IT’S ONLY WORDS

INTERFERENCE IN IMPLEMENTING HEALTH WARNINGS IN CAMBODIA

Southeast Asia Tobacco Control Alliance (SEATCA)
August 2010
# Contents

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Acknowledgements</td>
<td>4</td>
</tr>
<tr>
<td>Introduction</td>
<td>5</td>
</tr>
<tr>
<td>Prior to the Introduction of Sub-Decree on Health Warnings</td>
<td>6</td>
</tr>
<tr>
<td>Making Ways Toward Effective Health Warnings</td>
<td>7</td>
</tr>
<tr>
<td>Challenges from Tobacco Industry Interference</td>
<td>10</td>
</tr>
<tr>
<td>How Tobacco Industry Subverts Health Warnings in Cambodia</td>
<td>11</td>
</tr>
<tr>
<td>The Role of World Health Organization (WHO) and Non-Governmental</td>
<td>19</td>
</tr>
<tr>
<td>Organizations (NGOs) in Supporting Tobacco Control</td>
<td></td>
</tr>
<tr>
<td>Recommendations</td>
<td>21</td>
</tr>
<tr>
<td>References</td>
<td>22</td>
</tr>
<tr>
<td>About SEATCA</td>
<td>23</td>
</tr>
</tbody>
</table>
Acknowledgements

This report aims to provide lessons learned for countries drawing on the case study of Cambodia’s experience in advocating for strong Sub-Decree on health warnings and challenges faced in putting in place effective tobacco control policy. Documentation of this valuable experience was aimed to support progressive policy development in ASEAN countries and is part of Southeast Asia Tobacco Control Alliance (SEATCA)’s effort in advancing World Health Organization Framework Convention on Tobacco Control (WHO FCTC) in the region.

SEATCA acknowledges the contributions and commitment of all groups ranging from policymakers, health professionals, tobacco control advocates, academicians, and civil societies in Cambodia to ensure strong tobacco control measures are enacted and implemented.

We would like to thank all who have directly or indirectly contributed in providing and sharing information related to their key role in supporting the passing of the Sub-Decree on health warnings in Cambodia.

Photo Credits

Dr Yel Daravuth, National Professional Officer, TFI WHO, Cambodia
Dr Mom Kong, Director of Cambodia Movement for Health (CMH)
Tan Yen Lian, Knowledge and Information Manager, SEATCA
Introduction

The Kingdom of Cambodia, formerly known as Kampuchea, ratified and became a party to an international health treaty, World Health Organization Framework Convention on Tobacco Control (WHO FCTC) on 15 November 2005. With the entry into force of this Treaty, Cambodia has progressively worked towards the adoption of FCTC recommendations. The government aims to translate the general provisions of WHO FCTC into national laws and regulations in the interest of advancing public health policy. One of the most urgent measures needed to be put in place within three years after the ratification is to implement Article 11 obligations on Packaging and Labelling of Tobacco Products of the WHO FCTC.

In response to this obligation, a Sub-Decree on Health Warnings was approved by the Council Ministers on 22 August 2009 that requires a text only health warning to be printed on the surface of each cigarette pack sold in the market. Subsequently, the Sub-Decree on Health Warnings was signed by the Prime Minister on 20 October 2009. Given that Cambodia government has taken a compromising approach to implement bigger, visible and 5 rotated textual health warnings covering 30% of the bottom front and back of the pack. All cigarette manufacturers and importers are required to print these new textual health warnings on their cigarette packages effective August 2010.

From a public health perspective, the passage of Sub-Decree on Health Warnings signifies a significant step forward in tobacco control to replace an existing Ministry Circular on Health Warning which is not legally binding. Since its issuance in 1998, the tobacco industries have escaped being penalized despite the failure to place textual health warning on their cigarette products. Though there seems to be a major gain, the reality is the Cambodian people had actually suffered a major loss when the government decided on only textual instead of picture warnings. The tobacco industry has successfully derailed the implementation of pictorial health warnings.

With minimal tobacco control regulation in place and the absence of a ban on tobacco advertising, promotions and sponsorships provided an opportunity for the tobacco industry to undertake a wide range of promotions to market its products. It continues to act and react solely on its own interests to challenge and interfere with the implementation of cost-effective tobacco control measures in Cambodia.

This report documents the challenges and lessons learned from Cambodia’s experiences in advocating for potent health warning in place. It also aims to highlight tactics and arguments used by the tobacco industry to undermine the effectiveness of WHO FCTC recommendations.

WHO FCTC Article 11

Article 11 requires Party to the global treaty to implement large, clear, visible and legible health warning labels on tobacco packaging. These labels should:

- contain graphic images of health conditions caused by tobacco use, and
- cover 50% or more, and no less than 30%, of the pack.
- be rotated so consumers do not become accustomed to any specific warnings.

