ROLE OF THE WHO FCTC IN LEGAL CHALLENGES

Posted on April 7, 2017 by Suzanne Zhou

Key points:
The WHO FCTC, its guidelines, and other COP decisions can strengthen parties’ positions in the face of legal challenge by:
As other sections of this website show, use of the WHO FCTC, its guidelines, and other relevant COP decisions can support parties facing legal challenges in a number of ways. These include by:

- Providing or strengthening the legal basis for a measure
- Demonstrating that a measure is evidence-based
- Demonstrating that a measure is supported by international practice or consensus
- Supporting limitations on the exercise of commercial rights and interests
- Demonstrating that a measure is reasonable or proportionate
- Demonstrating that a measure protects public health
- Demonstrating that a measure promotes human rights, in particular the rights to health and life

Discussion of the effect of the WHO FCTC, its guidelines, and other COP decisions across the different legal systems of WHO FCTC parties and across international trade and investment law will necessarily require some generalisation. However, it is possible to draw out some common themes about the ways the WHO FCTC has been considered in legal challenges. These may be instructive for parties considering how to use the WHO FCTC in the development and implementation of tobacco control laws and in defending tobacco control measures against legal challenge.

and a critical component of the global fight against non-communicable diseases, as recognised in the 2011 UN General Assembly Political Declaration on the Prevention and Control of Non-Communicable Diseases.

The guidelines to the WHO FCTC are intended to assist parties in implementing their obligations. They reflect scientific evidence, best practices, and the experience of parties. The UN International Law Commission has recognised (A/73/10, draft conclusion 11 and commentaries) that where the guidelines establish a shared interpretation of the parties, they constitute subsequent agreements and/or subsequent practice under article 31(3) of the Vienna Convention on the Law of Treaties, which must be taken into account in the interpretation of obligations under the WHO FCTC.

The WHO FCTC therefore advances important values that are shared with many of the instruments under which legal challenges are brought. Domestic and international laws recognise the importance of human rights, including the right to health, while sustainable development is a key aim of the WTO and many international investment agreements. It is important to emphasise that these instruments can – and should – be interpreted in harmony with WHO FCTC obligations.

The WHO FCTC and its guidelines as legal and normative instruments line Item 2

Providing or strengthening the legal basis for a measure

The WHO FCTC can strengthen the legal basis for measures that implement it. This may be relevant if the implementation of international obligations is a source of government power to regulate. For example, in domestic or regional contexts, a common ground of challenge is that a government did not have the legal power or authority to adopt the measure.

In Ceylon Tobacco Co v Minister of Health, the Sri Lankan Court of Appeal considered whether the authority to regulate for ‘health warnings’ under the National Authority on Tobacco and Alcohol Act included pictorial health warnings. The Court held that it did, because the Act was to be interpreted in harmony with international commitments, including the WHO FCTC and its Article 11 guidelines. As noted by the court, ‘...there cannot be any prohibition to convey the message by pictorial health warnings...Our courts recognize international commitments and [relevant articles] of the Constitution endeavor to foster respect for international law and treaty obligation.’ (page 30, more on this case here)

In Legislative Consultation with the Constitutional Division of the Supreme Court No. 2012-003918, the Supreme Court of Costa Rica found that the challenged provisions of the tobacco control bill implemented international obligations under WHO FCTC articles 6, 8, 13 and 16. It therefore supported the legal basis under Costa Rica’s constitution for the legislature to implement specific
excise taxes on tobacco; ban smoking in public places; prohibit tobacco advertising, promotion and sponsorship; and raise the minimum pack size from 10 to 20 cigarettes.

In *British American Tobacco Kenya v Cabinet Secretary for Public Health* ([Court of Appeal], Kenya, 2017 and [Supreme Court], Kenya, 2019), the Court of Appeal of Kenya considered a requirement under Kenya’s Tobacco Control Regulations for tobacco companies to contribute 2% of sales revenue annually to a public fund for tobacco control as compensation for tobacco-related harm (a ‘solatium compensatory contribution’). The Court of Appeal found that the purpose of the solatium compensatory contribution was to mitigate the adverse effects of tobacco use, in order to implement the WHO FCTC’s obligation to adopt measures to protect present and future generations from the devastating health, environmental, and social consequences of tobacco consumption and exposure to tobacco smoke, and in order to fulfil the constitutional right to health. It therefore found that the solatium compensatory contribution was a levy that was within the powers of the Ministry of Health to adopt, rather than a tax (which would have required further legislation) (p. 32-36, more on this case [here](#) and [here](#)). The Supreme Court upheld the Court of Appeal's decision (more on this case [here](#)).

