REINFORCING DISPUTE SETTLEMENT MECHANISM UNDER THE FRAMEWORK CONVENTION ON TOBACCO CONTROL AS AN OPTION TO SOLVE TRADE/INVESTMENT-RELATED TOBACCO DISPUTES

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ABSTRACT

The liberalization of international trade in tobacco products has been criticized for the spread of tobacco epidemics worldwide. Tobacco control policies have been legally challenged for violations of international trade and investment agreements. Trade and investment issues have long been one of the controversies fiercely debated among delegates of the Framework Convention on Tobacco Control (hereinafter "FCTC") since the initiation of negotiation in 1999, and continue to be an issue in relation to the implementation of the FCTC since its entering into force in 2005. The tobacco-related dispute settlement mechanism and its relationship with other trade or investment dispute settlement mechanisms remains one of the significant issues due to the potential impacts of such trade or investment rulings on the formation and implementation of tobacco control policies. With a brief overview of how international trade issues evolved under the FCTC, this paper focuses on the examination of problems of current dispute settlement provision (namely Article 27) of the FCTC. While the use of Article 27 dispute settlement mechanism has limited implications for initiation of a trade or investment

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dispute, establishing an enhanced ad hoc *arbitration mechanism avails Parties to the FCTC an alternative forum for solving tobacco disputes within the realm of the international health law. This paper explores possible options for the reinforcement of the current system to encourage the use of a pro-health settlement of tobacco disputes under the FCTC.*

KEYWORDS: *tobacco control, dispute settlement, Framework Convention on Tobacco Control (FCTC),* ad hoc *arbitration, international trade, international investment, public health*

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I. INTRODUCTION

The tension between public health and international trade has deepened with the world economy becomes more integrated at international or regional levels.[1] Trade liberalization has been criticized as one of the major causes for the spread of tobacco pandemic worldwide, especially from developed countries to low or middle-income countries.[2] Subjecting tobacco products to free trade rules has been the common practice among countries in developing international trade or investment norms despite the unique feature of such products being detrimental to the health of people.[3] Unlike contraband such as arms, munitions or hazardous chemicals, tobacco products had never been treated differently from other goods when international trade rules were concluded at multilateral, bilateral, or even regional levels.[4] Against such a trend, the public health community has consistently warned of the threats of international trade and investment rules for introducing innovative tobacco control policies or weakening the effectiveness of existing tobacco control measures.

Such threats were realized as several legal challenges brought under the World Trade Organization (hereinafter "WTO")[5] and international investment regimes.[6] As a world leader in charge of health affairs, the World

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[1] *See* PRABHAT JHA & FRANK J. CHALOUPKA, CURBING THE EPIDEMIC: GOVERNMENTS AND THE ECONOMICS OF TOBACCO CONTROL 14-15 (1999).

[2] *See generally* CYNTHIA CALLARD ET AL., AN INTRODUCTION TO INTERNATIONAL TRADE AGREEMENTS AND THEIR IMPACT ON PUBLIC MEASURES TO REDUCE TOBACCO USE (2001), htt p://www.smoke-free.ca/pdf_1/Trade&Tobacco-April%202000.pdf; Allyn Taylor et al., *The Impact of Trade Liberalization on Tobacco Consumption*, *in* TOBACCO CONTROL IN DEVELOPING COUNTRIES 343 (Prabhat Jha & Frank Chaloupka eds., 2000).

[3] *See* Cynthia Callard et al., *Why Trade and Investment Liberalisation May Threaten Effective Tobacco Control Efforts*, 10(1) TOBACCO CONTROL 68, 68-70 (2001).

[4] It is not until the negotiation of Trans-Pacific Partnership Agreement [hereinafter TPP] that special trade rules have been proposed and debated to safeguard tobacco control measures. The TPP negotiation is likely to be a game changer for shaping a different set of rules to ensure that states can adopt effective tobacco control policy without fearing the potential violation of trade and investment rules. Since the withdrawal of the US from the TPP in January 2017, this agreement was renamed as "Comprehensive and Progressive Agreement for Trans-Pacific Partnership [hereinafter CPTPP]," in which art. 29.5 clearly provided an exception for tobacco control measures. It avails the right for the CPTPP Parties to decline the jurisdiction of an investment arbitration tribunal for hearing claims on tobacco control measures.

[5] *See, e.g.*, Appellate Body Report, *Dominican Republic — Measures Affecting the Importation and Internal Sale of Cigarettes*, WTO Doc. WT/DS302/AB/R (adopted May 19, 2005); Panel Report, *Dominican Republic — Measures Affecting the Importation and Internal Sale of Cigarettes*, WTO Doc. WT/DS302/R (adopted May 19, 2005); Panel Report, *United States — Measures Affecting the Production and Sale of Clove Cigarettes*, WTO Doc. WT/DS406/R (adopted Apr. 24, 2012); Appellate Body Report, *United States — Measures Affecting the Production and Sale of Clove Cigarettes*, WTO Doc. WT/DS406/AB/R (adopted Apr. 24, 2012); Panel Report, *Australia — Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WTO Doc. WT/DS435/R, WT/DS441/R, WT/DS458/R, WT/DS467/R (adopted Aug. 27, 2018).

[6] *See, e.g.*, Philip Morris Asia Ltd. v. The Commonwealth of Austl., PCA Case No. 2012-12,

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Health Organization (hereinafter "WHO") has made a lot of efforts to address trade and investment issues with cooperation with WTO or other international organizations. Trade issues remained controversial when members of the WHO negotiated the Framework Convention on Tobacco Control (hereinafter "FCTC") since 1999, the first treaty concluded under the auspice of WHO to address the imminent tobacco epidemic at the international level. It became more urgent for the FCTC to seek any possible ways to mitigate the impact of trade or investment agreements on the effective implementation of tobacco control policy in response to those imminent legal challenges brought by big tobacco companies or other WTO Members claiming their tobacco control measures violated trade or investment agreements.

Unlike slow recognition of the unique feature of tobacco products in the development of international trade rules, the public health community has a long historical record of its attempt to tackle trade and investment issues for public health objectives.[7] It had been proposed to incorporate a provision giving health priority over trade during the negotiation of the FCTC. Despite the failure of incorporating such provision in the FCTC, the Conference of the Parties (hereinafter "COP") to the FCTC have constantly emphasized the significance of public health in its decisions or declarations after the FCTC entering into effect in 2005. In October 2014, the sixth COP to the FCTC adopted two relevant decisions on trade and investment issues in relation to the implementation of the FCTC. Proposed by Malaysia, the first decision was originally designed to carve out tobacco products from subjecting to trade rules prescribed in free trade agreements.[8] The second decision, proposed by Uruguay, tried to strengthen the dispute settlement mechanism under the FCTC. Despite the relevance of these two proposals to tackle the trade issues in tobacco control, this paper focuses only on Uruguay's proposal for the reinforcement of Article 27 of the FCTC and examines the development of the same issue at the seventh session of the COP.