The standards on packaging and labeling also call for banning on the use of false, misleading and deceptive terms or labels that give the impression that a tobacco product is less harmful than any other tobacco product. This includes terms such as "low tar", "light" and "mild" that have been proven to be meaningless.
Prior to the Introduction of Sub-Decree on Health Warnings (or First Generation Health Warning)

The first Ministry Circular on Health Warning was issued in 1998 by the Ministry of Commerce and the Ministry of Industry, Mines and Energy. It requires a textual health warning stating “Smoking is harmful to health” to be printed on all locally manufactured and imported cigarette packs. This warning was particularly vague and did not mention any specific smoking-related diseases. The weak and inconspicuous textual health warning in Khmer language must be placed on either one of the side panel or on the bottom front panel of the pack.

Taking advantage of the fact that this was a non-legally binding legislation, the tobacco industry has undermined the Ministry Circular by printing the health warning in English language instead of Khmer to diminish the effectiveness of the health message to reach a wide segment of the population. The tobacco industry managed to exploit this long-standing loophole without any litigation ever taken against them.

Tobacco manufacturing has started in Cambodia since the 1980s. British-American Tobacco Cambodia (BATC) is the leading company with 40.3% of the total market share in 2005. Followed by Viniton (28.6%), a Chinese Cambodia joint venture, Altadis (18.8%), a foreign company operating outside Cambodia and the other two transnational companies, Philip Morris International (PMI) and Japan Tobacco International (JTI) with market share of 0.7% and 0.3% respectively.

Monitoring of tobacco industry surveillance activities between 2007 and 2008 revealed that more than 200 types of local and imported cigarette brands are sold in the market. Most of the imported cigarettes originate from France, China, British, America, Singapore, Thailand and Indonesia in which majority of them do not have a tax stamp.

With reference to WHO FCTC as a global health treaty that reaffirms the right of all people to the highest standard of health, Cambodia government has displayed a strong interest to implement effective public health policies with the establishment of the Sub-Decree on Printing Health Warning on Cigarette Packages which was signed by the Prime Minister on 20 October 2009. The Sub-Decree presents a paradigm shift for Cambodia’s public health in developing a legally binding regulation to address addictive substances particularly tobacco. The adoption of large, clear, visible and rotated health warning messages on tobacco packaging is a tool used to create awareness of the health hazard of smoking among smokers and the public.
Making Ways Toward Effective Health Warnings

Prior to the inception of the WHO FCTC, the Cambodia government has started its way in strengthening public health policies through the establishment of the first Inter-ministerial Committee for Education and Reduction on Tobacco Use (IMC) since 21 June 2001. This initiative has marked a historic milestone to effectively put in place strong tobacco control measures in the country. Represented by eleven different ministries with Ministry of Health as the chairperson of the IMC, it aims to work together among the various ministries to reduce smoking prevalence in the country by preventing smoking uptake among the young and women and encouraging quitting behavior among smokers.

With the growing interest to support the global public health treaty, Cambodia has joined forces with other 168 countries in the world to ratify the WHO FCTC. A call to implement strong health warnings on tobacco product packaging and labeling after three years of ratification (deadline on February 2009) is an obligation to the Article 11 of the WHO FCTC was highly recognized by the government. In order to meet this objective, the National Center for Health Promotion (NCHP), under the Ministry of Health has obtained approval to take lead in drafting a Government Circulation on Health Warning during the 9th Inter-Ministerial Committee (IMC) meeting which was held on 13 December 2006. The draft circulation will be submitted to the Council of Ministries for endorsement.

Inter-Ministerial Technical Working Group together with NCHP have started to work on the development of pictorial health warnings (PHWs) including drafting the content of the health warning circulation and have decided on the selection of PHWs messages.

Since 2006, the development of PHWs has been initiated by Ministry of Health and NCHP plays its role as a coordination secretariat for developing the PHWs and has worked closely with various agencies in the country to facilitate the process of preparing the PHWs. They include World Health Organization Cambodia and several Non-Governmental Organizations (NGOs) that are working on tobacco control such as Adventist Development and Relief Agency Cambodia (ADRA), Cambodia Movement for Health (CMH) and MEDiCAM as well as other relevant ministries. A series of meetings has been conducted to identify the suitable PHWs messages before and after carrying out the pre-testing study among the public using focus group discussions.

Finally, a set of six PHWs have been developed which include:

- **Smoking causes lung cancer**
- **Smoking causes heart disease**
Due to time constraints in acquiring local specimens of victims of smoking-related diseases such as emphysema and stroke, the Ministry of Health (MOH) sought alternative sources of effective pictures from other countries. The Ministry of Health has finally obtained approval of copyright free of the use of pictorial health warnings on “Smoking causes emphysema” and “Smoking causes stroke” from Thailand and Australia which have implemented pictorial health warnings since 2005 and 2006, respectively.

