

Navigating the Crossroads: Balancing Tobacco Control Frameworks with Trademark Rights in Zambia

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Abstract

Tobacco has been grown for quite a long time. Countries that grow the crop have justified their growing of it based on employment creation for local farmers and the contribution tobacco growing makes to economic emancipation. Despite that, the negative effects posed by tobacco use remain undeniable at a global level. Consequently, the World Health Organization (WHO) adopted the Framework Convention on Tobacco Control (FCTC) in 2003. The Convention is aimed at securing the health of the public from the adverse effects of tobacco and its use. It, therefore, calls on State Parties to adopt measures and strategies aimed at reducing the consumption of tobacco, such as plain packaging of tobacco products. While the Zambian government is aware of the obligations placed on it by the Convention, which it acceded to in 2008, calls for domestication have not been heeded. It will be demonstrated in this article that the failure to domesticate the Convention by the government offends the right to health and, by and large, leaves room for tobacco companies to take advantage of the right to trademark protection over the FCTC plain packaging recommendation.

Annotasiya

Tütün uzun müddətdir becərilən məhsuldur. Məhsulu yetişdirən ölkələr yerli fermerlər üçün iş yerlərinin yaradılması və tütünçülüynün iqtisadi baxımdan onlara verdiyi töhfə səbəbi ilə onun yetişdirilməsini əsaslı hesab edirlər. Buna baxmayaraq, tütündən istifadənin yaratdığı mənfi təsirlər qlobal səviyyədə danılmaz olaraq qalır. Nəticə etibarilə 2003-cü ildə Ümumdünya Səhiyyə Təşkilatı (ÜST) tərəfindən “Tütünə qarşı mübarizə haqqında” Çərçivə Konvensiyası (bundan sonra – Konvensiya) qəbul edilmişdir. Konvensiya əhalinin sağlamlığını tütünün və onun mənfi təsirlərindən qorumaq məqsədi daşıyır. Buna görə də o, üzv dövlətləri tütün məmulatlarının sadə qablaşdırılması kimi tütün istehlakının azaldılmasına yönəlmiş tədbirlər və strategiyalar qəbul etməyə çağırır. Zambiya hökuməti 2008-ci ildə qoşulduğu Konvensiya ilə üzərinə düşən öhdəliklərdən xəbərdar olsa da, milliləşdirmə çağırışlarına məhəl qoyulmamışdır. Bu məqalədə hökumət tərəfindən Konvensiyanın milliləşdirilməsinin sağlamlıq hüququnun pozuntusu olduğu və bütövlükdə, tütün şirkətlərinə FCTC-nin sadə qablaşdırma tələbi ilə müqayisədə əmtəə nişanı hüququndan istifadə etmək imkanı yaratdığı göstəriləcək.

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Introduction

Tobacco consumption in Zambia poses significant health challenges, contributing to a range of adverse effects on the population. The widespread use of tobacco has led to a surge in health issues, including respiratory diseases, cardiovascular disorders, and various forms of cancer.¹ In the context of the global effort to address tobacco-related health risks, Zambia's awareness of these challenges is reflected in its accession to the Framework Convention on Tobacco Control (FCTC) in 2008. However, the failure to effectively domesticate the convention raises concerns about the nation's commitment to mitigating the detrimental impact of tobacco on public health.

The FCTC stands as the inaugural worldwide agreement in public health and reasserts everyone's entitlement to optimal health standards. It marks a significant change in crafting regulatory approaches to tackle addictive substances.² The FCTC aims to “*protect present and future generations from the devastating health, social, environmental and economic consequences of tobacco consumption and exposure to tobacco smoke*”.³ To attain this, the FCTC requires both price/tax and non-price measures to reduce tobacco demand, covering smoke protection, product regulation, education, and tobacco dependence reduction.⁴ In terms of supply reduction, the FCTC addresses issues relating to the illicit trade in tobacco products, sales to and by minors, and support for economically viable alternative activities.⁵

¹ Ira S. Ockene & Nancy Houston Miller, *Cigarette Smoking, Cardiovascular Disease, and Stroke: A Statement for Healthcare Professionals From the American Heart Association*, 96 *Circulation* 3243, 3243 (1997). Available at: <https://www.ahajournals.org/doi/full/10.1161/01.cir.96.9.3243>

² See WHO Framework Convention on Tobacco Control, V (2003). Available at: https://wipolex-res.wipo.int/edocs/lexdocs/treaties/en/who-tc/trt_who_tc.pdf

³ *Id.*, art. 3.

⁴ *Id.*, art. 6-14.

⁵ *Id.*, art. 16-17.

