FCTS's COP6 Meeting and Its Implications for Tobacco Control Polices

Lukasz A Gruszczynski, Institute of Law Studies, Polish Academy of Sciences
Trade, Investment and Risk

This section highlights the interface between international trade and investment law and municipal and international risk regulation. It is meant to cover cases and other legal developments in WTO law (SPS, TBT and TRIPS Agreements and the general exceptions in both GATT 1994 and GATS), bilateral investment treaty arbitration and other free trade agreements such as NAFTA. Pertinent developments in international standardization bodies recognized by the SPS and TBT Agreement are also covered. Risk regulation refers broadly to regulation of health, environmental, financial or security risks. Of recurrent interest in this Area are questions of whether precautionary policies can be justified, the extent to which policy can and should influence risk regulation and the standard of review with which international judicial and quasi-judicial bodies assess scientific evidence.

FCTC’s COP6 Meeting and Its Implications for Tobacco Control Polices

Lukasz Gruszczynski*

I. Introduction

The sixth meeting of the Conference of the Parties (COP) of the Framework Convention on Tobacco Control (FCTC)1 took place in Moscow on 13 – 18 October 2014. This report is intended to summarize the outcomes of the COP6, analyzing in more detail three specific issues that were addressed and/or discussed during the meeting: (i) the relationship between international trade regime and the FCTC; (ii) the guidelines for the implementation of Art. 6 of the FCTC (price and tax measures); and (iii) the treatment of electronic nicotine delivery systems.

II. Decisions of the COP6

1. International trade (and investment arbitration) v. FCTC

Two draft decisions relating to the relationship between international trade and investment regimes and the FCTC were proposed during the meeting. The first, tabled by Malaysia, encouraged the Parties to entirely exclude tobacco products from future trade and investment agreements. It echoed the proposal already made by this country in 2013 in the context of Trans-Pacific Partnership talks. The second draft decision, put forward by Uruguay, aimed at improving FCTC dispute settlement mechanisms. To this end it proposed the establishment of an expert group that would investigate the topic and suggest possible enhancement measures. Arguably, the idea behind this proposal was to make the FCTC a prime point of reference for disputes concerning tobacco control measures and to limit the risk of challenges through other mechanisms (e.g. the WTO dispute settlement system).

Both initiatives were met with mixed reactions. While some Parties expressed their support, others were more sceptical, even hostile. Eventually the COP adopted two less controversial texts that simply remind the Parties “of the possibility to take into account their public health objectives in their negotiation of trade and investment agreements”2 and request the FCTC Secretariat to prepare a report on health-trade relations in the context of efforts undertaken by developing countries (the Malaysia proposal) as well as a report investigating possible procedures for settling disputes within the FCTC and their interaction with other mechanisms (the Uruguay proposal). No language that would suggest a carve out of tobacco products from trade and investment

---

* Assistant Professor at the Institute of Legal Studies, Polish Academy of Sciences (Poland). The research was financed by the Polish National Science Center pursuant to grant number 2012/07/B/HSS/03767.


2 Conference of the Parties to the WHO Framework Convention on Tobacco Control, 6th session (Moscow, 13-18 October 2014), First Report of Committee B, FCTC/COP6/6/AR/2, item 5.4 and 5.5.
agreements was included in the decision. Similarly, no expert group was established.

This was not the first attempt of the Parties to adopt a decision that would include a kind of carve out for tobacco products and privilege the FCTC dispute settlement system over other available alternatives. During the COP5 meeting in 2012 the Philippines made a proposal for a COP decision that highlighted public health as a priority in international trade and investment disputes, privileged the FCTC dispute settlement mechanism, and called for carving out tobacco products from any future free trade agreements. The initiative was heavily criticized and the text proposed by Philippines was eventually not included in the final version of the decision.