The tobacco control law has been drafted in 2003 prior to the ratification of FCTC in November 2005. Afterwards, the draft tobacco control law was revised, in consultation with different lawyers at the Council Ministers, in accordance with the FCTC provisions to include provisions relating to PHWs. However, the decision to work actively on PHWs was emphasized after the development of FCTC implementation master plan in 2007 which indicated that the deadline for Article 11 was February 2009. The FCTC implementation master plan was developed in consultation with technical experts from Southeast Asia Tobacco Control Alliance (SEATCA) together with WHO Cambodia and Inter-Ministerial FCTC Secretariat.

**Source: Ministry of Health, Cambodia**

Conducting pre-testing of pictorial health warnings with the participation of local community.
In order to meet the obligation, the Inter-Ministerial FCTC Secretariat has agreed with the proposal to develop a legal circulation on health warning with the assumption that a government circulation will be passed within a shorter period, probably a year. The decision was made during the Inter-Ministerial technical working group meeting in 2007. During the same meeting the Inter-Ministerial technical working group which was established in 2001 was changed to Inter-ministerial FCTC Secretariat. The FCTC Secretariat consists of 25 officers from 11 ministries with two officers represented from each ministry.

Several meetings were held within the FCTC Secretariat to discuss the draft Government Circulation on Health Warnings in consultation with partners from WHO and NGOs during the development of the circulation. The decision to submit the Government Circulation on Health Warnings to the Council Minister was made during the 10th Inter-ministerial Committee (IMC) for Tobacco Control meeting on 7 November 2008. Prior to this, the draft circulation must be reviewed by the legal department of Ministry of Health. The National Center for Health Promotion (NCHP) has organized a meeting together with the legal department officers to discuss about the plan to submit the draft government circulation on health warnings to the Council of Ministers. The Secretary of State who is also responsible for tobacco control was invited to chair the meeting. However, he was unable to come as he was attending a meeting at Conference of Party (COP 3) in Durban, South Africa. As a replacement, another Secretary of State of the Ministry of Health was called to chair the meeting. The meeting arrived at the final decision of having only five PHWs to be submitted to the Councils of Ministers instead of six PHWs. The proposed PHW message “Cigarette smoke affects others around” was removed.

However, the Economic, Social and Cultural Council and the Council of Jurists at the Council of Ministers realized that the government circulation is not a strong regulation because it does not include penalty. On the other hand, they have proposed changing the circular to a Sub-Decree. The decision was made and it was then submitted to the Economic, Social and Cultural Council together with the Council of Jurist of the Council of Ministers to review as part of the procedure when the propose regulation contains a penalty aspect. Eventually, the proposed draft of government circulation on health warnings was officially changed to a Sub-Decree on Health Warnings using the same contents and wordings.

In January 2009, two documents including Sub-Decree on Health Warning and Tobacco Control Law were submitted to the Council of Ministers. It was agreed that the Council of Ministers prioritize the discussion on the Sub-Decree on Health Warning which was convened in August 2009. The proposal of a series of five PHWs which was initially approved by all government ministers was watered down to mandatory textual health warnings with five different health warning messages which is required to be printed in Khmer language. These include:

- Smoking causes lung cancer
- Smoking causes heart disease
- Smoking causes emphysema
- Smoking causes stroke
- Smoking causes tooth decay

The decision made at the Council of Ministers Meeting was final. Thus the content of Sub-Decree on Health Warnings which was mainly on PHWs was amended and tailored to the agreed decision on textual health warnings. A new revised version of the Sub-Decree on Health Warnings was later approved in another plenary meeting which was held in early October 2009.

Lastly, the Prime Minister has signed the Sub-Decree on Health Warnings on 20 October 2009 which requires all cigarettes sold in Cambodia to be printed with five rotated messages of textual health warnings on both principle display areas covering 30% of the bottom of the pack. The five textual health warnings will take effect in early August 2010.
Challenges from Tobacco Industry Interference

Tobacco industry uses a wide range of tactics to undermine tobacco control activities and fight tobacco control regulation.

Research into tobacco industry documents continues to reveal new evidence of long-range tobacco industry plans, tactics and strategies to thwart, undermine or circumvent public health policy particularly tobacco control regulation at the international level as well as in many different countries. WHO (2008) reports that the industry employs strategies such as “direct and indirect lobbying and campaign contributions, financing research, attempting to affect the course of regulatory and policy machinery and engaging in social responsibility initiatives as part of a public relations campaigns”, to challenge, discredit, weaken, obstruct and delay implementation of effective tobacco control measures.

Philip Morris, Japan Tobacco and British American Tobacco have used their political influence to dilute and defeat public health policies even in the wealthiest countries (INFACT 2002). Anecdotal information from non-governmental organizations (NGOs) indicates that transnational tobacco companies have interfered with and influenced tobacco control policies in ASEAN. There is evidence that tobacco companies have interfered with FCTC ratification and/or implementation, promotes itself as a stakeholder, drafted and distributed tobacco-friendly sample legislation to governments, uses threats of court action to protect its profits, employs delay tactics, engages influential personalities on its board and implements corporate social responsibility activities to enhance its public image.

