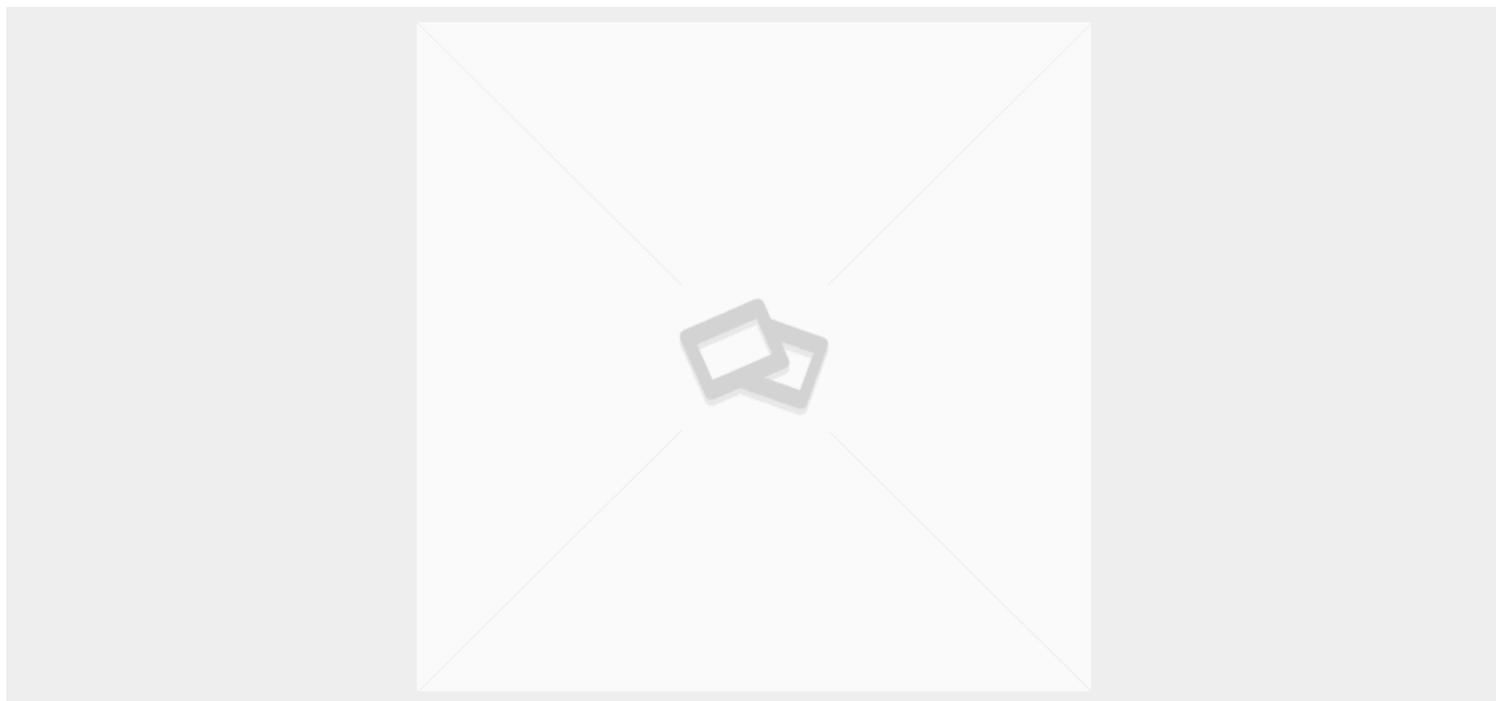


WHAT IS INTERNATIONAL TRADE LAW AND WHY IS IT RELEVANT TO WHO FCTC IMPLEMENTATION?

Posted on April 7, 2017 by Suzanne Zhou



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Key points:

- International trade law governs how states may restrict or regulate international trade in goods and services, including in relation to tobacco products
- It is relevant to WHO FCTC implementation because obligations regarding tax or regulatory measures under trade agreements may interact with obligations to implement tax or regulatory measures under the WHO FCTC
- The key legal instruments in this area are contained in the WTO. Some states may also be covered by preferential trade agreements
- The COP has adopted a number of decisions addressing the relationships between WHO FCTC implementation and international trade law

40 default wide line What is international trade law

International trade law governs the way in which states may restrict or regulate trade in goods and services, including in relation to tobacco products. It is, for the most part, governed by the World Trade Organization (WTO) agreements, with some states also party to bilateral, plurilateral, or regional preferential trade agreements.