Leaving aside the issue of the usefulness of carve-outs for tobacco products from international trade and investment agreements, the above proposals provoke at least two additional questions: (i) can a COP decision impose any binding obligations on the Parties? (e.g. with regard to the exclusion of tobacco products from future trade agreements), and (ii) how does a COP decision affect a mandate of WTO dispute settlement bodies to hear and decide a case submitted by one of the Members? Although ultimately none of the decisions adopted by COP6 require the Parties to carve out tobacco products or to privilege the FCTC dispute settlement system, one may expect to see similar initiatives in the future, presumably with a stronger language.

In spite of some disagreement in the literature as to legal status of decisions of conferences of the parties (e.g. operating within environmental agreements), most scholars agree that COP decisions should be evaluated against the standards of the Vienna Convention of the Law of Treaties (according to which the consent of a State of prime importance) and concludes that normally they do not impose any binding obligations. In the context of the FCTC, this conclusion is reinforced the language of Art. 23.5 (a provision that grants the COP the power to adopt decisions), which speaks not about rules or norms but merely about “decisions necessary to promote its [Convention’s] effective implementation”. The lack of any wording that would denote the existence of binding obligations strongly suggests that the Parties did not intend to give COP decisions any normative character. The Convention also contains specific provisions for adopting protocols, annexes and amendments to the Convention (Arts. 28, 29 and 33), instruments which are traditionally used for creating international obligations. All of them, in order to become binding on specific Parties, require their explicit consent. Since decisions can be adopted by mere three-fourths majority, recognizing them as legally binding acts would undermine the significance of those provisions. In this context, it should be noted that FCTC guidelines are adopted in the form of COP decisions, and they are universally regarded as a type of soft law. While protocols and annexes are also adopted in such a form, subsequent formal consent of the Parties is required to give them legal force.

The language used in the proposals also confirms this finding. The documents prepared by the Philippines spoke, for example, about “advising” and “re-minding”, and employed the word “should” rather than “shall” or “obliged to”, while Malaysian draft merely requested the Parties to support the efforts undertaken by other Parties for carving out tobacco products. All these elements indicate that FCTC COP decisions cannot be regarded as creating binding obligations for the Parties to the Convention.

If it is accepted that the decisions are non-binding, there is no need to analyse whether they can affect a mandate of the WTO dispute settlement bodies to hear and decide cases submitted by WTO Members. What can be considered however is the impact of Art. 27 FCTC, establishing the FCTC dispute settlement mechanism, on the mandate of WTO panels to hear the cases.

The Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) does not envisage the possibility for a WTO panel to decline its

---

3 Conference of the Parties to the WHO Framework Convention on Tobacco Control, Fifth session (Seoul, Republic of Korea, 12-17 November 2012) Summary Records of Committees, FCTC/COP5/REC/2, p. 156.
jurisdiction over a claim concerning an alleged violation of one of the WTO agreements (or to dismiss it during the course of the proceeding) because of the availability of some other dispute settlement mechanism, even if a defendant in a particular case is in favour of such other system. To the contrary, apart from Art. 23.1 of the DSU, which gives Members a right to have recourse to the WTO dispute settlement system, Art. 7.2 states that “[p]anels shall address the relevant provisions in any covered [i.e. WTO] agreement or agreements cited by the parties to the dispute”, while Art. 3.3 adds that the prompt settlement of disputes is essential to the effective functioning of the organization. Hence if a panel were to decline its jurisdiction it would go against the explicit language of the DSU (e.g. to address a potential violation of relevant WTO provisions) and could undermine the prompt settlement of a dispute as required by Art. 3.3.8 This observation is in principle confirmed by the existing WTO case law. For example, in Mexico – Soft Drinks,9 the Appellate Body considered whether a panel had a right to decline the exercise of its jurisdiction if the same complaint10 could be also addressed in another dispute settlement mechanism (here NAFTA). It concluded, after referring to various provisions of the DSU, that the panel did not have such a choice and it was obliged to exercise its jurisdiction (also acknowledging a corresponding entitlement of a Member to have a ruling by a WTO panel).11

