3. EXPLORING THE PURSUIT OF EFFECTIVE PUBLIC HEALTH POLICIES THROUGH A TRADE LENS
1. The Public Health Exception in International Trade Law
2. The WTO Tobacco Plain Packaging Dispute: Lessons Learnt for Health Policy Making
3. Health Policy at the Multilateral Level: The Need for Policy Coherence
THE MULTILATERAL TRADING SYSTEM (THE WTO)

WORLD TRADE ORGANISATION

- GATT Article II
- MFN
- National treatment
- Prohibition on QRs

Nicole D. Foster, 30 Jan 2020
TACKLING HEALTH CONCERNS WITHIN THE WTO

- Article XX, General Agreement on Tariffs and Trade 1994 / Article XIV General Agreement on Trade in Services
- Article 2, Agreement on Technical Barriers to Trade
- Article 2, Agreement on Sanitary and Phytosanitary Measures
- TRIPS Agreement
- Dispute Settlement Understanding
GATT ARTICLE XX / GATS ARTICLE XIV

• Allows for otherwise WTO-inconsistent measures provided they are:
  - necessary to protect human, animal or plant life or health;
  - are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade.

Nicole D. Foster, 30 Jan 2020
IN THE SPOTLIGHT: TBT AGREEMENT

- Preamble recognises Members’ right to implement measures to protect health at the level they consider appropriate provided:
  - they are not applied in a manner that amounts to arbitrary or unjustifiable discrimination or a disguised restriction on international trade.

  i.e. is the measure rationally connected to the objective? Is it justifiable in light of risk sought to be mitigated?

Nicole D. Foster, 30 Jan 2020
IN THE SPOTLIGHT: TBT AGREEMENT

- Technical regulations **must not be more trade-restrictive than necessary to fulfil a legitimate objective**, taking account of the risks non-fulfilment would create.

- Legitimate objectives specifically mentioned in TBT Agreement Art. 2 include “**protection of human health or safety**”.

Nicole D. Foster, 30 Jan 2020
IN THE SPOTLIGHT: TBT AGREEMENT

• There is a rebuttable presumption that a technical regulation does not create an unnecessary obstacle to international trade if it:
  ▪ falls within the scope of one of the explicitly mentioned legitimate objectives; and
  ▪ is in accordance with relevant international standards.

Nicole D. Foster, 30 Jan 2020
IN THE SPOTLIGHT: TBT AGREEMENT

• TBT Annex 3 Code of Best Practice:
  ▪ International standards shall be used as a basis for standard development where they exist or their completion is imminent;
  
BUT
  ▪ Expressly preserves Member States’ right/ability to take action not based on an international standard where said international standard would be ineffective or inappropriate.

Nicole D. Foster, 30 Jan 2020
THE WTO TOBACCO PLAIN PACKAGING DISPUTE: LESSONS LEARNT

Nicole D. Foster, 30 Jan 2020

Australia wins landmark WTO ruling on plain tobacco packaging

GENEVA (Reuters) - Australia triumphed on Thursday in a major trade dispute over its pioneering “plain” tobacco packaging law, with World Trade Organization judges rejecting a complaint brought by Cuba, Indonesia, Honduras and Dominican Republic.
WTO TOBACCO PLAIN PACKAGING DISPUTE: HIGHLIGHTS

- Noted that ‘protection of human health or safety’ is one of the ‘legitimate objectives’ explicitly identified in TBT Article 2.2.

- Recalled Appellate Body’s previous ruling in EC-Asbestos that the preservation of human life and health through the elimination or reduction of well-known and life-threatening health risks (asbestos fibres) was a value “both vital and important to the highest degree.”

Nicole D. Foster, 30 Jan 2020
WTO PLAIN PACKAGING CASE: HIGHLIGHTS

- Confirmed that determining whether or not a technical regulation is ‘more trade-restrictive than necessary’ under the TBT Agreement Art. 2.2. involves weighing and balancing, *inter alia*:
  - the challenged measure’s degree of contribution to the legitimate objective at issue;
  - the trade-restrictiveness of the challenged measure; and
  - the nature of the risks at issue as well as the gravity of the consequences that would arising from non-fulfilment of the objective pursued by the Member through the measure.

Nicole D. Foster, 30 Jan 2020
WTO PLAIN PACKAGING CASE: HIGHLIGHTS

- Further confirmed that for an alternative measure to ‘trump’ the challenged (public health) measure, it would have to:
  - be less trade-restrictive than the challenged measure;
  - make “an equivalent contribution” to the legitimate objective in question, taking account of the risk non-fulfilment would create; and
  - be ‘reasonably available’ to the Member against whom the claim was being brought.

Nicole D. Foster, 30 Jan 2020
WTO PLAIN PACKAGING CASE: HIGHLIGHTS

- Significance of the fact that Australia’s TPP measures were part of a comprehensive suite of tobacco control measures such as enlarged graphic health warnings, public education etc.

