

Tobacco control and trade policy: Proactive strategies for integrating policy norms

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Abstract Palpable tension continues at the intersection of tobacco control and trade policy. Through consideration of four major tobacco control-related trade disputes, we suggest how to empower public health proponents in the face of entrenched economic policymaking norms. We argue that a more effective pro-tobacco control message should: (a) seek to be broadly consistent with core principles of the world trading system, (b) boldly assert countries' international commitments to the Framework Convention on Tobacco Control, (c) marshal deep scientific evidence, and (d) come from a broad range of actors, including from low- and middle-income countries as well as from other trade policy community members.

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Introduction

The global scourge of non-communicable disease (NCD) has reached deadly new heights, responsible for more than nine million deaths annually.¹ In a rather cruel twist, as many citizens in lower- and middle-income countries (LMICs) are increasingly enjoying improved standards of living and life expectancies, they are also enduring a growing NCD burden.² This challenge is different from many others in development because there is enormous potential to modify key NCD risk factors. For example, actors can mitigate the largest risk factor,

tobacco use, through changes in social, political, and economic norms. The global tobacco control community has been addressing these challenges for decades. The World Health Organization's (WHO) 2005 Framework Convention on Tobacco Control (FCTC), which developed a set of global standards, obligations, and guidelines, is a landmark victory.

The FCTC has demonstrated tangible initial success: the WHO reported recently that 120 of 174 parties had improved domestic tobacco control programs,³ suggesting that tobacco control norms – international standards of policy behavior – are shifting positively. But parties are experiencing tensions between FCTC-related obligations and their commitments to international economic agreements, particularly those related to trade liberalization, which aim to reduce barriers, such as tariffs, to the cross-border flow of goods and services.

For global tobacco control to be effective, perhaps particularly for vulnerable countries, including most LMICs, global tobacco control and trade communities need to understand and address the tensions between trading rules and the FCTC, including how they are manifested legally. Our research seeks to fill this gap in the policy literature by tracing major recent developments at the intersection of trade and tobacco control and illustrating how the two broad norms are beginning to forge some meaningful and potentially proactive common ground. We offer strategies for all major actors in the process – governments, civil society actors, practitioners, and academics – to pursue effective policies for the successful promotion of public health norms in the context of a world economic system that largely embraces liberalized trade (often termed 'open' trade).

Background

Existing studies and commentaries at the nexus of trade policy and tobacco control have primarily focused on how policies of open trade have sometimes dominated attempts to implement better public health policies.^{4–6} During the negotiation of the FCTC, actors seeking strategies within the treaty to address the potential collision between tobacco control and trade issues largely abandoned their efforts and excluded trade issues from the agreement.⁷ Unsurprisingly, tobacco control and trade continue to come into conflict. We argue that the post-FCTC negotiation trade–tobacco control intersection has been more complex



than a simple ‘trade wins’ scenario. Evidence exists that the discussion, even within key trade-based fora such as the World Trade Organization (WTO), is far more nuanced and demonstrates a shift toward greater acceptance of health norms. Understanding this shift can help to shape efforts to improve tobacco control.

We begin with short analyses of the main legal parameters of four contemporary disputes at the intersection of tobacco control and trade policy. In the second part of this article, we infer from these cases to specify recommendations for strategies to promote tobacco control in the face of open trade policies, within the broader environment of public international law. Our discussion and suggestions serve as a useful starting point for many countries that are only beginning to engage with these complex issues, including many LMICs.

Four Major Trade–Tobacco Control Disputes

In 2009, Canada introduced Bill C-32, which seeks to mitigate youth smoking. Part of the legislation is a ban on many additives to tobacco. Almost immediately, WTO parties – with particularly vehement official objections from Malawi,⁸ Kenya,⁹ and Uganda¹⁰ – scrutinized the measure in meetings of the WTO’s Technical Barriers to Trade (TBT) committee. The principal trade-related issues under the TBT Agreement include: the potential for the measure to be too trade-restrictive (Article 2.2); its basis on product design and descriptive characteristics rather than end use (Article 2.8); and how the measure might adversely affect developing country parties (Article 12.3).

The Canadian WTO representative defended the ban swiftly and unequivocally. First, in terms of being too ‘trade restrictive’ – *the notion that a government could achieve the same regulatory goal(s) with other measures that would conflict less with the norm of open trade* – Canada argued that it was the appropriate effective policy action because the overwhelming scientific evidence, including from the tobacco industry, indicates that many additives make smoking more attractive to youth. Canada employed similar logic in justifying the decision to emphasize the ingredients over the end use, because it is precisely the additives that make smoking more attractive or palatable to youth. More generally, Canada also argued that the regulation is a complement, not an alternative to a broader set of existing tobacco control measures that

includes education and advertising restrictions. Therefore, Canada emphasized the *necessity* of the measure to protect public health.

