



FCTC
WHO FRAMEWORK CONVENTION
ON TOBACCO CONTROL

Trade- and investment-related tobacco control issues

EMRO Consultation on Tobacco and Trade
19-21 March 2013



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Presentation Objectives

To outline:

- 1) Types / categories of trade and investment-related tobacco control situations
- 2) Principles / Complexities of trade and investment in tobacco control context
- 3) Tobacco industry scare tactics using trade/investment

Case studies

Leveraging international trade and investment rules to oppose public health:

- 1) International Trade Rules – US-Indonesia Cloves
- 2) International Investment - Philip Morris International (Switzerland) v Uruguay
- 3) Industry Scare tactics – Japan Tobacco and Mild Seven brand

WTO – Indonesia-USA Clove cigarettes

Category 1: International Trade Rules



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PMI – URUGUAY

Category 2: International Investment



ICSID

International Centre for Settlement of Investment Disputes



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PMI - Uruguay

Category 2: International Investment

Philip Morris Brand Sàrl (Switzerland), Philip Morris Products S.A. (Switzerland) and Abal Hermanos S.A. (Uruguay) v. Oriental Republic of Uruguay
(ICSID Case No. ARB/10/7)

Proceeding

Decisions & Awards

Procedural Details

Subject Matter

Tobacco industry

Date Registered

March 26, 2010

Date of Constitution of Tribunal

Constituted: March 15, 2011

Composition of Tribunal

President: Piero BERNARDINI (Italian)

Arbitrators: Gary B. BORN (U.S.)
James R. CRAWFORD (Australian)

Party Representatives

Claimant(s)

Lalive, Geneva, Switzerland

Sidley Austin, Washington, DC, USA

Respondent(s)

Presidencia de la República Oriental del Uruguay, Montevideo, Uruguay

Ministerio de Salud Pública (MSP), Montevideo, Uruguay

Foley Hoag, Washington, DC, USA

Status of Proceeding

Pending (the Respondent files a memorial on jurisdiction on September 24, 2011)

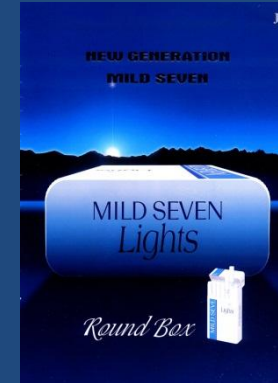


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MISLEADING DESCRIPTORS

Category 3: Industry tactics

JTI "Mild Seven" Brand - Industry using threat of contravention of TRIPS and TBT in developing countries



4. Of particular relevance in this context is Article 2.2 of TBT:

"Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create."

5. In order to comply with the "necessity" test, technical regulations must not be more restrictive to trade than is necessary to fulfil a legitimate purpose, such as implementation of Article 11(1)(a) of the Framework Convention on Tobacco Control (FCTC). Technical regulations fail the test if the objective can be addressed by alternative measures that are reasonably available and are less restrictive of trade.

6. A prohibition that extended to "Mild" in MILD SEVEN is neither "necessary" nor appropriate in the pursuit of the health objective of the FCTC. Any such prohibition would be less effective than the various alternative solutions available and disproportionate in its impact upon JTI's business and legitimate intellectual property rights.

7. Furthermore, Articles 2.9 and 10.1 require a Member to publish a notice before adopting the regulations in order to allow international consultation on potential barriers to trade.

8. JTI believes, therefore that any such prohibition would, accordingly, be contrary to Articles 2.2 of TBT and may invoke international comment.

MISLEADING DESCRIPTORS (2)

Many countries ban misleading descriptors despite national court challenges

Courts have found that use of adjectives such as "mild" or "low-tar" misrepresents the product to the public; that the tobacco industry knew of the harm of "mild" and "low-tar" cigarettes and continued to market them as a safer alternative.

Over past 2 decades, many smokers switched to lights/mild on the mistaken assumption of reduced health risks, instead of quitting, and tobacco companies appear to have been deliberately using the descriptors to encourage this behaviour – NZMA

Over a quarter of light/mild smokers reported smoking these brands to reduce their risks of smoking, and 40% reported smoking light/mild brands as a step toward quitting – CJPH (2001)



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BAT letter to Minister of Health, Namibia, November 2011

On 14 November 2011, Namibia published its "Notice of intention to make regulations: Tobacco Products Control Act, 2010" (the "draft TPC Act") in the Republic of Namibia's Government Gazette, providing 30 days for comments. The draft TPC Act raises a number of concerns in terms of Namibia's compliance with its international trade law obligations in general and its obligations as a Member of the World Trade Organization ("WTO") in particular.

First, Article 20 of the TRIPS Agreement requires that the use of trademarks in the course of trade shall not be "unjustifiably encumbered by special requirements, such as... use in a special form or use in a manner detrimental to its capability to distinguish the goods or services of one undertaking from those of other undertakings." By imposing a health warning that covers at least 60 % of the pack and is to be positioned in the centre of the pack both at the front and back, the draft TPC Act is clearly inconsistent with Article 20.

Furthermore, the draft TPC Act provides that a retailer may indicate the availability of tobacco products and the price thereof only by means of a sign at the point of sale that bears only the name of the product and its retail costs, and is in a colouring similar to the rest of the pricing labels of all other products in that retail outlet.² The draft TPC Act thus appears to prohibit the use of tobacco products' trademarks in the course of trade. Moreover, the draft TPC Act regulates the packaging of tobacco products by requiring that cigarettes may only be sold in "a package of at least 20 cigarettes."³

The above-mentioned features of the draft TPC Act violate several important provisions of the TRIPS Agreement in relation to the protection of trademarks and constitutes an unnecessary barrier to trade in violation of Namibia's obligation under the TBT Agreement, as incorporated also in, for example, the free trade agreement between the European Free Trade Association and the Southern African Customs Union.⁴