

Missing in Action: The Global Strategy to Reduce the Harmful Use of Alcohol and the WTO

Paula O'BRIEN* 

This article addresses the question of how the World Health Organization (WHO) Global Strategy to Reduce the Harmful Use of Alcohol (Global Strategy) and its Framework Convention on Tobacco Control (FCTC) have been used in the context of discussions about alcohol and tobacco measures, respectively, in the World Trade Organization (WTO) Committee on Technical Barriers to Trade. The article finds considerable differences not only in the extent to which the FCTC is used compared to the Global Strategy, but also in the ways in which the two global health instruments have been used in the WTO context. The article proffers three key reasons for these differences: the legal status of the instrument; the content of the instrument in terms of whether it contains guidance as to the use of detailed, evidence-based measures; and the role and legitimacy that the instrument accords to the relevant industry interests. The article considers how the insights from the research can inform the developments in global governance of alcohol that are underway in WHO policy. It also positions its findings in terms of the wider international law debates about hard law versus soft law, and whether different types of international regulatory instruments and the legal status of these instruments impact their effectiveness in supporting domestic public health measures.

I. INTRODUCTION

In February 2020, a grave concern with “the ‘slow-moving disaster’ of harmful use of alcohol”¹ led the Executive Board of the World Health Organization (WHO) to decide to develop an “action plan”² to implement the WHO’s *Global Strategy to Reduce the Harmful Use of Alcohol (Global Strategy)*.³ This new development in the global governance of alcohol is a positive, given the considerable global burden of harm associated with the consumption of alcohol, especially for low- and middle-income countries.⁴ But “an action plan” falls far short of the aspiration for a

* Senior Lecturer and Director of the Health Law and Ethics Network, Melbourne Law School, University of Melbourne, Australia; email: obrienpl@unimelb.edu.au. I am grateful to the anonymous referee for very helpful comments. I acknowledge the excellent research assistance of Aviva Kidd and Eliza Waters.

¹ D Jernigan, *Global Developments in Alcohol Policies: Progress in Implementation of the WHO Global Strategy to Reduce the Harmful Use of Alcohol Since 2010* (Background Paper Developed for the WHO Forum on Alcohol, Drugs and Addictive Behaviours, 26–28 June 2017) vi.

² WHO, Executive Board, “Accelerating Action to Reduce the Harmful Use of Alcohol” (7 February 2020) EB146(14) (WHO Decision of the Executive Board).

³ WHO, *Global Strategy to Reduce the Harmful Use of Alcohol (2010) (Global Strategy)*.

⁴ WHO, *WHO Global Status Report on Alcohol and Health 2018* (2018) pp 63, 78, 85.

treaty on alcohol control,⁵ modelled on the WHO Framework Convention on Tobacco Control (FCTC).⁶

Since coming into force in 2005, the FCTC has been lauded for its multifaceted contribution to global tobacco control efforts.⁷ One of the perceived benefits of the conclusion of a similar treaty on alcohol control (often referred to as a “framework convention on alcohol control” (FCAC)) would be its ability to prevent future challenges to progressive public health measures on alcohol under international trade and investment law.⁸ Although there have been no such challenges in respect of alcohol to date,⁹ the experience with multiple claims against tobacco control measures under international economic law is salutary,¹⁰ and concern exists that progress on alcohol controls may be met with similar legal claims.¹¹

The FCTC has been used extensively in litigation in domestic courts, both as a “shield” to defend government’s progressive tobacco control measures and as a “sword” by civil society organisations to attack the adequacy of existing tobacco measures to protect health.¹² At the international level, the recent World Trade Organization (WTO) jurisprudence shows that the FCTC has been helpful to the defence of progressive tobacco control measures.¹³ However, the utility of the FCTC does not lie in some capacity to override WTO rules and block all international economic law challenges. Rather, in recent WTO reports, the FCTC was looked to as a source of authoritative evidence about the “tobacco epidemic”¹⁴ and the effectiveness of selected public

⁵ See, eg, S Casswell and T Thamarangsi, “Reducing Harm from Alcohol: Call to Action” (2009) 373 *Lancet* 2247.

⁶ WHO Framework Convention on Tobacco Control (adopted 21 May 2003, entered into force 27 February 2005) 2302 UNTS 166 (FCTC).

⁷ See, eg, S Zhou and J Liberman, “The Global Tobacco Epidemic and the WHO Framework Convention on Tobacco Control – The Contributions of the World Health Organization’s First Convention to Global Health Law and Governance” in GL Burci and B Toebe (eds), *Research Handbook on Global Health Law* (Cheltenham, Edward Elgar 2018) 340.

⁸ See B Baumberg and P Anderson, “Trade and Health: How World Trade Organization (WTO) Law Affects Alcohol and Public Health” (2008) 103 *Addiction* 1952, 1956.

⁹ See P O’Brien and AD Mitchell, “On the Bottle: Health Information, Alcohol Labelling and the WTO Technical Barriers to Trade Agreement” (2018) 18(1) *QUT Law Review* 124; T Voon and AD Mitchell, “International Trade Law” in T Voon, AD Mitchell and J Liberman (eds), *Regulating Tobacco, Alcohol and Unhealthy Foods: The Legal Issues* (Abingdon, Routledge 2014) 86, 93.

¹⁰ See B McGrady, “Appellate Body Report, United States – *Clove Cigarettes* for Non-Communicable Disease” (2012) 3 *European Journal of Risk Regulation* 251; T Voon, “Third Strike: The WTO Panel Reports Upholding Australia’s Tobacco Plain Packaging Scheme” (2019) 20 *Journal of World Investment and Trade* 146; T Voon, “Philip Morris v Uruguay: Implications for Public Health” (2017) 18 *Journal of World Investment and Trade* 320.

¹¹ P O’Brien et al, “Commentary on ‘Communicating Measures about Drinking’: Using the ‘Big Legal Guns’ to Block Health Warning Labels” (2018) 53(3) *Alcohol and Alcoholism* 333.

¹² McCabe Centre for Law and Cancer and the Campaign for Tobacco-Free Kids, *Report on WHO FCTC in Legislation and Litigation* (2015) part I, pp 2–12 <<https://www.who.int/fctc/cop/cop7/Documentation-Supplementary-information/en/>> (last accessed 26 May 2020) (FCTC in Legislation and Litigation); SY Zhou, JD Liberman and E Ricafort, “The Impact of the WHO Framework Convention on Tobacco Control in Defending Legal Challenges to Tobacco Control Measures” (2019) 28 *Tobacco Control* 113.

¹³ See L Gruszczynski and M Melillo, “The FCTC and Its Role in WTO Law: Some Remarks on the WTO Plain Packaging Report” (2018) 9 *European Journal of Risk Regulation* 564.

¹⁴ See, eg, WTO, *US: Clove Cigarettes – Appellate Body Report* (4 April 2012) WT/DS406/AB/R, para [235]; WTO, *Australia: Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging – Panel Report* (28 June 2018) WT/DS435/R, WT/DS441/R, WT/DS458/R, WT/DS467/R, paras [7.250], [7.1309]–[7.1310].

health measures.¹⁵ The successful deployment of the FCTC in this manner in formal WTO dispute settlement raises an interesting question about how different global health instruments are used in *informal dispute settlement processes* in the WTO. One such process is found in the WTO's Committee on Technical Barriers to Trade (TBT Committee). The TBT Committee is a forum that has been established for WTO members to raise concerns or otherwise consult with each other about policy measures that are being proposed or have been adopted and their consistency with one of the WTO agreements called the Agreement on Technical Barriers to Trade (TBT Agreement).¹⁶

This article takes up the question of how the *Global Strategy* and the FCTC, as two distinct types of global health instruments – the former being, in effect, a statement of political commitment by WHO members, and the latter being a legally binding international agreement – have been used in the context of discussions about alcohol and tobacco measures, respectively, in the TBT Committee. This research speaks to the wider debate about whether different types of international regulatory instruments and the legal status of these instruments impact their effectiveness in supporting domestic health measures. Unlike the FCTC, the *Global Strategy* and its proposed action plan are not binding instruments under international law, nor are they in the nature of the non-binding codes adopted by the World Health Assembly (WHA) in relation to breast-milk substitutes in 1981¹⁷ and the recruitment of international health workers in 2010 (*WHO Health Worker Code*).¹⁸ The capacity of “soft law” instruments, including codes, standards, strategies, plans of action or other instruments howsoever named, to achieve their stated purpose in global health is disputed.¹⁹ Some scholars, such as Allyn Taylor, whose work significantly informed the design of the FCTC and the *WHO Health Worker Code* and who supports the use of a non-binding code for alcohol,²⁰ argues that “such instruments are not without legal or political significance. Like treaties, these nonbinding instruments can be mechanisms for advancing international consensus on rules and for promoting

¹⁵ See, eg, WTO, *US: Clove Cigarettes – Panel Report* (2 September 2011) WT/DS406/R, paras [7.230], [7.414]–[7.415]; WTO, *Australia: Plain Packaging – Panel Report*, supra, note 14, paras [7.416], [7.664]–[7.665]. An argument that the Panel had given “too much legal weight” to the FCTC (and its Guidelines) was rejected by the Appellate Body, which found that the Panel had used the FCTC (and its Guidelines) as “additional factual support” for its conclusion about the consistency of Australia's measure with the Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement: WTO, *Australia: Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging – Appellate Body Report* (9 June 2020) WT/DS435/AB/R, WT/DS441/AB/R paras [6.700]–[6.707].

