

Tobacco and trade

*Report of an intercountry consultation
WHO Regional Office for South-East Asia
New Delhi, 3–4 October 2012*



**World Health
Organization**

Regional Office for South-East Asia

SEA-Tobacco-47
Distribution: General

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Printed in India

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Abbreviations

ASEAN	Association of Southeast Asia Nations
AFTA	ASEAN Free Trade Area
BIT	bilateral investment treaties
COP	Conference of the Parties
DSU	dispute settlement understanding
DSB	dispute settlement body
FDI	foreign direct investment
FET	fair and equitable treatment
FTA	free trade agreement
GATT	General Agreement on Tariff and Trade
GATS	General Agreement on Trade in Services
ILO	International Labour Organization
IPR	Intellectual Property Rights
MFN	most favoured nation
MoH	ministry of health
MoT	ministry of trade
PMI	Philip Morris International
RA	regional adviser
SEA	South-East Asia
TBT	technical barriers to trade
TFI	Tobacco Free Initiative
TRIPS	Trade-Related Aspects of Intellectual Property Rights
TPRM	trade policy review mechanism
WHO	World Health Organization
WHO FCTC	The World Health Organization Framework Convention on Tobacco Control
WHO SEAR	WHO Regional Office for South-East Asia
WTO	World Trade Organization

Executive summary

An expert intercountry consultation on tobacco and trade was held at the WHO Regional Office for South-East Asia, New Delhi on 3–4 October, 2012. It was attended by 31 participants from the ministries of health, trade and, agriculture and legal offices from Bangladesh, Bhutan, India, Indonesia, Myanmar, Maldives, Nepal, Sri Lanka and Thailand as well as WHO staff from WHO country offices in Bangladesh, India, Indonesia, Myanmar and Nepal. The agenda and list of participants are given in Annexes 1 and 2, respectively.

The consultation consisted of presentations, open forum and group works. This report presents the highlights of the discussions and chronicles the output of the group work and open forum and the recommendations which were presented at the closing session.

The technical sessions were conducted to meet the objectives of the meeting. Discussions were held on the role of trade in the global tobacco epidemic. Presentations were made by experts on trade and investment agreements including the General Agreement on Tariffs and Trade 1994 and their implications for tobacco control; the Agreement on Trade-Related Aspects of Intellectual Property Rights and the challenges to Australian Plain Packaging. Topics also included technical barriers to trade (TBD), minimizing the risk of claims under international investment agreements and ensuring compliance with trade agreements. Trade issues were also discussed in the context of the WHO Framework Convention on Tobacco Control (FCTC) and its guidelines and how the Convention as an international treaty could be used in disputes and court cases against the government by the tobacco industry. An introductory presentation to the World Trade Organization (WTO) and its resources was made by a counsellor from Intellectual Property Division of WTO.

Participants worked in groups in four brainstorming sessions to identify common issues on trade and health, measures to prohibit emerging tobacco products, treatment of tobacco control in a hypothetical trade and investment negotiation and to develop country action plans in coordinating tobacco control and trade policy priorities in future trade and investment agreements. Participants agreed that health should be given a priority over

trade, whereas there were also views that there should be a balance between health and trade. Lack of coordination between the ministries of health and trade came out repeatedly during the discussions. Concerns over inadequate information in the area of alternative livelihood for tobacco farmers were also raised repeatedly. Participants also voiced concern over weak enforcement of tobacco control legislation and lack of public awareness on hazards of tobacco. They felt that the WHO FCTC was not fully implemented in the Member States and that limited funds were available to implement tobacco control in most Member States.

Many Member States in the Region are facing litigation from the tobacco industry; Nepal and Sri Lanka were facing law suits filed by the tobacco companies against pictorial health warnings at the time of the consultation. They learnt from experience from other Member States and also from the Australian Plain packaging case.

The participants worked in country teams to prioritize the key action points to coordinate tobacco control and trade policy priorities in future trade and investment agreements. They also developed recommendations for the Member States as well as WHO. Establishing and strengthening coordination between the ministries of health and trade on policies and regulations on trade and investment relating to tobacco and tobacco products was strongly recommended. Advocacy on health perspectives of international and investment agreements was also discussed and recommended. Participants agreed that full implementation of the WHO FCTC should be strengthened and there should be more funds for tobacco control in the Member States. Effective law enforcement and public compliance was also recommended. Research on health cost studies and alternative livelihood for tobacco farmers were also recommended by the participants.

1. Background

Over the past 20 years, trade in tobacco and tobacco products has rapidly expanded with the liberalization of international trade. This increase has led to a corresponding rise in tobacco consumption across low- and middle-income countries since the 1980s. The liberalization of trade, therefore, poses a major threat to global public health. This phenomenon highlights the inevitable connection between international trade agreements and the tobacco control policies enshrined in the WHO FCTC.