The FCTC primarily focuses on safeguarding public health through the implementation of various measures. Despite its clear objectives aimed at protecting people's health, the tobacco industry, involved in the production, marketing, and sale of tobacco products, often expresses reservations and opposition to these measures. This tension underscores the complex interplay between public health priorities and the commercial interests of the tobacco industry.⁶ Specifically, the FCTC mandates Parties to ensure that “*tobacco product packaging and labelling do not promote a tobacco product by any means that are misleading, deceptive or likely to create an erroneous impression about its characteristics, health effects, hazards or emissions*”.⁷ This obligation does not require “*any term, descriptor, trademark, figurative or any other sign that directly or indirectly creates the false impression that a particular tobacco product is less harmful than other tobacco products*”.⁸

This requirement, as argued by the tobacco industry, deprives them of their intellectual property rights, and as such, they feel duty-bound to protect their rights.⁹ Their argument, it seems, is anchored on Article 20 of the Agreement on the Trade-Related Aspects of Intellectual Property Rights (hereinafter the TRIPS Agreement) which is to the effect that using a trademark in business activities should not be unduly burdened by specific demands or used in such a way that diminishes its ability to differentiate one company's products or services from those of others.¹⁰

This provision is arguably misconceived, especially given the nature of the obligations under the TRIPS Agreement. It prohibits *unjustifiable* encumbrances, and this is in so far as the use does not negatively affect the capability to distinguish between goods or services. The import of this provision goes against the plain packaging requirement under the FCTC, and failure by the government of Zambia to domesticate makes its enforceability weak as compared to the TRIPS Agreement whose provisions have been domesticated in the *Zambian Trademark Act*.¹¹

The non-domestication of the FCTC implies that tobacco companies are not compelled to adhere to the plain packaging recommendation outlined in the convention. Inadvertently, the right to a trademark gains precedence, as the TRIPS Agreement has been domestically adopted. This allows tobacco companies operating in Zambia to freely seek the use of trademarks,

⁶ Thomas Clausen, Karen E. Charlton and Gerd Holmboe-Ottesen, *Nutritional Status: Tobacco Use and Alcohol Consumption of Older Persons in Botswana*, 10 *Journal on Nutritional Health Aging* 104, 110 (2006).

⁷ *Supra* note 2, art. 11.

⁸ *Ibid.*

⁹ Sergio Puig, *Tobacco Litigation in International Courts*, 57 *Harvard International Law Journal* 383, 414 (2016).

¹⁰ Agreement on Trade-Related Aspects of Intellectual Property Rights, art. 20 (1995).

¹¹ See *Zambian Trademarks Act* (2023).

facilitating marketing endeavours. Consequently, the people of Zambia are deprived of the health advantages associated with implementing the convention in relation to tobacco. This leads to the argument that the right to health of the Zambian population is compromised.

In light of the aforementioned considerations, this article aims to illustrate that the failure of the Zambian government to domesticate the Framework Convention on Tobacco Control (FCTC) constitutes a violation of the right to health. Moreover, this absence of domestication inadvertently creates an environment conducive to the exercise of trademark rights by tobacco companies.

Initially, the article will provide an overview of the FCTC and its objectives, emphasizing its significance in global public health policy. Subsequently, the article will examine Zambia's regulatory framework on tobacco control, including existing legislation and policies related to smoking and public health.

Following this, the article will delve into an analysis of the right to health within the context of the FCTC, highlighting the obligations it imposes on signatory countries to protect public health from the harms of tobacco use. Special attention will be given to the specific provisions of the FCTC relevant to tobacco control measures and their implications for the right to health in Zambia.

Moreover, the article will explore the intersection between tobacco control and intellectual property rights, focusing on the protection afforded to trademarks. This section will scrutinize how the absence of domestication of the FCTC may inadvertently facilitate the exploitation of trademark rights by tobacco companies, potentially undermining public health objectives.

I. Framework Convention on Tobacco Control

The notion of developing a tool regarding the global control of tobacco was conceived in 1995. This was followed by the adoption of a resolution to conduct a feasibility study on an "International Instrument for Tobacco Control".¹² In the same year, the World Health Assembly, at its 49th Session adopted the resolution that requested the Director-General of WHO to commence the development of a FCTC.¹³ In 1998, WHO prioritised the framework, and in May 1999, multilateral negotiations on the framework commenced which resulted in the establishment of two bodies to draft the Convention – a technical working group and an intergovernmental

¹² World Health Organization Report, The Feasibility of an International Instrument for Tobacco Control (1996). Available at: https://iris.who.int/bitstream/handle/10665/172800/EB97_Inf.Doc-4_eng.pdf (last visited Feb. 7, 2024).

