

Plain packaging: an opportunity for improved international policy coherence?

RAPHAEL LENCUCHA^{1*} and JEFFREY DROPE²

¹*Faculty of Medicine, McGill University, Hosmer House, 3630 Promenade Sir William Osler, Montréal, Quebec, Canada, H3G 1Y5 and* ²*American Cancer Society, 250 Williams St. NW, Atlanta, GA 30303, USA*

**Corresponding author. E-mail: rlencuch@gmail.com*

SUMMARY

This paper highlights two salient challenges at the intersection of tobacco control and macroeconomic policy-making: (i) the use of trade and investment disputes to undermine and/or stall tobacco control legislation and (ii) the inconsistency, and thus unpredictability, of country

positions across the two spheres. In the interest of improving international policy coherence, the authors suggest possible solutions to these two challenges at the national and intergovernmental levels.

Key words: trade; tobacco labeling; healthy public policy; governance

INTRODUCTION

The entry into force of the World Health Organization's (WHO) Framework Convention on Tobacco Control (FCTC) in 2005 marked a clear turning point for global tobacco control. The FCTC compels binding international legal obligations on those governments who ratify the treaty. In legal terms, the governments that sign and ratify the treaty are consenting to be bound by the minimum standards explicated in the treaty. It is stated in Article 2.1 that Parties, in addition to minimum commitments, are 'encouraged to implement measures beyond those required by this Convention and its protocols' (WHO, 2005). This encouragement aligns with the spirit and intention of the FCTC 'to give priority to their (the Parties to this Convention) right to protect public health' (WHO, 2005). As of early 2013, 176 countries are Party to the FCTC. Despite the legal weight of the FCTC in fundamental statutory terms, this treaty cannot be viewed as a final victory for global tobacco control; rather, implementation of aspects of the

Convention's voluntary (i.e. beyond minimum obligations) provisions is increasingly under challenge. The provisions enshrined in the FCTC continue to be challenged particularly under international economic law, including challenges brought forward under the auspices of the World Trade Organization (WTO) and bilateral investment agreements.

Whereas much of the discourse produced within the health literature sees these challenges as undermining the ability of the Parties to implement the FCTC, we argue that these challenges, given the legal strength in the defense of FCTC implementation, present timely opportunities for Parties of the FCTC to move forward within the broader system of international law and global governance. This position is derived from both temporal and systemic perspectives. The temporal perspective views the FCTC as the beginning of an international legal regime to address health issues globally. The FCTC will achieve its desired impact only as ambiguities and uncertainties are confronted and explicated over time. From this perspective, the challenges

at the intersection of trade and FCTC implementation are important markers to clarify the obligations set out in this regime. In other words, each challenge brings forward an opportunity to enhance the interpretative clarity of FCTC obligations, a markedly evolutionary perspective of treaty interpretation.

The systemic perspective recognizes the entrenched intersectoral nature of governing global issues, such as the global control of tobacco. In this respect, the FCTC is necessarily enmeshed with trade, investment, agriculture, labor and other sectors. All of the rules that govern these sectors bear on the control of tobacco and a systemic perspective aims not to isolate but to approach and refine the overlapping regulatory standards. The creation of the United Nations Ad Hoc Interagency Task Force on Tobacco Control in 1999 reflects the need to approach the issue systemically. In fact, the United Nations Economic and Social Council discussed a draft resolution in 2012 that urged actors within the UN system to support the implementation of the FCTC and requested that the ‘Secretary-General to include in his report to the Council at its substantive session of 2013 options to effectively monitor the work of the (Interagency) Task Force (on Tobacco Control) and the integration of the FCTC implementation efforts within the United Nations Development Assistance Frameworks, where appropriate, in order to promote coordinated and complementary work among funds, programmes and specialized agencies’ (ECOSOC, 2012). This systemic reality does not detract from or discount the concern over trade and investment challenges to FCTC implementation, but does set the context whereby solutions can move not only the FCTC regime forward, but also the other intersecting regimes. It is likely that this system refinement will prove beneficial to future health-based international legal regimes, particularly those that seek to regulate products such as food or alcohol. It is these two perspectives that guide the following discussion.