Against such background, this paper briefly surveys the evolution of international trade issues under the FCTC and illustrates how trade issues connect with dispute settlement mechanisms under the FCTC in Part II. Next, this paper examines the origin and contents of Article 27 of the FCTC, the provision dealing with dispute settlement, and the COP's decisions in response to Uruguay's proposal for further implementation of Article 27 will

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Award on Jurisdiction and Admissibility (Dec. 17, 2015); Philip Morris Brands Sàrl et al. v. Uru., ICSID Case No. ARB/10/7, Award (July 8, 2016).

[7] *See generally* Ira S. Shapiro, *Treating Cigarettes as an Exception to the Trade Rules*, 22(1) SAIS REV. 87 (2002).

[8] For discussion about the problems of exclusion policy towards tobacco products in international trade agreements, see generally Benn McGrady, *Trade Liberalisation and Tobacco Control: Moving from a Policy of Exclusion Towards a More Comprehensive Policy*, 16(4) TOBACCO CONTROL 280 (2007).

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also be addressed in Part III. In Part IV, this paper identifies problems of the current dispute settlement mechanism under Article 27 and explores possible options for reinforcement of the current mechanism particularly through the enhancement of *ad hoc* arbitration mechanism.

II. REVIEW OF INTERNATIONAL TRADE ISSUES UNDER THE FCTC

Recent ongoing tobacco disputes under the WTO or international investment regimes have deepened the worry in the public health field that tobacco control policies may be affected by the rulings from the trade or investment tribunals other than the forum under the FCTC. The emergence of various tobacco-related trade and investment disputes had prompted Parties to the FCTC to reconsider how to reinforce the dispute settlement mechanism under the FCTC.[9] Before exploring possible ways for improving the dispute settlement system under the FCTC, it is necessary to examine how the trade issues were addressed during different phases of the treaty-making process under the FCTC, and how the voice to reinforce dispute settlement mechanism under FCTC was brought out in order to clarify its connection with the issues of international trade.

A. Evolution of Trade v. Health Debate Under the FCTC

International trade agreements have long been criticized for their negative impacts on states' willingness to adopt effective tobacco control policies or measures. Ever since the initiation of FCTC negotiation in 1999, member states had fiercely debated over whether the FCTC should incorporate any relevant provision dealing with the relation between trade and health.[10] Despite a seemingly compromised solution not to have any explicit language in the final text of the FCTC, the trade (and investment) issues had emerged once again when the COP engaged in the efforts to implement the FCTC since its entering into force in 2005. This paper examines how the trade issues evolved at different stages of the development of the FCTC to lay the historical foundation for further discussions over the

[9] At the fifth session of the Conference of the Parties to the WHO Framework Convention on Tobacco Control [hereinafter COP] in 2012, the representative of the Philippines proposed an addition to a draft decision prepared by Canada with respect to an agenda item on Cooperation with the World Trade Organization on trade-related tobacco-control issues, that would advise "the Convention Secretariat to remind the member Parties that there is an existing mechanism under Article [27] of the WHO Framework Convention on Tobacco Control for dispute settlement and that this should be first exhausted before resorting to other international bodies . . . ." The Philippines' proposal was supported by India, but it was too ambitious and controversial to be accepted by others Parties. It was not included in the final decision adopted by the COP 5. *See* World Health Org. [hereinafter WHO], *Summary Records of Committees*, at 156, WHO Doc. FCTC/COP/5/REC/2 (2013) (COP 5).

[10] *See* Ira Shapiro, *"Health vs. Trade": Still Contentious*, 44 ALLIANCE BULL. 2, 2 (2003).

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dispute settlement provision.

1. Negotiation Stage — Since 1999, the World Health Assembly (hereinafter "WHA") had established different subsidiary bodies to develop the first treaty under the WHO. The birth of FCTC had undergone various processes of hefty works by Working Group (hereinafter "WG"), the Intergovernmental Negotiating Body (hereinafter "INB"), and the Intergovernmental Working Group (hereinafter "IGWG") authorized by the WHA.[11] The WG firstly advised possible treaty elements of the FCTC, and then the INB negotiated substantive provisions of the FCTC. The final task was for the IGWG to deal with institutional or financial issues. Throughout such multiple phases of negotiation, two major controversies can be shown with respect to international trade issues, namely, whether to incorporate a health-over-trade provision in the FCTC and whether to have a non-discrimination provision as one of the guiding principles in the FCTC. Not all of the delegates shared the same position towards these issues, and a pro-health and a pro-trade group could be roughly categorized.

(a) Incorporating a Health-over-trade Provision in the FCTC? — Developing countries and civil society are major proponents to have a clear health-over-trade provision being incorporated in the FCTC. The original idea had been proposed by the WG in 1999 to include an element dealing with trade issues due to the unique feature of tobacco products. It had suggested possible text: "[A]s a result of the unique nature (addiction and health damage) of tobacco products, normal trade practices are not applicable."[12] Later at INB 4 in 2002, a relevant text had been proposed that "[p]riority should be given to measures taken to protect public health when tobacco control measures contained in the Convention and its protocols are examined for compatibility with other international agreements."[13]

The rationales for having a health-over-trade provision are threefold. Firstly, unlike regular agricultural or industrial products, tobacco is a unique product that general trade rules may not be fully in line with tobacco control policies because the consumption of the product is addictive in nature and harmful to public health.

Secondly, proclaiming health-over-trade would be necessary to support the right of sovereign states to adopt more effective tobacco control measures without fearing legal challenges brought by other states or tobacco companies. Moreover, such provision can provide a stronger foothold to deliver the common position of the Parties in addressing any potential

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[11] *See generally* Ruth Roemer et al., *Origins of the WHO Framework Convention on Tobacco Control*, 95(6) AM. J. PUB. HEALTH 936 (2005).

[12] WHO, *Elements of a WHO Framework Convention on Tobacco Control*, at 7, WHO Doc. A/FCTC/WG1/6 (Sept. 8, 1999).

[13] Hadii M Mamudu et al., *International Trade Versus Public Health During the FCTC Negotiation, 1999-2003*, 20(1) TOBACCO CONTROL e3, 4 (2011).

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conflicts or confusions with trade rules.

