation with other Parties, including regional trade blocs, that they make reference to the WHO FCTC when negotiating and signing trade and investment agreements.

A COP Decision could act in two ways:

First, to establish a principle that all WHO FCTC Parties should enter negotiations of new trade and investment agreements (or renegotiations of old ones) with the objective of ensuring that there is specific text incorporated into the trade and investment agreement that protects measures taken in furtherance of the WHO FCTC, its obligations, recommendations and objectives.

Second, in addition, a COP Decision could provide affirmation and recognition of the legal principles set out in the July 2016 tribunal ruling from the investment treaty challenge by Philip Morris against Uruguay. These include:

- That tribunals should give substantial deference to government judgments about the protection of public health, including tobacco control measures;
- That manufacturers and distributors of harmful products, such as cigarettes, can have no expectation that new and more stringent regulations will not be imposed; and
- That states can rely on the WHO FCTC as a valid source of scientific evidence and best practice.

A COP Decision of that nature would encourage positive investment treaty design and act as a multilateral declaration that would enhance coherence in the “highly fragmented” universe of trade and investment agreements.

COP7 should also request that the Secretariat monitor industry interference at WTO and other trade institutions and explore ways to formalise the process for the FCTC Secretariat to intervene on the health science elements of measures being challenged in litigation under trade and investment regimes.

The Secretariat should also explore ways to engage the FCTC dispute provisions under Article 27, or an alternative forum under Article 23.5, to allow parties to engage other parties which facilitate industry interference in trade fora.

WHO, the Secretariat and other development partners should seek to raise funding to support Parties which are moving in the direction stated above, since such efforts not only potentially expand or retain another Parties’ regulatory space for tobacco control in the face of serious tobacco industry challenges, but will also provide global prominence to the FCTC.