For Article 12.3, countries argued that the measure singled out products made from one type of tobacco (burley), more common to LMICs. Not only did Canada point out that LMICs would not be meaningfully affected because of insignificant or non-existent tobacco-related trade with Canada,¹¹ but it also argued more generally that the ban is not discriminatory – *treating imported products differently than similar or ‘like’ domestically-produced goods* – because the legislation does not prohibit specific types of tobacco leaf or product. Finally, Canada strongly invoked its international legal obligations to the FCTC, citing particularly the work on guidelines for bans on additives and flavorings (paragraph 210).¹² Several countries, including the European Union (paragraph 198)¹² and Macedonia (paragraph 203),¹² have publicly acknowledged their binding commitments to the convention. Notably, in TBT meetings after June of 2011, parties have not revisited the issue.

A second closely-related case emerged in 2010 in the TBT committee when Brazil also proposed an additive and flavoring ban. The objections are very similar to those in the Canadian case. Like Canada, Brazil has responded firmly and has cited both FCTC obligations and the scientific evidence supporting the ban, including demographics, manufacturing, and pharmacology. For evidence, Brazil presented survey research demonstrating the disproportionately large percentage of youth who use flavored tobacco. Brazil also cited a manufacturing process for burley tobacco products that does not require additives, negating arguments for their inclusion. Last, Brazil introduced studies demonstrating that additives can heighten nicotine’s addictive effect or tobacco’s carcinogenic effects. As of mid-2012, the case remains under discussion.

A third major case that bears on the issue of norms development occurred in 2009 when within broader tobacco control legislation the United States introduced a ban on tobacco additives and flavorings, which notably did not include menthol. Indonesia, a major producer of clove cigarettes, filed a formal complaint at the WTO, arguing under General Agreement on Tariffs and Trade (GATT) Article III:4 and TBT Article 2.1 that the ban discriminates by treating ‘like’ Indonesian clove cigarettes differently (banning them) from US menthol cigarettes (no ban). Indonesia pursued an additional, more aggressive, strategy by arguing that the measure was not necessary in the pursuit of

the protection of human life, which violates TBT Article 2.2 and cannot be justified under the public health exception in GATT Article XX(b).¹³ After negotiations in the WTO-mandated consultation period failed, a formal panel in the Dispute Settlement Body adjudicated the dispute.

The mixed ruling in September 2011 remains instructive.¹⁴ The panel ruled that the measure was indeed discriminatory: the United States is treating the domestically-produced good (menthol-flavored cigarettes) more favorably than the 'like' imports (clove cigarettes). However, it also stated that it was consistent within WTO agreements for the United States to use similar measures to pursue health goals provided that they did not discriminate, for example by banning both types of products. It also placed the burden of proving necessity of the measure on the complainant, not the defendant. The WTO appellate body concurred with these findings.¹⁵ It is not yet clear what the full ramifications of the decisions will be, but they could develop into part of a strong legal foundation favorable to tobacco control and public health.

Last, in 2010 Australia announced its intention to develop plain packaging for tobacco products. After many parties challenged Australia in both TBT committee and the Trade-Related Aspects of Intellectual Property Rights (TRIPS) Council meetings, Ukraine and Honduras requested WTO dispute settlement consultations. In addition to familiar arguments regarding trade restrictiveness and questions of sufficient scientific evidence, the complainants are relying heavily on the TRIPS Agreement, including both the protection of other parties' trademarks (Articles 15 and 17) and unjustified barriers to them (Article 20). The core of the Australian legal defense, consistent with TRIPS (particularly Article 20), is that plain packaging is a *necessary* measure for the protection of public health because existing measures are clearly insufficient to mitigate tobacco-related public health problems effectively.¹⁶

Notably, representatives from other countries, including several LMICs, have voiced significant support for plain packaging. Uruguay, which is involved in a related dispute with tobacco giant, Philip Morris International (PMI), cited both the GATT's public health exception (Art. XX(b)) and binding commitments to the FCTC.¹⁷ India has cited both the FCTC and scientific evidence that supports plain packaging, and noted important trade laws supporting the Australian measure: the TRIPS public health exception (Article 8), the 2001 Doha Declaration

(public health and intellectual property), and the WTO panel decision in the EC-Asbestos case.¹⁸

Policy Prescriptions for Norms Development

In this section, we draw some specific lessons from these cases for tobacco control proponents.

