NIH Public Access

Author Manuscript

Tob Control. Author manuscript; available in PMC 2011 May 6.

Published in final edited form as:
Tob Control. 2011 January ; 20(1): e3. doi:10.1136/tc.2009.035352.

International trade versus public health during the FCTC negotiations, 1999-2003

Hadii M Mamudu[1], **Ross Hammond**[2], and **Stanton A Glantz**[3]

[1]Department of Health Services Administration, College of Public Health, USA

[2]Independent consultant, USA

[3]Department of Medicine and Center for Tobacco Control Research and Education, University of California, San Francisco, USA

Abstract

Objective—To examine why the Framework Convention on Tobacco Control did not include an explicit trade provision and delineate the central arguments in the debate over trade provision during the negotiations.

Methods—Triangulate interviews with participants in the FCTC negotiations, the FCTC negotiations documents, and tobacco industry documents.

Results—An explicit FCTC trade provision on relation between international trade and public health became a contentious issue during the negotiations. As a result, two conflicting positions, health-over-trade and opposition to health-over-trade emerged. Opposition to explicit trade language giving health priority was by both tobacco industry and countries that generally supported strong FCTC provisions because of concerns over 'disguised protectionism' and setting a precedent whereby governments could forfeit their obligations under pre-existing treaties. Owing to lack of consensus among political actors involved in the negotiations, a compromise position eliminating any mention of trade emerged, which was predicated on belief among some in the public health community that public health would prevail in future trade versus health conflicts.

Conclusion—The absence of an explicit FCTC trade provision was due to a political compromise rather than the impact of international trade agreements and decisions on public health and lack of consensus among health advocates. This failure to include an explicit trade provision in the FCTC suggests that the public health community should become more involved in trade and health issues at all levels of governance and press the FCTC Conference of the Parties for clarification of this critical issue.

Copyright Article author (or their employer) 2010. Produced by BMJ Publishing Group Ltd under licence.

Correspondence to: Dr Hadii Mamudu, Department of Health Services Administration, College of Public Health, East Tennessee State University, S Dossett Drive, Lamb Hall, PO Box 70264, Johnson City, TN 37614, USA; mamudu@etsu.edu.

Contributors HMM and RH identified the debate over the relation between trade and health during the FCTC negotiation as important subject and did the data collection for this paper and wrote the first draft. RH assisted in identifying important documents and reviewed the final revised manuscript. SAG supervised the project and participated in preparing all versions of the manuscript.

Competing interests HMM has no competing interest to declare. RH was the head of the lobbying committee for the Framework Convention Alliance during the negotiations and participated actively in the discussions over the role of trade in the FCTC. SAG was present for part of INB6 and met with WHO Director General Gro Harlem Bruntlund regarding the (lack of) necessity to compromise the FCTC to increase the chance that the USA (under the George W Bush Administration) would ratify the treaty; SAG was not involved in any of the issues discussed in this paper.

Ethics approval This study was conducted with the approval of the Institutional Review Board of University of California, San Francisco.

Provenance and peer review Not commissioned; externally peer reviewed.

NIH-PA Author Manuscript

NIH-PA Author Manuscript

NIH-PA Author Manuscript

NIH-PA Author Manuscript NIH-PA Author Manuscript NIH-PA Author Manuscript

INTRODUCTION

International trade agreements and World Trade Organization (WTO) decisions can threaten tobacco control policies by forcing states to remove barriers to trade,[1-13]which affects efforts to reduce tobacco consumption by raising prices through tobacco excise taxes and duties and limiting exposure to tobacco advertising,[9, 14] and through threats of trade sanctions (C Callard, personal communication, 2009).[9, 15, 16] In 2002, WTO and the World Health Organization (WHO) prepared a report to reconcile WTO trade decisions and WHO public health policies[17] amidst the contentions concerning whether the WHO Framework Convention on Tobacco Control[18] (FCTC) should have a trade provision and the language for such provision during the negotiations (D Yach, personal communication, 2008). The General Agreement on Tariffs and Trade (GATT)/WTO has provided the venue for settling trade-health conflicts among countries until the FCTC negotiations. (The GATT became the WTO in 1994.) GATT Article XX(b) allows countries to protect health of humans, animals or plants life[19] but GATT and WTO panels have interpreted this provision narrowly, requiring public health regulations that affect trade be 'non-discriminatory,' 'necessary' and 'reasonable,'[7] impeding tobacco control (table 1).

In the 1980s the USA threats to use sanctions and retaliation allowed under GATT forced Japan, South Korea and Taiwan to open their markets to foreign tobacco companies, increasing tobacco use.[3, 23, 24] The 1986-1994 Uruguay GATT Round added tobacco as a commodity covered by trade rules, increasing global cigarette supply.[5] In 1989, after US Cigarette Exporters' Association lobbying, the US trade representative challenged Thailand's 1966 Tobacco Act for placing limitations on US companies. In 1990, a GATT panel upheld the US challenge, forcing Thailand to open its market to the multinationals[5, 21, 27]; the Thai government subsequently promulgated modified (but stringent) tobacco control measures consistent with this ruling.[21] In 1994, in response to proposed plain packaging of tobacco products, Philip Morris threatened legal action against Canada alleging violation of trademark and intellectual property protections under GATT and North Atlantic Free Trade Area.[36] Although Philip Morris, a private company, did not have legal standing to bring a WTO claim,[29] Canada abandoned the policy.[9, 15, 16]

The interconnectedness and interdependence fostered by these trade agreements and decisions facilitates the worldwide expansion of the multinational tobacco companies into developing countries, increasing tobacco-induced diseases.[1, 9, 37, 38] In 2006, the World Health Assembly passed its 'International Trade and Health Resolution' (WHA59.26) that called on countries to give more attention to trade.[39] Trade-health tensions came to a head during FCTC negotiations over language giving health priority over trade. In the end, the FCTC preamble urged governments to give priority to health, but the FCTC did not include an explicit trade provision. The effort to shift the venue for resolving trade-health conflicts to a public health venue under FCTC failed, which can be understood in terms of global governance,[40-42] because FCTC establishes a global regulatory framework to cope with the problem of the use and spread of tobacco worldwide.[12, 43-46] We analyse how and why this effort failed.

METHODS

We triangulated[47-49] interviews and tobacco industry and FCTC documents for the analysis.

We interviewed 54 people from 26 countries between July 2006 and May 2009, including current and former WHO cabinet members, former World Bank employees, World Health Assembly and FCTC negotiation delegates, WHO consultants and expert committee members, heads of national public health institutions, government officials, heads and

NIH-PA Author Manuscript
NIH-PA Author Manuscript
NIH-PA Author Manuscript

representatives of non-governmental organisations, researchers and advocates using a protocol approved by the Committee on Human Subjects, UCSF.

We searched industry documents at legacy.library.ucsf.edu and tobaccodocuments.org beginning with 'trade and FCTC', 'health and FCTC' and 'trade and public health' and conducted follow-up searches using Bates numbers of documents and named individuals and organisations between May and December 2008, yielding 300 relevant documents.

We also searched FCTC negotiation documents and advocacy materials from Framework Convention Alliance[50] (FCA) and news reports.

RESULTS

FCTC negotiations: 1999–2003

In 1999, within the context of member states' commitments to bilateral and multilateral trade liberalisation agreements, the WHA created[51] the Intergovernmental Working Group (IGWG) to draft the treaty elements and the Intergovernmental Negotiating Body (INB) to negotiate the FCTC. In March 2000 the IGWG released the 'Chair's Text', including Guiding Principle D.4 (later renamed Guiding Principle D.5) that 'Trade policy measures for tobacco control purposes should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade'[52] (table 2). This proposal generated tensions among the delegates and public health community (table 3) because it appeared to prioritise trade over health.

The WHO Tobacco Free Initiative (TFI) (C Callard, personal communication, 2009), (Lambert P, personal communication, 2009) supported Guiding Principle D.5, which was similar to GATT Article XX(b) (table 1) because TFI's prime objective was to ensure successful negotiation of the FCTC. TFI's support for this 'non-discrimination' provision coincided with major trading countries positions (IS Shapiro, personal communication, 2009). In January 2000, TFI presented a paper[8] during an FCTC consultation in New Delhi, India, arguing that Article XX(b) (table 1) protected public health. This position was controversial among public health advocates and generated a debate during the 11th World Conference on Tobacco or Health in August 2000, where civil society supporters of FCTC and an FCTC delegate argued that WTO health provisions limited countries' abilities to regulate tobacco; TFI's assistant executive director and Ira Shapiro, a former US trade negotiator, opposed this position.[2, 54] TFI maintained this position during the negotiations because 'similar treaty language was contained in a number of multilateral environmental agreements'(INB, unpublished, 2001). Although the 2002 WHO/WTO report[17] attempted to reconcile the issue, it continued to divide the public health community during FCTC negotiations.

