

The GATS: Impacts of the international "services" treaty on health-based alcohol regulation

A number of researchers have addressed the structural conflicts between so-called trade liberalization and a range of public policy priorities. Some studies have examined the wide-ranging impacts of the World Trade Organization (WTO) agreements (Shrybman 1999; Wallach & Sforza 1999) while others have considered the effects of international treaties on specific sectors including tobacco (Chaloupka & Nair 2000; Bloom 2001; Callard & Collishaw & Swenarchuk 2001) and alcohol (Germer 1990; Tigerstedt 1990; Ferris & Room & Giesbrecht 1993; Holder et al. 1998; Room & West 1998; Vingilis & Lote & Seely 1998; Sutton & Nylander 1999; Alavaikko & Österberg 2000; Grieshaber-Otto & Sinclair & Schacter 2000).

The WTO emerged in 1994 as a result of the Uruguay Round of multilateral trade

negotiations. After eight years of negotiations, the 124 participating nations agreed to significant and dramatic changes to the previous multilateral trade regime, then known as the General Agreement on Tariffs and Trade, or the GATT. These included a stronger and legally binding dispute settlement mechanism, the inclusion of more nations, especially developing and least developed countries, and a major expansion of rules beyond border measures, such as tariffs, to rules covering the domestic regulatory heartland of government authority. The Ministerial declaration highlighted that one of the most significant features of the Uruguay Round was the "establishment of a multilateral framework of disciplines for trade in services" (Marrakesh Declaration 1994) in the form of the General Agreement on Trade in Services – or GATS. It has

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been noted that services "underpin all forms of international trade and all aspects of global economic activity" (Global Services Network 2000) and that services "affect virtually all aspects of our lives" (Sinclair 2000). Indeed, while the services rules agreed to in the Uruguay round are themselves significant, they can be expected to become increasingly important in part because the treaty contains a provision that requires ongoing, periodic negotiations beginning five years after its entry into force even in the absence of a new round of WTO negotiations. This explicit objective is designed to achieve progressively higher levels of services liberalization, which necessarily entail the adoption of more stringent rules restricting government authority.

Despite the failure to launch a new round of WTO negotiations in Seattle in late 2000, WTO members began formally to renegotiate the GATS in February 2001, and these negotiations have generated new interest in this little-known treaty. Critical general analyses of the GATS have been provided by Sinclair, 2000; Gould & Joy, 2000; and *Coordination pour le Contrôle Citoyen de l'OMC*, 2000. Analyses of the potential impact of the GATS on specific sectors are rare, but sectoral studies have been prepared for health care (Public Services International and Education International 1999a; Price & Pollock & Shaoul 1999; Pollock & Price 2000; Sanger 2001); postal services (Sinclair 2001), public education (Public Services International and Education International 1999b; Sanger & Grieshaber-Otto, in preparation); and the environment (Shrybman, in press).

The impact of the GATS on alcohol regulation has not been examined in detail, even though "the global burden of disease from alcohol exceeds that of tobacco and is on a par with the burden attributable to unsafe sex worldwide" (World Health Organiza-

tion 1999a). The purpose of this paper is to examine some of the key impacts of the GATS, and ongoing GATS re-negotiation, on governments' ability to minimize alcohol-related harm.

Key features of the General Agreement on Trade in Services (GATS)

Services underpin or are associated with practically all aspects of international trade, domestic regulation and global economic activity. In the international alcohol sector, for example, the production of grain is a service, as is the transportation of that grain to a brewery or a distillery. Alcohol production, bottling and distribution are services; so too are the marketing or advertising of alcohol and the serving of alcohol products. The direct investment in a foreign alcohol production facility is considered a form of "commercial presence" and thus a mode of supplying a service. Even epidemiological research on the public health impacts of alcohol consumption is considered a service. It is difficult to conceive of any aspect of the alcohol sector that is not a service or is not affected by the supply of a service. And given the ubiquitous nature of services in the global economy, it is not surprising that many proponents (Coalition of Service Industries 1998; Global Services Network 1999; Vastine 2000) view the expansion of the GATS to be a key international negotiating priority.

The GATS is a multilateral framework agreement containing legally enforceable restrictions on the government actions of all WTO members relating to services. It is very broad and quite complex. The WTO's training manual on the treaty (WTO 1998) is a useful reference, while Sinclair (2000) provides an extensive and accessible critical analysis of the agreement. The treaty covers

practically all government measures in all service sectors including services relating to alcohol production, distribution and marketing. It covers all possible means of supplying services, including through international travel, foreign investment and commercial establishment.

The GATS extends beyond border measures and trade, covering all government measures "affecting" the supply of services that have some international component. Recent panel rulings have made it clear that the broad scope of the GATS overlaps with WTO provisions pertaining to goods. For example, in 1996 the United States challenged the EU's practice of providing preferential duty-free access for bananas from 70 developing countries in Africa, the Caribbean and the Pacific. The EU had exempted this special trade-and-aid treaty – The Lomé Convention – from the GATT rules. However, the US challenged the convention under GATS rules and the WTO panel ruled that the convention was inconsistent with the GATS. The panel stated that both the GATT and the GATS can apply to the same measure and that GATS rules may apply even to measures that are specifically designed to cover goods if those measures affect services.