¹³ *Supra* note 2, 33.

negotiating group.¹⁴ The two bodies conducted a series of negotiations reaching a consensus on several aspects. Finally, the FCTC was unanimously adopted on May 21, 2003, during the 56th World Health Assembly. It was open for states to sign for one year. On February 27, 2005, 90 days after being accepted by 40 States, the FCTC came into force.¹⁵ As per the FCTC, States Parties are encouraged to implement necessary tax and price policies as a means of reducing tobacco consumption,¹⁶ and States Parties are obliged to also adopt and implement non-price measures through effective legislative, executive, administrative or other measures.¹⁷ Article 8 (1) mandates States Parties to protect the public from exposure to tobacco smoke in indoor workplaces, public transport, and public places.¹⁸ Under the FCTC, each State Party must provide guidelines for testing and measuring the contents and emissions of tobacco products and require manufacturers and importers of tobacco products to disclose to governmental authorities information about the contents and emissions of tobacco products.¹⁹

The FCTC also requires that States Parties put in place effective measures that ensure that tobacco product packaging and labelling do not promote a misleading, deceptive or erroneous impression about a tobacco product's characteristics, health effects, hazards or emissions. Each unit packet and package of tobacco products as well as any outside packaging and labelling of such products must also carry health warnings describing the harmful effects of tobacco use.²⁰ It is each State Party's responsibility to promote and strengthen public awareness of tobacco control issues using all available communication tools.²¹ Appropriate, comprehensive and integrated guidelines on the promotion of cessation of tobacco use and adequate treatment for tobacco dependence must be developed and promoted by each State Party.²²

According to the content of the obligation put by the Convention on State Parties, they must adopt and implement effective measures that ensure that all unit packets and packages of tobacco products and any outside packaging of such products are marked to assist Parties in determining the origin of

¹⁴ Both bodies were open to all Member States and regional economic integration organizations to which their Member States had transferred competence over matters related to tobacco control.

¹⁵ *Supra* note 2, vi.

¹⁶ *Id.*, art. 6 (1) (2).

¹⁷ *Id.*, art. 7.

¹⁸ *Id.*, art. 8 (2).

¹⁹ *Id.*, art. 9-10.

²⁰ *Id.*, art. 11.

²¹ *Id.*, art. 12.

²² *Id.*, art. 14.

tobacco products.²³ Additionally, States Parties are mandated to forbid the sale of tobacco products to persons under the age of eighteen.²⁴

It can be concluded from the above that the FCTC aims to curb the global tobacco epidemic by implementing evidence-based strategies. Its key objectives include reducing tobacco consumption, protecting people from exposure to tobacco smoke, regulating tobacco product packaging and advertising, preventing illicit trade of tobacco products, and promoting international cooperation to address the health and economic impacts of tobacco use.

It suffices to mention that Zambia does not currently derive benefits from the Framework Convention on Tobacco Control as it has not been domestically incorporated. However, despite this, Zambia has enacted specific legislation to address the significant issue of tobacco overconsumption, and this is the discussion of the next part.

II. Regulatory Framework on Tobacco Control in Zambia

Tobacco control in Zambia is governed by a triad of legislative acts: the Local Government (Prohibition of Smoking in Public Places) Regulations, the Public Health (Tobacco) Regulations, and the Tobacco Act. Together, these statutes form a comprehensive framework aimed at regulating various aspects of tobacco use and promotion across the country.

The Local Government (Prohibition of Smoking in Public Places) Regulations, made under the Local Government Act Chapter 281, forbid a person from smoking in any building, premises, conveyance or another place to which the public has access.²⁵

The Public Health (Tobacco) Regulations issued on January 1, 1992, made under Public Health Act Chapter 535, require a manufacturer, importer, distributor or retailer to label any tobacco product they sell in a clear, legible and conspicuous manner.²⁶ The label should contain a warning, "WARNING: TOBACCO IS HARMFUL TO HEALTH" which will appear on both sides of the large surface area of the package printed in bold letters.²⁷ Where such a product is to be sold, distributed, or manufactured, it must contain the same warning.²⁸ The Regulations also forbid a person from selling tobacco products

²³ *Id.*, art. 15.

²⁴ *Id.*, art. 16.

²⁵ The Local Government (Prohibition of Smoking in Public Places) Regulations, art. 3 (1) (2008).

²⁶ Public Health (Tobacco) Regulations, art. 3 (1992). Available at: <https://atca-africa.org/wp-content/uploads/2021/02/The-Public-Health-Tobacco-Regulations-1992.pdf> (last visited Feb. 7, 2024)

²⁷ *Id.*, art. 3 (2) (a).

