

Interface of health and trade: a view point from health diplomacy

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Traditionally, health diplomacy has been focused on achieving policy dialogue and consensus between states on important matters affecting and governing health. With the growing expansion of social, economic and political determinants of health, health diplomacy becomes equally focused on dialogue and coherence between different sectors. This makes the multisectoral dimension as an integral and equally important element of multilateral negotiations for health.

Another recent phenomenon is the legal nature of global health instruments aimed at and resulting from some of the international negotiations for health. The adoption of the WHO's first global treaty, the WHO Framework Convention on Tobacco Control (FCTC),¹ and more recently its first Protocol,² which is a new international treaty in its own right, have had a profound impact on strengthening the legal dimension of international health cooperation.

The above developments expand and strengthen the level and nature of interaction between health and the other key sectors. One such area is the interface between health and trade, a junction of growing complexity and interaction at both national and international levels.

This paper aims to demonstrate challenges and dynamics in the area of health and trade diplomacy, through a particular focus on tobacco control area where the recently adopted legal instruments marked significant changes and opportunities for intersectoral coherence and protecting health. Although the WHO FCTC was specifically negotiated to strengthen the action against tobacco, it is generally recognised that it shares broader governance space with other international agreements, including trade, human rights, customs and environment and that the tobacco control-trade policy nexus is not isolated, but rather part of a broader shift as countries consider the challenges of global governance generally.³

Summary box

- ▶ The paper analyses the growing and complex interface of health and trade from a viewpoint of health diplomacy and international legal instruments.
- ▶ The WHO Framework Convention on Tobacco Control (FCTC), WHO's first global treaty, had profoundly influenced and enriched trade and health diplomacy through the legal strength it brought, along with the International Health Regulations (2005), to public health.
- ▶ The intensifying interaction of governments' legal obligations in trade and health triggers the need for and evidence of stronger policy coordination between the two sides.
- ▶ The negotiations and adoption of the WHO FCTC (and its first Protocol) represented unprecedented health diplomacy resulting in a highest level of international agreement for health; as the first health treaty experiences of the new century, they also represented a new approach in addressing the negative effects of globalisation and trade liberalisation on health.
- ▶ Multisectoral diplomacy and trade and health diplomacy in particular are at even higher demand when countries proceed to ratify and implement the agreed obligations on health in the complex environment of multiple legal frameworks and often competing agendas of governments.

From the viewpoint of health diplomacy, one apparent challenge in the intersection of health and trade is policy coordination between respective government sectors often pursuing different objectives and priorities; the need for such coordination and coherence has also been acknowledged at the international level.⁴ Another challenge is linked to the fact that while flexibilities to protect public health were incorporated in the World Trade Organisation (WTO) regime, the growing net of regional and bilateral trade and investment agreements (TIAs) weakens this determination and creates new obstacles; in addition, the strong corporate interests and 'power asymmetries' in how TIAs are negotiated and implemented, particularly the negotiating power imbalances between



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corporations and small states⁵ represent a notable challenge. In the case of implementing the WHO FCTC, challenges requiring protection of public health manifested in several instances, such as, for example, in the case of disputes initiated by several states in WTO questioning Australia's plain packaging legislation⁶ or in the case of legal claims made by Philip Morris against Australia and Uruguay under respective bilateral investment agreements.⁷

In addition to WTO law and WHO FCTC, there have been other normative developments,⁸ in a form of 'softer' international instruments, aimed at policy coherence at the trade and health interface and promoting health, such as the WTO's 2001 Doha Declaration on the TRIPS agreement and public health, reaffirming and prioritising the agreed flexibilities to protect public health⁹ and the 2006 World Health Assembly Resolution on international trade and health⁴ addressing the issues of policy coherence in this intersection. In the meantime, the entry into force and implementation of the FCTC, as WHO's first global treaty, may have substantially changed the dynamics in the trade and health interface through the legal strength it brought, along with the International Health Regulations (2005), to public health.

In our view, there are several layers by which the intersection of health and trade can be seen in light of the first treaty experience in modern global health.

First, the WHO FCTC itself was developed in response to the growing influence of cross-border factors on health in the era of globalisation, including trade liberalisation, foreign direct investments, transnational marketing and illicit trade. It is widely seen that the Convention was the global response to the globalisation of the tobacco epidemic.