¹⁶ Marrakesh Agreement Establishing the World Trade Organization (adopted 15 April 1994, entered into force 1 January 1995) 1867 UNTS 3, annex 1A (Agreement on Technical Barriers to Trade) (TBT Agreement).

¹⁷ *International Code of Marketing Breast-milk Substitutes*, WHA Res 34.22, (adopted 21 May 1981).

¹⁸ *WHO Global Code of Practice on the International Recruitment of Health Personnel*, WHA Res 63.16, WHO Doc A63/8 (adopted 21 May 2010).

¹⁹ See GL Burci, “Global Health Law: Present and Future” in GL Burci and B Toebes, *Research Handbook on Global Health Law* (Cheltenham, Edward Elgar 2019) 486; S Sekalala, *Soft Law and Global Health Problems: Lessons from Responses to HIV/AIDS, Malaria and Tuberculosis* (Cambridge, Cambridge University Press, 2017) ch 2.

²⁰ AL Taylor and IS Dhillon, “An International Legal Strategy for Alcohol Control: Not a Framework Convention – At Least Not Yet” (2012) 108 *Addiction* 450; See also J Landon et al, “International Codes and Agreements to Restrict the Promotion of Harmful Products Can Hold Lessons for the Control of Alcohol Marketing” (2016) 112 *Addiction* 102; AD Mitchell and J Casben, “Trade Law and Alcohol Regulation: What Role for a Global Alcohol Marketing Code” (2016) 112 *Addiction* 109.

consistent state action”.²¹ Other scholars regard soft law instruments as largely inutile for alcohol control purposes.²² The findings in this article about the use of the FCTC and the *Global Strategy* in the TBT Committee add a new perspective to these debates.

In order to address the question about how the FCTC and *Global Strategy* have been used in the TBT Committee, this article starts by explaining, firstly, the legal status and substantive content of the *Global Strategy* (Section II). It then does the same in relation to the FCTC (Section III). Against this background, Section IV describes the study methodology and presents the results on how the *Global Strategy* and the FCTC have been used in the TBT Committee. Section V provides a discussion of the reasons for the different uses of the *Global Strategy* and the FCTC in the TBT Committee. Section VI concludes with a discussion of the implications for the future global governance of alcohol, including the negotiation of a treaty.

II. GLOBAL GOVERNANCE OF ALCOHOL

Alcohol has been a sporadic focus of the WHO since its inception in 1948.²³ A renewed interest in alcohol at the WHO can be seen from 2005 when the WHA called on the WHO “to draw up recommendations for effective policies and interventions to reduce alcohol-related harm, and to develop technical tools that will support Member States in implementing and evaluating recommended strategies and programmes”.²⁴ It was this call that ultimately led to the WHA’s adoption of the *Global Strategy* in 2010.²⁵ The *Global Strategy* represents a political commitment by the WHO members to address problems related to alcohol.

Despite considerable obstacles in its making,²⁶ the *Global Strategy* “aims to give guidance for action at all levels; to set priority areas for global actions; and to recommend a portfolio of policy options”²⁷ for domestic implementation with a view to achieving “improved health and social outcomes . . . with considerably reduced morbidity and mortality due to harmful use of alcohol”.²⁸ In terms of domestic interventions, there are ten “recommended target areas, which should be seen as supportive and complementary of one another”:²⁹ leadership, awareness and

²¹ A Taylor, “Global Health Law: International Law and Public Health Policy” (2017) *International Encyclopaedia of Public Health* 268, 273.

²² R Room et al, “International Regulation of Alcohol” (2008) 337 *BMJ* 1248; Casswell and Thamarangsi, *supra*, note 5; R Room, “Healthy Is as Healthy Does: Where Will a Voluntary Code Get Us on International Alcohol Control?” (2013) 108 *Addiction* 456; S Casswell and J Rehm, “Reduction in Global Alcohol-Attributable Harm Unlikely after Setback at WHO Executive Board” (2020) 395 *Lancet* 1020, 1020–21. See also J Liberman, “Alternative Legal Strategies for Alcohol Control: Not a Framework Convention – At Least Not Right Now” (2013) 108 *Addiction* 456; D Zeigler, “On Delaying a Framework Convention on Alcohol Control: Regrettably Agreeing but Calling for Strategic Action to Accelerate the Process” (2013) 108 *Addiction* 456.

²³ R Room, “World Health Organization and Alcohol Control” (1984) 79 *British Journal of Addiction* 85.

²⁴ World Health Assembly (WHA), Res 58.26 (25 May 2005) 58th sess, WHO Doc WHA58/2005/REC/1.

²⁵ WHA, Res 63.13 (21 May 2010) 63rd sess, WHO Doc WHA63/2010/REC/1.

²⁶ TF Babor et al, “Who Is Responsible for the Public’s Health? The Role of the Alcohol Industry in the WHO *Global Strategy* to Reduce the Harmful Use of Alcohol” (2013) 108 *Addiction* 2045.

²⁷ *Global Strategy*, *supra*, note 3, para [9].

²⁸ *ibid*, para [8].

²⁹ *ibid*, para [16].

commitment; health treatment services; “community action”; drink driving controls; availability restrictions; regulating alcohol marketing; pricing; reducing the negative consequences of drinking and alcohol intoxication (including consumer information and labelling on alcoholic beverages); controlling illicit and informally produced alcohol; and monitoring and surveillance of consumption, harms and policy interventions.³⁰

III. GLOBAL GOVERNANCE OF TOBACCO

Tobacco is governed by the FCTC.³¹ After four years of negotiations,³² the treaty was adopted by the WHA on 21 May 2003.³³ It remains the only treaty adopted under Article 19 of the WHO Constitution.³⁴ It opened for signature on 16 June 2003 and came into force on 27 February 2005 with 168 parties.³⁵ It now has 181 parties.³⁶ Of significance, in terms of population size, is the failure of the USA and Indonesia to become parties to the FCTC.³⁷

Although called a “framework convention”, the FCTC does not conform to the traditional “framework convention” model, which involves “establish[ing] a general system of governance for an issue area, and not detailed obligations”,³⁸ followed by “separate protocols containing specific measures designed to implement these goals”.³⁹ Rather, the FCTC itself contains “detailed provisions” and “strong obligations”.⁴⁰ With the objective being to “protect present and future generations from the devastating ... consequences of tobacco consumption and tobacco smoke”,⁴¹ the FCTC sets clear obligations for the Parties to implement, at the domestic level, multiple measures for demand reduction. These relate to pricing and taxation,⁴² packaging and labelling⁴³ and advertising, promotion and sponsorship.⁴⁴ There are also some supply reduction measures, in particular addressing the illicit

³⁰ *ibid.*, pp 11–19.

³¹ FCTC, *supra*, note 6.

³² R Roemer, A Taylor and J Lariviere, “Origins of the WHO Framework Convention on Tobacco Control” (2005) 95(6) *American Journal of Public Health* 936, 936.

³³ WHA, *International Framework Convention for Tobacco Control* (25 May 1996) WHA Res 49.17, 49th sess, 6th plen mtg.

³⁴ *Constitution of the World Health Organization* (1946) Art 19.

³⁵ FCTC, *supra*, note 6.

³⁶ “WHO Framework Convention on Tobacco Control”, United Nations Treaty Collection (web page, 22 September 2019) <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtmsg_no=IX-4&chapter=9&clang=_en> (last accessed 27 February 2020).

³⁷ *ibid.*

³⁸ D Bodansky, “The Framework Convention/Protocol Approach”, *WHO FCTC Technical Briefing Series* (1999) WHO Doc WHO/NCD/TFI/99.1, p 15.

³⁹ AL Taylor, “An International Regulatory Strategy for Global Tobacco Control” (1996) 21 *Yale Journal of International Law* 257, 294.

⁴⁰ J Liberman, “The Power of the WHO FCTC: Understanding its Legal Status and Weight” in AD Mitchell and T Voon, *The Global Tobacco Epidemic and the Law* (Cheltenham, Edward Elgar, 2014) 48, p 52.

⁴¹ FCTC, *supra*, note 6, Art 3.

⁴² *ibid.*, Art 6.

⁴³ *ibid.*, Art 11.