The disagreement over the 'non-discrimination' trade provision, Guiding Principle D.5, led the chairman to revise the text before INB4 in March 2002. The revised chairman's text contained four policy options, ranging from FCTC taking precedence over all international agreements to subordination of FCTC provisions to prior international commitments (table 2).[55] At INB5 in October 2002, the Guiding Principle was replaced with Articles 2.3 and 4.5, which simply subordinated FCTC to WTO.

Articles 2.3 and 4.5 were deleted from the chairman's text between INB5 and INB6 based on the argument that previous international conventions already dealt with relationships between treaties. According to a February 2003 confidential briefing for the INB6 chairman, probably prepared by TFI, 'it was unnecessary to include a specific provision (Article 2.3) on this topic (FCTC relationship with existing international treaties) since these matters are

NIH-PA Author Manuscript

NIH-PA Author Manuscript

NIH-PA Author Manuscript

adequately addressed by the Vienna Convention on the Law of Treaties', stipulating that 'the more recent treaty will be applied in precedence over the older one' and 'the more specific treaty will be applied in precedence over the more general one….' (INB, unpublished, 2003). This note suggested that since the FCTC was more recent and product-specific, it would supersede older and generic treaties, including WTO.[8] With respect to Article 4.5, the briefing said,

> The issue of public health and trade is a complicated question because values are involved. There is no point in addressing the question of whether health takes preceden(ce) over trade, or the other way around, because the real question relates to translating this principle into obligations that states will accept. (INB, unpublished, 2003)

This briefing attempted to avoid a contentious issue that had potential of derailing the entire negotiations. In contrast, civil society participants suggested that Articles 2.3 and 4.5 were deleted from the Chair's text before INB6 because of opposition from FCA and lack of support from most WHO member countries (C Callard, personal communication, 2009; IS Shapiro, personal communication, 2009; J Bloom, personal communication, 2009).

At the same time that the chairman was being briefed to delete Articles 2.3 and 4.5, civil society groups[56](C Callard, personal communication, 2009; J Bloom, personal communication, 2009) and countries that favoured health-over-trade (table 4) continued to press the issue. As a result, the articles were re-inserted into the Chair's text for INB6 (INB, unpublished, 2003).

Lacking consensus on FCTC trade language during INB6, delegates deleted both provisions and settled on silence[18] (table 2).

Tobacco industry activities

The tobacco companies monitored and sought to undermine any WHO tobacco control activities that could affect trade,[57] particularly after the idea of developing FCTC entered WHO agenda in 1995,[58, 59] efforts that accelerated during the negotiations.[60-63] A 1999 British American Tobacco (BAT) Consumer and Regulatory Affairs Department 'roadmap' on countering international tobacco regulation stated, 'tax and trade structures have a major, measurable impact on our business and profitability.'[62] The companies thought FCTC threatened their ability to freely trade tobacco[60, 64-66] and pressed all levels of government to keep tobacco a commodity under WTO.[60, 62, 67, 68] A March 2001 BAT analysis of the Chair's text concluded, 'in an era of globalisation (BAT will) oppose new restrictions to international trade.'[66]

Using trade issues to delay and dilute the FCTC

By 1999, the tobacco companies were simultaneously working to stop FCTC and influence its content.[60, 63, 69-71] In a March 1999 email urging staff to lobby local politicians and policy-makers, BAT's international governmental affairs manager encouraged them to emphasise economic and trade issues because he thought these issues could undermine WHO efforts to develop the FCTC.[72]

The companies worked at the national level to engage trade, finance and agricultural ministries and the local companies in the negotiations.[73-77] As a result, Russia's (Ref 76) position moved towards the industry's position (J Bloom, personal communication, 2009). The companies monitored the US government's position throughout the negotiations because of its support for trade liberalisation and sought to find avenues to influence its positions.[78-85]

NIH-PA Author Manuscript

NIH-PA Author Manuscript

NIH-PA Author Manuscript

The companies recruited influential and politically connected trade experts to develop policy papers challenging the legitimacy and necessity of an FCTC trade provision. They included BAT's international trade affairs manager, Nicola Shears, formerly of the UK's Department of Trade and Industry,[68, 86-89] and consultant Doral Cooper, formerly assistant US trade representative and president of Crowell and Moring, a Washington, DC-based international trade and investment consulting firm.[89-91] The position papers argued that FCTC trade provision conflicted with WTO and other international agreements[90, 92-96] and, like WHO[17] and its TFI,[8] that existing WTO health provisions protected public health, making health-over-trade FCTC provision unnecessary.[77, 97-108]

The companies also monitored other international forums in which FCTC might be discussed, particularly the 1999 WTO Millennium ministerial meeting in Seattle[109, 110] and the April 2001 Summit of Americas.[111, 112] Neither made any official statement on the FCTC.[113]

The companies unsuccessfully lobbied top WTO officials[114-119] to participate in the FCTC trade-health debate to ensure that trade-health conflicts remained under WTO ambit. After Mike Moore, WTO Director General from 1999 to 2002, was elected, BAT International Trade Affairs and International Political Affairs mangers worked directly through their CEO, Martin Broughton[115, 118, 119] and consultants,[118] and indirectly through the International Chamber of Commerce[120-126] to lobby Moore to intervene in the FCTC debate. Moore did not intervene.[116, 117]

Finally, the companies unsuccessfully sought to get other industries, particularly alcohol,[70, 110, 125, 127] involved in the debate using the 'slippery slope' argument that any WHO regulation of tobacco trade would have implications for them.[70, 101, 125, 127]

Industry support for guiding principle D.5

The companies strongly supported Guiding Principle D.5, the 'non-discrimination' provision (table 2), because it would have strengthened their ability to trade freely[69-71, 128-132] by subordinating FCTC to WTO rules. In a 2001 submission to a US FCTC hearing, Philip Morris supported Guiding Principle D.5,[129] arguing that WTO rules already 'allow governments to take legitimate actions to impose health-related measures that might impact international trade in tobacco products, provided those measures do not arbitrarily or unjustifiably discriminate against foreign products or provide disguised protections to domestic goods.'[129]

FCTC COALITION ACTIVITIES

An informal coalition of government delegations, intergovernmental organisations, and civil society groups that supported a strong FCTC emerged during the negotiations (C Callard, personal communication, 2009; D Yach, personal communication, 2008; N Collishaw, personal communication, 2006).[50] This coalition included Australia, Canada, New Zealand, Norway, the English-speaking Caribbean and some Latin America countries, Pacific Island States and WHO African, Eastern Mediterranean, and Southeast Asia regions, the European Union, TFI, World Bank, and FCA. While coalition members agreed by INB6 that Articles 2.3 and 4.8 should be deleted (tables 2 and 4), they disagreed on appropriate trade language (C Callard, personal communication, 2009; D Yach, personal communication, 2008; N Collishaw, personal communication, 2006; P Lambert, personal communication, 2009; IS Shapiro, personal communication, 2009). This disagreement was contentious and polarising, resulting in three competing positions: support of health-over-trade, opposition to health-over-trade, and silence (table 4) (C Callard, personal communication, 2009; IS Shapiro, personal communication, 2009; J Bloom, personal communication, 2009).

NIH-PA Author Manuscript NIH-PA Author Manuscript NIH-PA Author Manuscript

Support of health-over-trade: the civil society position

The FCA was the leading supporter of health-over-trade, together with some national delegations, led by Thailand (table 4) (D Yach, personal communication, 2008; IS Shapiro, personal communication, 2009; J Bloom, personal communication, 2009; N Collishaw, personal communication, 2006). Delegations, particularly from Latin America, that had supported Guiding Principle D.5 (table 3) in 2001 became more supportive of health-over-trade by INB6 in 2003. The FCA's strong opposition to Guiding Principle D.5 (table 3) and the desire to have an explicit health-over-trade provision in the FCTC (C Callard, personal communication, 2009; D Yach, personal communication, 2008; IS Shapiro, personal communication, 2009; J Bloom, personal communication, 2009) created tension with TFI.