Unlike other WTO agreements, the GATS explicitly includes in its scope and coverage the measures taken by central, regional, and local government authorities as well as non-governmental bodies in the exercise of powers delegated by those governments.

Significantly, in committed sectors, the agreement not only prohibits governments from treating domestic services and suppliers more favourably than their "like" counterparts, it goes further, prohibiting outright certain types of non-discriminatory government measures. The agreement does provide some protective exemptions and ex-

clusions, but these generally are of limited practical effect. For example, the most important exclusion, for "services supplied in the exercise of governmental authority" (Article I.3), is defined so narrowly that, as noted below, its effectiveness has been called into question.

The most powerful constraints in the agreement now apply only to those sectors that are listed in a member government's country schedule, but these constraints are intended to apply more comprehensively through time as on-going negotiations take place.

The central question in the debate over the impact of the WTO services agreement is whether GATS rules merely enhance services trade or whether the rules are more far-reaching, limiting governments' ability to balance competing domestic public policy objectives including those pertaining to alcohol.

GATS general rules

Certain GATS provisions are of general application, applying to all service sectors even where a member has not made a specific commitment. Three of these provisions most relevant to the alcohol sector – namely Most-Favoured-Nation treatment, Monopolies and Exclusive Service Suppliers, and Transparency – are considered in turn below, while GATS rules on Domestic Regulation are considered later.

The GATS Most-Favoured-Nation (MFN) treatment

The GATS MFN obligation (Article II) is one of the treaty's general rules that apply unconditionally and automatically to all services, including alcohol-related services. MFN requires that the best treatment ac-

corded to any foreign service provider must be accorded "immediately and unconditionally" to all foreign service providers.

In general terms, this powerful provision has the practical effect of consolidating any commercialization, privatization or other market-opening measures involving foreign service providers. It may also greatly increase the constituency for commercialization and privatization and for resisting future efforts to reverse such initiatives (Sinclair 2001).

GATS rules on Monopolies and Exclusive Service Suppliers

Like the MFN obligation, the GATS Article VIII restrictions on the activities on monopolies and exclusive service suppliers fall within the "general obligations and disciplines" of the agreement. However, this article may be understood as a hybrid provision, combining features of general obligations and specific commitments which, as noted below, apply conditionally only to services listed by members. The article obliges members to ensure that the activities of monopolies or exclusive service suppliers conform both to the MFN rule considered above and to any specific commitments made by the member concerned. These provisions also apply where a member, "formally or in effect", authorizes a small number of service suppliers and prevents competition among them (Article VIII:5).

The GATS Transparency rules

GATS transparency rules require members to publish all existing measures, at all levels of government, that "pertain to or affect the operation" of the treaty. Article III also requires Members to inform the WTO Council for Trade in Services of any new, or changes to existing, measures that "significantly

affect trade in services" covered by that member's specific commitments. Members are also required to establish enquiry points to provide information to other members on any changes or new measures affecting services.

While these GATS transparency rules may not appear to be particularly onerous, they introduce new administrative burdens on governments and formally impose policy imperatives that, particularly for local and state or provincial governments, may be as demanding as they are novel. More significantly, some GATS proponents (cf. Warren & Findlay, 1999) have indicated that GATS transparency rules are a precondition or necessary tool for further liberalization during subsequent rounds of negotiations. In addition, these rules could serve as the framework under which more sweeping GATS provisions are instituted.

GATS specific commitments

In addition to the general rules considered above, the GATS contains conditional obligations. These powerful provisions apply only in sectors where a member has undertaken specific commitments; they include National Treatment and Market Access.

The GATS National Treatment rule

The GATS national treatment rule (Article XVII) requires members to extend the best treatment that is given domestically to other GATS members. Broader than generally recognized, this non-discrimination provision requires that every advantage given to a domestic service or service provider must be accorded to a like foreign service or service provider. Indeed, GATS Article XVII:2 and 3 stipulate that national treatment of foreign services and providers extends beyond

treatment that is "formally identical" to that accorded domestically; members must accord foreign services and providers "no less favourable ... conditions of competition". Significantly, this doctrine, treatment to ensure effective equality of conditions of competition, has recently been applied to the MFN article (WTO, 1997, para. 234). Together with the expansive scope of the GATS, this rigorous standard for non-discrimination ensures dispute settlement panels will find many government measures, which on their surface are origin- and nationality-neutral, GATS-inconsistent. As Sinclair (2000) notes, "It need only be argued that such measures are capable of altering the conditions of competition either in favour of domestic services and service providers (national treatment) or in favour of certain, but not all, foreign services and services providers (most-favoured-nation)."