While most international trade agreements contain provisions permitting the restriction of trade in the pursuit of human health, the agreements nevertheless remain open to exploitation at the expense of tobacco control policies and broader public health initiatives. Consequently, the tobacco industry and its supporters are increasingly relying on international trade agreements to thwart the efforts of Member States to implement their WHO FCTC tobacco control obligations. Significantly, Canada has recently faced trade-based opposition to its decision to ban flavourings and other additives in tobacco products. Furthermore, the industry continues to employ potential violation of international trade agreements, in order to deter Member States from advancing legitimate tobacco control measures and furthering implementation of the WHO FCTC.

Australian legislation requiring that tobacco products be sold in plain packaging has been challenged under the law of the World Trade Organization (WTO). The same legislation, which implements Articles 11 and 13 of the WHO FCTC, has also been challenged directly by Philip Morris (Asia) under a bilateral investment treaty between Australia and China (Hong Kong, Special Administrative Region).

Philip Morris has also challenged Uruguayan tobacco packaging measures under a bilateral investment treaty. One of the challenged measures requires that graphic health warnings cover 80% of the surface

area of product packaging. Another challenged measure prohibits Philip Morris from presenting more than one variant of a given brand on the basis that the brand variants in question mislead consumers.

Recently, a law restricting the sale of flavoured tobacco products in the United States of America was also found to violate the World Trade Organization (WTO) law. The law in question prohibited the sale of tobacco products with a characterizing flavour other than tobacco or menthol. This law was found to discriminate against clove cigarettes of Indonesian origin in favour of menthol cigarettes of US origin.

These recent developments highlight the need for support to be provided to WHO Member States on the implications of international trade and investment agreements for tobacco control. The consultation provided an opportunity to review the implications of trade and investment agreements for tobacco control and to discuss how those implications may be addressed at the domestic and international levels.

The consultation sought to build capacity in the South-East Asia Region of both the ministry of trade (MoT) and ministry of health (MoH) focal points in order to build understanding of international trade concepts as they relate to tobacco control and, consequently, how to defend the development and implementation of tobacco control policies from trade-related arguments proffered by the tobacco industry.

This consultation was particularly timely, given that the fifth session of the WHO FCTC Conference of the Parties (COP) is to be held in the Republic of Korea, in November 2012 and the forthcoming implementation of tobacco control regulations in a number of Member States in the Region.

2. Objectives

The objectives of the consultation were:

- (1) To review existing commitments under international (including regional) trade and investment agreements and their implications for tobacco control measures;

- (2) To review arguments made by the tobacco industry that draw on international trade and investment agreements, as well as the counter arguments made by governments and civil society;
- (3) To discuss contemporary issues concerning tobacco control in the negotiation of new international trade and investment agreements;
- (4) To make recommendations for further steps to be taken to strengthen implementation of the tobacco control programme in light of international trade and investment agreements.

3. Inaugural session

Dr Poonam Khetrpal Singh, Deputy Regional Director, WHO South-East Asia Region, welcomed the participants and delivered the message from the Regional Director, Dr Samlee Plianbangchang. In his message, the Regional Director said that the consultation marked an important milestone, as it was the first time in the Region that representatives from both the ministries of health and finance were participating to discuss issues related to health with reference to tobacco.

The Regional Director also highlighted the burden of tobacco use in the Region, which was the highest among all WHO Regions and continued to be a growing public health crisis. He stated that there were approximately 250 million smokers and nearly the same number of smokeless tobacco users in the Region, leading to more than 1.3 million deaths every year due to tobacco use. The Regional Director expressed concern over the increasing use of tobacco in the Region, particularly among women and girls. He said that in addition to being a leading consumer of tobacco products, the Region was also a major tobacco producer, since India and Indonesia belonged to the top 10 tobacco producers and consumers in the world.

The Regional Director stated that over the past 20 years, trade in tobacco and tobacco products had rapidly expanded with the liberalization of international trade leading to a corresponding rise in tobacco consumption across low- and middle-income countries since the 1980s. He reminded that the liberalization of trade posed a major threat to global public health.

The Regional Director noted that in recent times, implementation of tobacco control measures, including implementation of the provisions of the WHO Framework Convention on Tobacco Control (WHO FCTC) had been challenged under international trade and investment agreements. He highlighted the need for support to be provided to WHO Member States on the implications of international trade and investment agreements for tobacco control. He stated that the consultation would provide an opportunity to review the implications of trade and investment agreements for tobacco control and to discuss how those implications might be addressed at the domestic and international levels.

The Deputy Regional Director urged all the participants to have an active and transparent dialogue to improve understanding between the two ministries. She hoped that the deliberations will produce recommendations for further steps to be taken to strengthen the tobacco control programmes in Member States in light of international trade and investment agreements.

Dr Dhirendra Sinha, Regional Adviser, Surveillance (Tobacco Control), WHO-SEARO introduced the participants.

4. Summary of the proceedings

Day 1

Dr Athula Kahandaliyanage, Director, Department Sustainable Development and Healthy Environments, WHO Regional Office for South-East Asia, moderated the business session. Dr DTP Liyanage, Director, Noncommunicable Diseases, Ministry of Health, Sri Lanka was nominated as the chairman of the meeting and Mr Md. Sadar Ali Biswas, Deputy Secretary, Ministry of Commerce, Government of the People's Democratic Republic of Bangladesh, was nominated as co-chairman.