In addition to other tactics to influence negotiations,[43, 50, 133] FCA hired trade consultants, including the former US trade negotiator, Ira Shapiro (IS Shapiro, personal communication, 2009),[134] whose position had evolved from the adequacy of the WTO health provisions to support for an explicit FCTC health-over-trade provision,[54, 134] to help the FCA lobby and provide expert advice to the delegates. Shapiro defended the health-over-trade position in a special report in the FCA *Bulletin* during INB2,[135] arguing that some WTO Panel and Appellate Body decisions placed an unreasonable burden on governments to justify public health measures. He concluded that a health-over-trade provision was necessary to uphold the rights of sovereign countries to institute tobacco control measures without fear of losing a WTO case or retaliation from other countries. He argued that tobacco is a unique product because it is addictive and dangerous, requiring that product-specific rules be adopted as a limited exception to general trade rules.[135] Shapiro and a colleague argued in the *Bulletin* during INB6 that without a health-over-trade provision, 'hard-won tobacco control measures will be subject to trade challenges by countries where the multinational tobacco companies are headquartered' because Article XX(b) has been construed narrowly and 'in practice most trade panels have resolved uncertainty in favour of international trade interests.'[28]

The FCA argued that Guiding Principle D.5 was 'borrowed from Article XX of GATT, [which] creates serious problems for tobacco control and should be deleted' because it would burden governments to prove that both the intent and effect behind a challenged regulation were not discriminatory[136] (table 1). The FCA was also concerned that in the absence of clarifying language for Guiding Principle D.5, national tobacco control measures could be challenged using GATT and WTO precedents that such measures should be 'necessary' and 'least restrictive'.[137] While the FCA efforts contributed to support of this position by countries, including South Africa and WHO Africa, Eastern Mediterranean and Southeast Asia regions (table 4), it created tensions with the TFI and other countries, including the USA.

Opposition to health-over-trade: the governmental position

The governmental actors, including WHO and its TFI, WTO, World Bank, and, arguably, European Union (C Callard, personal communication, 2009; D Yach, personal communication, 2008; J Bloom, personal communication, 2009)[28] opposed a health-over-trade position, along with individual countries (table 4) and the tobacco industry.[64, 66]

WHO (through TFI) and WTO continued to argue that WTO health provisions provided protection for public health and do not limit states' regulatory autonomy to enact tobacco control measures, making an FCTC health-over-trade provision unnecessary. Although by the first IGWG meeting in October 1999 World Bank had published its *Curbing the Epidemic*,[138] strongly supporting tobacco control, the bank's representative argued for a demand-side approach to tobacco control because 'trade restrictions are ineffective'(IGWG, unpublished, 1999). The EU's European Commission said that FCTC should be 'in

conformity with the relevant international conventions governing, for example, international trade' (IGWG, unpublished, 1999). The European Commission consistently sought a trade provision whereby countries would have freedom to design and implement tobacco control measures and honour other international obligations, suggesting that it opposed the health-over-trade position (C Callard, personal communication, 2009; D Yach, personal communication, 2008).[139] Countries committed to trade liberalisation, such as the USA and Japan, opposed the FCTC health-over-trade provision, arguing that it conflicted with prior commitments. The US brought in trade experts from its Department of State to lobby states who favoured health-over-trade to support the US position.

No explicit trade provision: the silence position

The trade-health issue created a gulf between civil society and national delegations and organizations that agreed on most FCTC provisions (C Callard, personal communication, 2009; IS Shapiro, personal communication, 2009; J Bloom, personal communication, 2009). The silence position emerged as a compromise during INB6 as it became clear that the differences over the language of an FCTC trade provision threatened to stall the entire negotiations (C Callard, personal communication, 2009; D Yach, personal communication, 2008; IS Shapiro, personal communication, 2009; J Bloom, personal communication, 2009).

States and non-governmental organisations supported the silence position for different reasons. During INB6, Canada, who had supported strong FCTC provisions on other issues said, 'Silence was the best route given different stands and perspective on issue around health and trade' (INB, unpublished, 2003). Turkey, who had favoured Guiding Principle D. 5 during INB2 in 2001 (table 3), indicated that 'If silence is the choice prevailing here, we would cooperate' (INB, unpublished, 2003). Countries that wanted a provision that would make trade interests trump public health interests (such as the USA) supported the silence position.[50, 140] The debate among the delegates centred on the hierarchy of treaties (C Callard, personal communication, 2009; IS Shapiro, personal communication, 2009) and whether FCTC should supersede previous agreements. Unable to reach a consensus, the parties agreed to drop an explicit trade provision, but keep a statement in the preamble giving priority to governments' right to protect public health.

The silence position was also supported by those in the public health community frustrated by the inability to secure a health-over-trade provision during INB6 (IS Shapiro, Personal communication, 2009).[141] Shapiro wrote in the *Bulletin* during INB6 that FCA has 'steadfastly supported a clear statement that the public health provisions of the FCTC should prevail over the general trade rules of the WTO when and if conflicts arise…. But if delegates can't get it right, then it's better to say nothing at all.'[141] In this respect, this segment of the public health community preferred silence to Articles 2.3 and 4.8 during INB6 (tables 2 and 4), which would have subordinated the FCTC to existing international agreements, including WTO.

Those who favoured silence argued that the FCTC Preamble (table 1) and Article 2.1, ('In order to better protect human health, Parties are encouraged to implement measures beyond those required by this Convention and its protocols, and nothing in these instruments shall prevent a Party from imposing stricter requirements that are consistent with their provisions and are in accordance with international law'[18]), gave countries the leverage to put public health over everything, including trade (IS Shapiro, personal communication, 2009; N Collishaw, personal communication, 2006; M Assunta, personal communication, 2008). The FCA criticised this presumption during INB5 and INB6 in the *Bulletin*,[142] arguing during INB6 that it was 'plainly wishful thinking' for proponents of the silence position to 'contend that there probably will not be conflicts between the FCTC and trade agreements',[28] even as

NIH-PA Author Manuscript NIH-PA Author Manuscript NIH-PA Author Manuscript

NIH-PA Author Manuscript

NIH-PA Author Manuscript

NIH-PA Author Manuscript

the FCA came to recognise that they were not going to get an explicit clause allowing health to trump trade.

During INB6 most of the delegations agreed to the compromise silence position (table 4), accepting the belief that future trade-health conflicts would be resolved in favour of health (IS Shapiro, personal communication, 2009; INB, unpublished, 2003; N Collishaw, personal communication, 2006), because FCTC was more recent and product-specific than WTO and would prevail under the Vienna Convention on Law of Treaties (C Callard, personal communication, 2009; N Collishaw, personal communication, 2006). Neil Collishaw of Physicians for Smoke-Free Canada, who led the WHO Tobacco or Health Program in the early 1990s and was a civil society participant in the FCTC negotiations, noted in a 2006 interview,

> There was a huge amount of discussion about this clause versus that clause to put in the treaty…. The Vienna Convention on Treaty Making upholds the principle that in the case of a conflict between two treaties it is the most recent provision that prevails…. So even if there isn't anything said there, the very fact that the [FCTC] exists creates a counter weight to economic considerations that are in the trade treaties. (N Collishaw, personal communication, 2006)

Supporters of this view also argued that the global policy environment had changed in favour of public health since the *Thai Case* in 1990 (C Callard, personal communication, 2009; IS Shapiro, personal communication, 2009), although the WTO Appellate Body used similar principles in the *Dominican Republic Case* in 2005 to cancel Dominican Republic's requirement that tax stamps be affixed on cigarette packets and cigarette importers should place a bond (table 1).[32-34] They cited the enormous accumulation of scientific evidence on the dangers of tobacco use (C Callard, personal communication, 2009; IS Shapiro, personal communication, 2009) and the fact that in the 1998 *Asbestos Case*,[143] both the WTO Panel and Appellate Body rejected Canada's challenge to France's import ban on asbestos for public health reasons (C Callard, personal communication, 2009; IS Shapiro, personal communication, 2009). Similarly, in 2001 the Doha WTO Ministerial Declaration permitted developing countries to override patent rules under TRIPS to provide cheap drugs to deal with HIV/AIDS, tuberculosis, malaria and other public health emergencies.[144, 145] Finally, they argued that the fact that 191 countries came together to negotiate the FCTC would create an environment in which future conflicts would likely be resolved in favour of the FCTC (D Yach, personal communication, 2008; IS Shapiro, personal communication, 2009; N Collishaw, personal communication, 2006; M Assunta, personal communication, 2008).

DISCUSSION

The relationships between international trade and public health became a contentious issue during the FCTC negotiations (table 4), resulting in the silence position.

