

INTERNATIONAL TRADE ISSUES AND THE FCTC

Briefing on Trade-related Aspects of the Chair's Text and Suggested Modifications September 2002

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The Chair's Text of the Framework Convention on Tobacco Control (FCTC) makes substantial progress in addressing many important tobacco control issues. One major exception is the failure of the Chair's Text to address public health concerns about international trade in tobacco products. The Chair's Text unequivocally makes the FCTC subordinate to all other international agreements, ensuring that in any conflict between FCTC provisions and international trade agreements, international trade agreements will prevail. The Chair's Text also fails to include several important proposals that enjoyed widespread support during prior negotiating sessions, including:

- language reflecting the Parties' intent to make public health concerns a higher priority than commercial and trade concerns;
- a commitment by Parties not to promote tobacco product exports or tobacco use in other nations; and
- a provision acknowledging that action to protect the public from the proven harms caused by tobacco use are justified even in the absence of complete scientific certainty about the effectiveness of proposed remedies and related issues.

These provisions would ensure, to the extent possible, that international trade agreements are not used by the tobacco industry to stimulate tobacco use in other nations.

If these trade-related proposals are included in the FCTC, they would be binding among FCTC Parties, would establish an important precedent in international law, and could lead to helpful changes in the way tobacco products are viewed in international trade. These provisions would have no effect on nations that do not voluntarily ratify the FCTC because, under international law, it is impossible for the FCTC to change the terms of any other international agreement or to impose any new or different obligations on non-FCTC Parties.

There are four primary reasons why these provisions are needed:

- 1. Tobacco products are unlike any other traded product; they are uniquely harmful and therefore require special rules to ensure that international trade practices do not stimulate tobacco use.**

The tobacco industry and its supporters argue that tobacco products should be treated just like any other "legal product" in trade. In fact, tobacco products are not like any other legal product. They are

uniquely addictive and lethal when used as intended, resulting in the death of approximately half of all long-term users.¹ Unlike other risky products that are acknowledged to have some beneficial uses, tobacco use is universally discouraged by governments and health authorities. And unlike products that are harmful under some circumstances, tobacco products are harmful to all users at all dose levels. Rather than being simply “legal,” the manufacture, sale, advertising and use of tobacco products are subject to special rules in most nations. For these reasons, tobacco is fundamentally different from every other product and it is entirely appropriate to include language in the FCTC to ensure that international trade agreements and practices among FCTC Parties do not stimulate tobacco use.

2. There is ample precedent in many other international agreements for provisions to address concerns about trade in uniquely hazardous products.

There is a well-established pattern in which broad trade agreements establish general rules, and specific agreements are developed as necessary to address unusual products that do not fit within the general framework. International agreements already are in place to address specific concerns regarding hundreds of products including small arms, landmines, other weapons, narcotic drugs and psychotropic substances, ozone-depleting chemicals, hazardous waste, genetically modified organisms, persistent organic pollutants such as DDT, and endangered species.² In the environmental field alone, more than 20 multilateral treaties include trade-related provisions.³

3. Existing international trade agreements do not adequately address public health concerns about trade in tobacco products.

International trade rules are designed to stimulate increased trade and consumption of products. Tobacco is an anomaly within this system because, as discussed above, it is uniformly harmful rather than beneficial. Logically, one would expect that trade rules would allow a more restrictive approach to trade in uniformly harmful products.

Some agreements, such as the General Agreement on Tariffs and Trade (GATT 1994), provide a limited and narrowly construed exception to general rules of trade to protect public health. However, that exception, Article XX(b), imposes strict scrutiny on health measures that might impact trade. In essence, Article XX(b) requires that a panel of trade experts must be convinced not only that a measure is “necessary” to protect health, but also that no less restrictive measure is available and that there are not protectionist motives behind the measure. In practice, this means that health related concerns are subordinated to trade-related concerns under these agreements. The same is generally true of other international trade agreements.⁴

¹ Peto, Richard, et al., *Mortality from Smoking in Developed Countries, 1950-2000*, Oxford University Press, 1994.

² Bloom, J., “Tobacco Control and International Trade: Issues Raised by Tobacco Tariffs and the Privatization of State-Owned Tobacco Companies,” Campaign for Tobacco-Free Kids, August 2002, (Appendix 1: “Goods and Services Restricted in International Trade.”)

³ “Trade Measures and Multilateral Environmental Agreements: Resolving Uncertainty and Removing the WTO Chill Factor.” World Wildlife Federation, WWF International Discussion Paper, November 1999.

⁴ For a more detailed discussion of public health and international trade agreements see: Bloom, J, *Public Health, International Trade and the Framework Convention on Tobacco Control*, Campaign for Tobacco-Free Kids, March 2001, <http://tobaccofreekids.org/campaign/global/framework/docs/Policy.pdf>; Callard, C, Collishaw, N, Swenarchuk, M, *An Introduction to International Trade Agreements and Their Impact on Public Measures to*

Standards that place a high priority on promoting trade and that impose strict scrutiny on trade-restrictive measures may be appropriate as a general rule when applied to beneficial products. As discussed above, however, tobacco products are uniquely harmful, and so it is entirely appropriate to develop rules that place a higher priority on protecting public health than on promoting trade in tobacco products.