⁴⁴ *ibid.*, Art 13.

trade in tobacco products.⁴⁵ There have been Guidelines developed by the Conference of the Parties, an institutional mechanism established under the FCTC,⁴⁶ which “are intended to help Parties to meet their obligations . . . [reflecting] best practices and standards that governments would benefit from in the treaty-implementation process”.⁴⁷ These Guidelines are not part of the FCTC, but may, according to Zhou and Liberman, be considered to be evidence of “subsequent agreement” between the Parties.⁴⁸ At the very least, they represent “an important statement of international evidentiary consensus and best practice”.⁴⁹ These Guidelines specifically encourage bans on additives⁵⁰ and the use of plain packaging.⁵¹ There has also been an optional protocol, which is a separate treaty, negotiated to eliminate illicit trade in tobacco products.⁵²

IV. ALCOHOL AND TOBACCO IN THE WTO TBT COMMITTEE

This section presents the study of the use of the *Global Strategy* and the FCTC in the WTO’s TBT Committee. In Section IV.1, there is a discussion of the TBT Committee as an informal dispute settlement forum within international trade law. In Section IV.2, the methodology that was used in the study is described. In Sections IV.3 and IV.4, the findings in relation to alcohol and tobacco, respectively, are presented.

1. WTO TBT Committee

As explained in Section I, the TBT Committee is not a formal WTO dispute settlement mechanism. But it is said to be “akin to an informal form of resolution of trade conflicts”,⁵³ serving to “settle” trade concerns between members⁵⁴ without resort to formal WTO dispute settlement. Until the recent impasse in the appointment of members of the Appellate Body,⁵⁵ the WTO’s formal enforcement process was hailed as “the central pillar of the multilateral trading system, and the WTO’s unique contribution to the stability of the global economy”.⁵⁶ Formal dispute settlement in

⁴⁵ *ibid*, Art 15.

⁴⁶ *ibid*, Art 23.

⁴⁷ WHO, *WHO Framework Convention on Tobacco Control Guidelines for Implementation of Articles 5.3, 8, 9, 10 and 11, 12, 13, 14* (2013).

⁴⁸ Zhou and Liberman, *supra*, note 7, pp 355–56.

⁴⁹ *ibid*, p 356.

⁵⁰ WHO, “Partial Guidelines for Implementation of Articles 9 and 10”, *supra*, note 47, para [3.1.2.2(i)].

⁵¹ *ibid*, “Guidelines for Implementation of Article 11”, para [46]; *ibid*, “Guidelines for Implementation of Article 13”, paras [15]–[17].

⁵² Protocol to Eliminate Illicit Trade in Tobacco Products (adopted 12 November 2012, entered into force 1 October 2018) WHO Doc FCTCCOP5(1).

⁵³ H Horn, PC Mavroidis and EN Wijkström, “In the Shadow of the DSU: Addressing Specific Trade Concerns in the WTO SPS and TBT Committees” (8 March 2013) Research Institute of Industrial Economics Working Paper No. 960, 1 <<https://www.econstor.eu/bitstream/10419/81444/1/wp960.pdf>> (last accessed 25 February 2020).

⁵⁴ *ibid*, p 29.

⁵⁵ See J Pauwelyn, “WTO Dispute Settlement Post 2019: What to Expect?” (2019) 22(3) *Journal of International Economic Law* 297.

⁵⁶ WTO, “A Unique Contribution” (web page) <https://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm> (last accessed 25 February 2020).

the WTO has various stages through which a matter may be escalated if it cannot be settled. The first stage is a request for consultations between parties. The second stage involves a hearing before a Panel and the issuance of a Panel report. Any party may appeal the findings in the Panel report to the Appellate Body. The reports of the Panel and the Appellate Body must be adopted by the WTO Dispute Settlement Body (composed of all of the members of the WTO) to become binding. Reports are automatically adopted unless, by consensus, members decide not to adopt the report.⁵⁷

It is argued that the TBT Committee processes provide an alternative and less formal forum than consultations for the resolution of concerns about a member's measure. In the Committee, WTO members have "the opportunity of consulting on any matters relating to the operation of [the TBT] Agreement or the furtherance of its objectives".⁵⁸ The TBT Committee consists of all WTO members and accredited observers, one of which is the WHO/Food and Agriculture Organization (FAO) Codex Alimentarius Commission.⁵⁹ The Committee holds three formal meetings each year, and minutes of its meetings are made publicly available, including via the WTO's website.⁶⁰ These meetings are unlikely to be the extent of the contact between members about matters of concern. There will likely be other communications in person or in writing, but the formal TBT Committee meetings bring matters to the attention of all WTO members and observers.

Most measures come to the TBT Committee for discussion through a "notification", which is a formal WTO process whereby members are required to notify the WTO of new measures they are proposing.⁶¹ Sometimes, measures come to the TBT Committee that have not been formally notified to the WTO (with the failure to notify being one of the concerns that may be raised in the TBT Committee).⁶² A measure (notified or not) that is brought to the TBT Committee for discussion is called a "specific trade concern" (STC).⁶³ A single STC may contain multiple domestic regulatory measures.⁶⁴ In the TBT Committee, they are grouped together as a single STC.⁶⁵ Through interactions in the TBT Committee, such trade concerns, which otherwise could become the subject

⁵⁷ Marrakesh Agreement Establishing the World Trade Organization (adopted 15 April 1994, entered into force 1 January 1995) 1867 UNTS 3 annex 2 ("Understanding on Rules and Procedures Governing the Settlement of Disputes") Art 16(4).

⁵⁸ TBT Agreement, *supra*, note 16, Art 13.1.

⁵⁹ WTO, "International Intergovernmental Organizations Granted Observer Status to WTO Bodies" (web page) <https://www.wto.org/english/thewto_e/igo_obs_e.htm#tbt> (last accessed 25 February 2020).

⁶⁰ WTO, "TBT Official Documents" (web page) <https://www.wto.org/english/tratop_e/tbt_e/tbt_work_docs_e.htm> (last accessed 25 February 2020).

⁶¹ TBT Agreement, *supra*, note 16, Arts 2.9 and 2.10 in relation to the notification of a "technical regulation".

⁶² Note that some notifications never become the subject of discussion in the TBT Committee, arguably because there is no concern about the measure or no desire to use the Committee process.

⁶³ The measures covered by the TBT Agreement are "technical regulations", "standards" or "conformity assessment procedures". A government-mandated labelling standard for alcohol would be a "technical regulation": *ibid*, TBT Agreement, *supra*, note 16, Annex 1 paras 1–3. See also P O'Brien et al, "Marginalising Health Information: Implications of the Trans-Pacific Partnership Agreement for Alcohol Labelling" (2017) 41(1) Melbourne University Law Review 341, pp 368–69.

⁶⁴ See, eg, Ireland's new Public Health Act (Alcohol) Act 2018, which contains rules concerning alcohol labelling, marketing and pricing. The measures that are combined into a single STC may also have been the subject of one or multiple notifications: see, eg, WTO, *STC – India*, IMS ID 225 (18 March 2009).

⁶⁵ WTO, *STC – Ireland*, IMS ID 516 (10 November 2016) (Ireland STC 516).

of formal dispute settlement, may be resolved by: (1) a member revising its measure to make it (more) WTO-consistent or more acceptable to other members; (2) complaining members offering technical or financial assistance to “facilitate compliance”;⁶⁶ or (3) complaining members coming to some level of acceptance of the proposed measure.

2. Methodology

In this study, the same methodology for the review of the TBT Committee meetings minutes was used, with appropriate adaptations, for alcohol and tobacco.

For alcohol, the review of the minutes is related to TBT Committee meetings starting from 23–24 June 2010 (being the dates of the first TBT Committee meeting after *Global Strategy* was adopted by the WHA)⁶⁷ until 20–21 June 2019 (being the dates of the most recent Committee meeting).⁶⁸ In this period, there were 28 TBT Committee meetings and associated sets of minutes. Each of the 28 sets of TBT Committee meeting minutes was then searched for STCs relating to alcohol.⁶⁹ I identified 49 STCs concerning alcohol measures. The minutes of the meeting discussions relating to these 49 alcohol-related STCs were then reviewed for references to the *Global Strategy*.⁷⁰ If there were references to the *Global Strategy*, the minutes were analysed to determine by whom and in what manner the *Global Strategy* had been used. The minutes of the 49 alcohol STCs were also reviewed to determine whether the STC related to a measure that was one of the policy options promoted by the *Global Strategy*.