Overview of the workshop

The WHO South-East Asia Region is among the major producers and consumers of tobacco and tobacco products. It is unique in the sense that both smoking and smokeless forms of tobacco products are prevalent in the Region. Smoking among adult men ranges from 24.3% (India) to 67.4%

(Indonesia) and among women from 0.4% (Sri Lanka) to 15% (Myanmar and Nepal). Trade in tobacco and tobacco products has rapidly expanded with the liberalization of international trade leading to immense rise in tobacco consumption across low- and middle-income countries since the 1980s. Liberalization of trade, therefore, poses a major threat to global public health. The tobacco industry and its supporters are increasingly relying on international trade agreements to thwart the tobacco control obligations.

The role of trade in the global tobacco epidemic

The choice of buying tobacco differs from that of other goods, since it is a unique product. It is addictive nicotine, contains more than 4000 known chemicals and is the only legal consumer good that kills half of its users when used as directed by the manufacturer. Tobacco kills, maims and causes extreme pain and suffering. Currently, it is estimated that tobacco kills nearly 6 million people per year, but this will increase to over 8 million per year in a few decades. If current smoking patterns continue, tobacco could kill up to 1 billion persons in the 21st century unless urgent action is taken.

International trade in manufactured tobacco products such as cigarettes has increased rapidly since the mid-1980s.

The potential causes for this increase include:

- inability of a specific country to produce tobacco products in sufficient quantity/quality leading to increased importation;
- price differentials in tobacco products between different countries leading to increased importation/exportation;
- reduced trade barriers, import bans, tariffs, quotas, and domestic content requirements leading to increased trade in tobacco products.

Lowering of barriers on trade in tobacco leads to increase in supply, enhanced product competition and brand proliferation leading to lower prices, increase in tobacco consumption and tobacco-related deaths and disability. Freer trade is expected to reduce the cost of living, provide more choice and better quality products, raise incomes and stimulate economic

growth. However, it is also expected to lead to an increase in cigarette consumption in low- and middle-income countries. The potential health consequences of trade and investment liberalization are, therefore, higher rates of tobacco-related deaths and disability. This means that the long-term consequences of the liberalization of tobacco-related trade and investment will be a significant increase in the burden of death and disease caused by tobacco. The tobacco industry has voiced its strong interest in taking advantage of trade liberalization to enter and develop new markets. Tobacco companies have adopted aggressive strategies to expand global trade and achieve market penetration in developing countries and emerging market economies. Youth and women are the prime targets of these campaigns.

Key discussion points

- Striking a balance between foreign direct investment (FDI) and tobacco control was a challenge.
- WHO was not advising Member States to stop free trade agreements, but to implement the WHO FCTC fully; in the plain packaging case of Australia, it is not a measure against trade liberalization, but Philip Morris International (PMI) used this case in order to challenge tobacco control measures. Similarly, PMI sued the government of Norway on point-of-sale bans. Courts ruled against both cases.
- Health cost studies should be the cornerstone for discussions with governments on health over trade.

Recent trade- and investment-related tobacco control issues

Case studies were presented on leveraging international trade and investment rules to oppose public health. Under international trade rules, the case of Canada Additives and US versus Indonesia Cloves cigarettes was discussed; under international investment, the case of Philip Morris International (Switzerland) versus Uruguay and under industry scare tactics, the case of Japan Tobacco and Mild Seven brand were discussed. The tobacco industry had used the threat of contravention of Trade Aspects of Intellectual Property Rights (TRIPS) and Technical Barriers to Trade (TBT) in developing countries.

Introduction to the World Trade Organization (WTO) and WTO resources

The World Trade Organization is based in Geneva, Switzerland and was established on 1 January 1995. WTO is a Member-driven and rules-based organization where decisions are taken by consensus. The highest decision-making body is the Ministerial Conference which meets every two years with the General Council conducting business in intervals and is open to all Members. The WTO believes that a non-discriminatory, open, transparent, predictable, pro-competitive, and stable rules-based multilateral trading system is beneficial for all countries. WTO recognizes the need for flexibility to take account of the trade and development interests of developing countries. The basic principle of WTO agreements includes non-discrimination, most-favoured-nation (MFN) treatment and national treatment.

The authors of these agreements are the member governments themselves — the agreements are the outcome of negotiations among members. The ultimate responsibility for settling disputes also lies with member governments.

The objectives of WTO include: raising living standards, ensuring full employment and allowing optimal use of world resources in accordance with the objective of sustainable development. WTO contributes to these objectives by aiming to substantially reduce tariffs and other barriers to trade (market access) and eliminate discriminatory treatment in international trade relations in a manner consistent with the respective needs and concerns of WTO Members at different levels of economic development. WTO's dispute settlement mechanism is well-respected in the world of trade law and it is vital for enforcing the rules and, therefore, for ensuring that trade flows smoothly.