Using the recent case of Australia’s plain packaging legislation, we discuss the diplomatic, political and legal features of FCTC implementation. The following questions remain salient at the intersection of FCTC implementation and commitments to international economic regimes: to what extent can trade-related concerns pertaining to FCTC implementation be addressed within the FCTC system, specifically by the

Conference of the Parties (COPs)? How can Parties to the FCTC support policy commitments that extend beyond the minimum obligations? How can the COP mediate conflicts of interpretation and compliance? These questions cannot be fully answered in this paper; however, they underpin our discussion.

The purpose of this research is to highlight two salient political challenges to the implementation of the FCTC: (i) the use of trade and investment disputes to undermine and/or stall tobacco control legislation and (ii) the inconsistency, and thus unpredictability, of country positions across the two spheres. We conclude by suggesting seven possible diplomatic approaches to address these challenges. The approaches that we suggest are not simple, but rather reflect the necessary complexity that comes when addressing health governance issues that span international law, politics and economics. This complexity includes the need to establish formal and informal relationships across sectors and to couch health messages in terms that are understood by the target audiences (Drope and Lencucha, 2013). The recognition of the nuances involved in trade challenges to tobacco control measures that are in line with FCTC obligations is particularly salient given that governments have limited formal ability to address such challenges within the WHO system.

PLAIN PACKAGING OF TOBACCO PRODUCTS: RECENT CHALLENGES

The tobacco industry is utilizing alleged commitments to economic agreements to justify challenges to tobacco control, including challenges to Uruguay’s attempt to enhance warning labels on tobacco packages and Australia’s legislation to implement the world’s first plain tobacco packaging requirement (Lencucha, 2010; PMI, 2011; Wallace, 2011). Australia’s law is under challenge at the WTO where, in 2012, Ukraine, Honduras, (both Parties to the FCTC) and the Dominican Republic have requested consultations with Australia (WTO, 2012a,b). This discussion focuses on Ukraine and Honduras because they both have consented to be bound by the provisions of the FCTC, pointing to possible conflict between FCTC commitments and the challenges brought forward at the WTO. These consultations represent the first step in formal WTO dispute settlement and provide not

just more evidence of clashing norms but are pivotal test cases not only for the strength of plain packaging as a health promotion and protection strategy in the context of international trade law, but also for the legitimacy and strength of other key facets of the FCTC. These consultations also have implications for binding and non-binding provisions of similar international health agreements as they interact with other types of international agreements.

The challenges brought forward by Ukraine and Honduras question the scientific evidence base underlying the plain packaging measures and argue that tobacco companies have an affirmative right to use their trademarks, invoking the General Agreement on Tariffs and Trade (GATT, 1994), the Trade-Related Aspects of Intellectual Property Rights (TRIPS) and the Technical Barriers to Trade (TBT) Agreements. These arguments are an indirect challenge to the FCTC itself because official Convention guidelines for packaging and labeling of tobacco products recommend the adoption of plain packaging as well as the use of large graphic health warnings (WHO, 2012a,b,c). Notably, FCTC Parties—including Ukraine and Honduras—developed and unanimously adopted the official guidelines. The evidence-based guidelines note that plain packaging ‘may increase the noticeability and effectiveness of health warnings and messages, prevent the package from detracting attention from them, and address industry package design techniques that may suggest that some products are less harmful than others’ (WHO, 2012a,b,c). In the absence of plain packaging legislation, the tobacco industry continues to utilize packaging as an avenue for direct marketing of tobacco products. Such an avenue is forcibly prohibited in the text of the FCTC (Moodie *et al.*, 2011). Article 13 of the treaty outlines a ‘comprehensive ban on advertising, promotion and sponsorship’, recognizing that the elimination of such activity ‘would reduce the consumption of tobacco products’.

Recent legal scholarship strongly suggests that Australia’s packaging and labeling legislation is on firm legal ground (Mitchell, 2010; Voon and Mitchell, 2011; Mitchell and Studdert, 2012). For example, international agreements, such as TRIPS, do not oblige WTO Members to permit trademark rights holders to *use* their trademarks rather they ensure the protection and registration of trademarks (Mitchell, 2010). Under TRIPS, a trademark right is a right to exclude third Parties from use in certain circumstances (Mitchell,

2010). The TRIPS Agreement also incorporates so-called ‘flexibilities’ that enshrine a high degree of domestic regulatory autonomy with respect to health protection (Mitchell, 2010). Mitchell notes ‘It is implicit within the TRIPS Agreement itself, and especially in Article 20, that a high degree of domestic regulatory autonomy shall be afforded to a Member State to enact measures to protect and promote public health’ (Mitchell and Studdert, 2012). In addition, WTO jurisprudence creates a relatively low scientific threshold for a WTO Member to prove that a measure contributes to a health objective (McGrady, 2009).