**Demonstrating that a measure protects public health**

As a treaty to ‘protect present and future generations from the devastating health, social and environmental effects of tobacco use and exposure to tobacco smoke’, the WHO FCTC can support arguments by a state that a measure implementing the WHO FCTC is for the purpose of protecting public health. This may be relevant to determining, for example, whether the measure falls within a health exception in trade or domestic law, whether it is an exercise of a state’s sovereign right to regulate under international investment law, and/or whether it can be characterised as ‘reasonable’ or ‘proportionate’ under investment or domestic law. Parties may find it useful to expressly refer to the WHO FCTC in the objectives of their legislation or related preparatory materials for this reason.

In *Australia – Plain Packaging*, the WTO panel constituted to hear the dispute referred to the WHO FCTC, as well as the references to it in Australia’s tobacco plain packaging legislation and the explanatory memoranda to the legislation, to confirm that tobacco plain packaging aims to improve public health by reducing the use of and exposure to tobacco, and that it does so by acting as one element of a broader suite of complementary tobacco control measures (paras 7.243, 7.1728-7.1730, more on this case [here](#)). The WTO Appellate Body upheld the panel’s finding (more on this case [here](#)).

In *Philip Morris v. Uruguay*, an investment tribunal placed significant weight on the fact that Uruguay’s measures implemented the WHO FCTC in determining that the measures exercised Uruguay’s sovereign right to regulate and were reasonable (paras 304-307, more on this case [here](#) and [here](#)).
Demonstrating that a measure is evidence-based

The WHO FCTC is an evidence-based treaty, and its guidelines are based on the best available scientific evidence and the experiences of parties. While it is generally prudent for states to gather the best available evidence in support of their measures when developing and implementing measures or defending legal challenges, the WHO FCTC and its guidelines can provide additional evidentiary support for a measure.

In *Philip Morris v. Uruguay*, for example, the tribunal considered that Uruguay’s graphic health warnings were evidence-based because they were based on the WHO FCTC guidelines. The tribunal considered that, as a country with limited technical and financial resources, Uruguay was entitled to rely on evidence-based instruments such as the WHO FCTC guidelines and the process of scientific and technical cooperation undertaken through the WHO FCTC in developing its measures. There was no need for Uruguay to have conducted further studies in order to demonstrate the evidence base in support of its measure. (para 396, more on this case [here](#) and [here](#)).

In *Australia – Plain Packaging*, the WTO panel constituted to hear the dispute referred extensively to the WHO FCTC to support its factual findings, including its findings that branding on packaging is a form of tobacco product promotion, that removing such branding contributes to reducing the appeal of tobacco products, and that the health risks of failing to address such branding are extremely grave (paras 7.250, 7.664, 7.1310, 7.2592, 7.2595-7.2596, more on this case [here](#)).

In *Philip Morris Norway v. Health and Care Services of Norway*, the District Court of Oslo found that it was ‘accepted knowledge’ that tobacco advertising had an impact on consumption, as found in article 13(1) of the WHO FCTC. The Court considered that the article 13 guidelines supported the finding that Norway’s retail display ban was a suitable and necessary measure to protect public health. (page 10 and 11 of linked unofficial translation, more on this case [here](#)).

In *US – Clove Cigarettes*, a case between two FCTC non-parties, the WTO panel considered that the WHO FCTC article 9 and 10 guidelines reinforced the scientific evidence in favour of a ban on flavoured cigarettes, as well as the evidence that such cigarettes were attractive to youth (para 7.230, 7.414-415, more on this case [here](#), [here](#) and [here](#)).

Demonstrating that a measure is supported by international practice or consensus

The WHO FCTC can also demonstrate that a measure is supported by international consensus, that it has been implemented by a number of states, or that it is considered a best practice.

In *Philip Morris v. Uruguay*, the tribunal considered that Uruguay’s graphic health warnings implemented an ‘internationally accepted’ principle, contained in the WHO FCTC guidelines, of having
large graphic health warnings to warn of the harms of tobacco use. This finding supported the Tribunal’s conclusion that the warnings were reasonable. (para 412, more on this case here and here).

In British American Tobacco South Africa v Minister of Health, the Supreme Court of Appeal of South Africa found that ‘South Africa ... has international law obligations to ban tobacco advertising and promotion, and that this has been the practice in many other open and democratic societies’ (para 22). The Court took this into account in determining that South Africa's comprehensive ban on tobacco advertising, promotion and sponsorship was not a violation of the right to freedom of expression. (para 22, more on this case here).

In Canada (Attorney General) v. JTI-Macdonald Corp, the Supreme Court of Canada upheld a law restricting tobacco advertising, promotion, and sponsorship, noting that ‘Governments around the world are implementing anti-tobacco measures similar to and, in some cases, more restrictive than Canada’s. The WHO Framework Convention on Tobacco Control (2003).... which Canada ratified in 2004, mandates a comprehensive ban on tobacco promotion, subject to state constitutional requirements’ (para 10, more on this case here and here).