Regarding the Australia Plain Packaging case, concerns were first raised by Ukraine, Honduras, the Dominican Republic and others in the relevant WTO bodies in 2011, including the Trade Related Aspects of Intellectual Property Rights (TRIPS) Council about Australian plain packaging law. The Australian Plain Packaging legislation requires cigarette packaging to be of a single colour (dark olive green), limiting the information on packaging to only a brand name in standard lettering, along with health warnings, in specified locations, without any symbols, logos or

design features. According to the law, 75% of the front of the package, 90% of the back and at least one of the sides of that package will have to bear health warnings. The stated objectives of the legislation are (1) to reduce the appeal of tobacco products to consumers; (2) increase the effectiveness of health warnings on the packaging of tobacco products; and (3) reduce the ability of the packaging of tobacco products to mislead consumers about the harmful effects of smoking.

The Dominican Republic and Ukraine have argued at the Council that this limitation of the use of trademarks on packaging *inter alia* violates Article 20 of the TRIPS Agreement, as it establishes a special requirement detrimental to the mark's ability to distinguish goods from those of other producers, Article 10*bis* of the Paris Convention, because the standardized package will increase the risk of consumer confusion. There are also systemic concerns about the measures undermining intellectual property protection more generally. They argued that plain packaging would not succeed in achieving the purported public health objectives, as in their view, there was no comprehensive evidence that it would actually contribute to a reduction of smoking levels; whereas it might have undesirable consequences such as increase in tobacco consumption due to increased price competition and rise in counterfeiting facilitated by fewer distinguishing packaging features. In addition, they expressed concerns about the potential adverse effects of the measure on small economies that depended in large part on the production and export of tobacco and derivative products.

These concerns were echoed by a number of other Members, including Cuba, El Salvador, Honduras, Nicaragua, Nigeria, the Philippines, Zambia and Zimbabwe. They argued that, while Members had the undisputed right to take measures necessary to protect public health, Article 8 of the TRIPS Agreement clearly stated that such measures had to comply with the Agreement. Australia responded that in view of the extensive health burden of smoking, plain packaging was the logical next step in its tobacco control campaign that already comprised *inter alia* extensive smoking bans, age restrictions, pricing measures and advertising control. The measures were appropriate and justified, as extensive peer-reviewed literature showed the impact of plain packaging on smoking behaviour. It did not expect an increase in counterfeiting, as anti-counterfeiting markings would continue to be permitted on products. In its view, the legislation

complied with TRIPS. Canada, New Zealand, Norway and Uruguay welcomed Australia's initiative, arguing that the legislation was justified and fully within a Member's sovereign competence, as confirmed by the Doha Declaration on TRIPS and Public Health. While not focusing on this particular measure, e.g. Brazil took the view that developments in the WTO and other forums on the relationship between IP and public health reflected a recognition that all countries were allowed to adopt any measure necessary to protect public health. A number of other countries, such as Chile, China, India, and Switzerland had called for more discussion about the systemic concerns raised by the complex interplay between public health measures and the protection of IPRs. In their view, while public health measures were legitimate, such measures had to be effective, not overly restrictive and had to properly take into account IP owners' interests, and also needed to be based on scientific evidence.

Group work 1. "Burning issues" in the countries and expectations from the consultation

The participants were divided into two groups. The purpose of the group work was to map issues of trade and health sectors separately and to reflect on common concerns and to identify the expectations from this consultation.

Health issues	Trade issues
<ul style="list-style-type: none"> • High prevalence of tobacco use both smoking and smokeless. • High exposure to second-hand smoke (SHS). • Increasing use of tobacco by school children. • Increased use of tobacco products and proactive marketing strategy by tobacco manufacturers. • Growing burden of NCDs. • High health care cost for tobacco-related diseases. • Less productivity due to these diseases. 	<ul style="list-style-type: none"> • Smuggling of tobacco products. • National acts (legislation) without any regulations. • Low level of awareness of harms of tobacco use. • Informal trade and tax evasion. • Unregulated export and import of tobacco products. • Ineffective regulations and tax evasion. • Rapid increase in trade negotiation. • Low tariff for imported cigarettes.

Health issues	Trade issues
<ul style="list-style-type: none"> • Need for tobacco cessation; limited facilities for cessation. • Low levels of awareness about the hazards of tobacco use. • Inadequate dissemination of information. • Need for capacity development. • Ineffective implementation of tobacco control laws and regulation. • Ineffective implementation of the WHO FCTC provisions. • Lack of human resources for tobacco control at field level. • Government commitment: tobacco control is not a priority programme. • Alternative farming. • Strong pressure of tobacco industries. • Tobacco monopoly. 	<ul style="list-style-type: none"> • Lack of coordination and inter-ministerial collaboration. • Negative impact on socio-economic development and environment leading to poverty, nutritional deficiencies, reproductive and child health problems and infertility, etc. • Product regulation and tertiary laboratory for testing contents in manufactured tobacco products. • Fear of obligations. • Livelihood affected. • Health above trade in the WHO FCTC. • Licensing of tobacco trade. • Small-scale industry and production in unorganized sector. • Cross-border advertisements.
Common issues	
<ul style="list-style-type: none"> • Lack of interministerial consultations. • Need to enhance coordination among various agencies involved in tobacco control efforts. • Need to balance between health and trade. • Need for research in terms of tobacco and trade. • Weak implementation of the WHO FCTC and ineffective law enforcement. • Conflict of interest. • Need to strengthen information sharing. • Weak compliance with the WHO FCTC and WTO provisions in harmony. • Need for better understanding of the complexities of tobacco, trade and health issues. 	