WTO Agreements

The World Trade Organization is the '[only global international organization dealing with the rules of trade between nations](#)'. It is a '[rules-based, member-driven](#)' multilateral organization, founded in 1994. The objectives of the WTO recognise that its Member States' 'relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development'. [tooltip hint="Marrakesh Agreement preamble"][*][/tooltip]

The WTO provides a 'common institutional framework for the conduct of trade relations among its Members in matters related to the' WTO agreements,[tooltip hint="Marrakesh Agreement article II.1"][*][/tooltip] a series of international treaties that regulate various aspects of international trade.

Joining the WTO involves making a 'single undertaking' to accede to all of the WTO agreements as a '[whole and indivisible package](#)'. In making the single undertaking, WTO Members accede to the [Marrakesh Agreement Establishing the World Trade Organization](#), as well as more than two dozen '[covered agreements](#)' regulating different aspects of trade between members. Under these agreements, Members commit to restrictions on their imposition of tariff barriers (such as import taxes or customs duties) and non-tariff barriers to trade (such as regulatory measures, quantitative restrictions, and internal tax laws that apply to both domestic and imported products). WTO Members

also make commitments in other areas related to trade, such as protection of intellectual property rights, food safety, agriculture, customs valuation, and subsidies.

These pages will focus on the three WTO agreements which have been the subject of tobacco-control-related disputes, which are the [General Agreement on Tariffs and Trade 1994](#) (GATT, incorporating obligations under [GATT 1947](#)), the [Agreement on Technical Barriers to Trade](#) (TBT Agreement), and the [Agreement on Trade-Related Aspects of Intellectual Property Rights](#) (TRIPS Agreement), which regulates the adoption of intellectual property standards by members. It will also briefly cover dispute settlement procedures under the [Dispute Settlement Understanding](#).

Box: Overview of agreements covered in these pages
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Overview of agreements covered in these pages

The **GATT (1994 and 1947 versions to be read together)** applies to trade in goods. Under the GATT, members agree not to discriminate against imported products or between imports of different WTO members. They also agree not to impose tariffs beyond levels negotiated in their respective GATT schedules, and to limit the use of quantitative restrictions (such as import quotas). GATT contains a general exceptions clause; members may adopt measures that otherwise violate GATT if they fall within the exceptions (which include public health). See: [discrimination](#), [health exceptions](#)

The **TBT** applies to technical regulations. Members agree that their technical regulations will not discriminate against imported products or between imports of different WTO members, and that their technical regulations will be no more trade-restrictive than necessary to achieve a legitimate objective. They also agree to notify certain technical regulations to the TBT Committee, to use international standards for technical regulations as far as is appropriate, and to make information available about their technical regulations. Several provisions of the TBT and its preamble recognise that members have a right to adopt measures for legitimate objectives such as public health. See: [discrimination](#), [trade-restrictiveness](#)

TRIPS applies to the protection and enforcement of intellectual property rights. Members agree to incorporate certain minimum standards of intellectual property protection into their domestic law. TRIPS must be read in conjunction with its objectives and principles, which recognise the importance of public health and balancing rights and obligations, and with the [Doha Declaration on TRIPS and Public Health](#), a ministerial declaration which affirms that TRIPS 'does not and should not' prevent members from taking measures to protect public health. See: [intellectual property](#).

The **Dispute Settlement Understanding** establishes a rules-based state to state dispute settlement procedure in relation to the WTO Agreements, including a process for appeals. See: [dispute settlement](#)

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As of July 2019, the WTO has [164 members](#), and there is a substantial overlap between WTO members and WHO FCTC members.