Lesson 1: Modify the message

For many years, there was no coherent message about trade policy and tobacco control, and the dominant one – exclusion – generated perhaps even more tension and lacked any path to a resolution acceptable to a wide range of stakeholders. The cases reveal some suggestions for alternative paths.

Couch the public health argument in trade terms

As we observe in several of the cases above – particularly involving Canada and Australia – a solid legal justification of the measures couched in the terms of WTO parties' precise trade obligations appears to provide significant legitimacy, including emphasis on the measure's necessity to protect health and its non-discriminatory nature. These trade-based messages are particularly important in light of common thinking that the WTO framework is incompatible with health goals. In fact, the public health community is beginning to recognize that there are multiple avenues afforded to health within this framework.

Seek better integration of norms

Early suggestions for how to address the tensions between trade and tobacco control norms sometimes begin with tobacco exclusion – *an exemption for tobacco from trade agreements, thus protecting tobacco control from trade disputes*.^{4,19} Citing the unique scenario wherein open trade would drive down prices of a categorically unhealthy product, thus potentially leading to increased consumption, trade critics pled for exclusion. Likely fearing similar pleas, trade negotiators almost always rejected this idea. In the cases above, however, none of the countries seeking improved tobacco control sought exclusion for tobacco in trade agreements, supporting the idea that tobacco can remain a part of trade

regulation while still affording the health norms opportunities to grow through proven measures such as non-discriminatory labeling requirements.

Some legal scholars seek to conceptualize integration of the norms. In their legal analysis of Australia's plain packaging, Voon and Mitchell argue that the norms of health, economic development, and public order – all terms embedded in the WTO and most bilateral investment regulations – can be used to support health legislation.²⁰ They note that owing to the great economic burden placed on Australia's health-care system from tobacco-related illness, health and economic development are actually complementary norms.

Marshall and use scientific evidence

Effective use of compelling, evidence-based arguments contributes strongly to a case for tobacco control that might otherwise face serious resistance. In all four cases, the measures' proponents use scientific evidence to support their claims for the public health necessity of the laws and for arguing why less trade-restrictive alternatives are not sufficient. Furthermore, proponents sometimes augment strictly health-based reasoning with broader logic, such as presenting the economic case for tobacco control (that is, the costs of tobacco use to society), that has the potential to appeal to a wider policymaking audience.

Assert the legal force of the FCTC

To promote trade norms that incorporate public health, it is important to use the appropriate public health regimes, and even strengthen them where possible, including the FCTC. Proponents of the FCTC should be confident that the legal commitments to public health under the convention are just as important and binding as countries' legal commitments to open international trade.²¹ After missing earlier opportunities to consider trade directly, since 2010, FCTC proponents are taking more proactive new steps. The convention's Fourth Conference of Parties' (COP4) Punta del Este Declaration addresses public health policy, trade policy, and the tobacco industry, citing specifically the TBT and TRIPS Agreements, and the Doha Declaration on intellectual property issues. A second decision from COP4 requests that the FCTC and WTO Secretariats cooperate on information-sharing on all tobacco control-trade issues; this began in late 2011.²²



Though public health norms specific to tobacco control are gaining credibility despite their recent introduction to the international trade community, the cases discussed here are mainly reactive, addressing countries' struggles to develop domestic-level public health rules within the constraints of the international trading system. In a closely-related discussion happening simultaneously, countries are seeking to write new rules for the international trading system that will incorporate health more actively. For example, recently the tobacco industry and a number of non-governmental organizations have sought to influence negotiations for the Trans-Pacific Partnership, a free trade agreement involving many countries around the Pacific Rim. A key battle concerns countries' rights to regulate public health, and particularly tobacco. The tobacco industry is seeking 'investor state' provisions that would put commercial interests above a government's ability to regulate to protect the public's health, while many public health proponents are pressing for an exclusion for tobacco from the agreement.^{2,3} With the stakes so high, we believe countries must be more proactive in using the FCTC to shape trade negotiations by reinforcing parties' international law commitments to the convention.

Proponents of an approach that integrates health and trade should actively seek strong legal precedents to establish a clear pattern for these emerging norms. The WTO panel decision in the Indonesia–US case, and the subsequent appellate body's decision to uphold the finding that the United States is within its WTO rights to protect human health, may prove to be very positive precedents for public health. Considering the obvious discriminatory nature of the measure in its menthol exclusion, the case could easily have turned out very badly for the public health community if the panel had elected to rule very narrowly on the trade-specific components and ignore the public health aspects. Fortunately, this scenario did not happen, but it could have, and public health proponents need to vet carefully any future measures with potential trade policy ramifications to ensure that the risk of an unfavorable ruling to public health is minimized.