For tobacco, the review of the minutes started with the meeting on 22–23 March 2005 (being the dates of the first TBT Committee meeting after the FCTC entered into force)⁷¹ and finished with the meeting on 20–21 June 2019 (being the dates of the most recent Committee meeting).⁷² In this period, there were 44 meetings and associated sets of minutes. Each of the 44 sets of TBT Committee minutes was searched for STCs relating to tobacco.⁷³ I identified 20 STCs concerning tobacco measures proposed or adopted by WTO members in the 44 sets of minutes. The minutes of the meeting discussions relating to these 20 tobacco-related STCs were then searched for references to the FCTC.⁷⁴ If there were references to the FCTC, the minutes were analysed to determine by whom and in what manner the treaty had been used. The

⁶⁶ D Prévost, “Transparency Obligations under the TBT Agreement” in T Epps and MJ Trebilcock (eds), *Research Handbook on the WTO and Technical Barriers to Trade* (Cheltenham, Edward Elgar 2013) 128, p 158.

⁶⁷ WTO TBT Committee, Minutes of the Meeting 23–24 June 2010, WTO Doc G/TBT/M/51 (1 October 2010) (WTO TBT Committee June 2010).

⁶⁸ WTO TBT Committee, Minutes of the Meeting 20–21 June 2019, WTO Doc G/TBT/M/78 (10 October 2019) (WTO TBT Committee June 2019).

⁶⁹ Searches were conducted on the terms “alcohol”, “wine”, “spirits”, “beer” and “whisky”.

⁷⁰ The search terms were: “*Global Strategy* to Reduce the Harmful Use of Alcohol”, “*Global Strategy*”, “global”, “harmful”, “strategy”, “World Health Organization”, “WHO”, “Global Action Plan for the Prevention and Control of Noncommunicable Diseases 2013–2020”, “Action Plan” and “NCD”. Our decision to search for the latter two terms was based on the fact that the WHO, *Global Action Plan for the Prevention and Control of Noncommunicable Diseases 2013–2020* (2013) endorsed the contents of the *Global Strategy*, such that members might refer to the *NCD Action Plan* interchangeably with the *Global Strategy*.

⁷¹ WTO TBT Committee, Minutes of the Meeting 22–23 March 2005, WTO Doc G/TBT/M/35 (24 May 2005).

⁷² WTO TBT Committee June 2019, *supra*, note 68.

⁷³ Additional searches were conducted on the terms “cigar”, “cigarette”, “nicotine”, “tar”, “beedi” and “bidi”, but no additional measures were identified.

minutes of the 20 tobacco STCs were also reviewed to determine whether the STC related to a measure that was one of the policy options covered by the FCTC.

It should be noted that the TBT Committee is the only informal WTO dispute settlement mechanism that publishes a record of the discussions occurring therein. It is therefore a valuable source of information about interactions between WTO members regarding their trade-related concerns about each other's domestic regulatory measures. At the same time, the minutes of the meetings published by the WTO are only *summaries* of the discussions and are not *verbatim records* of the members' contributions to the Committee meetings. It is therefore possible that there were additional references to both the *Global Strategy* and the FCTC that are not recorded in the available minutes.

3. Alcohol

Over the course of the 28 meetings from the time that the *Global Strategy* was adopted by the WHA until the present day, there were 49 individual alcohol-related STCs discussed in the meetings. Was the *Global Strategy* used in these discussions? If so, how was it used?

a. Was the Global Strategy used in TBT Committee meeting discussions of alcohol STCs?

Of the 49 alcohol-related STCs, 21 raised at least one measure that reflects the policy options promoted by the *Global Strategy* (see Table 1). Of the 21 STCs that include at least one measure consonant with the *Global Strategy*,⁷⁵ 20 of the measures related to public health-directed labelling,⁷⁶ 3 related to alcohol marketing restrictions (other than on the label space)⁷⁷ and 1 related to alcohol pricing.⁷⁸ Yet, only 3 of these 21 STCs used the *Global Strategy* in the TBT Committee meetings (see Table 1) and all 3 related to alcohol labelling.

The remaining 28 alcohol-related STCs did not include a single measure that fell within the scope of the *Global Strategy*, and they covered matter such as the use of geographical indications on the product label,⁷⁹ manufacturer and importer details,⁸⁰ ingredient lists,⁸¹

⁷⁴ The search terms were: "Framework Convention on Tobacco Control", "FCTC", "framework", "convention" and "treaty".

⁷⁵ Note that the numbers do not add to 21 because some STCs raised more than one type of public health alcohol intervention.

⁷⁶ The labels covered alcohol content (see, eg, WTO, *STC – Brazil*, IMS ID 557 (20 June 2018)); low-risk drinking guidelines (WTO, *STC – Vietnam*, IMS ID 532 (29 March 2017)); and warnings and other health advice (see, eg, WTO, *STC – Korea*, IMS ID 518 (10 November 2016); WTO, *STC – Korea*, IMS 577 (6 March 2019); WTO, *STC – Indonesia*, IMS ID 561 (20 June 2018) (Indonesia STC 561); Ireland STC 516, supra, note 65; WTO, *STC – Mexico*, IMS ID 445 (5 November 2014)).

⁷⁷ See WTO, *STC – Ukraine*, IMS ID 374 (6 March 2013) (Ukraine STC 374); WTO, *STC – Thailand*, IMS ID 427 (18 June 2014) (Thailand STC 427); Indonesia STC 561, supra, note 65. It is not clear that the TBT Agreement covers non-label marketing restrictions.

⁷⁸ See, eg, Ireland STC 516, supra, note 65. It is not clear that the TBT Agreement covers pricing restrictions.

⁷⁹ See, eg, WTO, *STC – European Union*, IMS ID 345 (13 June 2012) (EU STC 345).

⁸⁰ See, eg, WTO, *STC – India*, IMS ID 298 (24 March 2011).

⁸¹ *ibid.*

Table 1. Alcohol and tobacco in the World Trade Organization's Committee on Technical Barriers to Trade Committee (TBT).

	Alcohol	Tobacco
TBT Committee meeting start dates	23–24 June 2010	22–23 March 2005
TBT Committee meeting finish dates	20–21 June 2019	20–21 June 2019
TBT meetings between start and finish dates (<i>n</i>)	28	44
STCs (<i>n</i>)	49	20
STCs raising at least one policy measure included in GAS/FCTC (<i>n</i>)	21	18
STC using GAS/FCTC (<i>n</i>)	3	12

FCTC = Framework Convention on Tobacco Control; GAS = *Global Alcohol Strategy*; STC = specific trade concern.

allergen labelling,⁸² product definitions,⁸³ maximum residue levels⁸⁴ and product testing and certification.⁸⁵

b. How was the Global Strategy used in TBT Committee meeting discussions of alcohol STCs?

In this section, I analyse how the *Global Strategy* was used in discussions of three alcohol-related STCs in the TBT Committee: (1) Thailand's graphic alcohol warnings; (2) Thailand's alcohol marketing prohibition; and (3) Nepal's graphic alcohol warnings.

i. Thailand: graphic warning labels. The first use of the *Global Strategy* in the TBT Committee meeting occurred in June 2010, almost immediately after the *Global Strategy* was adopted by the WHA in May 2010. It was used in discussions of a measure proposed, but never brought into law, by Thailand for the introduction of warning labels on packaged alcoholic beverages.⁸⁶ The proposed measure was a world-first in that it included graphic photograph-style warnings, adopting the approach that is widely used for warnings on tobacco packaging. It also proposed to connect the consumption of alcohol to a range of harms not generally referred to in alcohol label warnings, including the risk of suicide, family violence and sexual impotence. The labels were to be large, colourful and regularly rotated.⁸⁷

⁸² See, eg, EU STC 345, *supra*, note 79.

⁸³ See, eg, WTO, *STC – Colombia*, IMS ID 217 (18 March 2009).

⁸⁴ See, eg, WTO, *STC – Vietnam*, IMS ID 267 (23 June 2010).

⁸⁵ See, eg, WTO, *STC – Russia*, IMS ID 332 (20 March 2012).

⁸⁶ WTO, "Notification" WTO Doc G/TBT/N/THA/332 (21 January 2010); WTO "Notification – Addendum" WTO Doc G/TBT/N/THA/332/Add.1 (30 March 2010) (Addendum). In December 2018, Thailand informed the TBT Committee that it is considering introducing a revised version of the graphic warning label scheme: see WTO, Statement by Thailand to the Committee on Technical Barriers to Trade on 14 and 15 December 2018, G/TBT/W/586 (14 December 2018) (Thailand TBT Statement).

⁸⁷ See discussion of the proposal in P O'Brien, "Australia's Double Standard on Thailand's Alcohol Warning Labels" (2013) 32 *Drug & Alcohol Review* 5, p 6.