Tobacco industry has vigorously opposed comprehensive tobacco control policies being implemented in many countries. There is clear evidence from the tobacco industry’s own secret documents, showing that tobacco companies have strenuously tried to derail the work of WHO and governments on the implementation of tobacco control life-saving measures such as picture health warnings on packages of cigarettes. Systematic searches of internal industry documents revealed tobacco industry efforts to avoid, delay and dilute health warnings on cigarettes in Australia. The study revealed that the Australian industry has used four main strategies to fight health warnings. They include:

1) submissions to government, arguing against health warnings;
2) privately influencing politicians using covert lobbying campaigns targeting key decision makers in government and political party machines as well as influence media coverage;
3) using third parties to support their lobbying; and
4) commissioning research to gather evidence that supports industry’s claim that awareness of harmfulness of smoking is high and that new warnings are not needed.

In the early days (from seventies to the nineties) of fighting textual health warnings, based on the case of Australia, the industry has used six arguments to oppose the introduction and strengthening of warnings:

- tobacco warnings are the start of a “slippery slope”, arguing that the policy would lead other products to carry warnings as well
- claims made in warnings are unsubstantiated by the evidence
- warnings are an assault on free enterprise and the national economy
- warnings don’t work
- smokers already know that smoking is harmful
- warnings desecrate pack design and branding
The industry used similar arguments to lobby the Singapore government on labeling and health warnings to delay implementation of health warnings on cigarette packs in the 1990’s.8

The industry continues to fight health warnings in other ASEAN countries. For example, Philip Morris sent letter to Public Health Minister of Thailand to contend against the Thai health authorities’ decision to require new pictorial health warning covering 50% of the surface area of cigarette packets in the early 2000s. It argued that adopting such a measure would violate the World Trade Organization’s on Trade-Related Aspects of Intellectual Property Rights (WTO’s TRIPS) Agreement of which Thailand is a member and also threatened to sue the public health ministry.5

How Tobacco Industry Subverts Health Warnings in Cambodia

As predicted, there was resistance and defiance of the tobacco industry to the implementation of the proposed pictorial health warnings in Cambodia. Similar strategies and tactics as mentioned above were employed by the industry to weaken or thwart strong health warnings on cigarette packs. Some of these strategies are described below.

Lobbying Policy Makers

Infiltrating government agencies is a common strategy used by the industry to directly lobby policy makers in Cambodia. When significant mass media coverage highlighted the government’s decision to seriously impose pictorial health warnings on cigarette packs, this drew various responses from the industry. The tobacco industry started to lobby the Ministry of Health (MOH) in early 2008 when the industry discovered that policy makers have reached consensus to submit Sub-decree on Health Warning. Subsequently, the industry attempted to arrange a meeting with MOH to discuss the implementation of Article 11 on Packaging and Labeling of Tobacco Products. However, in compliance to FCTC Article 5.3, MOH rejected the invitation and restricted interactions with the tobacco industry, recognizing the conflict of interests between the tobacco industry and public health.

Guidelines for implementation of Article 5.3: Protection of public health policies with respect to tobacco control from commercial and other vested interests of the tobacco industry

Principle 1: There is a fundamental and irreconcilable conflict between the tobacco industry’s interests and public health policy interests.

Recommendations

Establish measures to limit interactions with the tobacco industry and ensure the transparency of those interactions that occur.

20. In setting and implementing public health policies with respect to tobacco control, any necessary interaction with the tobacco industry should be carried out by Parties in such a way as to avoid the creation of any perception of a real or potential partnership or cooperation resulting from or on account of such interaction. In the event the tobacco industry engages in any conduct that may create such a perception, Parties should act to prevent or correct this perception.

Source: Guidelines for implementation of Article 5.3 of the WHO Framework Convention on Tobacco Control9
Failing to influence the Ministry of Health, the tobacco industry then shifted its focus to other government officials in related government agencies to promote its cause. Their ultimate motive is to frustrate the implementation of strong health warnings that are against their interest. As expected, the industry tried to befriend officials of other ministries – particularly the Ministry of Commerce specifically the Department of Intellectual Property, Ministry of Domestic Trade, Ministry of Economic and Finance, and Ministry of Customs, in order to forge ties and to use its political and economic influence to gain support. The tobacco industry uses a similar strategy in most countries in the region to prevent or influence the implementation of tobacco control law that is against their interest.