²⁸ *Id.*, art. 9 (1).

to a person under the age of 16.²⁹ There are also specified areas where smoking should not be done – hospitals, health centres, nursing homes, kindergartens, cinema halls, theatres, elevators, public transport and schools for persons less than 21 years of age.³⁰ Moreover, it is the responsibility of the owner or operator of the premises clearly and visibly to display the warning “NO SMOKING”.³¹

The Tobacco Act has been enacted to promote, control and regulate the production, marketing, packing, import and export of tobacco in Zambia.³² The Act establishes a Board whose responsibility is to, *inter alia*, provide strategic policy direction to the Tobacco Board of Zambia. The Act also requires a person who sells tobacco to seek authorisation.³³

Despite this, the regulations in Zambia have been deemed ineffective for tobacco control. This ineffectiveness stems from several factors, including their restrictive approach to banning tobacco advertising and promotion. Additionally, there has been a failure to enforce restrictions on smoking in public places. Moreover, the regulations have not mandated the inclusion of large graphic health warnings on tobacco products. The reason behind this restrictive approach to tobacco regulation is that the Tobacco Act in Zambia primarily concentrates on regulating the production, marketing, and sale of tobacco products, without imposing restrictions on consumption. It establishes licensing requirements for manufacturers and retailers, sets quality control standards for tobacco products, and provides guidelines for advertising and promotion. This is against the growing body of research that indicates that tobacco control measures that align with the FCTC and its guidelines are effective. These studies have uncovered compelling international evidence demonstrating the effectiveness of various strategies in reducing tobacco consumption and associated health risks. Price and tax increases, comprehensive smoke-free policies, pictorial health warnings, and bans on tobacco advertising, promotion, and sponsorship have all been identified as highly effective measures. Additionally, cessation interventions have been found to significantly encourage quitting among tobacco users.³⁴

It is the author’s view that because the FCTC has not been fully implemented, tobacco still remains an epidemic in Zambia. This view is in line with various studies that have shown that there is a correlation between

²⁹ *Id.*, art. 4.

³⁰ *Id.*, art. 5 (1).

³¹ *Id.*, art. 5 (2).

³² See The Tobacco Act (2022).

³³ *Id.*, art. 24.

³⁴ Chung-Hall Janet, Craig Lorraine, Gravely Shannon, Sansone Natalie and Fong T. Geoffrey, *Impact of the WHO FCTC Over the First Decade: A Global Evidence Review Prepared for the Impact Assessment Expert Group Tobacco Control*, 28 Tobacco Control BMJ Journal 119, 122 (2019).

tobacco use reduction and the domestication of the FCTC.³⁵ This implies that the outlined effects of tobacco use in this article are widespread in Zambia, posing a considerable challenge to achieving the right to health. In consideration of this, the next section will examine the right to health in Zambia and how its fulfilment has been jeopardized due to the non-domestication of the FCTC.

III. The FCTC and the Right to Health

The FCTC and the right to health share a common goal of promoting and protecting public health, with the FCTC providing a framework for global efforts to address the specific challenges posed by tobacco consumption. As this part will demonstrate, the treaty's comprehensive approach aligns with the principles of the right to health, emphasizing prevention, protection and education to ensure individuals can enjoy the highest attainable standard of health. Before delving into more detailed discussions, it might be helpful to first explore the concept of health in relation to tobacco consumption.

Regional and international instruments have articulated the right to health. The Constitution of the WHO in its preamble defines health as "a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity". The concept of "complete physical, mental, and social well-being" as defined by the WHO relates to tobacco consumption in that tobacco use adversely affects all three dimensions of health – mental, physical and social. The 1948 Universal Declaration of Human Rights provides that everyone has the right to an adequate standard of living.³⁶ The Declaration thus recognizes the connection between health and well-being and adopts a broader view of the right to health as a human right, even though health is but a single component of an adequate standard of living.

The Convention on the Rights of the Child (1989) requires States Parties to recognize the right of the child to the enjoyment of the highest attainable standard of health and facilities for the treatment of illness and rehabilitation of health.³⁷ The notion of "the highest attainable standard of health" takes into account both the child's biological, social, cultural and economic preconditions and the State's available resources, supplemented by resources made available by other sources, including non-governmental organizations, the international community and the private sector.³⁸ According to Carol Bellamy, "Children have a right to be protected from tobacco's collateral

³⁵ Report of the Sixth Session of the Conference of the Parties to the WHO Framework Convention on Tobacco Control, 114 (2014).

