



Global Trade and
Investment Advisors

Banning ENDS: step one into the WTO discrimination

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14 June 2019 | GNF | Warsaw

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

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Several Uses

Positions/Advocacy/Policy

Raising awareness/Dissemination

Legal/Regulations

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