### Forming Allies and Using Third Parties

The tobacco industry also used allies from International organizations such as International Trademark Association (INTA) as a strategy to support and strengthen its arguments on the use of trademark issue to ensure its ability to use tobacco packages to promote their products’ visibility and image. In Cambodia, tobacco industry appears to have used the support of the New York-based Trademark Association to raise concerns with Minister of Health about requiring trademarks only be shown in a plain standard font is encroaching on the rights of trademark owners and their ability to properly and lawfully use their trademarks. The tobacco industry claims that this is a violation of International Treaty Obligations such as Paris Convention and the WTO’s TRIPS Agreement of which Cambodia is the member. A similar strategy has been employed in other countries such as New Zealand and Australia to prevent and defer the implementation of stronger health warning.

### Exploiting Loopholes in the Law

To prevent pictures, colours and descriptions from being used to suggest that a particular tobacco product is less harmful, Articles 11 and 13 of the World Health Organization Framework Convention on Tobacco Control (WHO FCTC) banned their use. These provisions also banned advertising of attractive tobacco packaging. To fight this proposed ban, the industry cited the Cambodian laws - Law Concerning Marks Trade Names and Acts of Unfair Competition of Cambodia – to support arguments against the ban. The industry argued that banning the registered commercial “marks, pictures, colour, or trade dress” is against some Articles stated in the Law Concerning Marks Trade Names and Acts of Unfair Competition of Cambodia because the use of the “registered marks, pictures, or colours that are used on cigarette packaging to attract consumers” are actually allowed under the said national law.

The industry however, failed to mention that the ‘mark’ that FCTC Article 11 and 13 sought to prohibit relates only to those which are defined as misleading descriptors, and that banning misleading descriptors in marks is actually consistent with the Marks, Trade Names and Acts of Unfair Competition of Cambodia which provides that a mark cannot be registered if it is likely to mislead the public or trade circles.
In addition, Article 11 (1)(a) of the WHO FCTC explicitly refers to “misleading descriptors” states:

Article 4 (c) of Law Concerning Marks Trade Names and Acts of Unfair Competition of Cambodia

A mark cannot be validly registered:

if it is likely to mislead the public or trade circles, in particular as regards the geographical origin of the goods or services concerned or their nature or characteristics.

Source: Law Concerning Marks Trade Names and Acts of Unfair Competition of Cambodia

1. Each Party shall, within a period of three years after entry into force of this Convention for that Party, adopt and implement, in accordance with its national law, effective measures to ensure that:

(a) tobacco product packaging and labelling do not promote a tobacco product by any means that are false, misleading, deceptive or likely to create an erroneous impression about its characteristics, health effects, hazards or emissions, including 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. These may include terms such as “low tar”, “light”, “ultra-light”, or “mild”.

Source: WHO Framework Convention on Tobacco Control, 2003

Therefore, the industry tried to convince Cambodian policy makers that the FCTC guidelines infringes its right to use registered marks but remained silent on the fact that the FCTC and the national law are actually consistent in that both promotes the banning of “misleading marks.”

The same tactics were also used in the Philippines when the industry protested against the approval of Administrative Order (AO) No. 2010 – 0013 requiring them to print pictorial health warnings covering upper 30% of front and 60% of the back panels of each cigarette pack. Tobacco industry immediately challenged the legitimacy of the AO by pointing out that it will be a violation of the Section 13(g) of Republic Act 9211 (RA 9211), which was formerly known as the Tobacco Regulation Act of 2003. The Act states that:
The tobacco industry claims that if they comply with the AO, they will be slapped with a hefty fine and face imprisonment in accordance with RA9211. The tobacco industry ignored the fact that the requirement of the AO is a “graphic health information” and that even if it should be construed as the “warning” that RA9211 refers to, the act of placing other warnings is not one of the prohibited acts defined by the law.

It must also be noted the AO does not contradict RA 9211 because it was issued in accordance with the country's commitment to an international treaty, the Framework Convention on Tobacco Control (FCTC) of which the Philippines is a signatory. However, the tobacco industry continued to impede the introduction of stronger warning by taking legal challenges against the Ministry of Health's efforts to strengthen health warnings.

The Marikina Trial Court issued an order granting Fortune Tobacco to petition for a Preliminary Injunction against the said AO. The said injunction bars the Ministry of Health from requiring tobacco firms to place graphic warnings on their product packages as long as the case remains pending. The legal tactic used by the tobacco industry serves to completely dampen the MOH's efforts in implementing Article 11 of the FCTC.

### Fight PHWs Using Intellectual Property Rights and Trade Arguments

Over the years, the industry has shifted its debate from health to property rights as one of their strategies to weaken the proposal of implementing PHWs in a country. They started to build arguments on trade grounds, focusing on trademark protection in the TRIPS Agreement and Paris Convention for the Protection of Industrial Property governed by the World Intellectual Property Organization (WIPO). The approach deliberately aims to shift the focus of health issue from Ministry of Health into an industrial issue related to trade, economic and commerce ministries in which the industry has more allies as they are also one of the stakeholders in these ministries.