4. Existing international trade rules threaten tobacco control policies and have stimulated tobacco consumption in many nations.

The tobacco industry has a long history of using international trade agreements to force open restricted markets,⁵ drive down tobacco product tariff rates⁶ and challenge effective tobacco control measures. For example:⁷

- When the government of Thailand asked tobacco companies to disclose what is in their products, the companies argued that disclosing ingredients violated their rights under the Trade-Related Aspects of Intellectual Property Rights (TRIPS) agreement, resulting in years of delay.
- When the government of Canada considered requiring companies to use so-called “plain packaging” to reduce the appeal of cigarettes to children, tobacco companies argued that the proposal would violate GATT and NAFTA. The Canadian government dropped its proposal.
- Currently, the Canadian government is considering a proposal to prohibit the use of misleading descriptors such as “light” and “low tar.” Philip Morris has threatened to use its independent right of action under NAFTA Chapter 11 to sue the Canadian government if it moves ahead with its proposal.⁸

Often, a threat by the industry is all that is needed to discourage a nation from enacting an innovative tobacco control policy. Very few nations wish to become involved in complex international trade disputes. This “chilling effect” is already substantial and is likely to grow in light of the trend in trade agreements toward giving private companies a right to of action independent of any national government. Tobacco companies have virtually unlimited funds available to bring international trade actions designed to thwart effective tobacco control measures, and have shown a willingness to do so if given the opportunity.

Reduce Tobacco Use, Physicians for a Smoke-Free Canada, April 2001, http://www.smoke-free.ca/pdf_1/Trade&Tobacco-April%202000.pdf; and *WTO Agreements and Public Health: A Joint Study by the WHO and the WTO Secretariat*, August 2002, http://www.wto.org/english/res_e/booksp_e/who_wto_e.pdf.

⁵ Frankel, G., “U.S. aided cigarette firms in conquests across Asia,” *The Washington Post*, November 17, 1996 p. A1, <http://www.washingtonpost.com/wp-srv/national/longterm/tobacco/stories/asia.htm>.

⁶ Bloom, J., “Tobacco Control and International Trade: Issues Raised by Tobacco Tariffs and the Privatization of State-Owned Tobacco Companies,” Campaign for Tobacco-Free Kids, August 2002.

⁷ Examples taken from Callard, C, Collishaw, N, Swenarchuk, M, *An Introduction to International Trade Agreements and Their Impact on Public Measures to Reduce Tobacco Use*, Physicians for a Smoke-Free Canada, April 2001.

⁸ For more information see <http://www.ftc.org/news217.shtml>.

Changes in the Chair's Text that are necessary to address concerns about international trade in tobacco products:

The following changes endorsed by the Framework Convention Alliance (FCA) would improve the text substantially:

Delete Article 2.3. Article 2.3 states:

Nothing in this Convention and its related protocols shall be interpreted as implying in any way a change in rights and obligations of a Party under any international treaty.

Rationale: Article 2.3 appears at first glance to be intended to ensure that the FCTC does not harm the interests of nations that do not ratify the FCTC (non-FCTC parties), or change the rights or obligations of nations under international trade or other agreements. If this is the intent of Article 2.3, then it should be deleted as unnecessary because the rights of non-FCTC parties already are fully protected. It is simply not possible under international law for the FCTC to change the terms of any other international agreement or alter the rights or obligations of non-FCTC parties. FCTC provisions would only govern disputes among nations who have agreed to be bound by its terms. The fundamental rules governing conflicts that arise when parties are subject to two inconsistent treaties are (a) *lex specialis* -- treaties of a specific nature take precedence over treaties of a general nature; and (b) *lex posterior* -- the later in time treaty prevails.⁹ There is no reason to override these rules to make the FCTC subordinate to all other agreements, as Article 2.3 would do.

Delete Article 4.5. Article 4.5 states

While recognizing that tobacco control and trade measures can be implemented in a mutually supportive manner, Parties agree that tobacco control measures shall be transparent, implemented in accordance with their existing international obligations, and shall not constitute a means of arbitrary or unjustifiable discrimination in international trade.

Rationale: This provision effectively subordinates the FCTC to trade agreements and subordinates concern for public health to concern for non-discrimination in tobacco trade. Non-discrimination in trade is an important value, especially with regard to trade in beneficial products. However, with respect to trade in tobacco products, protecting public health must be the paramount concern.

Delete article 15.2. Article 15.2 states

The parties agree that measures to this end shall be transparent, well-defined, non-discriminatory and implemented in accordance with their national, regional and international obligations.

Rationale: This provision would make it a higher priority to avoid discrimination in tobacco product trade than to establish effective measures to secure more than \$25 billion in government revenue, save lives from tobacco use and tackle organised crime, money laundering and terrorism.

