

Formation and Development of International Legal Approaches to Regulating the Circulation of Tobacco Products

Rayimova Munisa Nozim kizi

Lecturer at Tashkent State University of Law (TSUL)

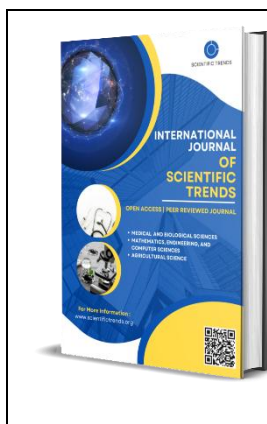
Graduate of the University of Sydney

Independent Researcher of TSUL

Sunnatillaeva Sarvinoz Izzatullo qizi

Lecturer at Tashkent State University of Law (TSUL)

Independent Researcher of TSUL



Abstract

Despite being subject to some of the most stringent international regulations of any consumer product, tobacco nonetheless circulates with relative freedom across borders, raising some very basic questions about the efficacy and coherence of international legal regulation. Despite being widely regarded as the leading cause of preventable death, international law still falters where the need to protect public health has to be weighed against trade liberalization and intellectual property norms .

Keywords: international law, namely international treaties, agreements, and authoritative sources of interpretation of the said international rules

Introduction

International law on tobacco products' circulation demonstrates features of normative fragmentation. On the one hand, global health instruments-most notably, the WHO Framework Convention on Tobacco Control-impose binding obligations on states to restrict, for the protection of public health, tobacco advertising, packaging, and distribution¹.

At the same time, the regimes of international trade and intellectual property within the context of the World Trade Organization operate with a continued emphasis on market access, non-discrimination, and trademark protection, especially in the context of the GATT and TRIPS agreements².

The coexistence of these different legal regimes has created a situation of legal uncertainty for states desiring to enact strong tobacco control measures. As scholars point out, the lack of a clear

¹ Allyn Taylor and Douglas Bettcher, 'WHO Framework Convention on Tobacco Control' 2000

² Tania Voon, Andrew Mitchell and Jonathan Munro, Public Health and WTO Law, 2011

normative hierarchy between public health obligations and trade commitments has created regulatory conflicts and divergent interpretations in international dispute settlement³.

Against this background, this article addresses the following research question:

To what extent have global responses to regulating the flow of tobacco through international law adapted to balance health goals with global trade regulations and efforts to secure proper intellectual property rights? This article advances the hypothesis that:

Despite the evolution of the international legal framework for tobacco control, which has increasingly recognized the consideration of public health as a legitimate overriding interest, the regulation of the circulation of tobacco products remains disintegrated in the context of the structural predominance of the principles of trade and intellectual property.

It is submitted that although the WHO FCTC is a major normative evolution in the realm of international health law, its ability to regulate the movement of tobacco products is impacted by the structural tenets within the general framework of the World Trade Organization⁴.

II. Methodology

For instance, the article applies a qualitative doctrinal methodology of research together with certain aspects of comparative and systemic analysis to investigate the formation of international approaches to the regulation of the circulation of tobacco.

Firstly, the research performs a doctrinal analysis of the main sources of international law, namely international treaties, agreements, and authoritative sources of interpretation of the said international rules. Of great interest for the subject matter of the research in the present thesis is the relevant normative framework introduced by the WHO Framework Convention on Tobacco Control, which represents the main binding source of law in the international regulation of the tobacco industry⁵. This analysis highlights the legal requirements specified for states regarding the regulation of tobacco advertising, packaging, and distribution and seeks to investigate to what level these requirements contribute to the spread of tobacco products to different countries.

Secondly, the article examines the rules and principles pertaining to international trade and intellectual property law within the auspices of the World Trade Organization, including the General Agreement on Tariffs and Trade (GATT) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). This aspect of the analysis will discuss how disciplines in international trade relate with and limit the regulatory freedom of countries in the uptake and adoption of measures for tobacco control⁶.

In third place, the approach uses a case-based analytical method through an examination of international dispute settlement proceedings on tobacco regulation, with special emphasis on the conflict of tobacco plain packing, as a way of analyzing how international adjudication organs interpret and balance the conflicting public health and trading concerns. This is aimed at determining emerging patterns of legal thoughts on the matter⁷.