The debate over potential conflict between the FCTC and WTO contradicted the 2002 WHO/WTO report,[17] prepared to reconcile the trade-health issue amid the contention and polarisation during the negotiations, concluding that there is no inherent conflict between FCTC provisions and WTO rules.[17, 146] The debate suggests that the tobacco companies' activities to highlight FCTC implications for trade and WTO rules,[77, 107, 147, 148] which coincided with broader commitment to trade liberalisation by countries, including those belonging to the Organization for Economic Cooperation and Development, had traction during the negotiations. Closely linked to the issue of potential conflict between FCTC and WTO rules was the quest to avoid a precedent in global governance that would allow countries to forgo prior obligations (D Yach, personal communication, 2008; IS Shapiro, personal communication, 2009; J Bloom, personal communication, 2009). In a 2008

interview, TFI's executive director during the negotiations argued in a way similar to the tobacco companies' 'slippery slope' argument on the trade-health issue.[70, 125, 127]

> I think many sides appreciated the fact that (a health-over-trade FCTC provision) would lose potentially the (Organization for Economic Cooperation and Development) countries, the major trading countries of the world because they would not want a conditionality like health should trump trade, because it would lead to all sorts of pressure in other areas outside of tobacco. … So they (delegates) were very careful of setting a (global governance) precedent. Of course, (health-over-trade FCTC provision) would have implications for the pharmaceuticals industry; it would have implications for mining industry. There were many industries where you could see this could have implications (D Yach, personal communication, 2008).

The potential conflict an explicit health-over-trade FCTC provision would have created among branches of government made the national delegations want to remain silent on the issue (D Yach, personal communication, 2008; IS Shapiro, personal communication, 2009; M Assunta, personal communication, 2008). In this respect, the tobacco companies' argument that the FCTC should solely focus on public health issues,[72, 149-151] the emphasis on the economic importance of tobacco,[50, 57] and lobbying to get other ministries involved in the negotiations[72, 75, 77, 150, 151] coincided with the outcome of the debate on the trade-health issue.

Policy options

Absent an explicit FCTC health-over-trade provision, tobacco control measures will be adjudicated under a trading regime whose trade-centric perspective sometimes regards national health and safety regulations as forms of disguised protectionism[152, 153] and often resolves trade-health conflicts silently.[11, 154-156] All that exists is the 2002 WHO/WTO report,[17, 146] which did not affect the outcome of 2005 Honduras vs The Dominican Republic Case (table 1). The ambiguity between trade and health could limit the creativity of countries to develop innovative tobacco control measures because of concern that the measures would violate WTO rules.

The public health community should strongly advocate that the WTO interpret its health provisions broadly when resolving any tobacco trade-health conflict in a way that public health is given priority over further liberalising tobacco trade. The Philippines vs Thailand Case,[35] filed in September 2008 and still pending as of May 2010, may provide an opportunity for the public health community to advocate for this broader interpretation of the health provisions. In this case, the Philippines is challenging Thailand for 'biased, partial, and unreasonable' administration of its tobacco tax measures, which gives an advantage to the Thai Tobacco Monopoly, the main competitor of Philippines cigarettes in the Thai cigarette market, in violation of WTO rules. There also is an emerging issue concerning plain packaging for cigarettes, whereby tobacco companies have threatened to take legal actions against governments in Asia for violating trademark rules under TRIPS (table 1) should the governments attempt to enact plain packaging measures,[15] but no formal complaint had been filed as of May 2010. However, similar to the 1994 case[9, 15, 16] where Philip Morris's threats[36] led Canada to abandon the policy, there is concern that the mere threat of a WTO complaint or legal action could be enough to have a 'chilling effect' and dissuade countries from pursuing plain packaging. Additionally, the relation between trade and health has become contentious in bilateral trade agreements, including the one between the USA and South Korea and multilateral trade agreements, such as the Association of South East Asian Nations-Australia-New Zealand Free Trade Area. How WTO resolves the Philippines complaints and these countries settle their differences will determine whether the

NIH-PA Author Manuscript NIH-PA Author Manuscript NIH-PA Author Manuscript

NIH-PA Author Manuscript

NIH-PA Author Manuscript

NIH-PA Author Manuscript

contention that such conflicts will be resolved in favour of health holds in practice. This effort to press for broader interpretation of the health provision under the trading regime is consistent with WHO and its TFI, WTO,[8, 17, 146] and the tobacco industry argument that they provide protection for public health. Moreover, public health advocates need to ensure that these bilateral and regional agreements do not include terms that create new barriers to developing and implementing tobacco control measures.

At the same time, the public health community should urge the FCTC Conference of the Parties to clarify Article 2.1 by developing guidelines to explicitly address trade-health relations to remove uncertainties that member states may face in the implementation of the FCTC. In the long-term, though, the WHO can facilitate the development of a protocol to deal with the broader trade-health issue in the international system.[157]

Conclusion

International factors, together with tobacco industry activities at the country level hampered the development of international norms on trade and health in the FCTC. The debate suggests that it is important for public health professionals to learn the international trade lexicon[11, 17, 155, 158] and gather evidence to illuminate how international trade and trade agreements impact health. The tobacco companies and their allies in governments can be expected to continue to seek that future trade-health conflicts be settled under WTO with the expectation that they would be resolved in the industry's favour, similar to the 1990 *Thai Case*. The public health community should not regard the settlement of trade-health issues as belonging to trade realm, neither should trade-health conflicts be considered as issues for only trade experts. In this respect, the public health community should actively get involved in trade-health conflicts regardless of the venue of settlement, including WTO, such as the example of an *amicus curiae* (friend of the court) brief[159] submitted by the Public Health Law Center of Minnesota in the USA in the *Thai Case* that was pending at the time of this paper in 2010. Public health professionals should engage the issue and press for further policy development by governments.

Acknowledgments

This article was produced with the support of postdoctoral fellowships from the American Legacy Foundation and National Cancer Institute (CA-113710) and National Cancer Institute Research Grant (CA-87472). The funding agencies had no involvement with the conduct of the research or preparation of the manuscript.

Funding Legacy Foundation, USA; and National Cancer Institute, USA.

REFERENCES

1. Bettcher, D.; Taylor, AL. Confronting the tobacco epidemic in an era of trade liberalization. WHO; Geneva, Switzerland: 2001.
2. Callard C, Chitanondh H, Weissman R. Why trade and investment liberalization may threaten effective tobacco control efforts. Tobacco Control. 2001; 10:68–70. [PubMed: 11226365]
3. Chaloupka, F.; Laixuthai, A. US Trade Policy and cigarette smoking in Asia. NBER Working Paper Series paper 5543. 1996. www.impacteen.org/fjc/PublishedPapers/w5543.pdf
4. Chaloupka, FJ.; Corbett, M. Trade policy and tobacco: towards an optimal policy mix. In: Abedian, I.; van der Merwe, R.; Wilins, N., et al., editors. The economics of tobacco control: towards an optimal policy mix. Applied Fiscal Research Center, University of Cape Town; Cape Town, South Africa: 1998. p. 129-45.
5. Chaloupka FJ, Nair R. International issues in the supply of tobacco: recent changes and implications for alcohol. Addiction. 2000; 95(Suppl 4):S477–S89. [PubMed: 11218346]
6. Drager N, Beaglehole R. Globalization: changing the public health landscape. Bull World Health Organ. 2001; 79:803.