The *Global Strategy* was not, as might be expected, raised by Thailand in its response to member concerns about its measure. Arguably, Thailand could have pointed to the *Global Strategy*'s policy recommendation for "providing consumer information about, and labelling alcoholic beverages to indicate, the harm related to alcohol".⁸⁸ However, it did not do so. Rather surprisingly, the *Global Strategy* was raised by New Zealand in two consecutive meetings in the course of putting up resistance to the Thai measure. The minutes record New Zealand as stating (in the very first meeting after the *Global Strategy* was approved), "[I]n line with the 'WHA Strategy on the Harmful Use of Alcohol', a proper balance between policy goals in relation to the harmful use of alcohol and other public policy goals should be achieved."⁸⁹ New Zealand seems to have passed over the "guiding principle" that "public health should be given proper deference in relation to competing interests",⁹⁰ and instead focused on several minor statements about the need for "balancing different interests".⁹¹ For example, the *Global Strategy* states:

Production, distribution, marketing and sales of alcohol create employment and generate considerable income for economic operators and tax revenue for governments at different levels ... Policy-makers face the challenge of giving an appropriate priority to the promotion and protection of population health while taking into account other goals, obligations, including international legal obligations and interests.⁹²

In this questionable use of the *Global Strategy*, which is contrary to the intent and spirit of the instrument, New Zealand seems to have been impliedly arguing that Thailand's proposal for graphic warning labels was an extreme public health measure, which failed to balance other important interests, such as international trade. There was no evidence in the minutes of Thailand refuting New Zealand's use of the *Global Strategy* in this manner.

ii. Thailand: alcohol labelling restrictions. The *Global Strategy* was subsequently used by Thailand in 2014 to support a new alcohol label marketing restriction, which was implemented in 2015⁹³ and continues to be a source of considerable consternation in the TBT Committee.⁹⁴ The measure prohibits the use of certain words and images on the labels of alcoholic beverage containers. Prohibited messages are those that are "unfair to consumers", lead to "bad effects to the society as a whole", "persuade" people to drink alcohol or "exaggerate the benefit or quality of alcoholic

⁸⁸ *Global Strategy*, supra, note 3, p 17, para [36(f)].

⁸⁹ WTO TBT Committee June 2010, supra, note 67, para [245].

⁹⁰ *Global Strategy*, supra, note 3, p 9, para [12(d)].

⁹¹ *ibid*, pp 7, 10.

⁹² *ibid*, p 7, para [6(d)].

⁹³ WTO, Notification – Thailand, WTO Doc G/TBT/N/THA/437 (25 March 2014). The measure came into effect on 22 April 2015, although non-compliant products imported before 22 March 2015 were able to be sold until 18 October 2015.

⁹⁴ The STC has been discussed in 14 consecutive TBT Committee meetings between 18–19 June 2014 and 14–15 November 2018: see Thailand STC 427, supra, note 77.

beverages”.⁹⁵ It is this latter rule against exaggeration that has been most agitated in the TBT Committee, as it encompasses a ban on “cartoons”, as well as pictures or messages concerning athletes, artists, singers, movie stars or actors.⁹⁶

In its response to criticisms of the measure in the TBT Committee, Thailand has agreed to conduct various reviews.⁹⁷ However, throughout the TBT Committee meetings,⁹⁸ Thailand has also maintained that the measure is consistent with the TBT Agreement and other WTO obligations, including those under the Agreement on Trade-related Aspects of Intellectual Property.⁹⁹ To this end, it has explained that the measure was the government’s solution to the fact that “alcohol packaging and labelling had been used aggressively as a marketing channel”¹⁰⁰ (thus fuelling consumption and harm) in Thailand. In one meeting, Thailand seemed to attempt to legitimate the choice of this measure by reference to the *Global Strategy*. The minutes record:

In line with the principle of consumer protection, and taking account of the recommendations of the WHO’s “Global Strategy to Reduce Harmful Use of Alcohol” on controlling alcohol beverage labels to reduce the negative impacts of drinking and intoxication, Thailand developed this [measure] with the aim of reducing [the] attractiveness and appeal of alcohol to drinkers, especially young people.¹⁰¹

The minutes suggest that Thailand saw the statement in the *Global Strategy* about alcohol labelling as a policy option as *recommendatory only* and not binding. This is correct as a matter of law. It is also interesting to note that the minutes record that Thailand suggests that the *Global Strategy* recommends “controlling alcohol beverage labels”. However, Thailand’s law to *remove* marketing from the beverage label is not squarely provided for in the *Global Strategy*. Rather, as noted above, the *Global Strategy* recommends “providing consumer information about, and labelling alcoholic beverages to indicate, the harm related to alcohol”,¹⁰² which seems to be concerned with mandating the *addition* of warnings and other health information on the label space. Arguably, the *Global Strategy*’s call for the regulation of alcohol marketing might have used as the basis for Thailand’s marketing rule.¹⁰³ But Thailand seems not to have been relying on a specific provision in the *Global Strategy* to gird its

⁹⁵ WTO, “Notification”, supra, note 86, 1 and 2.

⁹⁶ Further detail about the law is found in “Brief of Technical Documents” (copy supplied by Thai TBT Enquiry Point on 26 April 2018) (on file with author).

⁹⁷ See, eg, Thailand TBT Statement, supra, note 86.

⁹⁸ Marrakesh Agreement Establishing the World Trade Organization (adopted 15 April 1994, entered into force 1 January 1995) 1867 UNTS 3, annex 1C (Agreement on the Trade-Related Aspects of Intellectual Property Rights) (TRIPS Agreement).

⁹⁹ WTO TBT Committee, Minutes of the Meeting 5–6 November 2014, WTO Doc G/TBT/M/64/Rev.1 (6 March 2015) para [2.218].

¹⁰⁰ *ibid*, para [2.220].

¹⁰¹ *ibid*; see also para [2.219].

¹⁰² *Global Strategy*, supra, note 3, p 17, para [36(f)].

¹⁰³ *ibid*, pp 15–16, para [31(a)].

measure. Instead, it seems to recognise the legitimacy of the *Global Strategy* and to seek general support for its policy from the *Global Strategy*.

iii. *Nepal: graphic warning labels.* The *Global Strategy* was most recently used by Nepal in 2017 in its rebuttal of criticisms of its new alcohol labelling measure. Nepal introduced a suite of alcohol controls in 2017, including advertising restrictions, limitations on availability and mandatory graphic health warnings about alcohol's link to liver cirrhosis and damage to other organs. The labels are to cover 75% of the container space.¹⁰⁴ Assuming that the graphic warnings are in the nature of photographs and not just pictograms, the labelling measure makes Nepal the first and only country in the world to require graphic health warnings on alcohol, as well as the country with the most onerous standards for the amount of container space that must be covered by the label. Although the rules have been in place for several years, WTO members' interest in this measure appears to have been activated by Nepal's recent steps to enforce the rules.¹⁰⁵

There has only been one meeting at which Nepal's measure has been discussed to date. The USA dominated the discussions, asking for information about alcohol consumption in Nepal, how 75% was chosen as the appropriate label space and offering to assist Nepal with examples of how the USA addresses alcohol-related harm.¹⁰⁶ Another query from the USA suggests that Nepal has likely been using the *Global Strategy* in its explanation of its measure. The minutes record the USA as asking, "[C]ould further information be provided on the ten WHO strategies referred to in Nepal's policy document as obligating Nepal to implement these policies?"¹⁰⁷ Assuming "the ten WHO strategies" refer to the policy options set out in the *Global Strategy*,¹⁰⁸ the phrasing of the question suggests that Nepal has been arguing that it is *obliged* to adopt the options listed there. The *Global Strategy* is not legally binding, and it seems unlikely that Nepal was suggesting that it was. However, it is possible that Nepal considers it has a *political* obligation to other WHO Member States to implement the *Global Strategy*. This sense of political obligation may be institutionalised in certain countries through their involvement in WHO regional activities to support the implementation of the *Global Strategy*. For example, in 2014, the countries of the WHO South East Asia region passed a resolution urging countries within the region to adopt "systems and mechanisms" to implement the *Global Strategy*.¹⁰⁹

¹⁰⁴ Nepal did not notify its measure to the WTO. Details about the measure have been gleaned from the following: WTO TBT Committee, Minutes of the Meeting 14–15 June 2017, WTO Doc G/TBT/M/72 (TBT Committee June 2017) paras [3.46]–[3.47]; "Nepal: Government Adopted New Alcohol Law", *IOGT International* (Online News Article, 22 February 2017) <<https://iogt.org/news/2017/02/22/nepal-government-adopted-new-alcohol-law/>> (last accessed 25 February 2020).

¹⁰⁵ WTO TBT Committee June 2017, *supra*, note 104, para [3.47].

¹⁰⁶ *ibid*, paras [3.46]–[3.47]. The EU and Canada were also vocal: see paras [3.48] and [3.49], respectively.

¹⁰⁷ *ibid*, para [3.46].

¹⁰⁸ *Supra*, note 3. See *supra*, Section II.

¹⁰⁹ WHO, Regional Office for South-East Asia, "South-East Asia Regional Action Plan to Implement Global Strategy to Reduce Harmful use of Alcohol (2014–2025)" (12 September 2014, 6th sess) SEA/RC67/R4.

4. Tobacco

Over the course of 44 meetings of the TBT Committee from the time the FCTC entered into force until the present day, there were 20 individual tobacco-related STCs discussed. Was the FCTC used in these discussions? If so, how was it used?

a. Was the FCTC used in TBT Committee meeting discussions of tobacco STCs?

