



THE UNIVERSITY OF  
MELBOURNE

MELBOURNE LAW SCHOOL

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# Ensuring Compliance with Trade and Investment Agreements: Tips on Implementation

Professor Andrew D Mitchell

# Discriminatory Effects



- Is the proposal likely to be discriminatory in its effects, eg imposing a greater burden on:
  - foreign investors compared with domestic investors?
  - foreign investors from particular countries compared with foreign investors from other countries?
  - foreign entities compared with domestic entities?
  - foreign entities from particular countries compared with foreign entities from other countries?

# Targeted Products



- Is the targeting of particular products (cigarettes) over similar products (eg cigars, other tobacco products) justified on health grounds or other legitimate policy grounds?

- Avoid making specific assurances to particular investors or to foreign investors generally about the current or future state of tobacco control regulation.
- In particular, make clear that tobacco consumption remains a concern and that more stringent measures including plain packaging are being considered.



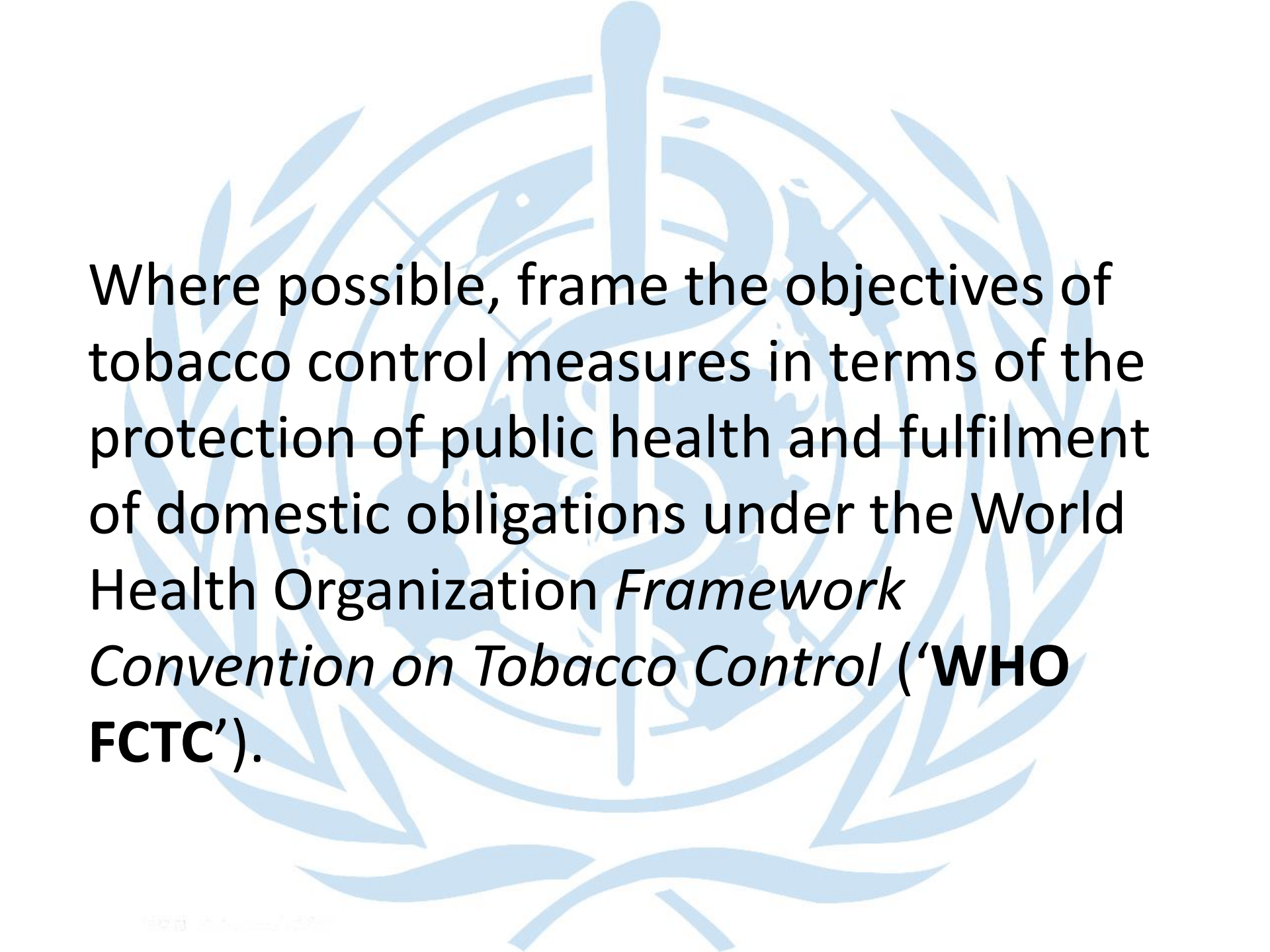


Review all preferential trade agreements and bilateral investment treaties to determine the extent of potential conflict with tobacco control measures, and assess in each case whether to pursue clarification, modification or termination.





Follow usual legislative processes including public consultation and local and international notifications.

The background of the slide features a large, light blue watermark of the World Health Organization (WHO) logo. The logo consists of a central staff with a single snake-like figure (Rod of Asclepius) entwined around it, surrounded by a circular wreath of olive and oak leaves.

Where possible, frame the objectives of tobacco control measures in terms of the protection of public health and fulfilment of domestic obligations under the World Health Organization *Framework Convention on Tobacco Control* (**WHO FCTC**).

Include in the relevant legislation, regulations or associated material:

- explanations of how the measure will assist in protecting public health and fulfilling WHO FCTC obligations;
- relevant references to scientific evidence and empirical studies conducted in relation to the domestic market for tobacco products;
- descriptions of other significant domestic measures targeting tobacco consumption, eg excise taxes, advertising restrictions and public smoking bans, as well as the historical regulatory context for these measures and their interaction with the measure;
- an assessment of the risks of not fulfilling the public health objective of the measure, emphasising the existing and projected health and broader social costs associated with domestic tobacco consumption.



- Include **flexibilities** such as:
  - Recognition of regulatory sovereignty; right to protect public health
  - Limits on rights of intellectual property owners eg negative rights; balance between rights & obligations
  - Recognition of rights & obligations under other treaties eg WHO FCTC
- Include **clarifications/definitions** such as:
  - The scope of key investment concepts such as expropriation and fair & equitable treatment, leaving sufficient policy space for governments
- Avoid making **specific assurances** to investors about future public health regulation and other public policies
- Include methods for **future modification** such as:
  - Ability of parties to clarify rules or agree on interpretations of rules
  - Ability of parties to alter rules with limited notice period

# Implications for Tobacco control in the Region

- Involve lawyers early and keep them involved throughout the process.
- Take a whole-of-government approach to tobacco control and ensure coherence between trade and health departments.