NIH-PA Author Manuscript NIH-PA Author Manuscript NIH-PA Author Manuscript

7. Eckhardt JN. Balancing interests in free trade and health: how the WHO's Framework Convention on Tobacco Control can withstand WTO scrutiny. Duke Journal of Comparative and International Law. 2002; 12:197.
8. Onzivu, W. International Legal and Policy Framework for WHO Framework Convention on Tobacco Control; http://www.who.int/entity/tobacco/media/en/ONZIVU2000X.pdf
9. Shaffer ER, Brenner JE, Houston TP. International trade agreements: a threat to tobacco control policy. Tobacco Control. 2005; 14(Suppl 2):ii19–25. [PubMed: 16046697]
10. Smith RD. Foreign direct investment and trade in health services: a review of the literature. Social Science and Medicine. 2004; 59:2313–23. [PubMed: 15450706]
11. Smith RD. Trade and public health: facing the challenges of globalization. J Epidemiology and Community Health. 2006; 60:650–1.
12. The Lancet. Bridging the divide: global governance of trade and health. Vol. 373. The Lancet; London, UK: 2009.
13. Weissman, R. International Trade Agreements and Tobacco Control: threats to public health and the case for excluding tobacco from trade agreements. 2003. http://www.takingontobacco.org/trade/tobacco.trade.v02.backgrd.pdf
14. Zeigler DW. International trade agreements challenge tobacco and alcohol control policies. Drug Alcohol Review. 2006; 25:567–79.
15. Callard, C.; Collishaw, N.; Swenarchuk, M. An introduction to International Agreements and their impact on Public Health Measures to Reduce Tobacco Use. 2001. http://www.smoke-free.ca/pdf_1/trade&tobacco-April%202000.pdf
16. Crawford, P. Background on the plain packaging debate in Canada. July 4. http://legacy.library.ucsf.edu/tid/rer90a99
17. WHO. WTO. WTO Agreements and Public Health: a joint study by the WHO and WTO Secretariat. 2002. http://whqlibdoc.who.int/hq/2002/a76636.pdf
18. World Health Organization. WHO framework convention on tobacco control; Geneva, Switzerland: World Health Organization. 2003;
19. WTO. Understanding the WTO. http://www.wto.org/english/thewto_e/whatis_e/tif_e/understanding_e.pdf
20. Bloom, J. Public health, International trade, and the framework convention on tobacco control; Washington, DC: Campaign for Tobacco Free-Kids. 2001;
21. Chitanondh, H. Defeat in trade-victory in health. Thailand Health Promotion Institute and The National Health Foundation; Bangkok, Thailand: 2001.
22. Jackson, JH. The World trading system: law and policy of International economic relations. 2nd edn.. MIT Press; Cambridge, MA: 1997.
23. Bohigian, GM.; Council of Scientific Affairs, American Medical Association. Impact of U.S. Tobacco Exports on the Worldwide Smoking Epidemic: Report of the Council on Scientific Affairs. 1989. http://legacy.library.ucsf.edu/tid/mpn03f00
24. National Security and International Affairs Division, U.S. General Accounting Office. Testimony: Dichotomy between U.S. Tobacco Export Policy and Antismoking Initiatives: Statement of Allan I. Mendelowitz, Director Trade, Energy, and Finance Issues, National Security & International Affairs Division. May 17. 1990 http://legacy.library.ucsf.edu/tid/ndk98c00
25. Conahan, FC. Dichotomy between US Tobacco Export Policy and antismoking initiatives. May 5. 1990 http://legacy.library.ucsf.edu/tid/izn14a99
26. Stewart, TP., editor. The GATT uruguay round: a negotiation history (1986–1994). Kluwer Law International; Deventer: 1993.
27. GATT. Thailand - restriction on importation of and internal taxes on cigarettes, report of the panel. GATT; Geneva, Switzerland: 1990.
28. Bloom, J.; Shapiro, I. Framework convention alliance. International trade and the FCTC: we can do better than silence. *Alliance Bulletin [serial on the Internet]*. 2003. http://fctc.org/index.php?option=com_docman&task=cat_view&gid=21&limit=5&limitstart=5&order=date&dir=DESC&Itemid=21

NIH-PA Author Manuscript NIH-PA Author Manuscript NIH-PA Author Manuscript

29. McGrady B. TRIPs and trademarks: the case=of tobacco. World Trade Review. 2004; 3:53–82.
30. Taylor, AL.; Frank, JC.; Emmanuel, G., et al. The impact of trade liberalization on tobacco consumption. In: Prabhat, Jha; Chaloupka, Frank, editors. Tobacco control in developing countries. Oxford University Press; Oxford: 2000. p. 343-64.
31. WTO. Peru—taxes on cigarettes (dispute DS227). March I. 2001 http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds227_e.htm#facts
32. WTO. Dominican Republic—Measures affecting the importation and internal sale of cigarettes. http://docsonline.wto.org/imrd/directdoc.asp?DDFDocuments/t/WT/DS/302-5.doc
33. WTO. Dominican Republic—Measures affecting the importation and internal sale of cigarettes (dispute DS302). http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds302_e.htm
34. WTO. Dominican Republic—import and sale of cigarettes (DS302). http://www.wto.org/english/tratop_e/dispu_e/cases_e/1pagesum_e/ds302sum_e.pdf
35. WTO. Thailand—customs and fiscal measures on cigarettes from the Philippines (dispute DS371). http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds371_e.htm
36. Webb, WH. Philip Morris' Letter to the Canadian House of Commons' Standing Committee on Health. May 5. 1994 http://legacy.library.ucsf.edu/tid/hmh42c00
37. Yach D, Beaglehole R. Globalization of risks for chronic disease demands global solution. Perspective on Global Development and Technology. 2004; 3:213–34.
38. Yach D, Bettcher DW. Globalization of the Tobacco Industry Influence and New Global Response. Tobacco Control. 2000; 9:206–21. [PubMed: 10841858]
39. WHO. WHA59.26: International Trade and Health. May 27. 2006 https://apps.who.int/gb/ebwha/pdf_files/WHA59/A59_R26-en.pdf
40. Weiss T. Governance, good governance and global governance: conceptual and actual challenges. Third World Quarterly. 2000; 21:795–814.
41. Krahman E. National, regional, and global governance: one phenomenon or many? Global Governance. 2003; 9:323–46.
42. Gordenker L, Weiss T. Pluralizing Global Governance: analytical approaches and dimensions. Third World Quarterly. 1996; 16:357–87.
43. Collin J, Kelley Lee, Karen Bissell. The framework convention on tobacco control: the politics of global health governance. Third World Quarterly. 2002; 23:265–82.
44. Mamudu, HM. The Politics of the Evolution of Global Tobacco Control: The Formation and Functioning of the Framework Convention on Tobacco Control; Germany: VDM Verlag. 2008;
45. Mamudu HM, Donley ST. Multilevel Governance and shared sovereignty: European Union, Members States, and the FCTC. Governance. 2009; 22:73–97. [PubMed: 20622934]
46. Dodgson, R.; Lee, K.; Drager, N. Global Health Governance: a conceptual review. WHO; Geneva, Switzerland: 2002.
47. O'Donoghue, T.; Punch, K. Qualitative research in action: doing and reflecting. Routledge; London: 2003.
48. Altrichter, H.; Posch, P.; Somekh, B. 2nd edn.. Routledge; London: 2006. Teachers investigate their work: an introduction to the methods of action research.
49. Cohen, L.; Manion, L. Research methods in education. 5th edn.. Routledge; London: 2000.
50. Mamudu HM, Glantz SA. Civil society and the negotiation of the Framework Convention on Tobacco Control. Global Public Health. 2009; 4:150–68. [PubMed: 19333806]
51. World Health Assembly. WHA52.18 Towards a WHO Framework Convention on Tobacco Control; 24 May 1999; http://www.who.int/tobacco/framework/wha_eb/wha52_18/en/index.html
52. WHO. Provisional texts of proposed draft elements for a WHO framework convention on tobacco control; 29 Feb 2000; A/FCTC/WG 2/3http://www.who.int/gb/fctc/PDF/wg2/ef23.pdf
53. WHO Intergovernmental Negotiating Body. INB 5: New Chair's text of a framework convention on tobacco control; 2002; Document No. A/FCTC/ INB5/2http://www.who.int/gb/fctc/PDF/inb5/einb52.pdf
54. Bettcher D, Shapiro I. Tobacco control in an era of trade liberalization. Tobacco Control. 2001; 10:65–7. [PubMed: 11226364]