2. Guidelines for implementation of Art. 6 of the FCTC

The COP6 also adopted new guidelines for the implementation of Art. 6 of the FCTC (i.e. price and tax measures).12 The new guidelines elaborate on the set of guiding principles and recommendations13 which were approved by the Parties during the COP5 in 2012. They also add a new set of recommendations to already existing guidelines, bringing their total number to eight.14

The Art. 6 guidelines highlight that price and tax measures are one of the most effective tobacco control tools available to regulators. They are able to lower consumption and reduce the prevalence of tobacco products (or to counteract growing affordability of tobacco products due to increased incomes), and as a consequence improve the general level of public health. Price and tax measures are particularly useful to reduce health inequalities as low- and middle-income groups are more responsive to price increases. The same is true for young consumers. In order to maintain their effectiveness, the guidelines recommend regular adjustments of tobacco tax levels. They express a preference for a system of uniform specific excise taxes over ad valorem variation, as this system ensures higher prices for different type of products (i.e. low and high-price brands) and is easier to administer. The new guidelines do not directly specify the level of recommended tax. They actually confirm, in line with Art. 6.2 of the Convention, that the determination of tobacco taxation policies is a sovereign right of the Parties. At the same time, the guidelines include a reference in one of their footnotes to the WHO technical manual on tobacco tax administration,15 which recommends an excise tax levied on tobacco products at the level of at least 70% of the retail price. This inclusion proved to be one of the most controversial issues discussed by the committee responsible for preparation of the draft.

In order to limit the risk of switching, the guidelines call for similar tax burdens for different tobacco products. They also propose certain minimum standards for tax administration (such as movement of excisable goods and conditions for tax payments,

---


10 Note that in the case of the WTO and FCTC even the complaint will be different. The FCTC dispute settlement system is relevant for disputes concerning application and interpretation of the Convention. On the other hand, the WTO counterpart is available for violations of WTO provisions. Although there might be some overlaps between the two regimes (in term of the facts underlying the dispute), both of them relate to different international obligations – not only in a formal sense but also in terms of the substance of those obligations.


12 Guidelines for implementation of Article 6 of the WHO FCTC (Price and tax measures to reduce the demand for tobacco), 16 October 2014, FCTC/COP6/5.

13 Set of guiding principles and recommendations for implementation of Article 6 of the WHO Framework Convention on Tobacco Control (Price and tax measures to reduce the demand for tobacco), 17 November 2012, FCTC/COP5/7.

14 All adopted guidelines are available at the official FCTC webpage (http://www.who.int/tct/guidelines/adopted/en/).

and prevention of forestalling). Last but not least, the guidelines recommend that the Parties consider prohibiting or restricting tax- or duty-free sales and/or importation of tobacco products.

Overall, the new recommendations remain very general and rather descriptive, particularly if one compares them to other guidelines. As a consequence they can hardly be regarded as controversial (but may leave some health advocates disappointed). This restrained language probably results from the fact, as mentioned above, that tax policy is explicitly recognized by the FCTC as a sovereign prerogative of the Parties.

3. Electronic nicotine delivery systems

One of the issues considered by the Committee A, a body operating within the COP6 meeting, was the treatment of electronic non-nicotine delivery systems (ENNDS) and electronic nicotine delivery systems (ENDS), the latter category being that which currently comprises electronic cigarettes. The committee eventually proposed a decision,16 which was subsequently adopted by the COP6. The decision invites the Parties to consider either prohibiting or regulating ENDS/ENNDS (para. 3). For those Parties which choose the second option, the decision recommends contemplating measures identified by the WHO report on ENDS,17 commissioned by the COP5. The report enumerates various regulatory solutions, such as prohibiting health claims for ENDS, ban on the use of ENDS in indoor public places; restrictions on ENDS advertising, promotion and sponsorship (but not necessary a total ban); protecting the regulatory and legislative processes from vested commercial interests; requirements on product design (e.g., ban on fruit, candy-like and alcohol-drink flavours); mandatory health warnings; surveillance and monitoring of the relevant market; and prohibition of sales to minors. Almost all the above restrictions may be waived if there is relevant scientific evidence (convincing or reasonable, depending on the measure in question) showing, for example, public health benefits of ENDS.