Supporting limitations on commercial rights or interests

The WHO FCTC can support measures limiting the commercial rights or interests of the tobacco industry. This can occur in a number of ways which may overlap with those discussed under other headings on this page. For example:

- In British American Tobacco South Africa v. Minister of Health, the Supreme Court of Appeal of South Africa stated that: ‘in determining whether or not to impose a ban on advertising and promotion of tobacco products the Minister would have been obliged to have regard to the Framework Convention’. As such, the Court was ‘obliged, under the Constitution, to give weight to [the WHO FCTC] in determining the question of justification or the limitation of the right to freedom of speech.’ (para 23, more on this case here).
- In Philip Morris Norway v. Health and Care Services of Norway, the District Court of Oslo found that article 13 and its guidelines supported the finding that Norway’s retail display ban was a suitable and necessary measure to protect public health, and therefore within the public health limitation under the European Free Trade Agreement. (page 10 and 11 of linked unofficial translation, more on this case here).
- In Claim of unconstitutionality filed by over 5,000 citizens against Article 3 of Law No. 28705, Docket 00032-2010-Pi/TC, 19 July 2011 (Constitutional Court of Peru), the Constitutional Court of Peru found that the importance of implementing the right to health through the WHO FCTC outweighed the interest in the freedom to conduct a business (para 67-82, more on this case here).
- In C-547/14 – Philip Morris Brands SARL and Others (European Court of Justice, 2016), the
European Court of Justice considered article 11’s recommendation that graphic health warnings cover 50% or more of the principal display areas of the pack in reaching its finding that the regulations were proportionate to their aims and a reasonable interference with commercial expression (paras 202-212, more on this case here).

Demonstrating that a measure is reasonable or proportionate

The WHO FCTC can demonstrate that a measure is reasonable, proportionate, not arbitrary, or otherwise justified. This is relevant to the use of health exceptions and the determination of standards of reasonableness such as fair and equitable treatment, trade-restrictiveness, or similar concepts in domestic law.

In Philip Morris v. Uruguay, for example, the WHO FCTC was considered to be a ‘point of reference for the reasonableness’ of Uruguay’s tobacco packaging and labelling measures. The tribunal ultimately found that since Uruguay’s measures implemented the WHO FCTC, they were not ‘arbitrary’ under the fair and equitable treatment standard (para 401, more on this case here and here).

Likewise, in British American Tobacco v Secretary of State for Health, the Court of Appeal of England and Wales considered that the WHO FCTC article 11 and 13 guidelines were relevant to whether or not the UK’s plain packaging regulations were proportional to any interference with property or intellectual property rights. It upheld the High Court of Justice’s use of the guidelines in finding that the regulations were proportional to any interference with property rights (para 234, more on this case here, here and here).

In Australia – Plain Packaging, in determining whether or not special requirements encumbering the use of trademarks were justified, the panel emphasised that ‘the importance of the public health reasons for which the trademark-related special requirements under the TPP measures are applied is further underscored by the fact that Australia pursues its domestic public health objective in line with its commitments under the FCTC, which was “developed in response to the globalization of the tobacco epidemic” and has been ratified in 180 countries’. The panel noted that its conclusion that plain packaging was justifiable was confirmed by the fact that Australia pursued its plain packaging measure ‘in line with the emerging multilateral public health policies in the area of tobacco control as reflected in the FCTC and the work under its auspices, including the Article 11 and Article 13 FCTC Guidelines’ (paras 7.2596, 7.2604, more on this case here). The WTO Appellate Body upheld the Panel’s finding (para 6.707, more on the case here).

Demonstrating that a measure promotes or protects human rights, in particular the rights to health, life, or a healthy environment

Where this is relevant in the domestic legal system of a country, the WHO FCTC can demonstrate that
a measure protects the human right to health and/or the human right to life. This can be relevant in demonstrating that commercial interests must be balanced against other important rights, or in showing that the state has a duty to implement the WHO FCTC.

In *Claim of unconstitutionality filed by over 5,000 citizens against Article 3 of Law No. 28705*, Docket 00032-2010-PI/TC, 19 July 2011 (Constitutional Court of Peru), the court found that the WHO FCTC is a human rights treaty protecting the right to health, and therefore had constitutional rank. The state’s duty to implement the WHO FCTC to protect the right to health therefore took precedence over the minor interference with personal autonomy and freedom to conduct a business represented by a ban on smoking in public places. (para 67-82, more on this case [here](#)).

In *Legislative Consultation with the Constitutional Division of the Supreme Court No. 2012-003918*, the Supreme Court of Costa Rica found that the WHO FCTC implemented the rights to health and life, and thus supported the legal basis for implementing a comprehensive tobacco control law.

Back to top