The fact that both Ukraine and Honduras endorsed the adoption of the packaging guidelines raises important questions pertaining to policy coherence across international legal regimes. From a political perspective, these challenges are not merely more evidence that the trade regime of the WTO is potentially hampering the ability to regulate products for health purposes. In fact, as mentioned above, the legal basis of these challenges is markedly weak according to scholars of trade law. Considering that the legal case is weak and these countries were in favor of the guidelines that articulated the importance of plain packaging for tobacco products, it appears that these challenges do not stem solely from conflicts of interpretation between the trade regime and FCTC implementation, but also from a lack of intrastate coherence across ministries and whole-of-government commitment to FCTC implementation. Furthermore, the lack of coherence, in light of interpreting other Parties’ efforts to enshrine voluntary commitments to the FCTC, suggests the need to conceptualize better the hard and soft law features of FCTC conflict resolution.

Notwithstanding the strong legal positions of Australia, these legal challenges are problematic from the perspective of FCTC implementation. The challenges impose significant burdens on government in terms of time and cost. Such challenges may also generate regulatory chill whereby governments unnecessarily hesitate to regulate while awaiting the outcome of a dispute, elect not to regulate when they otherwise would, or roll back regulation (Tienhaara, 2011). Regulatory chill is particularly important given that Australia is the first country to implement plain packaging legislation. Hence, speedy and successful resolution of the disputes is in the interests of public health. Moreover, expedient dispute resolution in

favor of Australia's plain packaging legislation will assist in fostering confidence among Parties to the FCTC to consider plain packaging as a legally viable piece of tobacco control legislation. This viability has already been demonstrated in a domestic-level legal context by the Australia High Court's recent decision to dismiss the tobacco industry's challenge against the plain packaging legislation, a decision that was publically endorsed by the Director-General of the World Health Organization (Chan, 2012). A decision in favor of Australia within the WTO system will reinforce the legality (i.e. within international law) of pursuing health objectives in the face of interpreting the strength of trademark protections. Such a decision will build on decisions pertaining to product regulations for health purposes that have potential implications for international trade and its rules. What remains to be discussed is whether mechanisms of formal consultations within the FCTC apparatus could abate challenges within the trade regulatory sphere. For example, could Ukraine and Honduras have raised concerns about plain packaging within the FCTC? Would the presence of such a mechanism expose pernicious intentions if Parties, when moving forward to a formal trade dispute, ignore it?

As discussed above, Honduras and Ukraine have expressed consent to be bound by the provisions of both the FCTC and the WTO, and since international law is known for its fragmentation and complexity (McGrady, 2011), it is perhaps not surprising that tensions have developed. Governments do indeed have the right to raise challenges within the WTO or other fora if they believe trade is being restricted unnecessarily, or if they perceive unfair treatment. However, it is widely recognized by legal scholars that there is no inherent legal conflict between the FCTC and WTO law (Mitchell and Voon, 2011). As mentioned previously, Parties to the FCTC are not restricted to the implementation of minimum binding provisions but as Article 2 notes: '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' (WHO, 2005). These statements embedded in the FCTC reinforce the notion that Parties are within their right to implement regulatory measures that extend beyond the minimum standards

outlined in the treaty. Our proposed approaches to address these challenges adhere to the premise that it is important for Parties of the FCTC and those non-state actors that are in favor of tobacco control to explore political and diplomatic mechanisms within the FCTC COPs, and the WHO generally, to ensure that FCTC implementation is compliant with other commitments, while ensuring that the strongest possible health legislation is at minimal risk of external challenge. The need to conscientiously address issues at the intersection of trade and FCTC implementation at the COP is made salient by the fact that many of pertinent issues remain unresolved.

PLAIN PACKAGING OF TOBACCO PRODUCTS: POSSIBLE SOLUTIONS

Approaches to address the above challenges are not straightforward. Scholars of international law and international relations continue to vigorously debate questions of treaty compliance, coherence across treaties and the role of private interests in public international law (Zangl *et al.*, 2012). Below we discuss three general approaches at the intragovernmental level and four approaches at the intergovernmental level (Table 1).