The GATS Market Access rule

Like the national treatment obligation, the GATS market access rules (Article XVI) are onerous provisions that apply only to those services that a government lists in its schedule of specific commitments. The article (subsection 2(a)–(c)) states that in sectors where such market access commitments are made, members "shall not maintain or adopt .. limitations on... the number of service suppliers, ... the total value of service transactions, ... or the total number of service operations..." It must be emphasized that, in principle, these market access prohibitions are absolute, preventing outright such numerical limits on services or service suppliers even where such government limitations do not discriminate against foreign services or suppliers.

Other GATS provisions

The built-in GATS Commitment to Repeated Re-negotiation

All WTO member governments have consented to the overarching commitment, contained in Article XIX, to broaden and deepen the agreement through successive rounds of future negotiations. The intent is to achieve "a progressively higher level of liberalization" largely by "increasing the general level of specific commitments undertaken by Members" and through new rules on domestic regulation. Given the prospect of repeated GATS re-negotiation, any explicit protection achieved for alcohol policy measures, for example, cannot be considered permanent and may indeed have the perverse effect of drawing increased attention to such measures and so making them even more vulnerable in future negotiating rounds (Grieshaber-Otto & Sinclair & Schacter 2000).

The GATS Domestic Regulation rules

In GATS Article VI:4, members agreed that the WTO Council for Trade in Services "through appropriate bodies it may establish" shall "develop any necessary disciplines" to ensure that "measures relating to qualification requirements ... technical standards and licensing requirements do not constitute unnecessary barriers to trade in services..." Negotiations are now underway to carry out this mandate. It is important to understand that these new restrictions are specifically and exclusively aimed to constrain non-discriminatory regulatory measures taken by governments. The effect of the domestic regulation provisions could be to introduce into the revised GATS a new and more restrictive test – a finer screen – through which government measures must

pass. As a result, even government measures that are fully consistent with the arduous non-discrimination rules contained in the GATS MFN and national treatment articles, and even those that are consistent with the GATS market access provisions, could be found to violate the GATS under the proposed domestic regulation restrictions. Moreover, because these so-called "disciplines" are found in Part II General Obligations and Disciplines, it is reasonable to conclude that member nations intended them to apply across-the-board to all service sectors and not be limited to service sectors for which member governments have listed specific commitments in their national schedules. Under these proposed rules, governments would be obliged to demonstrate that non-discriminatory regulations were "necessary" to achieve a legitimate objective and that no alternative measure was available that was less commercially restrictive (Sinclair 2000).

There are no public indications that any WTO member is opposed to developing these "disciplines" under Article VI:4. However, these negotiations are likely to attract increased attention among GATS critics. Indeed, a prominent Canadian international trade lawyer recently called the exercise "a wholly unwarranted intrusion of trade law into important domestic public safety laws" (Swenarchuk 2000).

The GATS Governmental Authority Exclusion

As previously noted, GATS Article I:3 contains a seemingly broad exclusion for "services provided in the exercise of governmental authority". This exclusion, which appears to provide the most promise for the protection of alcohol control measures, has widely been interpreted to exclude both public service systems and their regulation and so protect them from the full force of

the GATS. However, a recent examination of WTO and related references concludes that the exclusion is in fact "defined very narrowly" and will almost certainly be interpreted restrictively. According to this analysis, the narrowness of this critical GATS exclusion, together with the broad coverage of the treaty itself, brings "many public service systems – and their regulation – within the sphere of WTO authority" (Government of British Columbia 2001).

The governmental authority exclusion contains two criteria, both of which must be satisfied for the exclusion to apply. These criteria are that a service (a) must not be supplied on a "commercial basis", and (b) must not be "supplied ... in competition with one or more service suppliers." Both of these terms remain undefined in the GATS and, as another recent review of the exclusion concludes: "The interpretation of Article I:3 (b)(c) GATS based on the interpretive methods of the Vienna Convention on the Law of Treaties do not render a clear result.... [A WTO] Appellate Body would be in conformity with international law if it adopted a narrow understanding" of the exclusion (Krajewski 2001).

Based on the above analyses and despite subsequent assertions by the WTO Secretariat (WTO 2001), it would appear that most, if not all, health-based alcohol policy measures are likely to fall outside the narrow governmental authority exclusion and thus be fully subject to all applicable GATS rules. At the very least, health-based alcohol policy makers now face a new, external obstacle that is not subject to domestic decision-making and that creates considerable uncertainty about whether proposed actions conform with GATS rules. Since WTO panels are not bound by previous panel rulings, and since future interpretations will be made on a case-by-case basis, in the absence of mitigating action by

WTO members, this uncertainty will undoubtedly persist

Potential impact of GATS and GATS re-negotiations on alcohol policy

International 'trade' treaties have already forced changes in many government measures affecting alcohol availability and control. Their most significant impacts have been to government alcohol monopolies and taxation regimes that are generally considered to be among the most significant or promising from a public health standpoint (Grieshaber-Otto & Sinclair & Schacter 2000).

