



This document relates to item 5.4 of the provisional agenda

### *FCA Policy Document*

## **Tobacco Control in Future Trade and Investment Agreements**

### **Principles**

- 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 trade ministries, work toward the goal of a world free from the death and disease caused by tobacco.
- 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.

### **Recommendations**

- The COP should encourage Parties to enact policies precluding government resources, including embassies, from being used to encourage the export of tobacco products<sup>1</sup> or to challenge another Party’s tobacco control measures, including launching state-to-state challenges under trade treaties.
- When negotiating or renegotiating new or expanded trade and investment agreements, Parties should ensure that they protect their ability to implement the FCTC without interference from the tobacco industry, and that they do not give privileges, benefits or incentives to the tobacco industry. Any such agreements, including any provision related to the settlement of disputes between governments and investors, should be designed to ensure that the tobacco industry cannot use them to delay or prevent implementation of tobacco control measures. The tobacco industry should not be able to use the provisions of such agreements to impose substantial costs on governments, for example by requiring them to spend scarce time and resources defending against investor and foreign state actions directed at tobacco control measures.

*FCA commends the Malaysian government for proposing that tobacco control measures be excluded from the Trans-Pacific Partnership Agreement. FCA also welcomes the efforts of various policy-makers in Europe and elsewhere who are working to ensure the protection of tobacco control in trade and investment agreements and that investor-state dispute settlement mechanisms will not be available for tobacco companies to challenge FCTC implementation measures in international trade fora.*

<sup>1</sup> In December 2013, the United Kingdom promulgated new guidelines for its overseas posts, forbidding support for tobacco industry interests and severely limiting interaction with the tobacco industry. See [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/287119/Guidance\\_for\\_Overseas\\_Posts\\_on\\_support\\_to\\_the\\_Tobacco\\_Industry.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/287119/Guidance_for_Overseas_Posts_on_support_to_the_Tobacco_Industry.pdf). The Philippines enacted a similar policy in 2010 as part of its broader policy implementing FCTC Article 5.3.

- The COP should request the Secretariat and WHO to provide guidance and tools that will assist parties in exercising their sovereign right to exclude the tobacco industry from the benefits and privileges provided by trade and investment agreements while in the course of negotiating or renegotiating them.
- Given the impending threat created by future trend-setting trade and investment treaties (such as the Trans-Pacific Partnership Agreement, or TPPA) and the vast difference in approaches to be employed between existing (comply) and future (negotiate) trade agreements, COP should ensure that this matter is discussed in an agenda item that is separate from Item 5.4, which primarily focuses on existing trade and investment agreements and disputes, and preferably in Item 4.8, to be discussed in Committee A, as it involves more substantive matters than institutional concerns.

## Introduction

International trade and investment rules are being used by the tobacco industry and their government sponsors in attempts to delay or block tobacco control measures. Since the FCTC came into force, some trade and investment agreements have included the right of corporate investors to bring direct legal action against government tobacco control measures. At the same time, modern trade 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.<sup>2</sup>

Despite the steadfast position of civil society organisations (CSO)s 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 has been discussed by the Conference of the Parties 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 trade and investment 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.

As the Sixth Session of the COP meets in Moscow, two large regional free trade agreements are being negotiated: the TPP, among 12 Pacific Rim countries, and the Trans-Atlantic Trade and Investment Partnership (TTIP), between the United States and the European Union. Once completed, the TPP and TTIP will be the two largest regional trade agreements in force, and would likely serve as models for other multilateral trade and investment agreements. Within the TPP negotiations, tobacco became a key political issue when Malaysia proposed a

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<sup>2</sup> Stumberg, Robert, *Safeguards for Tobacco Control: Options for the TPPA*, AM. J. OF LAW AND MEDICINE, 39 (2013):382-441 at 385.

complete exclusion, or “carve-out”, for tobacco control measures in August 2013 (while the US is contemplating providing a much criticised “weak” general exception language for tobacco). The FCA applauds the Government of Malaysia for taking a strong stand in defence of its right to protect public health by implementing the FCTC.

Given the gravity of the worsening global tobacco epidemic, the FCA urges Parties to consider ways to ensure that trade 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.

Therefore, **the FCA recognises that:**

- Tobacco is unique. It is the only consumer product that kills about half of its long-term users. It should not be treated the same as other consumer products under trade and investment agreements.
- 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.
- The goals of modern trade and investment treaties – including investor protection and rights – should not in any way benefit the tobacco industry.
- The tobacco industry’s influence and ability to interfere with FCTC implementation is stronger at higher levels of policymaking. Trade officials may not understand the public health justification for increasingly tough regulation and control of the tobacco industry. International trade rules and negotiations may create an opportunity for the tobacco industry to gain access to and create “partnerships” with government in order to erect barriers to the implementation of comprehensive tobacco control measures.
- The tobacco industry has used its claimed corporate 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.
- The tobacco industry has huge financial resources to pursue litigation against governments. The cost<sup>3</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.
- 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 investors in case the government loses,<sup>4</sup> but may have limited understanding of public health priorities in relation to tobacco control.

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<sup>3</sup> Estimated cost is at least US\$3-8 million. Legal fees in investment disputes could reach up to US\$56 million while investor claims could reach up to billions of dollars in damages.

<sup>4</sup> Furthermore, decisions are not appealable to domestic courts.