The third reason is related to the issue of health inequality between developing and developed countries. The proponents tried to mitigate the negative health impacts on developing countries *via* a clear health-over-trade provision. As indicated in the record of the meeting, it was suggested that "developing countries should be protected from the effects of international trade in tobacco products and that developed countries exporting tobacco products and/or leaves to them should be accountable."[14]

The opposing arguments mainly relied on distrusting the capacity and expertise of the WHO in dealing with the trade issues if such provision was included. Instead of addressing trade issues, the FCTC would be more capable of dealing with health issues without the need to divert their efforts to weigh the value between the two. Moreover, the inclusion of such provision in the FCTC would engender unnecessary controversies over the potential conflicts with prior commitments made by the Parties under international trade agreements.

(b) Incorporating a Non-discrimination Provision in the FCTC? — Tobacco companies and developed countries are major supporters of the inclusion of a non-discrimination provision in the FCTC. It had been proposed a non-discrimination provision since the WG suggested possible elements of the FCTC. The original draft provided that "[m]easures taken . . . should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade."[15] It had been transformed into Guiding Principles D.4, stating that "trade policy measures for tobacco control purposes should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade."[16] Later in INB 2, the draft had been revised as Guiding Principles D.5, stating that "[t]obacco-control measures should not constitute a means of arbitrary or unjustifiable discrimination in international trade."[17]

The tobacco industry strongly supported this provision because it would ensure the full compliance of trade rules so that their tobacco products can be freely traded across territories of the Parties. Developed countries also supported it as this provision was a reflection of current trade rules under the WTO. The civil society proposed the above health-over-trade provision to counteract this non-discrimination provision; however, it ended up with a compromised silence position discussed as follows.

(c) Compromised Position: No-trade Provision in the FCTC — Given

[14] WHO, *Proposed Draft Elements for a WHO Framework Convention on Tobacco Control: Provisional Texts with Comments of the Working Group*, at 3, WHO Doc. A/FCTC/INB1/2 (July 26, 2000).
[15] WHO, *supra* note 12, at 6.
[16] WHO, *supra* note 14, at 9.
[17] WHO, *Chair's Text of a Framework Convention on Tobacco Control*, at 1, WHO Doc. A/FCTC/INB2/2 (Jan. 9, 2001).

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the contentiousness of trade issues, delegations finally compromised on a "silence position,"[18] i.e., not to include any explicit language indicating whether trade or health prevail over the other at the end of the negotiation. Nonetheless, there are several relevant provisions worth noting as indicated in the final text of the FCTC that are associated with trade issues.

Firstly, in the Preamble of the FCTC, Parties determined to "give priority to their right to protect public health" despite no indication as to whether such priority was given against trade or other values being provided in the main body of the treaty.

Moreover, Parties are encouraged to implement measures beyond those required by the FCTC and its protocols in Article 2.1 of the FCTC, proclaiming the standards of FCTC served as the minimum level of tobacco control policy, and each Party can go further beyond such minimum standards. However, such stricter requirements should be consistent with the FCTC and in accordance with international law under Article 2.1. Despite not mentioning trade, the term "international law" was meant to include international trade agreements.

Finally, Article 2.2 provides a more neutral or general way of addressing the relationship between the FCTC and other international agreements without touching the contentious language over trade or health. It provides that "[t]he provisions of the Convention and its protocols shall in no way affect the right of Parties to enter into bilateral or multilateral agreements, including regional or sub-regional agreements, on issues relevant or additional to the Convention and its protocols, provided that such agreements are compatible with their obligations under the Convention and its protocols." In sum, the first round of debate ended up with a silent approach without including any explicit language about the trade over health or the opposite.

2. Implementation Stage — While the FCTC failed to incorporate an explicit health-over-trade provision at the end of the negotiation, Parties came back to reiterate the significance of public health over trade at the implementation stage. This paper finds that the trade issues have been back in the spotlight in the following manners.

Firstly, Parties constantly adopted declarations proclaiming the health should be prioritized over trade, such as Punta Del Este Declaration at COP 4,[19] Seoul Declaration at COP 5,[20] and Moscow Declaration at COP 6.[21] These declarations do not have a legally binding effect; nonetheless, Parties

[18] The term is used by Mamudu et al., *supra* note 13, at 6-7.

[19] WHO, *Punta del Este Declaration on the Implementation of the WHO Framework Convention on Tobacco Control*, WHO Doc. FCTC/COP4(5) (Nov. 19, 2010).

[20] WHO, *Seoul Declaration*, WHO Doc. FCTC/COP5(5) (Nov. 17, 2012).

[21] WHO, *Report of the Sixth Session of the Conference of the Parties to the WHO Framework Convention on Tobacco Control*, at 135-37 (2014), https://apps.who.int/gb/fctc/PDF/cop6/FCTC_COP6_Report-en.pdf (Moscow Declaration, WHO Doc. FCTC/COP6(26)).

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delivered a strong political message to support a common position taken collectively against the legal threats or challenges based on trade and investment rules.

Secondly, Parties tried to reconsider the trade issues through international cooperation with the WTO or other international organizations such as the United Nations Conference on Trade and Development (UNCTAD).[22] The purpose was to share information on trade-related tobacco control issues and to facilitate regular communication between the WHO and relevant Committees at the WTO.

Finally, Parties adopted decisions addressing trade and investment issues. At COP 6, the COP adopted two decisions proposed by Malaysia and Uruguay. Malaysia's original proposal aimed to carve out tobacco products from subject to free trade agreements to avoid violations of trade or investment rules therein. After sounds of debates, the final decision was more neutralized without any langue about exclusion or carve-out. It only reminds Parties of "the possibility to take into account their public health objectives in their negotiation of trade and investment agreements." Moreover, the scope of this decision is limited to apply only under the context of the WHO FCTC without possible far-reaching effects outside the FCTC. Another one related to the reinforcement of dispute settlement of Article 27 of the FCTC proposed by Uruguay.

B. Assessment of the Debate and Connection of Tobacco Disputes with Trade Rules

As indicated in the historical debate, trade and investment issues remained to be an obstacle to reach common ground among representatives of the Parties to the FCTC at the negotiation stage. Without having a consensus on how to incorporate relevant guiding principles regarding the health versus trade relationship in the FCTC, the compromised solution can probably be reached for an ultimate silence on the reference to the trade and investment rules. Such a result can be reasonably expected because putting aside this controversial and relatively minor issue could expedite the negotiating progress to reach a consensus on formulating the substantive rules for tobacco control.

Nonetheless, the lack of any provision specifically mentioning the relationship of the FCTC with the trade and investment rules could make states worried about potential violations of trade and investment rules for their adoption of more effective tobacco control measures. After the conclusion of the FCTC, such worry was finally realized in 2010 when

[22] WHO, *Cooperation Between the Convention Secretariat and the World Trade Organization*, WHO Doc. FCTC/COP4(18) (Dec. 6, 2010).