Like previous international treaties, the GATS exhibits several general features that are important from an alcohol policy perspective. Firstly, the GATS does not distinguish between alcohol-related services, which may have important public health consequences, and any other service, treating them alike in principle. Secondly, while the treaty contains exceptions and exclusions, recent WTO rulings have interpreted them narrowly, indicating that these exemptions are unlikely to provide significant and lasting protection for alcohol policy measures that would otherwise violate GATS rules. Thirdly, the GATS effectively 'locks-in' existing policy measures, thereby restricting future public policy flexibility in the alcohol sector and making the adoption of new or more GATS-inconsistent measures far more difficult in the future.

The GATS also contains a number of new features that are of significance to alcohol policy. The treaty is potentially far broader than many previous treaties, applying to both services and investment. It is generally acknowledged to have "an impact on a far wider range of domestic policy and regulation than the GATT" (WTO 1998, p. 6). Indeed, the GATS could prove far more in-

trusive than previous treaties because it extends beyond international trade and so-called border measures, applying explicitly to non-discriminatory domestic regulation of alcohol. The treaty also applies explicitly to monopolies and state enterprises and, of particular significance to federal states, to all levels of government. Finally, as previously noted, unlike most other treaties, the GATS contains a built-in commitment by member governments to broaden and deepen the treaty through repeated negotiations.

Together, these features of the GATS can be expected to increase alcohol market liberalization worldwide. This, in turn, is likely to increase the availability and individuals' access to alcohol and to increase advertising and promotion, effects which existing research (Edwards et al. 1994) indicate are likely to increase alcohol consumption and associated health problems. The GATS thus raises a range of issues of direct relevance to public health. The following areas appear to be of central importance during GATS re-negotiations.

Alcohol monopolies

The activities of alcohol monopolies can be an important aspect of public health strategies designed to minimize harm associated with alcohol consumption. However, there appears to be an underlying tension between the fundamental principles of the GATS and many of the activities of alcohol and other monopolies. Through the general obligations on monopolies (Article VIII), the treaty brings monopolies directly and explicitly within the sphere of WTO oversight and dispute settlement. It requires monopolies at all levels of government to provide most-favoured nation treatment, not to "abuse its monopoly position" in supplying services outside its monopoly,

and more critically, conform with any specific commitments members make under the treaty. Since members have agreed to expand the treaty in part by making new, or more comprehensive, specific commitments, the pressure to make new, or more extensive, specific commitments will increase. And it is the obligations entailed in the agreement's national treatment (Article XVII) and market access (Article XVI) commitments that appear to be especially at odds with the activities of alcohol monopolies. In particular, the GATS market access commitments, which prohibit limitations on the numbers or types of service suppliers, appear to run counter to the very existence of alcohol monopolies.

Even GATS commitments that are more limited may prove to have significant, and unintended, public health consequence. Members' specific commitments on distribution services – which, unless specifically exempted, include the distribution of alcohol – appear to be particularly important. Those members making specific commitments in the distribution services sector may subject their alcohol monopolies to the agreement's onerous national treatment and market access obligations in franchising or in wholesale or retail sales. The application of the national treatment rules would prohibit monopolies from modifying the "conditions of competition" (Article XVII:3) of "like" services or suppliers of any other member. Market access rules prohibit "limitations on the number of service suppliers", for example, including monopolies and exclusive service suppliers, or the requirement for "an economic needs test", unless specified in a member's schedule (Article XVI:2a).

Members are not obliged to make specific commitments, and it is possible for member countries to exclude alcohol from any specific commitments they make on distribu-

tion services. Indeed, when the GATS came into force, Japan specified that alcoholic beverages were not included in its specific commitments in distribution services (WTO 1994a). Similarly, Canada exempted alcoholic beverages at the wholesale level and liquor, wine and beer sales at the retail level (WTO 1994b). In the Nordic countries, Sweden excluded alcohol at the retail level (WTO 1994c), Norway excluded wholesale and retail sale of alcohol (WTO 1994d) and Finland indicated that its specific commitments in the distribution services sector did not include alcoholic beverages (WTO 1994e).

However, exemptions for alcohol cannot with confidence be considered permanent. The Nordic alcohol exemptions in the distribution services sector stand in contrast to the European Union's initial specific commitments, which include alcohol (WTO 1994f). The U.S. International Trade Commission hints that this contrast may be due chiefly to a mere technicality, noting that the differing commitments "reflect the classifications listed in the schedules" before these countries entered the European Union (United States International Trade Commission 1995). More critically, these alcohol exemptions are also at odds with, and could be undermined by, the EC's current negotiating proposals. In December, 2000, as part of the ongoing GATS re-negotiation process, the EC proposed that other countries reduce "unnecessary trade distortive barriers" in distribution services (which include the distribution of alcohol), arguing that "In our view, it is hard to see any justification for restrictions other than ... very limited number of extremely sensitive products" (WTO 2000a). The United States takes a similar position, proposing that WTO members apply, without limitation, existing GATS market access and national treatment rules (WTO 2000b).