³⁶ The Universal Declaration of Human Rights, art. 25 (1) (1948).

³⁷ The Convention on the Rights of the Child, art. 24 (1989).

³⁸ Committee on the Rights of the Child, General Comment No. 15 (2013) on the Right of the Child to the Enjoyment of the Highest Attainable Standard of Health (art. 24), para. 48 (2013).

effects – they have a right to health and development, and their use of tobacco is frequently a consequence of the denial of those rights”.³⁹

At a regional level, the African Charter of Human and Peoples Rights confers on every individual the right to enjoy the best attainable state of physical and mental health.⁴⁰ This could be appreciated by considering the case of the Social and Economic Rights Action Centre (SERAC) & the Centre for Economic and Social Rights v. Nigeria, where the African Commission on Human and People’s Rights stated that this right “obligates governments to desist from directly threatening the health and environment of their citizens”.⁴¹ This implies that States Parties are to ensure that necessary measures are taken to protect the health of their people including the effects of tobacco.

Today, despite the omission of human rights in the FCTC, concerns about the adverse effects of tobacco on human life have been mooted. By ratifying the FCTC, member states acknowledge that the Convention is the minimum standard to protect the health of the public from the adverse effects of tobacco products.⁴² This implies that human rights concerns are making inroads in global tobacco control. Scholars have argued that, while it is too early to make any definite judgements on the extent of this transformation, it is clear that the concept of human rights is increasingly complementing and combining with the already established public health discourses on smoking.⁴³

In conclusion, the nexus between the right to health and the Framework Convention on Tobacco Control (FCTC) underscores their intertwined significance in addressing global public health challenges, with a primary emphasis on mitigating the impact of tobacco consumption. The right to health, as elucidated throughout this discussion, stands as a foundational human right acknowledged internationally. Its scope encompasses the entitlement of individuals to experience the highest achievable standard of both physical and mental well-being.

Equally, the FCTC, detailed earlier as a treaty adopted by the World Health Organization (WHO), represents a targeted effort to combat the pervasive global tobacco epidemic. Its specific objective is to safeguard both current and future generations from the severe consequences—be they health-related,

³⁹ William Onzivu, *International Legal and Policy Framework for WHO Framework Convention on Tobacco Control*, 21 (2000).

⁴⁰ The African Charter of Human and Peoples Rights, art. 16 (1981).

⁴¹ Social and Economic Rights Action Centre (SERAC) and the Centre Economic and Social Rights v. Nigeria, ACHPR155/19, para. 52 (2001).

⁴² Oscar A. Cabrera & Lawrence O. Gostin, *Human Rights and the Framework Convention on Tobacco Control: Mutually Reinforcing Systems*, 7 *International Journal of Law in Context* 285, 292 (2011).

⁴³ David Reubi, *Making a Human Right to Tobacco Control: Expert and Advocacy Networks, Framing and the Right to Health*, 7 *Global Public Health* 176, 179 (2012).

social, environmental, or economic – stemming from tobacco consumption. In light of this, the failure of the Zambian government to incorporate the FCTC into national legislation poses a significant risk. This lapse compromises the citizens' ability to fully enjoy their right to health, as they remain exposed to the detrimental effects of tobacco without the comprehensive protective measures outlined in the international treaty. Therefore, the alignment of national policies with global health initiatives is crucial for ensuring the holistic well-being of the population and effectively addressing the challenges posed by tobacco use.

IV. Challenges in Realizing the Right to Health: The Imperative of FCTC Convention Domestication in Zambia

In the pursuit of safeguarding the fundamental human right to health, the domestication of international agreements becomes a crucial mechanism for nations to address contemporary public health challenges. Zambia, like many other countries, stands at the intersection of this global endeavour, seeking to realize the right to health through the domestication of the Convention. Having acceded to the FCTC on May 23, 2008, Zambia is obligated to implement comprehensive tobacco control laws. By fulfilling these obligations, Zambia would begin to mitigate the effects of tobacco consumption, thereby safeguarding public health and promoting well-being.

