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"International Trade Law and World Trade Organisation"

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Introduction:

International trade law governs the way in which states may restrict or regulate trade in goods and services, including in relation to tobacco products. It is, for the most part, governed by the World Trade Organization (WTO) agreements, with some states also party to bilateral, plurilateral, or regional preferential trade agreements.

WTO Agreements:

The World Trade Organization is the 'only global international organization dealing with the rules of trade between nations'. It is a 'rules-based, member-driven' multilateral organization, founded in 1994. The objectives of the WTO recognise that its Member States' 'relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development'.

Joining the WTO involves making a 'single undertaking' to accede to all of the WTO agreements as a 'whole and indivisible package'. In making the single undertaking, WTO Members accede to the Marrakesh Agreement Establishing the World Trade Organization, as well as more than two dozen 'covered agreements' regulating different aspects of trade between members. Under these agreements, Members commit to restrictions on their imposition of tariff barriers (such as import taxes or customs duties) and non-tariff barriers to trade (such as regulatory measures, quantitative restrictions, and internal tax laws that apply to both domestic and imported products). WTO Members also make commitments in other areas related to trade, such as protection of intellectual property rights, food safety, agriculture, customs valuation, and subsidies.

These pages will focus on the three WTO agreements which have been the subject of tobacco-control-related disputes, which are the General Agreement on Tariffs and Trade 1994 (GATT, incorporating obligations under GATT 1947), the Agreement on Technical Barriers to Trade (TBT Agreement), and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement), which regulates the adoption of intellectual property standards by members. It will also briefly cover dispute settlement procedures under the Dispute Settlement Understanding.

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Preferential Trade Agreements:

In addition to belonging to the WTO, many states (including WHO FCTC Parties) are parties to other trade agreements. These agreements (known as preferential trade agreements or PTAs) are usually bilateral or regional agreements. Parties to PTAs grant trade preferences to each other, typically by eliminating tariffs.

PTAs may also include non-tariff obligations similar to those in the WTO agreements or obligations that place greater restrictions on their parties than WTO rules, such as requiring higher levels of intellectual property protection than the provisions in the TRIPS Agreements. Although many PTAs provide for inter-state dispute settlement, generally, states have used WTO dispute settlement procedures when they wish to bring dispute settlement proceedings against other WTO Members.

Case Law:

In *US — Clove Cigarettes*, a case concerning whether a ban that covered clove cigarettes but not menthol cigarettes constituted discrimination under article 2.1 of the TBT, the Appellate Body held that clove and menthol cigarettes were like because:

Properties, nature and quality: both products contained flavours designed to reduce the harshness of tobacco and were attractive to youth and competed in the youth market.

End-uses: both types of cigarettes were capable of performing similar functions (i.e. satisfying the addiction to nicotine and having a social or experimental function)

Consumer tastes and habits: it was sufficient that the products were substitutable for some consumers (youth smokers and potential smokers) and it need not be established that the products also competed for market share among adult smokers. The Appellate Body relied on the panel's finding that menthol cigarettes had the same characteristics as clove cigarettes in terms of their effect on rates of smoking among young people.

The products had the same 6-digit tariff classification.

Directly Competitive or Substitutable Products (Tax Measures under GATT):

For tax measures under GATT, even if products are not deemed to be ‘like’, there is an additional obligation applying to products that are ‘directly competitive or substitutable’. Products are directly competitive or substitutable if they are ‘interchangeable’ or offer ‘alternative ways of satisfying a particular need or taste’.

To determine whether this is the case, a panel will look at the competitive conditions between the products in the relevant market, in light of the products’ physical properties, common end uses, tariff classification, channels of distribution, and price relationships including cross-price elasticity’s.

Why is International Trade Law Relevant to WHO FCTC Implementation?

Regulatory and tax measures to implement the WHO FCTC may interact with obligations under international trade law, in particular the GATT, the TBT, and the TRIPS agreement.

In these agreements, WTO member states commit to ensuring that:

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Regulatory and tax measures do not discriminate between local and imported 'like products', or between 'like products' from different countries (GATT, TBT)

Regulatory measures that constitute technical regulations are 'no more trade-restrictive than necessary' (TBT)

Certain intellectual property protections are implemented into national law (TRIPS)

These obligations have been the subject of WTO disputes relating to tobacco products, as well as discussions in WTO committees.

Although only states can access the WTO dispute settlement system, the tobacco industry routinely claims that measures will infringe international trade law. WTO-related arguments often appear in lobbying or media activities by the industry. Some WTO-based arguments, such as those relating to intellectual property, may also appear in legal challenges brought by the industry in other forums, such as in international investment disputes or domestic or regional legal challenges.

Understanding the relationship between the WHO FCTC and international trade law will allow states to manage the relationship between WHO FCTC implementation and international trade law, including in developing their measures and by critically evaluating claims that a measure will breach international trade law.

Conclusion:

A panel will compare the challenged measure with any possible alternative measures identified by the complaining member. A panel will consider whether an alternative measure would be less trade restrictive, would make an equivalent contribution to the objective (taking account of the risks non-fulfilment would create), and whether it is reasonably available.

A 'reasonably available' measure is one which would equally achieve or make an equivalent contribution to the achievement of the regulatory objective, which the government is capable of adopting and which does not impose an 'undue burden' in the form of prohibitive costs or technical difficulties.

In *Australia – Plain Packaging*, the complainants argued that Australia could have implemented one or all of four alternative measures, instead of plain packaging – raising the minimum legal purchasing age, raising excise tax, improving social marketing, and pre-vetting all tobacco packs to check for misleading branding. The panel considered that the first three of these measures were complements rather than alternatives to plain packaging, as they acted through different mechanisms as part of a comprehensive overall package of tobacco control measures. Substituting any of these alternatives would leave the impact of branding unaddressed, and therefore not provide the same level of protection. The pre-vetting mechanism alternative, on the other hand, was more trade-restrictive than plain packaging, and did not provide the same level of protection compared to standardizing the packs to remove branding altogether. The panel also found that none of the alternatives could be clearly demonstrated to be less trade-restrictive than plain packaging.

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These decisions highlight WTO tribunals' acknowledgement that in a number of regulatory areas (including tobacco control), a responding WTO Member will be able to successfully argue that different types of measures are *complementary* and operate as part of a suite of measures designed to achieve a particular objective, rather than being alternative measures. This is similar to acknowledgements of the complementary nature of Members' measures under the GATT health exception.

The panel will make its assessment of the alternatives in light of the nature of the risk toward which the measure is directed and the consequences that would arise should the objective of the measure not be achieved. The Appellate Body has indicated that the higher the risk of not fulfilling the objective, the more restrained a tribunal should be in determining whether alternative measures proposed by the complaining government are 'reasonably available' or 'make an equivalent contribution'.

In the context of WHO FCTC measures, this would involve consideration of the devastating health, economic, social and environmental consequences of tobacco use, and the potential risks of not addressing them. In Australia – Plain Packaging, the panel considered that failing to address tobacco use and exposure to tobacco smoke was a risk that was 'exceptionally grave', and that it was 'especially grave for youth'.