³ Benn McGrady, *Trade and Public Health*, 2011; Tania Voon, 'Tobacco Plain Packaging and WTO Law' 2015

⁴ Lawrence Gostin, *Global Health Law*, 2014; Benn McGrady, *Trade and Public Health*, 2017; Tania Voon, 'Tobacco Plain Packaging and WTO Law' 2015

⁵ Allyn Taylor and Douglas Bettcher, 'WHO Framework Convention on Tobacco Control' 2000

⁶ Tania Voon, Andrew Mitchell and Jonathan Munro, *Public Health and WTO Law* 2011

⁷ Benn McGrady, *Trade and Public Health* 2017; Tania Voon, 'Tobacco Plain Packaging and WTO Law' 2015

III. Results

Analyzing this issue from a legal perspective, this study has found four major points regarding the formation of an international legal standard in regulating the spread of cigarettes.

1. Increasing awareness of the public health status of tobacco under public international law

This analysis clearly shows that the normative transformation of the stance of the international community of states from considering tobacco as any other commodity that could change hands, to acknowledging it as a special threat that mandates special treatment, is most apparent in the implementation of the WHO Framework Convention on Tobacco Control. This document sets clear guidelines for the reduction of both demand for and supply of tobacco.

The FCTC has played a role in the normalization of tobacco control as a proper manifestation of state regulatory power based upon health protection grounds. The results show that international health law has come to position tobacco control more as a responsibility of states than a question of discretion elsewhere⁸.

2. The prevalence of trade and intellectual property norms in regulating circulation

Despite such a normative progress, findings indicate that the diffusion of tobacco products is largely influenced by global trade practices and intellectual properties. Much to that effect, legal tools functioning under the World Trade Organization, such as GATT and TRIPS, continue to influence the possibility of implementing domestic policies on tobacco in national jurisdictions.

The analysis demonstrates that the tobacco health obligation is not automatically considered to have priority over the trade commitment. Rather, measures correlated with health are often examined under the concepts of non-discrimination, necessity, or proportionality. This means that health is made subject to economic disciplines⁹.

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4. The emergence of interpretative accommodation over normative integration

These results also indicate that a reactive approach through interpretive accommodation is visible under international law regarding the interplay of health and trade. This is because judges dealing with tobacco-related cases have started recognizing the goals of health as a legitimate factor while supporting the central role of the disciplines of trade.

It is a reflection of a balancing approach, rather than a radical shift in the priority of the law. Although public health arguments are not longer rejected per se, they operate within the

⁸ Lawrence Gostin, *Global Health Law*, 2014; Allyn Taylor and Douglas Bettcher, 'WHO Framework Convention on Tobacco Control' 2000

⁹ Tania Voon, Andrew Mitchell and Jonathan Munro, *Public Health and WTO Law* 2011

¹⁰ Benn McGrady, *Trade and Public Health* 2011

boundaries of the interpretative framework of the law of trade and intellectual property law, thus being limited in its transformative capability¹¹.

Interim conclusion

Overall, the findings suggest that while the international legal response to the regulation of tobacco has come to include a greater recognition of health interests, the international movement and dissemination of tobacco is nonetheless informed by a complex legal framework, one that is emblematic of the structural tensions in international law in which health is increasingly incorporated but nevertheless subordinate to the imperatives of economic liberalization.

IV. Discussion

This result verifies the primary hypothesis that whereas international legal methodologies in balancing trade and controlling tobacco product distribution ever increasingly acknowledge public health concerns to be a legitimate and thus imperative regulatory goal in this context, this phenomenon has not led to a consistent and hierarchical system to override potential contradictions between these norms and trade and property rights agreements.

The adoption of the Framework Convention of Tobacco Control is one of the major normative changes that have occurred in international law, moving away from approaches that were previously soft in nature. According to Gostin, the Framework Convention of Tobacco Control has brought tobacco control from the realm of politics to that of law¹². However, the results clearly indicate that this transformation has not translated to the promotion of health norms above alternative economic systems.

In actuality, however, public health interests are habitually scrutinized through pre-existing trade law discourse, namely through the lens of necessity and proportionality. This serves to support McGrady's argument that health norms, including the FCTC, are better understood as interpretative devices within trade law adjudication than as free-standing sources of decision-making that have the potential to transform the legal order¹³.

Fragmentation and the limits of systemic integration

Thus, the persistence of normative fragmentation is a reflection of larger structural features of international law. While there may be some scope to ensure a degree of balancing between health laws and international trade under the Vienna Convention on the Law of Treaties, a cursory understanding of the analysis provided in the present discussion reveals that such an integration is largely minimal in scope¹⁴.

Trade adjudication and constrained regulatory autonomy

An exploration of trade-related disputes involving tobacco policies also serves to further evidence the limited nature of the autonomous regulation capacities of the state. While international adjudicatory organs, operating under the aegis of the World Trade Organization, increasingly recognize the legitimacy of public health objectives, they also reaffirm the centrality of trade policies.

