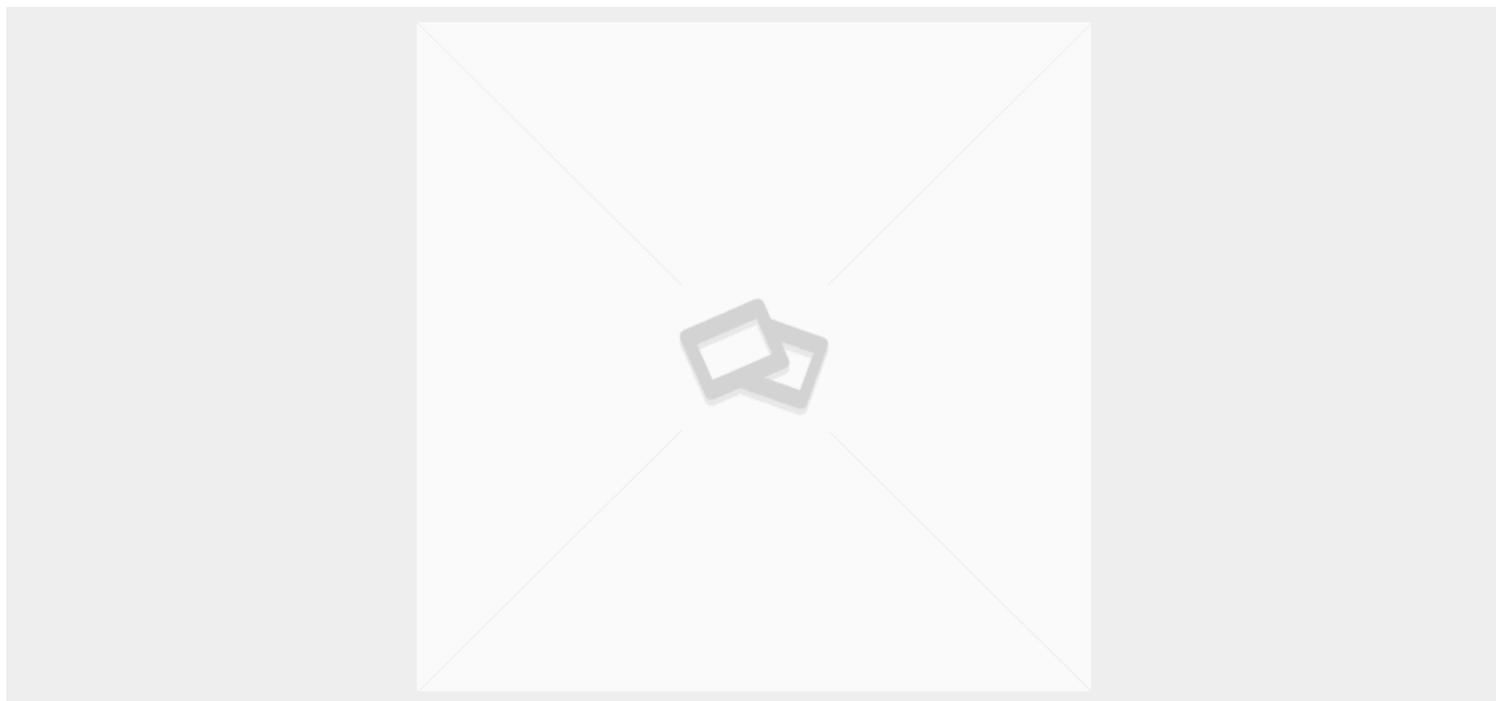


LEGAL CHALLENGES TO WHO FCTC IMPLEMENTATION IN DOMESTIC AND REGIONAL COURTS

Posted on September 23, 2016 by Suzanne Zhou



:

Domestic courts remain the most frequent venue for legal challenges to measures implementing the WHO FCTC. The tobacco industry has brought challenges against WHO FCTC-implementing measures in the domestic courts of a large number of countries. Such challenges are invariably aimed at weakening or delaying implementation, raising the costs of adopting tobacco control measures, tying up government resources that could otherwise be used on implementation, or dissuading governments from regulating.