Expectations

- To understand tobacco-related issues
- To learn about alternatives for tobacco cultivators, labourers, retailers
- Clear and transparent regulations
- Specific understanding of regional status
- More research in terms of tobacco and trade
- More funds available for implementation of WHO FCTC
- More information-sharing
- Increase in tobacco taxes
- Recommendation to WTO.

Trade issues in the context of the WHO FCTC and its guidelines

Currently, 176 Member States are bound by the WHO FCTC covering more than 80% of the world's population. Of the 176 parties to the WHO FCTC, 139 are also WTO Members. The WHO FCTC, as a binding international treaty is on equal footing with other binding international instruments when questions of conflicts and interpretation arise. The example of the Oslo District Court Decision on 14 September 2012 on the Point of Sale Advertising Ban referred to both WHO FTC and guidelines. The September 2012 decision in Germany on banning of flavouring capsules in cigarette filters referred to guidelines for Articles 9 and 10; the court agreed to the decision of the regulatory authority to ban the flavouring capsules based on Article 9 & 10 guidelines. One of the judges said that even if these guidelines were not legally binding, they represented a broad scientific consensus internationally and had been accepted by the Parties.

The Agreement on Technical Barriers to Trade (TBT)

The agreement on technical barriers to trade (TBT) applied to technical regulations which were mandatory, applied to an identifiable product or group of products and laid down product characteristics (either in negative or positive form).

Non-discrimination: Article 2.1 establishes a prohibition on discrimination, which is not subject to an exception.

Necessity: Article 2.2 requires that technical regulations be not more trade restrictive than necessary to achieve a legitimate objective.

International standards: Article 2.4 obliges Members to use relevant international standards as a basis for technical regulations. This is not required where those standards would be an inappropriate or ineffective means for fulfillment of the legitimate objective pursued. Art. 2.5 creates a rebuttable presumption of compliance with paragraphs 2 – 4 where a technical regulation is adopted, applied or prepared for one of the legitimate objectives explicitly mentioned in Art. 2.2 and is ‘in accordance’ with relevant international standards.

The Agreement on Trade-Related Aspects of Intellectual Property Rights and the challenges to plain packaging of tobacco products in Australia

TRIPS is an international agreement administered by the WTO that sets down minimum standards for many forms of intellectual property (IP) regulations as applied to nationals of other WTO Members. TRIPS obliges WTO Members to ensure minimum standards of protection for intellectual property rights. The Dispute Settlement Body was established by WTO following a complaint filed by Ukraine against Australia for a tobacco plain-packaging law aimed at discouraging tobacco use. TRIPs included patents, copyright and related rights, trademarks, industrial designs, layout designs of integrated circuits, undisclosed information including trade secrets and geographical indications, rules of origin. TRIPS obliges WTO members to ensure a minimum standard of protection for intellectual property rights.

A **trademark** is a sign that an individual trader or company uses to distinguish its goods and services from the goods and services of another undertaking; it must be distinctive and not be deceptive. All intellectual property laws are territorial in their applications.

Doha Declaration on the TRIPS agreement and public health

Adopted on 14 November 2001, the Declaration, as other aspects, include the following:

We agree that the TRIPS Agreement does not and should not prevent Members from taking measures to protect public health. Accordingly, while reiterating our commitment to the TRIPS Agreement, we affirm that the Agreement can and should be interpreted and implemented in a manner supportive of WTO Members' right to protect public health and, in particular, to promote access to medicines for all.

Introduction to the General Agreement on Tariffs and Trade, 1994, and its implications for tobacco control

The World Trade Organization came into existence on 1 January 1995. It was created by the Marrakesh Agreement, which sets out the functions, structure and status of the WTO. The Marrakesh Agreement involves a 'single undertaking'. In other words, all WTO Members must be party to all the above agreements apart from the plurilateral trade agreements.

Annexed to the Marrakesh Agreement are:

- the General Agreement on Tariffs and Trade (GATT) 1994 and the other multilateral agreements on trade in goods;
- the General Agreement on Trade in Services (GATS);
- the Trade-related Aspects of Intellectual Property Rights (TRIPS) Agreement;
- the Dispute Settlement Understanding (DSU);
- the Trade Policy Review Mechanism (TPRM); and
- the plurilateral trade agreements, two of which have expired

The remaining two plurilateral agreements are the Agreement on Trade in Civil Aircraft and the Agreement on Government Procurement.

Core GATT disciplines

Core GATT disciplines include non-discrimination and market access.

Non-discrimination includes:

- (1) National treatment essentially means an obligation to treat products of other Members no less favourably than domestic products (and directly competitive or substitutable products).

- (2) MFN treatment requires that any favour granted to a product of another country (not Member) must be granted immediately and unconditionally to the like products of all Members. Essentially, it means that WTO Members must not discriminate among WTO Members or in favour of any non-Member.

