

Addressing the relationship between FCTC implementation and international trade and investment rules

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Recommendation

It is recommended that the COP decide to:

- request the Convention Secretariat to engage with relevant international organisations in the fields of international trade and investment and report to each session of the Conference of Parties on these activities;
- request each Party to consider how it can provide immediate support, with respect to international trade and investment rules, to Parties in need;
- request the Convention Secretariat to create a mechanism to coordinate requests for support and offers of support made by Parties;
- establish a working group on the relationship between FCTC implementation, international trade and investment.

Summary

International trade rules govern the use of tariff and 'non-tariff' barriers to trade, such as regulatory measures, whereas international investment laws govern the treatment of foreign investment. Some states, and a number of tobacco companies, have argued that trade and investment rules prohibit the implementation of a number of FCTC measures. This raises concerns that each body of rules can limit the autonomy of FCTC Parties to implement measures for the protection of public health.

With these rules in mind, the FCTC begins with an expression of the Parties' determination 'to give priority to their right to protect public health'. Despite the fact that the FCTC reflects the priority afforded to health, recent events have brought the relationship between FCTC implementation and international trade and investment laws to a tipping point. In response, the Conference of the Parties (COP), which has a responsibility to promote implementation of the FCTC, should take two actions. First, the COP should request the Convention Secretariat to engage with relevant international organisations. Secondly, the COP should establish a working group on the relationship between FCTC implementation, international trade and investment with a mandate to consider:

- how mutually agreed legal cooperation on trade and investment issues might be facilitated between the Parties;
- how to strengthen the capacity of Parties to address trade and investment law issues insofar as they affect FCTC implementation;
- how Parties might minimise policy conflicts between health, trade and investment policies at the domestic and international levels;
- what procedures should be implemented to enhance communication between Parties on trade and investment issues; and
- the relationship between measures implementing the FCTC and international trade and investment laws.

Establishment of a working group with this mandate could enhance efforts to strengthen domestic capacity, information exchange and international cooperation in accordance with Articles 4.3, 4.4, 5.3, 20, 21 and 22 of the Convention. This action would improve policy dialogue in the interests of all

FCTC Parties and follow established approaches used by other treaty bodies and international organisations.

A number of recent events have highlighted the need for the Fourth Session of the Conference of the Parties (COP-4) to take action concerning FCTC implementation and rules governing international trade and investment. In the context of trade law, issues of concern include that:

- the tobacco industry and associated groups have condemned Australia's decision to implement plain packaging, a measure recommended for implementation of both Articles 11 and 13 of the FCTC, making a spurious argument that the measure will violate World Trade Organisation (WTO) rules;¹
- Philip Morris Norway AS, a subsidiary of Philip Morris International, has brought a claim in Norwegian courts, arguing that bans on point of sale displays – part of a comprehensive ban on tobacco advertising, promotion and sponsorship under Article 13 of the FCTC – violate the European Economic Area Agreement;²
- Indonesia has requested the establishment of a WTO panel concerning restrictions implemented by the United States on the sale of flavoured cigarettes;³ and
- a number of WTO Members have expressed concern about Canadian measures restricting flavoured tobacco products.

The tobacco industry has also used international investment law to interfere with the implementation of public health policies in a manner that undermines implementation of Article 5.3 of the Convention and its guidelines. Most prominently:

- Philip Morris Products (Switzerland) has lodged a Request for Arbitration with the International Centre for Settlement of Investment Disputes (ICSID) concerning tobacco labelling measures implemented by the Uruguayan Government in accordance with Article 11 of the FCTC and the guidelines for implementation of that provision. Among other things, the Request for Arbitration asserts that a bilateral investment treaty between Uruguay and Switzerland prohibits pictorial health warnings of a demeaning character and warnings covering 80 percent of a pack;⁴ and
- companies such as Philip Morris continue to push for stronger investment protection provisions in order to undermine FCTC implementation and protect their commercial interests.⁵

As these disputes and debates suggest, a tipping point has been reached. It is no longer possible to ignore the implications of international laws governing trade and investment for implementation of the FCTC. In response, COP-4 should request that the Convention Secretariat engage with other international organisations and bodies and seek observer status in relevant WTO committees and subsidiary bodies. COP-4 should also establish a working group on the relationship between FCTC implementation, international trade and investment.

1. Requesting the Secretariat to engage with relevant international organisations and bodies

It is not uncommon for international treaty bodies to be requested to engage with the WTO.⁶ A number of treaty bodies have been granted observer status to WTO committees or are invited on an ad hoc /

¹ See Inquiry into Plain Tobacco Packaging (Removing Branding from Cigarette Packs) Bill 2009, Submissions received by the Committee as at 7 June 2010, available at http://www.aph.gov.au/senate/committee/clac_ctte/plain_tobacco_packaging_09/submissions/sublist.htm.