Parties to the Convention are obligated under Article 5 (3) to avoid providing the tobacco industry with “incentives, privileges, or benefits”, as well as any form of “preferential tax exemption”. Regrettably, it appears that trade considerations have taken precedence over public health in this instance.⁴⁴

Mandating protective measures against tobacco smoke exposure in various settings, Article 8 necessitates Parties to enforce bans in indoor workplaces, public transport, and other public places. Despite progress through the development of a smoke-free manual and law enforcement training, enforcement faces challenges due to resource constraints and a fragmented legislative framework for tobacco control. Despite the existence of the Local Government (Prohibition of Smoking in Public Places) Regulations, which aim to restrict smoking in public areas, their ineffectiveness is evident. Research indicates persistently high rates of exposure to “second-hand” smoke, with 74% prevalence in bars and 30% in indoor workplaces,

⁴⁴ A Mockery to FCTC: Renowned Tax Avoidance BAT Opens Giant Cigarette Plant in Zambia's Tax Free Zone (2019), <https://afrodemocracyjournal.wordpress.com/2019/12/03/a-mockery-to-fctc-renowned-tax-avoidance-bat-opens-giant-cigarette-plant-in-zambias-tax-free-zone/> (last visited Feb. 7, 2024).

underscoring the ongoing issue of inadequate protection from tobacco smoke in these environments.⁴⁵

Parties are obligated by Article 11 to establish and execute effective packaging and labelling measures within three years of ratification. However, Zambia has not adhered to this requirement. The existing single text-only warning occupies less than 30% of both the bottom front and back of the cigarette package and is exclusively presented in English.⁴⁶

States Parties are compelled by Article 12 to enhance public awareness of tobacco control issues and implement measures to raise awareness regarding matters related to tobacco control. In reality, there are low awareness levels of the adverse effects of tobacco use, i.e., 31% of tobacco users noticed anti-tobacco messages on the radio while 28% were on tobacco packages.⁴⁷ Concerning the actual harmful effects of tobacco use, Zambia is the third lowest in terms of awareness of tobacco usage.⁴⁸

Under the mandate of Article 13, Parties are required to implement measures prohibiting tobacco advertising, promotion, and sponsorship within five years of ratification. Despite this requirement, Zambia has not yet enforced a comprehensive ban on tobacco advertising, promotion, and sponsorship. Research conducted shows that Zambia continues to allow tobacco advertising through newspapers, radio, television, cinema, billboards, posters, magazines, and videos, while entertainment media exposes 22% of tobacco users to tobacco promotion, shops and bars advertise 15% of tobacco users and shop windows or inside shops 14%.⁴⁹

Article 16 compels Parties to “*adopt and implement effective legislative, executive, administrative or other measures*” to prohibit the sale of tobacco products to minors. Such measures may include requiring sellers of tobacco products to put signage “SELL TO MINOR IS PROHIBITED” and request a purchaser of tobacco products to produce proof of having reached full age; banning the sale of tobacco products in any manner by which they are directly accessible; prohibiting the manufacture of objects in the form of tobacco products that appeal to minors; and ensuring that tobacco vending machines are not accessible to minors. Notwithstanding this obligation, research shows

⁴⁵ International Tobacco Control Zambia National Report: Findings from the Wave 1 and 2 Surveys, Executive Summary, International Tobacco Control Policy Evaluation Project (2012-2014), 3 (2015). Available at: https://itcproject.s3.amazonaws.com/uploads/documents/ITC_Zambia_National_Report_Waves_1_and_2_2012-2014_Decem.pdf (last visited Feb. 14, 2024).

⁴⁶ *Ibid.*

⁴⁷ Ministry of Health, Prevention and control of non-communicable diseases in Zambia: The case for investment, Table 3 (2019).

⁴⁸ *Ibid.*

⁴⁹ *Id.*, 4.

that 38% of youth aged 13-15 smoke cigarettes purchased from stores.⁵⁰ In addition, the tobacco industry remains free to market to youth by advertising at the point of sale and on entertainment channels.⁵¹ Vending machines, internet sales and the sale of sweets, snacks, toys or any other objects made to look like tobacco products (which appeal to minors) are not prohibited.⁵²

The observation was made because there has been hesitance from the government to domesticate the FCTC. While it would be expected that the government would state its position concerning protecting the right to health through tobacco control, its policies do not seem to suggest so. In the Seventh National Development Plan (2017-2021), the government is committed to facilitating the establishment of a tobacco production club. Additionally, it aims to provide an enabling policy environment conducive to the tobacco industry. The plan also seeks to build the capacity of smallholder tobacco farmers and promote tobacco marketing initiatives. Furthermore, it aims to facilitate access to affordable financing mechanisms for tobacco farmers. Lastly, the plan emphasizes promoting investment in research and development to enhance yields and increase productivity in the tobacco sector.⁵³

The laxity to domesticate is despite the growing threat of the tobacco epidemic. This has led to arguments from researchers that the continued indecisiveness “is promoted by incorrect beliefs that tobacco leaf growing is an economic boon to Zambian farmers”.⁵⁴ Surprisingly, this argument is fortified by the government’s desire to encourage crop diversification rather than curb tobacco production.