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Uruguay was challenged by Philip Morris for violating investment rules under the Switzerland–Uruguay Bilateral Investment Treaty. Given that the FCTC is devoid of a clear health-over-trade provision, Parties to the FCTC can simply rely on adopting non-binding declarations (e.g., Punta del Este Declaration in 2010) to support Uruguay in defending tobacco control measures.

The trade and investment issue continued to be raised after the FCTC entering into effect. As indicated above, Parties to the FCTC resumed the health versus trade debate through the adoption of declarations, decisions and cooperation with other international organizations. Among others, strengthening the dispute settlement mechanism under the FCTC was one of the decisions made by the COP at the sixth session in 2014. Nonetheless, a toned-down decision was later made at the seventh session by the COP in 2016 without pursuing a more ambitious agenda on reforming Article 27 of the FCTC. It seemed reasonable that Parties to the FCTC made such a toned-down decision because Uruguay prevailed over Philip Morris in the investment dispute earlier in the same year of 2016. This could explain why the Parties to the FCTC decided not to vigorously pursue the agenda to reinforce Article 27 of the FCTC originally proposed by Uruguay.

Trade and investment rules were frequently used by the tobacco industry to challenge tobacco control measures adopted by sovereign states. The frequent interference of the tobacco industry through litigation against FCTC member states became a serious problem for the implementation of tobacco control policies. Although the challenged tobacco control measures are based on the FCTC in which Article 27 also provides a mechanism for settlement of disputes, tobacco industry or member states preferred other trade or investment fora such as the WTO or International Centre for Settlement of Investment Disputes (ICSID) to solve the tobacco-related disputes.[23]

At the COP 6, Uruguay proposed a draft decision aiming at strengthening dispute settlement procedures under the FCTC in response to those litigations under other fora currently faced by member states. Its proposal was based on the consideration that Article 5 and Article 22 of the FCTC encourages Parties to cooperate in formulating procedures or guidelines aimed at strengthening the capacity of Parties to implement and fully comply with the FCTC. As part of the implementation efforts, Uruguay recommended that Parties demonstrate their commitment to implement the

[23] Transnational tobacco companies have traditionally relied on international trade and investment law to discourage countries from adopting tobacco control measures. Examples are Australia' tobacco plain packaging measures being challenged by Philip Morris International *via* Hong Kong-Australia Bilateral Investment Treaty or by Ukraine (followed by Cuba, the Dominican Republic, Honduras and Indonesia) *via* WTO dispute settlement proceedings. *See* Lukasz Gruszczynski, *The WTO and FCTC Dispute Settlement Systems: Friends or Foes?*, 12(1) ASIAN J. WTO & INT'L HEALTH L. & POL'Y 105, 110-13 (2017).

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FCTC by strengthening the mechanisms provided in Article 27 to facilitate the settlement of disputes concerning the implementation of the FCTC.

This paper finds that the original idea to have a more effective dispute settlement mechanism under FCTC was trying to have those tobacco-related disputes be solved preferably under the FCTC forum. It is worth exploring options to strengthen the current dispute settlement mechanism under the FCTC to facilitate Parties to solve tobacco disputes *via* the FCTC forum.

III. SETTLEMENT OF TOBACCO DISPUTES UNDER THE FCTC

A. Origin and Content of Article 27 of the FCTC

When the FCTC was negotiated, the WG had proposed a dispute settlement provision as one of the important elements to be a part of the implementation mechanism in the FCTC.[24] If a dispute arises between Parties, the WG proposed that Parties may refer for settlement *via* the following means: (1) arbitration, (2) International Court of Justice or arbitration, and (3) consultation or the use of diplomatic channels. Delegates from Iran later added the fourth means, (4) Permanent Court of Arbitration, to which Parties may refer their dispute. However, the final text of FCTC reserved two of them, namely, consultation (or other peaceful means) and arbitration, and did not refer to any international tribunals such as the International Court of Justice or the Permanent Court of Arbitration.[25] This outcome indicated that Parties to the FCTC considered the implementation of the Convention to be more important than a settlement of disputes among Parties concerned. In other words, regarding the settlement of the dispute, Parties focused more on setting up an internal mechanism to facilitate the implementation of the FCTC than relying on external tribunals to engage in the dispute between the Parties.

The final provision regarding settlement of the dispute was provided in Article 27 of the FCTC,[26] many of which resemble similar provisions in the

[24] WHO, *supra* note 12, at 27. In addition to dispute settlement, the implementation mechanism also includes other elements such as national reporting and noncompliance/consultation procedures.

[25] WHO, *supra* note 14, at 30.

[26] WHO Framework Convention on Tobacco Control [hereinafter FCTC] art. 27, June 16, 2003, 2302 U.N.T.S. 166:

> 1. In the event of a dispute between two or more Parties concerning the interpretation or application of this Convention, the Parties concerned shall seek through diplomatic channels a settlement of the dispute through negotiation or any other peaceful means of their own choice, including good offices, mediation, or conciliation. Failure to reach an agreement by good offices, mediation or conciliation shall not absolve parties to the dispute from the responsibility of continuing to seek to resolve it.

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Framework Convention on Climate Change (Article 14), the Convention for the Protection of the Ozone layer (Article 11.3), and Convention on Biological Diversity (Article 27.3).[27] Specifically, major elements and procedures set under Article 27 are discussed below.

Firstly, the jurisdictional scope of application of this provision is limited to a dispute concerning the interpretation or application of the FCTC between two or more parties.

Secondly, when a dispute arises, parties concerned shall first try to resolve it by themselves or seek help from third parties with non-binding means of dispute resolution. The methods indicated in Article 27.1 include diplomatic dialogue, negotiation or other peaceful means of their own choice such as good offices, mediation, or conciliation.

Thirdly, if Parties concerned failed to reach an agreement by good offices, mediation or conciliation, either Party shall not absolve parties to the dispute from the responsibility of continuing to seek to resolve it. This paragraph does not mention what kinds of alternative means could be resorted to by Parties if they failed to reach an agreement by above non-binding means besides *ad hoc* arbitration provided in Article 27.2.

Fourthly, Parties may refer to an *ad hoc* arbitration, which is a compulsory or legally binding method to solve the dispute according to

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> 2. When ratifying, accepting, approving, formally confirming or acceding to the Convention, or at any time thereafter, a State or regional economic integration organization may declare in writing to the Depositary that, for a dispute not resolved in accordance with paragraph 1 of this Article, it accepts, as compulsory, ad hoc arbitration in accordance with procedures to be adopted by consensus by the Conference of the Parties.
> 3. The provisions of this Article shall apply with respect to any protocol, unless otherwise provided therein.