Although each case and the legal system it is litigated under is unique, the tobacco industry frequently repeats similar arguments across jurisdictions. There is therefore much that parties can

learn from each others' experiences in defending tobacco control measures from legal challenge in domestic courts. In [Decision 6\(18\)](#) the COP requested the Secretariat, 'in coordination with the WHO Secretariat and the relevant knowledge hubs, to continue facilitating information sharing and cooperation among the Parties with regard to legal challenges against their tobacco control measures in domestic courts or through international dispute settlement mechanisms' and invited Parties to 'share information relating to legal disputes faced by States with respect to tobacco control measures in domestic courts or international dispute settlement mechanisms' through the Convention Secretariat Information Platform.

Common tobacco industry arguments can be divided into two groups:

- Arguments about procedural aspects of legislative or regulatory development or implementation – for example, arguments about participation in the legislative process, arguments that the legislation is outside the power of the Minister, or arguments that regulations are not consistent with their parent legislation
- Arguments about substantive legal rights provided for under constitutions or statutes – such as constitutional protections for property, commercial speech, or the freedom to run a business.

These pages cover both types of arguments. They focus on claims based on substantive legal rights, which tend to have more in common across jurisdictions, and tend to raise more broadly applicable questions about government powers to regulate for tobacco control, and for public health more generally.

Common arguments by measure

Parties developing similar measures to implement the WHO FCTC often see the same arguments from challengers. In many cases, states can draw on counterarguments developed by other states and findings by courts in other jurisdictions in responding to these claims.

The following pages provide some examples of domestic litigation by measure:

- **[Challenges to measures providing for protection from exposure to tobacco smoke \(WHO FCTC article 8\)](#)**
- **[Challenges to tobacco product ingredient regulation \(including additive and characterizing flavour bans\) \(WHO FCTC article 9\)](#)**
- **[Challenges to large graphic health warnings \(WHO FCTC article 11\)](#)**
- **[Challenges to plain \(standardised\) packaging \(WHO FCTC articles 11 and 13\)](#)**
- **[Challenges to retail display bans \(WHO FCTC article 13\)](#)**
- **[Challenges to bans on tobacco advertising, promotion and sponsorship \(WHO FCTC](#)**

article 13)

- **Challenges to bans on tobacco vending machines (WHO FCTC articles 13 and 16)**
 - **Challenges to tobacco control legislation or regulations as a whole**
-

The measures and countries on these pages have been chosen to reflect a variety of regions, legal systems, and arguments. They are not intended to be a comprehensive catalogue of all legal challenges. They should also not be taken to suggest either that some measures are more important or that some measures are more likely to be challenged than others. Rather, the measures here have been chosen because similar arguments have been used across jurisdictions in relation to these measures, and because they demonstrate the different ways in which courts have addressed the way in which legal protections for commercial interests interact with values such as the protection of public health; obligations under the WHO FCTC; and the rights to health, life, and/or a healthy environment.

Relevance of the WHO FCTC to challenges under domestic law

The WHO FCTC, as an evidence-based treaty with 181 parties, can strengthen, and has strengthened, parties' legal positions in the context of domestic litigation. For more, see [Role of the WHO FCTC in legal challenges](#).

Database of tobacco control litigation

For further information, the Campaign for Tobacco-Free Kids maintains [Tobacco Control Laws](#), a free, searchable database of legislation and litigation relating to tobacco control across the world. This covers not only legal challenges to measures implementing the WHO FCTC, but also other forms of litigation, such as those brought to hold the tobacco industry liable in line with WHO FCTC article 19 (e.g. health care cost recovery claims, claims by individuals against the tobacco industry, or enforcement actions by the state), and public interest litigation to compel states to adopt stronger laws. The database also includes unofficial English translations of case law in other languages.

The database can be accessed here: <http://www.tobaccocontrolaws.org/>