- Accepted that Australia’s TPP measures did contribute to Australia’s objective of improving public health by reducing use of, and exposure to, tobacco products even though that there were some limitations to the literature that Australia had relied upon.

Nicole D. Foster, 30 Jan 2020
WTO PLAIN PACKAGING CASE: HIGHLIGHTS

• Strong reliance on WHO/FCTC Secretariat’s evidence and analysis (even though FTCTC Guidelines were not considered to be an international standard for the purposes of Article 2.5 TBT Agreement).
  - Considered “highly relevant” the recognition in a number of sources of the comprehensive nature of tobacco control in particular, including the numerous iterations to this effect within the FCTC and its supporting guidelines for implementation.

Nicole D. Foster, 30 Jan 2020
LESSONS LEARNT / UTILIZING EXISTING WTO POLICY SPACE

- Clearly defined public policy objective
  - Evidence needed of public health problem
  - ‘Framing’ is important (concrete & measurable)
- Contribution of measure to the public health objective
  - Evidence needed
  - Multi-pronged approach is helpful
- No reasonably available less trade-restrictive alternatives
  - Alternative must be ‘reasonably available’ and equivalent in effect
  - Where there is a multi-pronged strategy one element can’t be substituted for another
- Non-discriminatory
  - Rational connection between the public health objective being pursued
  - Favourable treatment must be based exclusively on a legitimate regulatory distinction.
- Due process
  - Robust and transparent consultative processes

Nicole D. Foster, 30 Jan 2020
TRADE, HEALTH AND THE NEED FOR POLICY COHERENCE: CODEX ALIMENTARIUS

• Codex Alimentarius
  ▪ Joint body of FAO and WHO
  ▪ Its standards would typically fall within the scope of Article 2.5 of TBT Agreement i.e. presumed to be WTO-consistent.
    ▪ this does \textit{not} mean that states can only act when an international standard exists or that they have to await the outcome of negotiations on a given proposed international standard.
    ▪ Moreover, even if an international standard exists, Member States are not precluded from going above this standard (their action being supported by evidence).
  ▪ Current work on-going on the issue of front-of-pack labelling.

Nicole D. Foster, 30 Jan 2020
TRADE, HEALTH AND THE NEED FOR POLICY COHERENCE: CODEX ALIMENTARIUS

- Current discussions within CODEX are in their infancy and will take several years to produce an outcome (if at all).
- The outcome of these discussions will necessarily be a compromise (minimum) position.
- The experiences and evidence gathered from implementation of FOPL schemes such as the proposed regional standard could make a useful contribution to the CODEX discussions i.e the two processes do not have to contradict/undermine each other.

Nicole D. Foster, 30 Jan 2020
TRADE, HEALTH AND THE NEED FOR POLICY COHERENCE: WHO/PAHO, UN, WIPO

- PAHO/WHO
- UNCTAD
- WIPO
- United Nations human rights processes
  - All CARICOM countries are not State Parties to the International Covenant on Economic, Social and Cultural Rights (ICESCR).
  - **BUT**
    - All of them have ratified the Convention on the Rights of the Child (CRC).

Nicole D. Foster, 30 Jan 2020
TRADE, HEALTH AND THE NEED FOR POLICY COHERENCE: CONSTRAINTS

• Limited resources (financial and technical)
  ▪ Potential ‘regulatory chill’ factor when confronted by threat of litigation etc.

• Inadequate coordination and information-sharing between and among Ministries and overseas Missions/Embassies.

• Limited presence within some negotiations e.g. WTO
TRADE, HEALTH AND THE NEED FOR POLICY COHERENCE: THE WAY FORWARD

- Better coordination and sharing of information within and between Ministries.
- Active participation and engagement on multilateral front, across multiple fora (leverage Missions etc)
  - TRIPS and Public Health (Barbados Drug Service worked closely with Ministry responsible for intellectual property to monitor and input into the negotiations through the Barbados Mission)
  - More diversified delegations/input for negotiations

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TRADE, HEALTH AND THE NEED FOR POLICY COHERENCE: THE WAY FORWARD

- Strategic partnerships with like-minded states (e.g. FOPL: Chile and Uruguay are obvious potential allies)
- Leverage skill set/knowledge of international/regional partners (e.g. PAHO/WHO, Bloomberg Philanthropies) as counter to ‘regulatory chill’
  - Jamaica plain packaging example (Uruguay had a similar experience)
  - Plain packaging dispute (WHO/FCTC Secretariat’s role)
  - CARICOM/Bloomberg Philanthropies/GHAI collaboration on childhood obesity.

Nicole D. Foster, 30 Jan 2020
CONCLUDING COMMENTS

• While WTO Member States do not have a ‘blank cheque’ when it comes to formulating and implementing public health policies, WTO rules are not a barrier to implementing bona fide, effective public health policies.

• What is required is the political will to take the necessary action coupled with carefully drafted, evidence-based policies.

Nicole D. Foster, 30 Jan 2020
THANK YOU!!!

THE END