Economically, Zambia needs to implement the FCTC because investment analysis suggests that the comprehensive implementation and enforcement of prioritized FCTC interventions offer a highly cost-effective approach to mitigating the tobacco burden.⁵⁵ If these FCTC tobacco control interventions are effectively implemented and enforced in Zambia, the government could save an estimated 40,349 lives over a 15-year period. Additionally, the adoption and enforcement of these measures could lead to significant cost savings, amounting to approximately ZMW 12.4 billion. Furthermore, implementing these interventions could prevent healthcare expenditures

⁵⁰ World Health Organization (WHO), Global Youth Tobacco Survey (GYTS): Zambia 2021 (2021). Available at: <https://www.who.int/teams/noncommunicable-diseases/surveillance/data/zambia> (last visited Feb. 14, 2024).

⁵¹ The Tobacco Atlas: Zambia, 5 (2019). Available at: <https://tobaccoatlas.org/factsheets/zambia/> (last visited Dec. 29, 2023).

⁵² *Supra* note 45, 19.

⁵³ See Seventh National Development Plan: 2017-2021, § 16.8 (2017).

⁵⁴ *Supra* note 4550, 11.

⁵⁵ *Ibid.*

totalling ZMW 685 million over the same timeframe.⁵⁶ This underscores the substantial health and economic benefits associated with prioritizing tobacco control measures in Zambia.⁵⁷

The comprehensive implementation of the FCTC in Zambia necessitates a holistic approach, involving legislative alignment, coordination, policy development, public awareness, taxation, monitoring, collaboration, enforcement, integration into health systems, and capacity building. A coordinated effort across these diverse areas is essential for mitigating the impact of tobacco-related health issues within the country.

V. Navigating Trademark Protection and Plain Packaging in the Absence of FCTC Domestication in Zambia

The absence of domestication of the FCTC makes it challenging to implement the plain packaging recommendation. As demonstrated in the previous section, the FCTC recommends plain packaging as a measure to reduce the appeal of tobacco products and discourage consumption. Without domestication, the legal framework necessary for enforcing this crucial measure may be lacking. In the absence of plain packaging recommendations, tobacco companies in Zambia may opt to pursue trademark protection under the Trademarks Act. This is facilitated by the domestication of the TRIPS Agreement, which provides a legal basis for the protection of trademarks. Furthermore, the failure to domesticate the FCTC potentially hinders the implementation of measures designed to protect public health, creating a situation where commercial interests, such as obtaining trademarks, may take precedence.

While some may argue that the voluntary nature of the plain packaging requirements grants tobacco companies a justification for non-compliance, the true essence and impact of this recommendation transcend mere legality. For example, the implementation of plain packaging in Canada in February 2020 marked a significant step in the country's tobacco control efforts. A pre-post evaluation study was conducted to assess the impact of plain packaging on various factors, including pack appeal and health warning label (HWL) effectiveness. The conclusion was that the implementation of plain packaging in Canada had a profound impact on pack appeal and HWL effectiveness. These findings provide compelling evidence for the efficacy of plain

⁵⁶ Zambia Ministry of Health, *The Case For Investing in WHO FCTC Implementation*, 2 (2019). Available at: <https://www.undp.org/sites/g/files/zskgke326/files/migration/zm/f6d0c8dbf67305a3bbf50fdb248e3a8e52832b27d08195c9e56ad810b9dea8b1.pdf> (last visited Feb. 7, 2024).

⁵⁷ *Id.*, ix.

packaging as a tobacco control measure and underscore its potential to contribute to reduced smoking rates and improved public health outcomes.⁵⁸

Plain packaging requires that all forms of tobacco branding be labelled exclusively with simple, unadorned text. It involves the removal of trademarks, graphics, logos and other attributes from cigarette packs, except the brand name.⁵⁹ The pack should also be in a neutral colour and include only the content and consumer information (e.g., toxic constituents) as well as health warnings required by law.⁶⁰ In other words, plain packaging aims at standardizing the appearance of all cigarette boxes to make them unappealing, especially for adolescents, thus reducing the prevalence and uptake of smoking.⁶¹ It is also said to encourage those who smoke to give up smoking discourage those who have given up from relapsing, and reduce people's exposure to tobacco smoke.⁶² The reasoning is that doing so is likely to reduce tobacco consumption by making cigarettes look less attractive while ensuring that health warnings and information are more visible. This would also reduce misconceptions about the risks of smoking which will, in turn, protect human health. This requirement goes against the provision of Article 20 of the TRIPS Agreement which provides that:

The use of a trademark in the course of trade shall not be unjustifiably encumbered by special requirements, such as use with another trademark, 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.