[27] Convention on Biological Diversity art. 27, June 5, 1992, 1760 U.N.T.S. 79, 31 I.L.M. 818:

> 1. In the event of a dispute between Contracting Parties concerning the interpretation or application of this Convention, the parties concerned shall seek a solution by negotiation.
> 2. If the parties concerned cannot reach an agreement by negotiation, they may jointly seek the good offices of, or request mediation by, a third party.
> 3. When ratifying, accepting, approving, or acceding to this Convention, or at any time thereafter, a State or regional economic integration organization may declare in writing to the Depositary that for a dispute not resolved in accordance with paragraph 1 or paragraph 2 above, it accepts one or both of the following means of dispute settlement as compulsory: (a) Arbitration in accordance with the procedure laid down in Part 1 of Annex II; (b) Submission of the dispute to the International Court of Justice.
> 4. If the parties to the dispute have not, in accordance with paragraph 3 above, accepted the same or any procedure, the dispute shall be submitted to conciliation in accordance with Part 2 of Annex II unless the parties otherwise agree.
> 5. The provisions of this Article shall apply with respect to any protocol except as otherwise provided in the protocol concerned.

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Article 27.2 of the FCTC. However, two conditions should be satisfied before Parties can resort to *ad hoc* arbitration. Parties concerned, either a state or a regional economic integration organization, have to declare in writing to the Depositary that it accepts *ad hoc* arbitration as a compulsory means of dispute settlement. Moreover, the rule governing arbitration procedure has to be adopted by consensus by the COP.

Finally, Article 27 shall apply with respect to any protocol as between the parties to the protocol, unless otherwise provided therein.

B. COP's Decisions on Further Implementation of Article 27 of the FCTC

As mentioned above, trade and investment issues were one of the major controversies within the COP 6 agenda, and there were two decisions finally adopted by the COP 6. While Article 23.5 of the FCTC avails the power to the COP to take the decisions necessary to promote the effective implementation of the FCTC, the legal status of COP's decisions remains unclear if having a legally binding effect.[28] Despite such controversy, the COP's decisions remain useful sources of legal guidance as they reflect the common intentions of the Parties.[29]

One of the decisions was proposed by Uruguay addressing the issue of dispute settlement under Article 27. The original draft decision proposed by Uruguay was hotly debated and revised into a more neutralized and less ambitious mandate by Parties. This paper finds several textual differences that could well indicate that the adopted decision has retreated from the

[28] For the discussion of the legal status of FCTC COP decisions, see Lukasz Gruszczynski, *Tobacco and International Trade: Recent Activities of the FCTC Conference of the Parties*, 49(4) J. WORLD TRADE 665, 670-75 (2015).

[29] WHO, *Issues Related to Implementation of the WHO FCTC and Settlement of Disputes Concerning the Implementation or Application of the Convention: Report by the Convention Secretariat*, ¶ 24, WHO Doc. FCTC/COP/7/20 (July 27, 2016). In examining the issue of Article 27 of the FCTC, the report emphasizes the positive implication of the COP's decision in helping Parties' legal position on tobacco control policies. It states that:

> The WHO FCTC and COP decisions, including implementation, guidelines, can be expected to strengthen Parties' legal position in defending challenged measures without recourse to Article 27 dispute settlement. These instruments can demonstrate broad international consensus on the seriousness of the harm caused by tobacco use and on the types of measures that contribute to reducing tobacco use and protecting and promoting public health; inform the interpretation or application of particular provisions in trade or investment agreements, such as whether a measure is "necessary" to protect health; and provide evidence of factual matters that may be in dispute, such as the regulatory goal of a tobacco control measure implemented by a Party to the WHO FCTC, the contribution such a measure makes to the achievement of a State's regulatory goal, and the importance of a regulatory goal pursued.

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original draft decision proposed by Uruguay.

First, the original title of the draft decision emphasized the reinforcement of the current dispute settlement mechanism would be part of solutions to address "trade and investment issues and legal challenges" currently faced by Parties. Partly because such title may indicate a more pro-health direction for further reform of dispute settlement mechanism, the COP decided to change the title to a more neutralized language, i.e., "issues related to the implementation of" the WHO FCTC and settlement of disputes concerning the implementation or application of the Convention.

Second, final decisions deleted two sensitive and controversial paragraphs in the Preamble of the decision, which may indicate the tobacco control measures should prevail over trade rules. Original draft mentioned paragraph 17 of the Doha Declaration of the TRIPS Agreement and Public Health and Article XX(b) of the General Agreement on Tariffs and Trade (GATT), indicating these trade rules ensure Parties' adoption of tobacco control measures to protect public health. The reason to delete was partly that it is not appropriate for the FCTC to instruct how these trade rules should be applied or interpreted as the decision indicated.

Third, the final decision established a less ambitious mandate as compared to Uruguay's original proposal. Here are some examples. Instead of establishing a "group of experts" for further study on Article 27 proposed by Uruguay, the final decision simply requested the "Convention Secretariat" to prepare a report for consideration at the COP 7.

Moreover, the final mandate for the Convention Secretariat was limited to the areas of study for further implementation of Article 27 whereas the original draft suggested several encouragements for Parties to commit or promote such as defending FCTC measures from tobacco industry interference, coordinating on trade and public health issues at a national level, supporting the efforts made by States to duly implement the FCTC in the exercise of their sovereign right to protect public health, and most importantly, demonstrating their commitment to strengthen the dispute mechanism provided in Article 27 in order to facilitate the settlement of disputes concerning the implementation of the FCTC.[30]

Although these disparities may indicate a setback of public health position, the final adopted decision at least provides three clear mandates to move this agenda item forward. Firstly, the decision clearly instructs the Convention Secretariat which areas of study needed to be addressed in a report submitted for consideration at the COP 7. In detail, the Convention Secretariat has to examine: "(a) possible procedures for settling disputes concerning the interpretation or application of the Convention, through negotiations, diplomatic channels, or [*ad hoc*] arbitration in accordance with

[30] *See* WHO, *supra* note 21, at 23-25, 124-25.