NIH-PA Author Manuscript NIH-PA Author Manuscript NIH-PA Author Manuscript

55. WHO. Chair's text of a framework convention on tobacco control; 2002; A/FCTC/INB 4/2(a)http://www.who.int/gb/fctc/PDF/inb4/einb42a.pdf
56. Laokein, C.; Saouna, I.; Basseine, M., et al. INGOs Urge African Region Not to Compromise Stand on FCTC: Resolve of African Nations Critical in Reversing Global Tobacco Epidemic. *Alliance Bulletin (serial on the Internet)*. 2003. http://fctc.org/index.php?option=com_docman&task=cat_view&gid=21&limit=5&limitstart=5&order=date&dir=DESC&Itemid=21
57. Mamudu HM, Hammond R, Glantz SA. Tobacco Industry Attempts to Counter World Bank Curbing the Epidemic and Obstruct the WHO Framework Convention on Tobacco Control. Social Science and Medicine. 2008; 67:1690–9. [PubMed: 18950924]
58. Bishop, D. World Bank/IMF. British American Tobacco Company Limited; Feb 15. http://legacy.library.ucsf.edu/tid/qur03a99/pdf
59. Bishop, D. Plan. 1998. http://legacy.library.ucsf.edu/tid/ynx71a99/pdf
60. Millson, S. WHO tobacco free initiative. Nov 30. 1999 http://legacy.library.ucsf.edu/tid/jdo93a99
61. Vecchiet, A. International political affairs. July 5. 2000 http://legacy.library.ucsf.edu/tid/trx92a99http://legacy.library.ucsf.edu/tid/trx92a99
62. CORA. Consumer & regulatory affairs—roadmap. 1999. http://legacy.library.ucsf.edu/tid/ibm93a99
63. BAT. British-American Tobacco: Proposed WHO Tobacco Free Initiative Strategy. No Date. http://legacy.library.ucsf.edu/tid/axr53a99
64. PM. Philip Morris International and Philip Morris USA's Comments on the World Health Organizations Framework Convention for Tobacco Control. Aug 8. 2000 http://legacy.library.ucsf.edu/tid/wle24c00
65. BAT. WHO: FCTC - Analysis by British-American Tobacco of Chairman Amorim's Draft Text. March 29. 2001 http://legacy.library.ucsf.edu/tid/wwc65a99
66. BAT. British-American Tobacco's Assessment of the Framework Convention on Tobacco Control; March 15 2001; http://legacy.library.ucsf.edu/tid/qji23a99
67. CORA. (Africa, Middle East, South and Central Asia) Regional CORA Plan 1999-2001. http://legacy.library.ucsf.edu/tid/ulp44a99
68. Shears, N. Team meeting follow up. February 27. 2001 http://legacy.library.ucsf.edu/tid/txx44a99
69. Beveridge & Diamond. Presentation on the WHO International Framework Convention on Tobacco Control; January 12 1999; http://legacy.library.ucsf.edu/tid/mlp83c00
70. Lioutyi, A. WHO-Tobacco Free Initiative: CORA Conference; March 29 2000; http://legacy.library.ucsf.edu/tid/lsj55a99
71. Shandwick. Let's make it work. no date. http://legacy.library.ucsf.edu/tid/ero14a99
72. Opukah, S. WHO tobacco free initiative. March 25. 1999 http://legacy.library.ucsf.edu/tid/ocj63a99
73. Diazgranados, O. Note from Michael Prideaux (watchdog checked). February 15. 1999 http://legacy.library.ucsf.edu/tid/wol55a99
74. Diazgranados, O. Tobacco free initiative action plan (watchdog checked). October 8. 1999 http://bat.library.ucsf.edu//tid/dpl55a99
75. Philippov, S. WHO in Russia. March 22. 2000 http://legacy.library.ucsf.edu/tid/exj34a99
76. Philippov, S. Russian Position on FCTC. March 23. 2000 http://legacy.library.ucsf.edu/tid/cxj34a99
77. PM. WHO Framework Convention on Tobacco Control (FCTC) and Its Implications; Dec 11 2002; Jan. http://legacy.library.ucsf.edu/tid/mna82c00
78. Ferris, R. Information on US Position at INB-3. November 29. 2001 http://legacy.library.ucsf.edu/tid/jbf20c00
79. PMI. BAT. the German NMA. Industry WHO Meeting in New York; December 12 1999; http://legacy.library.ucsf.edu/tid/pzm85a00
80. Nassif, G. FW: WHO - FCTC - Provisional summary record of INB2. August 14. 2001 http://legacy.library.ucsf.edu/tid/bnc03c00

NIH-PA Author Manuscript NIH-PA Author Manuscript NIH-PA Author Manuscript

81. Regan, JD.; IBGC. Brown, K., et al. WHO/FCTC: Meeting next week; April 6 2000; http://legacy.library.ucsf.edu/tid/det36a00
82. Regan, JD. WHO-FCTC. April 11. 2000 http://legacy.library.ucsf.edu/tid/nsm50d00
83. Regan JD, IBGC. WHO – FCTC. March 24.2000 http://legacy.library.ucsf.edu/tid/osm50d00.
84. Regan, JD.; IBGC. Meeting with U.S. delegation members to FCTC; April 17 2000; http://legacy.library.ucsf.edu/tid/djn50d00
85. Regan, JD.; IBC. JTI-IBC relationship and issues. July 31. 2000 http://legacy.library.ucsf.edu/tid/bbl85a00
86. Duncan, R. Trade lobbying. August 2. 1999 http://bat.library.ucsf.edu//tid/ywy23a99
87. CORA. Resumes of the Employees of British-American Tobacco Company. No Date. http://legacy.library.ucsf.edu/tid/cal93a99
88. BAT. Nicola shears 2000 [Key result areas]. http://legacy.library.ucsf.edu/tid/dyx44a99
89. Cooper, D. Project. May 5. 2000 http://legacy.library.ucsf.edu/tid/hjk23a99
90. Cooper, DS. Letter from Doral S Cooper to Andreas Vecchiet regarding C&M International. M. International Limited; January 11. 2000 http://bat.library.ucsf.edu//tid/ljk23a99
91. Cooper, DS. Letter from Doral S Cooper to Nicola Shears regarding work at C&M International. M. International Limited; January 7. 2000 http://bat.library.ucsf.edu//tid/mjk23a99
92. CORA. CORA management board report - December 2000. December. http://legacy.library.ucsf.edu/tid/kqc53a99
93. CORA. Operational planning meeting - 30th August: main points and actions; 30 Aug 2000; http://legacy.library.ucsf.edu/tid/jrc24a99
94. BAT. British-American Tobacco on International Trade. September. 2000 http://legacy.library.ucsf.edu/tid/qfm55a99
95. PM. Position paper: International trade. June 15. 2000 http://legacy.library.ucsf.edu/tid/ojw29c00
96. Shears N. Budget 2001. March 1.2001 http://legacy.library.ucsf.edu/tid/jtp53a99.
97. Bourdeau, KS. WHO Framework Convention on Tobacco Control; December 16 1998; http://legacy.library.ucsf.edu/tid/nlp83c00
98. Branca, C. CORA WHO. September 10. 1999 http://legacy.library.ucsf.edu/tid/ouv61a99
99. CORA. CORA Latin America and Caribbean Regional Meeting; June 14,15 2000; http://legacy.library.ucsf.edu/tid/snl55a99
100. Indton, C. Proposal for a Directive on Tobacco Advertising and Related Sponsorship. Imperial Tobacco L.; March 8. 2001 http://bat.library.ucsf.edu//tid/xew23a99
101. PM. Philip Morris Positions on Tobacco Issues. August 1. 2000 http://legacy.library.ucsf.edu/tid/afb18c00
102. PM. WHO's proposed framework convention: an opportunity to make progress in several important areas of tobacco policy around the World; September 15 2000; http://legacy.library.ucsf.edu/tid/ixm82c00
103. Reemtsma. Initial comments by Reemtsma on the proposed framework convention on tobacco control; July 5 2000; http://legacy.library.ucsf.edu/tid/lkm55a99
104. RJR. Letter to Michael J. Copps. March 14. 2000 http://legacy.library.ucsf.edu/tid/cqu60d00
105. Shears, N. Meeting on Monday; June 22 1999; http://bat.library.ucsf.edu//tid/bvy23a99
106. Shears, N. WHO briefing. December 17. 1999 http://legacy.library.ucsf.edu/tid/kvy23a99
107. PM. WHO Framework Convention on Tobacco Control (FCTC) and Its Implications on International Trade Policy; 1998; http://legacy.library.ucsf.edu/tid/spz37c00
108. RJR/JTI. Addressing Potential Violations of International Trade Law Arising under the Proposed Who Framework Convention on Tobacco Control; December 5 1999; http://legacy.library.ucsf.edu/tid/bxl61c00
109. Shears, N. WTO draft ministerial statement. BAT; October 13. 1999 http://bat.library.ucsf.edu//tid/wvy23a99
110. Shears, N. WTO issues management. July 26. 1999 http://legacy.library.ucsf.edu/tid/nkk23a99
111. Vecchiet, A. *What's Canada up to*. Quebec. January 4. 2001 http://bat.library.ucsf.edu//tid/gmi23a99