This was reflected in an industry document, revealing that The New Zealand Tobacco Institute decided in May 1993 that regulations over packaging and labelling should not be:

---

**Republic Act 9211 (RA 9211)**

Section 13 Warning on Cigarette Packages

(g) “no other printed warnings, except the health warning and the message required shall be placed on cigarette packages.”

Source: Tobacco Regulation Act of 2003

---
It is also a common strategy for the industry to use international trade agreements related to intellectual property and the use of trademark as tools to resist the threat of implementing large health warnings or plain packaging in most countries. They would constantly lobby policy makers to make them believe that adopting pictorial health warning or plain packaging would violate the international intellectual property protections and is contrary to their countries’ obligations under international trade agreements.

In the case of Cambodia, the submission of draft government Sub-Decree to Council Minister pertaining to pictorial health warning does not require implementing plain packaging. However, the tobacco industry directed its attack on plain-packaging with the intention to confuse policy makers. The issue of plain packaging using trade arguments has always been used by tobacco industry in the cause of trademark protection and in the pretext to discredit the WHO FCTC Guidelines for Implementation of Article 11 and 13 besides aiming at buying time in the hope that the government will change its mind from approving the Sub-Decree on pictorial health warnings and ultimately adopting a less effective measure, that is only textual health warning.

The tobacco industry often argues that banning the use of “pictures colours or descriptive text” on tobacco product packaging would infringe the rights of trademark owners by restricting their ability to legitimately use their trademarks and thus limiting the ability of consumers to exercise choice in making decisions about the product they are purchasing. This argument is built on the fact that it is contrary to any article of the TRIPS Agreement. There is no inconsistency between the TRIPS Agreement and the banning the use of “pictures colours or descriptive text” on tobacco product packaging as TRIPS provides public health exception in Article 8.1, which states that:

**Article 8.1 of TRIPS Agreement**

Members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement.

Source: WTO ANALYTICAL INDEX: Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)
Therefore, the regulation on pictograms does not violate TRIPS. Moreover, the industry argued that banning the registration of marks such as pictures, colours or descriptive text on packaging is against the Article 7 of the Paris Convention for the Protection of Industrial Property which Cambodia is a state member. However, we have to note that the Paris Convention governed only trade mark registration, not trade mark use. In fact, banning the registration of marks such as pictures, colours or descriptive text on packaging is consistent with the Paris Convention where Article 6 applies to banning or invalidating existing trademark that are “contrary to morality or public order” or “of such a nature as to deceive the public”.

**Article 6 quinquies of Paris Convention**

B. Trademarks covered by this Article may be neither denied registration nor invalidated except in the following cases:

3. When they are contrary to morality or public order and, in particular, of such a nature as to deceive the public.

*Source: WIPO Database of Intellectual Property, Legislative Texts*¹⁸

Similarly, Article 10 of the Paris Convention states that:

**Article 10bis (3) of Paris Convention**

The following in particular shall be prohibited:

3. indications or allegations the use of which in the course of trade is liable to mislead the public as to the nature, the manufacturing process, the characteristics, the suitability for their purpose, or the quantity, of the goods.

*Source: WIPO Database of Intellectual Property, Legislative Texts*¹⁸

It must be noted that the tobacco industry often used the same arguments that having pictorial health warning is in violation of WTO Members’ International Obligations under TRIPS and the Paris Convention. Back in the early 2002 when the Thailand health authorities started to put in place strong tobacco control measures including implementing pictorial health warning, the tobacco industry strongly opposed the proposal of Thailand implementing pictorial health warning by arguing that this would violate the WTO’s TRIPS Agreement of which Thailand is a member. Philip Morris, the giant tobacco company of its flagship brand of Marlboro cigarette has reacted to the plan by issuing a warning including a threat to sue the Public Health Ministry. In relation to that Philip Morris sent a letter to the Public Health Minister of Thailand to argue against the new pictorial health warnings which covers 50% of the principle surface area of cigarette packages.¹⁹
IT'S ONLY WORDS

The Philip Morris letter propagated that:

"Trademarks are valuable Company property and are protected by the Trademark Act B.E. (Buddhist Era) 2534, the Penal Code, as well as by TRIPS, of which Thailand is a member. TRIPS provides that the use of a trademark shall not be unjustifiably encumbered by special arrangements, such as use in a special form or manner detrimental to its capacity to distinguish the goods or service of one undertaking from those of other undertakings. The Regulation would violate this principle."

Source: Thailand: Country Report on Labelling and Packaging, WHO

In actual fact, the Trademark Act B.E.2534 prohibits the destruction or imitation of trademarks in which the pictograms would do neither. This is consistent with the fact stated in the Article 8.1 of TRIPS Agreement recognizes the right of countries to take measures necessary to protect public health and nutrition, provided that such measures are consistent with the provisions of the TRIPS Agreement. Hence, the regulation on warnings and messages in the form of or include pictures or pictograms does not violate TRIPS.