Market access includes:

- (1) **Tariff bindings (GATT Art II):** Each WTO Member has negotiated schedules of 'concessions', which are annexed to the GATT 1994. A Member must not impose tariffs (customs duties imposed at the border) on imports of a given product from any other Member at a rate above that identified for that product in the first Member's schedule. This requirement is relevant to all goods, including tobacco leaf and various types of tobacco products. Schedules list tariffs for goods classified in accordance with the Harmonized System, which was developed by the World Customs Organization. The tariff 'ceilings' contained in each Schedule represent 'bound' rates; 'applied' rates for a given product may be lower, as long as the Member provides them on an MFN basis (that is, to all WTO Members). GATT, 1994, Art II:1(a).
- (2) **Prohibition on Quantitative Restrictions (QR) (GATT Art XI):** Article XI:1 of the GATT 1947 contains a general prohibition on quantitative restrictions such as quotas and licences on importation or exportation with respect to other Members. Thus, a ban on imports of a given product (a quota of zero) would generally not be allowed (unless it fits within a relevant exception).

Exceptions: A number of 'exceptions' apply to the four key disciplines of the GATT 1994 just identified. These include subsidies to domestic producers, imposition of anti-dumping or countervailing measures, customs unions and general exceptions.

Dispute settlement understanding (DSU): The WTO's dispute settlement system is governed by the DSU and is designed to resolve situations where a Member considers that its benefits under a WTO agreement are being impaired by another Member's measures. This is 'essential to the effective functioning of the WTO and the maintenance of a

proper balance between the rights and obligations of Members'-DSU, Article 3.3. The Appellate Body hears appeals from Panel Reports regarding issues of law and legal interpretations and comprises seven 'persons of recognized authority, with demonstrated expertise in law, international trade and the subject matter' of the WTO agreements.

International investment agreements: Overview

Investment agreements have to be clear and precise. There are two principles of non-discrimination in WTO: non-discrimination of nations and most-favoured nations. International investment arbitration has increased greatly. Disputes were the highest by far in 2011.

International investment agreements give teeth to the substantive obligations contained in investment treaties and give foreign investors a right to bring a claim against a State for violation of the substantive investment guarantees. In many cases substantial awards have been made in an investor's favour. Investment Treatment Obligations include absolute protections (non-contingent obligations) and relative protections (contingent obligations). Absolute protections include fair and equitable treatment, full protection and security and compensation for expropriation. Relative protection includes national treatment (NT) and most-favoured-nation (MFN).

Bilateral investment treaties (BITs) often prohibit the taking of a foreign investment by a public authority except (i) for a public purpose, (ii) on a non-discriminatory basis, and (iii) against compensation.

Article 6 (Hong Kong–Australia BIT), expropriation: Investors of either Contracting Party shall not be deprived of their investments nor subjected to measures having an effect equivalent to such deprivation in the area of the other Contracting Party except under due process of law, for a public purpose related to the internal needs of that Party, on a non-discriminatory basis, and against compensation. There is direct and indirect expropriation: direct expropriation are acts that transfer title and physical possession and indirect expropriation are acts that lead to the loss of management, use or control, or a significant depreciation in the value of assets. Creeping expropriation is 'the slow and incremental encroachment on one or more ownership rights of a foreign investor that diminishes the

value of its investment. Arbitral tribunals have found a number of different factors relevant in distinguishing non-compensable regulation by the State from compensable expropriation. Relevant considerations: whether the government has acquired the investor's property rights; whether the interference with those rights is proportionate to a public interest objective; the degree and duration of the interference; whether the measure entails an exercise of the State's sovereign *police powers*; and the legitimate expectations of investors.

Fair and equitable treatment (FET): Arbitral decisions concerning the FET standard have assessed government conduct according to principles of reasonableness, consistency, non-discrimination, transparency, and due process. Pursuant to Article 2(2) of the Hong Kong–Australia BIT, 'investments and returns of investors of each Contracting Party shall at all times be accorded fair and equitable treatment in the area of the other Contracting Party'.

International investment law is a growing area of international law; there are an increased number of arbitral decisions and number of investment treaties. There is improvement in the legal position of investors, but the host states have become less enthusiastic. The outcome of arbitration cases are difficult to predict.

Minimizing the risk of claims under international investment agreements

Expropriation: Increasingly, treaty language clarifies the meaning of expropriation. For example, an annex to the ASEAN – Australia – New Zealand FTA clarifies the meaning of indirect expropriation as "non-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 of the type referred to in Paragraph 2(b)."

Fair and equitable treatment: Increasingly, treaty language clarifies the meaning of fair and equitable treatment. The ASEAN – Australia – New Zealand FTA provides another example:

- (1) Each party shall accord to covered investments fair and equitable treatment and full protection and security.

- (2) For greater certainty:
 - fair and equitable treatment requires each party not to deny justice in any legal or administrative proceedings;
 - full protection and security requires each party to take such measures as may be reasonably necessary to ensure the protection and security of the covered investment; and
 - the concepts of “fair and equitable treatment” and “full protection and security” do not require treatment in addition to or beyond that which is required under customary international law, and do not create additional substantive rights.
- (3) A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article.