Of the 20 tobacco-related STCs, 18 raised at least 1 measure that directly reflects the policy options promoted by the FCTC (see Table 1). The 18 STCs¹¹⁰ reflecting at least 1 FCTC policy related to: product composition (eg maximum amounts of tar, nicotine, etc.) (1 STC);¹¹¹ the use of additives (including flavourings) (7 STCs);¹¹² plain packaging (9 STCs);¹¹³ labelling (4 STCs);¹¹⁴ advertising (1 STC);¹¹⁵ and product traceability for public health purposes (1 STC).¹¹⁶ Of the 18 STCs relating to the FCTC, 12 were found to have referred to the FCTC in 1 or more TBT Committee meetings (see Table 1).

b. How was the FCTC used in TBT Committee meeting discussions of tobacco STCs?

In this section, I analyse how the FCTC was used in discussions of alcohol-related STCs in the TBT Committee. The tobacco-related STCs are too voluminous to be discussed individually, as was done with the alcohol-related STCs in Section IV.3. As the use of the FCTC has been overwhelmingly in connection with two types of tobacco measures (bans on additives and plain/standardised packaging) and the engagement with the FCTC has been similar across these two measures, this section briefly outlines the two measures (Sections IV.4.a.i and IV.4.a.ii) and then analyses the ways in which the FCTC has been used in the TBT Committee in relation to them (Section IV.4.a.iii).

i. Bans on flavourings and other additives. The TBT Committee meetings about tobacco have included seven STCs relating to the restriction on the use of additives in tobacco products. For example, one of these related to the Canadian Cracking Down on Tobacco Marketing Aimed at Youth Act that banned listed additives from being used in tobacco products for any

¹¹⁰ Note the numbers do not add up to 18 because some STCs raised more than one type of public health alcohol intervention.

¹¹¹ WTO, *STC – Brazil*, IMS ID 288 (24 March 2011) (Brazil STC 288).

¹¹² WTO, *STC – European Union*, IMS ID 377 (6 March 2013); WTO, *STC – Moldova*, IMS ID 437 (18 June 2014) (Moldova STC 437); WTO, *STC – Canada*, IMS ID 463 (18 March 2015); WTO, *STC – European Union*, IMS ID 513 (15 June 2016); *ibid*; WTO, *STC – United States*, IMS ID 257 (13 June 2012) (US STC 257); WTO, *STC – Canada*, IMS ID 249 (5 November 2009) (Canada STC 249).

¹¹³ WTO, *STC – Australia*, IMS ID 304 (15 June 2011) (Australia STC 304); WTO, *STC – New Zealand*, IMS ID 361 (27 November 2012); WTO, *STC – Ireland*, IMS ID 380 (17 June 2013); WTO, *STC – United Kingdom*, IMS ID 424 (19 March 2014); WTO, *STC – France*, IMS ID 441 (5 November 2014); WTO, *STC – Norway*, IMS ID 474 (17 June 2015); WTO, *STC – Singapore*, IMS ID 484 (4 November 2015); WTO, *STC – Hungary*, IMS ID 498 (9 March 2016) (Hungary STC 498); WTO, *STC – Israel*, IMS ID 573 (6 March 2019).

¹¹⁴ Brazil STC 288, *supra*, note 111; WTO, *STC – Ukraine* STC 374, *supra*, note 77; Moldova STC 437, *supra*, note 112; Hungary STC 498, *supra*, note 113.

¹¹⁵ Ukraine STC 374, *supra*, note 77.

¹¹⁶ WTO, *STC – European Union*, IMS ID 550 (8 November 2017).

purpose.¹¹⁷ A less restrictive law in the USA banned the use of additives for the purpose of flavouring tobacco products.¹¹⁸ The members introducing these measures all repeated some version of the purpose underpinning the Canadian legislation of “address[ing] public health concerns by reducing the incentives for young people to smoke”.¹¹⁹ The purpose reflected the view that additives, particularly those that mask the harsh taste of tobacco with chocolate or fruit flavourings, play a role in young people initiating smoking. These additive bans have been heavily contested in the TBT Committee, and the US ban progressed to formal dispute settlement before the WTO Appellate Body in *US: Clove Cigarettes*.¹²⁰

ii. *Plain packaging*. Since the FCTC came into force, there have been nine STCs relating to tobacco plain packaging.¹²¹ The first related to Australia’s Tobacco Plain Packaging Bill 2011.¹²² It was the subject of TBT Committee discussion over a period of two years before Indonesia commenced the process of formal dispute settlement, which culminated in Australia’s success before a WTO Panel and the WTO Appellate Body in *Australia: Tobacco Plain Packaging*.¹²³ As evidenced by the progression of Australia’s measure to formal dispute settlement, tobacco plain packaging has been a vociferously debated matter in the WTO.

iii. *Use of the FCTC*. The FCTC and its Guidelines have been important to members defending their additive and plain packaging measures in the TBT Committee. The FCTC has been used in some of the same ways to how it has been used in formal dispute settlement in the WTO, but there are also additional uses that seem particular to the TBT Committee. Firstly, like in formal dispute settlement, there seems to have been some attempt to deploy the FCTC to signal the gravity of the tobacco problem and the urgency of addressing it. For example, Canada in particular repeatedly asserted in discussions the significance of tobacco being “the only good to be the subject of a legally binding treaty”.¹²⁴

Secondly, the treaty is used in various ways to support an argument as to the “appropriateness” of the contested measure. There was rightly no argument made in the TBT Committee that a member’s obligations under the FCTC take priority over their duties under the WTO Agreements. There are nonetheless mentions of the proposing member being a party to the FCTC and appeals to their need to observe

¹¹⁷ Canada STC 249, *supra*, note 112; Brazil STC 288, *supra*, note 111; for a discussion of the Canadian measure, see A Mitchell and T Voon, “Regulating Tobacco Flavors: Implications of WTO Law” (2011) 29 *Boston University International Law Journal* 383, pp 390–92.

¹¹⁸ US STC 257, *supra*, note 112.

¹¹⁹ WTO TBT Committee, Minutes of the Meeting 4 October 1996, WTO Doc G/TBT/M/2, para [16] (Canada).

¹²⁰ See WTO, *US: Clove Cigarettes – Appellate Body Report*, *supra*, note 15; see also T Voon et al, “United States – Measures Affecting the Production and Sale of Clove Cigarettes” (2012) 106 *American Journal of International Law* 824, pp 824–25.

¹²¹ See *supra*, note 113.

¹²² Australia STC 304, *supra*, note 113.

¹²³ WTO, *Australia: Tobacco Plain Packaging – Panel Report*, *supra*, note 14; WTO, *Australia: Tobacco Plain Packaging – Appellate Body Report*, *supra*, note 15.

¹²⁴ WTO TBT Committee, Minutes of the Meeting 4–6 November 2017, WTO Doc G/TBT/M/67 (3 February 2016) para [2.34]; WTO TBT Committee, Minutes of the Meeting 6–7 March 2019, WTO Doc G/TBT/M/77 (11 December 2019) para [3.5] (Canada).

their responsibilities as parties to the FCTC. The European Union (EU) has been explicit that its ban on additives was an attempt to balance its obligations under the FCTC and the TBT Agreement.¹²⁵ The EU seems to be asserting that it has struck a reasonable or appropriate balance between these two *equal* sets of obligations. The appropriate relationship between the TBT Agreement and the FCTC was a major concern that emerged from the minutes, with calls for a meeting between the WHO Secretariat and the WTO to “increase awareness of TBT issues and coherence with other international organizations”.¹²⁶

Furthermore, the *specific* content of the FCTC and its Guidelines has also been used to suggest that the chosen measure is “justified”. The FCTC or the Guidelines have been put forward as the “basis for” a measure,¹²⁷ or a measure has been said to be “in line” with the FCTC and the Guidelines.¹²⁸ For example, Australia referred to the FCTC Guidelines as “recommending” the introduction of plain packaging.¹²⁹ Norway, in its statement of support for Australia, also relied on the FCTC Guidelines having “explicitly mentioned the FCTC as one of the options to achieve the objective of health protection”.¹³⁰ Whatever the language used, members used the FCTC to prove that a measure is capable of contributing to the realisation of the member’s public health objective. With the latter approach, the FCTC and the Guidelines are treated as an authoritative source of supporting evidence for a measure.¹³¹ This is consistent with the patterns of use of the FCTC in more formal legal contexts, including in tobacco-related litigation in the WTO¹³² and elsewhere,¹³³ and in law-making.¹³⁴

It should also be noted that the use of the FCTC to buttress a domestic measure has not been without contest. Some members, such as Nicaragua, claimed that FCTC members were not required to implement the FCTC Guidelines, saying they were recommendatory only.¹³⁵ Others have claimed that the FCTC was being used as cover to pursue protectionist, “commercial interests”.¹³⁶

¹²⁵ WTO TBT Committee, Minutes of the Meeting 6–7 March 2013, WTO Doc G/TBT/M/59 (8 May 2013) para [2.77] (EU).