112. BAT. Introduction of an Initiative with Regard to the Framework Convention on Tobacco Control During the Preparatory Sessions for the next Summit of the Americas; No Date. http://legacy.library.ucsf.edu/tid/jcw23a99
113. Organization of American States. Summit of the Americas: Information Network: Declaration of Quebec City. 2001. http://www.summit-americas.org/Documents%20for%20Quebec%20City%20Summit/Quebec/Declaration%20of%20Quebec%20City%20-%20Eng%20-%20final.htm
114. Shears, N. Chinese accession to WTO. March 24. http://legacy.library.ucsf.edu/tid/xwy23a99
115. Shears, N. Letter to Mike Moore. DG World Trade Organization; September 8. http://legacy.library.ucsf.edu/tid/kkk23a99
116. Moore, M. Letter from Mike Moore to Martin Broughton regarding framework convention on tobacco control; April 19. http://legacy.library.ucsf.edu/tid/nto93a99
117. Moore, M. Letter from Mike Moore to Martin Broughton regarding proposed tobacco convention; May Oct. http://legacy.library.ucsf.edu/tid/ora14a99
118. Marriott, A. Meeting 10th April 2000; April 14; http://legacy.library.ucsf.edu/tid/qhr03a99
119. Broughton, M. Letter from Martin Broughton to Mike Moore regarding multilateral trade talks in Seattle. September 9. http://legacy.library.ucsf.edu/tid/lkk23a99
120. ICC. ICC United Kingdom: 14/15 Belgrave Square, London Swix 8PS. April 2. http://legacy.library.ucsf.edu/tid/woc24a99
121. Shears N. International Chamber of Commerce: UK Governing Body. November 4. http://legacy.library.ucsf.edu/tid/cgc53a99.
122. Shears, N. ICC - Governing Body. April 3. http://legacy.library.ucsf.edu/tid/bgc53a99
123. Shears, N. Meeting with Maria Cattaui, ICC International 2001; March 30; http://legacy.library.ucsf.edu/tid/mgc53a99
124. Shears, N. International Chamber of Commerce (ICC) UK Governing Body Meeting; 2001. April 4; http://legacy.library.ucsf.edu/tid/ofc53a99
125. Miles, M. Message from Andreas Vecchiet. December 22. http://legacy.library.ucsf.edu/tid/iuv61a99
126. CB. ICC. No Date. http://legacy.library.ucsf.edu/tid/ufc53a99
127. Millson, S. WHO Tobacco free initiative. September 20. http://legacy.library.ucsf.edu/tid/tiu50a99
128. Attorney, PM. Comments on the FCTC Chair's Text. February 23. http://legacy.library.ucsf.edu/tid/xjr81c00
129. PM. US Government Submission on FCTC. March 16. http://legacy.library.ucsf.edu/tid/eiz07a00
130. PM. Briefing paper. January 9. http://legacy.library.ucsf.edu/tid/cpn10c00
131. RJR. WHO's Provisional Texts of Proposed Draft Elements for a Framework Convention on Tobacco Control; December. http://legacy.library.ucsf.edu/tid/tmm50d00
132. Williams, D. WHO FCTC—joint position paper. Apr 06. http://legacy.library.ucsf.edu/tid/pou63a99
133. White A. Controlling big tobacco: the winning campaign for a global tobacco treaty. Multinational Monitor. 2004; 25:13–16.
134. Shapiro IS. Treating cigarettes as an exception to trade rules. SAIS Review. 2002; 22:187–96.
135. FCA. Shapiro, IS. Tobacco and trade: put health first. *Alliance Bulletin [serial on the Internet]*. 2001. http://fctc.org/index.php?option=com_docman&task=cat_view&gid=16&limit=5&limitstart=0&order=date&dir=DESC&Itemid=21
136. FCA. Delegates favour health over trade. *Alliance Bulletin [serial on the Internet]*. 2001. http://fctc.org/index.php?option=com_docman&task=cat_view&gid=16&limit=5&limitstart=0&order=date&dir=DESC&Itemid=21
137. FCA. Business or Health? *Alliance Bulletin [serial on the Internet]*. 2001. http://fctc.org/index.php?

NIH-PA Author Manuscript NIH-PA Author Manuscript NIH-PA Author Manuscript

option=com_docman&task=cat_view&gid=17&limitApr=5&limitstart=0&order=date&dir=DESC&Itemid=21

138. Jha, P.; Chaloupka, F. Curbing the epidemic: Governments and Economic of tobacco control. World Bank; Washington, D.C.: 1999.
139. FCA. Alliance Bulletin 2000-2003. http://fctc.org/index.php?option=com_docman&Itemid=21
140. Waxman H. Letter to the President from Henry A. Waxman. 2003 http://www.tobacco.org/resources/general/030429waxman.html.
141. Shapiro, IS. Framework convention alliance. 'Health versus trade': still contentious. *Alliance Bulletin [serial on the Internet]*. 2003. http://fctc.org/index.php?option=com_docman&task=cat_view&gid=21&limitstart=0&order=date&dir=DESC&Itemid=21
142. FCA. Health versus trade: will the minority view prevail? *Alliance Bulletin [serial on the Internet]*. 2002. http://fctc.org/index.php?option=com_docman&task=cat_view&gid=20&limit=5&limitstart=5&order=date&dir=DESC&Itemid=21
143. WTO. European communities—asbestos. 1998. http://www.wto.org/english/tratop_e/envir_e/edis09_e.htm
144. Bagchi S. What happened at doha? Economic and Political Weekly. 2001; 36:4782–5.
145. Dhar B. Doha: a developing Country perspective. Economic and Political Weekly. 2001; 36:4343–5.
146. Howse R. The WHO/WTO study on trade and public health: a critical assessment. Risk Analysis. 2004; 24:501–7. [PubMed: 15078321]
147. Lioutyi, A. Trade issues. August 22. http://legacy.library.ucsf.edu/tid/qwj34a99
148. BAT. World Health Organization's proposed framework convention on tobacco control - British-American Tobacco's view; September 8. http://legacy.library.ucsf.edu/tid/bax14a99
149. ITGA. Note regarding "The Tobacco Free Initiative". No Date. http://legacy.library.ucsf.edu/tid/bqr24a99
150. Lioutyi, A. Industry's Working Group on WHO Issues. May 26. http://legacy.library.ucsf.edu/tid/uwj34a99
151. Lioutyi, A. CORA strategy. November 27. http://legacy.library.ucsf.edu/tid/aew70a99
152. Jackson, JH.; Davey, WJ. International economic relations. West Publishing Co.; St. Paul, MN: 1986.
153. Sapsin JW, Thompson TM, Stone L, et al. International trade, law, and public health advocacy. J Law, Medicine, and Ethics. 2003; 31:546–56.
154. Shaffer ER, Waitzkin H, Brenner J, et al. Global trade and public health. Am J Public Health. 2005; 95:23–34. [PubMed: 15623854]
155. Sapsin J, Kimball AM. International trade agreements: vehicle for better public health? Journal of Law, Medicine, and Ethics. 2005 Winter;33(4 Suppl):111–14.
156. Pollock A, Price D. The Public Health Implications of World Trade Negotiations on the General Agreement on Trade in Services and Public Services. Lancet. 2003; 362:1072–5. [PubMed: 14522540]
157. McGrady B. Trade liberalization and tobacco control: moving from a policy of exclusion towards a more comprehensive policy. Tob Control. 2007; 16:280–3. [PubMed: 17652245]
158. Labonte R, Sanger M. Glossary on the World Trade Organization and public health: part 1. J Epidemiol Community Health. 2006; 60:655–61. [PubMed: 16840752]
159. Public Health Law Center. Trade Disputebetween Thailand and Philippines over Tobacco Taxes (DS371). http://www.publichealthlawcenter.org/resources/trade-dispute-between-thailand-and-philippines-over-tobacco-taxes