Most-favoured-nation (MFN) treatment: To restrict the ability of investors to make arguments based upon more favourable clauses in other bilateral investment treaties (BITs), States clarify the scope of MFN clauses. For example, language might clarify that the MFN obligation does not apply to dispute settlement.

Using exceptions: Some investment treaties include general exceptions such as those found in Article XX of the General Agreement on Tariffs and Trade 1947. The investment chapter of the Australia – Singapore Free Trade Agreement is an example. There is some controversy whether these clauses protect against claims for compensation.

Carve-outs: Many investment treaties include exemptions for sensitive products or products of specific classes. The prospect of a tobacco-specific carve-out has been discussed in the context of the Trans-Pacific Partnership negotiations.

Managing risk under existing treaties: Renegotiating or clarifying existing commitments; the terms of existing agreements have been clarified along similar lines to those of new agreements. Examples include side letters to the Singapore – US FTA and the Free Trade Commission interpretation concerning the North American Free Trade Agreement.

Managing an investor's expectations: Avoid making specific commitments to foreign investors in the tobacco sector. Outline tobacco control as a long-term policy priority to clarify what foreign investors can expect.

Due process: Provide due process / natural justice rights within the bounds of domestic law and Article 5.3 of the WHO FCTC.

Determining whether to accept foreign investment: Where treaties leave discretion concerning the acceptance of investment, consider whether to accept or reject foreign investment in the tobacco sector. Avoid accepting investment that may provide a basis for future claims e.g. registering misleading trademarks.

Ensuring compliance with trade and investment agreements

Targeted products: Is the targeting of particular products (cigarettes) over similar products (example; cigars, other tobacco products) justified on health grounds or other legitimate policy grounds? Follow usual legislative processes including public consultation and local and international notifications. Where possible, frame the objectives of tobacco control measures in terms of the protection of public health and fulfilment of domestic obligations under the WHO FCTC.

Include in the relevant legislation, regulations or associated material explanations of how the measure will assist in protecting public health and fulfilling the WHO FCTC obligations, relevant references to scientific evidence and empirical studies conducted in relation to the domestic market for tobacco products, descriptions of other significant domestic measures targeting tobacco consumption, eg. excise taxes, advertising restrictions and public smoking bans, as well as the historical regulatory context for these measures and their interaction with the measure and an assessment of the risks of not fulfilling the public health objective of the measure, emphasizing the existing and projected health and broader social costs associated with domestic tobacco consumption.

The relevant legislation, regulations or associated material explanations should also include:

- **flexibilities** such as recognition of regulatory sovereignty; right to protect public health, limits on rights of intellectual property owners e.g. negative rights; balance between rights and obligations, recognition of rights and obligations under other treaties such as WHO FCTC.
- **clarifications/definitions** such as the scope of key investment concepts such as expropriation and fair and equitable treatment, leaving sufficient policy space for governments.

Making **specific assurances** to investors about future public health regulation and other public policies should be avoided. Methods for **future modification should be included**, such as ability of parties to clarify rules or agree on interpretations of rules and ability of parties to alter rules with limited notice period. Lawyers should be involved early and kept involved throughout the process.

Group work 3. Treatment of tobacco in a new FTA negotiation

The purpose is to apply new knowledge on free trade agreements and their relationship to tobacco control by developing an answer to a question presented in the case study (case-study includes: background and question). The group was asked to prepare a joint briefing for the ministers of health and trade containing policy options on how tobacco and tobacco products should be addressed under the FTA. These options should address a number of issues, including: whether commitments should be made to lower tariffs on tobacco leaf or tobacco products (and how any such commitments would differ from the status quo); and how tobacco should be treated under provisions governing the protection of foreign investment.

Outputs from groups

- To exclude investment of tobacco exclusively. If not possible, to go for other options to avoid pitfalls.
- Non-discriminatory measures.
- Concurrence for free trade agreement (FTA) to increase revenue for government. Possibility of excluding tobacco investment in the scope of FDI to ensure public safety.

- Need to ensure reservation on tariff issues. If any dispute arises, should discuss first within the country and not with the investors and then take the measure to WTO.
- Should agree on FDI with agreement to spend 5% of the revenue on public health sector.
- Will advise both MoH and MoT to exclude tobacco products from negotiations.
- Not to reduce tariff on tobacco products.
- Increase tax on domestic producers.
- Non-discriminatory tax on both domestic and imported tobacco products.
- Non-discriminatory taxes will be used to keep the prices of tobacco products up.

Group work 4. Country action plans: how can we coordinate tobacco control and trade policy priorities in future trade and investment agreements?

The purpose of this group work is to identify aspects of coordination that can be improved. Groups engaged in worksheet exercises and team discussion on the guiding questions to assess readiness and capacity for coordination between the trade and health sectors. The team had to reach a consensus on their response, tally the results and discuss which aspects of coordination, needs to be urgently addressed.

There were six thematic areas: the need for coordination, support for coordination work, planning for more effective coordination, coordinating our actions, minimizing barriers to coordination and reflecting on continuing coordination. Finally, they had to come up on how they fared as a team.

An example of a presentation on Group work 4.