¹²⁶ WTO TBT Committee, Minutes of the Meeting 24–25 March 2011, WTO Doc G/TBT/M/53 (26 May 2011) para [22] (Mexico).

¹²⁷ WTO TBT Committee, Minutes of the Meeting 20–21 March 2012, WTO Doc G/TBT/M/56 (16 May 2012) para [130] (Brazil).

¹²⁸ WTO TBT Committee, Minutes of the Meeting 17–20 June 2013, WTO Doc G/TBT/M/60 (23 September 2013) para [3.166] (EU).

¹²⁹ WTO TBT Committee, Minutes of the Meeting 15–16 June 2011, WTO Doc G/TBT/M/54 (20 September 2011) para [29] (Australia); WTO TBT Committee, Minutes of the Meeting 5 and 8 May 2000, WTO Doc G/TBT/M/55 (16 June 2000) para [222] (Australia).

¹³⁰ WTO TBT Committee May 2000, *supra*, note 129, para [192] (Norway).

¹³¹ WTO TBT Committee June 2011, *supra*, note 129, para [261].

¹³² See, eg, WTO, *Australia: Plain Packaging – Panel Report*, *supra*, note 14, paras [7.416], [7.664]–[7.665]; WTO, *US: Clove Cigarettes – Panel Report* (2 September 2011) WT/DS406/R, paras [7.230], [7.414]–[7.415].

¹³³ See, eg, in the EU context, Case C-547/14 *Philip Morris Brands SARL and ors, Imperial Tobacco Limited (intervening) and ors (intervening) v Secretary of State for Health* ECLI:EU:C:2016:325, esp paras [3–10], [109–19], [175–79], [203–11]. See also FCTC in Legislation and Litigation, *supra*, note 12, part I, pp 2–12.

¹³⁴ FCTC in Legislation and Litigation, *supra*, note 12, part II.

¹³⁵ WTO TBT Committee, Minutes of the Meeting 10–11 November 2011, WTO Doc G/TBT/M/55 (9 February 2012) para [206] (Nicaragua). See also WTO TBT Committee March 2012, *supra*, note 127, para [164] (Honduras).

¹³⁶ WTO TBT Committee March 2012, *supra*, note 127, para [127] (Turkey).

V. THE *GLOBAL STRATEGY* AND THE FCTC COMPARED

This study reveals fundamental differences in the use of the *Global Strategy* and the FCTC in the TBT Committee. In this section, I outline these differences (Section V.1) and offer an explanation for why the *Global Strategy* has had so little use and impact in the TBT Committee, whereas the FCTC has had such extensive use and impact (Section V.2).

1. The use of the *Global Strategy* and the FCTC in the WTO TBT Committee

Firstly, it is noteworthy that the FCTC has been used so extensively and on so *many more occasions* than the *Global Strategy*. It has been used in over half (12/20) of the tobacco-related STCs discussed in the TBT and in two-thirds of STCs that are about measures covered by the FCTC (12/18). It is also important to observe that there is a relatively low number of STCs relating to tobacco in the TBT Committee, which may be due to the FCTC being used to head off concerns about new tobacco measures. By comparison, the *Global Strategy* has only been referred to in 3 out of 49 of the STCs relating to alcohol and in 3 out of 21 of the STCs that raised matters covered by the *Global Strategy*. It is evident that the FCTC is highly significant in trade-related discussions about tobacco, whereas the *Global Strategy* is not seen as relevant at all or only very marginal to these issues.

Secondly, the *ways* in which the FCTC has been used in the TBT Committee confirm its authority, persuasiveness and centrality to states' action on tobacco control. Even in an informal forum like the WTO TBT Committee, tobacco control and the FCTC are treated as inseparable. When the FCTC was raised in relation to a particular tobacco STC, it was central to the discussions, often being mentioned multiple times by several members. WTO members made reference to particular obligations imposed by the FCTC and elaborated in the Guidelines. When raised, the texts of the FCTC and the Guidelines were presented as incontrovertible evidence of the effectiveness of contested measures. The contrast is stark with the *Global Strategy*. The *Global Strategy*, when it was included in the TBT Committee meetings, was marginal to the discussions. It rated a bare and very general mention by Thailand, almost as an afterthought. The *Global Strategy* was not central to Thailand's defence of its position, and there was no indication that the content of the *Global Strategy* had played any important part in the formulation of its domestic policies. Nepal, by contrast, did seem to have given more weight to the *Global Strategy* and to regard it as a blueprint for alcohol policy reforms.

Thirdly, and very significantly, the *Global Strategy* was notably used against public health measures to reduce alcohol-related harm. New Zealand (who was an early adopter of tobacco plain packaging and a key proponent of FCTC-based arguments in the TBT Committee) deployed the *Global Strategy* against Thailand's alcohol warning label proposal. There is no indication in the TBT Committee minutes that the FCTC has been (or could be) used to support an objection to tobacco control.¹³⁷

¹³⁷ FCTC, *supra*, note 6, Art 5.3.

2. Explaining the patterns of use of the *Global Strategy* and the FCTC in the WTO TBT Committee

What explains these patterns of use of the *Global Strategy* and the FCTC in the TBT Committee? The TBT Committee is an informal forum that resolves potential disputes through robust discussion, persistent questioning, persuasion and pressure between WTO members. In this forum, it might have been expected that the *Global Strategy*, as a statement of political commitment by WHO members, would play more of a role than this research has found to be the case. However, the work of the TBT Committee is anchored in the TBT Agreement, and so at least some of the discussion is directed towards the legal question of the consistency of a measure with the rules in the TBT Agreement. In this type of mixed political and legal space, the weak normative status of the *Global Strategy* results in it being marginalised. The *Global Strategy* has no firm legal status, no strong policy directives and no serious political support, having had so few resources dedicated to its implementation over the past ten years.¹³⁸ At the same time, the mixed political and legal environment in the TBT Committee is perfect for the use of the FCTC, which has a high legal status, defined obligations and resounding political backing from most of the world's countries, many of whom have enacted legislation to give effect to their treaty obligations. In this section, I argue that there are three principal reasons for the differential use of the FCTC and the *Global Strategy*: (1) their legal status; (2) the nature of their policy recommendations; and (3) the role of industry in the policy domain of tobacco versus alcohol.

a. Legal status of the instrument

The fact that the FCTC is a treaty, which as such imposes legally binding obligations on its parties, cannot be underestimated in explaining its use in the TBT Committee. Technically, the legal status of the instrument has no significance in TBT Committee discussions. But the legal character of the FCTC seems to generally add to its status in the TBT Committee. Furthermore, the WTO Panels and the Appellate Body have recognised the relevance of the FCTC, as a treaty, to formal WTO dispute resolution, thereby legitimising its inclusion in informal dispute settlement forums like the TBT Committee.¹³⁹ By comparison, the *Global Strategy* is not a legal instrument, has no formal legal status under international law and has not been “approved” in the WTO dispute settlement system in the same way that the FCTC has.

However, none of what is said here about the FCTC and the *Global Strategy* precludes the possibility that, under the right circumstances, an instrument with a lesser legal status than a treaty may also have significant impact in the TBT Committee. The WHO/FAO Codex Alimentarius, a type of soft law instrument, could be seen as such an example. Its status in the WTO rests on it having been recognised as an “international standard” for the purposes of TBT Agreement.¹⁴⁰ The use and impact of the instrument may also be based

¹³⁸ WHO, *Discussion Paper: Implementation of the WHO Global Strategy to Reduce the Harmful Use of Alcohol Since Its Endorsement, and the Way Forward* (21 September 2019) p 5.

¹³⁹ See supra, notes 14 and 15.