² Philip Morris International, "Philip Morris Norway AS Announces Lawsuit Challenging Norwegian Tobacco Product Display Ban" March 9, 2010.

³ United States – Measures Affecting the Production and Sale of Clove Cigarettes, Request for the Establishment of a Panel by Indonesia, World Trade Organisation, WT/DS406/1, 11 June 2010; See also United States – Measures Affecting the Production and Sale of Clove Cigarettes, Request for Consultations by Indonesia, World Trade Organisation, WT/DS406/1, G/L/917, G/SPS/GEN/1015, G/TBT/D/38, 14 April 2010.

⁴ The Request for Arbitration is available at http://www.smoke-free.ca/eng_home/2010/PMIvsUruguay/PMI-Uruguay%20complaint0001.pdf.

⁵ For example, Philip Morris has lobbied the US Trade Representative, seeking inclusion of investment protection provisions in the proposed Trans-Pacific Partnership Agreement (see Submission of Philip Morris International in Response to the Request for Comments Concerning the Proposed Trans-Pacific Partnership Trade Agreement).

⁶ See for example Conference of the Parties to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, Sixth Meeting, Geneva, 9 – 13 December 2002, UNEP/CHW.6/40, Decision IV/30, Cooperation with the World Trade Organisation; Rotterdam Convention on the Prior Informed Consent Procedure for

meeting-by-meeting basis.⁷ At present, the WHO has observer status in a number of WTO committees, but the Convention Secretariat has not been requested to seek this status. This limits the ability of the Convention Secretariat to promote awareness of the FCTC and to advance its interests at the international level.

While it is important to avoid duplication between the work of the Convention Secretariat and WHO, there is merit to requesting the Convention Secretariat to engage with international organisations such as the WTO. Where measures implemented pursuant to the FCTC are brought into question in other forums, the fact that the FCTC is an international treaty is significant in terms of international law. Accordingly, it is important that the legal status of the FCTC be promoted alongside broader efforts to raise awareness of tobacco control. The ability of the COP to monitor relevant developments at the international level will be enhanced by requesting the Convention Secretariat to engage with other international organisations and bodies, and to report back to the COP.

In addition, requesting the Convention Secretariat to engage in this manner could provide immediate support in the context of the controversies identified above. Engagement in the manner described would also redress an imbalance in the international system. In this respect, the WTO is accredited as an observer to the FCTC and a member of the UN Ad Hoc Inter-agency Task Force on Tobacco Control, but the Convention Secretariat is not an observer within the WTO. Remedying this imbalance would permit a more proactive approach to the assertion of goals underlying the FCTC.

2. *Establishing a Working Group on the Relationship between FCTC implementation, International Trade and Investment*

At the international level, a variety of bodies have been established to address the relationship of international trade and investment laws with other social objectives, such as protection of human health and the environment. Examples include the WTO Committee on Trade and Environment, the joint UNEP UNCTAD Capacity Building Task Force on Trade, Environment and Development and an OECD Working Party on Trade and Environment. Drawing on the experience of these bodies, and mindful of the Parties' determination to give priority to their right to protect public health, the COP should establish a working group with a mandate to consider:

- how mutually agreed legal cooperation on trade and investment issues might be facilitated between the Parties;
- how to strengthen the capacity of Parties to address trade and investment law issues insofar as they affect FCTC implementation;
- how Parties might minimise policy conflicts between health, trade and investment policies at the domestic and international levels;
- what procedures should be implemented to enhance communication between Parties on trade and investment issues; and
- the relationship between measures implementing the FCTC and international trade and investment laws.

Ideally, the working group would be composed of delegates with expertise in public health, international trade law and international investment law, and Parties should take measures to ensure an adequate representation by health officials.

Each of the possible functions of the working group is now addressed in further detail.

How Mutually Agreed Legal Cooperation between FCTC Parties might be Facilitated

A working group could consider how FCTC Parties might enhance cooperation in terms of the provision of legal and other expertise. Article 22 of the FCTC requires cooperation in the transfer of technical, scientific and legal expertise as mutually agreed between Parties.

Certain Hazardous Chemicals and Pesticides in International Trade, Conference of the Parties, First meeting, Geneva, 20–24 September 2004, Draft decision for consideration by the Conference of the Parties on cooperation between the secretariat of the Rotterdam Convention and the World Trade Organisation, UNEP/FAO/RC/COP.1/29 (see also the eighth, ninth and tenth recitals of the Rotterdam Convention).

⁷ See http://www.wto.org/english/thewto_e/igo_obs_e.htm.