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Article 27; (b) the kind of disputes that may be subject to such procedures; (c) the interaction of such procedures with other disputes settlement mechanisms."[31] Secondly, for those Parties facing legal challenges, the decision requests the Convention Secretariat: (a) to facilitate the provision of technical support, training and capacity building activities; and (b) to facilitate information sharing and cooperation among Parties in coordination with the WHO Secretariat and relevant knowledge hub. Finally, the decision invites Parties, through the Convention Secretariat Information Platform, to share information relating to legal disputes, promote information exchange and assistance to other Parties under the Platform.[32]

Upon the request from the COP 6, the Convention Secretariat published a report on issues related to implementation and dispute settlement of the FCTC in July 2016 and requested further guidance from the COP at the seventh session.[33] Without taking more ambitious action, the COP 7 only instructed the Convention Secretariat to inform Parties appropriate practices in promoting and safeguarding tobacco control measures under trade and investment agreements, to document decisions of international tribunals relating to tobacco control measures, and to inform the Parties the most frequently targeted tobacco control measures by the tobacco industry and the way to protect their regulatory capacity.[34]

IV. PROBLEMS AND POSSIBLE OPTIONS TO STRENGTHEN ARTICLE 27 OF THE FCTC

While the FCTC contains a dispute settlement provision under Article 27, it has so far never been used effectively to solve tobacco disputes among Parties to the FCTC as compared to other trade or investment fora. This paper first identifies the problems of the current dispute settlement provision under FCTC and explores possible options for an enhanced implementation of Article 27 with a view to find ways to secure a pro-health settlement of tobacco disputes under the FCTC.

A. Problems of Article 27 of the FCTC

This paper finds that the current dispute settlement mechanism under Article 27 of the FCTC suffered several drawbacks in terms of the effectiveness of settling tobacco disputes even if this provision resembles

[31] *Id.* at 124 (Issues Related to Implementation of the WHO FCTC and Settlement of Disputes Concerning the Implementation or Application of the Convention, WHO Doc. FCTC/COP6(18)).
[32] *Id.* at 125.
[33] WHO, *supra* note 29, ¶ 27.
[34] WHO, *Trade and Investment Issues, Including Agreements, and Legal Challenges in Relation to the Implementation of the WHO FCTC*, at 2, WHO Doc. FCTC/COP7(21) (Nov. 12, 2016).

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relevant provisions in other international agreements.

Firstly, Article 27 relies too much on non-binding or voluntary means to settle tobacco disputes among Parties without providing a clear rule on whether, when and how the proceeding should move to a legally binding means to solve the dispute if the peaceful means chosen by Parties concerned fail to reach an agreement.

Secondly, even if Article 27.2 provides the possibility that Parties may refer their dispute to *ad hoc* arbitration when they accept it as a compulsory means of dispute resolution, this paragraph has never been used because the application of this rule has to satisfy two conditions which are difficult if not impossible to fulfil.

The first condition requires the explicit consent of individual States involved in the dispute. To initiate a compulsory arbitration proceeding, a state or regional economic integration organization has to declare in writing to the Depositary that it accepts, as compulsory, *ad hoc* arbitration for a dispute not resolved by above peaceful means. As of January 2021, only two Parties to the Convention—Azerbaijan and Belgium—had declared their acceptance of compulsory *ad hoc* arbitration.[35]

The second condition requires that such compulsory *ad hoc* arbitration procedures should be adopted by consensus by the COP without the possibility of self-formulation of such procedures by the Parties concerned. In other words, the problem of the current mechanism lies in incomplete procedural rules provided by the COP for the use of *ad hoc* arbitration as a means of dispute settlement. The Parties are prevented from establishing their own procedural rules to resort the dispute to *ad hoc* arbitration. The procedural rules for an *ad hoc* arbitration, if any, have to be adopted by the COP. To the worst, the COP has not yet adopted or even begun to consider adopting the rules for such *ad hoc* arbitration procedures.

Finally, the current system lacks strong "teeth" against the Party fails to comply with the obligations of the FCTC. Unlike the WTO providing trade retaliation against the recalcitrant states, it is difficult for the FCTC to impose effective sanctions on the Party for its violation of obligations or to provide enough deterrence for the Party attempting to violate the FCTC. Such "soft" rules show that Parties to the FCTC focus more on the implementation of the Convention than settling the dispute between Parties.

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[35] The Republic of Azerbaijan declares that where any disputes arising between the Republic of Azerbaijan and any Party concerning the implementation and interpretation of the Convention cannot be settled by negotiations and other diplomatic means, according to paragraph 1 of the above-mentioned Article such disputes shall be settled through arbitration, in accordance with paragraph 2 of Article 27 of the Convention. The Kingdom of Belgium declares that, for a dispute not resolved in accordance with paragraph 1 of Article 27 of the Convention, it accepts, as compulsory, *ad hoc* arbitration in accordance with procedures to be adopted by consensus by the Conference of the Parties. *See Declarations*, FCTC, https://www.who.int/fctc/declarations/en/ (last visited Sept. 8, 2021).

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Moreover, it could be explained why the format of the convention is set as a "framework" convention which normally would not contain too many "hard" rules. Similarly, the FCTC intended to give greater latitude for each Party to formulate specific tobacco control measures on their own without too much interference over their domestic policymaking.

B. Possible Options to Strengthen Article 27 of the FCTC

In exploring possible options to strengthen Article 27 of the FCTC, this paper suggests that the following points of issue should be addressed by the COP in order to seek a common understanding among Parties on how to further enhance the current dispute settlement mechanism.

Firstly, the COP should debate over what objectives in terms of the dispute settlement mechanism that the FCTC aims to achieve collectively. The major issue in setting objectives of the mechanism aims at either emphasizing more on encouraging Parties' implementation of FCTC[36] or on settling the disputes between Parties regarding the interpretation or application of the FCTC. If a more effective dispute settlement mechanism is to be preferred, the COP may consider if introducing a rule granting an *ad hoc* arbitration tribunal compulsory and exclusive jurisdiction over a dispute arising under the FCTC.

In other words, whether a legally binding means like arbitration should be preferred to non-binding means? In answering this question, the COP may need to re-examine what is the real purpose of strengthening Article 27. If the purpose is to counteract legal challenges brought under trade or investment tribunals, making the FCTC dispute settlement a compulsory and exclusive means to solve tobacco-related disputes under the FCTC may be a possible option worth trying. Nonetheless, the cautious decision at COP 7 indicates that such an objective is too ambitious to be adopted by the delegates. Moreover, it has been argued that even Article 27.2 of the FCTC is amended to preclude recourse to other dispute settlement mechanisms; it won't have any legal consequences for the jurisdiction of a WTO panel.[37] Therefore, one might step back to seek a more practical solution without making the FCTC an exclusive forum for solving tobacco disputes whereas

[36] It has been expounded that the enhancement of effective implementation can be pursued in a number of ways other than through dispute settlement. In the WHO FCTC context, for example, the COP has a broad role, set out in Article 23.5 of the Convention, to "keep under regular review the implementation of the Convention and take the decisions necessary to promote its effective implementation." WHO, *supra* note 29, ¶ 8.