Preferential trade agreements

In addition to belonging to the WTO, many states (including WHO FCTC Parties) are parties to other trade agreements. These agreements (known as preferential trade agreements or PTAs) are usually bilateral or regional agreements. Parties to PTAs grant trade preferences to each other, typically by eliminating tariffs. PTAs may also include non-tariff obligations similar to those in the WTO agreements or obligations that place greater restrictions on their parties than WTO rules, such as requiring higher levels of intellectual property protection than the provisions in the TRIPS Agreement. Although many PTAs provide for inter-state dispute settlement, generally, states have used WTO dispute settlement procedures when they wish to bring dispute settlement proceedings against other WTO Members.

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20 default 2. Why is international trade law relevant to WHO FCTC implementation? line Why is international trade law relevant

Regulatory and tax measures to implement the WHO FCTC may interact with obligations under international trade law, in particular the GATT, the TBT, and the TRIPS agreement.

In these agreements, WTO member states commit to ensuring that:

- Regulatory and tax measures do not [discriminate](#) between local and imported 'like products', or between 'like products' from different countries (GATT, TBT)
- Regulatory measures that constitute [technical regulations are 'no more trade-restrictive than necessary'](#) (TBT)
- Certain [intellectual property](#) protections are implemented into national law (TRIPS)

These obligations have been the subject of [WTO disputes](#) relating to tobacco products, as well as discussions in WTO [committees](#).

Although [only states can access the WTO dispute settlement system](#), the tobacco industry routinely claims that measures will infringe international trade law. WTO-related arguments often appear in lobbying or media activities by the industry. Some WTO-based arguments, such as those relating to intellectual property, may also appear in legal challenges brought by the industry in other forums, such as in international investment disputes or domestic or regional legal challenges.

Understanding the relationship between the WHO FCTC and international trade law will allow states to

manage the relationship between WHO FCTC implementation and international trade law, including in developing their measures and by critically evaluating claims that a measure will breach international trade law.

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Since COP4, the COP has adopted a number of decisions on trade, investment, and the WHO FCTC.

These include:

- The Punta Del Este Declaration on the Implementation of the WHO Framework Convention on Tobacco Control (Decision [COP 4\(5\)](#)) – which recalls provisions of the General Agreement on Tariffs and Trade, the Agreement on Technical Barriers to Trade, and Agreement on Trade-Related Aspects of Intellectual Property Rights that affirm space for the implementation of public health measures and declares that Parties have the right to define and implement national public health policies pursuant to compliance with conventions and commitments under WHO, particularly with the WHO FCTC.
- Decision [COP4\(18\)](#): ‘Cooperation between the Convention Secretariat and the World Trade Organization’, which requested the Convention Secretariat to ‘cooperate with the WTO Secretariat with the aim of information sharing on trade-related tobacco control issues’ and ‘monitor trade disputes regarding WHO FCTC-related tobacco control measures and other trade-related issues of relevance to the implementation of the Convention’, as well as facilitate information-sharing activities between the parties.
- Decision [COP5\(15\)](#): ‘Cooperation between the Convention Secretariat, the World Health Organization, the World Trade Organization and the United Nations Conference on Trade and Development’, which requested the Secretariat to ‘continue its information sharing activities involving the WHO Secretariat, the WTO Secretariat and UNCTAD in relation to tobacco control, international trade and investment issues’
- Decision [COP6\(18\)](#): ‘Issues related to implementation of the WHO FCTC and settlement of disputes concerning the implementation or application of the Convention’, which requested the Secretariat to ‘facilitate the provision of technical support, training and capacity building activities if necessary, in respect of legal challenges to implementation of the Convention’ as well as to facilitate information-sharing between parties ‘with regard to legal challenges against their tobacco control measures in domestic courts or through international dispute settlement mechanisms’
- Decision [COP6\(19\)](#): Trade and investment issues, including international agreements, and legal challenges in relation to implementation of the WHO FCTC, which encouraged parties ‘to cooperate in exploring possible legal options to minimize the risk of the tobacco industry making undue use of international trade and investment instruments to target tobacco control

measures'

- Decision [COP7\(21\)](#): Trade and investment issues, including agreements, and legal challenges in relation to the implementation of the WHO FCTC, which called on parties to 'increase, as appropriate, coordination and cooperation between health and trade/investment departments, including in the context of negotiations of trade and investment agreements'

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