Silent on Selected Facts

The industry also contended that WHO FCTC Guidelines for Implementation of Article 11 and 13 are inconsistent with the TRIPS Agreement claiming that they never mentioned about the ban on use of pictures, colours or descriptive text on tobacco product packaging. Although TRIPS agreement legally protects the intellectual property rights of a company’s trademark, however it has provisions that restrict the use of a trademark for vital reasons of protecting public health interest. For example, Article 8.1 of the TRIPS agreement specifies that members may “adopt measures necessary to protect public health and nutrition” while Article 17 specifically limits the protected parties to “fair use of descriptive terms”.

"Members may provide limited exceptions to the rights conferred by a trademark, such as fair use of descriptive terms, provided that such exceptions take account of the legitimate interests of the owner of the trademark and of third parties."

Source: WTO ANALYTICAL INDEX: Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)
This is consistent with the provision of FCTC Article 11 states measures that are necessary to protect public health include the banning of misleading descriptors, without distinction as to whether these are registered or not.

Additionally, Article 15 of the TRIPS agreement states that:

**Article 15 (2) of TRIPS Agreement**

Paragraph 1 shall not be understood to prevent a Member from denying registration of a trademark on other grounds, provided that they do not derogate from the provisions of the Paris Convention (1967).  

**Source:** WTO ANALYTICAL INDEX: Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)

The Paris Convention also explicitly recognizes the right of Parties to deny or invalidate the registration of trademarks that are contrary to morality or public order, in particular, those which can deceive the public”. In fact, WTO has never put into question the level of health protection that its Members chose to pursue. WTO rules provide significant leeway for countries to put measures in place to protect human health. It is evident that the industry skillfully selects clauses in these Trade Agreements to defend their vested interests, while remaining silent on clauses that override the pure interest of economics and trade in protection of well being and health of the populace.
The Role of WHO and NGOs in Supporting Tobacco Control

As an international partner, World Health Organization (WHO) Cambodia plays a crucial role in providing technical support and materials for the development of PHWs in addition to providing financial support to organize workshops and meetings related to tobacco control activities. It ensures the implementation of tobacco control policies in accordance with the World Health Organization Framework Convention on Tobacco Control (WHO FCTC) provisions.

In addition, Non-Governmental Organizations (NGOs) also play a key role in creating a supportive environment for the control of tobacco use as well as promoting and advocating for effective tobacco control policies. Both national and regional NGOs work together with the Cambodian government to ensure that cost-effective tobacco control measures are adopted in the country to protect the interest of public health. At the national level, NGOs that are actively working on tobacco control are Cambodia Movement for Health (CMH), Adventist Development and Relief Agency Cambodia (ADRA) and MEDiCAM. Throughout the development phases of the PHWs, NGOs played a key role in providing technical support to Ministry of Health and in taking a leading role at the national level to enhance the public’s knowledge of PHWs and pushing for strong tobacco control policies in addition to supporting other tobacco control related activities and actions. In their efforts to push for PHWs, numerous press releases, press conferences, workshops and briefings to policy makers and media were conducted as well as disseminating materials such as fact sheets and evidences from local and international on the need and importance of pictorial health warnings to be adopted in the country. They worked closely with the media to create awareness and gain support from the public to call for implementation of PHWs.

In response to a grave need to fast track tobacco control policies in Southeast Asia, a regional alliance of Southeast Asia Tobacco Control Alliance (SEATCA) was established in 2001. As a multi-sectoral alliance, SEATCA aims to support ASEAN countries in developing and putting in place effective tobacco control policies. SEATCA plays a pivotal role in supporting the movement to advance and advocate for PHWs in Cambodia by working closely with local partners in Cambodia including Ministry of Health, World Health Organization and various ministries as well as local NGOs. It provides technical assistance directly to government officials and other partners in the country to support their effort in generating local evidence, capacity building training for various sectors and mentorship as well as organize workshops and briefings to strengthen the tobacco control policy development in Cambodia.
SEATCA helps its national partners to build their capacity to draw out plans of action including assistance in developing the FCTC Implementation Master Plan for Cambodia together with WHO and Inter-Ministerial FCTC Secretariat to push for effective tobacco control laws. Many of the tobacco control advocates and researchers from Ministry of Health and NGOs were invited to participate in regional capacity building training workshops and mentorship under the fellowship program. As a result, the number of tobacco control advocates and workers has increased and strengthened. Research grant to carry out the study on effectiveness of PHWs was provided to the fellows to support the need for gathering local evidence to be presented to the policy makers. In addition, SEATCA also provided technical assistance and resource materials to support the regional launching of 2009 World No Tobacco Day (WNTD) with the theme of “Tobacco Health Warnings” on 29 May 2009 at Technical School for Medical Care, Phnom Penh, Cambodia.