Lesson 2: Consider the messengers

More messengers from LMICs

The four cases demonstrate that significant opposition to public health norms in these disputes comes from LMICs. Sometimes similar



opposition occurs in FCTC meetings. In meetings of the FCTC committee developing Articles 9 and 10 guidelines – which include bans on flavorings and additives – actors from a group of African countries, particularly from the Common Market for Eastern and Southern Africa (COMESA), sought to dilute the guidelines.²⁴ The case is particularly instructive because the health officials from these countries were supportive of the emerging guidelines, but were blindsided by the opposing position taken by officials from trade and agriculture ministries from their own governments. This speaks to the considerable complexity of trying to integrate the two policy norms. It also demonstrates that greater public health-friendly trade norm development might need to happen in LMICs where these norms are typically less established. One possible way to encourage more LMICs to have more public health-oriented trade policy is to observe similar countries embracing it. The case involving Brazil's additives ban is thus a very important 'test', as Brazil is a prominent LMIC leader, has a large and growing international profile, and is a huge tobacco producer (both leaf and manufactured products). Yet Brazil is rapidly becoming a world leader in tobacco control policy and the 'diffusion' effect might prove to be a very hopeful development for tobacco control across other LMICs. This point is particularly salient as the burden of NCDs shifts away from wealthier countries, placing a massive economic burden on already fragile health systems. Governments in LMICs must address this emerging paradox wherein they promote open trade policies based on economic development arguments while simultaneously fostering conditions that create health-related economic burdens.

More trade-related messengers

An emerging though perhaps unwitting public health strategy is the use of messengers who are more commonly associated with trade norms. In the cases discussed above, it is typically trade – not health – representatives who are making strong public pronouncements in favor of public health. Arguably, a message from these actors about how to integrate trade and public health will carry significant weight within the economic policy community – perhaps more than when health-focused messengers make similar arguments. Likewise, when influential WTO actors – for example, an official dispute panel or the dispute settlement appellate body – make significant decisions that meaningfully consider public

health needs and concerns, these statements can potentially resonate more broadly and deeply among the member countries, thereby shifting trade norms more toward integration with public health goals.

Lesson 3: Choose venue wisely

The consideration of the ideal or appropriate venues for discussion, development, and/or adjudication of issues that relate to trade and tobacco control is important because it is likely to have an effect on the content and tone of the conversation, in addition to the outcomes. On the one hand, public health proponents might prefer to have discussions about these tensions within health agreements or organizations because it is possible to frame the discussion more easily with participants who understand and support the health norms. Thus, it stands to reason that the continuing FCTC process must keep trade high on the agenda, including in a special committee and explicitly in the COP process.

On the other hand, victories for public health in trade-specific venues – such as a WTO panel or committee – will certainly have a positive impact. For trade fora such as the WTO system, many of the trade representatives have little or no experience with public health issues – let alone understand the subtleties of public health exceptions – so the burden of ‘proof’ is greater, but the reward in terms of promoting the health norm may arguably be higher. A ‘big win’ for the Australia plain packaging initiative in the WTO dispute settlement system – a case that many believe is strong for tobacco control¹⁶ – might provide notable credibility to public health within trade circles.

It is clear that the tobacco industry considers venue when seeking favorable adjudicatory outcomes. When Uruguay introduced large graphic warning labels, PMI challenged the measure not through the WTO system but through investment-based arbitration. In such a venue, a firm has legal standing (in most multilateral trade agreements, only a national government has the ability to file a case), and because they permit direct claims for damages (most trade agreements work on the principle of country-to-country, not firm-specific, economic retaliation). In the Australia plain packaging case, in addition to the aforementioned WTO consultations, PMI’s Asia subsidiary is challenging the measure in two additional venues: arbitration via an investment agreement between Hong Kong and Australia, and in Australia’s domestic judicial system. The industry’s aggressive – but perhaps worried – behavior suggests hedging.



Conclusion

A wide range of proponents of public health – from both health and economic policy backgrounds, and from high-income countries and LMICs – must continue to promote the tobacco control norm in both the public health and economic policymaking realms. The messages, however, have to consider carefully both the health and the economic norms, including bodies of law and regulation. To summarize, public health proponents must consider whether tobacco control measures treat similar products in the same (that is, non-discriminatory) manner. Proponents must also make an evidence-based case for the necessity of the measure and show that it complements existing law/regulation. Finally, tobacco control proponents must confidently assert parties' FCTC obligations as a legitimate and crucial part of integrating the two overarching legal norms.

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