[37] *See* Gruszczynski, *supra* note 23, at 115-26 (arguing that there is no conflict of jurisdiction regarding the dispute settlement mechanism between the FCTC and WTO; and even if such conflict exists, the availability of FCTC dispute settlement mechanism does not deprive a WTO panel of its jurisdiction over claims made under its covered agreements.) *See also* WHO, *supra* note 29, ¶ 23.

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providing incentives for Parties resorting to their disputes under the FCTC by reinforcing Article 27 in order to avoid future threats from legal challenges based on trade and investment rules.

Secondly, the COP may need to consider what legal instrument should be used to strengthen the current mechanism, either adopting a guideline or creating a protocol. If a more ambitious goal is determined, it is suggested a new protocol governing dispute settlement procedure should be adopted and applied to those Parties acceded to such protocol. On the other hand, if a less ambitious goal is preferred, adopting a guideline by the COP would be an appropriate way to implement Article 27.

Thirdly, for possible procedures to be designed, this paper finds that a variety of relevant issues have to be addressed. For example, the rule has to clarify the relationship between consultation or diplomatic solution and arbitration, i.e., whether mutual consultation should be a prerequisite proceeding before resorting to *ad hoc* arbitration. How to determine the scope of the term of reference? What procedure should be followed for the arbitral tribunal to be established, and how many arbitrators should the tribunal be consisted of? How long should the tribunal render its decision? What would be the deadline for each case? The COP may also consider other relevant procedural issues such as the rule on confidential information, submission of evidence, record-keeping, impartiality or qualification of arbiters, etc.

Fourthly, the COP needs to consider what kinds of disputes may be subject to such procedures. Unlike trade or investment regimes, it is hard to imagine a "non-violation" claim or compensatory claim could be brought under the FCTC. Most disputes potentially brought under the FCTC would be a "violation" claim for a Party's failure to perform particular obligations provided in the Convention. Given the following reasons, this paper finds that several issues should be addressed in order to delineate the cause of action for a dispute to be brought under the FCTC. The first issue relates to who may bring the dispute before the tribunal. Whether the complaint has to demonstrate any damage suffered, in terms of the impact on public health, due to the non-compliance of the defending Party?

Moreover, a Party may not successfully file a violation claim against any tobacco control measures adopted by the defending Party that goes beyond those required by the FCTC because Article 2.1 allows and encourages Parties to do so to better protect public health. So, most common disputes may involve a situation that a Party fails to implement the required measures or implements the measures without efficacy or sufficiency. In other words, "non-compliance" or "under-compliance," instead of "over-compliance," with the Convention would be the common situation the dispute settlement procedures may be used between Parties. Even so, this paper finds that it is difficult to bring a case for such a "specific

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performance" claim before the tribunal because the obligations under the FCTC are too generally prescribed to have a clear determination on whether the Party does fail to perform or implement, and some provisions even allow Parties to implement the obligations in accordance with its national law.

In sum, as Article 27 of the FCTC aims to solve a dispute concerning the interpretation or application of the FCTC between two or more Parties, this provision has a limited scope of jurisdiction over the types of disputes that can be subjected to the prescribed procedure. In other words, Article 27 is originally designed to tackle the problems of "non-compliance" or "under-compliance" where Parties fail to comply with the FCTC rules. It is arguable if Article 27 can cover a dispute involved with a tobacco control measure that goes beyond the required standard provided under the FCTC. Such an "over-compliance" tobacco control measure is normally the center of controversy as the adoption of such measure is more likely to be challenged for possible violations of trade and investment rules. Therefore, if the COP wishes to strengthen Article 27 of the FCTC, one of the key elements that has to be taken into account is the specific types of dispute that the system intends to solve.

Finally, the COP may wish to address the issue regarding the interaction of FCTC's dispute settlement procedures with other disputes settlement mechanism, mainly WTO or other investment dispute systems. The level of interaction may depend on what objectives the FCTC would try to achieve in shaping its dispute settlement procedures as discussed. If the COP desires to develop a more ambitious and effective system, it may need to introduce rules granting the arbitral tribunal compulsory and exclusive jurisdiction over the disputes arising under the FCTC. However, the development at the COP7 indicated that Parties were cautious about such an ambitious approach. Even with a clear intention to move towards this direction, it may not prevent Parties from resorting their disputes to other trade or investment for so long as they have valid claims under other international agreements.

Moreover, given the progress and result of legal proceedings under trade and investment fora, Uruguay and Australia had a prevailed ruling to sustain their tobacco control measures under trade and investment rules. The original incentive to shield tobacco disputes from other trade and investment fora became less significant due to the favorable rulings delivered to support the challenged tobacco control measures. Such a positive outcome could explain why the COP 7 might not be in direct need to pursue a more ambitious proposal to strengthen Article 27 of the FCTC.

V. CONCLUDING REMARKS

Strengthening the dispute settlement mechanism under the FCTC can be one of the strategies to counteract the legal challenges brought under trade or

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investment laws. Uruguay's proposal at the COP 6 was a tumbling starting point to re-focus on strengthening dispute settlement procedures to solve tobacco disputes under the FCTC. As the history indicated, reinforcing dispute settlement mechanism will expect immense difficulties and fierce debates among Parties to the FCTC. There will be many hurdles and issues to be addressed to have an effective pro-health mechanism in settling tobacco disputes under the FCTC. It won't be achieved in the short-run as current development shows that a "medium-term strategic framework" has been adopted by the COP 8[38] after an information sharing mechanism being operated in corporation with relevant Knowledge Hubs.[39]

This paper suggests that the reform can start with a much easier step for the COP to adopt a guideline governing the procedures for an *ad hoc* arbitration provided already under Article 27.2 of the FCTC. Rules for such procedures may refer to those in other international agreements such as Annex II of Convention on Biological Diversity. The next step would consider whether to make *ad hoc* arbitration a compulsory means to resolve tobacco disputes among Parties in order to increase the frequent use of such procedures without relying too much on the requirement of state consent. At this point, a protocol may be needed to have all Parties agreed to subject their disputes to the procedures under the FCTC because current Article 27.2 is on a voluntary basis to declare their consent or acceptance to an *ad hoc* arbitration.

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[38] The Working Group presented its Report on measures to strengthen the implementation of the Convention through coordination and cooperation to the COP 8 for consideration, in which a medium-term strategic framework was proposed to guide the development of biennial workplans, budgets and implementation support. *See* WHO, *Measures to Strengthen Implementation of the Convention Through Coordination and Cooperation: Report by the Working Group*, WHO Doc. FCTC/COP/8/11 (May 9, 2018). *See also* WHO, *Measures to Strengthen Implementation of the Convention Through Coordination and Cooperation*, WHO Doc. FCTC/COP8(16) (Oct. 6, 2018).