SEATCA through its regional lawyer’s network has provided legal support to assist Cambodia in countering the challenges from tobacco industry and be of assistance on any legal issues in developing tobacco control policies. SEATCA strongly promotes knowledge-sharing among countries in the region for effective, evidence-based tobacco control measures and regional cooperation.

SEATCA was invited to participate in the IMC 8th Meeting.

Research dissemination workshop such as this is often supported by SEATCA for capacity building.

SEATCA provided resource materials to support the regional launching of WNTD, 2009 in Cambodia.

Cambodian delegates participated in the consultative meeting on implementing FCTC Article 11 held in Kuala Lumpur, Malaysia, in 2008.
All of the tobacco industry tactics can be interpreted as an effort to pre-empt legislation on pictorial health warnings in line with provisions stated in the WHO FCTC Article 11 Guidelines on Packaging and Labelling of Tobacco Product. These are the lessons learned from the common arguments and tactics used by tobacco industry in the effort to undermining effective public health policy. It strategically aims to prevent the passage of strong tobacco control measures particularly that of introducing pictorial health warnings, a powerful and cost-effective vehicle for communicating to the public the health risk of smoking. In order to thwart and circumvent tobacco industry interference in the development of public health policies, it was learned that the very significant steps for a country to take is to:

1. Build a good network or coalition between different governmental agencies and strengthen collaboration with international organization such as World Health Organization (WHO) and also partner with local, regional and international non-governmental organizations (NGOs) to monitor and alert about any activity related to tobacco industry interference.

2. Publicize the guidelines on Articles 11 (Packaging and Labelling of Tobacco Product) and 5.3 (Protection of Tobacco Control Measures from Interference by the Tobacco Industry) to all segments of society.

3. Call for legal advice from WHO or international contacts to solicit assistance and support.

4. Utilize media to advocate and expose any activity related to tobacco industry interference.

5. Establish and sustain a tobacco industry surveillance system to monitor tobacco industry activities.

6. Conduct workshops and forums to educate the community of the various aspects of FCTC and the ploys of the industry.
References

1. Sub-Decree on Printing Health Warning on Cigarette Packages, Royal Government of Cambodia, No. 181 ANKRBK.
17. WTO Analytical Index: Agreement on Trade-Related Aspects of Intellectual Property Rights http://www.wto.org/english/res_e/booksp_e/analytic_index_e/trips_01_e.htm#article8A
About SEATCA

The Southeast Asia Tobacco Control Alliance (SEATCA) works closely with key partners in ASEAN member countries to generate local evidence through research programmes, to enhance local capacity through advocacy fellowships, and to be the catalyst in policy development through regional fora and in-country networking.

By adopting a regional policy advocacy mission, it has supported member countries to ratify and implement the WHO Framework Convention on Tobacco Control (FCTC). SEATCA has been in existence since 2001 to act as supportive base for government and non-government tobacco control workers and advocates in the SEA region, primarily to Thailand, Malaysia, Cambodia and Vietnam. Currently, the alliance has formally extended to three more countries of Indonesia, Lao PDR, and the Philippines.

SEATCA was awarded the WHO Western Pacific Regional Office’s 2004 World No Tobacco Day Award in recognition of its major contribution to tobacco control in the region. “SEATCA has emerged as a major catalyst for advances made in tobacco control in the South East Asia Region, especially with regard to policy and legislation.”
- Dr Shigeru Omi, Regional Director for the Western Pacific Regional Office at the presentation of 2004 World No Tobacco Day Awards.

**SEATCA Objectives**

1. To form a supportive base for government and non-government tobacco control workers in their efforts to promote the implementation of effective evidence-based national tobacco control measures.

2. To encourage greater cooperation between tobacco control workers at national and regional levels and to act as a regional leader on issues which affect all countries in the region.

3. To facilitate information transfer and the sharing of experience and knowledge, to organize capacity building exercises, and to coordinate national and regional initiatives in tobacco control work.

4. To strengthen national tobacco control movements and to bring mainland Southeast Asian issues into the international tobacco control arena.

**SEATCA Activities**

1. Building local evidence through Collaborative research programme which provides funding, capacity building training, mentorship and platform to disseminate research studies to policy makers. The products from this programme are local evidences and knowledge for policy development.

2. Capacity building which focuses on strengthening local capacity on policy development through programmes named ASEAN fellowship programme and national tobacco control working group.

3. Regional network for policy development through SEATCA regional forum which highly responds to in-country policy movement. SEATCA organizes two regional fora per year focusing on policy issues like tobacco tax, health warnings, best practice on advertising ban, etc.

For more information: [www.seatca.org](http://www.seatca.org)
Southeast Asia Tobacco Control Alliance
Thakolsuk Place, Room 2B,
115 Thoddamri Road, Nakornchaisri Dusit,
Bangkok 10300, Thailand
Website: www.seatca.org
Email: info@seatca.org

“Working together to promote the implementation of effective evidence-based tobacco control measures in Southeast Asia”