The significance to the alcohol sector of GATS commitments on distribution services should not be underestimated. As noted above, in the recent EC Bananas case, GATS distribution services commitments resulted in the successful challenge, by the United States, of the preferential, duty-free access into the EU for bananas produced in the former European colonies in the Caribbean and elsewhere (WTO 1997). The powers of existing alcohol monopolies worldwide, including those in the Nordic countries which were resolutely defended during the European integration process, will unquestionably face new, intense pressures during the current round of GATS re-negotiations. In developing and other countries where alcohol monopolies do not now exist, extensive commitments in distribution services could make establishing such monopolies, for public health or any other purpose, far more difficult.

Advertising restrictions

As a means of reducing alcohol-related harm, advertising restrictions may be considered particularly relevant in countries where other more direct policy instruments are either not available or are less feasible. They may also prove attractive where international alcohol corporations advertise aggressively or in ways that are widely perceived to be inappropriate.

However, prohibitions or restrictions on alcohol advertising appear to be contrary to GATS rules. In particular, such restrictions may violate member countries' GATS commitments on national treatment and market access. The recent application of EC Treaty rules to Sweden's ban on alcohol advertising provides a useful illustration of the types of issues that are likely to arise in the GATS.

In 1979, Sweden adopted rules on the

Marketing of Alcoholic Beverages which were explicitly designed to reduce alcohol-related harm. Article 2 of the law states:

"In view of the health risks involved in alcohol consumption, alcoholic beverages should be marketed with particular moderation. In particular, advertisements or other marketing measures must not be insistent, involve unsolicited approaches or encourage alcohol consumption."

This law prohibits radio and television advertising of spirits, wines, strong beer and beer, and in certain publications prohibits advertising of spirits, wines and strong beer (European Court of Justice 2001, para.3, 4).

In a recent ruling on Sweden's alcohol advertising ban, the European Court of Justice found the ban to be an obstacle to the free movement of goods and the freedom to provide services within the EC. The Court ruled that Sweden's ban could be saved by the EC Treaty's public health exceptions provided the ban meets "the condition of proportionality required in order for the derogation ... to be justified" (Ibid., para. 41). This determination is left to the national court.

To maintain its alcohol advertising ban, Sweden now faces a very tough test. It must establish that the ban "is proportionate to the objective to be achieved and does not constitute either a means of arbitrary discrimination or a disguised restriction on trade between Member States" (Ibid., para. 28). It must also demonstrate that "the protection of public health against the harmful effects of alcohol can not be ensured by measures having less effect on intra-community trade" (Ibid., para. 34, 42, summary).

The ruling confirms the importance to the alcohol sector of international services rules and especially rules on advertising services. In particular, the ruling establishes

that the advertising ban is, in principle, contrary to the EC treaty provisions relating to both goods (alcohol) and services (the advertising of alcohol). The court concluded that the advertising ban is a national treatment violation, stating that "a prohibition of all advertising directed at consumers ... is liable to impede access to the market by products from other Member States more than it impedes access by domestic products, with which consumers are instantly more familiar" (Ibid., para. 21). The ruling also indicates that under EC treaty rules, public health measures are derogations, or exceptions, from treaty rules pertaining to the freer flow of goods and services and that these public health derogations or exceptions are to be interpreted narrowly.

It may be tempting for public health advocates to focus on what could be seen as the 'silver lining' in this European Court of Justice ruling – that a national court could rule that the Swedish ban is "proportionate" and can, under EC Treaty rules, be saved. However, such an optimistic view seems unwarranted. Even if this European case were ultimately to result in a favourable public health ruling, the matter is unlikely to rest there. Sweden may be exposed to future challenges to its alcohol advertising restrictions – on grounds similar to those used in the European case – under GATS rules.

Sweden (together with Norway and Finland) made extensive specific commitments on advertising services in the GATS in 1994 (WTO c,d,e). And, while they excluded alcohol from their specific commitments in the distribution services sector, they did not exclude alcohol advertising from their specific commitments in advertising services. As a result, GATS market access and national treatment rules now appear to apply to advertising services in those countries. Moreover, in the event of a GATS dispute, under the public health and other excep-

tions contained in GATS, member countries are required to establish that their offending measure is "necessary" (Article XIV:b). Negotiations now underway on the GATS domestic regulation provisions (Article VI:4) which may require members to prove in future that their advertising restriction – even if it is non-discriminatory, treating foreign and domestic services and providers alike – is the "least trade restrictive" measure available (Sinclair 2000). In these circumstances, a GATS dispute panel would interpret any exception or exclusion narrowly according to GATS provisions and relevant international law.

It should be noted that were a dispute affecting alcohol to be brought under GATS provisions, GATS tribunals would rule without direct reference to national law or practice. Moreover, in contrast with the European Court of Justice, GATS dispute panels are not bound by the principles contained in the EC Treaty (Treaty Establishing the European Community) and in particular its protocol on subsidiarity and proportionality (EC Protocol 1997) which require that Community powers "shall not go beyond what is necessary to achieve the objectives of the treaty." GATS panels would rule solely on the basis of GATS rules and related international law, independent of EC Treaty provisions. This appears to reinforce concerns of public health advocates about the potential for GATS rules to be used in future to challenge the Swedish ban on alcohol advertising.