Intra-governmental solutions

In the context of investment treaties (typically, bilateral agreements), governments can protect themselves to some degree by clarifying or renegotiating the commitments in existing agreements and by including exceptions, exemptions and/or clarifications for tobacco control measures or tobacco products in future agreements (McGrady, 2012). This move can serve to protect governments from legal challenges by the tobacco industry under the auspices of bilateral investment treaties (BITs). In this respect, the Australian government has changed its policies regarding investment treaties since the Philip Morris claim filed under the purview of a Hong Kong–Australia BIT (Australian Department of Foreign Affairs and Trade, 2011). Australia will no longer include investor-state provisions in its investment agreements, wherein firms or other non-governmental actors can directly challenge Australia's laws and regulations through the international arbitration process.

Table 1: Proposed approaches to foster policy coherence between trade and tobacco control

Level	Proposed approaches
Intra-governmental	<ol style="list-style-type: none"> (1) Clarify or renegotiate commitments in existing BITs (2) Evaluate the lawfulness of tobacco control legislation from a trade perspective (3) Increase coordination across ministries
Inter-governmental	<ol style="list-style-type: none"> (1) Apply diplomatic pressure within the trade law system, especially the WTO (2) Amplify support for the Punta del Este Declaration, and the use of Declarations and Decisions as a tool of soft-law (3) Support the role of the FCTC Secretariat in interagency consultations and initiatives (4) Apply FCTC Party-to-FCTC Party pressure to Ukraine and Honduras within the COP process

Many tobacco control proponents have been pushing for a tobacco exclusion from the Trans-Pacific Partnership (TPP) Trade Agreement. The general rationale for a tobacco exclusion is the prevention of tariff reductions and challenges to country's tobacco control regimes using the agreement's broader economic commitments. Although tobacco exemption in trade or investment agreements is appealing on the surface because it might positively affect tobacco product prices and/or mitigate challenges to tobacco control regulations and/or legislation using economic policy commitments, it is also important to note that this approach may foster regulatory isolation. We define regulatory isolation as an approach to policy-making that either consciously disregards or implicitly ignores the intersectoral implications of the policy. Regulatory isolation may serve short-term objectives, but does not address complex system-level issues very effectively. For example, although hypothetical, if a health ministry develops tobacco control legislation in the absence of consultation with trade or foreign affairs ministries, it may increase the likelihood that such legislation is vulnerable to trade and investment challenges. A more compelling option is to encourage engagement and cooperation across sectors in order to develop tobacco control regulation that fulfills all of the health-based goals

and is consistent with trade and investment commitments. This engaged approach shifts the strategy from one of fear of vulnerability to one of legitimacy within the broader system of trade and investment law. Ideally, this approach will lead to greater coherence within the system of governance and will have temporal benefits. For example, if tobacco control proponents continue to engage within the sphere of international trade law mechanisms and clarify and refine protections for health regulation, then future regulatory strategies to protect health such as product regulations of 'junk foods' such as sugary beverages will be better protected from legal challenge in the trade sphere.

We are beginning to see some efforts to engage a more intersectoral approach with regard to tobacco control and economic policy, though progress is inconsistent. In 2012, the United States Trade Representative (USTR)—in coordination with the Department of Health and Human Services and reportedly, higher levels in the executive branch—began to pursue an approach that would clarify TPP governments' rights to regulate tobacco to protect public health with origin-neutral and scientifically substantiated provisions. However, by the end of 2012, statements from the USTR made it unclear what direction it might pursue as the TPP negotiations continued (USTR, 2012).

As a natural corollary to actively seeking to engage in the negotiation of economic agreements that are more proactive for public health, governments can also take steps to maximize the likelihood that individual tobacco control measures will be considered lawful under trade and investment agreements (WHO, 2012a,b,c). For example, Canada's WTO representative's recent defense of a tobacco flavoring and additives ban is strongly rooted in both health and trade rules and goals by emphasizing, for example, both the scientific evidence that demonstrates that young people are attracted by flavors and additives in tobacco products and the non-discriminatory nature of the provision (TBT, 2011). The WHO Secretariat noted, in a report submitted to the fifth COP, that technical assistance must be provided to Parties of the FCTC when they are drafting domestic legislation to ensure compliance with trade regimes (WHO, 2012a,b,c). The Secretariat also noted that technical assistance could be provided after challenges are waged in the trade sphere to support the efforts of Parties to implement the provisions of the FCTC.