¹⁴⁰ O'Brien and Mitchell, supra, note 9, pp 150–55.

on the normative force that has built up around it. This normative force may or may not be buttressed by the legal status of the instrument. Arguably, in the case of the FCTC, its status as a treaty in force under international law has contributed to the normative influence of the instrument and its use in the TBT Committee. A sense of extraordinary achievement continues to surround the conclusion of a treaty – not some lesser instrument – for global tobacco control.¹⁴¹ The political solidarity that has built up between parties to the FCTC is, to some extent, predicated on a recognition of the import of states assuming legally binding commitments to confront powerful commercial interests and rid the world of the scourge of tobacco use and exposure. The other factors, discussed below, also contribute to the power and influence of the FCTC in the TBT Committee and more widely. The *Global Strategy* lacks the legal foundation that gives some baseline legitimacy to the FCTC. But equally significantly is the fact that the *Global Strategy* is weak on the other factors, discussed below, all of which are additional strengths of the FCTC.

b. Detailed, evidence-based policy measures

Some of the normative force of the FCTC is due to it offering detailed, evidence-based, policy-based measures for tobacco control. This same feature makes it especially useful in the TBT Committee context. The FCTC and its Guidelines are sufficiently specific and clear about the measures needed to tackle tobacco use and harm that WTO members can refer to these documents to support their claims of the consistency of the measure with the WTO Agreements. Offering this kind of blueprint for tobacco policy gives the FCTC relevance and significance, which in turn serves to garner adherents and advocates for the treaty, and reinforces the legal and political importance of the treaty. For example, Article 11 of the FCTC imposes an obligation on parties to introduce tobacco warning labels with specifications that the labels shall be rotating, “large, clear, visible and legible”, “50% or more of the principal display areas but . . . no less than 30% of the principal display areas” and “may be in the form of or include pictures or pictograms”.¹⁴² The Guidelines, which have been elaborated through the sophisticated institutional arrangements developed under the FCTC,¹⁴³ further articulate what the evidence base and best practice indicate about effective tobacco labelling, including advice about every possible aspect of the label design.¹⁴⁴

By contrast, one of the defects in the *Global Strategy* relates to its failure to clearly articulate the policy measures that members should take. Soft law instruments that do not create legal obligations can nonetheless be detailed and precise in their content, so as to generate a sense of political obligation around their terms. In this way, soft law can also be “hard”.¹⁴⁵ But the *Global Strategy* does not meet this description. The lack of firm policy guidance undermines the relevance and authority of the

¹⁴¹ Burci, *supra*, note 19, 518–19; Roemer, Taylor and Lariviere, *supra*, note 32.

¹⁴² FCTC, *supra*, note 6, Art 11.1(b).

¹⁴³ Zhou and Liberman, *supra*, note 7, pp 351–54, 356–58.

¹⁴⁴ WHO, “Guidelines for Implementation of Article 11”, *supra*, note 47, para [12].

¹⁴⁵ See KW Abbott and D Snidal, “Hard and Soft Law in International Governance” (2000) 54(3) *International Organization* 421, pp 421–44.

Global Strategy. In terms of the TBT Committee, this defect also makes the *Global Strategy* largely inutile as it lacks granular detail about the policy measures that should be taken to address alcohol-related harm. The *Global Strategy* lists ten “policy options” that members are recommended to consider. However, specific alcohol control measures are not set out in sufficient detail, and too much leeway is left for states to interpret the content of these measures to accommodate financial and commercial interests. For example, and in contrast to the FCTC, the *Global Strategy* recommendation about policy action on alcohol labelling is only put in terms of “labelling alcoholic beverages to indicate the harm related to alcohol”.¹⁴⁶ It should be acknowledged that there have been recent attempts at WHO to address these deficits in the *Global Strategy*, including with the launch of the SAFER Initiative through which more technical guidance and support is being offered to Member States in relation to priority policy measures.¹⁴⁷ Regional plans for the implementation of the *Global Strategy* also constitute some attempt to overcome this serious flaw in the capacity of the *Global Strategy* to guide alcohol policy,¹⁴⁸ but none have so far fully remedied this problem.

c. Industry involvement in public health policy

The FCTC has been able to garner extensive political support over the last 15 years, which gives it significant weight in the kinds of discussions that happen in the TBT Committee. The political momentum around the FCTC’s goal of “protect[ing] present and future generations from the devastating health, social, environmental and economic consequences of tobacco consumption and exposure to tobacco smoke”¹⁴⁹ is attributable to many factors, but one of them is the de-legitimisation of the tobacco industry over the past 30 years. Without the tobacco industry running interference, it has been easier to bring governments to accept the public health position on tobacco control enshrined in the FCTC. The FCTC itself contributes to this side-lining of the industry. Article 5.3 of the FCTC provides that “in setting and implementing their public health policies with respect to tobacco control, Parties shall act to protect these policies from commercial and other vested interests of the tobacco industry in accordance with national law”.¹⁵⁰ The FCTC Guidelines further assist parties to protect their policies from tobacco industry influence.¹⁵¹ The FCTC’s strong position on public health concerns not being subjugated to industry interests can be well deployed in the TBT Committee meetings. Where WTO members criticise tobacco control measures, they are generally acting as a mouthpiece for their domestic

¹⁴⁶ WHO, “Global Strategy”, supra, note 3, p 17, para [36(f)].

¹⁴⁷ WHO, “SAFER: Preventing and Reducing Harms from Alcohol” <https://www.who.int/substance_abuse/safer/msb_safer_framework.pdf?ua=1> (last accessed 8 June 2020).

¹⁴⁸ WHO, “Discussion Paper”, supra, note 138, p 4.

¹⁴⁹ FCTC, supra, note 6, Art 3.

¹⁵⁰ FCTC, supra, note 6, Art 5.3. See also GJ Fooks et al, “Controlling corporate influence in health policy making? An assessment of the implementation of Article 5.3 of the World Health Organization Framework Convention on Tobacco Control” (2017) 13(12) *Globalization and Health* 1.

¹⁵¹ WHO, “Guidelines for Implementation of Article 5.3”, supra, note 47.

tobacco industries. The FCTC supports a strong line being taken, in the name of public health, against tobacco industry interests.

The situation with the *Global Strategy* could not be more different. The building of political support for the *Global Strategy* has been severely hampered over the past ten years by activities of the alcohol industry.¹⁵² Lobbying by the alcohol industry at the local and global levels has stymied the widespread creation of political constituencies that support and advocate for the implementation of the *Global Strategy*. With so little political import, the *Global Strategy* is not seen as a tool of persuasion in the TBT Committee. Furthermore, and contrary to the FCTC approach, the *Global Strategy* itself has enabled the alcohol industry to play this undermining role. The *Global Strategy* sanctions alcohol industry perspectives and interests being given weight in alcohol policy development, with allowance made for the possibility that public health might be subjugated to commercial interests.¹⁵³ As such, the *Global Strategy* does not provide convincing support for an argument that public health concerns about alcohol consumption should trump industry interests. These failings are reflected in the fact that New Zealand was even able to contemplate using the *Global Strategy* to attack Thailand's proposed alcohol warning measure.

VI. CONCLUSION: THE FUTURE GLOBAL GOVERNANCE OF ALCOHOL

The findings from this study, which show such a marked difference in the use of the *Global Strategy* and the FCTC in the WTO TBT Committee, come at an opportune time. The WHO Secretariat, as requested by the Executive Board, is about to embark on the development of an "action plan" to implement the *Global Strategy* for the period 2022–2030.¹⁵⁴ Although this process certainly means that a treaty for alcohol is off the table for at least the next ten years, the Executive Board also decided that it would review the *Global Strategy* in 2030.¹⁵⁵ In creating the action plan, the experience with the FCTC is invaluable. Accepting that the action plan will not be a legal instrument, it is essential that it otherwise bear the features of the FCTC that have contributed its political impact. This means that the action plan must: be unequivocal about the need to prioritise the addressing of alcohol-related harm over financial interests; take a strong position against alcohol industry involvement; contain very detailed, evidence-based, substantive means for doing so; use powerful institutional mechanisms for the implementation of these measures at the global and national levels; and be adequately resourced. With these features, there is the chance of greater coordinated action being taken on alcohol consumption and harm. It is also important that, although the action plan is necessarily tethered to the *Global Strategy*, it is not constrained by the *Global Strategy*, especially its position on industry involvement in alcohol policy. The political cohesion of multiple states, which produced the WHO decision to create an action plan, indicates that there are the

¹⁵² Casswell and Rehm, *supra*, note 22, pp 1020–21.

¹⁵³ WHO, "Global Strategy", *supra*, note 3, p 7, para [6(d)].

¹⁵⁴ WHO, "Decision of the Executive Board", *supra*, note 2.

¹⁵⁵ *ibid.*

beginnings of the global solidarity that is needed to create a robust action plan and to make it work in practice. These states, as well as the civil society organisations that supported them, need to bring other WHO members into the fold so that the action plan is created with a broad support base and is implemented widely.

The success of the alcohol action plan is arguably a precondition to any decision to negotiate a treaty. If countries are not committed to the action plan, it is highly unlikely that they will commit to the negotiation of an effective treaty on alcohol through the WHO. Therefore, the next eight years matter deeply for the future of the global governance of alcohol. If a powerful action plan can be developed and used by many countries over the next eight years, then at the time of review in 2030, WHO members may be willing to commit to a treaty, knowing that the legal status of a treaty offers additional benefits, particularly in legal dispute settlement contexts, compared to non-legal instruments. WHO members may also decide that the action plan has been so successful that any additional benefits from a treaty are not worth the costs involved in its negotiation. But to be in a position in 2030 to make that decision, the WHO, governments, civil society, academics and other United Nations organisations need to work together (against the alcohol industry) in a concerted, coordinated, organised and well-resourced manner going forward.