For countries wishing to maintain their full ability to restrict alcohol advertising, the European Court ruling on the Swedish ban, together with the potential application of GATS rules, highlight the importance of avoiding making alcohol-related GATS specific commitments on national treatment and market access in the advertising sector. It also suggests the need for countries that

have already made such commitments to revise them during current GATS re-negotiations to remedy their current exposure to future challenges.

Governments' control over access to alcohol

Separate from the activities of alcohol monopolies, countries exercise control over the access and availability to alcohol in many varied ways. Such measures include, for example:

- restrictions on the number or licensing of distribution outlets in particular regions,
- restrictions on the number or licensing of drinking establishments,
- restrictions on the commercial establishment of certain types of distribution outlets,
- restrictions on the sale of certain classes, or strengths, of alcoholic beverages in grocery stores, gas stations or stadiums,
- restrictions on the hours of sale.

These and other similar restrictions could run afoul of members' GATS obligations.

Restrictions on alcohol access and availability may be particularly vulnerable to GATS challenge where member countries make unlimited specific commitments in the distribution services sector. Even if such measures treat like foreign services and providers identically, they could still offend the tough GATS prohibition against de facto discrimination if they have the effect of modifying "the conditions of competition" so as to favour domestic services or suppliers (Article XVII:3). These measures may also be vulnerable to the GATS prohibitions on quantitative restrictions contained in Article XVI (Market Access). This article states:

"2. In sectors where market-access commitments are undertaken, the measures which a Member shall not

maintain or adopt either on the basis of a regional subdivision or on the basis of its entire territory, unless otherwise specified in its Schedule, are defined as:

- (a) limitations on the number of service suppliers whether in the form of numerical quotas, monopolies, exclusive service suppliers or the requirements of an economic needs test;...
- (c) limitations on the total number of service operations or on the total quantity of service output expressed in terms of designated numerical units in the form of quotas or the requirement of an economic needs test..."

As in the case of advertising services, member countries intent on retaining full flexibility in these important public policy areas should avoid specific commitments in distribution services pertaining to alcohol.

International health-based alcohol initiatives

At the World Health Organization European Ministerial Conference on Young People and Alcohol, held on February 19-21 2001 in Stockholm, members adopted a declaration containing specific targets, policy measures and support activities to protect young people from the pressures to drink and to reduce the harm done to them by alcohol. In order to reach to targets agreed to in this important Declaration, which follows the European Alcohol Action Plan 2000-2005 (World Health Organization 1999b), European governments will need to consider implementing those public policy measures that are the most effective in protecting public health. Critically, many of these policies are, in principle, at odds with existing GATS rules and may be in even greater conflict if more expansive proposals are adopted in current negotiations. It is increasingly evident that health-based alcohol policy has become inextricably linked to international "trade" policy, and that the two may sometimes be in direct conflict

(Grieshaber-Otto 2001).

Faced with this underlying incompatibility, citizens and political representatives appear to be faced with a difficult choice. On the one hand, they may choose to accede to ratchet-like "trade" treaty constraints that render an ever-greater number of domestic and international health policy options – including the policies that are most effective in reducing alcohol-related harm – far more difficult to achieve. On the other hand, citizens and their political representatives may choose to play a more proactive role to ensure that the GATS and other international commercial treaties achieve more balanced results from a public health standpoint (Ibid.).

It is difficult to see how this incompatibility will be resolved in the alcohol sector. Not surprisingly, it extends into other public policy areas. For example, long before the GATS was adopted, the Universal Postal Union (UPU), headquartered in Berne, Switzerland, regulated international postal services by multilateral agreement. As Sinclair (2001) has noted:

"Since the advent of the GATS in 1994, concerns have arisen about the potential conflict between GATS provisions and the rules and regulations of the UPU.... There is no indication that the WTO officials or GATS negotiators ever alerted postal authorities or the UPU to these potential conflicts while the GATS was being negotiated. Meanwhile, international corporate lobbyists who well understood the leverage GATS rules would provide them, were closely consulted through lobby organizations such as the U.S. Coalition for Service Industries. This failure to inform or to consult those directly affected raises serious questions about the legitimacy of GATS restrictions whose implications were poorly understood and inadequately publicized at the time the treaty was signed and ratified.

...As awareness has grown, national postal administrations and the UPU have paid more attention to these potential conflicts. The UPU has requested observer status in the current WTO GATS negotiations and a draft memorandum of understanding

providing for greater cooperation between the UPU and the WTO has been prepared."

The lessons of the UPU experience may prove instructive for alcohol policy researchers, public health advocates, and national and international health representatives. With adequate support from members, for example, the World Health Organization could prove very influential in GATS and other international "trade" negotiations that affect alcohol-related public policy. International agreements on alcohol and/or public health could also be developed which, in the event of a conflict, take precedence over the provisions of GATS and other commercial treaties. As interest in the GATS grows, and knowledge of its potential impact expands, member governments may begin to adopt negotiating strategies that are fundamentally different from those they are now pursuing so as to accord with public health imperatives.