The Request for Arbitration filed by Philip Morris Products (Switzerland) with respect to Uruguay's tobacco packaging laws highlights the importance of enhancing cooperation of this type. The laws confirm Uruguay as a world leader in tobacco control and require that 80 percent of a pack be covered with health warnings. The claim brought by Philip Morris Products (Switzerland) will have implications for labelling measures implemented by other FCTC Parties, meaning that FCTC Parties share a common interest in the outcome of the dispute.

Against this backdrop, a working group could consider ways to facilitate and systematise requests for the provision of assistance and make recommendations to COP-5 on this issue. Such assistance might include legal assistance, the production of evidence relating to the effects of measures and the provision of expert evidence and advice. A working group could also consider how states that are parties to relevant agreements, such as the Switzerland – Uruguay bilateral investment treaty, might cooperate with Parties to the FCTC.

Strengthening Domestic Capacity and Minimising Policy Conflicts

A working group could identify approaches that seek to build domestic capacity of two types.

First, a working group could make recommendations to COP-5 on how to build the capacity of domestic officials on the intersection of international trade and investment law with implementation of the FCTC. This would strengthen the ability of Parties to respond to claims such as those made by Philip Morris Products (Switzerland). Capacity building could include the provision of training courses, materials, briefings, seminars, workshops and conferences.

Secondly, a working group could identify approaches aimed at integrating trade and health policy-making. In this respect, some commentators have argued for the exclusion of tobacco from trade and investment agreements altogether. Others have argued for approaches that seek coherence between public health and trade policies. In considering these approaches at the domestic level, some Parties use impact assessments to determine the impact of trade policies on human health.⁸ Other Parties have joint teams of trade and health officials that generate policy or conduct reviews of potential trade claims to ensure that they are in the public interest. At the international level, a variety of approaches designed to minimise policy conflicts exist. By reporting to COP-5 on best practice, a working group could facilitate assistance in accordance with Article 4.3 of the FCTC and facilitate development of comprehensive multisectoral measures and responses to reduce consumption of all tobacco products.⁹

Enhancing Communication between FCTC Parties on Trade and Investment Issues

A working group could consider how FCTC Parties might enhance communication and exchange of information on questions of international trade and investment law. Open policy dialogue can assist awareness-raising and enhance mutual understanding of issues faced by different policy communities and may permit the sharing of experiences and good practice. Enhanced communication and exchange of information could minimize disputes between FCTC Parties. Articles 20 and 21 of the FCTC establish obligations concerning exchange of information and a working group should explore how these provisions might be implemented in the context of international trade and investment law.

Identifying the Relationship between International Trade and Investment Laws and Measures Implementing the Convention

A working group could serve a valuable role in identifying the relationship between international trade and investment laws and measures implementing the Convention.

The tobacco industry has a long history of attempting to dissuade governments from implementing legitimate and lawful tobacco control measures by arguing that they are prohibited by international trade and investment laws. These tobacco industry arguments seek to interfere with the implementation of public health policies. These arguments also take advantage of the highly

⁸ For example, the European Commission uses a system of sustainability impact assessments (see <http://ec.europa.eu/trade/analysis/sustainability-impact-assessments/>).

⁹ The need for approaches of this type is recognised in Article 4.4 of the FCTC.

specialised character of international trade and investment laws by presenting distortions of the law to non-specialised audiences.

A working group could minimise tobacco industry interference, reducing uncertainty for health officials, by identifying the relationship between international trade and investment laws and measures implementing the FCTC.

In the context of international investment law, there is an emerging trend to clarify the effect of bilateral investment treaties and investment agreements on domestic regulation. For example, an Annex to Chapter 11 of the ASEAN – Australia – New Zealand Free Trade Agreement clarifies that '[n]on-discriminatory regulatory actions by a Party that are designed and applied to achieve legitimate public welfare objectives, such as the protection of public health, safety, and the environment do not constitute expropriation'. Clarifications such as these give comfort to states as they implement health measures and deter opportunistic claims that are intended to intimidate Parties into removing measures.

In the context of international trade law, similar efforts have been made to clarify legal obligations in other areas. For example, the WTO Committee on Trade and Environment was tasked with, among other things, identifying 'the relationship between trade measures and environmental measures, in order to promote sustainable development.'¹⁰ The work of this committee has helped clarify application of WTO law to environmental measures and to minimise disputes between WTO Members.

By taking on this task, a working group would enhance implementation of FCTC provisions where controversy over implementation may arise under international trade or investment law.

¹⁰ Ministerial Decision on Trade and Environment adopted in Marrakesh on 15 April 1994, available at http://www.wto.org/english/tratop_e/envir_e/issu5_e.htm.