Additionally, Canada put forward a decision to ensure that information is provided ‘on tobacco control and the WHO FCTC to WTO Members in relevant bodies’ (COP, 2012a,b).

To reiterate, a dichotomy between health and trade is neither necessary, nor in most cases practical, to ensure that health objectives are not compromised by trade commitments. For example, it is possible that the architects of the recent US flavoring ban did not heed counsel on the discriminatory nature of excluding a major additive (menthol) from the measure. In this case, it is possible that the developers of the legislation were unaware of trade commitments or the complex politics of developing the legislation overwhelmed counsel’s better advice on the country’s broader international economic commitments. In either event, it is clear that better intersectoral working would help to ensure that the decisions brought forward by health authorities are less vulnerable to trade and investment challenges. Although this solution may seem benign, it has important implications from a system perspective. If countries continue to strengthen the regulation of tobacco products there is a need to ensure consistency across regulatory regimes and if consistency is detrimental to health objectives then regulators can work with their colleagues on system reform. In fact, the COP approved a decision that requests the Convention Secretariat to ‘continue to encourage communication and information sharing between trade and health officials of Parties to the WHO FCTC’ (COP, 2012a,b). In a rather ironic twist, in its first national report on tobacco control in 2009 Ukraine itself notes that, ‘a multi-sectoral approach is needed, mobilizing different government sectors and civil society efforts under the leading role of the public health sector’ (Ukraine, 2009).

It is important to return to the point that regimes such as the GATT, TRIPS and TBT have explicit provisions to ensure that health is not compromised by trade commitments and practices. In order for governments to better align their commitments to the FCTC and other treaties, there must be formal mechanisms and fora whereby health and trade ministries can communicate. For example, the President of Brazil has established a National Commission for the Implementation of the FCTC that includes representatives from thirteen different ministries including industrial development and international trade.

Intergovernmental level solutions

The plain packaging WTO case offers an opportunity because of the nature of the WTO dispute settlement process, particularly in comparison to dispute resolution within many BITs. Decisions on disputes filed under bilateral investment agreements typically occur within the international arbitration process and are difficult to predict because of the ‘shifting cast of arbitrators’ and the non-binding force of earlier decisions. (Mitchell and Studdert, 2012). In contrast, though there is no formal use of legal precedent, WTO law is sometimes easier to predict precisely because previous WTO dispute settlement decisions are often used in cases and directly cited in decisions. Accordingly, such decisions can generate significant legal implications because they establish a pattern of international trade jurisprudence in arguably the most important international economic dispute settlement mechanism. If the current consultations move to a formal dispute panel, the decision may set the tone for plain packaging as a legislative option for health protection and may promote or dissuade future challenges.

It is also important to note that the WTO, like the WHO, is a multilateral context that has an important norm-setting role. Outcomes from this context can have significant implications for the behavior of states in their domestic politics (McGrady, 2011). As such, states will be watching the consultations to observe the positions of various countries in support of or opposition to plain packaging legislation and using this information to inform their own decision to move forward on plain packaging. It is important for Parties of the FCTC to apply pressure on their country delegates at the WTO not only to monitor the dispute settlement proceedings, but to join the consultations in an effort to support Australia. Thus far, 12 countries and the European Union have formally joined the consultations, though some of these countries are hostile toward the packaging measure. It is possible that members can apply important pressure on the complainants to settle the dispute in a manner that is amenable to tobacco control before it reaches panel adjudication. Or, if the case eventually reaches a formal panel, members can as WTO Article 10 permits, deliver written or oral testimony in support of another member.

Although past WTO panel decisions at the intersection of health and trade have used a

restrictive view toward the use of extraneous treaty commitments to interpret challenges, McGrady argues that a broad reading of Article 31(3)(c) of the Vienna Convention on the Law of Treaties would permit the use of extraneous treaties to interpret WTO law (McGrady, 2008). This broad view can be supported by members of the WTO to encourage the use of FCTC commitments in these types of trade-related challenges, thus a more systemic and coherent approach to governance. It is therefore critical that these delegates are knowledgeable of the legality of Australia's plain packaging legislation in accordance with WTO law and are willing to assert this knowledge during the proceedings.

