

TRADE AGREEMENTS AND TOBACCO USE

A submission to the World Health Organization August, 2000

Submitted to the World Health Organization during its review of the proposed Framework Convention on Tobacco Control by:
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INTRODUCTION

Physicians for a Smoke-Free Canada is a member of the Canadian National Coalition for Action Against Tobacco (NCAT) and fully supports the NCAT submission to the WHO hearings on the Framework Convention for Tobacco Control. One problem addressed in that brief is trade agreements and tobacco use. NCAT is calling for the FCTC to apply the public health precautionary principle – first, do no harm – and to ensure that this precautionary principle is given primacy over agreements to provide national treatment and market access to transnational tobacco companies.

In doing so, NCAT is echoing the first two resolutions of the recent 11th World Conference on Tobacco or Health. The first was a resolution in favour of a strong Framework Convention on Tobacco Control, the second supported addressing other international agreements. “Be it resolved,” the WCTOH decided “that the international tobacco control community work vigorously to exclude and remove tobacco and tobacco products from bilateral and multilateral trade agreements that would have negative public health consequences.” Negotiators for the FCTC have the opportunity to turn this global public health consensus into reality.

This brief will provide some specific suggestions on how the FCTC can be constructed to help protect national and international tobacco control programs from the negative public health consequences of trade agreements.

GUIDING PRINCIPLE 4 IN THE CURRENT DRAFT OF THE FCTC

The current draft FCTC proposes to shield tobacco control from trade agreements with the following Guiding Principle:

4. *trade policy measures for tobacco control purposes should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction of international trade;*

The language of this proposed guiding principle is borrowed from Article XX of the General Agreement on Tariffs and Trade (GATT), which states:

Article XX

General Exceptions

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or

* This is an established Canadian charitable organization working in the public interest for improved national and international tobacco control. Physicians for a Smoke-Free Canada (PSC) is run by a volunteer board of directors made up entirely of Canadian physicians. PSC is funded by membership fees, charitable donations, and by contributions from the Canadian federal government.

a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

- (a) necessary to protect public morals;
- (b) necessary to protect human, animal or plant life or health;

The effect of Guiding Principle 4, if retained, would be to have the existing GATT Article XX general exception apply as the way of protecting public health measure from the negative public health consequences of trade measures.

This is a recipe for disaster. To date, not once in the 53-year history of the existence of Article XX has it been used to successfully defend sound public health measures from challenges under trade liberalization rules.* Among the many public health measures lost before GATT trade tribunals have been the following:

- Australia has had to accept peanuts high in cadmium.
- The Europe Union has had to accept hormone-treated beef, or face trade sanctions.
- Thailand, while having its rights to introduce comprehensive tobacco control measure affirmed, had to open its borders to foreign cigarettes.

While in principle, Article XX looks like it could protect public health, in practice it does not. Trade tribunals have invariably looked at public health measures with their view filtered through the lens of free trade. Invariably, when free trade and public health have been in conflict, free trade has won. How many more sound public health proposals have never been implemented because of the likelihood that they would fall victim to international trading rules?

Guiding principle 4, as currently drafted, does no more than reinforce the status quo. This is not good enough. The FCTC must provide better solutions to protect tobacco control measures from the negative public health consequences of international trade measures.

Looking for solutions in other international agreements

At the Second Working Group meeting in March, 2000, some delegations questioned the adequacy of Guiding Principle 4. In response, *“participants were advised that the language contained in paragraph 4 had been used in multilateral environmental conventions and was compatible with existing international trade agreements.”*

FCTC negotiators should not be satisfied with this response for the following reasons:

1. Compatibility with existing international trade agreements provides no useful protection from the negative public health consequences of trade measures.
2. This language has been used in only one of the major multilateral environmental protection conventions, the Framework Convention on Climate Change. Negotiators of the Biosafety Protocol and other environmental conventions have specifically rejected the language of Article XX of GATT as inadequate to the task of providing an acceptable nexus between environmental protection and global trade arrangements.

Use of language from GATT Article XX is the exception rather than the rule in international environmental treaties. In fact, environmental treaties do provide us with many examples of establishing a balance between environmental protection and trade, and ways in which the

* This record is about to be broken. It is expected that France will be successful in defending its ban on importing chrysotile asbestos against a challenge from Canada. Still, one successful defence of public health against dozens of losses in 53 years does not inspire confidence in Article XX as an effective public health protection measure.

precautionary principle – first do no harm – can be expressed in defence of the environment. Here are some of them.

1992 Rio Declaration: Principle 15:

In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.