Alcohol policy in developing countries

Alcohol researchers have recently drawn attention to the prospect for rapid growth in alcohol consumption in developing countries and the serious harm that this growth is likely to entail. Recent research has shown that while alcohol consumption is declining in most of the developed countries, it is rising in Central and Eastern Europe and in many of the developing countries (Monteiro 2001). Global alcohol corporations, "thirsting for markets" are increasingly shifting their emphasis towards the developing world (Jernigan 1997, 2000, 2001). It has been noted that some of these corporations make false or misleading health claims about alcohol and specifically target young people and the poor (Kolandai 2000). Many global corporations also em-

ploy sophisticated alcohol marketing practices involving sponsorships, product tie-ins, special events and web marketing to promote not their product but their brand. As Jernigan (2001) states:

”What is emerging worldwide is the dominance of a small number of companies, several of which are based in Europe, whose marketed images, created to appeal to young people in the developed countries, increasingly define alcohol and the culture of alcohol use for the world.”

The process of development itself ”tends to bring an increased supply of alcohol and new methods of promoting its sale” (Room 2001). At the same time, many developing countries do not have well established regulatory structures that are capable of regulating alcohol supply or availability, restricting advertising, separating alcohol use from harm, or treating alcohol-related problems (Ibid.). Moreover, increased alcohol consumption frequently exacerbates poverty and can have serious health consequences, and alcohol-related harm may be particularly devastating on developing countries (Kolandai 2000).

It is within this context of the expansion of global alcohol corporations into developing countries that the GATS was adopted and is now being re-negotiated. This is also the context in which, as noted above, the EC and the US are proposing that member countries liberalize alcohol distribution services. These proposals increase the pressure on developing countries to eliminate domestic restrictions on alcohol services that may exist. They also increase pressure on developing countries for commitments that would make the introduction of new or more restrictive alcohol policies far more difficult in the future, even if new evidence or developments showed such restrictions to be a public health imperative. Developed countries may also pressure developing

countries to make more extensive commitments in advertising services, thereby diminishing the potential that new restrictions on advertising could be implemented in these countries in the future. For developing countries seeking greater access to markets in developed countries, whether for services, agricultural products or in other areas, it may be difficult to resist international pressure during intense GATS negotiations to permanently eliminate health-based regulatory restrictions related to alcohol. However, the fact that a number of developing countries recently wrested some changes in global pharmaceutical companies’ pricing of drugs to treat HIV/AIDS under a different WTO agreement suggests that these countries could also begin to resist pressure on alcohol at the GATS.

Summary and conclusions

There is an underlying incompatibility between public health-focused alcohol regulation and the GATS. The treaty is extremely broad, extending beyond border measures into areas previously considered the purview of domestic regulation. Recent WTO disputes under the GATS have confirmed that the treaty covers all levels of government, including non-governmental entities with delegated authority. These rulings have also highlighted the fact that WTO rules on goods and services overlap, and that even government measures designed to cover goods may fall under GATS rules if these measures affect services.

GATS general obligations already apply to large areas of government decision-making authority, even where member countries have made no specific commitments under the treaty. The general rules, notably most-favoured-nation (MFN) treatment and transparency, already apply and have the ef-

fect of 'cementing' or expanding current levels of market liberalization and of augmenting pressure on members to make more extensive commitments in future on-going negotiations. Present negotiations to clarify and implement provisions on domestic regulations (Article VI) are also likely to result in significant general obligations that limit the ability of governments to regulate for non-trade and non-commercial purposes such as for public health. The GATS restrictions on domestic regulation go beyond restrictions on discrimination against foreign firms and services and are explicitly designed to restrict non-discriminatory decision making authority at the domestic level. Exceptions and exclusions to the GATS are either weak, as in the case of the exclusion for 'governmental authority', or are temporary, as in the case of MFN exceptions. Present negotiations are widely expected to lead to an expansion of general rules, specifically affecting transparency and domestic regulation.

GATS specific commitments on National Treatment and Market Access reduce the ability of governments to restrict access to committed service sector markets. Commitments in the areas of distribution services include alcohol distribution unless specifically excluded. Commitments in advertising services overlap with many other service sectors. These commitments may entail novel GATS prohibitions against restrictions on alcohol advertising that are neither anticipated nor intended by member countries. Current negotiations are designed to expand the reach of the treaty in part through pressure on members to make new and more extensive specific commitments.

Do GATS rules merely enhance services trade or do these rules limit governments' ability to balance competing domestic public policy objectives such as in health-based alcohol policy? It is increasingly apparent

that both the general and specific obligations of the existing GATS have the potential to restrict alcohol-related public health policies. For example, applicable GATS rules prohibit restrictions on market access for alcohol (including the number of retail outlets), the nature and amount of advertising, and even the ownership structure of alcohol retail outlets (public or private, for-profit or not-for-profit). On-going negotiations are designed to place even more restrictions on governments' ability to shape public health policies on alcohol.