NIH-PA Author Manuscript NIH-PA Author Manuscript NIH-PA Author Manuscript

NIH-PA Author Manuscript
NIH-PA Author Manuscript
NIH-PA Author Manuscript

Table 1

Trade policies and precedents and implications for tobacco control

Trade policies	Purpose	Implication(s) for tobacco control
1947–1994–5: General Agreement on Tariffs and Trade (GATT)	Most favoured nation (MFN) or no less favourable treatment of like products Like products should be granted national treatment or non-discrimination Prohibition of quantitative restriction on imports	Article XX(b) grants Member States the right to take measures to protect human, animal or plant life or health. However, the measures should be 'necessary' and 'least restrictive,' and should not constitute a 'disguised restriction on international trade' or 'arbitrary or unjustifiable discrimination. The burden is on countries to prove that their tobacco control measures meet these standards[7-9, 13, 16, 20-22]
1980s: The US enforced 1984 Amendment to Section 301 of the 1974 Trade Act	The US Cigarette Export Association lobbied the US Trade Representative, which used the threat of trade sanctions to open markets in Japan, Taiwan, South Korea and Thailand to US tobacco companies.	The opening of the Asian markets resulted in increased tobacco use[9, 23-25]
1986–1994–5: Uruguay round of trade talks	Tobacco products and raw tobacco were made part of the negotiations on agricultural products such as coffee, maize and rice.	Tobacco negotiated as part of agricultural products and made a tradable commodity under the international trading regime, which places limitation on countries' ability to develop innovative public health policies without fear of violating World Trade Organization (WTO) rules or retaliation from other countries[5, 26]
1990: GATT Panel ruling in the Thai case	The US claimed that Thailand's 1966 Tobacco act violated GATT principle. The Thai government defended the Act under GATT Article XX(b)	Panel concluded that tobacco control measures should be 'non-discriminatory,' and recognised the right of Member States to adopt and implement tobacco control measures, but such measures should be equally applicable to both domestic and imported products[5, 8, 15, 21, 27]
1994: Canada and plain packaging for tobacco products.	Philip Morris threatened to instigate a trade dispute over violation of trademark rules	Canada abandoned the policy (C Callard, personal communication, 2009)[9, 16]
1994: World Trade Organization (WTO) General Agreement on Trade in Services (GATS)	Covers rules governing trade in services	Opens health services to participation of the private sector and multinational corporations. These services include advertising, packaging, retailing, distribution, telecommunication, health care, licensing, and education, which impact trade in tobacco[8, 9, 13, 15, 28]
1994: WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)	Regulations of patents, copyrights, trademarks, and industrial designs	Affects governments' ability to introduce medication programs such as those for treating tobacco dependence and cessation, and can apply to trademarks, labelling and packaging, and product/ingredient disclosure[5, 7, 9, 13, 15, 28, 29]
1994: WTO agreement on technical barriers to trade (TBT)	Technical regulations and standards for products, and recognises international standards by organizations such as the International Standards Organization	Grants Member States the ability to adopt and implement non-discriminatory and least restrictive measures that do not excessively impede trade. This agreement is relevant for product regulation, health warning and packaging, testing methods and regulation of the content of tobacco products[5, 7, 9, 13, 15, 28]
1994: WTO Agreement on import licencing procedures	Regulations concerning issuing of import licences	Relevant for licence to business to import both manufactured and un-manufactured tobacco products, and its relevant for measures to deal with illicit tobacco trade[5, 8, 30]
1994: Agreement on rules	Regulations governing the transport of goods from the origin to destination	Relevant to tracing and tracking and duty-free tobacco control policies, and measures to deal with illicit trade in tobacco

NIH-PA Author Manuscript NIH-PA Author Manuscript NIH-PA Author Manuscript

Trade policies	Purpose	Implication(s) for tobacco control
of origin		products[5,30]
2001: Chile versus Peru	Chile claimed that Peru's General Sales Tax and Selective Consumption Law that identify goods subject to selective consumption tax places different specific tax on imported cigarettes made by tobacco (dark and bright) primarily from Chile. As such, the Peru's tax regime was discriminatory	Chile withdrew the case following Peru's amendment of the law to make all cigarettes subject to the common selective tax system regardless of their origin, price, type or quality of tobacco and/or number of sales market.[31] That is, the amended law became consistent with the 'non-discrimination principle.' Thus, governments must ensure that their tobacco control measures are universal and does not discriminate against imported products, necessary, and consistent with the WTO
2000–2003: Ban on misleading descriptors ('light,' 'mild,' 'low') in Canada and European Union	Philip Morris threatened to bring claim against Canada under the North Atlantic Free Trade Area. British American Tobacco, Imperial Tobacco, and Japan Tobacco International challenged the European Union ban at the European Court of Justice for infringement on trademark rights	The European Court of Justice dismissed the case, but did not determine TRIPS legality[9]
2003: Honduras versus The Dominican Republic	Honduras claimed that the application of the Dominican Republic Selective Tax Law created less favourable conditions for imported cigarettes and inhibited the importation of foreign cigarettes, contradicting GATT principles[32]	The Appellate Body concluded that the requirement that tax stamps be affixed on cigarette packets in the Dominican Republic was 'not necessary' because there were 'reasonably available' alternative WTO-consistent measures; rejected Honduras' claim that the policy accords less favourable treatment to imported tobacco because 'detrimental effect of a measure on a given imported product does not necessarily imply that the measure accords less favourable treatment to imports if the effect is explained by factors unrelated to the foreign origin of the product;' and that the Dominican Republic imposition of bond requirement on cigarette importers violated the principle of no less favourable treatment of like products[33,34]
2008: The Philippines case	Philippines claims that Thailand is violating GATT rules through a 'partial and unreasonable' administration of tobacco tax measures that give advantage to the Thai Tobacco Monopoly	The first tobacco-related case filed at the WTO since the FCTC became international law in February 2005. The case had not been decided as of May 2010[35]
Emerging issue: plain packing in Asia	Tobacco companies have threatened to bring claim against some countries in Asia for violating trademark rules under TRIPS	Formal complaint has not been filed. These threats could have 'chilling effects' on states' innovation of tobacco control measures

NIH-PA Author Manuscript

Table 2

Evolution of trade and health text during the framework convention on tobacco control negotiations

Working Group	INB1	INB2	INB3	INB4	INB5	INB6	FCTC
27–29 March 2000 Guiding Principle D.4 Trade policy measures for tobacco control purposes should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade	16–21 October 2000 Guiding Principle D.4 Trade policy measures for tobacco control purposes should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade	30 April - 5 May 2001 Guiding Principle D.5 Tobacco-control measures should not constitute a means of arbitrary or unjustifiable discrimination in international trade	22–28 November 2001 Guiding Principle D.5 {5. Tobacco-control measures (taken to protect human health) {should not {constitute}/(be deemed as constituting) a means of arbitrary or unjustifiable discrimination in} (must take into account the rules of) international trade}	18–23 March 2002 Guiding Principle D.5 (Priority should be given to measures taken to protect public health when tobacco control measures contained in this Convention and its protocols are examined for compatibility with other international agreements) or (The Parties agree that tobacco control measures shall be transparent, non-discriminatory and implemented in accordance with their existing international obligations) or (Tobacco control measures should not constitute a means of arbitrary or unjustifiable discrimination in international trade.) or (Tobacco control measures taken to protect human health should not be deemed as constituting a means of arbitrary or unjustifiable discrimination in international trade)	14–25 October 2002 Article 4.5[53] While recognising that tobacco control and trade measures can be implemented in a mutually supportive manner, Parties agree that tobacco control measures shall be transparent, implemented in accordance with their existing international obligations, and shall not constitute a means of arbitrary or unjustifiable discrimination in international trade	17–28 February 2003 Article 4.8 (4.8. While recognising that tobacco control and trade(-related) measures can be implemented in a mutually supportive manner (to protect public health), Parties agree that tobacco control measures shall be transparent, implemented in accordance with their existing international obligations, and shall not constitute a means of arbitrary or unjustifiable discrimination in international trade, or Tobacco control measures taken to promote public health in accordance with the provisions of this Convention shall not be deemed as constituting a means of arbitrary or unjustifiable discrimination in international trade.)	21 May 2003 Preamble The parties to this convention, determined to give priority to their right to protect public health, …
					Article 2.3 Nothing in this Convention and its related protocols shall be interpreted as implying in any way a change in rights and obligations of a Party under any existing international treaty	Article 2.3 (2.3. (Priority should be given to measures taken to protect public health when tobacco control measures contained in this Convention and its protocols are examined for compatibility with other international agreements)/(Nothing in this Convention and its related protocols shall be interpreted as implying in any way a change in the	

NIH-PA Author Manuscript
NIH-PA Author Manuscript
NIH-PA Author Manuscript

Working Group	INB1	INB2	INB3	INB4	INB5	INB6	FCTC
						rights and obligations of a party under any existing international treaty))	

NIH-PA Author Manuscript

NIH-PA Author Manuscript

NIH-PA Author Manuscript

Table 3

Position on proposed FCTC guiding principles D.5 during second session on the Intergovernmental negotiating body in 2001 (FCTC Intergovernmental negotiating body, FCTC Documentation Center, 2001)

Favour	Ambivalent	Opposed
Japan, USA, Tobacco companies, Turkey, WHO Tobacco Free Initiative 19 Latin American countries	Russia and Surinam	Countries: Armenia, Bangladesh, Canada, China, Egypt, Iran, Israel, Jamaica, Norway, Oman, Pakistan, Palau, Panama, Philippines, Saudi Arabia, Sri Lanka, Thailand and Uruguay Groups: Baltic States, European Union, WHO Africa and South East Asian regions

NIH-PA Author Manuscript

NIH-PA Author Manuscript

NIH-PA Author Manuscript

Table 4

Countries positions on Articles 2.3 and 4.8 during the 6th Session of Intergovernmental Negotiating Body, February 2003

Opposed health over trade	Health over trade	Consensus language/silence
Tobacco industry, Argentina, USA, and Russia	Countries: China, Namibia, Palau, Panama, Papua New Guinea, South Africa, Thailand, Groups: WHO African, Eastern Mediterranean and South East Asian Regions, Pacific Island States, English-speaking Caribbean countries Civil Society: Framework Convention Alliance	Countries: Australia, Canada, European Commission, Iceland, Iran, Japan, Norway, Pakistan, Philippines, Saudi Arabia, South Korea, Turkey Organisations: The WHO Tobacco Free Initiative