The COP decision also enumerates various objectives which should be achieved by ENDS/ENNDS control measures. This particularly includes preventing the initiation of ENDS/ENNDS’ use by non-smokers (especially young people), minimizing potential health risks, and preventing misleading claims about ENDS/ENNDS (para. 2). In addition, the decision urges the Parties to consider banning or restricting advertising and other promotional activities of ENDS (but not ENNDS). Finally, the decision requests the FCTC Secretariat to form an expert group that will prepare an updated scientific report on health aspects of ENDS/ENNDS’ use (para. 6).

Regulation of ENDS’ use is a highly controversial issue. This primarily results from the fact that there is a considerable disagreement between public health experts as to the benefits and risks connected with electronic cigarettes. Some scientists, while admitting potential negative health effects of ENDS use, argue that they present a safer (and realistic) alternative to conventional cigarettes and may serve as a useful tool for a harm reduction strategy. They also add that nicotine, although addictive, is not in itself harmful to human health.18 For example, a group of 53 prominent scholars of public health policy submitted before the COP6 a letter to Dr Chan – the Director General of the WHO – in which they argued that ENDS had to be regarded as a form of tobacco harm reduction strategy and not as a part of the tobacco problem.19 Others, however, concentrate on the harmful effects of the product rather than on its benefits, and point out that use of ENDS preserves the addiction and renormalizes smoking.20 Both aspects may prevent smokers from quitting completely and maintain an image of smoking as socially acceptable behaviour. In this context, it is also submitted that ENDS may serve as an easy gateway for adolescents

16 Conference of the Parties to the WHO Framework Convention on Tobacco Control, 6th session (Moscow, 13-18 October 2014), Second report of Committee A, FCTC/COP6/A/ARQ2, item 4.4.2.
19 Statement from specialists in nicotine science and public health policy, directed to Dr Margaret Chan, 26 May 2014, available at http://nicotinereview.net/documents/letters/MargaretChan.pdf (last visited 1 November 2014).
to conventional smoking, while studies show inconsistent results with respect to the efficacy of ENDS as a device to stop smoking. Somewhere in the middle are those who highlight the limited knowledge about ENDS, particularly with regard to its long-term health effects, and argue that unless their safety is scientifically proven, ENDS should be heavily regulated (e.g. as a medicinal product) or even banned.

The report prepared by the WHO is closer to the position taken by the critics of ENDS. While it highlights the gaps in current knowledge, it also recognizes the existence of several risks connected with the use of ENDS. In particular, it points out to health risks arising from nicotine inhalation (particularly for children, adolescents and pregnant women), the potential cytotoxicity of some solutions used in the liquids, the presence of carcinogenic compounds (e.g. formaldehyde) and other irritants in vapour (which may also pose a risk for bystanders). The report questions the overall efficacy of ENDS in helping smokers to quit the addiction because, as it explains, in most cases there will be rather a dual use of ENDS and conventional cigarettes, which provides only a minimal benefits in terms of health. It also repeats the concerns with respect to renormalization effects of ENDS and its capability to act as a gateway leading to conventional smoking. At the same time, the report states that it is very likely that "average ENDS use produces lower exposure to toxicants than combustible products." The same is true for the inhalation of second-hand ENDS vapour by non-users. Not surprisingly, the WHO report was heavily criticized by some scientists as being both erroneous and misleading (e.g. for example with respect to its conclusions on the potential of ENDS as a means to stop smoking).

