Banning ENDS: step one into the WTO discrimination

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WHO: ENDS position

Not definite regulatory position but 2014 FCTC COP Decision recommends:

• Classification as tobacco, or
• Classification as medicinal product, or
• Consumer good, or
• Other categories, or
• Complete **ban**

Today ENDS (as consumer goods) are **banned** in dozens of countries and more consider banning (e.g. India)
Discrimination in the WTO

✓ The products imported… shall be accorded treatment no less favourable than that accorded to like products… in respect of all laws, regulations…(Art III:4 of the GATT 1994)
✓ Members… ensure that in respect of technical regulations, products imported… shall be accorded treatment no less favourable than that accorded to like products of national origin…(Art 2.1 Technical Barriers to Trade (TBT) Agreement)

Are ENDS “like” cigarettes in the strict legal WTO sense?
How to measure “likeness” in WTO

Four elements identified in case law (EC – Asbestos):

1. The physical properties of the products
2. Their end-uses
3. Consumer preferences and
4. The international classification of the products for customs purposes

Basically a determination if the two products are or could be in a competitive relationship
Conclusions

1. ENDS – may be considered “like” cigarettes under the WTO legal tests

2. A ban may be found discriminatory if no science-based justification

3. Health justification difficult given expanding credible evidence on reduced risk profile compared to cigarettes
Several Uses

- Positions/Advocacy/Policy
- Raising awareness/Dissemination
- Legal/Regulations