This provision, it may be argued, only prohibits "unjustifiable" encumbrances, and this is in so far as the use is not detrimental to its capability to distinguish the goods or services. It may well be said that Article 20 requires "to remove" trademarks that are intellectual property, i.e., they are outputs of the human intellect (creations of the human mind), the result of human ingenuity or intellectual assets that are protected by law.⁶³ Intellectual assets form part of intellectual capital that has been captured, preserved, catalogued and made available for sharing and, as such, must be protected.⁶⁴ Such

⁵⁸ Shannon Gravely et al., *Evaluating the Impact of Plain Packaging Among Canadian Smokers: Findings from the 2018 and 2020 ITC Smoking and Vaping Surveys*, 32 *Tobacco Control* 153, 161 (2021).

⁵⁹ Enrico Bonadio, *Plain Packaging of Tobacco Products Under EU Intellectual Property Law*, 34 *European Intellectual Property Review* 599, 599 (2012).

⁶⁰ *Ibid.*

⁶¹ Becky Freeman, Simon Chapman, Matthew Rimmer, *The Case For the Plain Packaging of Tobacco Products*, 103 *Addiction* 4580 (2007); Alberto Alemanno & Enrico Bonadio, *The Case of Plain Packaging for Cigarettes*, 3 *European Journal of Risk Regulation* 268, 268 (2010).

⁶² Cyril Chantler et al., *Standardised Packaging of Tobacco: Report of the Independent Review Undertaken by Sir Cyril Chantler*, in *Independent Review into Standardised Packaging of Tobacco* 3, 15 (2014).

⁶³ Alexander I. Poltorak & Paul J. Lerner, *Essentials of Intellectual Property* (1st ed. 2002).

⁶⁴ *Ibid.*

protection confers exclusive rights (intellectual property rights) on creators with the ultimate goal of promoting innovation and creativity.

Tobacco companies nonetheless contend that no evidence exists to support the claim that plain packaging reduces smoking. It may lead to unintended consequences and is thus counterproductive to the fight against smoking. They argue that plain packaging is an unjustified deprivation of their brands and trademarks whose effect is to erode their intellectual property rights, making it difficult for consumers to identify their preferred brands.⁶⁵

It is highly doubtful whether the above arguments are well grounded. This is because many studies including but not limited to observational, experimental, and population-based investigations have indicated that plain packaging can reduce positive perceptions of smoking and dissuade tobacco use.⁶⁶ This provides empirical evidence that can be used by governments deciding to implement plain cigarette packaging measures to build a strong case that plain packaging plays a critical role in the quest to reduce tobacco use.⁶⁷

It can be said from the discussion above that the impact of FCTC non-domestication on balancing plain packaging and trademark protection in Zambia underscores the intricate relationship between public health priorities and trademark considerations. Addressing this challenge necessitates a harmonized approach that prioritizes the well-being of the population while acknowledging the legitimate business interests of tobacco companies. Domesticating the FCTC emerges as a pivotal step in achieving this delicate equilibrium and fostering a regulatory environment that safeguards public health in tandem with intellectual property rights such as trademarks.

Conclusion

In conclusion, the failure of the Zambian government to domesticate the FCTC despite its awareness of the obligations laid out in the convention raises serious concerns. The justifications for tobacco cultivation, such as employment creation and economic emancipation, must be carefully balanced against the undeniable global health risks posed by tobacco use.

The right to health, a fundamental human right, is compromised when governments neglect to implement measures that can effectively reduce tobacco consumption. The FCTC, with its emphasis on strategies like plain packaging, provides a roadmap for safeguarding public health from the adverse effects of tobacco.

⁶⁵ *Ibid.*

⁶⁶ Colin N. Smith, John D. Kraemer, Andrea C. Johnson, Darren Mays, *Plain Packaging of Cigarettes: Do We Have Sufficient Evidence?*, 8 Risk Management and Healthcare Policy 21, 21 (2015).

⁶⁷ *Ibid.*

The reluctance to domesticate the FCTC not only undermines the commitment made by Zambia to prioritize public health but also opens avenues for tobacco companies to prioritize their trademarks over the well-being of the population. This apparent contradiction between economic interests and public health is a critical issue that demands urgent attention.

To truly prioritize the right to health, the Zambian government should heed calls for the domestication of the FCTC, implementing measures that align with global efforts to mitigate the impact of tobacco use. By doing so, Zambia can strike a balance between economic considerations and the well-being of its citizens, contributing to a healthier and more sustainable future. It is imperative that governments worldwide recognize the importance of fulfilling their commitments under international conventions like the FCTC to protect the fundamental right to health for all.