One of the most powerful antidotes to further expansion of the GATS is increased public awareness. Sector-specific analyses are useful in this regard in that they can put a human face on an otherwise complex text. As a result, there is an urgent need for a detailed assessment of the potential impacts of the GATS particularly on alcohol monopolies, but also on advertising and other health-based alcohol policies. This will require close collaboration between alcohol specialists with direct, on-the-ground experience in the alcohol sector and trade experts familiar with GATS provisions and the latest developments in current GATS negotiations. Concerted efforts are also needed in the short term to devise effective strategies for the protection of alcohol monopolies and for member countries - developing countries in particular - to retain maximum policy flexibility that is critical for the reduction of alcohol-related harm in future.

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Summary

Jim Grieshaber-Otto & Noel Schacter: *The GATS: Impacts of the international "services" treaty on health-based alcohol regulation*

There is an underlying incompatibility between public health-focused alcohol regulation and the World Trade Organization's "services" treaty. This treaty, the General Agreement on Trade in Services (GATS), is very broad, extending beyond border measures to reach into many areas formerly considered purely matters of legitimate domestic regulation. Essentially unknown to the public, the GATS is currently being re-negotiated to broaden the number and types of services it covers and to place greater restrictions on the scope of governments' regulatory ability. All services, including services relating directly and indirectly to alcohol, are on the negotiating table. These negotiations can be expected to affect most adversely those alcohol policies that are considered to be the most effective in protecting public health. The European Commission and the United States are strong advocates for expanding the GATS and formally propose that countries liberalize their distribution systems, including systems for distributing alcohol. If adopted, this proposal would preclude many health-based policy options in developing countries and is likely to place increased pressure on alcohol policy in Europe, when other countries request reciprocal commitments from the EC. The paper examines threats that the treaty and its proposed expansion pose for alcohol monopolies, advertising restrictions, governments' control over availability and access to alcohol, international health-based alcohol initiatives, and alcohol policy in developing countries. Alcohol researchers and public health advocates are encouraged to play a more proactive role in international treaties to achieve more balanced results, rather than acceding to ratchet-like constraints that make the adoption of an ever-greater number of public policy options increasingly difficult.

Key-words: WTO, GATS, alcohol policy, alcohol monopoly, alcohol advertising, developing countries

The GATS: Impacts of the international “services” treaty on health-based alcohol regulation

Several noteworthy events have taken place since this article was originally published in Swedish (NAT Vol. 18, 2001 (3)). These indicate that the active involvement in the GATS debate by alcohol researchers and public health advocates in every country is as urgent as it is critical.

A new round of World Trade Organization (WTO) negotiations was launched, setting specific deadlines for the services negotiations

The World Trade Organization’s services treaty – the General Agreement on Trade in Services (GATS) – contains a commitment for members to engage in repeated rounds of negotiations to expand the reach of the agreement. Negotiations on the current round began in early 2000 and have been dubbed Services 2000. At the WTO Ministerial Conference held in Doha, Qatar in November 2001, members agreed to specific deadlines for the Services 2000 negotiations.

- June 30, 2002 is the deadline for WTO members to make initial requests of other members for market-opening commitments. Requests can be made in any service sector, including distribution, advertising and other services affecting alcohol.

- March 31, 2003 is the deadline for WTO members to make their initial offers to expand the reach of the GATS by indicating the additional specific commitments they are prepared to make, and

- These initial requests and offers are the

starting point of negotiations that will continue until January 1, 2005, the deadline to conclude the current round of WTO negotiations, including those to expand the GATS.

Draft initial European Communities (EC) services negotiating requests were leaked, including requests on alcohol distribution

As part of the ongoing GATS negotiations, the draft initial EC requests were leaked to a non-governmental organization and posted on the internet (GATSwatch, 2002). The leak indicates that the EC was, at minimum, preparing to request that other countries eliminate all restrictions on the distribution of alcohol at both the wholesale and retail level. It is not known whether this request will be incorporated into the final EC requests and whether this, and all other EC GATS requests, will officially be made public.

Valuable analyses have also become available recently. These include:

New paper on the impact of trade liberalization and alcohol policy

In their examination of the impacts of trade liberalization on alcohol policy, Gould and Schacter (2002) highlight the importance of the WTO accession process and its regular national trade policy reviews. The authors also examine the significance of recent WTO cases on alcohol tax policies and emphasize the importance of current nego-

tiations to expand the GATS.

Diverse perspectives in the debate about the GATS and ongoing negotiations to extend its reach

Following the publication of numerous critical analyses of the GATS, both the WTO (2001) and the OECD (2001) published official responses to GATS critics – responses which were themselves subjected to detailed analysis (Sinclair and Grieshaber-Otto, 2002). For those readers who desire accessible material on the GATS debate, these references should prove to be valuable starting points.

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