Second, the WHO FCTC elevated major public health action to the level of an international treaty. The interface of trade and health is therefore now regulated by legally binding obligations from both health and trade perspectives and not only from the trade perspective as it was before the adoption of the FCTC.

Third, there are fundamental factors suggesting that the two legal frameworks could be implemented without contradiction. It is important to note that the WHO FCTC expresses the determination of countries to give priority to their right to protect health. In turn, the WTO rules contain provisions in support of public health, such as exceptions and flexibilities to implement measures necessary to protect health (as long as such measures do not constitute 'arbitrary or unjustifiable discrimination between countries...or a disguised restriction on international trade').¹⁰ In addition, those rules articulate the need to protect intellectual property rights 'in a manner conducive to social and economic welfare, and to a balance of rights and obligations', with a particular reference to public health.¹¹ In summary, and also as stated in the United Nations Secretary General's report to Economic and Social Council,¹² the WTO agreements and implementation of the WHO FCTC are

not incompatible as long as the FCTC is implemented in a non-discriminatory fashion and for reasons of public health.

Fourth, the intensifying interaction of legal obligations in trade and health further underlined the need for policy coordination on both sides. Policymaking on health and trade is led by different ministries, generally with little interaction and even with little mutual awareness on relevant concerns, instruments and obligations; this has been manifested not only domestically but increasingly also in various international settings where the trade and health interaction takes place. Interestingly, the recent legal disputes launched in WTO and other international and national settings against governments introducing strong tobacco control measures such as plain packaging prompted increased dialogue and coordination between the two sectors.¹³ There is evidence of an increasing number of countries' trade representatives continuing the trend of the general support for tobacco control in meetings about international trade policy, including in WTO's Technical Barriers to Trade committee, using the language of trade policy, employing scientific evidence and citing the FCTC.³ However, such multisectoral diplomacy needs to improve also at the day-to-day level to ensure coherent implementation of countries' international obligations in both health and trade. It has also been argued that as trade policymaking is often embedded on larger political context, even strong health ministries, armed with good information and engaged in interministerial dialogue on trade, cannot guarantee a particular health-supportive outcome at international trade negotiations.¹⁴

Finally, the treaty approach had recently succeeded also in a related domain of international trade concerns with strong health implications, namely, illicit trade in tobacco products. Parties to the WHO FCTC negotiated, and adopted in 2012, the Protocol to Eliminate Illicit Trade in Tobacco Products – the first protocol to the FCTC and a new international treaty in its own right. The Protocol is yet another milestone in multi-lateral and multisectoral diplomacy for health, with the potential of substantial gains also beyond public health in areas such as trade, criminal justice, security and revenues.

Overall, in terms of health diplomacy at the intersection of health and trade, the unique contribution of the first treaty experience in modern public health is at least threefold:

- ▶ The development and adoption of the WHO FCTC and its first Protocol represented unprecedented health diplomacy resulting in a highest level of international agreement for health, with the participation of and consensus from a variety of non-health sectors, including trade.
- ▶ The Convention and its subsequent Protocol represent a new model for addressing the negative effects of globalisation and trade liberalisation on health, through negotiating and adopting legally binding

global instruments to protect and promote health. The reality, nevertheless, is more complex; applying legal models will depend on political will and multilateral climate which might not be the same as when the WHO FCTC and International Health Regulations (2005), the first global health legal instruments of the 21st century, were negotiated. Further, prospects of costly legal claims such as those brought forward by the tobacco industry in recent years^{7,8} might deter the will of smaller states to take legal obligations in other health areas. The coming years will show whether countries apply legal approach in areas such as, for example, alcohol, processed foods or antimicrobial resistance (AMR).

- ▶ One of the greatest achievements of multilateral health diplomacy—the negotiations and adoption of WHO's first international treaty, and its Protocol, now raises the need for extensive multisectoral diplomacy to support the implementation (in the case of the Protocol the ratifications and entry into force) of agreed obligations, in the complex environment of multiple legal frameworks and often competing agendas of governments. The interface of health and trade will be one of the key areas for such diplomacy.

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