Although the COP decision can only be considered as a recommendation (see the discussion in the previous section), the regulatory approach which it advocates appears to be overly restrictive. Although it provides some flexibility (e.g. restrictions on rather than outright prohibition of advertising), its overall language is rather hostile towards ENDS. It does not recognize an electronic cigarette as a useful tool in harm reduction strategy, but rather as yet another device delivering nicotine (and as a consequence recognizes a total ban as one of the legitimate regulatory options). This should not come as a surprise as the Convention itself takes very principled and conservative approach and does not envisage any harm reduction measures. However, considering that only a very small fraction of current smokers are able or willing to quit smoking, it would seem that safer options should be promoted rather than restricted. After all what matters is not so much a reduction in a number of nicotine users but a decline in number of tobacco-related diseases and premature deaths (and ENDS, as the WHO report admits, is most likely a less risky option than conventional cigarettes). Unfortunately, the decision (as well as the Convention itself) seems to be more concerned with potential and future smokers (i.e. renormalization and gateway arguments) rather than the current ones. From the ethical point of view this seems a very questionable stance.

4. Other decisions/actions of the COP6

The COP6 also adopted several other decisions. These include:
- decision concerning the status of the Protocol to Eliminate Illicit Trade in Tobacco Products, which calls upon the Parties to ratify or otherwise accept it and requests the FCTC Secretariat to promote this process in various ways;

---

24 WHO, supra note 17, p. 4.
27 Some researches estimate the long-term abstinence rate only at the level of 5% (see e.g., J. R. Hughes, J. Keely, S. Naud, Shape of the relapse curve and long-term abstinence among untreated smokers, 99 Addiction 29 (2004)).
28 The Protocol was adopted during the previous session of the COP in Seoul (12-17 November 2012); as of 31 October 2014, four countries concluded a ratification process. For more details on the Protocol, see L. Gruszczynski, The WHO Protocol to Eliminate Illicit Trade in Tobacco Products: A next step in international control of tobacco products, 1 European Journal of Risk Regulation 91 (2013).
- decision on implementation of Art. 19 of the FCTC ("Liability"), which, among the other things, extends the mandate of the expert group for another two years in order to finalize its report on available civil liability mechanisms that can be used against the tobacco industry;
- decision on smokeless tobacco products, encouraging the Parties to develop specific policies directed at such products;
- decision on the control and prevention of waterpipe tobacco products, which invites the Parties to strengthen implementation of the FCTC obligations with respect to this category of products;
- decision on economically sustainable alternatives to tobacco growing, which endorses a set of policy options and recommendations that are intended to help the Parties in their implementation of relevant provisions of the FCTC;
- decision endorsing the progress report of the working group elaborating guidelines for the implementation of Arts. 9 and 10 (contents of tobacco products and their disclosure) and mandating that group to continue its work (on disclosure, testing and measuring of contents and emissions);
- decision concerning the protection of tobacco control policies from commercial and other vested interests of the tobacco industry (Art. 5.3 of the FCTC), urging the Parties to improve implementation of Art. 5.3 and requesting the FCTC Secretariat to seek collaboration on that matter with all relevant international organizations.29

In the context of the last-mentioned decision, there was a considerable debate on the access of the general public to COP meetings. The COP6, in line with its previous practice, passed an ad hoc decision that excluded the public, including representatives of the media, from the latest meeting. Similarly, the majority of applications for observer status were rejected, including the one submitted by INTERPOL. In addition, there were also attempts to introduce a screening mechanism for the public and disclosure declarations for Parties delegates. Both these initiatives proved however to be too controversial and they were eventually rejected.

III. Conclusions

The latest meeting of COP brought about important, but not revolutionary, developments. It introduced new guidelines on the implementation of Art. 6 of the FCTC and for the first time comprehensively addressed the use of ENDS/ENNDS (in the opinion of the author of this report taking, however, a wrong direction). Considering the amount of the reports requested by the COP6 from the FCTC Secretariat and the number of expert groups that were either established or continued, one may expect to see some further significant developments during the next session of the COP, which was scheduled for the end of 2016 or beginning of 2017 and will take place in Geneva. The treatment of ENDS/ENNDS will be definitively one of the core issues.

29 During the meeting Thailand distributed a paper that called for the development, by an expert group, of a model policy for international organizations with respect to Art. 5.3. No expert group was, however, established.