[39] The COP 7 decided to work with WHO and relevant Knowledge Hubs with the mandate:

> (a) to collect, document and inform Parties as appropriate on practices in promoting and safeguarding public health measures, including tobacco control measures, under trade and investment agreements and in compliance with international commitments;
> (b) to document recent developments and decisions of international forums and tribunals regarding tobacco control measures implemented by Parties in compliance with the WHO FCTC and its guidelines with the objective of protecting public health;
> (c) to document the tobacco control measures most frequently targeted by the tobacco industry, and inform Parties, as appropriate, on how to protect their regulatory capacity in this regard . . . .

WHO, *supra* note 34.

臺灣大學學術期刊資料庫

REFERENCES

Book

JHA, PRABHAT & FRANK J. CHALOUPKA (1999), CURBING THE EPIDEMIC: GOVERNMENTS AND THE ECONOMICS OF TOBACCO CONTROL.

Articles

Callard, Cynthia et al. (2001), *Why Trade and Investment Liberalisation May Threaten Effective Tobacco Control Efforts*, 10(1) TOBACCO CONTROL 68.

Gruszczynski, Lukasz (2015), *Tobacco and International Trade: Recent Activities of the FCTC Conference of the Parties*, 49(4) JOURNAL OF WORLD TRADE 665.

Gruszczynski, Lukasz (2017), *The WTO and FCTC Dispute Settlement Systems: Friends or Foes?*, 12(1) ASIAN JOURNAL OF WTO & INTERNATIONAL HEALTH LAW AND POLICY 105.

Mamudu, Hadii M et al. (2011), *International Trade Versus Public Health During the FCTC Negotiation, 1999-2003*, 20(1) TOBACCO CONTROL e3.

McGrady, Benn (2007), *Trade Liberalisation and Tobacco Control: Moving from a Policy of Exclusion Towards a More Comprehensive Policy*, 16(4) TOBACCO CONTROL 280.

Roemer, Ruth et al. (2005), *Origins of the WHO Framework Convention on Tobacco Control*, 95(6) AMERICAN JOURNAL OF PUBLIC HEALTH 936.

Shapiro, Ira (2003), *"Health vs. Trade": Still Contentious*, 44 ALLIANCE BULLETIN 2.

Shapiro, Ira S. (2002), *Treating Cigarettes as an Exception to the Trade Rules*, 22(1) SAIS REVIEW 87.

Taylor, Allyn et al. (2000), *The Impact of Trade Liberalization on Tobacco Consumption*, *in* TOBACCO CONTROL IN DEVELOPING COUNTRIES 343 (Prabhat Jha & Frank Chaloupka eds.).

Treaties

Convention on Biological Diversity, June 5, 1992, 1760 U.N.T.S. 79, 31 I.L.M. 818.

WHO Framework Convention on Tobacco Control, June 16, 2003, 2302 U.N.T.S. 166.

Cases

Appellate Body Report, *Dominican Republic — Measures Affecting the Importation and Internal Sale of Cigarettes*, WTO Doc. WT/DS302/AB/R (adopted May 19, 2005).

臺灣大學學術期刊資料庫

Appellate Body Report, *United States — Measures Affecting the Production and Sale of Clove Cigarettes*, WTO Doc. WT/DS406/AB/R (adopted April 24, 2012).

Panel Report, *Australia — Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WTO Doc. WT/DS435/R, WT/DS441/R, WT/DS458/R, WT/DS467/R (adopted August 27, 2018).

Panel Report, *Dominican Republic — Measures Affecting the Importation and Internal Sale of Cigarettes*, WTO Doc. WT/DS302/R (adopted May 19, 2005).

Panel Report, *United States — Measures Affecting the Production and Sale of Clove Cigarettes*, WTO Doc. WT/DS406/R (adopted April 24, 2012)

Philip Morris Asia Ltd. v. The Commonwealth of Australia, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility (December 17, 2015).

Philip Morris Brands Sàrl et al. v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, Award (July 8, 2016).

Health-related Documents

World Health Organization, *Chair's Text of a Framework Convention on Tobacco Control*, WHO Doc. A/FCTC/INB2/2 (January 9, 2001).

World Health Organization, *Cooperation Between the Convention Secretariat and the World Trade Organization*, WHO Doc. FCTC/COP4(18) (December 6, 2010).

World Health Organization, *Elements of a WHO Framework Convention on Tobacco Control*, WHO Doc. A/FCTC/WG1/6 (September 8, 1999).

World Health Organization, *Issues Related to Implementation of the WHO FCTC and Settlement of Disputes Concerning the Implementation or Application of the Convention: Report by the Convention Secretariat*, WHO Doc. FCTC/COP/7/20 (July 27, 2016).

World Health Organization, *Measures to Strengthen Implementation of the Convention Through Coordination and Cooperation: Report by the Working Group*, WHO Doc. FCTC/COP/8/11 (May 9, 2018).

World Health Organization, *Measures to Strengthen Implementation of the Convention Through Coordination and Cooperation*, WHO Doc. FCTC/COP8(16) (October 6, 2018).

World Health Organization, *Proposed Draft Elements for a WHO Framework Convention on Tobacco Control: Provisional Texts with Comments of the Working Group*, WHO Doc. A/FCTC/INB1/2 (July 26, 2000).

World Health Organization, *Punta del Este Declaration on the Implementation of the WHO Framework Convention on Tobacco*

臺灣大學學術期刊資料庫

Control, WHO Doc. FCTC/COP4(5) (November 19, 2010).
World Health Organization, *Report of the Sixth Session of the Conference of the Parties to the WHO Framework Convention on Tobacco Control* (2014), https://apps.who.int/gb/fctc/PDF/cop6/FCTC_COP6_Report-en.pdf.
World Health Organization, *Seoul Declaration*, WHO Doc. FCTC/COP5(5) (November 17, 2012).
World Health Organization, *Summary Records of Committees*, WHO Doc. FCTC/COP/5/REC/2 (2013).
World Health Organization, *Trade and Investment Issues, Including Agreements, and Legal Challenges in Relation to the Implementation of the WHO FCTC*, WHO Doc. FCTC/COP7(21) (November 12, 2016).

Other Sources

CALLARD, CYNTHIA ET AL. (2001), AN INTRODUCTION TO INTERNATIONAL TRADE AGREEMENTS AND THEIR IMPACT ON PUBLIC MEASURES TO REDUCE TOBACCO USE, http://www.smoke-free.ca/pdf_1/Trade&Tobacco-April%202000.pdf.
Declarations, FCTC, https://www.who.int/fctc/declarations/en/.

臺灣大學學術期刊資料庫

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