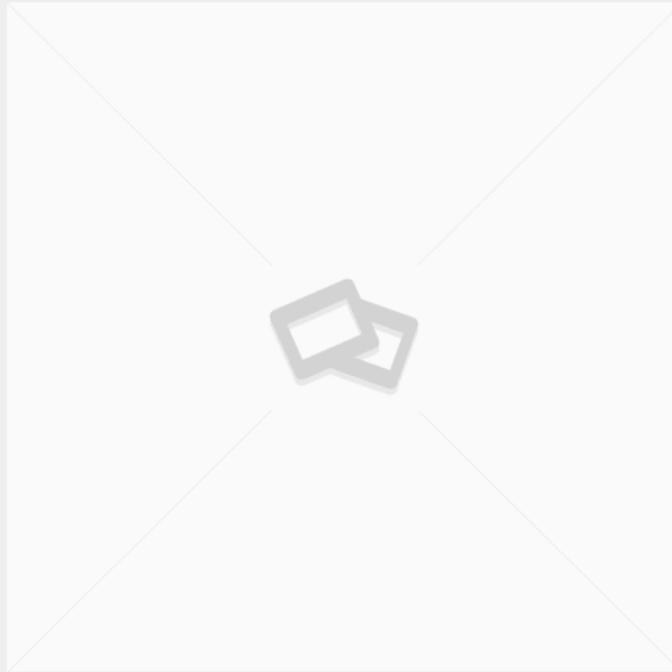


EXAMPLES OF THE INTERSECTION BETWEEN TOBACCO CONTROL AND INTERNATIONAL TRADE LAW

Posted on April 7, 2017 by Suzanne Zhou



On this page:

On this page:

Jump to: 2 20 default wide Key points:

- There have been three series of disputes in the WTO, or its precursor, the GATT 1947, relating to tobacco control measures implemented for the purpose of public health
- In two of these disputes, the WTO panel found the measure in question to be discriminatory, but recognised the importance of public health and of tobacco control
- Another series of disputes in relation to Australia's plain packaging laws, which do not involve claims of discrimination, found the measure in question not to be too trade restrictive to achieve its public health objectives and in compliance with the TRIPS agreement.

40 default wide Introduction

A number of disputes concerning tobacco control measures have taken place in both the WTO and its predecessor, the General Agreement on Tariffs and Trade 1947.

20 default line Item 1

There have been two disputes in the WTO that concern tobacco control measures that were adopted on public health grounds, discussed below. Disputes which concern tobacco-related measures that were not adopted for public health reasons (such as *Dominican Republic — Measures Affecting the Importation and Internal Sale of Cigarettes* and *Thailand — Customs and Fiscal Measures on Cigarettes from the Philippines*) are not discussed here.

Australia — Plain Packaging

Australia's plain packaging laws were challenged at the World Trade Organization (WTO) by [Cuba](#), the [Dominican Republic](#), [Honduras](#), and [Indonesia](#). A related dispute by [Ukraine](#) was discontinued in May 2015. On 28 June 2018, the WTO panel hearing the disputes found in favour of Australia on all grounds, ruling that plain packaging is an evidence-based measure that contributes to public health, that it is not more trade-restrictive than necessary, and that it does not violate WTO obligations relating to intellectual property. Honduras and the Dominican Republic appealed the decision to the WTO Appellate Body. On 9 June 2020, the WTO Appellate Body dismissed the appeal upholding the findings of the panel. Please see [our post on the background to the decision](#), our [paper](#) summarising the panel report and our [post](#) on the Appellate Body decision for more information.

US — Measures Affecting the Production and Sale of Clove Cigarettes (2012)

In [US — Clove Cigarettes](#), Indonesia challenged a US law prohibiting the sale of cigarettes containing characterizing flavours other than menthol or tobacco. The law, adopted for the purposes of discouraging youth smoking, had the effect of prohibiting clove-flavoured cigarettes, produced primarily in Indonesia, but not menthol-flavoured cigarettes, primarily produced domestically. Indonesia argued that the measure discriminated against imported clove cigarettes under TBT article 2.1, and was more trade-restrictive than necessary to achieve the objective of reducing youth smoking for the purposes of protecting public health. The Panel found that the measure was not more trade-restrictive than necessary at the US' desired level of protection. It relied on the [article 9 and 10 FCTC implementation guidelines](#), even though neither Indonesia nor the US was a party to the WHO FCTC, to conclude that restricting characterising flavours would reduce youth smoking. However, the Panel found in favour of Indonesia on the grounds that the measure discriminated against imported products (clove cigarettes) as compared to like domestic products (menthol

cigarettes). The US appealed the findings on discrimination to the Appellate Body, which upheld the panel's decision. The panel's findings on trade-restrictiveness were not appealed. Following the conclusion of the appeal in favour of Indonesia, the US and Indonesia reached a settlement.

[back to top](#)

[^ back to top](#)

20 default 2. Disputes under the GATT 1947 line Item 2

Two disputes relating to tobacco products occurred under the GATT 1947, the predecessor of the WTO. One dispute, *United States — Tobacco*, concerned production control and price support for domestically produced tobacco and did not concern public health issues. The other dispute, *Thailand — Cigarettes*, is discussed briefly below.

Thailand — Restrictions on Importation of and Internal Taxes on Cigarettes (1990)

Thailand — Cigarettes (1990) concerned a prohibition on the import or export of tobacco products without a license and a refusal by authorities to approve import permits over a lengthy period. The panel found that the Thai measures were inconsistent with Article XI:1 of GATT, which prohibits quantitative restrictions (prohibitions or restrictions on imports other than duties, taxes or other charges). Thailand sought to rely on the general health exception in article XX(b) of GATT as a defence, arguing that the measures were necessary to protect human life or health. The panel 'accepted that smoking constituted a serious risk to human health and that consequently measures designed to reduce the consumption of cigarettes fell within the scope of Article XX(b)'. However, it found that other measures were available to Thailand that would have impacted less on international trade, such as banning cigarette advertising and increasing cigarette prices. In its analysis, the Panel referred to a resolution of the Forty-Third World Health Assembly, *Tobacco or Health*, and the *Report of the WHO Expert Committee on Smoking Control Strategies in Developing Countries*, and took into account submissions made by the WHO, which had been provided to the Panel with the agreement of the parties to the dispute.

[back to top](#)

[^ back to top](#)

20 default 3. Discussions in WTO Committees line References

A number of tobacco control measures implemented by states, most notably plain packaging requirements in New Zealand, the United Kingdom, Ireland, and Norway; and flavouring restrictions in Brazil and Canada, have been discussed in the [TRIPS Council](#) and [TBT Committees](#). Discussion does not necessarily imply that the parties are disputing, and most of the discussed measures have been implemented or are in the process of being implemented without a WTO dispute.

back to top

[^ back to top](#)

20 default Previous: Dispute settlement h4 icon-left-open-big top

<https://untobaccocontrol.org/kh/legal-challenges/trade/dispute-settlement/> Trade landing page h4

icon-home top <https://untobaccocontrol.org/kh/legal-challenges/trade/>