In addition, the WHO through the FCTC Secretariat can observe dispute consultations and assert the legitimacy of Australia's FCTC voluntary commitments. The WHO can use its traditional role as 'technical expert' on health issues to mobilize the evidence pertaining to plain packaging, thereby enhancing the legitimacy of Australia's plain packaging legislation. For example, formal WHO reports, such as the 2012 report, 'Confronting the tobacco epidemic in a new era of trade liberalization', can be used by members to assert the legitimacy of tobacco control measures and to support the legality of such measures from a trade law perspective.

Proponents of tobacco control must continue to lead on issues related to trade and investment policy within the FCTC context. The fifth session of the FCTC COP (COP5) was held in November 2012. The COP is the governing body of the FCTC and is made up of the Convention Secretariat and Parties to the Convention. The COP is itself governed by rules of procedure. The rules permit Parties to introduce decisions and declarations that are considered and voted upon by all of the Parties. At the fourth session, the COP responded to the Philip Morris claim against Uruguay's labeling initiative by issuing the Punta del Este Declaration (COP, 2012a,b). The Declaration affirms the regulatory autonomy of FCTC Parties under trade and investment agreements, including the GATT, the TBT Agreement and TRIPS, all of which are invoked in the challenges within the WTO to plain packaging. The negotiation of this declaration was initiated by Uruguay and adopted unanimously by the Parties, including Ukraine and Honduras.

The Punta del Este declaration plays an important soft law function within the larger system of global governance. Declarations can galvanize

support for specific positions that can serve to enhance the core treaty. For example, the Punta del Este declaration sends a clear message that the FCTC has legal weight next to other regulatory regimes. More specifically, Alan Boyle notes that 'soft law instruments are used as mechanisms for authoritative interpretation or amplification of the terms of the treaty' (Boyle, 1999). Schachter also argues that declarations can be viewed and used as binding provisions that extend treaty commitments (Schachter, 1994). The Punta del Este declaration and related decisions, statements and declarations about trade and closely related issues are necessary because the FCTC negotiators left implicit in the convention's text the relationship between FCTC implementation and the international trade regime.

Canada put forward a new trade-related decision at COP5 in South Korea that prompted discussion among the Parties that also serves to illuminate the complexities of how countries might more effectively address challenges at the intersection of FCTC implementation and commitments to international economic agreements. Canada not only sought to encourage intra-governmental cooperation on these issues, but also information sharing among pertinent international organizations. In contrast, the Philippines took a more aggressive stance, seeking to amend Canada's decision by proposing that the Parties should adopt a position that 'excludes' tobacco from future trade and investment agreements and requires Parties to attempt to settle trade-related disputes within the COP before moving to venues such as the WTO. The juxtaposition of the nature of the two pieces of the proposal from the Philippines delegation is striking: one is isolationist (exclusion) whereas the other is much more about engagement that might lead to much more long-term clarity. Many positions of exclusion are potentially awkward because they implicitly—or explicitly—suggest that trade regulation is paradigmatically opposed to health regulation. Although it is not clear what authority the WHO or the COP actually has, a position that asserts a more active role for the COP that engages the Parties and openly encourages them to seek to find policy coherence might have far longer-lasting and positive effects for public health in the realm of competing and/or overlapping international regimes.

We suggest that the apparent inconsistency between Ukraine's and Honduras' WTO challenges to Australia's plain packaging measures

and their FCTC commitments provide evidence for the COP to further ‘insist on intersectoral mechanisms that create coherent policy between government departments’ (COP, 2012a,b). The WHO secretariat presented a report to the COP5 that highlighted important developments to ensure that the WHO and WTO are interacting more frequently and more meaningfully to protect FCTC implementation from trade challenges (WHO, 2012a,b,c). This type of interagency cooperation is an important development in the strengthening of the governance system, particularly from the perspective of regime coherence.

The FCTC and WHO secretariats can serve an important function across agencies within and outside of the United Nations system. Secretariats can play a pivotal role in ensuring that proactive information sharing, learning and other types of cooperation occur across agencies. Sanford describes Secretariats as ‘the organizational glue that holds the actors and parts of a treaty system together’ (Sandford, 1994). The existence and use of communication channels across multilateral agencies will be important as Parties continue to implement minimum and recommended FCTC provisions. The FCTC Secretariat, as a semi-autonomous body, will continue to play an important role canalizing information to economic and other agencies. This information communication will continue to facilitate the implementation of the FCTC and will work to ensure that unnecessary institutional impediments do not hinder this implementation.

