

# Contents

<i>Preface</i>	<i>page</i> xiii
<i>Abbreviations</i>	xv
<b>1. Intersections between Trade and Noncommunicable Disease</b>	<b>1</b>
1. Introduction	1
1.1. The Importance of Examining the Issues in Greater Detail	14
A. Tobacco	14
B. Alcohol	15
C. Diet	17
D. Justifications for Government Intervention in Each Area	18
2. The Approach of This Study	21
2.1. Determinacy	22
2.2. Balancing Trade and Health	23
A. Prohibitions and Obligations	27
B. The Interaction of Different International Instruments and Regimes	28
3. Outline	29
4. Limitations	30
<b>2. Normative Integration: Using Health Instruments in Interpretation of the WTO-Covered Agreements</b>	<b>34</b>
1. Overview of Relevant Health Instruments	35
2. Using Health Norms in Interpretation of the WTO-Covered Agreements	38



2.1.	The Use of Extraneous Rules and Resolutions as Evidence of Facts	38
2.2.	The Use of Extraneous Instruments without Recourse to an Enabling Rule	39
2.3.	The Use of Standards under the SPS and TBT Agreements	42
2.4.	Treaty Rules and Article 31(3)(c) of the Vienna Convention on the Law of Treaties	45
A.	The Article 31(3)(c) Debate	47
B.	Wording and Context	50
C.	The Merits of the Restrictive View	55
D.	The Merits of the Divergent View	59
E.	The Merits of the Broad View	71
F.	Which View Should Be Preferred?	73
G.	Can Either the Divergent or Broad Interpretation Apply in the Context of the WTO?	74
H.	Do Temporal Requirements Prevent the Use of Treaties Such as the FCTC in Interpretation of the WTO Agreement?	76
I.	Conclusion on Article 31(3)(c)	77
2.5.	Conclusion on Normative Integration	78
3.	<b>Freedom to Use Taxes, Subsidies, and Restrictions on Marketing</b>	80
1.	Price Measures	84
1.1.	How the Covered Agreements Apply to Tax Measures	87
A.	The First Sentence of Article III:2	91
B.	The Second Sentence of Article III:2	94
C.	Article III:4 and Price Floors	100
D.	The Use of Tariffs to Encourage Healthy Consumption Habits	101
1.2.	Subsidies to Encourage Production and Consumption of Healthful Goods	103
A.	Differential Taxes and the SCM Agreement	104
B.	Agricultural Subsidies	109
2.	Restrictions on Marketing	112
2.1.	The GATT and the Impact of Advertising Bans on Tobacco Products	115



A.	Advertising Bans and National Treatment under Article III:4	116
B.	Advertising Bans as Quantitative Restrictions under Article XI:1	118
2.2.	The GATS	120
A.	The Prohibitive Content of the GATS	122
B.	Specific Commitments	123
C.	Conclusion on Application of the GATS	126
3.	Conclusion	127
4.	<b>Necessity and Regulatory Autonomy under the GATT</b>	130
1.	Overlaps between the Covered Agreements	133
1.1.	Differential Taxation: Overlaps between the GATT, the Agreement on Agriculture, and the SCM Agreement	133
1.2.	Advertising: The GATT and the GATS	136
2.	Application of the GATT Necessity Test	136
2.1.	Measures Necessary to Protect Health	137
A.	Characterizing a Regulatory Goal and the Level of Protection Sought	139
B.	Applying the Necessity Test by Reference to the Various Factors	143
C.	Reasonably Available Alternatives	155
D.	Conclusions on the Necessity Test, Tobacco, Alcohol, and Diet	164
2.2.	The Requirements of the <i>Chapeau</i>	165
3.	Conclusion	168
5.	<b>Product Regulation and Labeling Measures under the SPS and TBT Agreements</b>	170
1.	Which Types of Measures Is the SPS Agreement Applicable to?	175
1.1.	Tobacco-Control Measures	176
1.2.	Alcohol	178
1.3.	Diet	178
2.	Applying the Requirements of the SPS Agreement to Food Regulation	180



2.1.	A Positive Requirement of Necessity	181
2.2.	Risk Assessment, Scientific Principles, and Necessity	184
	A. Basing a Measure on a Risk Assessment	185
	B. Provisional Measures under Article 5.7	187
	C. Inconsistent Approaches to Risk Where Risk Turns Largely on Consumer Behavior	189
	D. Least Trade-Restrictive Means	191
2.3.	Concluding Observations on Product Regulation under the SPS Agreement	194
3.	Food-Labeling Measures under the SPS Agreement	194
3.1.	Application of the SPS Agreement to Labeling Measures	195
4.	Application of the TBT Agreement to Labeling Measures, Bans on Flavored Cigarettes, and Alcopops	200
4.1.	When Is a Technical Regulation Trade Restrictive?	203
4.2.	Legitimate Objectives	205
4.3.	Measures That Are More Trade Restrictive Than Necessary	206
5.	Conclusion	213
6.	<b>Reallocating Authority at the International Level: Delegation, Legalization, and Harmonization</b>	215
1.	Delegation	218
1.1.	Who Should Make the Decisions?	218
1.2.	Can the Relevant Rules Be Theorized in a More Complete Manner?	221
	A. Case Study: The “Exclusion” of Tobacco from Trade Agreements	222
	B. Case Study: The Grant of a Waiver	225
	C. Conclusion on “Completely Theorizing” the Relationship	227
2.	International Legalization	228
2.1.	Binding and Nonbinding Instruments	229
2.2.	Conflicts between Treaties	234
	A. The Express Language of the FCTC and WTO Agreement	235
	B. Overlapping Subject Matter	236
	C. Overlapping Parties	242



D. Timing	242
E. How Will Any Conflict Be Resolved?	243
2.3. Treaties as a Response to Trade Processes	247
A. Responding to the “Globalization of the Tobacco Epidemic”	247
B. International Cooperation to Solve Collective-Action Problems	249
C. Liberal Accounts of Government Hand-Tying	251
D. Conclusions on Why Legalization Occurred in the Tobacco-Control Context	253
E. Implications for Legalization in the Contexts of Diet and Alcohol	254
3. International Harmonization	261
3.1. Harmonization and Regulatory Autonomy	262
3.2. Harmonization in Context	264
A. The Dietary Context	264
B. The Tobacco Context	270
C. The Alcohol Context	271
3.3. The Presumptive Value of Treaty Rules	272
4. Conclusion	274
 7. Conclusion	 277
<i>Glossary of Basic Trade Terms</i>	289
<i>Bibliography</i>	293
<i>Index</i>	321