¹¹ Benn McGrady, *Trade and Public Health* 2017; Tania Voon, 'Tobacco Plain Packaging and WTO Law' 2015

¹² Lawrence Gostin, *Global Health Law* 2014

¹³ Benn McGrady, *Trade and Public Health* 2011

¹⁴ Benn McGrady, *Trade and Public Health* 2017

As Voon points out, “Tobacco control measures are not prohibited under the WTO regime, but the circumstances in which these measures are legal are limited to the observance of various principles like non-discrimination and principles of necessity”—Tania Voon, ‘Tobacco Plain Packaging and WTO Law’ 2015. This enables only an ambiguous form of transformation, where economic norms prevail over other regulations.

Tobacco regulation as a test case for international legal coherence

Beyond the factual background related to tobacco, the study reveals that in a general way, the regulation of tobacco serves as a test case regarding the capacity of international law in meeting the requirements balancing different sets of normative requirements.

The lack of a distinct hierarchy between health and trade requirements points at a systemic incapacity in dealing with cross-cutting issues.

In this context, tobacco regulation illustrates a form of regulatory accommodation rather than normative integration. To a certain degree, public health is now being recognized, yet not conclusively prioritized, and so the resulting legal regime is one balancing but not truly addressing the issue at hand. Of obvious relevance to the development and direction one might foresee international law to evolve in a number of areas is the intersection between human health, environmental regulation, and economic liberalization.

Implications for the development of international tobacco regulation

The discussion highlights the need for greater normative clarity in the international regulation of tobacco circulation. Without explicit mechanisms to prioritise public health objectives, states remain vulnerable to legal challenges that may deter robust regulatory action. Strengthening the interpretative authority of international health instruments, or clarifying their relationship with trade and intellectual property law, may therefore be necessary to enhance the effectiveness of tobacco control at the global level.

V. Conclusion and Recommendations

The foregoing article has sought to examine the emergence and the growth of the international legal framework on the control of the movement of tobacco products, with particular reference being made to the interplay of the health regime of public international law and the international trade law regime/the intellectual property regime. Preliminarily, the discussion has sought to confirm the view of the inter/linkage of the evolution of public international law on the issue of tobacco control. Notably, the discussion has highlighted the emergence of the WHO Framework Convention on Tobacco Control as the landmark on tobacco control.

Nevertheless, what these findings also illustrate is that, as a recognition, such a framework does not yet amount to anything like a cohesive, hierarchical structure capable of fully mediating public health interest with other, equally compelling economic norms. Indeed, as noted, despite the legal obligation to fulfill its commitments under the FCTC, the free circulation of tobacco products remains subsumed under a fragmented legal structure wherein economic disciplines are dominant, albeit to an increasing degree, public health interests are also being legislatively acknowledged, albeit while being mediated by trade constraints, particularly through the aegis of the WTO¹⁵.

¹⁵ Lawrence Gostin, *Global Health Law 2014*; Benn McGrady, *Trade and Public Health 2017*

Thus, the fact that these tensions have persisted to a certain degree speaks to the overall challenges pertaining to fragmentation in international law. The regulation of tobacco is an indicative measure for the limits to effective integration and reveals a system of governance engaged in the management of norm conflicts instead of their resolution. Consequently, states aiming to design and engage efficient tobacco regulation policies have to do so in a context marked by a situation of legislative uncertainty.

Recommendations

Based on these findings and conclusions, a range of recommendations in both a normative sense and a policy-oriented sense can be provided:

Firstly, more weight must be placed on international health instruments, and particularly the WHO FCTC, in procedures for resolving disputes concerning international trade and IP laws. Acceptance and recognition of the FCTC could promote greater clarity and coherence in procedures for testing the validity of tobacco regulation¹⁶.

States should also spell out their FCTC commitments in the trade and investment policy-making process. This would lock in consistency of regulation and reduce the possibility of judicially created pathogens through conflicting international commitments, while at the same time reiterating the pre-eminence of public health objectives in domestic regulation¹⁷.

Thirdly, as far as future evolution in international law is concerned, the focus ought not to be just on the accommodative aspect of dealing with cases individually; rather, normative priority ought to be established in public health issues where inherently harmful products are concerned. Tobacco control provides an appealing model as far as the balancing of economic freedoms and public health protections in international law is concerned¹⁸.

Finally, additional scholarly research will be necessary to assess the possibilities for extending the model of tobacco regulation as a vehicle for dealing with similar normative contradictions in other policy areas, such as alcohol policy, food policy related to unhealthy food products, and environmental protection policy.

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¹⁶ Benn McGrady, Trade and Public Health 2011

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