A more controversial option is for FCTC Parties to confront Ukraine and Honduras and demand an explanation of their complaint within the context of the FCTC. There is no formal mechanism for such a confrontation within the WHO system and Parties might be reticent to be so forthright. However, Rule 9 of the rules of the procedure permits a Party to place any item on the agenda of a COP up to 10 days prior to the regular session (WHO, 2006). The COP can serve as a venue for the Parties to formally discuss how to deal with flagrant disregard for the obligations set forth in the FCTC, such as the WTO challenges brought forward by Ukraine and Honduras. Because the WHO does not have a formal dispute settlement understanding like that of the WTO, the COP provides a logical forum to bring forward inter-state disagreements pertaining to FCTC commitments. Such issues must be dealt with delicately given the potential to unfairly castigate WTO Members who bring

forward legitimate trade and investment challenges.

Two major potential complications are worth noting: (i) government delegations do not always speak with one voice and have internal conflicts pertaining to country positions and (ii) much of the consultation that leads to inter-state decisions/positions takes place informally before, after and during the COP. Given the reality of the first point, states must be conscious not to alienate Parties to the FCTC. The authors engaged in discussions at COP5 that suggest that the Ukraine delegation is conflicted about the challenge brought forward at the WTO. Although evidence of this is anecdotal, there is reason to believe that this is true, particularly given the movement Ukraine has made to strengthen domestic tobacco control since ratifying the FCTC (Ukraine, 2009). The point is that Parties must be sensitive to the internal challenges faced by delegations and work to support individual delegates to pressure their colleagues. The second point is tied to the first and suggests that formal and public confrontation may be ill suited in some circumstances to achieve the desired effect of exposing and pressuring Parties’ inconsistent actions pertaining to FCTC implementation. Such ‘shaming’ tactics may not always be a suitable solution.

CONCLUSION

There is a pervasive tendency of the proponents of tobacco control to isolate FCTC implementation and tobacco control in general from the larger system of global governance. Although this may be appealing because of its clear demarcation of tobacco control from other interests and legal regimes, in the long term, it may not be the most effective approach for the long-term viability of tobacco control. The approach that has informed this paper is that the FCTC and its implementation are part of a larger system of international and national-level regulatory regimes. It is true that the challenges discussed in this paper do exist at the intersection of trade and investment regulation and FCTC implementation. However, given the regulatory space provided within these regimes for health regulation, there is every reason to think that successes in this context will actually strengthen the FCTC and provide more confidence for Parties to move forward with its implementation. Proponents of policy coherence can work toward the explicit goal of ensuring that

this scenario plays out in favor of health governance and FCTC implementation.

CONFLICT OF INTEREST

None declared.

FUNDING

Research reported in this publication was supported by the National Institute On Drug Abuse, the Fogarty International Center and the National Cancer Institute of the National Institutes of Health under Award Number R01DA035158. The content is solely the responsibility of the authors and does not necessarily represent the official views of the National Institutes of Health.