⁹ *Lex posterior* is reflected in the Vienna Convention of the Law of Treaties, Article 30, Paragraph 3.

Add language, as proposed by Thailand at INB-2, reflecting the supremacy of the FCTC over other treaties:

In the event of a conflict between this Convention or any of its Protocols and any other international agreement, this Convention and its Protocols shall prevail.

Rationale: This language clarifies that, among FCTC Parties, the FCTC is the authoritative agreement on issues relating to tobacco and health, and that it should take precedence in any conflict with other agreements. Such language would not change the terms of any international trade agreement, and therefore would not impose any new or different obligations on non-Parties. It would, however, be binding on FCTC Parties in disputes that may arise among themselves, and it would establish an important principle within the FCTC.

Add language obligating Parties not to undermine tobacco control measures in other nations:

The parties agree to take all necessary measures to ensure that no person acting on their behalf shall attempt to (a) remove, weaken, undermine or otherwise interfere with tobacco control measures in force or under consideration in another State or (b) promote tobacco exports or tobacco use in another State.

Rationale: This language is modelled on U.S. domestic law and policy, which prohibits federal officials from undermining tobacco control efforts or promoting tobacco or tobacco products in another nation.¹⁰ The suggested language above was put forward by Thailand and Oman at INB-2, had widespread support, but was eliminated from the Chair's text.

Add language clarifying the right of parties to take action in the absence of scientific certainty:

It is scientifically certain that tobacco use causes needless suffering and early death in a high proportion of users. Lack of scientific certainty regarding related issues, including the efficacy of specific tobacco control measures, shall not be used as a reason for postponing such measures or for challenging tobacco control measures taken by other States.

Rationale: Historically the tobacco industry has exploited any real or perceived uncertainty about the nature and magnitude of risk posed by active smoking, passive smoking, tobacco advertising, addiction, additives, and a host of other issues. The industry has demanded that near unanimity of scientific opinion be achieved, both about these issues and about the effectiveness of proposed remedies, before any protective action is taken. This approach has proven devastating to public health and makes no sense in light of the scientific certainty that active and passive smoking cause needless suffering and death and that measures to reduce tobacco use are justified. The public should not be left unprotected during the often lengthy search for scientific certainty regarding the efficacy of protective measures and related issues. Therefore, the FCTC should include language, such as that proposed by Thailand at INB-

¹⁰ This policy was established in U.S. law by an amendment to the Fiscal Year 1998 Appropriations Bill for the Departments of Commerce, State, and Justice, the Judiciary and Related Agencies, Pub. L. 105-119, Sec. 618 (the Doggett Amendment). The Doggett Amendment has been carried forward in annual appropriations bills since 1997. This policy is reinforced by a legally binding Executive Order issued by the President on January 18, 2001.

2, stating that lack of full scientific certainty regarding the impacts of tobacco or the efficacy of specific tobacco control measures should not be used as a reason for postponing such measures or for challenging tobacco control measures taken by other States. A similar approach already is incorporated in numerous multilateral environmental agreements, including the Rio Declaration on Environment and Development,¹¹ the Montreal Protocol on Substances that Deplete the Ozone Layer,¹² United Nations Framework Convention on Climate Change,¹³ the UN Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks,¹⁴ the Cartagena Protocol on Biosafety,¹⁵ and others.

Clarify Article 2.1, encouraging Parties to exceed minimum standards set by the FCTC

Article 2.1 is intended to clarify that the FCTC only imposes minimum standards and to encourage Parties to implement stricter requirements when possible. This is critically important to avoid the misinterpretation of FCTC standards as maximum standards. The wording of this provision has become unnecessarily complex. In order to avoid confusion, the final clause of Article 2.1, “in order to better protect human health and the environment,” should be deleted as superfluous or used as an introductory clause, rather than a concluding clause.

Conclusion

These suggested changes in trade-related provisions of the FCTC will significantly strengthen the treaty. Addressing the unique health concerns regarding tobacco products in international trade also will serve to strengthen and protect the broader framework of agreements governing trade in beneficial products.

¹¹ Rio Declaration on Environment and Development, Principle 15, June 14, 1992, U.N. Doc. A/Conf.151/5/Rev. 1 (1992), reprinted in 31 I.L.M. 876 (1992).

¹² Montreal Protocol on Substances that Deplete the Ozone Layer, preamble, Sept. 16, 1987, reprinted in 26 I.L.M. 1550 (1987).

¹³ United Nations Framework Convention on climate Change, art. 3(3), May 29, 1992, reprinted in 31 I.L.M. 849 (1992).

¹⁴ UN Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks, art. 5©, Aug. 4, 1995, UN Doc A/CONF.164/38, reprinted in 34 I.L.M. 1542 (1995).

¹⁵ See, e.g., Articles 10 and 11, Cartagena Protocol on Biosafety, January 29, 2000, available at URL: <http://www.biodiv.org/biosafe/Protocol/Protocol/html>.