	Our score	How can we improve?
The need for coordination	16	<ul style="list-style-type: none"> • Increase interaction • Share resources, ideas, power
Support for coordination work	12	<ul style="list-style-type: none"> • Clarify roles and responsibilities • Improve skills
Planning for more coordination	16	<ul style="list-style-type: none"> • Develop and implement plans jointly
Coordinating our actions	13	<ul style="list-style-type: none"> • Regular meetings • Resource sharing
Minimizing barriers to coordination	14	<ul style="list-style-type: none"> • Increase skilled core staff • Develop dispute resolving strategies jointly
Reflecting on continuing coordination	14	<ul style="list-style-type: none"> • Establish collaborative review process • Recognize success in collaboration
Total score	85/120	

The next step is preparing an action plan for better coordination to identify ways of improving coordination on trade and tobacco policies in the future. Using the results of the last exercise, the groups were asked to develop a simple action plan to improve coordination on trade and tobacco policies in the future and provide indicative dates for achieving targets.

Objectives identified by countries focused on strengthening collaboration between MoH and MoT, to remove barriers for collaboration and capacity building of both sectors on trade and tobacco. Activities include formulation of policy which will support public health in harmony with related ministries, clarifying goals, establishing coordination committees and conducting coordination meetings to increase political support with commitment from government and parliament, sharing of resources and powers, joint review of progress, joint dispute resolving

strategy, skill development; strengthening infrastructure of both sectors, research and knowledge management to generate evidence to support trade negotiations and monitoring tobacco industry interference in trade negotiations.

5. Recommendations

Actions for Member States

- (1) An inter-ministerial consultation between relevant ministries and the ministries of health should be organized before formulating the country policies and regulations on trade and investment relating to tobacco and tobacco products for protection of public health.
- (2) An inter-ministerial coordination mechanism should be established and strengthened to promote awareness and capacity building of all stakeholders on the intersection between trade and public health for tobacco control.
- (3) Inter-ministerial coordination and collaboration should be strengthened for crop substitution and alternative livelihood.
- (4) Community awareness for consumer should be promoted to help them make informed choices on the hazards of tobacco products.
- (5) Studies on the health cost of tobacco use should be promoted.
- (6) Research in the area of tobacco and trade should be promoted and information thereon disseminated.
- (7) Multisectoral consultations at national, regional and international levels should be organized to provide platforms for discussion of treaties/international obligations related to trade and tobacco control for public health.
- (8) Inter-ministerial coordination should be increased for appropriate taxation on all types of tobacco products in order to maximize health protection.

- (9) Law enforcement related to tobacco control should be strengthened through inter-ministerial cooperation and coordination.
- (10) Advocacy with policy-makers on health perspectives of international trade and investment agreements should be promoted.

Action for WHO in collaboration with international partners

Member States should be supported in implementing the above recommendations and their capacity on health perspectives of international trade and investment agreements strengthened.

Annex 1

Agenda

1. Opening
2. Overview of the workshop
3. The role of trade in the tobacco epidemic
4. Overview of recent trade and investment disputes and tobacco industry arguments
5. Overview of the World Trade Organization and the General Agreement on Tariffs and Trade 1994
6. Trade issues in the context of the WHO FCTC and its guidelines
7. The Agreement on Technical Barriers to Trade
8. The Agreement on trade-related aspects of intellectual property rights international investment agreements
9. Overview of regional and bilateral trade and investment agreements
10. The Fifth session of the WHO FCTC of the Parties: trade and investment issues
11. Conclusions and recommendations

Annex 2

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Over the past 20 years, with the liberalization of international trade, trade in tobacco and tobacco products has rapidly expanded. This has led to a corresponding rise in tobacco consumption across low- and middle-income countries since the 1980s, and poses a major threat to global public health. This phenomenon highlights the inevitable connection between international trade agreements and the tobacco control policies enshrined in the WHO Framework Convention on Tobacco Control (FCTC).

An Expert Intercountry Consultation on Tobacco and Trade was held at the WHO Regional Office for South-East Asia, New Delhi on 3–4 October 2012. A total of 31 participants from the ministries of health, trade and, agriculture and legal offices from nine Member States as well as WHO staff from WHO country offices in Bangladesh, India, Indonesia, Myanmar and Nepal attended.

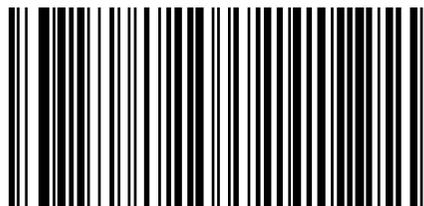
Recommendations for the Member States were: (1) establishing and strengthening coordination between the ministries of health and trade on policies and regulations on trade and investment relating to tobacco and tobacco products; (2) promoting advocacy on health perspectives of international and investment agreements; (3) strengthening full implementation of the WHO FCTC; (4) mobilizing more funds for tobacco control in the Member States; (5) ensuring law enforcement and public compliance; and (6) conducting research on health cost studies and alternative livelihood for tobacco farmers. It was recommended that WHO should strengthen the capacities of Member States on health perspectives of international trade and investment agreements.



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SEA-Tobacco-47