REFERENCES

- Australian Department of Foreign Affairs and Trade. (2011) Gillard Government trade policy statement: trading our way to more jobs and prosperity.
- Boyle, A. E. (1999) Some reflections on the relationship of treaties and soft law. *The International and Comparative Law Quarterly*, **48**, 901–913.
- Chan, M. (2012) WHO welcomes landmark decision from Australia's High Court on tobacco plain packaging act.
- COP. (2012a) FCTC/COP5(15) Decision: Cooperation between the Convention Secretariat. *The World Health Organization, the World Trade Organization and the United Nations Conference on Trade and Development*, Seoul, Korea.
- COP. (2012b) FCTC/COP/4/DIV/6 – Punta del Este Declaration on the implementation of the WHO Framework Convention on Tobacco Control. WHO, COP, Geneva.
- Drope, J. and Lencucha, R. (2013) Tobacco control and trade policy: proactive strategies for intergrating policy norms. *Journal of Public Health Policy*, **34**, 153–164.
- ECOSOC. (2012) E/2012/L.18 - United Nations system-wide coherence on tobacco control. ECOSOC, New York.
- Lencucha, R. (2010) Philip Morris versus Uruguay: health governance challenged. *Lancet*, **376**, 852–853.
- McGrady, B. (2008) Fragmentation of international law or systemic integration: of treaty regimes: EC-biotech products and the proper interpretation of article 31(3)(c) of the Vienna convention on the law of treaties. *Journal of World Trade*, **42**, 589–618.
- McGrady, B. (2009) Necessity exceptions in WTO Law: re-treaded tyres, regulatory purpose and cumulative regulatory measures. *Journal of International Economic Law*, **12**, 153–173.
- McGrady, B. (2011) Trade and public health: the WTO, tobacco, alcohol, and diet. Cambridge University Press, New York.
- McGrady, B. (2012) Confronting the tobacco epidemic in a new era of trade and investment liberalization. WHO, Geneva.
- Mitchell, A. (2010) Australia's move to the plain packaging of cigarettes and its WTO compatibility. *Asian Journal of the World Trade Organization and International Health Law and Policy*, **5**, 399–419.
- Mitchell, A. and Voon, T. (2011) Implications of the World Trade Organization in combating non-communicable diseases. *Public Health*, **125**, 832–839.
- Mitchell, A. and Studdert, D. M. (2012) Plain packaging of tobacco products in Australia: a novel regulation faces legal challenge. *JAMA*, **307**, 261–262.
- Moodie, C., Stead, M., Bauld, L., McNeill, A., Angus, K., Hinds, K. *et al.* (2011). Plain tobacco packaging: A systematic review. Public Health Research Consortium, Stirling, Scotland.
- PMI. (2011) Notice of Arbitration, Australia/Hong Kong Agreement for the promotion and protection of investments. Philip Morris Asia Limited, Hong Kong.
- Sandford, R. (1994) International Environmental Treaty Secretariats: stage-hands or Actors? In Bergesen, H. O. and Parmann, G. (eds), *Green Globe Yearbook of International Co-operation on Environment and Development*. Oxford University Press, Oxford, UK, pp. 17–29.
- Schachter, O. (1994) United Nations Law. *American Journal of International Law*, **88**, 1–23.
- TBT. (2011). G/TBT/M/53 – Minutes to the meeting of 24–25 March 2011 – Committee on Technical Barriers to Trade. WTO, Geneva.
- Tienhaara, K. (2011) Regulatory chill and the threat of arbitration: a view from political science. In Brown, C. and Miles, K. (eds), *Evolution in Investment Treaty Law and Arbitration*. Cambridge University Press, Cambridge.
- Ukraine, M. o. H. o. (2009). Tobacco Control in Ukraine: the national report. Ministry of Health of Ukraine, Geneva, Switzerland.
- USTR. (2012) USTR holding off on tabling TPP tobacco proposal at Auckland Round. Inside U.S. Trade, Washington, DC.
- Voon, T. and Mitchell, A. (2011) Time to quit? Assessing international investment claims against plain tobacco packaging in Australia. *Journal of International Economic Law*, **14**, 515–552.
- Wallace, D. (2011) Philip Morris Asia initiates legal action against the Australian government over plain packaging. www.pmi.com/eng/media_center/press_releases/pages/PM_Asia_plain_packaging.aspx (last accessed 1 August 2011).
- WHO. (2005) WHO Framework Convention on Tobacco Control. WHO, Geneva.
- WHO. (2006) WHO Framework Convention on Tobacco Control: Rules of procedure of the Conference of the Parties. HV5726. WHO, Geneva.
- WHO. (2012a). FCTC/COP/5/18 Cooperation with the World Trade Organization on trade-related tobacco-control issues. WHO Secretariat, Seoul, Korea.
- WHO. (2012b). Guidelines for implementation of Article 11 of the WHO Framework Convention on Tobacco Control (Packaging and labelling of tobacco products), para. 46. WHO, Geneva.
- WHO. (2012c) Workshop on trade-related issues relevant to implementation of the WHO FCTC: outcome document. WHO, Geneva.
- WTO. (2012a). WT/DS434/1. Australia – Certain measures concerning trademarks and other plain packaging requirements applicable to tobacco products and packaging – Request for consultations by the Ukraine. WTO, Geneva.

WTO. (2012b) WT/DS435/1. Australia – Certain measures concerning trademarks and other plain packaging requirements applicable to tobacco products and packaging – Request for consultations by Honduras. WTO, Geneva.

Zangl, B., Helmedach, A. *et al.* (2012) Between law and politics: explaining international dispute settlement behavior. *European Journal of International Relations*, **18**, 369–401.