1992 Convention on Biological Diversity, Preamble:

Noting that it is vital to anticipate, prevent and attack the causes of significant reduction or loss of biological diversity at source,

Noting also that where there is a threat of significant reduction or loss of biological diversity, lack of full scientific certainty should not be used as a reason for postponing measures to avoid or minimize such a threat...

2000 Cartagena Protocol on Biosafety to the Convention on Biological Diversity, Preamble:

Reaffirming the precautionary approach contained in Principle 15 of the Rio Declaration on Environment and Development,...

Recognizing that trade and environment agreements should be mutually supportive with a view to achieving sustainable development,

Emphasizing that this Protocol shall not be interpreted as implying a change in the rights and obligations of a Party under any existing international agreements,

Understanding that the above recital is not intended to subordinate this Protocol to other international agreements,

Have agreed as follows:...

2000 Cartagena Protocol on Biosafety to the Convention on Biological Diversity, Article 10.6:

Lack of scientific certainty due to insufficient relevant scientific information and knowledge regarding the extent of the potential adverse effects of a living modified organism on the conservation and sustainable use of biological diversity in the Party of import, taking also into account risks to human health, shall not prevent that Party from taking a decision, as appropriate, with regard to the import of the living modified organism in question as referred to in paragraph 3 above, in order to avoid or minimize such potential adverse effects.

These and other environmental protection treaties provide useful guidance on how Guiding Principle 4 could be restructured.

The FCTC is a public health protection treaty not a trade treaty

At the Second Working Group meeting, “it was suggested that paragraph 4 should be omitted or modified, as WHO dealt with public health, not trade.” Physicians for a Smoke-Free Canada agrees with this suggestion and recommends that Guiding Principle 4 be omitted and replaced with something much, much better. The primary purpose of the Framework Convention on Tobacco Control is not to serve the interests of international trade, its primary purpose is to defend public health and it should say so, in no uncertain terms. Trade promoting language must be changed to health promoting language.

DEFENDING PUBLIC HEALTH IN THE FCTC

For the FCTC to be a robust instrument of international law it needs to do four things that are not contained in the current draft. It needs to:

- Assert the importance of good health, and the importance of comprehensive tobacco control as an integral part of health protection, nationally and internationally;

- Assert the importance of the precautionary principle in the application of national and international tobacco control measures;
- Provide strong protection for national comprehensive tobacco control regimes from being weakened by application of international trade law;
- Assert that this convention should not be subordinate to any other international agreement, including trade agreements.

All of these issues can be addressed by replacing the existing Guiding Principle 4 with new wording. To get discussion started, the following replacement wording for Guiding Principle 4 is suggested for the consideration of negotiators:

4 (a). *The WHO Constitution states: "Health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity. The enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition." Tobacco is a threat to health and must be controlled. Comprehensive tobacco control programmes at the national and international levels are necessary and integral to achieving the highest attainable standard of health.*

4 (b). *In order to protect public health, the precautionary approach shall be widely applied by States in their comprehensive tobacco control policies and programs. Where there are threats of continuing harm from tobacco use, lack of full scientific certainty shall not be used as a reason for postponing effective measures to control tobacco.*

4 (c). *Effective tobacco control measures undertaken by States whether or not pursuant to this Convention or its Protocols, shall not be subject to annulment or weakening as a result of the application of any other international agreement.*

4 (d). *This Convention and its Protocols shall not be subordinate to other international agreements.*

The two most strongly supported resolutions of the 11th World Conference on Tobacco or Health held in Chicago in August 2000 stated:

1. *BE IT RESOLVED that the Framework Convention on Tobacco Control (FCTC) be strong, driven by public health considerations, not preclude nations from adopting stronger measures and fully integrate NGOs working for tobacco control in the process.*
2. *BE IT RESOLVED that the international tobacco control community work vigorously to exclude and remove tobacco and tobacco products from bilateral and multilateral trade agreements that would have negative public health consequences.*

Physicians for a Smoke-Free Canada strongly supports both of these resolutions. We have observed that Guiding Principle 4 in the current draft of the Framework Convention, if implemented, could potentially negate the wishes of the 11th World Conference, as expressed in these resolutions. At a minimum, Guiding Principle 4 needs to be removed. As an even better solution, it would be replaced with text that favours public health protection and comprehensive tobacco control. As a point of departure for further discussion and negotiation, replacement text has been suggested.

We all uphold the principles of the WHO constitution. If we are to protect the right of all the world's citizens to "the enjoyment of the highest attainable standard of health" we must do so strongly and without reservation. On the international stage, comprehensive tobacco control and the protection of public health must be leading actors, not a back-row chorus for free trade in tobacco.

The Framework Convention is our instrument for creating, protecting and preserving national and international tobacco control. Let us ensure that it does so, efficiently and
